LAW OF CONFESSIONS (2014)

Branden B. Miles
Deputy Weber County Attorney
Credit to:
William F. Daines, Former Chief Deputy (Deceased)
Weber County Attorney's Office
Ogden, UT

INTRODUCTION

"The ready ability to obtain uncoerced confessions is not an evil, but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *Montejo v. Louisiana*, 129 S.Ct. 2079, 173 L.Ed.2d 969 (2009).

The law of confessions implicates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and, by light reflected, the Constitution of the State of Utah. It also involves case law, both federal and state. Do not ignore Tenth Circuit Court opinions.

It is important to note at the outset how interaction between state law and federal law is resolved in the event of a conflict:

1. If a state decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds (e.g., a state constitution) the U.S. Supreme Court will not review the decision. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

2. A state supreme court has authority, based on the state's constitution, to impose any additional protections it deems appropriate. *Long*, 463 U.S. at 1041.

    a. It cannot impose fewer protections than required by the U.S. Constitution, however.

3. When a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the U.S. Supreme Court accepts as the most reasonable explanation that the State court decided the case the way it did because it believed that federal law required it to do so. Id. at 141.

DEFENDANT'S STATEMENTS: DUE PROCESS

1. The United States Supreme Court continues to exclude statements which are obtained involuntarily, *Dickerson v. U.S.*, 530 US. 428, 147 L.Ed. 2d, 405, 120 S.Ct. 2326 (2000).

   A. This is true whether or not *Miranda* rights are violated.

   B. This requirement rests on two constitutional provisions: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.

   C. A defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatsoever in a criminal trial. *New Jersey v. Partash*, 59 L.Ed 2d 501 (1979).

2. It is now well-established that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment . . . To assure that the fruits of such techniques are never used to secure a conviction, due process also requires that a jury not hear a confession unless and until the trial judge has determined that it was freely and voluntarily given. *Crane v. Kentucky*, 476 U.S. 683, 687-88, 106 S.Ct. 2142, 90 L.Ed. 2nd 636 (1986).

3. Whether a confession was voluntary depends upon the totality of the circumstances, including the crucial element of police coercion, the length of the interrogation and its continuity, the defendant's maturity, education, physical condition, and mental health, and the failure of the police to advise the defendant of his rights to remain silent and to have counsel present during the custodial interrogation. *Trice v. Ward*, 196 F.3d 1151, 1170 (10th Cir. 1999).

   a. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed. 2d 473 (1986).

4. A confession is involuntary only where evidence shows some physical or psychological force or manipulation that is designated to induce the accused to talk when he or she otherwise would not have done so. *State v. Rettenberger*, 1999 UT 80, P10, 25, 984 P.2d 1009.

5. A finding of involuntariness requires a causal relationship between the coercion and the subsequent confession. Id. at 18. In other words, the evidence must show that the coercive tactics . . . overcome the defendant's free will. *State v. Galli*, 967 P.2d 930, 936 (Utah 1998).

6. The Utah Supreme Court has set forth factors relevant to a consideration of coercion:

   a. the duration of the interrogation;
   b. the persistence of the officers;
   c. policy trickery;
   d. absence of family or counsel;
   e. threats and promises made to the defendant by officers;
   f. defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system. *Rettenberger*, 1999 UT 80, P14-15.

7. A defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is. *Galli*, supra, at 936.

8. The "false friend" police interrogation technique is not sufficiently coercive to produce an involuntary confession, but may be significant in relation to other tactics and factors. *State v. Bunting*, 2002 UT APP 195, P25.

9. The mere representation to a defendant by officers that they will make known to the prosecutor and to the court that he or she cooperated with them . . . or appeals to the defendant that full cooperation would be his best course of action are not coercive. *State v. Strain*, 779 P.2d 21, 225 (Utah 1989).

10. Most courts have found a confession involuntary where there was a threat to pursue a higher charge if the accused did not confess. Id. at 226.

11. When the voluntariness of a confession is challenged, the Fifth and Fourteenth Amendments require the prosecution to demonstrate by a preponderance of the evidence that the statement was made voluntarily. *State v. Allen*, 839 P.2d 291, 300 (Utah 1992).

12. In assessing such a challenge, a trial court must examine the totality of circumstances to determine whether a statement was made freely, voluntarily, and without compulsion or inducement of any sort. *State v. Werner*, 2003 UT APP 268, P209, 76 P .3d 204 (UT A PP 2003).

THE FIFTH AMENDMENT

As it pertains to confessions, the Fifth Amendment guarantees the right to be free from compelled self-incrimination. Long before *Miranda*, the U.S. Supreme Court would overturn convictions in state courts which rested on confessions obviously obtained under compulsion. *Brown v. Mississippi*, 297 U.S. 279, 80 L.Ed 2nd 683 (1935). In 1966, however, the Court squarely confronted relationships between compulsion and custodial interrogation as it pertains to state action. The result revolutionized the law of confessions and spawned a host of confession issues which the Court has continued to attempt to resolve into the present. The case was *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed 2d 694, 86 S.Ct. 1602 (1966).

