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Joint Committees

Administrative, Executive, and Legislative Review

Children, Youth, and Families

Senate Chair
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Testimony for SB 22
Criminal Procedure – Custodial Interrogation – Codification
Before the Judicial Proceedings Committee
On February 2, 2023

Good afternoon Chair Smith, members of the Judicial Proceedings Committee,

Senate Bill 22 is intended to address changes to Miranda rights resulting from the U.S. Supreme Court's decision in *Vega v. Tekoh*. *Miranda*, decided in 1966, found that self-incrimination, as protected by the Fifth Amendment of the Constitution, was only safe-guarded in instances of custodial interrogation when people were "warned prior to any questioning that they have the right to remain silent, that anything they say can be used against them in a court of law, that they have the right to an attorney, and if they cannot afford an attorney one will be appointed for them prior to any questioning."[1] These warnings gave people the opportunity to stay silent and avoid self-incrimination.

In *Vega v. Tekoh,* the U.S. Supreme Court found that the right noted in *Miranda v. Arizona,* was not a constitutional right, but rather merely a "prophylactic rule". In *Vega*, during an investigation Terence Tekoh made a confession while being interrogated by Deputy Carlos Vega. He was not informed of his Miranda rights prior to putting his statement in writing, which later became admissible and used against him. After two trials, an appeal up to the 9th circuit and eventually a grant of certiorari from the Supreme Court, it was decided that the *Miranda* warning not given prior to custodial interrogation did not impinge constitutional rights of self-incrimination, and that a person cannot bring suit as such. The decision in *Vega* reinterpreted what most of us believe we knew about the issuance of Miranda rights and its importance in informing subjects in custody of their rights, by reducing it to a preventative rule and not a constitutional right.

Senate Bill 22 proposes modifying section 2-401 in the Criminal Procedure Code, that currently allows the Judiciary to decide what is a "custodial interrogation." Senate Bill 22 takes this power back and seeks to allow the legislature, through this bill, to define custodial interrogation.

[1] Facts and Case Summary - Miranda v. Arizona | United States Courts (uscourts.gov)

Additionally, SB 22 includes a new section 2-401.1, which outlines the mandatory advisement of certain information during custodial interrogation that is necessary to make admissible a statement.

By defining what custodial interrogation is and codifying *Miranda* rights, which have been ingrained ad nauseum in American culture, Senate Bill 22 attempts to reset criminal procedure pre-*Vega*. With SB 22 we can assure the people of Maryland that the rights they have grown to know are there to safeguard them still. I urge the committee to vote in favor of SB 22 for the people of Maryland.

SB22 Testimony.pdf
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Testimony for the Judicial Proceedings Committee

February 1st, 2023

SB 22 Criminal Procedure – Custodial Interrogation – Codification

FAVORABLE

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The ACLU of Maryland supports SB 22, which would codify Miranda rights for Marylanders. SB 22 would exclude from admissible evidence any statements made by an individual during a custodial interrogation unless they are properly made aware that they have the right to remain silent, that their statements can be used against them, and that they have the right to speak to an attorney before questioning. These protections are integral to the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel.

These protections are essential for Black Marylanders and Youth

Black people in Maryland are more likely, in some places as much as 8 times more likely, to be arrested by the police. Codifying these protections would shore up the constitutional rights of Black Marylanders when they face these arrests and subsequent questioning. In high pressure situations where those who have been arrested are being questioned by police, many are not even aware of their right to counsel nor that they are under no obligation to answer the officer's questions. Law enforcement being legally allowed to present false information to those they are questioning only exacerbates the problem and ultimately serves the goal of mass incarceration.

Children, specifically black children, are particularly vulnerable to making the kinds of incriminating statements that these protections would exclude from admissibility, as they are often unaware of their rights and often attempt to tell law enforcement what they think officers want to hear in order to end the interaction or detention altogether. SB22 would rightly put the onus on law enforcement to inform those that they arrest, detain, and question of their rights to

not answer questions, be advised by counsel, and not incriminate themselves.

For the foregoing reasons the ACLU of Maryland urges a favorable report on SB22.

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Judicial Proceedings Committee
Senate Bill 22
February 2, 2023
Testimony of Joshua E. Hoffman

Like so many other rights long established, the Miranda warnings, which currently exist solely because of the Supreme Court, are certainly in jeopardy. For this conservative majority, it's difficult to understand how *Miranda v. Arizona* could survive. This reasons for this Committee to act to push back and preserve long established rights, meanwhile, could not be more clear.

Today's originalist majority wing of the Supreme Court, if we take them at their word, protects no rights that they don't find significant support for from the mid-nineteenth century. That is before modern policing, urban policing, even existed. If there is one thing ten years of practicing law before our courts, state and federal, has taught me, it is that courts are results oriented at times. And if they are result oriented sometimes, they may be so any time.

And rest assured, Miranda rights are not in the United States Constitution or the Maryland Declaration of Rights. They have merely been created by the Supreme Court as a necessary measure to give meaning to the constitutional right against self-incrimination. Maryland courts have followed that law but have never expanded it.

One scholar has written "You cannot justify the Gideon line of cases[1] in any remotely originalist way, and one of the important areas-- not the entire area, but one of the important areas--of the Fifth Amendment is Miranda. It's the same thing. I mean, it's about as far from originalism as one can possibly get."[2]

In *Dobbs*, this Supreme Court majority along partisan lines overruled all constitutional protection for abortion. It has been pointed out that their rationales would do the same for privacy rights like contraception, homosexuality, etc. In dissent, Justice Breyer, joined by Kagan and Sotomayor wrote "The Constitution

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[1] Gideon v. Wainwright, 372 U.S. 335 (1963) establishing that an "indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial." It is the considering police interrogation a phase of criminal proceedings which, in part, underpins not only Miranda but all protections against self-incrimination applied against police and not just courts.

