INITIATION-OF-CONTACT RULES UNDER THE FIFTH AMENDMENT

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ADDENDA

Bullet points: Miranda Initiation Restrictions (one page)

Miranda Initiation-of-contact Flowchart (one page)

INITIATION-OF-CONTACT RULES UNDER THE FIFTH AMENDMENT

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I. INTRODUCTION

The following article updates an article of the same title that first appeared in the April 1993 Law Enforcement Digest. We update this article annually. There have been no significant changes in the relevant case law in the past several years. The updated article may be accessed on the Internet by going to the Washington State Criminal Justice Training Commission's Law Enforcement Digest page at [https://www.cjtc.wa.gov/resources/law-enforcement-digest].

Readers should note that, unlike the subject area of search and seizure, where the Washington appellate courts have determined that the Washington constitution is more restrictive on law enforcement officers in a number of respects, the Washington appellate courts to date have interpreted the Washington constitution as not imposing greater restrictions on the Sixth Amendment and Fifth Amendment protections implicated in the initiation-of-contact cases. Tacoma v. Heater, 67 Wn.2d 733 (1966) (Sixth Amendment); State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) Aug. 97 LED:21 (Sixth Amendment); State v. Earls, 116 Wn.2d 364 (1991) (Fifth and Sixth Amendments); State v. Radcliffe, 164 Wn.2d 900 (2008) Dec. 08 LED:18 (Fifth Amendment); State v. Unga, 165 Wn.2d 95 (2008) March 09 LED:15 (Fifth Amendment).

As always, we caution our law enforcement readers to consult their legal advisors or prosecutors for legal advice. However, prosecutor advice on the Sixth Amendment issue addressed in Section II can be particularly difficult to formulate because prosecutors are subject to a general ethical obligation to not make direct or indirect ex parte contacts with parties who are represented by legal counsel in pending cases.

Note: This article focuses on appellate court decisions relating to relatively narrow areas of the law of interrogations. Readers should also be aware of the requirements of two

enactments from the 2021 Washington Legislature unrelated to those areas of interrogations law. Thus, the 2021 enactments do not address initiation-of-contact issues but will generally impact interrogations in many circumstances. First, RCW 13.40.170 generally requires, with a few exceptions, that juveniles be provided access to an attorney prior to any custodial interrogation, as well as in certain other circumstances. Second, Chapter 10.122 RCW codifies the Uniform Electronic Recordation of Custodial Interrogations Act, which requires, with some exceptions, recording of custodial interrogations by Washington law enforcement officers (A) of juveniles regarding suspected misdemeanors or felonies, and (B) of adults regarding suspected felonies. The 2021 legislation and essentially all other areas of confessions law are addressed in detail in the comprehensive 2025 *WAPA Custodial Interrogations Manual* that is accessible on the WAPA website at <https://waprosecutors.org/manuals/> My article provides a bit further discussion of the 2025 WAPA Manual below at pages 20-21.

II. THERE IS NO SIXTH AMENDMENT INITIATION-OF-CONTACT BAR

On May 26, 2009, the United States Supreme Court decided Montejo v. Louisiana, 129 S. Ct. 2079 (2009) July 09 LED:15, overruling the Supreme Court's decision in Michigan v. Jackson, 475 U.S. 625 (1986). The 1986 decision in Michigan v. Jackson had created a prophylactic rule barring law enforcement officers from initiating contact with a charged defendant as to the charged matter after the defendant had accepted counsel or had asserted the right to counsel at an arraignment or similar post-charge court proceeding. We have accordingly revised this initiation-of-contact article by deleting several pages of discussion of Michigan v. Jackson and of the cases interpreting it in a variety of circumstances.

The majority opinion in Montejo points out that the Fifth Amendment right-to-counsel, initiation-of-contact rule discussed below in this article provides broad protection for suspects who wish to assert their right to counsel per Miranda v. Arizona, 384 U.S. 436 (1966). Under the latter rule, when a suspect who is in custody asserts the right to counsel, officers must cease the interrogation, and no officer may initiate contact with the suspect while that suspect remains in continuous custody on any crime previously committed by the suspect, even after the suspect has consulted an attorney. See discussion in subsection III.C of this article below. Also, basic Sixth Amendment right-to-counsel protection is not changed under the Montejo decision. Generally, under the Sixth Amendment, once a suspect has been charged with a crime, in order for officers to lawfully talk to the suspect about the charged matter (note that this right to counsel is offense-specific), regardless of whether the person is in custody, officers must first give the person Miranda warnings and obtain a waiver. Patterson v. Illinois, 487 U.S. 285 (1988) (Miranda warnings suffice for obtaining Sixth Amendment waiver); Fellers v. U.S., 124 S. Ct. 1019 (2004) March 04 LED:05 (before questioning a charged defendant in his kitchen, officers were required to obtain a Miranda waiver even though the suspect was not in custody for Miranda purposes).

These protections are sufficient, the majority in Montejo concludes. It is not necessary to also have a Sixth Amendment initiation-of-contact bar.

The Montejo majority opinion also explains that the Sixth Amendment has never been guided by the rules of professional conduct that govern all lawyers, including prosecutors, in order to protect the attorney-client relationship. Under professional conduct rules, lawyers handling a case generally are subject to professional sanctions if they or their agents

communicate with the other party outside of court proceedings without the consent of the lawyer representing that other party.

