

## STATEMENTS (ADMISSIONS, CONFESSIONS)

*NOTE: When properly raised at trial, the voluntariness of a defendant's statement to law enforcement must be submitted to the jury upon the defendant's request.<sup>1</sup> The question of whether a defendant's statement was voluntary will turn on such factors as whether the defendant was in custody, if so, whether he/she was given and waived his/her Miranda rights<sup>2</sup>, and whether the statement was voluntary in the traditional Fifth Amendment sense. The question of whether the defendant's expanded right to counsel under the New York State Constitution was violated need not be submitted.<sup>3</sup>*

*No one jury instruction can apply to all situations given the varied circumstances surrounding the giving of statements, and the different instructions requested. What follows is a series of instructions on the most common issues from which the trial court can fashion a charge tailored to the facts and issues of an individual case.*

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## **Introduction**

I will now discuss the law as it relates to testimony concerning [a] statement(s) of the defendant made to a police officer [or assistant district attorney].

Our law does not require that a statement by a defendant be oral or written. It also does not require that questions and answers be electronically recorded [unless, as I shall explain, the statement was the product of custodial interrogation].

[A statement in written form need not have been (written or) signed by the defendant provided that the defendant adopted the statement. A defendant adopts a statement when he/she knowingly acknowledges the contents of the statement as his/her own. In deciding whether the statement was adopted, the presence or absence of the defendant's signature may be considered.]

There is no requirement that a statement be made under oath.

## **Pedigree Statements**

There is testimony that, while the defendant was in custody, the police asked him/her "pedigree" questions relating to: (specify, e.g., his/her name, address, date of birth, type and place of employment).

Under our law, a police officer may ask those questions of a person who is in custody, and the officer is not required to advise the defendant of his/her rights before doing so.<sup>4</sup> Thus, if you find the defendant made such statements, you may consider them in your evaluation of the evidence. In determining whether the statement was made, you can apply the tests of truthfulness and accuracy that we have already discussed.<sup>5</sup>

## **Custodial Statements**

There is testimony that, while the defendant was in custody, he/she was questioned by the police and made certain [oral and/or written] statement(s). [There is (also) testimony that the defendant made a videotaped statement to an assistant district attorney.]

Under our law, before you may consider any such statement as evidence in the case, you must first be convinced that the statement attributed to the defendant was in fact made [or adopted] by him/her. In determining whether the defendant made [or adopted] the statement, you may apply the tests of believability and accuracy that we have already discussed.

Also, under our law, even if you find that the defendant made a statement, you still may not consider it as evidence in the case unless the People have proven beyond a reasonable doubt that the defendant made the statement voluntarily.<sup>6</sup>

How do you determine whether the People have proven beyond a reasonable doubt that the defendant made a statement voluntarily?

## ***Miranda Rights*** <sup>7</sup>

Initially, under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney]. If any one of those three conditions is not met, a statement made in response to questioning is not voluntary and, therefore, you must not consider it.

[There is no particular point in time that the police [or assistant district attorney] are required to advise a defendant in custody of his/her rights, so long as they do so before questioning begins. A defendant in custody need be advised only once of the rights, regardless of how many times, or to whom, the defendant speaks after having been so advised; (provided the defendant is in continuous custody from the time he/she was advised of his/her rights to the time he/she was questioned and there was no reason to believe that the defendant had forgotten or no longer understood his/her rights. <sup>8</sup>)]

While there are no particular words that the police [or assistant district attorney] are required to use in advising a defendant, in sum and substance, the defendant must be advised:

1. That he/she has the right to remain silent;
2. That anything he/she says may be used against him/her in a court of law;
3. That he/she has the right to consult with a lawyer before answering any questions; and the right to the presence of a lawyer during any questioning; and

4. That if he/she cannot afford a lawyer, one will be provided for him/her prior to any questioning if he/she so desires.

Before you may consider as evidence a statement made by the defendant in response to questioning, you must find beyond a reasonable doubt that the defendant was advised of his/her rights, understood those rights, and voluntarily waived those rights and agreed to speak to the police [or an assistant district attorney]. If you do not make those findings, then you must disregard the statement and not consider it.