1. As stated in the *Miranda* decision's brief holding, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona*.

   A. The procedural safeguards are concrete constitutional guidelines for law enforcement agencies and courts to follow. They are now simply known as the *Miranda* warnings:

      a. You have a right to remain silent

      b. Anything you say can be used against you in a court of law

      c. You have a right to the presence of an attorney

      d. If you cannot afford an attorney, one will be appointed for you prior to any questioning if you so desire.

      Dickerson v. U.S., 530 U.S. at 435.

   B. The Court equates in communicado custodial interrogation in a police atmosphere with compulsion in the Fifth Amendment sense.

   C. Failure to give *Miranda* warnings creates a presumption of compulsion and there is an irrefutable presumption that the unwarned statement shall be excluded for purposes of the prosecutor's case-in-chief.

      Oregon v. Elstad, 470 U.S. 298, 84 L.Ed. 2d 222, 105 S.Ct. 1285 (1985).

D. The *Miranda* warnings are not talismanic incantations that must be given in the exact form as described in the decision. The inquiry is whether the warnings reasonably convey to the suspect his rights.

Duckworth v. Egan, 492 U.S. 195, 106 L.Ed 2nd 166, 109 S.Ct. 2875 (1989)

California v. Prysock, 453 U.S. 355, 69 L.Ed 2d 696, 101 S.Ct. 2806 (1981).

a. A translation of a suspect's *Miranda* rights need not be perfect if the defendant understands that he or she need not speak to the police, that any statement made may be used against him or her, that he or she has a right to an attorney, and that an attorney will be appointed if he or she cannot afford one.

U.S. v. Hernandez, 93 F. 3d 1493, 1502 (10th Cir. 1996).

E. The *Miranda* safeguards are required whether a person in custody is subjected to either express questioning or its functional equivalent. In other words, the term "interrogation" under *Miranda* refers not only to express questioning but also any words or actions that the police should know are reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1990).

a. The test of whether an interrogation has occurred is an objective one . . . the focus is on the perceptions of a reasonable person in the suspect's position rather than the intent of the investigating officer.

U.S. v. Rambo, 365 F.3d 906 (10th Cir. 2004).

F. The Fifth Amendment protects an accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. A communication must explicitly or implicitly relate a factual assertion or disclose information. It does not protect a suspect from being compelled by the State to produce real or physical evidence.

Pennsylvania v. Muniz, 496 U.S. 582, 110 L.Ed. 2d 528, 544, 110 S.Ct. 2638 (1980).

a. This does not include routine investigatory or booking questions. Cf. *Rosa v. McCroy*, 396 F.3d 210 (2nd Cir. 2005).

G. The State bears the burden of proving the voluntariness of the confession (even if police adhere to the dictates of *Miranda*).

Lego v. Twoney, 404 U.S. 477, 30 L.Ed. 2d 618, 92 S.Ct. 619 (1972).

2. Interrogation is defined in Utah as either express questioning or its functional equivalent and it incorporates any words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. *State v. Low*, 2008 UT 58, P71, 192 P3d 867; *State v. Gallegos*, 2009 UT 42, 220 P.3d 136.

WHAT IS CUSTODY?

1. Custody is the threshold issue that determines whether *Miranda* warnings must be given prior to interrogation. Custody was defined in the *Miranda* decision to be when a person is taken into custody or deprived of his freedom of action in any significant way.

A. The Court noted in footnote 4 that this is what it meant in *Escobedo* when it spoke of investigation that had "focused on the defendant."

2. This definition has now been refined to whether there was a formal arrest or restraint of freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 133 L.Ed 2d 383, 116 S.Ct. 457 (1995)

California v. Beheler, 463 U.S. 1121, 77 L.Ed 2d 1275, 103 S.Ct 3517 (1983)

Stansbury v. California, 511 U.S. 318, 128 L.Ed. 2d 293, 114 S.Ct. 1526 (1994)

3. Section 77-7-1 U.C.A. defines arrest in Utah as "an actual restraint of the person arrested or submission to custody. The person shall not be subjected to any more restraint than is necessary for his arrest or detention.

4. Section 77-7-6 dictates that in most circumstances, "the person making the arrest shall inform the person being arrested of his intention, cause, and authority to arrest him."

5. *Keohane* propounds a two-prong test to determine whether the definition of Miranda custody has been satisfied.

A. What were the circumstances surrounding the interrogation; and

B. Given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.

6. The Court has made it abundantly clear that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated. " *Stansbury*, supra, 511 U.S. at 323.

   By inserting the "reasonable man test" into the second prong, the Court has made this objective also.