Thus, Washington State has a rule of professional conduct (RPC 4.2) that generally bars a lawyer, including even a prosecutor in a criminal case, from being involved, by direct contact or indirectly but knowingly through an agent (such as a law enforcement officer), in communications with a represented and charged party in a pending case without the consent of the party's lawyer. Law enforcement officers, of course, are not subject to RPC 4.2 if they are not lawyers representing a client in a case. But law enforcement officers should be aware that the prosecutor's office cannot be a participant, even indirectly, in such contact. Therefore, if (1) an officer plans to talk to a charged and represented defendant about the charged matter without first obtaining consent from the defense attorney, and (2) the officer informs the prosecutor's office regarding the plan, the officer should expect that the prosecutor's office will discourage the officer from making the contact.

Whether a prosecutor's involvement in such a contact will require suppression of the defendant's statements during the contact is not clear under Washington law. In a decision issued over 40 years ago, the Washington Supreme Court ruled under a predecessor version of RPC 4.2 that such a violation of the rules of professional contact does not require suppression. State v. Nicholson, 77 Wn.2d 415 (1969). It is possible that the Washington Supreme Court would not rule the same if it were to look at the issue again. The courts in other jurisdictions are split on this suppression question.

III. FIFTH AMENDMENT INITIATION OF CONTACT RULE

A. TWO RULES: RIGHT TO SILENCE AND RIGHT TO COUNSEL

The Miranda opinion declares very clearly that where suspects assert their Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. The initiation-of-contact cases deal with the issue of whether police may later resume interrogation with a suspect who has asserted one of these rights during custodial interrogation and has since remained in continuous custody. (Note, as we will discuss in detail below, that the initiation-of-contact rule is not triggered (1) where the rights are asserted in non-custodial questioning, nor (2) where custodial contact is made after the person has been released from custody for 14 days). There are two lines of cases regarding the initiation of further interrogation after suspects have stopped custodial questioning by asserting their rights.

In Michigan v. Mosley, 423 U.S. 96 (1975) the U.S. Supreme Court held that in some circumstances it is permissible for police to initiate further contact with a suspect who has remained in continuous custody after asserting the right to silence. On the other hand, in Edwards v. Arizona, 451 U.S. 477 (1981) May-Aug. 81 LED:04, the U.S. Supreme Court created a "bright line" rule prohibiting police from initiating contact with a suspect who hsd remained in continuous custody after stopping questioning by asserting the right to an attorney.

B. *MICHIGAN v. MOSLEY* -- ASSERTION OF RIGHT TO SILENCE

1. *Michigan v. Mosley* Decision

In Michigan v. Mosley, the U.S. Supreme Court ruled that police did not violate an incarcerated arrestee's Fifth Amendment rights where, two hours after the arrestee had terminated an interrogation with one officer by asserting his right to silence on one crime, a second officer approached him and obtained a waiver of rights on an unrelated crime. The court held that the statements made on the unrelated crime were admissible because: (1) Miranda warnings were carefully given on each contact, (2) the first officer immediately ceased questioning when Mosley asked him to do so, (3) there was a significant time lapse between the two contacts, and (4) the second contact concerned an unrelated crime.

Some questions remain today regarding the duration of the Mosley restriction on re-contact of continuous-custody suspects who have asserted the right to silence. As we point out below in subsection III.C of this article, some aspects of the restrictions on initiating contact with a continuous-custody suspect are more restrictive where the suspect has asserted the **right to counsel**, as opposed to when the suspect has asserted only the **right to remain silent**. Thus, as discussed below in subsection III.C, an assertion of the right to counsel during custodial interrogation places a long-term bar on police initiation of contact with the continuous-custody suspect: **(i) on all previously committed crimes (related or unrelated); and (ii) by all officers (whether or not officers making subsequent contacts know or should know of the assertion of counsel rights).** On the other hand, Mosley holds, as noted above, that, so long as rights are otherwise carefully respected, a second set of officers may go back after a reasonable passage of time to re-contact the continuous-custody suspect where the contact is on an unrelated crime. There is not a great deal of Mosley-related case law on re-contacting the continuous-custody suspect who has asserted the right to silence, but what there is supports a flexible reading of the case to allow re-contact in some additional situations beyond its facts.

Thus, in U.S. v. Hsu, 852 F.2d 407 (9th Cir. 1988), the Federal Court held the following scenario to be lawful: in-custody drug suspect tells DEA agent #1 following Miranda warnings that he does not want to talk; thirty minutes later, DEA agent #2, not knowing of the continuous-custody suspect's earlier assertion of the right to silence to the other agent, contacts the suspect, Mirandizes him, and gets a confession. And in People v. Warner, 250 Cal. Rptr. 462, 203 Cal. App. 3d 1122 (1988), the initiation of contact found acceptable by the court was a similar re-contact on the same crime by an unknowing second officer, except that the time between contacts was several hours. If the Hsu or Warner defendants had initially asserted the right to counsel to the first officer, the re-contacts would have been unlawful, despite the subsequent officers' ignorance of the assertion. Mosley thus does not impose the same absolute, encompassing bar when the right initially asserted is that of silence, rather than the assertion of the right to counsel. Hsu and Warner appear to be correct readings of Mosley.

