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## **INTERROGATION**

### **The *Miranda* Right to Remain Silent: After *Thompkins*, Don't Be Silent**



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On June 1, the U.S. Supreme Court greatly expanded the powers of law enforcement officers in conducting custodial interrogations. Its decision in *Berghuis v. Thompkins*,<sup>1</sup> lessens the government's burden to show waiver of a suspect's right to remain silent and clarifies law enforcement obligations established in *Miranda v. Arizona*<sup>2</sup> more than 40 years ago.

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<sup>1</sup> *Berghuis v. Thompkins*, No. 08-1470 (June 1, 2010), 2010 WL 2160784.

<sup>2</sup> 384 U.S. 436 (1966).

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The *Thompkins* decision will find a happy audience in state and local law enforcement agencies. On the other hand, if potential defendants want to avoid any inadvertent confessions, they would be well-advised to speak up and invoke their right to silence.

#### **The Law Prior to *Thompkins*: *Miranda* and Beyond**

The starting point for any custodial interrogation is the Fifth Amendment to the U.S. Constitution, which guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The basic rule is that suspects are protected from incriminating themselves. In 1966, the Supreme Court recognized that prior to any questioning, a suspect in custody "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."<sup>3</sup> These rights are commonly known as the *Miranda* rights.

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<sup>3</sup> *Miranda*, 384 U.S. at 444.

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The *Miranda* rights have been developed by subsequent Supreme Court decisions. In *Harris v. New York*,<sup>4</sup> the court held that statements that are inadmissible because the defendant was not given the proper *Miranda* warnings may be used to impeach a defendant's trial testimony. The court again expounded on *Miranda* in 1975, in *Michigan v. Mosley*,<sup>5</sup> holding that the right to remain silent is not indefinite. The *Mosley* decision clarified that while officers must suspend questioning after a defendant has invoked his right to remain silent, interrogations may resume after a significant period of time has

passed and a fresh set of *Miranda* warnings is given.

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<sup>4</sup> 401 U.S. 222 (1971).

<sup>5</sup> 423 U.S. 96 (1975).

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In 1979, the Supreme Court in *North Carolina v. Butler*<sup>6</sup> denied adopting a per se rule requiring defendants to expressly waive their *Miranda* rights, finding that such a rule would go beyond the requirements of federal law. The 1985 decision in *Oregon v. Elstad*<sup>7</sup> held that incriminating statements made without *Miranda* warnings are inadmissible, but a subsequent voluntary confession following *Miranda* warnings is admissible. In *Colorado v. Connelly*,<sup>8</sup> just four years later, the Supreme Court found that the government need prove a waiver of *Miranda* rights only by a preponderance of evidence. Only a year later, the court held in *Illinois v. Perkins*<sup>9</sup> that confessions made to an undercover police officer posing as a fellow inmate did not require *Miranda* warnings because the incarcerated suspect was unaware of the compulsion present when speaking to a law enforcement official.

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<sup>6</sup> 441 U.S. 369 (1979).

<sup>7</sup> 470 U.S. 298 (1985).

<sup>8</sup> 479 U.S. 157 (1989).

<sup>9</sup> 496 U.S. 292 (1990).

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### **The *Thompkins* Facts**

On Jan. 10, 2000, a shooting occurred outside a mall in Southfield, Mich. There were two victims: Samuel Morris, who died from multiple gunshot wounds, and Frederick France, who later recovered and testified. A year after the shooting, Van Chester Thompkins, a suspect who had fled, was arrested in Ohio.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, who was awaiting transfer to Michigan. Starting at 1:30 p.m., Thompkins was interrogated for almost three hours in an 8-foot-by-10-foot room. Prior to the interrogation, the officers gave Thompkins a form with the *Miranda* warnings. Thompkins read the fifth warning aloud: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." The other four warnings were read aloud by one of the interrogating officers. Thompkins refused to sign a form to demonstrate that he understood his rights, but at no point did he say he wanted to remain silent or that he wanted an attorney.

After two hours and 45 minutes, during which Thompkins remained "largely silent," he was asked whether he believed in God and whether he prayed to God. Thompkins answered affirmatively to both questions. Thompkins was then asked whether he "pray[ed] to God to forgive [him] for shooting that boy down?" He again responded, "Yes." He refused to make a written confession, and the interrogation ended 15 minutes later.

### **Procedural History**

The trial court found Thompkins guilty of first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He was sentenced to life without parole. The trial court denied a motion for a new trial and rejected Thompkins's request to suppress his pretrial statements under *Miranda*. The Michigan Court of Appeals rejected the *Miranda* claim, holding that Thompkins had not invoked his right to remain silent and had waived it. The Michigan Supreme Court denied discretionary review.

Thompkins filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan. Affirming the Michigan Court of Appeals, the district court found that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation.

The U.S. Court of Appeals for the Sixth Circuit reversed. The court found that a waiver of the right to remain silent need not be express and that Thompkins's "persistent silence for nearly three hours" meant that "Thompkins did not wish to waive his rights."<sup>10</sup>

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<sup>10</sup> *Thompkins v. Berghuis*, 547 F.3d 572, 588 (6th Cir. 2008).

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### **The Court's Holding in *Thompkins* And What It Means**

The Supreme Court agreed with the Michigan Court of Appeals. The ultimate holding in *Thompkins* is

that a suspect must unambiguously invoke his *Miranda* right to remain silent.<sup>11</sup> The court reasoned that since a suspect must unambiguously invoke his *Miranda* right to counsel,<sup>12</sup> there is no need for a different standard for the right to remain silent.<sup>13</sup> The requirement of an unambiguous invocation of the right to remain silent sidesteps the need for officers or courts to interpret any ambiguous behavior and allows police to avoid guessing about a suspect's "unclear intent and face the consequences of suppression if they guess wrong."<sup>14</sup>

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<sup>11</sup> *Berghuis v. Thompkins*, slip op. at 9-10.

