

## More on Miranda

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### When Silence Is Golden

By Brian Beasley, Can't Shut Me Up  
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*Hello, darkness, my old friend. I've come to talk with you again  
because a vision softly creeping left its seeds while I was sleeping  
and the vision that was planted in my brain still remains within  
the sound of silence.<sup>1</sup>*

According to the numerous emails forwarded to me this week numerous times by numerous officers, the United States Supreme Court has handed down another ruling which affects our understanding of Miranda and how it applies in practice. Berghuis v. Thompkins<sup>2</sup> is the third Miranda-related opinion handed down by the Supremes already this year<sup>3</sup> and by far the hardest to say and spell.<sup>4</sup>

Van Chester Thompkins<sup>5</sup> was convicted of murder and sentenced to life in prison without parole for a drive-by shooting that occurred outside a mall in Southfield, Michigan on January 10, 2000. One victim died of multiple gunshot wounds while another victim recovered from his injuries and would later testify against Thompkins. After the shooting, Thompkins fled to Ohio where he was arrested a year later. Two Southfield police officers then travelled to Ohio to interview him about the murder.

The interview took place in a room that was about 8 by 10 feet and Thompkins was sitting in a "chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on)."<sup>6</sup> The police advised Thompkins of his Miranda rights using a written form. They had him read part

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<sup>1</sup> Ok, you caught me. I didn't make this up. Apparently some guy named Paul Simon wrote a song called "The Sound of Silence" (or "The Sounds of Silence" depending on who you ask) in his bathroom a few months after the assassination of John F. Kennedy. Pretty deep stuff. Ever notice how you can get away with run-on sentences in singing but not in writing?

<sup>2</sup> 08-1470, 560 U.S. \_\_\_\_ (2010).

<sup>3</sup> The other two were Florida v. Powell and Maryland v. Shatzer, which were both discussed in Legal Question of the Week, Vol. 3, Number 4 entitled "Maryland v. Shatzer: Ernesto Miranda and the Fortnight Rule."

<sup>4</sup> In case you are curious (and who wouldn't be), the reason this case isn't titled "U.S. v. Thompkins" or "Michigan v. Thompkins" is because it is not a criminal appeal. Defendants sentenced to prison in state courts that have exhausted all their direct appeals may under certain circumstances bring a habeas corpus suit in federal court to try and have their conviction overturned. A petition for a writ of habeas corpus is actually a demand for the prison official with custody to appear before a court and prove that they have lawful authority to detain the prisoner. As a result, Thompkins (our defendant) is one party to this action and Berghuis (the warden of the prison where Thompkins was serving his sentence) is the other party. I could throw in a whole lot more Latin here, but let's just leave it at that for now.

<sup>5</sup> This seems like an old-fashioned name to me. It conjures up images of a guy in a smoking jacket reclining in front of a fireplace in a stately mansion. Unfortunately, it appears this Van Chester Thompkins was much too busy for this type of leisure activity.

<sup>6</sup> I'm sure we all remember these chairs. They were uncomfortable, but I liked them because I would pretend to be James Kirk, captain of the U.S.S. Enterprise, by making computer noises when I was bringing the arm up into place and yelling "Warp speed, Mr. Sulu!" Unfortunately, I was in college at the time, so I got my fair share of weird looks from my classmates, but it was fun nonetheless.

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of the form out loud to show that he could read and understand English and then asked him to sign the bottom of the form stating that he understood those rights. Thompkins refused to sign.<sup>7</sup>

Over the next three hours, police interrogated Thompkins although one officer testified that the defendant was “peculiar,” “sullen,” “generally quiet,” “not verbally communicative,” and “largely remained silent.”<sup>8</sup> Further, the detective stated that the interview was “very, very one-sided” and “nearly a monologue.” The defendant did give a few responses such as “yeah,” “no,” or “I don’t know.” In addition, he nodded his head a few times, stated he didn’t want a peppermint<sup>9</sup> that was offered to him, and said that the chair he was sitting in was hard.<sup>10</sup> He never stated he wanted to remain silent, that he didn’t want to talk to the police, or that he wanted an attorney.

Now comes the dramatic part (cue music). After about 2 hours and 45 minutes, the following dialogue occurred:

Detective Helgert (to Thompkins): Do you believe in God?

Thompkins (looks up, eyes welling with tears): Yes.

Detective Helgert: Do you pray to God?

Thompkins: Yes.

Detective Helgert: Do you pray to God to forgive you for shooting that boy down?

Thompkins (looking away): Yes.<sup>11</sup>

Thompkins refused to make a written confession, and the interview ended about 15 minutes later.

At trial, Thompkins argued that “he invoked his privilege to remain silent by not saying anything for a sufficient period of time, so the interrogation should have ceased before he made his inculpatory statements.” The Supreme Court found this argument “unpersuasive” and ruled that the statement made was admissible, upholding Thompkins conviction and incarceration.<sup>12</sup> Let’s discuss why the Court ruled this way and what it means for us.

***And in the naked light I saw ten thousand people, maybe more. People talking without speaking. People hearing without listening. People writing songs that voices never shared. No one dared disturb the sound of silence.***

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<sup>7</sup> It is unclear from the opinion whether the officers specifically asked Thompkins if he wanted to talk to them. If they had asked him this question, I believe the Court would have mentioned it, so I am assuming that after Thompkins refused to sign the Miranda form the officers simply began their interrogation.