[2] Originalism and Criminal Law and Procedure 2005 National Lawyer's Convention November 10, 2005, 11 Chap. L. Rev. 277, 288 (2008)

will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all. And no one should be confident that this majority is done with its work."

For Miranda itself, this has already begun. This past June, in *Vega v. Tekoh*, a 6-3 decision also along partisan lines, the US Supreme Court reversed the 9th Circuit and held that a violation of Miranda cannot be cause for a civil rights law suit. They wrote that "a violation of Miranda does not necessarily constitute a violation of the Constitution." Dissenting, Justice Kagan wrote "Today, the Court strips individuals of the ability to seek a remedy for violations of the right recognized in Miranda."

And, of course, *Miranda v. Arizona* was mentioned in the now infamous footnote 48 from the concurring opinion in *Dobbs*, identified by many as a to-do list of cases for this Supreme Court majority to overturn.

As always, when declining to protect a right, the federal courts are quick to point out that state courts are free to decide otherwise within their jurisdictions, passing the buck, in other words. State courts often say much the same thing about their own legislatures. The common refrain is that they, as courts, are in no position to decide policy. And they say it regardless of whether they are making policy.

Perhaps they are right and the problem is that we spent so many decades relying on this super powered court to protect fundamental freedoms. Perhaps it has been the job of state legislatures all along. After all, there would never have been a risk of *Roe* being overturned if Congress had acted, unless Congress were to overturn it. The difference is Congress would be, in theory, responsible to their constituents, whereas the courts are responsible to no one.

In 1977 Justice Brennan wrote "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed."

That language seems quaint, from an older age. Unless they're Second Amendment Rights or the rights for unlimited election spending, this Court seems unlikely to protect them. His suggestion is so much more true for legislatures.

Recent history proves as much. Protections for Marylanders from law enforcement have come from nowhere but the General Assembly of late. Anton's Law, interrogations of children, use of force, body cameras, are all measures that came from the representatives of the people.

The courts meanwhile, including our own, have continued to gut the Fourth Amendment. Likely, no one on this Committee needs to be taught about Qualified Immunity, which, in the judiciary, has been a steady march of preventing rights violations from reaching juries, provided law enforcement can claim some plausible explanation for why a hypothetical, reasonable police officer *might* have thought their conduct was legal, regardless of how illegal it actually was.

The protections against self incrimination found in our Declaration of Rights and the Federal Constitution refer to criminal proceedings. With modern policing, the criminal proceeding begins at the very moment one is brought into contact with police. For that reason, SB 22 proposes expanding Miranda style warnings to detention scenarios. When a person is being interviewed, making statements, on or off body camera, the groundwork for any criminal trial is already being put in place.

Yet, there are so many possible scenarios. Investigative questioning during a DUI stop and during a free-to-leave interview for a sex offense bear only some similarities. And courts, as they so often point out, are in no position to establish a work group to study the various scenarios.

What of those who speak English as a second language? Or those with learning disabilities or the plain uneducated? What of citizens terrified of being hand cuffed versus hardened criminals?

While requiring these warnings for interrogations following arrest is beyond question, perhaps it is too early to expand Miranda style warnings to each and every police detention. This Committee ought to consider a work group to do what the courts cannot: to study the various situations law enforcement and our citizens find themselves in and adjust the law accordingly.

No doubt it will be suggested to leave the matter to the courts unless and until we are forced to act. The recent midterm elections showed, among other things, the preference of the public that we do *not* rely on the courts for protecting our basic rights.

A scenario where *Miranda* is overruled or substantially modified would create a period of tremendous uncertainty for those, like me, working on the front lines in our criminal tribunals. It is inconceivable to invite such chaos when this body may, while causing no changes anywhere, simply codify Miranda style warnings in statute. The question is not “why?” it is "why not?”

Joshua E. Hoffman

SB22 - FAV - 2.2.23 (JPR) - Tia Holmes - FINAL.pdf
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POSITION ON PROPOSED LEGISLATION

BILL: SB 22 – Criminal Procedure – Custodial Interrogation – Codification

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 2/2/2023

The Maryland Office of the Public Defender respectfully requests that this Committee issue a favorable report on Senate Bill 22. Senate Bill 22 would codify the procedural safeguards established by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966).[1] *Miranda* established guidelines for courts and law enforcement officers to follow to protect a person's Fifth Amendment privilege against self-incrimination and their right to request an attorney's presence during an interrogation. Senate Bill 22 is necessary to ensure that the procedural safeguards established in *Miranda* endure to protect Marylanders from unconstitutional police practices.

In *Miranda*, the Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[2] Since *Miranda*, the meaning of custodial

[1] Under *Miranda*, the person being interrogated "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." *Id.* at 479. Unless the prosecution can demonstrate that the person was warned and waived their rights, a prosecutor cannot use any evidence obtained during that interrogation at trial. *Id.* at 479.

The Maryland Office of the Public Defender notes, however, that the bill should be amended to include the final *Miranda* advisement: if a person cannot afford an attorney, one will be appointed for the person prior to any questioning if they desire.

[2] 384 U.S. at 444. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980), expanded "interrogation" to include "words or actions" that police reasonably should know are likely to elicit an incriminating response.

interrogation has been subjected to an evolving judicially determined meaning. And, "[w]ithout the womb of custodial interrogation,"[3] there are no *Miranda*-based protections.