   A. The Utah Supreme Court has established four factors for determining whether an accused who has not been formally arrested is in *Miranda* custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of the interrogation.

   B. *Miranda* warnings are required when a person is under arrest or his freedom of movement is curtailed to a degree associated with a formal arrest. *State v. Mirquet*, 914 P.2d 1144, 1146 (Utah 1996).

      (I) Even if a person is a suspect and accusatory questioning takes place in a police station, the person is not necessarily in [Miranda} custody if there is no arrest or restriction on his freedom of movement and the interrogated person is free to terminate the interview and leave. Id at 1148, citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed. 2d 714 (1977).

7. In the ensuing decisions, note how objective circumstances affect the custody issue.

   A. A person who was the "focus" of an investigation was interviewed by agents in his home. The Court ruled that *Miranda* warnings were not required because this was not an interrogation in a police-dominated atmosphere and that "focus" in the sense that someone is being looked at is not a relevant *Miranda* inquiry. "Focus" for *Miranda* means only questioning initiated by law enforcement officers after a person has been taken into custody or otherwise been deprived of his freedom of action in any significant way, which we now know to be an arrest or the functional equivalent thereof under the *Keohane* prongs.

      Beckwith v. U.S., 425 U.S. 341, 48 L.Ed. 2d 1, 96 S.Ct. 1612 (1976).

   B. Although people subjected to custodial interrogations on less severe cases such as misdemeanors are entitled to warnings, ordinary traffic stops do not require the giving of warnings. They are of known short-term duration and generally out in public for all to see. They are not generally "incommunicado" interrogations in a police-dominated atmosphere. For the same reasons, *Terry* stops do not generally require *Miranda* warnings. Both above situations are true even though

the officer may harbor an uncommunicated subjective intent to arrest the suspect.

Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed. 2d 317, 104 S.Ct. 3138 (1984).

Pennsylvania v. Bruder, 488 U.S. 9, 102 L.Ed. 2d 172, 109 S.Ct 205 (1988).

C. A probationer who was required to appear at the probation department, was required to answer questions truthfully, and was a suspect in a case was found not in custody for *Miranda* purposes. The Court reiterated it's *Beckwith* ruling that focus of investigation on a suspect does not trigger the need for warnings in an otherwise non-custodial (read non-arrest) setting.

Minnesota v. Murphy, 465 U.S. 420, 76 L.Ed. 2d 409, 104 S.Ct. 1136 (1984).

D. A suspect who voluntarily goes to the police station at the request of the police, is interviewed, and is thereafter allowed to leave is not in custody for *Miranda* purposes. Police stations do not automatically render a person in custody.

Oregon v. Mathiason, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977).

California v. Beheler, supra,

E. Conversations in jails and prisons between suspects and undercover agents do not implicate the concerns of *Miranda* because the essential ingredients of a police-dominated atmosphere and compulsion are not present when an incarcerated person speaks freely to someone who he believes to be a fellow inmate . When he considers himself in the presence of criminals and not officers, the coercive atmosphere is lacking.

Illinois v. Perkins, 496 U.S. 292, 110 L.Ed 2d 243, 110 S.Ct. 2394 (1990).

F. A rural road stop may lead to a finding of a more police-dominated atmosphere than an urban street where motorists and pedestrians are prevalent, therefore a finding of custody for *Miranda* purposes. *State v. Mirquet*, 844 P.2d 995 (Utah Ct. App. 1992); *State v. Levin*, 2007 UT App 65, 156 P.3d 178.

G. A person in her own home was found to be in *Miranda* custody when officers abruptly roused her from her bedroom early in the morning after forcibly entering her home to execute a search warrant. She was restrained in handcuffs and placed face down on the floor. *U.S. v Revels*, 510 F.3d 1269 (10th Cir. 2007).

OTHER TENTH CIRCUIT DECISIONS ON CUSTODY

1. Seminal Inquiry. Whether a reasonable person in the defendant's position would have understood his freedom of action to have been restricted to a degree consistent with formal arrest. (Test for second prong of *Keohane*?)

   A. Factors to consider:

      a. Whether the circumstances demonstrated a police-dominated atmosphere;

      b. Whether the nature and length of the officers questioning was accusatory or coercive;

      c. Whether the police made the defendant aware that he was free to refrain from answering questions, or to otherwise end the interview;

      d. Isolation in non-public interview rooms;

      e. Multiple officers; and

      f. Display of weapon or physical contact with the suspect.

