

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2302

September Term, 1999

JAGPREET BHALLA

v.

STATE OF MARYLAND

Murphy, C.J.,
Davis,
Byrnes,

JJ.

Opinion by Davis, J.
Dissenting Opinion by Murphy, C.J.

Filed: October 12, 2000

On August 16, 1999, appellant Jagpreet Bhalla entered a plea of not guilty to charges of attempted murder, conspiracy, first degree assault, use of a deadly weapon in the commission of a crime of violence, and wearing or carrying a concealed deadly weapon. He proceeded on a not guilty agreed statement of facts in the Circuit Court for Baltimore County (James T. Smith, J.), preserving his right to appeal the denial of his pretrial motions and the court found him guilty of attempted first degree murder and conspiracy and entered a *nolle prosequi* as to each of the remaining counts. On October 25, 1999, the court merged Count II into Count I and sentenced appellant to a term of life imprisonment, suspending all but twenty-five years. Appellant noted this timely appeal, presenting three questions:

- I. Did the motions court commit reversible error in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights in denying appellant's motion to suppress after the State failed its burden to prove that the statements were voluntarily made?
- II. Was the motions court's failure to find that the delay of presentment to the Commissioner was not unnecessary, pursuant to Rule 4-212(f) reversible error?
- III. Did the motions court commit reversible error in failing to suppress the statements which were taken in violation of the Fourth

Amendment and the Declaration of
Rights?

For the reasons set forth, *infra*, we answer appellant's first question in the affirmative and vacate the judgment of the lower court. For the guidance of the Circuit Court for Baltimore County, on remand, we shall address appellant's second and third questions, answering both in the negative.

FACTUAL BACKGROUND

The prosecution called a single witness, Detective Thomas M. Lau, at the hearing on the motion to suppress before the motions judge (Levitz, J.). According to the witness, he arrested appellant at approximately 9:48 p.m. on July 17, 1998 for attempted murder. Appellant was thereafter transported by Detective Lau and Detective Leonard Taylor to the police station, where they arrived sometime between 10:30 and 10:50 p.m., at which time appellant was escorted to the interrogation room. Appellant was first advised orally of his *Miranda* rights at 11:23 p.m., at which time he denied having committed the offenses for which he was arrested. After subsequently giving an oral admission, he was advised of his *Miranda* rights in writing at 12:26 a.m., whereupon he made a written confession in his own handwriting, which was completed at 1:30 on the morning

of July 18, 1998. Thereafter, appellant's responses to follow-up questions, reduced to writing, were completed by 2:05 a.m.

In his recantation, appellant indicated that he heard about a gentleman by the name of "Mel" who may have been involved in the shooting, but that he did not have any other information. When told that the detectives believed he possessed more information, appellant admitted that he knew about the shooting.

According to Detective Lau, appellant said that he had a conversation with a friend of his he knew as "Tavon" or "Davon" and that appellant was upset because Barry Bland adamantly objected to his being involved with Bland's daughter, Battina. Appellant told the detectives that Davon would be an intermediary who could introduce appellant to Mel who could actually shoot Bland. Appellant would have to pay Mel \$1,500 and Davon would provide Mel with the murder weapon. Appellant had driven Mel to Bland's residence where they lay in wait until the victim was seen proceeding to his home.

After appellant followed Bland a short distance and parked his station wagon, Mel exited the vehicle and proceeded toward the residence of the victim, whereupon appellant heard two gunshots and saw Mel running back toward the car. The pair drove a short distance from the scene of the crime, where Mel threw the firearm into a wooded area and they then proceeded to Davon's house. Appellant provided the names of the trigger man

and the individual who provided the murder weapon as Jamel Alexander Horsey and Davon Christopher Harris, respectively. As a result of the information obtained from the interrogation, appellant accompanied the detectives to an area off of Winands Road where a shotgun containing one spent shell and one live round was recovered in the weeds about fifty feet off of the roadway.

Detective Lau testified that appellant first arrived in the interrogation room at approximately 10:20 to 10:40 p.m. and that he was first advised of his *Miranda* rights at 11:23 p.m. The detectives had begun explaining the charges to appellant immediately after he was escorted to the interrogation room. Over the objection of appellant's trial counsel, Detective Lau testified that the victim had made a statement to the emergency personnel arriving at the scene that he had had a problem with appellant and that he believed appellant was behind this (referring to the assault). The detectives had also had a positive identification of appellant's vehicle and appellant as the person who was driving that vehicle seen leaving the scene of the shooting. After the State had rested its case-in-chief on the motion, appellant's trial counsel presented the following argument to the court in support of his assertion that the State had failed to prove voluntariness:

Second, [prosecution] according to the *Hof* case, H-o-f, the most recent detailed exploration of the law of confessions in Maryland has four burdens of proof. First he must prove compliance with *Miranda*. Second, he must prove that there was an absence under the Maryland common law of any promises, threats, inducements or coercion, including the use of physical force. It's his affirmative burden of proof.

[The prosecution] asked one question about that. And he made no effort in any other way to meet that burden. The question he asked was, did you make any promises to the [appellant] at the police station? No. Did you threaten him at the police station? No. That was it. No question about inducements. No question about coercion, using physical force, nothing.

Now, the courts have made it clear that [the prosecution] has the burden affirmatively of proving that. He just can't produce an incomplete record and then shift the burden to us to disprove it. It's been the law for a very, very long time as *Hof* states it. Now, *Hof* incidently, Judge, is 337 Maryland, 581, 1995. I believe it was a unanimous opinion written by Judge Bell overruling Judge Moylan's panel, where Judge Moylan said that all you have to do to satisfy Maryland and Constitution requirements is to show compliance with *Miranda*. They said no. . . . And so they have not directly proved the absence of inducements or coercion, including the use of physical force, and the case law makes it clear in a long line of cases which talk about the difference between an inducement and a promise. They are not synonymous. They are not synonymous under our law. And a threat is not the only coercion that can be done to a defendant, so if you are going to use anticipatory rebuttal you have to

cover the waterfront, they, the cases make it clear.

. . .

Now, with those tremendous advantages the Court of Appeals has said to the State's Attorney, you bear the affirmative burden of going forward with the evidence to prove the utter absence of any promise. The utter absence of any threat. The utter absence of any inducement. And the cases say as to those three, however slight.

Now, *Hof* goes on to say that there is also a Constitutional burden to prove the absence of coercion. Because as they point out, Federal law is different than Maryland common law. Maryland common law is much more restrictive as to what the State has to do. And there are [sic] a long line of cases which repeat that. And so the State had a chance and the obligation to prove the absence of inducements; they didn't.

The State had an opportunity to prove the absence of any physical force or other coercive behavior, other than threats. They didn't do it. And so this record shows unmistakably, that the State has failed to meet either under the Constitution requirement of proving affirmatively the absence of any coercion and the State law requirements, which absolutely require the State to do it, to the point that they have to prove it, that there weren't even the slightest promises, threats or inducements or the use of coercion.

Appellant testified that the detectives had told him that eleven people had been executed that year, that he could be the next one, and that his life was in their hands. He further testified that he was told that the detectives could do what

they want, that "you have nobody," that he was told "just tell us the truth, and we'll let you go home tonight." He testified that he did not understand the *Miranda* rights, that he had never read the card but had signed it anyway and that he never heard the word "*Miranda*" before and had no idea what it meant.

In support of appellant's claim that he did not understand his *Miranda* warnings, he presented the testimony of psychiatrist Dr. Neil Blumberg who testified that appellant had "a peculiar way of thinking," but not active psychosis and that his "overall intelligence quotient was found to be in the low average range although two of the subscales, i.e. for vocabulary and common sense reasoning, placed him in a borderline retarded or borderline intellectual functioning range." Dr. Blumberg was unable to say with a reasonable degree of medical certainty whether appellant had the capacity to understand the *Miranda* rights and make a free and voluntary waiver of those rights, although his ultimate conclusion was that it was unlikely. Finally, Dr. Blumberg testified that "it would be very difficult even on a good day for [appellant] to grasp this whole thing here," referring to the waiver form he signed containing the phrase, "without threats, promises, force or duress, I do hereby waive my rights as set forth and do knowingly and voluntarily agree to be questioned and/or make a statement."

Dr. Michael Spodak, testifying in rebuttal for the State, asserted that appellant may have had some learning disability and, in fact, may have had a personality disorder, but neither affliction had

anything to do with his capacity to understand the terms in this *Miranda* waiver and to knowingly and voluntarily waive it. They may have things to do with how you get along in society, and how you get along with other people, and what the direction of your life is going to take. I don't think it has anything to do with his ability to understand those various words and what they mean.