Senate Bill 22 establishes a statutory definition for custodial interrogation rather than leaving it to its evolving judicially determined meaning. Under the bill, "custodial interrogation" means any questioning conducted by an officer while the person is detained, is arrested, or has a reasonable belief that they are not free to leave the encounter. This concrete definition is necessary because Maryland courts engage in a fact-based analysis to determine whether a person is entitled to *Miranda*-based protections.[4] Thus, under current law, a person can be detained,[5] held in police custody,[6] or subjectively believe they are not free to leave,[7] but that person may not be entitled to *Miranda*-based protections if the court so determines.

Furthermore, the task of determining whether a person is "in custody" for the purpose of *Miranda* "has proved to be 'a slippery one.'"[8] Previous judicial opinions demonstrate that factual

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[3] *In re Darryl P.*, 211 Md. App. 112, 158 (2013).

[4] *Smith v. State*, 186 Md. App. 498, 522-23 (2009), *aff'd*, 414 Md. 357 (2010).

[5] *See Jones v. State*, 132 Md. App. 657, 666 (2000) (concluding that, even though the person "had been seized within the contemplation of the Fourth Amendment and was not free to leave the scene[,]" *Terry v. Ohio*, 392 U.S. 1 (1968)[,] [t]hat was enough to engage the gears of the Fourth Amendment, but it was not enough to engage the gears of *Miranda v. Arizona*."); *see also Griner v. State*, 168 Md. App. 714 (2006); *Craig v. State*, 148 Md. App. 670 (2002).

[6] *See Minehan v. State*, 147 Md. App. 432, 441-42 (2002) ("[W]e recognize that each case must be judged on its own merits, although certain benchmarks have developed in the thirty-plus years of *Miranda* litigation. For example, interrogation in a police station does not amount to custody *per se*."); *see, e.g.*, *Gupta v. State*, 452 Md. 103, 135 (2017) (holding that, because the suspect's demands to see a lawyer came when he was still in a holding cell and before interrogation was "imminent," his invocation of his *Miranda* right to counsel was invalid); *see also Hoerauf v. State*, 178 Md. App. 292 (2008) (same); *Costley v. State*, 175 Md. App. 90 (2007) (same). *But see State v. Rucker*, 374 Md. 199, 212 (2003) ("Rucker was not in custody for purposes of *Miranda* because he was not restrained to a degree associated with a formal arrest. Accordingly, *Miranda* warnings were not required before the police asked Rucker whether he had anything illegal.").

[7] *See Thomas v. State*, 429 Md. 246, 259 (2012) ("In analyzing whether an individual is in custody for *Miranda* purposes, we ask, under the 'totality of the circumstances' of the particular interrogation, 'would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.'").

[8] *Withrow v. Williams*, 507 U.S. 680, 711-12 (1993) (O'Connor, J., concurring, in part, and dissenting in part). Maryland court's have attempted to define custody in various factual scenarios with differing results. *See, e.g.*, *Reynolds v. State*, 88 Md. App. 197, 209 (1991) ("'Custody' ordinarily contemplates that a suspect will be under arrest, frequently in a jailhouse or station house

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scenarios can sometimes create legal conundrums and case law that may be unfavorable to the people placed in similar situations.[9] Nonetheless, courts place the burden on a person to prove that they were entitled to *Miranda*-based protections when a *Miranda* violation is in issue.[10] Senate Bill 22 eliminates that complicated task by providing three distinct factual situations where *Miranda* would apply. In effect, Senate Bill 22 would evince this Legislature's intent that *Miranda*-based constitutional protections should not evaporate simply because the facts missed some judicially determined mark.

While some court decisions reinforce constitutional guarantees, varying judicial interpretations of those decisions may threaten constitutional guarantees. Senate Bill 22 would ensure that a person's *Miranda*-based constitutional rights are statutorily protected anytime they are detained, arrested, or otherwise subjected to questioning in a police-dominated environment.[11] A vote in favor of this bill is a vote for constitutional rights.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a FAVORABLE report on Senate Bill 22.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.
Authored by: Tia L. Holmes, Esq., Assistant Public Defender, Tia.Holmes@maryland.gov.

setting."), *aff'd,* 327 Md. 494 (1992). *But see Bond v. State*, 142 Md. App. 219, 228 (2002) (holding the person was in custody when police questioned him in his bedroom, late at night).

[9] For example, in *Gupta*, *supra* note 6, Judge Sally Denison Adkins wrote a separate concurring opinion because she was "concerned that through its analysis of Mr. Gupta's arguments the Majority opinion will encourage interrogation practices that infringe on suspects' *Miranda* rights."452 Md. at 139 (Adkins, J., concurring).

[10] *Smith*, 186 Md. App. at 520.

[11] This legislation should not affect the judicially determined meaning of the custodial interrogation of a child or minor as it relates to their subjective belief. The Supreme Court has recognized that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B. v. N. Carolina*, 564 U.S. 261, 272 (2011).

MCPA-MSA-SB 22- Custodial Interrogation_Oppose.pdf
Uploaded by: Andrea Mansfield
Position: UNF

Maryland Chiefs of Police Association
Maryland Sheriffs' Association

MEMORANDUM

TO: The Honorable William C. Smith, Jr. Chairman and
Members of the Judicial Proceedings Committee

FROM: Darren Popkin, Executive Director, MCPA-MSA Joint Legislative Committee
Andrea Mansfield, Representative, MCPA-MSA Joint Legislative Committee
Natasha Mehu, Representative, MCPA-MSA Joint Legislative Committee

DATE: February 2, 2023

RE: **SB 22 – Criminal Procedure - Custodial Interrogation - Codification**

POSITION: **OPPOSE**

The Maryland Chiefs of Police Association (MCPA) and the Maryland Sheriffs' Association (MSA) OPPOSE SB 22. This bill would greatly impair the ability of law enforcement to interact with individuals and goes far beyond existing rules intended to protect the right against compelled self-incrimination.