      U.S. v. Jones, 523 F.3d 1235 (10th Cir. 2008)

      U.S. v. Lamy, 521 F.3d 1257 (10th Cir. 2008)

2. Caveat on Custody. The "not free to leave" standard beloved of the defense bar and some unsuspecting trial judges, is the test which determines whether a person has been seized under the Fourth Amendment to the U.S. Constitution. *U.S. v. Mendenhall*, 446 U.S. 544, 555, 100 S.Ct 1870, 1877-78, 64 L.Ed. 2d 496 (1980). This standard is broader than the *Miranda* standard. A person may be seized for Fourth Amendment purposes, but not be "in custody" for Fifth Amendment purposes. *Mirquet* (in the Supreme Court), supra at 1147,

WAIVER

Before officers may speak to a suspect after having given *Miranda warnings*, a valid waiver of rights must be taken before proceeding with custodial questioning. Suspect must knowingly, voluntarily and intelligently waive her or his rights.

1. A simple request of a suspect if the rights are understood, answered affirmatively, followed by a question whether the suspect is willing to speak to officers, again answered affirmatively, is adequate for a waiver of *Miranda* rights.

North Carolina v. Butler, 441 U.S. 369, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979).

2. Waiver need only be proven by a preponderance of evidence by the State in a motion to suppress.

   Colorado v. Connelly, 479 U.S. 157, 93 L.Ed. 2d 473, 107 S.Ct. 515 (1986).

3. A suspect's awareness of all possible subjects of questioning in advance of custodial interrogation is not relevant to determining whether the suspect knowingly, voluntarily, and intelligently waived his rights.

   Colorado v. Spring, 479 U.S. 564, 93 L.Ed. 2d 954, 107 S.Ct. 851 (1987).

   A. Some Circuits have ruled that a suspect may waive for some questions and not for others.

4. A heavy burden rests on law enforcement officer's to demonstrate that a defendant knowingly and intelligently waived his *Miranda* rights.

   A. The burden rests on the State to show that a suspect's waiver of rights was clear and unambiguous, as well as voluntary. *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106.

FIFTH AMENDMENT RIGHT TO COUNSEL

1. The *Miranda* right to counsel arises not from the explicit Sixth Amendment right, but from Supreme Court-made jurisprudence relating to the Fifth Amendment guarantee that no person shall be compelled in any criminal case to be a witness against himself, or, more accurately, cannot be compelled to provide the State with evidence of a testimonial or communicative nature.

   A. Like all *Miranda* rights, the right to counsel is constitutional (*Dickerson v. U.S.*, 530 U.S. at 444) though some members of the U.S. Supreme Court continue to refer to these rights as prophylactic. (Cf e.g. *U.S. v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004).

   B. Like all *Miranda* rights, the threshold issue for implementation is *Miranda* custody plus police interrogation specific.

2. The U.S. Supreme Court has created "three layers of prophylaxis" to vouchsafe to a suspect the right not to speak to police without counsel present when he is in *Miranda* custody. This they term the Miranda-Edwards-Minnick line of cases. *Montejo v.*

Louisiana, 129 S.Ct. 2079, 173 L.Ed. 2d 955,968 (2009). Arguably, there is a fourth layer in this line – *Roberson v. Arizona*, infra.

A. Once a suspect invokes the Fifth Amendment right to counsel during custodial interrogation, a valid waiver of that right cannot be established by showing that he responded to further police-initiated custodial interrogation even if readvised of rights prior to the second interrogation.

(I) Further, such accused shall not be subject to further interrogation by police until counsel has been made available to him. This is the so-called second layer of prophylaxis to the *Miranda* right to counsel.

(ii) The exception is if the accused initiates further communication with police and thereafter waives his right to counsel after proper admonition.

Edwards v. Arizona, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880 (1981).

B. The "until counsel has been made available to him" provision of *Edwards v. Arizona* means that if the accused requests counsel, interrogation must cease and police may not reinitiate interrogation within the same period of custody without counsel present, regardless of whether the accused has consulted counsel in the interim.

Minnick v. Mississippi, 498 U.S. 146, 112 L.Ed 2d 489, 111 S.Ct. 486 (1990).

C. Once a suspect has invoked his Fifth Amendment right to counsel, he cannot thereafter be interrogated during the same period of custody on unrelated crimes without counsel present. Subsequent interrogators are not excused because they are unaware of the previous invocation or because the suspect himself waived a fresh set of warnings without mentioning the previous invocation. Good faith does not apply. A resultant confession should be suppressed.

(i) If the suspect initiates the communication with subsequent interrogators and waives his rights after proper warnings, the interrogation may proceed.

Arizona v. Roberson, 486 U.S. 675, 100 L.Ed 2d 704, 108 S.Ct. 2093 (1988).

D. A suspect cannot anticipatorily invoke his right to counsel. The invocation must occur when presented with custodial interrogation to be effective.
State v. Perea, 2013 UT 68.

3. The U.S. Supreme court has decided what constitutes a break in *Miranda* custody for purposes of re-interrogation of suspects who have asserted their right to counsel within the four layers of prophylaxis:

   A. For suspects released into the general population, the court concluded that 14 days is the appropriate period, which provides ample time for the suspect to get re-acclimated to his normal life, consult with friends and counsel, and shake off any residual effects of the prior custody.