According to Dr. Spodak, none of the problems indicated in the tests administered by Dr. Blumberg were evident from appellant's past history and there was no clinically significant impairment to his day-to-day functions. He noted that appellant had graduated from high school without the aid of special classes or tutors and was enrolled in business management courses at a community college at the time of his arrest. There did not seem, in Dr. Spodak's view, to have been a history of being easily influenced by others and the vocabulary used in appellant's written statement was comparable to that used in the *Miranda* warning administered to him.

Appellant testified that, on the night he was arrested, he was coming out of a third floor apartment at 7139 Rolling Bend Road when "a guy standing about two stairs from the top" said,

"I need to talk to you." As he descended the stairs, one of the officers shoved him down the stairs and into a glass window at the bottom of the stairwell. The police, he said, pressed a gun "hard" in each temple and two weapons against his back as an officer patted him down. The officers then put shackles on his legs and handcuffed him behind his back. After he was escorted to the police vehicle, Detective Taylor asked him whether anyone called him "Johnny" to which he responded in the affirmative. Detective Taylor then asked whether he had anything in his pockets and, before he could respond, Detective Taylor retrieved appellant's car keys from his pocket. When asked where his car was, appellant pointed with his head in the direction of the apartment building.

As Detective Lau drove away from the scene, appellant asked where they were going, to which the police responded, "we're going to our office." Appellant estimated that it took between thirty-five and forty-five minutes to arrive at police headquarters; during the ride he was asked his name, address, and date of birth. He was further asked if he knew why he had been taken into custody, to which he responded that he did not know. When he arrived at the interrogation room, appellant asserted, no one had read him his rights and Detective Taylor refused to loosen the handcuffs when asked. After again asking appellant if he knew why he was there, the officers asked him

what he knew about Bland's shooting that took place on Wednesday night, to which appellant responded, "nothing." According to appellant, he was then told to tell the truth, that all the crying was not going to help him, and that he better just start talking. He gave an oral statement, he said, when asked again, "Do you know about Mr. Bland's shooting?" Ten to fifteen minutes had elapsed from the time appellant was first brought to the interrogation room to the time he began giving his oral statement, which he gave "because everything that was running just through my brain. I mean it was just racing through, right through my brain, everything that they had told me. I was frightened. I was just trying to do anything so I could go home."

He attributed the change in his responses from "I didn't know what happened" to telling the police what happened "because . . . [t]hey told me that I was going to get the death penalty. I could go home if I just came on this side of the table. So I was just following by what they were - they were doing." After giving his oral statement, Detective Lau read questions to him from a business card and told him to initial them by the number; appellant added that Detective Lau did not ask whether he understood what was read and that he initialed the card because he was frightened and did not know what else the police could have done to him.

He further claimed that no one had ever read "those things" to him before and that he did not read what was on the card when he initialed next to every number. Detective Lau then directed him to write everything he had said in the oral statement on a pad that he provided for appellant; that he wrote about three pages on the pad and that after he wrote these three pages, Detective Lau produced a piece of white paper which contained the same questions he had asked before on the card. He was then told to write everything in the statement that appellant had previously written on the yellow paper. He was asked additional questions and gave answers thereto after he had rewritten his statement on the printed form. Appellant maintained that he had never heard the word "*Miranda*" and that he only initialed the forms because he was frightened because his life was in the detectives' hands.

When he asked whether he was going home "right now," he was told that he first had to take them where the "guy who shot Mr. Bland and the guy the gun is from." When he again asked whether he was going home after he complied with their request, the police told appellant that he was "going to process down in the Baltimore County Detention Center."

With respect to his understanding of the information contained on the "*Miranda*" card, he responded "some of the words

are on here, I don't exactly understand what they mean." He could not understand or pronounce the word "decide," the word "insist," the word "cease," the word "secure," the word "absolute," the word "desire," and the word "affirmative." He acknowledged that no one suggested that they were going to shoot him, but he was thinking that Detective Taylor, seated in the back of the car, had a gun and could have pointed the gun "toward his head."

Dr. Blumberg testified that appellant, having taken an MRI and an EEG,¹ could have presented himself to Dr. Donner and Dr. Blumberg as a person who is mentally ill by exaggerating the symptoms but instead attempted to minimize the presence of psychological or psychiatric difficulties. Dr. Blumberg further opined that appellant's severe learning deficits and his paranoid schizoid personality trait rendered him extremely vulnerable to the kinds of stresses he described during his arrest and interrogation. Dr. Blumberg concluded that the sudden and frightening circumstances of his arrest at gunpoint would have diminished appellant's cognitive abilities such that, when coupled with his severe learning disability and his paranoid and schizotypal personality traits, he could not have

¹"MRI" is the designation for the medical procedure known as magnetic resonance imaging and "EEG" is the designation for electro encephalogram.

intelligently, knowingly, and voluntarily waived his *Miranda* rights.

The promises, threats, inducements, and coercive activities of the police, opined Dr. Blumberg, would have prevented appellant either from voluntarily waiving his *Miranda* rights or from giving a voluntary statement to the police, given his psychiatric and psychological problems and the diminution of his abilities because of stress. Dr. Blumberg further added that any of the voluntariness factors about which appellant testified would have, "either singularly or in combination," prevented appellant from knowingly and voluntarily waiving his *Miranda* rights in giving a voluntary statement to the police.

Dr. Spodak, on the other hand, testified that appellant had some learning problems, that he does have a learning disorder, and that he does have a personality disorder, but that he did not believe any of those disorders had anything to do with his capacity to understand the terms of his *Miranda* waiver and to knowingly and voluntarily execute the waiver. There was no mental or emotional condition which impairs ability to understand *Miranda* rights, according to Dr. Spodak, and there was "the absence of any indication that he was suffering from a major mental illness which had psychotic symptoms to it" such "as mental retardation." The three *Miranda* warnings Dr. Spodak

had asked appellant to explain were: (1) "you have the right to remain silent," (2) "anything you say can and will be used against you in a court of law," and (3) "you have a right to talk to an attorney before you're questioned and have them present thereafter." The court denied the State's request to call Detective Taylor to specifically rebut appellant's testimony, finding that the testimony was not proper rebuttal. Subsequent to the ruling of the motions court (Levitz, J.) that the statements were admissible, appellant agreed to proceed on an agreed statement of facts in lieu of a jury trial, was found guilty and sentenced as noted hereinbefore.

LEGAL ANALYSIS

Characterizing the evidence presented by the State on the motion to suppress as "scant," appellant initially claims that the trial court erred in finding that the State met its burden of proving voluntariness. The court opined:

The court was disturbed by comments made during the three days that this hearing took of the nature that this court has never granted or a court in Baltimore County never grants a suppression hearing when it comes down to the word of the defendant against the word of the police. I was concerned by those remarks because, quite frankly, I know them to be not true.

This court has granted suppression motions when the evidence was the testimony

of a police officer and the testimony of a defendant only and I believed the testimony of the defendant. So I know the statement that that never happens is incorrect. At least it happens with me. Because I think that's my role and function.

Certainly the issues that are to be addressed when confronting a motion to suppress is the totality of the circumstances regarding the voluntariness of a defendant's statement. The court, in all of the appellate cases is required to consider all the factors surrounding the taking of a statement by the police and must be convinced by a preponderance of the evidence that that statement was the product of the defendant's free will. That the statement was not the product of force or coercion, that it was voluntary in every sense of the word.

The appellate courts have said to us that we should look at various factors when making this determination. Factors such as the conversations, if any, between the police and the defendant, whether the defendant was warned of his [or her] rights, commonly referred to as the *Miranda* warnings, the length of time that the defendant was questioned, who was present, the mental and physical condition of the defendant, whether the defendant was subjected to force or threat of force by the police, the age, background, experience, education, character, intelligence of the defendant, whether the defendant was taken before a District Court Commissioner without unnecessary delay following arrest, and if not, whether that affected the voluntariness of the statement. And any other circumstances surrounding the taking of the statement.

I had attempted to consider each of the factors that I am required to consider, and over the three days of testimony that was

presented in this motion I have heard just about everything I think there is to hear about this case. . . .

I find as a fact that the [appellant] was given his *Miranda* warnings on two occasions. Shortly after he was arrested one, approximately an hour to an hour and a half [sic] after the time that the SWAT team arrested the [appellant]. Much has been made that this was improper. That the arrest procedure was somehow improper. I don't find that it was. Quite frankly, I can't imagine a police officer or officers arresting someone who is involved in the shooting, the assassination attempt, I assume, of a victim where the victim is shot, not employing the kind of tactics that were used. Are the police to approach such a person delicately, nicely, with all the courtesies extended?

