



U.S. Supreme Court

INVOCATION OF RIGHT TO REMAIN SILENT MUST BE UNAMBIGUOUS

Berghuis v. Thompkins

June 2010



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©2010 Brian S. Batterton, Attorney, Legal & Liability Risk Management Institute, *Berghuis v. Thompkins*, U.S. Supreme Court, decided June 1, 2010.

Under the United States Supreme Court's decision in *Miranda v. Arizona*ⁱ, a suspect has three options when faced with a custodial police interrogation: (1) the suspect can invoke his *right to counsel*, (2) the suspect can invoke his *right to remain silent*, or (3) the suspect can *waive his rights* and speak to the police. In 1994, in *Davis v. United States*ⁱⁱ, the Supreme Court held that if a suspect is going to invoke his *right to counsel*, he must do so "unambiguously." In other words, the suspect must be clear to the police that he does not wish to speak to them without an attorney. In contrast, the Supreme Court has never addressed whether a suspect must be "unambiguous" if he wishes to invoke his *right to silence*. However, on June 1, 2010, the Supreme Court decided *Berghuis v. Thompkins*ⁱⁱⁱ which directly confronted the issue of whether a suspect must be unambiguous if he wishes to invoke his right to remain silent.

The facts of *Thompkins*

Taken directly from the case:

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

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Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the Miranda rule. It stated:

"NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

"1. You have the right to remain silent.

"2. Anything you say can and will be used against you in a court of law.

"3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.

"4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

"5. 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." .

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four Miranda warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain

silent, and that his inculpatory statements were involuntary. The trial court denied the motion.^{iv}
[internal citations omitted]

Thompkins appealed the denial of his motion to suppress to the Michigan Court of Appeals which affirmed the decision of the trial court. The Sixth Circuit Court of Appeals reversed the decision of the Michigan courts and held that the waiver of a person's right to remain silent does not need to be express, but rather, can be inferred from the suspect's actions and words. The United States Supreme Court granted certiorari.

At issue were the admissibility of Thompkins' confession and an ineffective assistance of counsel claim regarding how his attorney handled a particular aspect of his case. This article will only address the admissibility of Thompkins statement.

Regarding the admissibility of his statement, Thompkins raised three arguments. First, he alleges that, by his virtual silence during the interview, he invoked his right to remain silent. Second, he alleges that, even if he did not invoke his right to silence, he did not waive that right. Third, he argues that the police could not question him at all without *first* obtaining a valid waiver of his rights under *Miranda*.

Issue One:

Did Thompkins invoke his right to remain silent?

The crux of this issue, according to Thompkins was that he validly invoked his right to remain silent by not saying anything for a sufficient amount of time; therefore, the police should have ceased the interrogation before he made his inculpatory statements.

To this issue, the Supreme Court looked at how they have previously ruled regarding whether a suspect must clearly or unambiguously waive his right to counsel. The Court noted that in *Davis*, they held

If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.^v

The Court noted two reasons why it would seem logical to follow the same rule for "right to remain silent" issues as they do with "right to counsel" issues. First, they said that it gives the police clear guidance to require that a suspect unambiguously invoke his right to remain silent. This would remove the guesswork for the police. Second, if the police guess wrong, then the statement would be suppressed. Suppression of voluntary confessions would place a significant burden on society's interest in prosecuting criminal activity.

Accordingly, the Supreme Court noted that Thompkins never said that he wanted to remain silent or that he did not want to talk to the police. As such, the Court ruled that Thompkins did not invoke his right to remain silent.

Issue Two:

Did Thompkins waive his right to remain silent?

To this issue, the Supreme Court first noted that, even though Thompkins did not invoke his right to silence, his statement would still be inadmissible unless the government can show that he knowingly and voluntarily waived his *Miranda* rights. Additionally, the Court stated that a valid waiver has two components. First, a valid waiver must be voluntary in that it is not the product of intimidation, coercion or deception. Second, for a waiver to be valid it must be made with a full awareness of the nature of the right that is being waived and the possible consequences of such a waiver.