The Fifth Amendment to the United States Constitution provides, "No person…shall be compelled in any criminal case to be a witness against himself…." In order to help ensure that stationhouse confessions made to police were voluntary, the United States Supreme Court created the *"Miranda* rules." *Miranda v. Arizona*, 384 U.S. 436 (1966). These rules are prophylactic only and not part of the Constitution. *Vega v. Tekoh*, 142 S.Ct. 2095, 2101 (2012). The Supreme Court of Maryland has consistently adopted the United States Supreme Court's *Miranda* decisions and has held that Art. 22 of the Maryland Declaration of Rights.[1] *See, e.g.*, *Madrid v. State*, 474 Md. 273 (2021) (determining that *Miranda* had been complied with and a custodial statement was properly admitted into evidence).

Miranda involved a stationhouse confession; the United States Supreme Court intended the new rules to apply to those or similar situations. Accordingly, "custody," for *Miranda* purposes occurs only when a person's freedom of action is curtailed to a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). A brief detention – a "*Terry* stop" – is not custody. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984). A routine traffic stop is also not custody. Id..

SB 22 changes the definition of "custody" to include *any* detention, no matter how brief. Under SB 22, before an officer can ask a driver of a vehicle, "Do you know how fast you were going?" or even "Do you have an emergency?" the officer must present a written notification of rights. A traffic stop – and all *Terry* stops – are intended to be brief, limited, and focused on resolving the reason for the stop as soon as reasonable. The requirements of SB 22 needlessly extend and complicate the routine stop.

Furthermore Senate Bill 22 would impact traffic stops and the processing of drivers under suspicion of Driving While Intoxicated (DWI) in violation of Transportation Article §21-902. These traffic stops are currently established by the Courts through a number of federal and state decisions. Under most

[1] Article 22 provides, "That no man ought to be compelled to give evidence against himself in a criminal case."

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circumstances the engagement between a police officer and someone suspected of driving under the influence (DUI) does not rise to the level of an arrest that would trigger providing a suspect Miranda rights through the entire "Per Se" process outlined in Transportation Article §16-205.1. Senate Bill 22 would lower the threshold as to what type of interaction between police and a driver would require an officer to advise a driver if a law enforcement officer wishes to use any of the responses as part of a criminal case under §21-902 as noted by MCPA and MSA above.

This poses a problem in DWI enforcement as one of the main purposes of §16-205.1 is to assist law enforcement in gathering evidence related to a driver's sobriety that may be used in a criminal case related to violations of §21-902. Currently, Miranda is not required until a person is "under arrest" which is defined by the Courts.

To the extent SB 22 is intended to provide protections for the right against self-incrimination, SB 22 goes much farther than necessary. *Terry* stops do not have the same potential for coercion as an arrest. *See, e.g., United States v. Leggette*, 2023 U.S.App. LEXIS 521 (4th Cir. 2023) ("For example, during a traffic stop, a driver may not be free to drive away, but such stops still do not ordinarily constitute 'custody' because they are not coercive enough.") Under the Maryland common law, statements are admissible only if found to have been voluntary. *Madrid*, 474 Md. at 320. Maryland law also requires other safeguards when an officer is interacting with a citizen, including:

- A requirement that interrogation rooms be equipped with audiovisual recording equipment. Crim. Pro. §2-402
- A requirement that law enforcement agencies issue body-worn cameras. Pub. Safety §3-511
- A requirement that an officer provide certain information at the commencement of a stop. Crim. Pro. §2-109
- Mandatory attorney consultation for juveniles subject to custodial interrogation. Cts. & Jud. Proc. §3-8A-14.2

Case law, statutes, and the sound discretion of judges and juries already help ensure that only voluntary statements are admitted in evidence.

Finally, unlike *Miranda*, SB 22 does not provide an exception for exigent circumstances. *New York v. Quarles*, 467 U.S. 649 (1984). Police officers are expected to act in a manner that protects the public, and that includes asking questions related to threats to public safety. Excluding from evidence answers given to those questions penalizes "offices for asking the very questions which are most crucial to their efforts to protect themselves and the public." *Quarles*, 467 U.S. at 656, n.6.

For these reasons, MCPA and MSA OPPOSE SB 22.

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Terry v. Ohio.pdf
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95. OCTOBER BLOG, 2022

Terry vs. Ohio: How well do you really know it?

With a dearth of *interesting* criminal cases emanating from our appellate courts, I thought this would be a good opportunity to provide a refresher on one of the most iconic cases in United States Supreme Court jurisprudence: *Terry v. Ohio*, 392 U.S. 1 (1968), arguably the single - most important case that police and prosecutors need in their day-to-day lexicon and certainly one of my favorites.

The Facts

It was a cold, drab and dreary Thursday, October 31, 1963 in downtown Cleveland, Ohio. All the leaves were brown and the sky was gray and would grow significantly grayer as President John F. Kennedy would be assassinated just three weeks later. A gumshoe by the name of Marty McFadden was on foot patrol in plain clothes, when at approximately 2:30 in the afternoon his attention was drawn to two men – John Terry and Richard Chilton, who were standing on the corner of Huron Road and Euclid Avenue. While Detective McFadden couldn't say precisely what it was about the two individuals that drew his attention, over his 35 years' experience as a detective he had developed a pretty good eye for shoplifters and pickpockets. His interest piqued; McFadden took a covert position near the entrance of a store about 300 to 400 feet away from the suspected ne'er-do-wells.