I don't think that that's required. I think the police can and should do what is necessary to bring such a person who is suspected of such a crime under immediate control without being subjected to danger that such a person may present to the police. They don't know. They don't know what's involved. They don't know whether the [appellant] has a gun or doesn't have a gun. Somebody's been shot. The [appellant's] being arrested for an attempted murder. It seems to me that what the police did in the arrest, while certainly not being delicate in the sense of our sensibilities, I mean, this [appellant] was not physically harmed, he was arrested with the amount of force that I think is not uncalled for in a case like this.

. . . .

It has been argued to me that there has been no evidence presented that the [appellant] was not promised, was not

threatened, was not forced to make a statement. . . . Such evidence (has) been introduced by the State in its case[-]in[-]chief. The statement, the *Miranda* card, separate from the statement, which also includes *Miranda* warnings, were introduced. They were in evidence, along with Detective Lau's testimony that he did not make any promises or threats to the [appellant].

I find that the statement was voluntary, that the [appellant's] will was not overborne at the time he confessed.

The State elicited the following testimony from Detective Lau:

Q. During your interview with the [appellant] did he ever ask to speak with a lawyer?

A. No, sir.

Q. During your interview with the [appellant] did you promise him anything?

A. No, sir.

Q. Did you threaten him in any fashion?

A. No, sir.

I

A

BURDEN OF PROOF FOR VOLUNTARINESS

Voluntariness: The Federal Standard

The Supreme Court has held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson v. Denno*, 378 U.S. 36 (1964). Since *Jackson*, State and federal courts have addressed the issue of what standard of proof is needed to judge the voluntariness of confessions. In *Lego v. Twomey*, 404 U.S. 477, 482 (1972), a defendant challenged his guilty verdict, stating that he was not proven guilty beyond a reasonable doubt because the confession used against him at his trial had been proved voluntary only by a preponderance of the evidence. Although the Court noted that "implicit in [his] claim is an assumption that a voluntariness hearing is designed to enhance the reliability of jury verdicts," the Court maintained that the true purpose of a suppression hearing is the determination of whether the

confession was coerced, not the exclusion of an unreliable confession. *Id.* at 485 n.12. Although "there may be a relationship between the involuntariness of a confession and its unreliability," the issue of "whether [the confession is] true or false is irrelevant." *Id.* at 484 & n.12. Thus, the use of coerced confessions, whether true or false, is forbidden solely because the method used "offends constitutional principles." *Id.* at 485. "[This] procedure . . . was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." *Id.*

Because the purpose of a voluntariness hearing cannot serve to improve the reliability of jury verdicts, the Supreme Court found that the admissibility of a confession does not need to meet the higher standard of beyond a reasonable doubt. *See id.* at 489. The prosecution, in a federal trial, must prove "at least by a preponderance of the evidence that the confession was voluntary." *Id.* In *dicta*, the Court was mindful of the notion that "states are free, pursuant to their own law, to adopt a higher standard. . . . [and] they may indeed differ as to the appropriate resolution of the values they find at stake."² *Id.*

²State courts that have considered the question since the *Jackson v. Denno* case "have adopted a variety of standards, most of them founded upon state law. . . . Many have sanctioned a standard of proof less strict than beyond a
(continued...)

Voluntariness: The Maryland Standard

Five years ago, in *Hof v. State*, the Court of Appeals stated the standard of proof the State must shoulder on the issue of voluntariness of a confession. See 337 Md. 581 (1995). Relying on prior court decisions, the *Hof* Court held that Maryland requires a two-tier approach, i.e., that the voluntariness of an accused's statement be proven twice. *Id.* at 604; see e.g., *Hillard v. State*, 286 Md. 145, 151 (1979); *Dempsey v. State*, 277 Md. 134, 150-54 (1976); *Day v. State*, 196 Md. 384, 399 (1950).

First, the State must prove to the satisfaction of the trial judge that the confession was voluntarily made. *Hillard*, 286 Md. at 151. Second, if the court finds the statement admissible, the trier of fact, be it court or jury, must be satisfied beyond a reasonable doubt that the confession was freely and voluntarily made. *Id.* The State has the burden of establishing voluntariness by a preponderance of the evidence at a suppression hearing. See *Hof*, 337 Md. at 605. At trial, on the other hand, as with all the elements of the State's case, its burden of proof for voluntariness is beyond a reasonable

²(...continued)
reasonable doubt, including proof of voluntariness by a preponderance of the evidence or to the satisfaction of the court or proof of voluntariness in fact." See *Twomey*, 404 U.S. at 479 n.1. Other States, however, require proof beyond a reasonable doubt. See *id.*

doubt. See *id.*; *Hillard*, 286 Md. at 151; *Gill v. State*, 265 Md. 350 (1972).

The Court of Appeals observed in *Gill v. State* that, when there is a bench trial, the court must perform dual functions. *Gill*, 265 Md. at 359. The trial court's initial determination of the voluntariness of a confession will be based on both law and fact to ascertain whether *prima facie* proof exists as to its voluntariness. See *id.* at 358-59. If the trial court admits the confession into evidence, "that evidence should be reviewed by him in his fact[-]finding role, taking into account all the

testimony presented at trial,"³ and in deciding whether the confession was voluntary beyond a reasonable doubt. *Id.* at 359.

We note that, although this "two-tiered approach" to determining the voluntariness of a confession is the current law with respect to Maryland criminal procedure, it was not always

³The prosecutor advised the court during the course of its recitation of the factual basis:

The [appellant] ultimately gives the police an oral statement. The detectives asked him if he would like to write it down. He says he would. I introduce State's Exhibit Number Two, an eight page statement *also addressed at motions*. The [c]ourt can see the first three and a half pages are the [appellant's] own handwriting and the remaining pages with questions and answers posed by the Baltimore County Police to the [appellant]. He answered and wrote his answers down.

Appellant's statement was then received into evidence. Because the parties proceeded on a not guilty agreed statement of facts, appellant's counsel merely indicated at the conclusion of the State's recitation of the factual basis:

If I could just have one minute. Your Honor, providing that all of the issues surrounding the statement can be litigated on appeal, and that would be the statement itself, of course, and any fruits of the statement, because I didn't intend to abandon that, I have no problem with the statement of facts and we would agree to proceed in this fashion.

Subsequently, the lower court made a perfunctory ruling, denying the motion for judgment of acquittal and announcing:

The [c]ourt has considered the statement and the exhibits. I am persuaded beyond a reasonable doubt of the [appellant's] guilt under count one and count two of attempted first degree murder and conspiracy to commit attempted first degree murder. The verdicts are respectively guilty.

Thus, the court's role in determining whether the State had shouldered its burden of proving all of the elements of the offenses charged beyond a reasonable doubt, including the voluntariness of appellant's statement, was severely curtailed as the evidence offered on the motion to suppress essentially served as the basis for the court's ruling on the merits.

such. In *Nicholson v. State*, 38 Md. 140, 148-49 (1873), a case decided over one hundred years ago, yet still cited in decisions by this Court and the Court of Appeals, (see *Hof*, 337 Md. at 595; see generally, *Pappaconstantinou v. State*, 352 Md. 167, 174 (1998); *Ball v. State*, 347 Md. 156, 1176 (1997); *Hillard v. State*, 286 Md. 145, 151 (1979); *McCleary v. State*, 122 Md. 394 (1914); *Biscoe v. State*, 67 Md. 6 (1887); *West v. State*, 124 Md. App. 147, 157 (1998); *In re Joshua David C.*, 116 Md. App. 580, 603 (1997), *Holmes v. State*, 67 Md. App. 580, 603 (1997)), the law clearly was that the burden is on the State to prove "with certainty, beyond doubt, that no inducement had been offered." Further, "all the evidence submitted on this preliminary point [must be] . . . passed upon by the Court, without leaving to the jury to settle the question as to the admissibility of the confession, . . ." *Id.* at 149.

We also noted, quoting *Lego v. Twomey*, 404 U.S. at 489, that the prosecution must prove "'at least by a preponderance of the evidence that the confession was voluntary.'" *Holmes v. State*, 67 Md. App. 244, 250 (1986). Assuming, *arguendo*, that the State has proven by "at least a preponderance of the evidence" that appellant's statement was voluntarily made, we conclude that, because appellant proceeded by way of an agreed statement of

facts, this required the trial court to assume the role of trier of fact and view the confession under the stricter standard.