*[NOTE: Add if the defendant's mental capacity to understand the warnings is in issue:*

A person may validly waive [his/her] rights, regardless of whether or not [he/she] had a full understanding of the criminal law or procedures or, in particular, how what [he/she] says on waiving [his/her] rights may be used later in the criminal process.

What must be shown for a valid waiver is that the individual grasped the plain meaning of the warnings that [he/she] did not have to speak to the interrogator; that any statement might be used to [his/her] disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued.<sup>9]</sup>

## **Traditional Involuntariness**<sup>10</sup>

Under our law, a statement is not voluntary if it is obtained from the defendant by the use or threatened use of physical force [upon the defendant or another person].

In addition, a statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.<sup>11</sup>

## Expanded Charge on Traditional Involuntariness

*In addition to the foregoing charge on “Traditional Involuntariness,” the following expanded charge may be appropriate:*

In considering whether a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant’s physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement, you may consider such factors as:

The defendant’s age, intelligence, and physical and mental condition; and

The conduct of the police during their contact with the defendant, including, for example, the number of officers who questioned the defendant, the manner in which the defendant was questioned, what the police promised or said to the defendant<sup>12</sup>, the defendant’s treatment during the period of detention and questioning, and the length of time the defendant was questioned.

It is for you to evaluate and weigh the various factors to determine whether in the end a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant’s physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.



## **Failure to Record Statement**

(Added June 2017 for a law effective April 1, 2018)

*Note: Effective, April 1, 2018, CPL 60.45 requires the recording of a custodial interrogation taken by a "public servant" [Penal Law § 10.00(15)] in a "detention facility" when "the interrogation involves a class A-I felony, except one defined in article [220] of the Penal Law; felony offenses defined in section 130.95 and 130.96 of the Penal Law; or a felony offense defined in article [125] or [130] of such law that is defined as a class B violent felony offense in section 70.02 of the Penal Law." A "detention facility" is defined to mean "a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them." If there is an issue as to whether the defendant was in custody and subject to custodial interrogation, see the "additional charges" section below: "*

*I. Custodial but Spontaneous Statement*

*II. Was Defendant in Police Custody?*

Under our law, where a person is subject to custodial interrogation by a (specify e.g. detective) at a (specify "detention facility," e.g. police station) the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device.

As you are aware the People did not do so. The People's failure to record the statements may be weighed by you as a factor, but not as the sole factor, in determining

Select either or both of the following alternatives:

whether such statements were made,

[and if so,] whether they were made voluntarily.

## **Promise by the Police** <sup>13</sup>

A statement of the defendant may be involuntary for the reasons I have just explained to you, and it may also, or in the alternative, be deemed to have been made involuntarily if the statement was obtained from the defendant by a public servant engaged in law enforcement activity [or by a person then acting under his/her direction or in cooperation with him] by means of any promise or statement of fact, which promise or statement created a substantial risk that the defendant might falsely incriminate himself/herself.

## **Delay in Arraignment <sup>14</sup>**

Under our law, when a person is arrested, the police must bring him or her to court for arraignment without unnecessary delay. Before bringing an arrested defendant to court, the police may perform [a lineup], fingerprinting and photographing and may complete the paperwork associated with the processing of the arrest, and may question the defendant.

It is not for the jury to determine precisely when the defendant should have been arraigned; however, you may consider whether the police unnecessarily delayed the defendant's arraignment; and, if so, whether that delay, along with other relevant factors, affected the defendant's ability to make a choice about whether to make a statement.

A statement is not involuntary solely because of the length of time before a defendant is arraigned. That length of time is only one of the factors that you may consider in determining whether a statement was voluntary.

## **Conclusion**

If the People have not proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you must disregard that statement and not consider it.

If the People have proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you may consider that statement as evidence and evaluate it as you would any other evidence for truthfulness and accuracy.<sup>15</sup>

## **ADDITIONAL CHARGES**

### **I. Custodial but Spontaneous Statement**

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

If, however, a defendant in custody spontaneously volunteers a statement, that statement may be considered by the jury, regardless of whether or not the defendant was advised of his/her rights or waived them.