<sup>12</sup> See *Davis v. United States*, 512 U.S. 452 (1994).

<sup>13</sup> *Berghuis v. Thompkins*, slip op. at 9.

<sup>14</sup> *Id.* at 10.

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Even absent an invocation of this *Miranda* right, however, a suspect must "knowingly and voluntarily" waive this right.<sup>15</sup> The burden is on the government to show such waiver.<sup>16</sup> *Miranda's* core protection is advising defendants of their rights. *Miranda* rights, therefore, can be waived through means less formal "than a typical waiver on the record in a courtroom,"<sup>17</sup> and a waiver can be inferred "from the actions and words of the person interrogated."<sup>18</sup> Receiving a written copy of the *Miranda* warnings, being able to read and understand English, and actually reading and hearing a portion of these warnings aloud, suffice to show that Thompkins was aware of the *Miranda* protections and knowingly and willingly waived such protections.<sup>19</sup> "Police are not required to rewarn suspects from time to time."<sup>20</sup>

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<sup>15</sup> *Butler*, 441 U.S. at 373.

<sup>16</sup> *Miranda*, 384 U.S. at 475.

<sup>17</sup> *Berghuis v. Thompkins*, slip op. at 13.

<sup>18</sup> *Butler*, 441 U.S. at 373.

<sup>19</sup> *Berghuis v. Thompkins*, slip op. at 14.

<sup>20</sup> *Id.*

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### Reactions to *Thompkins*

Prosecutors and law enforcement officials will find this ruling helpful, as it allows for more confessions and incriminating statements to be admissible. Criminal defense attorneys may be less excited about this decision, as it requires them to be even more vigilant as to what their clients say in custodial interrogations.

Defense Attorney Peter Buh exclaims that "[b]ack in the olden days, Americans under police suspicion could be protected by remaining silent. Now it seems the Supreme Court forces the duty upon the defendant who wants to invoke his or her right to remain silent to do so unambiguously. This is the equivalent of saying 'Speak UP! I can't tell if you want to remain silent!' It's a strong decision that departs from *Miranda's* original intention, and in effect, turns that case on its head."<sup>21</sup>

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<sup>21</sup> Peter Buh, *Local DUI Attorney Reacts to Controversial Supreme Courts Reduction of Miranda Protection*, WebWire, June 8, 2010, <http://www.webwire.com/ViewPressRel.asp?aId=118209>.

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Declaring the *Thompkins* decision to be the death of *Miranda*, Huffington Post writer Charles Weisselberg states that the *Miranda* protections are now "mostly symbolic."<sup>22</sup> The Root's Sherrilyn A. Ifill finds it ironic that a former prosecutor, Justice Sonia Sotomayor, is the voice for the defense in *Thompkins*. Ifill goes on to claim that police officers have great discretion to interrogate criminal suspects for hours, as long as "the detainee does not use the magic words that expressly indicated a refusal to answer questions or the desire for an attorney."<sup>23</sup>

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<sup>22</sup> Charles Weisselberg, *Elena Kagan and the Death of Miranda*, The Huffington Post, June 1, 2010, [http://www.huffingtonpost.com/charles-weisselberg/elena-kagan-and-the-death\\_b\\_596447.html](http://www.huffingtonpost.com/charles-weisselberg/elena-kagan-and-the-death_b_596447.html).

<sup>23</sup> Sherrilyn A. Ifill, *Who Will Speak for the Defense on the Supreme Court?*, The Root, June 2, 2010, <http://www.theroot.com/views/who-will-speak-defense-supreme-court>.

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Many think *Thompkins* is a landmark decision. Over time, however, it is likely that *Thompkins* will not

have the predicted dramatic effect. The Supreme Court has laid down a bright-line rule to clarify *Miranda*. As one commentator has said, "The ruling is simply common sense."<sup>24</sup> If a criminal suspect is informed of his *Miranda* rights and understands these rights, he can remain silent to any questioning or he can expressly invoke his right to remain silent by unambiguously declaring to the authorities that he is invoking this right.

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<sup>24</sup> Steve Lackner, *Berghuis v. Thompkins: Supreme Court Rules that Miranda Right To Remain Silent Must Be Unambiguously Invoked By Suspect To Stop An Interrogation*, June 3, 2010, <http://www.stevelackner.com/2010/06/berghuis-v-thompkins-supreme-court.html>.

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### ***Thompkins's Impact***

Prosecutors and law enforcement agencies can breathe easier. They no longer have to second-guess a criminal detainee's actions or words. After investigators properly *Mirandize* a criminal suspect, the suspect has three options: (1) remain silent; (2) invoke the right to remain silent by expressly stating that he or she does not want to speak to the police and claiming the *Miranda* right to silence; or (3) invoke the right to counsel by expressly stating that he or she wants counsel present. If the suspect exercises any of these options, the investigators have no more cards to play. The interrogation is over.

Is *Thompkins* the death knell of *Miranda*? No, it is a clarification. The decision creates a bright-line rule to guide police and criminal suspects during custodial interrogations. The police need not cease interrogation of a criminal suspect unless the suspect states that he or she wishes to remain silent. Criminal detainees can control their interrogations by invoking their *Miranda* rights. This decision provides unambiguous guidelines for prosecutors, defense attorneys, law enforcement agencies, and potential defendants.

However, *Thompkins* does leave us wondering about one thing—should law enforcement agencies update their *Miranda* warnings in light of this decision?

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