We also believe that it is **not** necessary that a re-contact of the Mosley-silence-right-asserting, continuous-custody suspect be by unknowing second officers. State v. Elkins, 188 Wn. App. 386 (Div. III, 2015) July 15 LED:07 upheld a re-contact by knowing officers from another jurisdiction investigating the same homicide, where there was a several-hour gap between contacts. We believe that at least one re-contact of the continuous-custody suspect by the same officer on the

same crime will be lawful if: (a) there is a significant time lapse between contacts (e.g., several hours), (b) both sets of warnings are given in a non-coercive manner, and (c) the defendant freely waives his or her rights on the second occasion. U.S. v. House, 939 F.2d 659 (8th Cir. 1991) (House holds re-contact on same crime permitted under Mosley where there was a nine-hour time lag and other factors met); Charles v. Smith, 894 F.2d 718 (5th Cir. 1990); Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) (in Smith and Jacobs, re-contact on same crime fails Mosley analysis, but apparently only because officers waited only a few minutes). See also State v. Brown and State v. Duke, 158 Wn. App. 49 (Div. III, 2010) Dec. 10 LED:18 (Officer A Mirandized Mr. Brown after arresting him. Mr. Brown stated that he did not want to talk about the weapons found in his vehicle. Officer A did not ask Mr. Brown any questions after that. Two hours passed while Mr. Brown remained in continuous custody without any attempt by any officers to question him. Officer B then re-Mirandized Mr. Brown and asked him if he would talk about some recent vehicle prowl incidents. Mr. Brown acknowledged that he understood the warnings, and he agreed to talk. Under these circumstance, the Court of Appeals held, the Miranda-based rule of the U.S. Supreme Court decision in Michigan v. Mosley permitted Officer B to initiate contact with Mr. Brown regarding the vehicle prowls, re-Mirandize him and question him about the vehicle prowls.)

2. Ambiguous Assertions

A suspect's assertion of the right to silence must be express and unambiguous. Under the controlling case law, a suspect's ambiguous reference to the right to silence (e.g., "maybe I shouldn't talk to you") does not invoke the suspect's right and can be ignored by interrogating officers. Thus, a suspect's statement during interrogation that "I don't want to talk right now, man," viewed in context of what was said and done before that, was ambiguous and therefore did not assert his right to silence. It was merely his way of saying that he was choosing to make a police-aided written statement over making a tape-recorded statement. State v. Piatnitsky, 180 Wn.2d 407 (2014) July 14 LED:12. In In Re Personal Restraint Petition of Cross, 180 Wn.2d 664 (2014) August 14 LED:12, the Washington Supreme Court held that a suspect's statement was not ambiguous. After an officer Mirandized a triple-murder suspect, the suspect immediately said "I don't want to talk about it." The officer temporarily stopped questioning the suspect and walked away, but then returned with a cup of water and said consolingly "Sometimes we do things we normally wouldn't do, and we feel bad about it later." The suspect responded immediately with an incriminating statement. The Washington Supreme Court ruled that the officer re-interrogated in violation of the rule. Also, the Court of Appeals ruled in a recent case that when a custodial suspect shook his head side to side immediately after officers Mirandized him and asked if he wanted to talk, he unequivocally invoked his right to remain silent, and officers should not have questioned him further. State v. I.B., 187 Wn. App. 315 (Div. III, April 28, 2015) May 15 LED:04.

Case law permits officers to ignore a suspect's ambiguous statement about his or her Miranda rights. But Smith v. Illinois, 469 U.S. 91 (1984) held that what a suspect says in response to interrogation after invoking Miranda rights is irrelevant on the ambiguity issue. But it is advisable that officers clarify such a statement with the suspect so that reviewing courts will be more likely to view the officers' actions as reasonable and the statement as ambiguous.

There does not appear to be such a thing as an implied assertion of the right to silence in federal jurisdictions or in state jurisdictions such as Washington that follow the federal constitutional standards for Miranda. That was the holding of the United States Supreme Court in Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) July 10 LED:02. In Thompkins, the U.S. Supreme Court effectively overruled the decision of the Washington Court of Appeals in State v. Hodges, 118 Wn. App. 668 (Div. I, 2003) Dec. 03 LED:16, where the Washington Court of Appeals stated that an implicit assertion of the right to silence will be deemed to have occurred if the suspect remains silent in the face of persistent attempts at interrogation over an extended period of time. In Hodges, the Court of Appeals held that the facts of that case did not present such a circumstance.

In Thompkins, the U.S. Supreme Court rejected the implied-assertion approach of Hodges and instead held that where a custodial defendant understood the Miranda warnings, his silence at the start of questioning and throughout much of the nearly-three-hour interrogation session did not make inadmissible his confession that came near the end of the session. The Thompkins Court ruled that the defendant's waiver was implied in his confession and the fact that at no point did he expressly assert either his right to silence or his right to an attorney. We have set forth immediately below in this article essentially the entire July 2010 Law Enforcement Digest entry (with minor edits) on the Thompkins decision.

JULY 2010 LED ENTRY ON THOMPKINS

Facts and trial court proceedings: (Excerpted from Thompkins majority opinion)

> Two Southfield [Michigan] police officers traveled to Ohio to interrogate Thompkins [an arrestee in a Southfield drive-by shooting], 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. Compare [the following] (at a suppression hearing, Helgert testified that Thompkins verbally confirmed that he understood his rights), with [the following] (at trial, Helgert stated, "I don't know that I orally asked him" whether Thompkins understood his rights).
>
> 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, see Michigan v. Mosley, 423 U.S. 96, 103 (1975), citing Miranda v. Arizona, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

. . . .

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

State court appeals and federal court review

Thompkins appealed and lost in the Michigan appellate courts. He then sought review in the federal courts. He lost in the U.S. District Court, but the Sixth Circuit of the U.S. Court of Appeals ruled that Thompkins's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his [Miranda] rights."