Over the next few minutes, McFadden observed one of the men walk a short distance away and glance into a store window. He then walked past the window a short distance, turned around and walked back, again pausing to look in the same store window. He then rejoined his crony and they had a brief conversation. The second man then went through the same gyrations: strolling down Huron Road; pausing to look in the same store window; walking past it; turning around; looking into the same store window; and re-joining his companion and holding a brief discussion. The two men repeated this same little dance routine five or six times apiece, stopping to stare into

the window approximately 20 - 24 times. At this point the plot thickens and they were joined by a third man, who briefly engaged them in conversation before leaving the two and walking away. Terry and Chilton continued their mysterious machinations for another few minutes, whereupon they then walked off together in the same direction taken by the third man.

McFadden, now on high-alert, suspected the two men of casing the joint in preparation of a stick-up. Fearing that they may be packing heat, McFadden followed them and saw them stop in front of Zucker's Fine Men's Haberdashery to talk to the same third man they had conversed with just a short time earlier. At this point McFadden leaped into action and confronted the three men, identifying himself as a lawman and asking for their names. When the men responded with something along the lines of "Puddin'n'tain. Ask me again I'll tell you the same" McFadden grabbed Terry, positioning him between McFadden and the other two reprobates and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, McFadden felt a pistol. He reached inside the overcoat pocket but was unable to remove the gun. He then removed Terry's overcoat and was able to retrieve a .38-caliber snub nose. He then had all three men assume the position and patted down the outer clothing of Chilton, as well as the third man, who was ultimately identified as Katz. Another revolver was felt (and recovered) in the outer pocket of Chilton's overcoat. The only item Katz was packing was a Pez dispenser.

McFadden later testified that he only patted down the men to see whether they had any weapons and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. After seizing the guns, all three men were ushered into the store and the proprietor was asked to call for back-up. After being transported to the station, Chilton and Terry were charged with carrying concealed weapons. Katz appears to have been sent on his way with a stern finger-wagging and a fatherly admonition to find a better circle of friends.

Motion to Suppress

On the motion to suppress the guns, the prosecutor argued that the guns were recovered during a search incident to a lawful arrest. The trial judge – obviously much sharper than the prosecutor – rejected that theory, instead holding that the officer, on the basis of his experience, "had reasonable cause to believe...that the defendants were conducting themselves suspiciously, and some interrogation should be made of their actions." The Court went on to hold that, purely for his own protection, Det. McFadden had the right to pat down the outer clothing of the men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The court held that the frisk was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet." It went on to hold that the pistols discovered during the frisk were admissible. *Id* at p. 8. Terry and Chilton were ultimately convicted.

The Supreme Court

The United States Supreme Court granted certiorari to determine whether the admission of the handguns was in violation of the Petitioner's Fourth Amendment rights. It must be remembered that 1968 was one of the most tumultuous years in this nation's history, with social issues such as the heightening of our involvement in Viet Nam, student protests, the civil rights movement, inner-city riots, Martin Luther King and Robert Kennedy being assassinated, gender equality, and the Democratic Republican National Convention in Chicago but just a few examples. Needless to say, there was a general mistrust of the police and the government in general among certain segments of society.

Against this backdrop the justices acknowledged the sensitive nature of rubber-stamping the police practice of "stopping and frisking" suspicious persons. It required balancing the police authority to confront dangerous situations on city streets versus the argument that that authority must be strictly circumscribed by the law of arrest and search to avoid exacerbating police-community tensions.

In oral argument, the government contended that a distinction should be made between a "stop/detention" and an "arrest" as well as between a "frisk" and a "search." It was urged by the prosecution that the police should be allowed to confront a person and detain him briefly for questioning upon suspicion that he may be involved with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the stop and frisk generates probable cause to believe the suspect has committed a crime, then the police would then have the right to arrest and search incident thereto.

The Court spent considerable time discussing the plusses and minuses of the exclusionary rule and its effects on police conduct. On one hand, the exclusionary rule operates to some degree to curtail unconstitutional police action. On the other hand, it cannot deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo a successful prosecution in the interest of serving some other goal. *Id* at p. 14. The Court cautioned that nothing in the *Terry* opinion should be taken as indicating approval of police conduct not meeting constitutional muster. The Court stressed that "trial courts would still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which treads upon personal security without the objective evidentiary justification which the Constitution requires." *Id* at p. 15.

The Court's Holding

The Supreme Court recognized that whenever a police officer contacts an individual and restrains his freedom to walk away, a seizure has occurred. It also stressed that whenever a police officer conducts an exploration of the outer surfaces of a person's clothing and puts his hands all over his or her body in an attempt to find

weapons, a serious intrusion on the sanctity of the person has taken place and is not to be undertaken lightly.

The Court determined that in this case, Det. McFadden "seized" Terry and subjected him to a "search" when he took hold of him and patted down the outer surface of his clothing. It was at that factual point that the Court had to determine whether it was *reasonable* for McFadden to act as he did. Remember, the Fourth Amendment doesn't prohibit *all* warrantless searches and seizures, only unreasonable ones. In determining whether McFadden's actions were reasonable, the Court had to address two questions – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Id* at p. 20.

Had the actions of Det. McFadden been deemed to have constituted an "arrest," the Court would have had to determine whether probable cause existed. Here, such was not the case. The conduct in question involved "on-the-spot" observations of the officer on the beat, which could not be subject to the warrant procedure and instead had to be judged on "reasonableness." *Id* at p. 20.

In determining reasonableness, the Court weighed the particular governmental interest the officer was seeking to protect versus the intrusion on the interests of the private citizen. In other words, the Court had to balance the officer's suspicion of a possible armed robbery and potential danger to the officer, store personnel and customers versus the intrusion on personal security which the seizure and frisk caused to our villains.