[In this case, the People concede that at the time of the statement, the defendant was in police custody (and had not been advised of his/her rights). The People, however, contend that the defendant spontaneously volunteered a statement.]

For a statement to be spontaneously volunteered, the spontaneity must be genuine and not the result of any questioning, inducement, provocation, or encouragement by the police.<sup>16</sup>

Under our law, questioning includes words or actions by the police [or assistant district attorneys], which they should know are reasonably likely to elicit an incriminating statement.

If you find that the People have proven beyond a reasonable doubt that the statement was spontaneously volunteered, you may then consider that statement as evidence and evaluate it as you would any other evidence for truthfulness and accuracy.<sup>17</sup>

If you find that the People have not proven beyond a reasonable doubt that the statement was spontaneously volunteered, then you must disregard the statement and not consider it.

## **II. Issue as To Custody of Defendant**

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

On the other hand, a defendant who is not in custody when questioned by the police [or assistant district attorney], need not be advised of his/her rights, and any voluntary statement may be considered by the jury.

Under our law, a person is in custody when he/she is physically deprived of his/her freedom of action in any significant way.<sup>18</sup>

The fact that the defendant was being questioned by police [or that the questioning took place inside a police station] does not necessarily mean the defendant was in custody.

Whether the defendant was in custody at the time of the questioning is not determined by what the defendant himself/herself believed or what the police believed.<sup>19</sup> In other words, the test is not whether the defendant believed he/she was in custody or the police believed he/she was in custody. The test is what a reasonable person, innocent of any crime, in the defendant's position, would have believed. If that reasonable person would have believed that he/she was in custody, then the defendant was in custody. If that reasonable person would have believed that he/she was not in custody, then the defendant was not in custody.<sup>20</sup>

To decide whether a reasonable person, innocent of any crime, in the defendant's position, would have believed that he/she was in custody, you must examine all the surrounding circumstances, including but not limited to:

Select as appropriate:<sup>21</sup>

the reason the defendant was speaking to the police or being questioned by the police;

where the questioning took place; [whether the defendant appeared at the police station voluntarily;]

how many police officers took part in the questioning;

whether the questioning was investigative or accusatory;

whether the questioning took place in a coercive atmosphere;

whether the defendant was handcuffed or physically restrained;

whether the police treated the defendant as if he/she were in custody;

whether the defendant was offered food or drink;

whether the defendant had been allowed to leave after the questioning.

1. See *People v Huntley*, 15 NY2d 72 (1965).  
See also *People v Cefaro*, 23 NY2d 283, 286-287 (1968); *People v Sanchez*, 293 AD2d 499 (2d Dept 2002).
2. See *People v Graham*, 55 NY2d 144 (1982).
3. See *People v Dawson*, 166 AD2d 808 (3d Dept 1990);  
*People v Daniels*, 159 AD2d 513 (2d Dept 1990); *People v Medina*,  
146 AD2d 344 (1st Dept 1989) *aff'd* *People v Bing [Medina]*, 76 NY2d  
331 (1990).
4. See *People v Rodney*, 85 NY2d 289 (1995); *People v Berkowitz*,  
50 NY2d 333, n. 1 (1980); *People v Rodriguez*, 39 NY2d 976 (1976);  
*People v Ryff*, 27 NY2d 707 (1970) (identification questions); *People*  
*v Rivera*, 26 NY2d 304 (1970) (defendant's address).
5. Such statements also need to have been voluntarily made, but it is  
unlikely that the voluntariness of such statements will be in issue.
6. See CPL 60.45 (1); *People v Huntley*, *supra*, 15 NY2d 72.
7. See *Miranda v Arizona*, 384 US 436 (1966);  
*People v Graham*, *supra*, 55 NY2d 144.
8. See *People v Hotchkiss*, 260 AD2d 241 (1st Dept 1999);  
*People v Crosby*, 91 AD2d 20, 29 (2d Dept 1983).
9. See *People v Williams*, 62 NY2d 285, 287-289 (1984)  
(An "individual may validly waive Miranda rights so long as the immediate  
import of those warnings is comprehended, regardless of his or her  
ignorance of the mechanics by which the fruits of that waiver may be used  
later in the criminal process." Thus, a "functionally illiterate, borderline  
mentally retarded man who also suffered from organic brain damage...[and]  
had previously been hospitalized for psychotic episodes" who "would not  
have understood [the] rationale [of the Miranda warnings] or the full legal  
implications of confessing" but who understood the "immediate meaning" of  
the pre-interrogation warnings, could, and here did, waive his Miranda  
rights). See also *People v Love*, 57 NY2d 998 (1982) (although the  
defendant was in a psychiatric hospital at the time of interrogation, his  
waiver of his pre-interrogation warnings was valid); *People v Thasa*, 32  
NY2d 712 (1973) (the defendant was found mentally incapable of waiving  
his pre-interrogation rights). *But see Colorado v Connelly*, 479 US 157  
(1986), decided after the foregoing cases, in which the United States  
Supreme Court held that a waiver of Miranda rights is effective in the  
absence of government coercion, irrespective of the defendant's mental  
state.
10. See *People v Anderson*, 42 NY2d 35 (1977).