   B. For suspects who are serving time in prison, release back into the general prison population constitutes a break in Miranda custody. Lawful imprisonment imposed upon conviction does not create the coercive pressures produced by investigative custody that justifies *Edwards*. When previously incarcerated suspects are released back into the general prison population, they return to their accustomed surroundings and daily routine – they regain the degree of control they had over their lives before the attempted interrogation.

      (i) Officers must still wait 14 days between attempts at interrogation to create a break in Miranda custody. *Maryland v. Shatzer*, 130 S.Ct. 1213, 1215; 175 L.Ed. 2d 1045 (2010).

4. In a pre-Shatzer decision, the Utah Court of Appeals held that in speaking to a person already in a prison facility, the courts must look for a change in the surroundings of a prisoner which results in an added imposition on his freedom of movement or some act which places further limitations on the prisoner to determine if he is being subjected to custodial interrogation, since *Miranda* was not intended to hamper prison administration. It propounded the following considerations, to be viewed from the perspective of a reasonable prisoner:

   A. the language used to summon the inmate;

   B. the physical surroundings of the interrogation;

   C. the extent to which the inmate is confronted with evidence of his guilt;

   D. any additional pressure exerted to detain the inmate.

   State v. Swink, 2000 UT App 262, P 11 (2000).

5. The Fifth Amendment right to counsel is the suspect's to assert. Failure to inform an in-custody suspect of a lawyer's attempts to reach him or to assert rights on his behalf are not violative of the right to counsel unless the Sixth Amendment right has attached and has been invoked.

Moran v. Burbine, 475 U.S. 412, 89 L.Ed. 2nd 410, 106 S.Ct. 1135 (1986).

6. Like all *Miranda* rights, the invocation of the right to counsel is not case specific, but is governed by the duration of the relevant Miranda custody.

7. A suspect must invoke the right to counsel unambiguously. 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 to ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.

   Davis v. United States, 512 U.S. 452, 459 (1994).

RIGHT TO SILENCE

The *Miranda* right to silence has been dealt with less rigorously than the right to counsel. Some say it is because a suspect inferentially says to police when he asserts this right that he can deal with them on his own and doesn't require the assistance of counsel, though this reasoning obviously has frailties.

1. When officers interrogate an in-custody suspect and he invokes the right to silence, officers must scrupulously honor this request and cease interrogations. If after a significant time lapse, but during the same period of custody, the suspect is given a fresh set of warnings and waives, he may be interrogated on an unrelated crime. The time period in *Mosley*, was over two hours.

   Michigan v. Mosley, 423 U.S. 96, 46 L.Ed. 2nd 313, 96 S.Ct. 321 (1975).

2. This rule has been more succinctly arranged into a four-part rule which states that if a suspect invokes his right to remain silent, interrogation must cease, and officers may reinitiate questioning only if:

   A. Questioning ceased immediately after silence was invoked;

   B. A substantial interval passed before the second interrogation;

   C. The defendant was given a fresh set of *Miranda* warnings; and

   D. The subject crime of the second interrogation was unrelated to the first.

   U.S. V. Glover, 104 f.3d 1370 (10th Cir. 1997).

3. The invocation of the right to silence must be unequivocal to be effective. In ruling this way, the Court analogized this right to the proper invocation of the right to counsel found in the preceding section and, after noting that the Court had not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, ruled that there is no principled reason to adopt different standards for determining when an accused has invoked his *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*, supra.

   A. Silence after *Miranda* is not an invocation of the right to silence.

   B. Silence after *Miranda* warnings followed by an uncoerced statement is an implicit waiver of the right to remain silent if the State can show the defendant understood his or her rights.

      Berghuis v Thompkins, 2010 U.S. Lexis 4379 (2010).

4. The use for impeachment purposes of a suspect's silence at the time of arrest and after receiving *Miranda* warnings to impeach an explanation subsequently offered at trial by the suspect violates the Due Process Clause of the Fourteenth Amendment.

   Doyle v. Ohio, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976).

5. Use of pre-arrest silence to impeach a criminal defendant's credibility does not offend the Fifth Amendment.

   A. Pre-Miranda silence also seems inoffensive to the Fifth Amendment, even if the defendant is under arrest.

      Jenkins v. Anderson, 447 U.S. 231, 238, 65 L.Ed. 2d 86, 100 S.Ct. 2124 (1980).

   B. The State cannot use a defendant's post-*Miranda* silence to impeach a defendant at trial, nor as substantive evidence of guilt, see *State v. Byrd*, 937 P.2d 532 (Utah Ct. App. 1997). However, these prohibitions do not mean that all references to defendant's post-*Miranda* silence are unconstitutional. The mere mention that the defendant invoked his constitutional rights does not prima facie establish a due process violation. *State v. Harmon*, 956 P.2d 262, 268 (Utah 1998); as quoted in *State v. Valdez*, 2008 UT App 448.