The State of Michigan sought and obtained review in the United States Supreme Court.

ISSUES AND RULINGS:

1) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, did defendant's silence for much of the questioning become – at any point in the interrogation session – an invocation of his Miranda right to silence? (ANSWER: No, rules a 5-4 majority)

2) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, and where defendant was silent for much of the questioning, was his incriminating statement near the end of the near-three-hour interrogation session an implied waiver of his Miranda right to silence? (ANSWER: Yes, rules a 5-4 majority)

3) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, did the officers violate Miranda by beginning to question him without first obtaining either an explicit or implicit waiver of Miranda rights? (ANSWER: No, rules a 5-4 majority)

Result: Reversal of decision of U.S. Court of Appeals for the Sixth Circuit; reinstatement of Michigan trial court conviction of Van Chester Thompkins for first degree murder, assault with intent to commit murder, and certain firearms-related offenses.

ANALYSIS BY THE UNITED STATES SUPREME COURT IN THOMPKINS:

1) Mere silence does not invoke right to silence under Miranda

The Thompkins majority opinion rejects defendant's argument that, even though he had been Mirandized and even though he understood his rights before the officers began questioning him, his silence in the face of much of the questioning constituted, at some point in the interrogation process, an invocation of his Miranda right to silence.

The majority opinion relies in large part on the U.S. Supreme Court's decision in Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02**. In Davis, the Court held that, where a custodial suspect – who had waived his Miranda rights at the outset of an interrogation – made an ambiguous reference to his right to an attorney mid-way through the interrogation, his interrogators were not required to stop questioning him or even to clarify his wishes. See also State v. Radcliffe, 164 Wn.2d 900 (2008) **Dec 08 LED:18** (applying Davis).

Prior to the Thompkins decision, most commentators and courts had interpreted Davis as addressing only a mid-interrogation reference by a suspect to his or her Miranda rights. The assumption had been that, at the threshold, a suspect's ambiguous statement about Miranda rights prior to a waiver did not relieve law enforcement of the requirement to obtain a Miranda waiver, either express or implied, before interrogating the suspect.

The Thompkins majority opinion, however, interprets Davis as supporting the conclusion that a suspect's ambiguous statement about Miranda rights – after receiving the warnings and understanding them but before any questioning – likewise need not be clarified. That is because the

Thompkins majority concludes that questioning can proceed, as discussed below under Part 3 of our digesting of the majority's analysis, without a waiver.

The Thompkins majority then reasons that, just as, under Davis, the assertion of the right to attorney must be unambiguous, so must an assertion of the right to silence be unambiguous. Mere silence in the face of questioning is not an unambiguous assertion of the right to silence, the majority concludes. The suspect must expressly say that he or she does not wish to answer questions or does not wish to talk or something similarly unambiguous to that effect.

2) Implied waiver of right to silence during interrogation

Central to the analysis by the Thompkins majority is the opinion's assertion that "where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." The Thompkins majority opinion explains as follows:

> The record in this case shows that Thompkins waived his right to remain silent. There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. There was more than enough evidence in the record to conclude that Thompkins understood his Miranda rights. Thompkins received a written copy of the Miranda warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that "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." He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.
>
> Second, Thompkins's answer to Detective Helgert's question about whether Thompkins prayed to God for forgiveness for shooting the victim is a "course of conduct indicating waiver" of the right to remain silent. If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a Miranda warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to re-warn suspects from time to time. Thompkins's answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation.

> Third, there is no evidence that Thompkins's statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. The fact that Helgert's question referred to Thompkins's religious beliefs also did not render Thompkins's statement involuntary. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " (quoting Oregon v. Elstad, 470 U.S. 298 (1985)). In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.
>
> [Some citations omitted]

3) Beginning the interrogation before waiver has occurred

The Thompkins majority opinion concludes its Miranda analysis with an explanation of the view of the majority justices that it would be inconsistent with the concept of "implied waiver" under Miranda to require interrogators to not begin questioning until after a suspect who understands the warnings has waived his or her Miranda rights:

> Thompkins next argues that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. [North Carolina v. Butler, 441 U.S. 369 (1979)] forecloses this argument. 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. The Butler Court thus rejected the rule proposed by the Butler dissent, which would have "requir[ed] the police to obtain an express waiver of [Miranda rights] before proceeding with interrogation." This holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the Miranda warnings themselves." Davis. The Miranda rule and its requirements are met if a suspect receives adequate Miranda warnings, understands them, and has an 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.
>
> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to

> cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.
>
> 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. On these premises, it follows the police were not required to obtain a waiver of Thompkins's Miranda rights before commencing the interrogation.
>
> [Some citations omitted]

LED EDITORIAL COMMENTS: In the legal subject area of search and seizure, the Washington Supreme Court, after decades of ruling to the contrary, determined in the early 1980s that the Washington constitution's article I, section 7 is more restrictive on law enforcement officers in a number of respects than is the U.S. Constitution's Fourth Amendment. But in the legal subject area of law enforcement interrogation of suspects, the Washington appellate courts to date have interpreted the Washington constitution as not imposing, under "independent grounds" analysis, greater restrictions than the U.S. constitution's Fifth and Sixth Amendment protections. See Tacoma v. Heater, 67 Wn.2d 733 (1966) (Sixth Amendment); State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) Aug. 97 LED:21 (Sixth Amendment); State v. Earls, 116 Wn.2d 364 (1991) (Fifth and Sixth Amendments); State v. Unga, 165 Wn.2d 95 (2008) March 09 LED:15 (Fifth Amendment).

