Putting the "Right to Remain Silent" Back on Its Feet

Here's a question: who must demonstrate that a defendant did or did not invoke his right to remain silent, the defendant or the police? For decades, the answer was the police. On January 13, 2012, the Supreme Judicial Court of Massachusetts ("SJC"), re-established that norm of police interrogations. So, what happened? Why did the SJC need to re-establish this norm with a ruling? The answer is *Berghuis*.

In 2010, the Supreme Court of the United States ("SCOTUS") decided *Berghuis v. Thompkins*. The question in *Berghuis* was when does a defendant invoke his right to remain silent during an interrogation if he does not specifically invoke the right? Before we can delve into *Berghuis,* a little history must be discussed. Most people understand that the right to remain silent is known as the *Miranda* warning, which is given a defendant around the time he is arrested. The right is derived from the Fifth Amendment to the U.S. Constitution, the right against self-incrimination, which was clarified in *Miranda v. Arizona.* SCOTUS in *Miranda* was concerned about coercive interrogation techniques conducted by the police. Thus, SCOTUS required a warning be given and that the state bear the burden of proving that the right to remain silent was waived, before the defendant's statements could be used against him. During the intervening years, many cases have come forward trying to nail down when, how and if a defendant has waived his right to remain silent. *Berghuis* was another in that series, with a different set of facts.

In January of 2010, Van Chester Thompkins was interrogated as the suspect in a murder. Thompkins was interrogated for three hours. During that time, Thompkins did not directly answer any questions. In fact, he was almost completely silent for that time. He did not state a wish to remain silent, or talk to an attorney or even a wish to stop the interrogation. After the three hours, the police changed tactics. The police asked Thompkins if he was spiritual. The police then asked Thompkins if he prayed to God. The police then asked Thompkins if he would pray to God for forgiveness because he killed a man. Thompkins' answer to these questions was "yes." These answers were used at Thompkins trial, where he was convicted. Upon appeal to SCOTUS, the Court held that the right to remain silent will be waived unless the suspect states he is invoking the right. Too many, this ruling turned *Miranda* on its ear by placing the burden upon the defendant to demonstrate that he invoked his right. Justice Sotomayor stated in her dissent that this case is "a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation." This creates an interesting situation where a suspect must state "I wish to invoke my right to remain silent" in order to remain silent. In steps *Commonwealth v. Clarke.*

In *Clarke,* there is no lengthy interrogation. The facts in *Clarke* are much simpler. Before the interrogation began, the police asked Clarke if he wanted to speak. Clarke responded by shaking his head. The police interrogated him anyways, and used his statements against him at trial. The SJC held that there does not need to be a clear invocation of the right to remain silent, under Article 12 of the Massachusetts Constitution. The SJC stated that Article 12 of the Massachusetts Constitution provided greater protection than the Fifth Amendment of the U.S. Constitution. Thus, Massachusetts was not required to follow the ruling of *Berghuis.* The SJC also stated that in cases where there is ambiguity as to whether or not the suspect has invoked a right, "there can be no dispute that it is good police practice for them to stop questioning on any other subject and ask the suspect to make his choice clear." Therefore, the burden is once again placed upon the police to

demonstrate that there was a clear waiver of the right to remain silent before a suspect's statements can be used at trial. Well, at least in Massachusetts.