In justifying the government's actions in such scenarios, a police officer must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Id @ p.21. In making that determination, Courts must determine whether the facts available to the officer at the moment of the seizure or the frisk "warrant a man of reasonable caution in the belief that the action was appropriate." Id @ pp. 21, 22.

The Seizure

Applying the balancing test, the Court spent little time and words in determining that Det. McFadden's interest in thwarting a potential armed robbery far out-weighed the inconvenience of Terry, Chilton and Katz being briefly detained while the situation was investigated. The on-going actions of Terry and Chilton, as viewed through the eye of an experienced police officer more than justified a brief investigatory detention.

The Frisk

Determining the propriety of the justification of searching the scoundrels for weapons proved to be a much more arduous and taxing issue. The Court took notice of the fact that 57 law enforcement officers were killed in the line of duty in 1966 and that

335 officers were killed between 1960 – 1966. 1966 also saw 23,851 assaults on police officers, of which 9,113 resulted in injuries to said officers. Of the 57 officers killed in 1966, 55 died from gunshot wounds, 41 of them inflicted by handguns easily concealed on the killer's person. See Footnote 21 *Id* @ p. 24. In light of those numbers, the Court could not ignore the need for law enforcement officers to protect themselves and other potential victims of violence in situations where they may lack probable cause to make an arrest. While it would seem to be unreasonable to deny police officers the right to take the steps necessary to determine if a person is carrying a weapon, the Court still had to take into consideration the nature and level of the intrusion on individual rights. A search for weapons in the absence of probable cause to arrest must be strictly limited by the exigencies which justify the action. The Court determined that those police actions must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. In other words, when checking for weapons, something less than a full search must be utilized.

The Court concluded that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he* has reason to believe that he* is dealing with an armed and dangerous individual, regardless of whether the officer has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man* in the circumstances would be warranted in the belief that his safety or that of others was in danger...And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his* inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he* is entitled to draw from the facts in light of his* experience." Id @ p. 27.

Finally, the Court examined the manner in which the seizure and search were conducted and opined that evidence may not be introduced if it was discovered by means of a search and seizure which were not reasonably related in scope to the justification for their initiation. The sole justification of the search is the protection of the police officer (and others nearby) and it must be limited to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. *Id* at p. 29.

Det. McFadden's Actions

The Court noted that Det. McFadden did not place his hands in any of the men's pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surface of his clothing as he discovered nothing on Katz that appeared

* The Court only used the subject pronoun "he" and "man" as opposed to "she" and "woman." Being enlightened and a man of the world, I would have added "her," "she" and "woman," though I am sure that will elicit criticism as well. To paraphrase the old Virginia Slims cigarette slogan, "I've come a long way, Baby," though probably still not far enough.

to be a weapon. Det. McFadden limited his search of the three man strictly to what was minimally necessary to learn whether they were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for evidence of any criminal activity other than weapons.

Holding

Once the Court balanced the facts and circumstances (and reasonable interpretation thereof) observed by Det. McFadden, it determined that a reasonably prudent man (person) would have been warranted in believing that Terry and Chilton were armed and thus presented a threat to the officer's safety while he was investigating the suspicious behavior.

The Court ultimately reached the well-reasoned determination that Det. McFadden's actions were constitutionally appropriate, holding:

> ....where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. Affirmed.

Conclusion

I know what you're thinking: That's a lot of flowery language from the Supreme Court, but what does it mean in layman's terms? Using the KISS principle, a *Terry* stop and frisk has two requirements:

1. In order to make the initial stop/detention, there must be reasonable articulable suspicion to believe that a crime is occurring, has occurred, or is about to occur; and
2. In order to conduct the frisk, there must be additional reasonable articulable suspicion to believe that the person is armed and dangerous.

A *Terry* pat down is meant to protect the officer, not to recover evidence. While *Terry* doesn't require the officer to be *certain* the person is armed and dangerous, there must be "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants the intrusion." *Thornton v. State*, 465 Md. 122, 142 (2019), (quoting *Sellman v. State*, 449 Md. 526, 541 (2016.)

Reasonable articulable suspicion takes into account the totality of the circumstances and each situation is fact specific. Courts will ask: Would a reasonably prudent police officer have felt that they were in danger, based on reasonable inferences from particularized facts in light of the officer's experience? See ***Bailey v. State***, 412 Md. 349 (2009). Due deference is given to an officer's training and experience. The Court noted in ***Bailey*** that the officer involved was a patrol supervisor with over 20 years of law enforcement experience.

In addition, *Terry v. Ohio* must be read as prohibiting "pat downs for officer safety." If every suspect coming into contact with the police could be automatically "patted down for officer safety" then *Terry v. Ohio* would have no meaning (since the police wouldn't *need* RAS to believe the person is armed and dangerous) and I would have just wasted the past two days of my life writing this blog...and you would have wasted the last half hour of your life reading this drivel.

Far be it from me to tell you that you cannot conduct pat downs for officer safety as I sit home in the comfort of my living room watching The Real Housewives of Missoula, Montana while you are out patrolling the mean streets of New Market or Chevy Chase, so do what you need to do to be safe. Just be aware that should you conduct a pat down that the trial judge deems lacking in reasonable suspicion, the result could very well be the suppression of any evidence recovered. We'd all be a little disconsolate if that handgun you recovered from the illegal pat down had been used in a triple homicide.

So what can you do?

You can always ask for consent to pat the person down. Just remember that consent must be freely and voluntarily given. You cannot say, "You don't mind if I pat you down for weapons, do you?" as you are actually conducting the pat down. And it goes without saying that you can't use their refusal to grant consent as forming the basis of your RAS. In other words, you can't rationalize that "only a person that has a weapon on them would refuse consent so that makes me believe they have a weapon on them."