In State v. Radcliffe, 164 Wn.2d 900 (2008) Dec. 08 LED:18 (a Fifth Amendment case), however, the Washington Supreme Court noted that the Court was declining to address the question of whether, under "independent grounds" analysis, article I, section 9 of the Washington constitution imposes greater restrictions on law enforcement interrogators than does the Fifth Amendment of the U.S. constitution. The Radcliffe Court declined to address the "independent grounds" question raised by defendant under article I, section 9 of the Washington constitution because defendant had not raised that question prior to the Washington Supreme Court's grant of review in that case.

The U.S. Supreme Court's decision in Berghuis v. Thompkins no doubt will prompt other defendants to ask the Washington Supreme Court to look at article I, section 9 of the Washington constitution as an "independent grounds" source of protection in relation to custodial interrogation. The majority opinion in Thompkins takes an approach to Miranda waiver and invocation of rights that we think is contrary to nationally settled expectancies

among criminal justice legal analysts – based on extensive, though admittedly a bit mixed, case law – regarding Miranda standards. See, for example, the Ninth Circuit's decision in U.S. v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008) April 08 LED:08, holding that Miranda waiver, either express or implied, was required prior to questioning a custodial suspect.

The Thompkins majority opinion stands for the contrary proposition that, so long as a custodial suspect is given and understands the Miranda warnings, law enforcement interrogators may lawfully start questioning immediately and may continue such questioning until and unless, at some point during the questioning, the suspect unambiguously invokes his or her right to silence (not just by remaining silent) or unambiguously invokes his or her right to an attorney.

The ruling and analysis in Thompkins will apply to almost all jurisdictions in the United States (we say "almost all" in light of our limited research indicating that, at a minimum, the appellate courts in Hawaii, Minnesota and New Jersey have taken a more restrictive, independent-state-constitutional-grounds approach to some elements of the Miranda waiver question). Accordingly, interpretation of Thompkins by most law enforcement agencies and courts throughout the nation will be of interest and relevance in Washington.

But remember that the question of whether a person has waived or has invoked Miranda rights remains a mixed question of fact and law that is analyzed under the totality of the circumstances of the particular case. The safest legal course for ensuring admissibility of a statement is for interrogators, when dealing with a suspect who has manifested that he or she understands the warnings but then says or does something ambiguous that might be construed as asserting the right to an attorney or to silence, seeking clarification – asking, depending on the circumstances, something along the lines of: "Are you telling me that you do want to talk to me further at this time?" or "Are you telling me that you do not want to talk to me any further at this time?"

Finally, as always, we remind our readers that any analysis and opinions expressed by the LED Editors are not legal advice, are our own personal thinking, and do not necessarily express the views of [identified agencies]. . . .

******* END OF EXCERPTS FROM JULY 2010 ENTRY ON THOMPKINS *******

3. Initiation Of Contact By The Suspect

The Mosley restriction is lifted if the continuous-custody suspect "initiates" contact with the officer, even if that initiation by the suspect occurs so soon after the invocation by the suspect of the right to silence that no officer could lawfully have initiated contact at that point. See discussion in subsection III.B.1. above regarding the circumstances under which officers may re-initiate contact with a suspect who has asserted the right to silence.

The discussion at III.C.3. below discussing initiation of contact by a suspect who has asserted the right to an attorney notes that the courts are generally open to viewing circumstances where suspects reopen communications with officers as "initiations" that lift a bar to further interrogation. Similarly, courts are open to viewing communications by suspects who have asserted

the right to silence as initiations of contacts by the suspects. But judges may be skeptical regarding the alleged change of mind by the defendant. Thus, we recommend that before proceeding with the suspect who has earlier asserted the right to silence, but who has since initiated contact, officers (if they do not re-Mirandize) try at least to get that suspect to acknowledge that he or she has received the Miranda advisement, understands those rights, and is willing to talk with those rights in mind.

4. Questioning Re New Crimes Or After Meaningful Break In Custody

In light of the less restrictive nature of this right-to-silence prong of the rule, as compared to the right-to-counsel prong, discussed in subsection III.C below, we are confident that the initiation-of-contact restriction does not apply to questioning on new crimes committed after the assertion of the right to silence during custodial interrogation. Compare the quandary that we express below in subsection III.C.6 regarding initiating contact with incarcerated suspects regarding new crimes that they commit after they invoke the right to an attorney during custodial interrogation.

We also believe that the initiation-of-contact restriction would be lifted after any meaningful break in custody following assertion of only the right to silence. Release from custody of even a few hours would probably constitute a meaningful break in custody. We do not believe that the 14-day rule of Maryland v. Shatzer, 130 S. Ct. 1213 (2010) March 10 LED:02, discussed below in subsection III.C.6, applies to those who have invoked only the right to silence, not the right to an attorney.

C. *EDWARDS v. ARIZONA* -- ASSERTION OF RIGHT TO COUNSEL

1. The *Edwards* And *Roberson* Decisions

In the 1981 Edwards v. Arizona decision, Edwards initially was given Miranda warnings by an arresting officer. When Edwards asserted his right to an attorney, the officer stopped the questioning immediately and Edwards was booked into jail. The next morning two detectives sent a jailer to Edwards' cell to bring him for possible interrogation. Edwards asserted to the jailer that he had told the arresting officer the night before that he wanted a lawyer, but the jailer told Edwards that he "had to go" see the detectives anyway.