   C. However, the government may comment on the failure of an accused to answer a specific accusatory question during a voluntary interview with the police. The prosecutor may argue at trial the failure to answer in this circumstance is evidence of guilt. A plurality reasoned that a person must invoke the privilege to get its protection. Two others (Scalia and Thomas) stated that Griffin v. California (1965) was wrongly decided and that prosecutors are entitled to comment on a

defendant's exercise of their Fifth Amendment privilege.

Salinas v. Texas, 133 S.Ct. 2174 (2013).

EXCEPTIONS TO MIRANDA REQUIREMENTS

1. A suspect's answers to questions posed by police after arrest or the functional equivalent thereof, but prior to *Miranda* warnings being given are admissible in the State's case in chief, as long as the questions asked were reasonably prompted by police concern for public safety.

   New York v. Quarles, 467 U.S. 649, 81 L.Ed. 2d 550, 104 S.Ct. 2626 (1984).

2. A suspect who has once responded to unwarned yet uncoercive questioning is not disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings used to be an exception.

   Oregon v. Elstad, 470 U.S. 298, 84 L.Ed 2d 222, 105 S.Ct. 1285 (1985).

3. The Court unfortunately had to revisit *Elstad* after it learned that unscrupulous police and prosecutor "strategists dedicated to draining the substance out of *Miranda*" have initiated the tactic of question first as a way around *Miranda*. *Elstad* has now essentially been eviscerated absent a preternatural showing of inadvertence by the police officer.

   Missouri v. Seibert, 542 U.S. 600, 159 L.Ed. 2d 643, 124 S.Ct. 2601 (2004).

4. In a case considering the *Miranda*-in-the-middle or question first issue, the court, applying the *Seibert* plurality's five-factor test, found that the record provided strong support for the view that the *Miranda*-in-the-middle warnings functioned effectively for the second statement. Applying the *Seibert* concurrence's intent-based test, it found the record did not appear to reflect any indicia of deliberate action by the officers in violating defendant's *Miranda* rights. Finally, applying the *Elstad* test, defendant's pre-*Miranda* statements appeared to be voluntary, and thus, the subsequent administration of the *Miranda* warnings made his post-*Miranda* statements admissible as long as he voluntarily waived his *Miranda* rights, which he did.

   United States of America v. Crisp, 2010 U.S. Appl. LEXIS 7077 (10th Cir. 2010), to be cited for persuasive value only.

5. Unwarned, yet uncoerced, statements from in-custody defendants may not be used in the State's case-in-chief, but may be used to impeach the defendant. To reiterate, this would not be true if the statement were excluded under the Due Process Clause because of compulsion.

Harris v. New York, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971).

6. The government may use "evidence from a court-ordered mental evaluation of a criminal defendant to rebut the defendant's presentation of expert testimony in support of a defense of voluntary intoxication."

Kansas v. Cheever, 134 S.Ct 596 (2013).

CONFESSIONS AND THE FOURTH AMENDMENT

1. The general rule is that testimonial evidence obtained as a result of an illegal search or seizure is inadmissible unless there is sufficient attenuation to purge the primary taint.

2. A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. If *Miranda* warnings are viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere form of words.

Taylor v. Alabama, 457 U.S. 687, 690, 73 L.Ed. 2d 314, 102 S.Ct. 2664 (1982).

3. Where police have probable cause to arrest a suspect, the exclusionary rule of the Fourth Amendment does not bar the State's use of a statement made by the defendant outside his home, even though the statement is taken after an arrest made in the home in violation of *Payton v. New York*, partially because of the fact that the statement was not the fruit of having been arrested in the home.

New York v. Harris, 495 U.S. 14, 20-21, 109 L.Ed. 2d 13, 110 S.Ct. 1640 (1990).

FIFTH AMENDMENT FRUIT OF POISONOUS TREE?

1. The defendant, having been given an incomplete set of *Miranda* warnings, revealed the whereabouts of a pistol during custodial interrogation in a voluntary statement. The pistol led to a firearm violation conviction. The Court in a plurality decision found that the *Miranda* rule protected against violations of the Fifth Amendment's prohibition against being compelled to give testimonial evidence, and was not implicated by the introduction at trial of physical evidence resulting from a voluntary statement.

U.S. v. Patane, 542 U.S. 630, 124 S.Ct. 2620, 159 Led.2d 667 (2004).

TRANSFORMATION ARGUMENT

Courts vary when confronted with the legal effect of a defendant who is given *Miranda* warnings during a non-custodial interrogation. Three basic concepts have emerged.

1. A suspect is not afforded any rights, since the giving of the warnings was unnecessary and superfluous.

2. The giving of *Miranda* warnings transforms a non-custodial interview into a custodial interview.

3. The trial court is permitted to consider the giving of the rights as one factor to determine if the statement is voluntary.