11. See CPL 60.45 (2) (a).
12. The material within commas was added in June 2015 in light of *People v Thomas*, 22 NY3d 629 (2014); see footnote 13.
13. See CPL 60.45 (2) (b). The “Promise by Police” charge was revised in June 2015 to accord with *People v Thomas*, 22 NY3d 629, 644-645 (2014) (“It is true that our state statute [CPL 60.45 (2) (b) (i)] treats as ‘involuntarily made’ a statement elicited ‘by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself,’ but this provision does not, and indeed cannot, displace the categorical constitutional prohibition on the receipt of coerced confessions, even those that are probably true....As CPL 60.45's enumeration of the various grounds upon which a statement may be deemed involuntary itself demonstrates, subdivision (2) (b) (i) constitutes an additional ground for excluding statements as ‘involuntarily made,’ not a license for the admission of coerced statements a court might find reliable.”).
14. The items the police may do before arraignment was revised in December of 2019 to include fingerprinting and photographing per CPL 210.10(3) [“[F]ollowing the arrest [on a bench warrant,] the executing police officer must without unnecessary delay perform all recording, fingerprinting, photographing and other preliminary police duties required in the particular case, and bring the defendant before the superior court”] and to accord with *People v. Jin Cheng Lin*, 26 N.Y.3d 701 (2016). See also *People v Ramos*, 99 NY2d 27 (2002).
15. In November 2020, the words “for truthfulness and accuracy” were added at the end of the second paragraph. See *Salnave v. Ercole*, 2014 WL 3014536 (ED NY 2014).
16. See *People v Maerling*, 46 NY2d 289, 302 (1978).
17. In November 2020, the words “for truthfulness and accuracy” were added at the end of the second paragraph. See *Salnave v. Ercole*, 2014 WL 3014536 (ED NY 2014).
18. See *People v Rodney*, 21 NY2d 1, 9 (1967).
19. See *Stansbury v California*, 511 US 318 (1994).
20. See *People v Yukl*, 25 NY2d 585 (1969).
21. See *People v Centano*, 76 NY2d 837, 838 (1990) (“The Appellate Division correctly applied the standard established in *People v Yukl* [25 NY2d 585, 589] and concluded that a reasonable person, innocent of any crime would not have believed he was in custody under the circumstances. It based its conclusion on evidence in the record that [1] defendant appeared at the

precinct voluntarily and presented himself to the police as a friend of Ivory eager to assist in investigating his death, [2] the atmosphere at the precinct was not coercive, [3] the questioning was investigative, not accusatory, [4] the police did not treat defendant as if he were in custody but rather informed him expressly that he was not a suspect, [5] defendant was never handcuffed or physically restrained, [6] the questioning was not continuous but was interrupted frequently, [7] defendant never protested the questioning, [8] defendant was fed and allowed to relax in the station house by watching a baseball game, [9] the police advised defendant that he was not required to take a polygraph test, [10] defendant was asked, not ordered, to return to the precinct after his first polygraph, [11] defendant was allowed to sleep alone in an unlocked room in the station house, and [12] defendant was permitted to go unescorted into a store the following morning. Taken together, these facts are sufficient to establish that the interrogation was noncustodial.").