In deciding whether the trial court erred in considering the confession, we note that, although a great deal must be left to the discretion of the judge, when there is direct conflict as to the factors surrounding the confession, and when there is an even balancing of the testimony of appellant and the State, there is ample authority for rejecting the confession. See *McCleary v. State*, 122 Md. 394, 407 (1914). Applying the two-tier approach outlined in *Hof*, we first look to see whether the trial judge erred in his discretionary capacity when applying the rule of law to the facts and circumstances surrounding the confession; and second, in his role as fact finder, whether he erroneously determined that the confession was voluntary beyond a reasonable doubt and therefore gave it weight in his final decision.

Resolving the question of the voluntariness of the confession requires the trier of fact to examine the totality of the circumstances surrounding the obtention of a defendant's confession. See *Hof*, 337 Md. at 596-97; *Lodowski v. State*, 307 Md. 233, 254-55 (1986); *In re Joshua David C.*, 116 Md. App. at 599. If there is any doubt that the confession was not voluntarily made, i.e., if it was induced by force, undue

influence, improper promises, or threats, it must be rejected. See *Hoey v. State*, 311 Md. 473, 483 (1988).

We stated in *In re Joshua*, 116 Md. App. at 599:

In reviewing the denial of a motion to suppress, we look only to the record of the suppression hearing; we do not consider the record of the trial itself. We extend great deference to the findings of fact and determinations of credibility made by the suppression hearing judge. Indeed, we accept the facts as found by the hearing judge, unless clearly erroneous. In addition, we review the evidence in the light most favorable to the State. Nevertheless, this Court must make its own independent constitutional determination as to the admissibility of the confession, by examining the law and applying it to the facts of the case.

(Citations omitted); see *West v. State*, 124 Md. App. 147, 155 (1998). We must also consider whether the accused's "will was overborne" or "whether his confession was the product of a rational intellect and a free will" and whether the accused knew and understood what he was saying. *In re Joshua*, 115 Md. App. at 599. (citing *Lodowski*, 307 Md. at 254 and *State v. Hill*, 2 Md. App. 594, 601-02 (1967)). Our first inquiry, therefore, is whether the State has shown affirmatively that appellant's statement was freely and voluntarily made, i.e., that it was not a product of coercion, a threat, a promise, or an inducement.

B

THE INSTANT CASE

Voluntariness of Waiver per Miranda

Appellant contends that his mental condition and cognitive deficiencies prevented him from understanding the waiver form which was being read to him as far as his rights were concerned. In this regard, appellant claims that he did not knowingly or voluntarily waive those rights. He stated on cross-examination that he did not understand the words "decide," "insist," "cease," "secure," "absolute," and "affirmative" on the card containing *Miranda* warnings. He insisted on re-direct that Detectives Lau and Taylor never explained these words to him. Appellant ultimately contends that his due process rights under the Fourteenth Amendment were violated when the trial court admitted appellant's involuntary statements to the detectives.

At the outset, the State points out that, at the motions hearing, appellant "never contended that he did not understand the waiver on the statement form," . . . rather "he contended that he did not understand his *Miranda* rights, a proposition that the motions court squarely rejected." The State also recounts the testimony of appellant's expert witness, Dr. Blumberg, who observed that appellant understood the basic concepts in the *Miranda* waiver form and that his lack of

comprehension of various words, including "duress," while testifying on the stand, "was considerably more impaired than when I saw him in the office." The State further replies to appellant's claim that the waiver form was defective because it omitted the word "coercion" by urging that, "without threats, promises, force or duress," would seem to cover "the entire universe of "coercion." The gravamen of appellant's argument before the trial court was that he did not understand the *Miranda* warnings rather than the defectiveness, *vel non*, of the waiver form in omitting the word, "coercion." Procedurally, refutation of any allegations of coercion by the police at the suppression hearing, if believed, would have rendered the alleged defect in the waiver form immaterial. As with our discussion, *supra*, we begin our analysis mindful that our appellate role requires us to defer to the fact finding of the lower court, including the credibility of the witnesses, and more particularly that of appellant.

The court found that it was incredible that appellant had never heard "these (*Miranda*) rights" before and that "he had no idea what these rights were" and that it further found that he was advised on two separate occasions as evidenced by his signature indicating the rights were read to him and he understood them.

More specifically, the judge stated:

The [appellant] claims that he was given his rights but he didn't understand them. Much time was spent in this motion about that. The [appellant] represented to me that he had never heard these rights before. That he had no idea what these rights were. Quite frankly, I find that to be incredible. I don't believe that there is a person in the United States of America who is over the age of 13, or probably lower, who hasn't heard the *Miranda* warnings numerous times.

You can't watch television, you can't go to the movies without knowing them, without knowing the *Miranda* rights. Elementary school children know what the *Miranda* rights are. They may not know that it's *Miranda* and they may not know the exact wording, but it's incredible to me that an adult person who reaches 18 years of age in this society, in this community has never heard, has no idea that they have the right to remain silent, that they have a right to an attorney, that they can not [sic] talk to the police. It would be incredible to me.

I find that the [appellant] was given his rights. He acknowledged on two separate occasions by his signature, by his initials that the rights were read to him, and that he understood them. And most importantly, what he said was, without threats, promises, force, duress, I do hereby waive my rights and do knowingly and voluntarily agree to be questioned an[d]/or make a statement.

Appellant offered extensive testimony through his expert witness, psychiatrist Dr. Neil Blumberg, who stated appellant had a "peculiar way of thinking" and that his "overall intelligence quotient was found to be in the low average range

although two of the subscales, i.e. for vocabulary and common sense reasoning, placed him in a borderline retarded or borderline intellectual functioning range." This testimony was offered to support appellant's claim that he was incapable of understanding the rights contained on the *Miranda* waiver form he executed.

In assessing whether the admission of appellant's statement violates his due process rights, we first look to the standard as set forth in the Supreme Court's decision of *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), which states that, "absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* A defendant's mental condition is considered but one factor in the voluntariness determination. As the Court opined:

[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

Id. at 164 (emphasis added).

In holding that reckless police practices regarding withholding information from a suspect's attorney are ethically objectionable, the Supreme Court nevertheless reasoned:

(W)hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. . . .

. . . Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of *ethics*, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his [or her] ability to understand the nature of his [or her] rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid.

Moran v. Burdine, 475 U.S. 412, 423-24 (emphasis added; citations omitted).

In the case *sub judice*, appellant argues that his learning deficiency, his insufficient vocabulary and poor reading skills, combined with the circumstances surrounding his arrest created significant duress to preclude him from giving any kind of voluntary statement. We agree that our determination of the voluntariness of that statement turns on appellant's mental ability in light of the circumstances attendant his arrest; however, appellant fails to factor into the equation the

prerogative of the fact-finder to extrapolate from the first level facts and reach its own conclusion as to whether the actions of appellant, *i.e.*, writing out a coherent four-page confession, coupled with the expert testimony, indicate he succumbed to coercive or inducive actions of the police in deciding to execute the waiver term.

The Court of Appeals faced a similar situation in *Bean v. State*, 234 Md. 432, wherein the defendant, who was fifteen years old with a full scale intelligence quotient (I.Q.) of 74, claimed that his confession should not be admissible because, along with the coercive nature of his arrest and the interrogations, he was suffering from an intellectual deficiency. See *id.* at 440. The Court, however, noted the following:

The appellant also contends that his age and mental ability rendered the confession involuntary, since he was only 15 years old and, according to a psychologist, had a full scale I.Q. of 74 at the time of the confession. While these factors were properly considered by the trial judges, they were not sufficient to make the confession inadmissible. The appellant had sufficient reasoning ability to give the sheriff an alibi when he was first accosted, and was self-assertive enough to curse the sheriff when the fragments of burned clothing were found later. The record shows that his testimony was alert and lucid when he took the stand for the limited purpose of discussing the confession. A psychiatrist who examined him when he was sent to Clifton

T. Perkins State hospital for examination found the appellant to be sane, and further stated that he was "attentive, cooperative, surprisingly polite and quite serious about the proceedings." . . . We think the evidence supported the trial court's finding that the appellant's mental condition was such that he realized the significance of what he was doing when he confessed.

Similarly, in the case before us, the trial court found that appellant had been given his *Miranda* warnings on two occasions - shortly after he was arrested and again prior to his written confession and that appellant acknowledged on both occasions, by his signature, that he understood those rights. He was told that he had the right to an attorney and he never asked for one. Significantly, the trial court noted that appellant wrote and signed his written confession in a coherent and intelligent manner. The court further stated for the record that it "attempted to consider each of the factors that [it] is required to consider, and over the three days of testimony that was presented in this motion [it has] heard just about everything . . . there is to hear about this case." We think the evidence is sufficient to support the trial court's finding that the appellant knowingly and voluntarily waived his *Miranda* rights and that appellant's mental condition was such that he realized the significance of what he was doing when he confessed. The trial court did not abuse its discretion in finding that

appellant knowingly executed the *Miranda* form waiving his constitutional right not to give a statement to the police.