The Court then noted that some language from *Miranda* may seem to indicate that waivers are difficult to prove without either an express written waiver or a formal, express oral statement. In fact, the court quoted from *Miranda* and stated

a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained...a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.^{vi}

However, the Court also observed that, in 1979, in the Supreme Court case of *North Carolina v. Butler*^{vii}, they clarified the language of *Miranda* with respect to waivers. The Court stated

Butler interpreted the *Miranda* language concerning the "heavy burden" to show waiver in accord with usual principles of determining waiver, which can include waiver implied from all the circumstances. And in a later case, the Court stated that this "heavy burden" is not more than the burden to establish waiver by a preponderance of the evidence...The prosecution therefore does not need to show that a waiver of *Miranda* rights was express. **An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. *Butler* made clear that a waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver."**^{viii} [internal citations omitted] [emphasis added]

Thus, in *Butler*, the Supreme Court seemed to back away from the strict language of *Miranda* that implied that a specific, express waiver be made. Further, in *Butler* the Supreme Court held that

As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection of those rights.^{ix}

The Supreme Court then applied the previously discussed rules to the facts of *Thompkins* case. First, the Court noted that there was no contention that *Thompkins* did not understand his rights. *Thompkins* read and spoke English, he was given time to read his *Miranda* warnings, the detective read him the warnings and *Thompkins* read point number five from the warning out loud to the detective. Based upon this, it was clear that *Thompkins* was aware that he could exercise his rights at any time during the interview.

Second, the Court stated that, when *Thompkins* answered the detective's question about whether he prayed to God for forgiveness for shooting the victim, his answer demonstrated a "course of conduct indicating waiver" of his right to remain silent.^x The Court stated that if *Thompkins* did not want to answer the question, he could have simply remained silent or told the police that he did not wish to speak. Further, the Court said that it did not matter that this inculpatory answer came approximately three hours into the interview. Additionally, the Court noted that *Thompkins* did give sporadic various answers during the course of the interview.

Third, there was no evidence that indicates that *Thompkins* statement was coerced. He did not claim that the police threatened or intimidated him or harmed him in any way during the interview. The Court stated that the three hour interview was not inherently coercive. Further, the *Fifth Amendment* privilege is not invoked by moral or psychological reference, such as those to God.

In light of the above considerations, the Supreme Court held that *Thompkins* knowingly and voluntarily made a statement to police and waived his right to remain silent.

Issue Three:

Could the police question *Thompkins* without first obtaining a waiver?

At the outset, the Supreme Court noted that its decision in *Butler* negates this argument. Specifically, they stated

The *Butler* Court held that courts can infer a waiver of *Miranda* rights from the actions and words of the person interrogated. This principle would be inconsistent with a rule that requires a waiver at the outset.^{xi}

The court further stated that

the requirements of *Miranda* are met if a suspect receives adequate *Miranda* warnings, understands them, and has a opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.^{xii}

Thus, in this case, Thompkins argument that he had to waive his rights prior to making a statement must fail.

Holding

The rule established by this case can be summed up from *Thompkins* as follows:

In order for an accused's statement to be admissible at trial, police must have given the accused a Miranda warning. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of Miranda rights. **In making its ruling on the admissibility of a statement made during custodial questioning, the trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established. Thus, after giving a Miranda warning, police may interrogate a suspect who has neither invoked nor waived his or her Miranda rights.**^{xiii} [internal citations omitted] [emphasis added]

Thus, the Supreme Court held that (1) Thompkins did not invoke his right to remain silent, (2) Thompkins waived his right to remain silent by making a voluntary statement to the police, and (3) the police were not required to obtain a waiver of Thompkins's right to remain silent before interrogating him.^{xiv}

The Bottom Line

- In order for a suspect to properly invoke his right to remain silent he must unambiguously assert this right. This could be accomplished by simply remaining silent or telling the police that he or she wishes to remain silent at the beginning of the interview or at any time during the interview.

- A waiver of *Miranda* rights may be implied through the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.
- As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection of those rights.
- The requirements of *Miranda* are met if a suspect receives adequate *Miranda* warnings, understands them, and has a opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

CITATIONS:

ⁱ 384 U.S. 436 (1966)

ⁱⁱ 512 U.S. 452, 459 (1994)

ⁱⁱⁱ 560 U.S. ____ (2010)

^{iv} *Id.* at 9-12

^v *Id.* at 20 (citing *Davis*, 512 U.S. 459-462)

^{vi} *Id.* at 23 (quoting *Miranda*, 384 U.S. at 475)

^{vii} 441 U.S. 369 (1979)

^{viii} *Thompkins* at 24

^{ix} *Id.* at 26 (citing *Butler*, 441 U.S. 372-376)

^x *Id.* at 28

^{xi} *Id.* at 30

^{xii} *Id.* at 31

^{xiii} *Id.* at 32

^{xiv} *Id.* at 33