   U.S. v. Harris, 221 F.3d 1048 (8th Cir 2000).

THE SIXTH AMENDMENT

The Sixth Amendment, which specifically delineates a right to counsel, has implications in confession law which are often far different from those of the Fifth Amendment. The prosecutor must be able to distinguish the differences, particularly when advising police.

1. The Sixth Amendment right to counsel is offense specific, contrary to the Fifth Amendment.

2. Custody is not relevant to a determination of when the Sixth Amendment right to counsel attaches.

3. An accused is denied basic protections of the Sixth Amendment when there is used against him at trial evidence of his words which agents deliberately elicited from him by listening to conversations set-up by agents with a co-conspirator, post-indictment, after the accused had hired a lawyer and after he had been released from custody.

   Massiah v. United States, 377 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199 (1964).

4. The right to counsel granted by the Sixth Amendment attaches at or after the time that adversary judicial proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

   Kirby v. Illinois, 406 U.S. 682, 32 L.Ed. 411, 92 S.Ct. 1877 (1972).

5. The Court re-visited the Sixth Amendment prophylactic decision of *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed. 2d 631 (1986) in 2009 and specifically overruled it in *Montejo*,

below. *Jackson* has been a bright line decision which held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."

6. The precise holding of *Montejo* was to overrule *Jackson* by name, then remand the State of Louisiana to determine if the defendant's Fifth Amendment rights under the *Miranda-Edwards-Minnick* line of cases, which were left intact, were violated. However, pending refinement by other decisions, *Montejo* may presently stand for the following, from a head note to the decision:

> Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings. Interrogation by the State is such a stage. The Sixth Amendment right to counsel may be waived by the defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not be itself counseled. And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that is typically sufficient, even though the *Miranda* rights purportedly have their source in the Fifth Amendment. As a general matter, an accused who is admonished with the *Miranda* warnings has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.

7. Ostensibly, this means that police or investigators advised by prosecutors may now approach a charged defendant known to be represented by counsel and ask the defendant to speak to them about the facts involved in the charged offense.

Or can they? The answer to this question implicates not only *Montejo*, but the ethical issues propounded by Rule 4.2 of the Utah Rules of Professional Conduct entitled Communication with Persons Represented by Counsel.

Rule 4.2

The general rule under Rule 4.2 reads as follows:

> (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

Exceptions exist within the body of the general rule, as follows:

> Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule, or court order, or as authorized by paragraphs (b), (c), (d) or (e).

Subsection (c) concerns a government lawyer engaged in civil or criminal practice, such as a prosecutor. These more specific rules read as follows:

> A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:
>
> > (c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing unlawful conduct; or
> >
> > (c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or
> >
> > (c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or
> >
> > (c)(4) the communications is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

Subsection (e) limits the types of communications a lawyer may make with a represented person and must be followed even if one of the exceptions above applies:

> When communicating with a represented person pursuant to this rule, no lawyer may (e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person's counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

The comment to Rule 4.2 clarifies in some respects the meaning of the rule and should be read, especially because, as can be seen, Rule 4.2 is not tied directly to the precepts of Fifth and Sixth Amendment rights to counsel law. Some highlights ensue.

A. A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession.

   Note: constitutional authority would surely include all U.S. Supreme Court decisions pertaining to counsel. Hopefully *Moran v. Burbine*, 475 U.S. 412 (1986) would apply to all contacts with suspects.

B. The exemptions for government lawyers contained in paragraph (c) of this Rule recognize the unique responsibilities of government lawyers to enforce public law. This pertains specifically to prosecutors, not to government civil lawyers.

C. Under the rubric of "any ongoing unlawful conduct" under (c)(1) of the rule, undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel, is permitted.

D. A government attorney may communicate directly with a represented defendant at the time of arrest, provided that the represented person has been fully apprised of his or her constitutional rights.

   a. The comment states that a government lawyer would have a significant burden to establish that the waiver of the right to counsel was knowing and voluntary.

   b. If constitutional authority is followed the standard should be a preponderance of evidence.

   c. Suggests a written or recorded waiver.

E. Nothing in this Rule prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person.

a. The actions of the officers will not be imputed to the government lawyer unless the conversation has been scripted by the government lawyer.

F. In the reported annotations after Rule 4.2 is the following excerpt from Utah Ethics Advisory Op. No. 95-05 (Utah State Bar):

> A prosecutor would violate the Utah rules of Professional Conduct if he made an ex parte contact, or caused another to make an ex parte contact, with a person the prosecutor knew was represented by counsel in the matter being investigated unless the prosecutor obtained the consent of that person's lawyer.

a. This is an older opinion. Presumably this would only apply absent the exceptions found in (a) and (c), together with the clarifications found in the Comment and constitutional authority to the contrary.

HOW *MONTEJO* APPLIES TO ITS PRECEDENTS

A. After 23 years of being the primary prophylactic decision in the area of Sixth amendment right to counsel, *Michigan v. Jackson* was overruled by name by *Montejo*.