Rebuttal of Allegations of Appellant: Streams v. State [238 Md. 278 (1965)]

Appellant complains that Detective Taylor was present in the interrogation room during the questioning, but only Detective Lau testified that he did not threaten appellant or promise him anything. More specifically, appellant avers:

No evidence was produced – either in the form of general testimony from Detective Lau or in the form of direct testimony from Detective Taylor himself – to show that *Detective Taylor* made no promises, threats, or inducements, and that he had not done or said anything demonstrating undue influence or coercion, including the use of physical force either after the arrest, during the car ride or at any time *before or during* the interview itself.

Appellant argued that no evidence was presented that he was not promised, threatened, or forced to make a statement. That argument, the court determined, was countered by the executed *Miranda* warnings introduced into evidence “along with Detective Lau’s testimony that he did not make any promises or threats to the [appellant].”

When asked if there was “any time when you were . . . questioning [appellant] where the other detective was outside the room[,]” Detective Lau answered “No. Detective Taylor and

myself were in the room the whole time." With respect to which detective appellant alleges employed coercive or improper inducements, Detective Lau was asked whether the writing authored by Detective Taylor was done in his presence to which Detective Lau responded, "That night, it may have, may not have."

The actions attributed to Detective Lau by appellant were:

He told me that - he said that, you know, "A lot of people got executed this year." And he said that all life - "Your life is in our hands. We can go do what we want. You have nobody."

. . .

Q. Did he ask you whether you understood what he said?

A. No, he didn't.

. . .

Q. All right. Now, did you suddenly not know how to write? In other words, did you tell *the detective* anything like, "I can't write anymore," or, "I'm suddenly unable to write[?]"

A. No.

Q. Were you still able to write at that point?

A. Yes.

Q. Now, let me just go to question three. "Did you and do you understand your *Miranda* rights?" And there's - is that in your handwriting?

A. No, that's not my handwriting.

Appellant testified as follows regarding allegations against both detectives or actions for which he could not recall who was responsible:

As soon as I finished giving my oral statement, if I'm not mistaken, *one of the detectives, I don't remember*, pulled out a thing that was - *I think Detective Lau* who pulled out like a wallet - like a business card wallet and this card with questions on it.

. . .

They told me if I told the truth I could go home. And then *he* told me that, you know, "Eleven people died - were executed this year. You could be the next one." And then I think he told me, "You could be the next one."

I was frightened. I was scared. I asked *him*, "Can I use the phone[?]" and *he* said, "No. You're 18."

. . .

They told my [sic] that my life was in their hands. *They* could do what they wanted with me. And as soon as I asked them "Can I use the phone[?]" they said, "No. You're 18." I said, "Well, I want to call my parents."

. . .

They asked [sic] me if I told the truth, I could go home.

. . .

I mean, *they* told me to tell the truth. Whatever I say can help me. Tell the truth.

. . .

They told me that I was going to get the death penalty. I could go home if I just came on this side of the table. So I was just following by what they were - they were doing.

. . . .

I mean, I was frightened. I didn't know what else *they* could have done to me. They said my life was in their hands. I was just going by -

. . . .

Because I didn't read it. I didn't know what it was.

Q. Why didn't you read it?

A. Because I was - I mean, everything *they* said to me before was just - was just going through my brain. I was frightened. I was scared.

. . . .

Well, up to right here is mine, and then the rest is where the detective - put the line down there.

Q. Okay. Now, whose signature is this right at the bottom of your handwriting?

A. *I don't remember which detective signed, but that's not my handwriting.*

Finally, appellant testified regarding actions by Detective Taylor as follows:

[APPELLANT'S
COUNSEL]:

Now, let me show you page five. It starts out by *Detective Taylor* says, [sic] "Did Detective Taylor and/or

Detective Lau promise anything or trick you into cooperating?" Do you see that?

[APPELLANT]: Yes.

[APPELLANT'S
COUNSEL]: Okay. And is it your handwriting where it says "no"?

[APPELLANT]: No, that's not my handwriting.

Appellant specifically accused Detective Taylor, while inside the police vehicle, of refusing to loosen his handcuffs when asked and, according to appellant, was "yelling the whole time." These were the only two allegations made personally against Detective Taylor by appellant; the remaining allegations were either made against Detective Lau, both detectives, or appellant was not sure which detective was "saying things to him." Included in the statements for which attribution was uncertain were: "you know Mr. Bland (the victim) is undergoing surgery at Johns Hopkins, and it can be worse than this"; "we're on the good side of the table and you're on the bad side of the table, if you tell the truth you come on this side of the table and you can go home tonight"; "if the victim dies it could be worse for you, than it is now"; and "eleven people were executed this year; you could be the next one; your life is in our hands; we can do what we want; you have nobody." Appellant was unable

to say who told him "all the crying is not going to help you; just tell us the truth and we'll let you go home tonight."

With respect to promises, threats, inducements, or coercion, appellant maintains that the only testimony elicited from Detective Lau was that appellant never asked to speak to a lawyer and that the witness never promised appellant anything or threatened him in any fashion. He complains that no testimony was presented regarding the conduct of the detectives before the interview or subsequent thereto. Evidence regarding the absence of "threats" and "promises" by Detective Lau during the interview, posits appellant, insufficiently rebuts specific allegations of promises, threats, inducements, and coercive statements. He further contends that Detective Lau made no general denial that promises, threats, or inducements were made or that force or coercion was employed by any other officer.

Specifically, appellant contends that, despite the fact that Detective Taylor was present during the entire interrogation, Detective Lau was only questioned as to *his* actions during the interview and that no testimony was elicited from Detective Lau to attempt to prove that he had made no promises, threats, or inducements at any time after the arrest or that he had used coercion or force during the time that appellant was transported or at any other time before the statement was obtained. Appellant also contends that the court erroneously relied on the

standard form, which provides "without threats, promises, force, or duress, I do hereby waive my rights as set forth and do knowingly and voluntarily agree to be questioned and/or make a statement," because that language failed to include inducements or coercion. Finally, appellant attempts to extend the *Streams* requirement to the testimony of Dr. Blumberg, asserting that "the unrebutted testimony of Dr. Blumberg was that [appellant] did not understand the word 'duress' because he had a learning disability, an insufficient vocabulary, and poor reading skills."

In support of his assertion that an inducement may occur under circumstances when, technically, there is no promise or threat, appellant cites *Clark v. State*, 48 Md. App. 637, cert. denied, 291 Md. 773 (1981), wherein we held:

In *Biscoe [v. State, 67 Md. 6 (1887)]*, the Court held a statement to be impermissibly induced where the accused was told that "it would be better for him to tell the truth and have no more trouble about it," even when he was also told that no promises could be made. The Court stated:

The prisoner was in the custody of the law, and although pressed, time and again, to make a confession, and pressed too by one in authority, he persisted in denying his guilt, and it was not until he was told that it would be better for him to tell the truth, and have no more trouble about it,

that the confession was made. Here there was an inducement, and one, too, of the strongest kind held out to him It was, in fact, saying to the prisoner, if you will tell me the truth, it will not only be the [sic] better for you, but you shall have no more trouble about the matter.

The Court of Appeals also has found improper inducements in the following: a statement to the accused that "it would be possibly better for him if he would make a clean statement, so it would not appear erroneously in the papers" officers' statements that they would "go to bat" for the accused if a statement was made; a warning to the accused to "'let it out before (your co[-] defendant) squeals, for if you do not, (the co[-]defendant) will squeal before you, and you will get the worst of it'"; telling the accused that although he didn't have to give a statement, "it will help you a lot."

Id. at 644-45 (citations omitted).

Contrasting statements *not* considered coercive, the Court continued:

On the other hand, the Court has held that mere exhortations to tell the truth, and nothing more, are not improper. "I want you to tell the truth" has been held not to be an improper inducement. *Nicholson v. State*[, 38 Md. 140 (1873)]. Similarly, in *Deems v. State*, 127 Md. 624 (1916), an officer's questions to the accused of "why (didn't he) tell the truth" and the statement that "the truth would hurt no one" did not render the confession inadmissible. In *Merchant v. State*, 217 Md. 61 (1958), the officer told the appellant, in response to a question, that he did not know if things

would go easier if he made a statement and he could make no promises. He added, "the truth hurts no one." The court did not think the generalization could be viewed as a promise of leniency, especially where the accused was told any statement could be used against him. Neither is it an improper inducement for an officer to tell an accused to "get it off his chest." *Bean v. State*, 234 Md. 432 (1964).