Should you find yourself in a situation in which weapons or other contraband ("Plain Feel Doctrine," See *Minnesota v. Dickerson*, 508 U.S. 366 (1993)) are recovered during a *Terry* pat down, make sure you include in your report ***everything*** that caused you to have a reasonable suspicion that the person was armed and dangerous. The following are some of the factors that courts should take into consideration in determining whether the pat down was in fact "reasonable." Some of them on their own might be enough. Others – standing alone - clearly will not be, so the more you have the better:

- What crime is being investigated;
- Evasive body language;

- Suspect was wearing baggy clothing that could easily conceal a weapon;
- Location and time;
- The number of suspects versus the number of officers;
- Evasive actions on the part of the suspect;
- Was a weapon found on another member of the group prior to the pat down of the other party;
- Lighting;
- What type of crime were the police investigating;
- Any inconsistent statements made by the suspects;
- Any known criminal records or history of violence;
- Were any of the suspects known to carry a weapon previously;
- Were they wearing gang colors;
- Was it a high-crime or drug-related neighborhood;
- Was there evasive or excessively nervous behavior;
- Furtive movements;
- Failure to follow orders;
- Aggressive or hostile behavior;
- Refusal to remove their hands from their pockets;
- Bulges in their pockets or waistband;
- Providing false names or false identification; and
- Anything else you can think of that may relate to a person possibly being armed.

AS ALWAYS, PLEASE CONSULT WITH YOUR LOCAL STATE'S ATTORNEYS' OFFICE WITH ANY SPECIFIC QUESTIONS REGARDING THE SUBJECT MATTER LOCATED HEREIN...

AND REMEMBER...BE CAREFUL OUT THERE!

A historical marker stands at the scene of the arrest made by Cleveland Police Department Hall of Fame Detective Martin McFadden. McFadden was a 38-year veteran when his actions on the job triggered the Supreme Court decision in *Terry* officially sanctioning the law enforcement tactic known as "stop and frisk."

McFadden joined the Cleveland Police Department in 1925 and was shortly promoted to detective. He was considered an expert in criminal tricks and tactics and gave presentations on how to avoid becoming a victim of criminals as well as how to catch them.

Martin McFadden retired from the Cleveland Police Department in 1970 after carrying a badge and gun for 45 years. He died in 1981 of cancer, but his legacy lives on. Stop and frisk continues to serve as a tool for police officers to prevent crimes, as well as save countless police and civilian lives. The legality of this technique's proper use has been upheld repeatedly and even expanded upon. This would not probably surprise McFadden. When the street-smart detective was asked what he thought about the Supreme Court's decision to affirm his actions, he simply said, "I knew I was right, and I was."

SB 22 - Criminal Procedure - Custodial Interrogati

Uploaded by: John Cox

Position: UNF

Bill Number: SB 22
Maryland States Attorneys Association
Opposed

WRITTEN TESTIMONY OF THE MARYLAND STATES ATTORNEYS ASSOCIATION IN OPPOSITION TO SENATE BILL 22
CRIMINAL PROCEDURE-CUSTODIAL INTERROGATION-CODIFICATION

The Maryland States Attorneys Association is opposed to Senate Bill 22, Criminal Procedure-Custodial Interrogation-Codification as a completely unnecessary and over extensive piece of legislation which would seriously impact the enforcement of all of the laws of this State.

Senate Bill 22 would enact into law a significant restriction on the ability of a police officer to talk to a person who may have committed a crime. The bill would redefine what custodial interrogation is and would be contrary to existing law. The bill would then require an advisement of any person to whom a police officer wishes to speak if the person feels they are not free to leave. The bill then appears to require that the advisement be in writing and if the person refuses to sign the advisement, then the refusal has to be recorded by video or audio recording.

As previously noted, the statute proposes its' own definition of custodial interrogation. It ignores the body of law from appellate courts for the last 56 years since Miranda v Arizona which has carefully and specifically defined custodial interrogation. With this legislation, every time anyone reasonably feels that they are not free to leave, they must be advised of their Miranda rights. This would logically include every traffic stop. If an officer pulls a car over, the officer must advise the person of their rights (apparently in writing) before they can ask the person their name or if they have been drinking. If an officer responds to a school shooting and stops the people running away from the shooting, the officer has to advise all of them of their rights before the officer can ask them what is happening or where the gun is that just shot a number of people.

It is wholly unreasonable to require an officer to have written advisement forms on them while they are out in the public and responding to emergencies or life-threatening situations. This bill would mean that any statement of a person arrested for an offense on the street cannot be used against the person if the statement or comment is in any way connected to a question by the officer even if the person was advised of their rights but the officer didn't have the written form.

There are so many appropriate exceptions to the advisement requirement in questioning of a person by law enforcement developed over the years and for very valid purposes. The United States Supreme Court and the Supreme Court of Maryland have addressed those exceptions since Miranda and for valid and constitutional reasons.

This bill would eliminate all of those exceptions. The protection of the public would be vastly affected.

We urge an unfavorable report.

sb22.pdf
Uploaded by: Matthew Pipkin
Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Matthew J. Fader
Chief Justice

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO:	Senate Judicial Proceedings Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	Senate Bill 22 Criminal Procedure – Custodial Interrogation - Codification
DATE:	January 18, 2023 (2/2)
POSITION:	Oppose

The Maryland Judiciary opposes Senate Bill 22. Senate Bill 22 alters the definition of custodial interrogation to mean questioning by law enforcement of a person who: (1) is detained; (2) is arrested; or (3) has a reasonable belief that the person is not free to leave the encounter with the law enforcement officer. In addition, it establishes Criminal Procedure Article § 2-401.1 which states a statement made by a person during custodial interrogation is not admissible in a criminal proceeding unless the person who made the statement is advised that:(1) the person has the right to remain silent; (2) any statement made by the person during custodial interrogation may be used against the person in a criminal proceeding for the purpose of proving the commission of a crime; and (3) the person has the right to speak to an attorney before any questioning.