Edwards was taken to see the detectives. After the detectives administered the Miranda warnings, Edwards apparently changed his mind, because he then waived his rights and confessed. The U.S. Supreme Court ruled, 6-3, that it was a *per se* violation of Edwards' Fifth Amendment right to counsel for police to re-initiate contact with him after he had requested an attorney, before he had been able to consult one, and while he had remained in continuous custody.

The majority opinion in Edwards explains the different results in Mosley and Edwards as follows: where a suspect in custody says he wants to talk to an attorney, he is saying in effect that he cannot cope with the situation by himself and needs legal assistance; however, where a suspect in custody merely says that he doesn't want to talk, he is not necessarily indicating the same need for outside assistance. Accordingly, only the assertion of the right to counsel by a custodial suspect requires a *per se* bar broadly prohibiting any initiation by police of further contact with the suspect while he remains in continuous custody.

In Arizona v. Roberson, 486 U.S. 675 (1988) September 88 LED:01, the U.S. Supreme Court restated this rationale and took the bar a step further when it held that Edwards' "no initiation of contact" rule applies to initiation of contact with suspects regarding unrelated prior crimes, as well as the crime on which the rights were initially asserted. By asking for an attorney during an initial interrogation request, Roberson was indicating his inability to deal with questions on any crimes under investigation, Roberson held. Therefore, no police personnel should have tried to re-contact him to question him on either related or unrelated prior crimes while he remained in continuous custody.

The Roberson decision also makes clear that the initiation of contact restriction applies even if the officers who initiate contact are not aware of the suspect's earlier assertion of the right to counsel to other officers; without exception, all officers from all agencies are conclusively presumed to be aware of an assertion of rights to any other officer from any other agency. In light of this fact and in light of the marked distinction in the duration of restriction of the initiation-of-contact bar where there is an (a) assertion of right to silence as opposed to an (b) assertion of right to counsel (i.e. officers may recontact the "won't talk" arrestee in many circumstances where they may not recontact the "want a lawyer" arrestee), officers confronted with a suspect who says merely that he does not want to talk to them would probably be well-advised to record his exact words, and to stop questioning, but not to seek clarification of whether the suspect is also asserting the right to counsel.

2. Ambiguous Assertions

A suspect's assertion of the right to an attorney must be express and unambiguous. Under the controlling case law, an ambiguous reference to the right to an attorney (e.g., "maybe I should talk a lawyer") does not invoke the suspect's right and can be ignored by interrogating officers. See Davis v. U.S., 512 U.S. 452 (1994) Sept. 94 LED:02 ("maybe I should talk to a lawyer" held to be ambiguous); State v. Radcliffe, 164 Wn.2d 900 (2008) Dec. 08 LED:18 ("maybe I should contact an attorney" held to be ambiguous); State v. Nysta, 168 Wn. App. 30 (Div. I, 2012) July 12 LED:09 ("I gotta talk to my lawyer" held to be unambiguous despite the context); see also State v. Gasteazoro-Panigua, 173 Wn. App. 751 (Div. II, 2013) May 13 LED:19 (holding a suspect's reference to a possible future discussion with his attorney to be ambiguous in context). While case law permits officers to ignore a suspect's ambiguous statement about his or her Miranda rights, and while Smith v. Illinois, 469 U.S. 91 (1984) held that what a suspect says in response to further interrogation after making the would-be invocation of Miranda rights is irrelevant on the ambiguity issue, it is advisable that officers clarify such a statement with the suspect so that later-reviewing courts will be more likely to view the officers' actions as reasonable and the statement as ambiguous.

Beware of the Ninth Circuit's controversial, since-vacated decision in Sessoms v. Runnels, 691 F.3d 1054 (9th Cir. 2012) Nov. 12 LED:06. By a 6-5 vote, the Ninth Circuit panel ruled that a custodial suspect's question about availability of an attorney and his statement that his father had advised him to ask for an attorney – uttered to detectives in the interrogation room before they gave him Miranda warnings – and thus prior to any waiver of Miranda rights should have been ruled by the California appellate court as either: (1) an ambiguous reference to his attorney right that must be honored as a preemptive request for an attorney terminating any attempt at interrogation and also precluding the officers from seeking clarification; or (2) an

unambiguous reference to his Miranda attorney right that likewise precludes interrogation or an attempt by officers to clarify. In the first of the two alternative holdings, the Ninth Circuit majority in Sessoms thus concluded that if a suspect makes an ambiguous statement about the right to an attorney at the outset of an interrogation session before Miranda warnings are given, officers are not permitted to question or clarify. The U.S. Supreme Court vacated the Ninth Circuit's decision without opinion and remanded the case, directing the Ninth Circuit to reconsider in light of Salinas v. Texas, 537 U.S. 178, 133 S. Ct. 2174 (June 17, 2013) August 13 LED:22. The Ninth Circuit's final decision after remand made no mention of the controversial first alternative holding of its earlier decision; the majority simply held that reference to the attorney right was unambiguous. See Sessoms v. Runnels, 776 F.3d 615 (9th Cir., Jan. 23, 2015).