Id. at 645 (footnote omitted).

Appellant also refers us to *Nicholson v. State*, 38 Md. 140 (1873), wherein the Court of Appeals held a statement to be impermissibly induced when the accused was told to "let it out before (your co[-]defendant) squeals, for if you do not, (the co[-] defendant) will squeal before you, and you will get the worst of it." Also cited by appellant, is *Lubinski v. State*, 180 Md. 1 (1941), wherein the statement held to be an improper inducement was that giving a statement would "help him a lot."

In response to the court's ruling denying the State's request to call Detective Taylor because his testimony was

merely repetitive, the State made a proffer⁴ of his testimony, essentially refuting appellant's allegations of coercion.

The following transpired after the State's proffer:

[PROSECUTION]: That would be my
 proffer, [Y]our Honor.

⁴The proffer represented that:

- (1) [appellant] was advised of his *Miranda* rights consistent with what Detective Lau said, prior to any questioning taking place;
- (2) [appellant] never complained about the handcuffs being too tight and never asked for the handcuffs to be removed;
- (3) the police officers' guns were in fact placed in a box well outside of the room;
- (4) [appellant's] demeanor was calm and he was never crying;
- (5) at no time did [appellant] ever say that he thought he was being arrested because of his driving record;
- (6) neither he nor Detective Lau ever said, "Eleven people got the death penalty. Do you want to be the next one?";
- (7) neither he nor Detective Law [sic] ever said that [appellant] was going to get a lethal injection if he didn't tell the truth;
- (8) neither one of them ever said [appellant] was going to get the death penalty;
- (9) neither detective ever said that "We are on the good side of the table and"-- "we're on the good side of the table and you're on the bad side of the table.";
- (10) neither detective ever said, "If you tell the truth you can go home tonight";
- (11) neither detective ever said, "Your life is in our hands";
- (12) the detectives never wrote any statement on a yellow pad, that the only statement that was written by the [appellant] in his own hand appears on the first four pages of State's Exhibit Number 3;
- (13) [appellant] was asked questions, and although the detective wrote answers, that they wrote them verbatim with what [appellant] said and he initialed them;
- (14) [appellant] never asked if he was going home that night;
- (15) neither detective ever said to the [appellant], "If you tell us the truth you can go home tonight"; and
- (16) following the recovery of the shotgun, [appellant] was turned over to Officer Benton and he was taken to the commissioner at - he was actually seen by the commissioner at 7:10 a.m.

THE COURT: I will not allow him to testify.^[5] It's not rebuttal. Almost everything you mentioned were things that were brought out on direct examination and cross-examination of Detective Lau. And in my opinion it's not rebuttal.

The court denied the State's request to call Detective Taylor to specifically rebut appellant's testimony, finding that the testimony would be a recapitulation of matters about which Detective Lau had already testified and, as such, was not proper rebuttal. With respect to the State's burden to rebut assertions of improper coercion, threats, or inducements to obtain a confession, the Court of Appeals opined in *Streams v. State*, 238 Md. 278, 281-82 (1965):

We do not agree with the appellant's contention that each person who has casual contact with the accused while he is detained by the police or who is present during the interrogations that lead to a confession must testify as to its voluntariness in order for the State to meet its burden. It may be enough if one credible witness can testify from personal observation that nothing was said or done prior to and during the obtention of the confession to mar or destroy its voluntary character and there is no claim by the

⁵The State conceded at oral argument before us that the court's ruling was "against" the prosecution, that the purpose of the proffer was to inform the court of those matters raised by appellant which could be refuted by Detective Taylor, and that the court should have allowed the testimony of Detective Taylor to be presented.

prisoner of improper treatment by others than those covered by such testimony.

(Emphasis added; citations omitted.)

Thus, the failure of a police officer, involved in the arrest and interrogation of a suspect, to take the stand and "deny a direct accusation by the appellant would indicate that the State had failed to meet its constitutional burden to prove the voluntariness of the confession." *Gill v. State*, 11 Md. App. 378, 384 (1971); see *Hutchinson v. State*, 38 Md. App. 160, 163 (1977). As the Court of Appeals also has made clear, "not . . . [every] person who had casual contact with the accused" must testify as to the voluntariness of the confession, but when it is contended that someone employed coercive tactics or inducements to obtain inculpatory statements, "that specific person must rebut the allegations of coercion as no one else is qualified to do so." *Gill v. State*, 265 Md. 350, 353-54 (1972).

Our task, as we see it, is to determine from our review of the record whether the testimony offered by Detective Lau rebutted the allegations of improper police conduct in obtaining appellant's confession, including allegations regarding unduly coercive actions during the arrest and transporting of appellant to the police station. Furthermore, we must decide whether there were allegations lodged against Detective Taylor which were not rebutted by the testimony of Detective Lau and, if so,

whether such allegations constituted violations of appellant's Due Process and Fifth Amendment Rights under the State and federal Constitutions. Of course, there would be no requirement to rebut allegations of conduct patently not calculated to overcome rational intellect or free will and thus perfectly proper police procedure. Moreover, contrary to appellant's sweeping postulation that there were no denials regarding promises or threats by "any other officer" or of improper police action subsequent to the interview, the State is not required to rebut that which has not been alleged. Appellant has made allegations only against Detectives Lau and Taylor and there are no allegations about improprieties *after* the interview. In the event that we conclude that allegations of violations of appellant's constitutional rights were not rebutted by Detective Lau's testimony, our inquiry must then address whether the constitutional defect in the proceedings compels our vacation of appellant's judgment of conviction. The trial judge's ruling, it should be noted, was based on his belief that Detective Lau's testimony preemptively rebutted appellant's testimony.

At the outset, we decline to extend the requirement, under *Streams*, that the State rebut evidence of police misconduct to the testimony of an expert witness. Moreover, Dr. Spodak testified, "I don't think it has anything to do with his ability

to understand those various words and what they mean," which effectively rebuts appellant's assertion that he did not understand the word, "duress," because of a learning disability, an insufficient vocabulary, and poor reading skills. The short answer to this contention is that *Streams* simply does not apply to evidence other than alleged police misbehavior.

In essence, appellant's remaining complaints regarding the failure to rebut his allegations can be grouped into (1) failure of Detective Lau to testify about what occurred before and after the interview regarding his own actions and (2) what happened before, during, and after the interview with respect to Detective Taylor's conduct. As we have noted, there would, of course, be no need to offer any testimony about a point in time before, during, or after the interview when no specific allegation of impropriety had been lodged by appellant.

Ironically and most telling is the proffer itself, which, we believe, is the most cogent outline of what should have been offered to rebut appellant's allegations. Although we do not believe that *Streams* and *Gill* require a point-by-point refutation of each and every allegation which does not rise to the level of a constitutional violation, *Hof* and *In re: Joshua David C.* instruct that voluntariness must be determined from the totality of the circumstances, including the point in time

from arrest through the obtention of the statement. Appellant essentially posits that it is incumbent, under *Streams* and *Gill*, for the State to rebut each and every action which one in custody claims, from a purely subjective point of view, resulted in him giving a statement against his will.

Although the State must rebut statements and actions by the police interrogators which the Court of Appeals and this Court have found to be improper coercion and inducements, we hold that neither *Streams* nor *Gill* requires a point-by-point refutation of each and every allegation as long as the State has shouldered its burden of production of evidence to refute allegations that "someone employed coercive tactics or inducements to obtain inculpatory statements." *Gill*, 265 Md. at 353-54. Once the State has satisfied this requirement of *Streams* and *Gill* regarding coercive tactics or inducements, the motions judge in his or her role as fact finder, may determine voluntariness from the totality of the circumstances, including appellant's susceptibility to having his will overborne, the actions of the police that are coercive but for which the State has offered rebuttal evidence and the remaining actions of the police which are patently non-coercive for which the State would have no obligation to rebut.

Consequently, although a general denial by one who was present throughout the time frame in question that there were no threats, coercion, inducements, or promises extended to obtain a statement may be sufficient under certain circumstances, such general denials must, at the very least, be a denial by one who is present that his or her fellow officer did not engage in coercive or improper tactics in his or her presence when allegations are lodged against his or her fellow officer. Although there may have been no requirement that the State rebut allegations that Detective Taylor yelled at appellant, appellant repeatedly asserted that it was Detective Taylor who refused to loosen his handcuffs. Under *Gill*, Detective Lau could have testified from his own personal observations with respect to coercion or improper inducements by Detective Taylor; however, Detective Lau was never asked specifically whether he observed Detective Taylor engage in any improper activity. Moreover, although Detective Lau stated that he and Detective Taylor were in the room the whole time, Detective Lau responded that he may have or may not have been present when the writing authored by Detective Taylor was penned.