The Judiciary opposes this bill because Maryland State case law already has a lengthy history of jurisprudence addressing the 5th Amendment and Miranda. This bill would conflict with some of that established jurisprudence which could result in confusion.

cc. Hon. Charles Sydnor
Judicial Council
Legislative Committee
Kelley O'Connor

SB 22 - Criminal Procedure - Custodian Interrogati

Uploaded by: Scott Shellenberger

Position: UNF

Bill Number: SB 22
Scott D. Shellenberger, State's Attorney for Baltimore County
Opposed

WRITTEN TESTIMONY OF SCOTT D. SHELLENBERGER,
STATE'S ATTORNEY FOR BALTIMORE COUNTY,
IN OPPOSITION TO SENATE BILL 22
CRIMINAL PROCUDURE – CUSTODIAL INTERROGATION - CODIFICATION

I write in opposition to Senate Bill 43 which attempts to codify decades of Constitutional case law that is derived from the Miranda v. Arizona decision. For decades case law has determined the admissibility of statements made by Defendants in a criminal case. Each of these cases turn on very specific facts that are analyzed under the Constitutional standards established by the courts. To try to turn that case law into a statute is not necessary as it is already codified in law. What is more is that each case is different and turns on their own particular facts.

Adding requirements that the waiver must always be signed or that the advice must be audio or video recorded is unrealistic and beyond what is necessary for the protection of a person's rights.
.

I urge an unfavorable vote.

2023-02-02 SB 22 (Letter of Concern).pdf
Uploaded by: Jer Welter
Position: INFO

ANTHONY G. BROWN
Attorney General

CANDACE MCLAREN LANHAM
Chief of Staff

CAROLYN QUATTROCKI
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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

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February 2, 2023

TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Jer Welter, Assistant Attorney General

RE: SB 22 - Criminal Procedure - Custodial Interrogation - Codification (LETTER OF CONCERN)

The Office of the Attorney General writes to express concerns regarding Senate Bill 22. This bill would codify a statutory definition of the term "custodial interrogation," rather than its judicially determined meaning, and would impose certain requirements on officers conducting "custodial interrogations," as redefined.

The Office of the Attorney General shares the sponsor's evident aim of ensuring that the rights of suspects against potential self-incrimination are appropriately protected. Nevertheless, we believe that Senate Bill 22, as written, does not present a workable way to achieve this aim.

Under current law, the term "custodial interrogation" retains its "judicially determined meaning." Md. Code, Crim. Proc. § 2-401. That meaning, as it has evolved over the years, has been given shape by countless decisions of the United States Supreme Court, the Supreme Court of Maryland, the Appellate Court of Maryland, and other courts around the country. Very briefly summarized, it means: express questioning by police or its equivalent (*i.e.*, "interrogation"), under circumstances where there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest (*i.e.*, "custodial"). *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011); *Berkemer v. McCarty*, 468 U.S. 420 (1984). It is an objective standard that courts assess based on the factual circumstances of each case, not the "subjective views harbored by either the interrogating officers or the person being questioned." *J.D.B.*, 564 U.S. at 271.

That meaning has stood the test of time and strikes an appropriate balance between the needs of law enforcement and the rights of the accused. The new definition proposed in this bill would depart from the established meaning in several ways. First, the new

definition would be at least partly subjective, depending on whether a person actually "has a reasonable belief that the person is not free to leave the encounter." This would eliminate the "benefit of the objective custody analysis [which] is that it is 'designed to give clear guidance to the police.'" *Id.* Second, by expanding to include any situation where a person feels they are not free to leave, the new definition would cover questioning during a much broader range of routine police interactions—including, for instance, a request for "license and registration" in an ordinary traffic enforcement stop for speeding. *But see Berkemer*, 468 U.S. at 435–42 (holding that a routine traffic stop is not "custodial interrogation"). Third, by being limited to "questioning, by a law enforcement officer," the new definition would exclude circumstances that are the "functional equivalent" of express questioning, which would appear to diminish the rights of suspects under current law. *See, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 600–01 (1990) (questioning includes "'any words or actions ... that the police should know are reasonably likely to elicit an incriminating response from the suspect'"). The established definition of "custodial interrogation," and the well-developed body of case law applying it, should not be discarded.

The bill's additional requirement to document a suspect's receipt of advisement about their rights in custodial interrogation (*i.e.*, the classic "*Miranda*" advice of rights) either in a writing signed by the suspect or via a video or audio recording, is also problematic—particularly when combined with the proposed redefinition of "custodial interrogation." (Officers who conduct custodial interrogations under the existing definition routinely document the giving of the *Miranda* advice of rights in writing and/or on video.) Among other things, this statutory requirement, combined with the redefinition, would effectively make it impossible to conduct a routine traffic stop without having a body-worn camera (although the body-worn camera mandate enacted by 2021 Md. Laws ch. 60 will not fully phase in for county police forces, let alone municipal forces, until 2025), and would seem to mean that an officer effectively could not pull a minor over for a traffic infraction without summoning the minor's parents and a defense attorney (given the requirements for custodial interrogation of minors enacted last year in the Child Interrogation Protection Act, Crim. Proc. § 2-405).

The Office of the Attorney General is prepared to work with the sponsor to protect the rights of accused while striking an appropriate balance with the needs of law enforcement.

cc: Members of the Committee