B. *Montejo* held that police may approach a defendant who is represented by counsel and request to speak to him. The defendant may waive his Sixth Amendment right to counsel if he does so voluntarily, knowingly and intelligently.

a. The decision to waive need not itself be counseled.

C. The defendant may waive his right to counsel by being read *Miranda* warnings and waiving them. This is adequate to have been apprised of the right to counsel.

D. The *Miranda*-*Edwards*-*Minnick* cases were found to be sufficient layers of prophylaxis – *Jackson* was superfluous. A person is capable of making the decision to speak to police after *Miranda*.

MONTEJO/RULE 4.2

A. *Montejo* proposed in his argument that the Supreme Court adopt the bright-line rule that no represented defendant can ever be approached by the State and asked to consent to interrogation. The Court respectfully declined, and in doing so, made the ensuing observation:

> Montejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. The American Bar Association's Model Rules of Professional Conduct (which nearly

all states have adopted into law in whole or in part) mandate that "a lawyer shall not communicate about the subject of [a] representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Model Rule 4.2 (2008). But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers. Montejo's proposed rule is both broader and narrower than the Model Rule. Broader because Montejo would apply it to all agents of the State, including detectives who interrogated him, while the ethical rule governs only lawyers. And narrower, because he agrees that if a defendant initiates contact with the police, they may talk freely - whereas a lawyer could be sanctioned for interviewing a represented party even if that party "initiates" the communication and consents to the interview.

B. The Comment to Rule 402 in Utah claims to "deviate substantially from ABA Model Rule 4.2 by the addition of paragraphs (b), (c), (d) and (e)."

a. A prosecutor can certainly communicate with a person known to be represented by counsel under the provisions of (c)(3) and (c)(4) without violating the ethical rule.

b. Both the Comment to Rule 4.2 and the commentary in *Montejo* on Rule 4.2 indicate that a person acting under a lawyers direction is not bound by Rule 4.2

i. A prosecutor's investigator is not a lawyer and should not be bound by Rule 4.2.

c. Subsection (c)(4) is similar to the *Edwards*-*Jackson* exception. Since *Jackson* was overruled, an argument can be made that *Montejo*, being constitutional authority, trumps (c)(4), both for defendants out of custody who are known to be represented by counsel and for in-custody defendants who have not asserted their post-*Miranda* rights to counsel, even though they might be represented by counsel.

i. Prosecutors should be able to speak to represented defendants without permission of defense counsel, both at the time of arrest (whatever temporal period that might be) and thereafter upon waiver of *Miranda* warnings.

d. *Miranda*-*Edwards*-*Minnick* is still the law after *Montejo* and must still be followed precisely.

e. All exceptions to Rule 4.2 found within the rule and all constitutional authority which is contrary should still be tempered by Rule 4.2(e), Limitations on Communications.

8. The Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent (who is not known by the accused to be a state agent).

Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed 2d 481 (1985).

9. Contrasted to *Perkins v. Illinois*, supra, the only method agents can use with a suspect incarcerated after attachment and assertion of the Sixth Amendment right to counsel is the use of a silent or benign informant where an undisclosed government informant cell mate listens to the accused's incriminating statements post-arraignment, but does not question him. *Kuhlman v. Wilson*, 477 U.S. 436, 91 L.Ed. 2d 364, 106 S.Ct. 2616 (1986).

a. Even engaging an accused in conversation might be a violation of the Sixth Amendment *United States v. Henry*, 447 U.S. 264, 65 L.Ed 2d 115, 100 S. Ct. 2183 (1980).

10. For the fruits of post indictment interrogations to be admissible in a prosecution's case-in-chief, the state must prove a voluntary, knowing and intelligent relinquishment of the Sixth Amendment right to counsel . . . We have recently held that when a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda*, . . . that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of post indictment questioning.

Michigan v. Harvey, 494, U.S. 344, 108 L.Ed2d 293, 110 S.Ct. 1176 (1990).

11. A defendant who undergoes post indictment questioning may waive his right to counsel after *Miranda* warnings. The right waived is his Sixth Amendment right to counsel. Police are not barred from initiating a post indictment interrogation with an accused who has not sought to exercise the Sixth Amendment right to counsel.

Patterson v. Illinois, 487 U.S. 285, 101 L.Ed. 2d 261, 108 S.Ct. 2389 (1988).

12. The Sixth Amendment right to counsel is offense-specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced by way of formal charge, preliminary hearing, indictment, information or arraignment. A defendant may not claim that the use of counsel on one offense-specific case for which he

has been charged is also an invocation of the non offense-specific *Miranda-Edwards* Fifth Amendment rights after he was approached and confessed to unrelated charges during the same period of custody.

McNeil v. Wisconsin, 115 L.Ed. 2d 158 (1991)