<sup>8</sup> Have no fear – Detective Thesaurus is on the case!

<sup>9</sup> Those of you that aren’t scared to come to my office know that I have a bowl of peppermints that I keep on my desk. These are for public consumption – you do not have to ask my permission to take one. If you want to take one to offer to a suspect that you are interrogating, that’s fine, too.

<sup>10</sup> Hard?! That’s Captain Kirk’s chair, man! Captain Kirk don’t need no stinking cushions!

<sup>11</sup> Cue curtain, play overture, applause, applause, sound of cell door slamming shut, applause, the end.

<sup>12</sup> As an aside, there was nothing wrong with an interrogation that lasted three hours or the questions that dealt with the suspect’s religious beliefs.

First, a brief and basic review of Miranda. Miranda applies to all custodial interrogations. Before a custodial interrogation may take place legally, a suspect has to be given warnings about his rights to remain silent and/or have an attorney present during questioning. For statements to be admissible, the state must show that the suspect understood the rights and waived them voluntarily.

A suspect is in custody for Miranda purposes when he has been formally arrested or when his movement has been restrained to a degree associated with a formal arrest. Interrogation is not just express questioning, but any words or actions by the officer which the officer should know are reasonably likely to elicit an incriminating response from the defendant. That's as simple as I can make it. Custody + Interrogation = Custodial Interrogation.

In deciding that Thompkins' incriminating "yes" was properly admitted, the Supreme Court pointed out that prior case law had always required that a suspect's request to have an attorney present during custodial interrogation be unambiguously made. The Court saw no reason why the assertion of the right to remain silent should be treated any differently. As the Court pointed out, "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'"

Also, the Court ruled that an express waiver of the right to remain silent is not required.<sup>13</sup> Although the detectives never (apparently) asked the suspect if he was willing to answer their questions, the state showed that Miranda warnings were given to Thompkins, that Thompkins understood those rights, and that Thompkins' statement was uncoerced. The Court ruled that these circumstances were enough to show an implied waiver of the right to remain silent.<sup>14</sup>

#### WHAT DOES THIS CASE MEAN?:

1. If Miranda warnings are given and the suspect understands those rights, a subsequent uncoerced statement establishes an implied waiver of those rights.
2. A suspect must unambiguously assert their right to silence . . . I think.<sup>15</sup>

#### WHAT SHOULD I DO?:

Continue doing what you've always done.<sup>16</sup> This case does not represent a big change in our application of the Miranda case and its progeny. When you are getting ready to conduct a custodial interrogation, advise the suspect of his Miranda rights. Use our department's printed rights form when possible. Ask the suspect to sign the rights form stating that he understands his rights and waives his

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<sup>13</sup> Although as you will see below, I would encourage you to seek one.

<sup>14</sup> Interestingly, this ruling was based on a 1979 U.S. Supreme Court ruling in a case dealing with an armed robbery of a gas station in Goldsboro, N.C. The N.C. Supreme Court had ruled that Miranda required a specific oral or written waiver of rights, but the U.S. Supreme Court disagreed and overruled them. The case was North Carolina v. Butler, 441 U.S. 369 (1979). That reminds me of last year's college basketball national championship game between Dook and Butler which was won in stunning fashion when Butler forward Gordon Hayward hit a desperation half-court shot at the buzzer to defeat Dook 62-61. That's how I remember it.

<sup>15</sup> I hold this opinion because of the language the Court uses, but I am qualifying it because this Court did not specifically come out and say this. This case really didn't require an opinion on what might constitute an unambiguous assertion of the right to remain silent, only that actually remaining (almost) silent was not such an assertion.

<sup>16</sup> Unless you have been doing it wrong all this time, in which case – Stop It!

rights.<sup>17</sup> If he understands, waives, and signs, begin your interrogation. Even though the Thompkins ruling means that officers aren't required to obtain an explicit waiver, the best practice is still to get one by either asking the defendant if he waives those rights or if he is willing to answer your questions.

What Thompkins tells us is that if the suspect understands his rights, refuses to sign the waiver, and says nothing about whether he is waiving or asserting his right to remain silent, you may begin your interrogation confident in the knowledge that any uncoerced statements he chooses to make will be admissible later. Remember that if the suspect at any time (even after an initial waiver) asserts his right to remain silent or his right to have an attorney present, your interrogation must stop.

***"Fools," said I, "you do not know silence like a cancer grows. Hear my words that I might teach you. Take my arms that I might reach you."* But my words like silent raindrops fell and echoed in the wells of silence.**

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**ABOUT THE AUTHOR: Brian Beasley is the Legal Advisor for the High Point Police Department. This legal update is provided free of charge to the SR&S Webpage in the hopes that officers across the state would be able to benefit from it. Brian is not an attorney with Smith, Rodgers, & Strickland, PLLC but he thinks they're pretty cool guys.**



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<sup>17</sup> The High Point Police Department Adult Rights Waiver Form states that the suspect’s signature indicates both understanding and waiver of his rights. For those in other departments, your form may be different but you should ensure that the suspect understands the rights and voluntarily waives them.