Note that in State v. Trochez-Jimenez, 180 Wn.2d 445 (2014) July LED:15, the Washington Supreme Court held that where a man suspected by Canadian officers of entering Canada illegally responded to a Canadian officer's warning about his attorney right under Canadian law, the man's request for an attorney did not trigger the Fifth Amendment initiation of contact bar. The Canadian officers were not acting as agents of the Washington officers, so the Washington officers acted lawfully when they Mirandized the suspect who had remained in continuous Canadian custody since asking the Canadian officers for an attorney in relation to the unlawful-entry investigation. The ruling would have been different if the initial invoking of the right to counsel had been made to officers in another state, rather than invoking the attorney right to officers in another country.

3. Initiation Of Contact By The Suspect Lifts Bar

When the suspect asserts the right to counsel, the officer almost certainly is permitted to give the suspect a business card and to inform the suspect that the officer is not permitted to talk to the suspect while the suspect remains in continuous custody unless the suspect initiates the contact. That is as far as the officer should go with the counsel-invoking suspect. The officer clearly may not communicate at this point that the suspect: (a) has made a "wrong" decision, or (b) will suffer adverse consequences because of that decision. But a detective's "small talk" not related to the investigation during transport has been held not to be initiation by the officer. State v. Elkins, 188 Wn. App. 386 (Div. III, June 15, 2015) July 15 LED:07.

In Oregon v. Bradshaw, 462 U.S. 1039 (1983) Sept. 83 LED:02, the U. S. Supreme Court addressed a situation where a suspect invoked his right to counsel. The officer immediately stopped questioning. But, a few minutes later, the suspect turned to the officer and asked: "What's going to happen to me now?" The Bradshaw Court held this was an "initiation" by the suspect, and that the officer in Bradshaw could therefore make another attempt to obtain a waiver of rights from the arrestee. Bradshaw and the limited additional case law on what constitutes "initiation" suggest that the concept of "initiation" by the suspect will be broadly interpreted in favor of the government. See, e.g., State v. Wade, 44 Wn. App. 154 (Div. III, 1986), and State v. McReynolds, 104 Wn. App. 560 (Div. III, 2001) May 01 LED:11. Note, however, as we noted above in subsection III.B.3 in our discussion of the right-to-silence rule, when contact is initiated by the arrestee, best practice is to obtain an express waiver of rights before proceeding with interrogation.

4. Non-Custodial, Non-Interrogation Situations Not Covered; Attempts By Third Persons to Assert The Rights On Suspect's Behalf Do Not Count

In both Edwards v. Arizona and Arizona v. Roberson, the Supreme Court had before it defendants who had asserted the right to counsel during custodial interrogation. In McNeil v. Wisconsin, 115 L.Ed.2d 158 (1991) Sept. 91 LED:10, the United States Supreme Court held that the assignment of counsel at arraignment on a charge does not trigger the person's Fifth Amendment rights as to any crimes. In a footnote, the majority in McNeil also suggested that a person cannot ever trigger the Fifth Amendment initiation-of-contact rule by making a request for counsel outside a custodial interrogation setting. This was confirmed in the U.S. Supreme Court's opinion in Bobby v. Dixon, 132 S.Ct. 26 (2011) Aug. 12 LED:05, holding that defendant did not bar initiation of contact by asserting his right to an attorney in non-custodial questioning five days earlier. See also State v. Stewart, 113 Wn.2d 462 (1989) Jan. 90 LED:03; State v. Stackhouse, 90 Wn. App. 344 (Div. III, 1998) Sept. 98 LED:20; State v. Warness, 77 Wn. App. 636 (Div. I, 1995) Sept. 95 LED:06; U.S. v. Wright, 962 F.2d 953, 955 (9th Cir. 1992); Alston v. Redman, 34 F.3d 1237 (3d Cir. 1994); U.S. v. LaGrone, 43 F.3d 332 (7th Cir. 1994).

In any event, it is clear that the Fifth Amendment initiation-of-contact rule is not triggered by an attorney's request to the police that police not question the suspect. Moreover, the police need not even tell the suspect of the attorney's request. The Fifth Amendment right is that of the suspect, not of the attorney. Accordingly, police may obtain a valid waiver of rights from a suspect without telling the suspect that an attorney has contacted police to ask that they not talk to the suspect in the absence of counsel. State v. Earls, 116 Wn.2d 364 (1991) May 91 LED:02; State v. Corn, 95 Wn. App. 41 (Div. III, 1999) June 99 LED:03; State v. Bradford, 95 Wn. App. 935 (Div. III, 1999) Sept. 99 LED:15.

What about the defendant who checks a box requesting an attorney when he fills out a public defender form at the jail in post-arrest, pre-hearing screening by the public defender's office? In State v. Greer, 62 Wn. App. 779 (Div. I, 1991) Feb. 92 LED:05, the Court of Appeals ruled that this does not trigger the Fifth Amendment initiation-of-contact bars, but that the form request does trigger the non-constitutional protections of Washington Court Rule, CrR 3.1. However, our reading of Greer is that CrR 3.1 does not establish a strict Edwards bar. Instead, we believe that if officers learn of the pre-hearing public defender request, they can still initiate contact. However, in light of Greer, we suggest that when encountering this situation, in addition to Mirandizing the defendant, officers also expressly ask the defendant if he wishes to talk to them in light of his earlier request for a public defender. Likewise, whenever interrogators are aware that a defendant in continuous custody has tried to contact an attorney following arrest, they should make a similar inquiry in addition to giving Miranda warnings.