More important, *In re: Joshua David C. and Hof* require that the actions of the police during a suspect's arrest and events leading up to the obtention of the statement be factored into

the voluntariness equation. To be sure, any person of normal sensitivity subjected to an arrest by several officers wherein force is employed would experience a certain level of fear. Although the circumstances (with the possible exception of being shoved into a glass door) as alleged by appellant surrounding his arrest were, in large part, in keeping with standard police procedure, the trial judge should have permitted the State to produce rebuttal testimony that the force appellant alleges was employed was exaggerated by him in his testimony. We note that, according to the proffer offered by the State, Detective Taylor was prepared to testify that appellant never complained about the handcuffs being too tight and never asked for them to be removed, that appellant was calm and was never crying, as alleged, and that he never indicated he felt he was being arrested because of his driving record. Detective Taylor was prepared to testify further that, after arriving at the police station, neither he nor Detective Lau ever stated that eleven men got the death penalty or that appellant was going to get a legal lethal injection if he did not tell the truth, or that appellant's life was in their hands, or that if appellant told the truth "[he] [could] go home tonight." Detective Taylor was also prepared to testify that he never wrote any statement on a yellow pad, as alleged, and that, although the detectives wrote answers, they wrote them verbatim recording what appellant had

said. Finally, Detective Taylor was prepared to testify that appellant never asked whether he was going home that night and that the detective transferred custody to Officer Benton who took appellant to be seen by the court commissioner at 7:10 a.m.

We are persuaded that, although general denials may suffice as to certain specific allegations, in the case at hand, the items listed in the proffer should have been offered through the testimony of Detective Taylor to rebut appellant's allegations. At the very least, the motions court, in its role as fact finder, would have been in a better position to discharge its role in assessing credibility had it allowed the proffered testimony to be admitted. Finally, although the State summarily dismisses appellant's reliance on *Clark*, for the reasons stated therein as recapitulated, *infra*, citing *Biscoe v. State*, we are not persuaded that Detective Lau's denial that any promises were made is synonymous with a denial that there were no inducements extended.

We conclude that the lower court erred in not allowing the State to produce testimony to rebut specific allegations by appellant. Obviously, because some of those allegations represent appellant's version of the totality of the circumstances, we are constrained to review the lower court's factual findings that were based on an incomplete evidentiary

record. More specifically, although it was within the province of the lower court to believe or disbelieve the testimony of any witness called on behalf of appellant or the State, the court was procedurally required to make its finding regarding credibility on a record comprised of the State's response to allegations which rise to the level of constitutional violations.

Neither the testimony of Detective Lau or the executed *Miranda* form responded to appellant's allegations regarding the events which occurred subsequent to his arrest and during the ride to the police station, particularly allegations against Detective Taylor. The State has failed to rebut significant allegations which comprise part of the totality of the circumstances under *Hof* and *In re Joshua David C.* Because under *Hof* and *In re Joshua David C.*, voluntariness must be determined from the totality of the circumstances, including the point in time from arrest through the obtention of the statement, we shall vacate the judgment of conviction and remand the case for a hearing in which the State will be put to its burden of producing evidence to rebut the specific allegations of appellant.

Traditional Voluntariness: Product of Rational Intellect and Free Will

The principal thrust of appellant's claim that his confession was not voluntary is that he lacked the cognitive ability to understand that, pursuant to the Fourteenth and Fifth Amendments of the United States Constitution and *Miranda v. Arizona*, he had a right not to be compelled to incriminate himself. Asserting that he was subjected to excessive force during the course of his initial arrest and subsequent detention, however, citing the "totality of the circumstances" test set forth in *Hof* and *In re Joshua David C.*, appellant also asserts his confession violated the traditional proscription against involuntary confessions because it was the product of an "overborne will" rather than a rational intellect and free will.

Although we address separately herein traditional voluntariness, waiver of *Miranda* rights, the State's burden to rebut allegations of illegal police action to extract a confession and the propriety of a delay in transporting one arrested to a commissioner, these issues must be considered in conjunction with each other in determining, pursuant to the totality of the circumstances test, whether the police conduct vitiated the voluntariness of the confession.

The State relies, in part, on the waiver form appellant signed in which he acknowledged waiving his rights knowingly and

voluntarily "without threats, promises, force or duress" and agreeing to be questioned and/or make a statement. The trial judge declared that he did not believe that the officers promised appellant that he could go home if he told the truth. Appellant contends, however, that the statements regarding the "good side" and "bad side" of the table constituted "hope of favor or fear of harm" and thus, an improper inducement. *McCleary*, 122 Md. at 405 (citing *Biscoe*, 67 Md. at 8, wherein a statement to defendant that "it would be better for [defendant] to tell the truth and have no more trouble about it" was construed by the court as an improper inducement and the resulting confession was excluded).

We are required to make an independent constitutional appraisal of the record employing the totality of the circumstances in our determination of the voluntariness of appellant's confession. *In re Joshua David C.*, 116 Md. at 599 (quoting *Hof*, 337 Md. at 596-97). Those circumstances include where the interrogation was conducted, its length, who was present, how it was conducted, its content, whether the defendant was given *Miranda* warnings, the mental and physical condition of the defendant, the age, background, experience, education, character, the intelligence of the defendant, when the defendant was taken before a court commissioner following

arrest, and whether the defendant was physically mistreated, physically intimidated, or psychologically pressured.

Applying the factors set forth in *Hof, Hoey, Lodowski*, and *In re Joshua David C.*, the trial judge found that by his execution of the waiver form, appellant acknowledged that "what he said" was without threats, promises, force, or duress and appellant waived his rights knowingly and voluntarily and agreed to be questioned and/or make a statement.

In making the determination that a confession was not the product of coercion, promise or inducement, we look to the evidence adduced at the suppression hearing, giving deference to the trial court's determinations of credibility. In this regard, the State relied on the testimony of Detective Lau as well as appellant's written waiver of his *Miranda* rights.

We find nothing inordinate about where the interrogation was conducted, its length or who was present. As discussed, *supra*, although appellant makes a frontal attack on whether he understood his *Miranda* warnings, there can be no question that they were administered on at least two separate occasions. With respect to appellant's age, background, experience, education, character, and intelligence at the time of trial, he was a nineteen-year-old graduate of Woodlawn High School, had been attending Catonsville Community College, and had been a

newspaper delivery person for the Baltimore Sunpapers for a period of approximately two years. The lower court noted that, although appellant was "no neurophysicist and was not particularly gifted intellectually, he is within the average to low average range of intelligence." The court further opined that it did not believe the mere fact of a learning disorder "determines whether a statement is voluntary or involuntary."

Significantly, the court observed that there was no dispute that appellant had written a four-page statement in his own handwriting and it found his testimony that "the police just made it up and had him sign and initial it" to be wholly incredible. Expressing disbelief, the court concluded that appellant had answered the questions as written and thereafter acknowledged his answers. Although appellant attempted to establish his mental deficiency through Dr. Blumberg, as we have discussed *supra*, that testimony was refuted by Dr. Spodak who acknowledged that appellant had a learning disorder as well as a personality disorder, but opined that neither of these disorders would have prevented appellant from waiving his *Miranda* rights or from giving a voluntary statement to the police.

Thus, given the conflicts in the testimony of Dr. Blumberg and Dr. Spodak, it was within the province of the lower court to

reject the findings of appellant's expert witness and credit that of Dr. Spodak. The lower court's observation that appellant had the ability to pen a coherent statement and was a high school graduate attending community college, coupled with the testimony of Dr. Spodak, supported the lower court's belief that appellant had sufficient mental capacity to give a statement that was a product of rational intellect when considered in light of the specific conduct of the police as found by the lower court.

Appellant was arrested at approximately 9:48 p.m. on July 17, 1999, and was taken before a court commissioner at 7:18 a.m. on July 18, 1999, approximately nine and one-half hours later. Appellant complains that, on the night he was arrested, he was coming out of a residence on Rolling Bend Road when he was accosted by an officer who pushed him from the back, causing him to hit the glass door whereupon several officers trained their guns on him. As two officers pressed their guns against either side of appellant's head and two covered him from the rear, his legs were shackled and the officers handcuffed him behind the back. Frightened and shaking, he was escorted by three officers toward an unmarked police car in which Detective Lau occupied the driver's seat and Detective Taylor sat in the back seat beside appellant. According to appellant, they arrived at the interrogation room of the police station approximately twenty-

five to forty-five minutes later. At 11:23 p.m. on July 17, 1998, appellant initially denied having committed the offenses for which he was arrested, but subsequently gave a written confession which was completed by 2:05 on the morning of July 18, 1998.

The lower court found the actions of the arresting officers reasonable, observing, "Quite frankly, I can't imagine a police officer or officers arresting someone who is involved in the shooting, or the assassination attempt . . . of a victim where the victim is shot, not employing the kind of tactics that were used." The court further expressed the view that the police can and should do what is necessary "to bring such a person who is suspected of such a crime under immediate control without being subjected to danger that such a person may present to the police." Noting that the police may not have been "delicate," appellant was not physically harmed and he was arrested with the amount of force, in the lower court's view, that was not "uncalled for in a case like this."

Our independent constitutional review essentially requires us to make two determinations from the record before us: (1) the ability of the accused to process the information regarding his custodial interrogation and make a rational choice given his age, background, experience, education, character, and mental and physical condition and (2) the circumstances attendant to

appellant's custody, including where the interrogation was conducted, its length, who was present, how it was conducted, its content, whether appellant was taken before a commissioner following arrest, and whether he was physically mistreated, intimidated, or psychologically pressured. Our independent constitutional review requires us to engage in an analysis of the interplay between the vulnerability of the suspect on the one hand and the coercive or improper influences on the other hand. Although the facts regarding appellant's persona are fully developed on the record, those facts must be measured against the backdrop of the police conduct and whether he was subjected to a hostile environment designed to wear down appellant's will. As to the second category, *Streams* and *Gill* instruct that the trial court assess credibility *after* the record is fully developed as to allegations of coercive conduct which must be rebutted by the State.

The court, however, put the cart before the horse. In other words, decisions regarding credibility should have occurred after the court had before it a complete record. As a consequence, the court's factual findings are derived from a record that is incomplete. Because the court refused to permit the State to respond to appellant's allegations of coercion and improper inducements, the record before us is not fully

developed and we therefore cannot say whether the court erred in its determination that appellant's confession was voluntary applying the totality of the circumstances test.

In sum, we are unable to measure appellant's susceptibility to coercive or improper influences with only one-half of the equation before us. Although the record supports the court's determination that appellant had the cognitive ability to understand what his choices were, because of the absence of rebuttal of allegations of improper police tactics, we cannot, on the record before us, conclude that the confession was voluntary in light of the court's factual findings derived from an insufficient record.

II

We are next asked whether it was reversible error for the trial court to find that the delay in the presentment of appellant to the Commissioner was not an unnecessary delay, as proscribed by Rule 4-212(f). Appellant was arrested on July 17, 1999 at approximately 9:48 p.m., he was presented to a judicial officer on July 18, 1999 at 7:18 a.m. Appellant contends that, because the police took him to the station for the purpose of questioning him about his involvement in the shooting of Bland, this constituted unnecessary delay as proscribed by Rule 4-212.

Rule 4-212 requires that a defendant be taken before a judicial officer "without unnecessary delay and in no event later than 24 hours after the arrest."

The trial judge opined:

The rule says that the police must take somebody before a commissioner not within any particular time period, not immediately after arrest. Doesn't say that. It says without unnecessary delay, and in no event more than 24 hours. Anybody who's been doing this kind of work for any period of time knows that there are cases where the police spend literally hours questioning someone, processing someone before that person is taken to a commissioner. Is that necessary delay or unnecessary delay, depends on the individual case.

But in this case the amount of time that went by from the time the [appellant] was arrested there at that apartment house by the SWAT team to the time that he [was] presented before a commissioner certainly does not appear to me to be without unnecessary delay. It is not an overtly long period of time. The police don't have to, according to the rule[,] arrest and take to a commissioner. If that were the rule certainly I agree that would change police practices in this State, and in any other state where [if] that were the rule would turn them on their ear.

For those reasons I find that the delay was not an unnecessary delay, and that Rule 4-212 was not violated. And in any event, it is now, since the *Johnson* case and the legislation has been passed that overruled the *Johnson* case holding that a statement had to be suppressed is a factor to be considered, as I have read. And I don't believe that factor had a thing to do with the [appellant's] voluntary decision to make

a statement to the police. For the reasons that I have stated[,] the motion to suppress the statement is denied.

Appellant argues that, because the officers did not take him directly to a judicial officer immediately after his arrest and prior to questioning, his confession should be excluded by virtue of the rule laid down in *Johnson v. State*, 282 Md. 314 (1978). The Court of Appeals held in *Johnson*, that

any statement, voluntary or otherwise, obtained from an arrestee during a period of unnecessary delay in producing him before a judicial officer, . . . is subject to exclusion when offered into evidence against the defendant as part of the prosecution's case-in-chief,

Id. at 328. Maryland Code (1998 Repl. Vol), Cts. & Jud. Proc. (C.J.) § 10-912 enacted after the *Johnson* decision, provides:

Failure to take defendant before judicial officer after arrest.

(a) Confession not rendered inadmissible.

- A confession may not be excluded from evidence solely because the defendant was not taken before a judicial officer after arrest within any time period specified by Title 4 of the Maryland Rules.

(b) Effect of failure to comply strictly with Title 4 of the Maryland Rules. - Failure to strictly comply with the provisions of Title 4 of the Maryland Rules pertaining to taking a defendant before a judicial officer after arrest is only one factor, among others, to be considered by the court in deciding the voluntariness and admissibility of a confession.

Thus, pursuant to C.J. § 10-912, the fact that a defendant was not taken before a judicial officer after arrest within the time period specified by Rule 4-212 should not, by itself, exclude a confession. Rather, it may be a factor, among others, to be considered by the court in deciding voluntariness and admissibility of a confession. *See id.*

Appellant was in the custody of the police for approximately nine and one-half hours before being presented to a judicial officer. It is routine for police to take suspects to a precinct or headquarters for questioning to prepare a charging document, formally charging appellant, the amount of time between appellant's arrest and his presentment was not an unnecessary delay in violation of Rule 4-212(f). The trial court did not err in its finding that Rule 4-212 was not violated.

III

Finally, we are asked to determine whether the trial court committed reversible error in finding that probable cause existed to arrest appellant. We have stated that probable cause is assessed by considering the totality of the circumstances in a given situation. *See Howard v. State*, 112 Md. App. 148, 160-

61 (1996). More recently, we stated in *In re Jason Allen D.*, 127 Md. App. 456, 491-92 (1999):

Maryland courts have repeatedly stated that probable cause is a "non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion." It has been defined as facts and circumstances "sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense."

(Citations omitted.)

With respect to probable cause, the lower court concluded:

Number one, I find that the police had probable cause to arrest the [appellant]. The statements by the victim when asked by the hospital personnel identifying the [appellant] as a person who he has had difficulty with, and then the statement that a witness saw the [appellant] driving away from the scene of the crime immediately after the crime had been committed in my opinion constitutes probable cause.

In the instant case, detectives had evidence from the victim that he believed appellant was involved in the shooting and there was evidence of ongoing hostility between appellant and Bland. Moreover, an eyewitness, Keith Awkward, identified appellant as the person driving away from the crime scene. This evidence alone is sufficient to warrant a prudent person to believe that appellant had committed the shooting.

JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE COUNTY
VACATED; CASE REMANDED FOR
FURTHER PROCEEDINGS
CONSISTENT WITH THIS
OPINION.

COSTS TO BE PAID BY
BALTIMORE COUNTY.

I agree that there was probable cause to arrest appellant, and that Maryland Rule 4-212 was not violated in this case. I dissent, however, from the holding that appellant's motion for suppression of his confession was decided on a factual predicate that is inadequate as a matter of law.

It is true that there are cases in which the defendant's suppression hearing testimony must be rebutted by a specific law enforcement officer "as no one else is qualified to do so." *Gill v. State*, 265 Md. 350, 353-54 (1972). In this case, however, the State produced "anticipatory rebuttal" evidence through the introduction into evidence of the WAIVER form that appellant initialed and signed. That form included the following statement:

Without threats, promises, force or duress,
I do hereby waive my rights as set forth
and do knowingly and voluntarily agree to
be questioned and/or make a statement.

Detective Lau testified that appellant placed his initials next to the word "Without," and signed his name next to the word "statement." In my judgment, the combination of Detective Lau's testimony and the WAIVER form initialed and signed by appellant was more than sufficient to satisfy the *Streams-Gill* requirement that the State produce evidence in rebuttal of a defendant's "coerced confession" testimony. I would therefore affirm the judgments of conviction.