One additional extra-constitutional duty imposed on law enforcement officers by CrR 3.1 must be noted at this point. Subsection (c)(2) of CrR 3.1 provides:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

In State v. Kirkpatrick, 89 Wn. App. 407 (Div. II, 1998) March 98 LED:12, the Court of Appeals held that a Lewis County detective interrogating an arrestee at the Port Angeles Police

station violated this rule on providing attorney access on request. After a 90-minute interrogation at the Port Angeles Police station, the arrestee stopped the interrogation by stating that he wanted an attorney. The detective did not try to place Kirkpatrick in contact with an attorney at that point; instead the detective simply followed **constitutional** requirements by terminating the interrogation. The detective then transported Kirkpatrick back to Lewis County.

On the trip to Lewis County, Kirkpatrick initiated contact with the detective, and, despite the detective's warning that Kirkpatrick had asserted his right to an attorney, Kirkpatrick then volunteered some incriminating information. The Court of Appeals held in Kirkpatrick that, because there was a phone available at the Port Angeles police station, the detective violated CrR 3.1(c)(2) by failing, while still at the Port Angeles stationhouse, to ask the arrestee whether he wanted to make a phone call *at that time* to a specific attorney or to a public defender. Accordingly, when the arrestee later initiated conversation with the detective during transport, his volunteered admissions were poisoned by the earlier violation of the rule, the Court of Appeals held.

The Kirkpatrick decision and the decision in State v. Pierce, 169 Wn. App. 553 (Div. II, 2012) Oct. '12 LED:13 appear to support the following two suggestions most recently made in the October 2012 LED entry regarding the Pierce case:

(1) If a person in custody requests counsel in response to Miranda warnings or terminates a custodial interrogation with a request for counsel (as opposed to a mere assertion of the right to remain silent), then the officer should ask if the arrestee wants to talk to an attorney at that time. If the arrestee says "no," then we think that the officer has no further obligation regarding the counsel request, other than to honor it by not initiating interrogation while the suspect remains in continuous custody. And, if the arrestee says that he or she does want to talk to counsel right away, then the officer should make a reasonable and contemporaneous effort to get the arrestee to a telephone to allow contact with an attorney, or direct others to do so.

AND

(2) If an officer becomes aware that there has been a violation of the access-to-counsel requirement of CrR 3.1(c)(2), then the officer should not assume that any subsequent initiation of contact by the "wronged" arrestee cures the error. Instead, to try to cure the taint of the earlier failure of law enforcement or correctional staff to follow up on the request for an attorney, the officer should inquire of any such contact-initiating arrestee whether that arrestee now wants an immediate consult with an attorney. If the arrestee states that he or she does want to talk to an attorney right away, then the officer should try, as indicated above, to help effect an immediate contact with an attorney. On the other hand, if the arrestee declines the correcting offer to facilitate an attorney consult, then, if the officer wants to interrogate, the officer should fully warn the suspect and obtain an express waiver before proceeding with interrogation.

5. New Crimes May Or May Not Be Covered

The discussion below in this subsection III.C.5 assumes that there has not been a 14-day break in custody within the meaning of Maryland v. Shatzer, 130 S. Ct. 1213 (2010) March 10 LED:02, discussed below in subsection III.C.6.

For many years, we stated the view in prior versions of this article that the Edwards/Roberson rule would not apply to bar questioning of a continuous-custody suspect who committed new crimes after having asserted the right to counsel in a custodial interrogation. So long as the suspect was contacted regarding only the new crimes, we asserted, the police-initiated custodial questioning would be lawful. But several years ago, we discovered that the single case that we had relied on for our stated exception to the "initiation" restriction did not actually support the exception. We are now uncertain whether there is a "new crimes" exception to the Fifth Amendment bar on questioning counsel-right-asserting-continuous-custody suspects. Our reasons for entertaining some doubt about our prior view are: (1) in admittedly less than exhaustive legal research, we can find no case anywhere expressly supporting the exception (note, however, that we also cannot find a case expressly holding to the contrary either); and (2) the Roberson Court did not use any qualifying language when it said the bar extends to "any crime."

We still think that this question is debatable, however, and we continue to lean toward the common sense view that new crimes are not covered by the initiation-of-contact bar. We will continue to watch for cases addressing the question. Meanwhile, officers choosing to initiate interrogation as to "new crimes" where there has not been a "break in custody" (see "break in custody" discussion in subsection III.C.6 below) should avoid questioning the suspect as to any crimes committed prior to the prior assertion of rights. If the suspect initiates discussion of such prior crimes, the officer should, before proceeding with questions as to the pre-assertion criminal activity, ensure that the suspect expressly waives the Fifth Amendment rights as to the pre-assertion criminal activity. Note further that if the continuous-custody suspect previously asserted only the right to silence, not the right to counsel, then it should be lawful for an investigating officer investigating a new crime to initiate contact with the prisoner. See generally the discussion of the right to silence prong of the Fifth Amendment "initiation" rule in subsection III.B above.

6. Break In Custody Of At Least 14 Days Lifts Bar

In Maryland v. Shatzer, 130 S. Ct. 1213 (2010) March 10 LED:02, the United States Supreme Court held that, where, during a custodial interrogation session a suspect invoked his right to an attorney, and where the suspect was subsequently released from custody, a law enforcement officer acted lawfully in initiating custodial contact with the suspect after waiting 14 days or more from the time of release. While the actual break in custody in Shatzer was three years, the Supreme Court created a "bright line" rule of 14 days as the period during which officers are barred from re-contacting a suspect after a break in custody and taking that suspect into custody for interrogation purposes.

The Shatzer decision also held that, where a suspect was incarcerated and in the general population in a state prison under conviction and sentence during the earlier custodial interrogation session in which he invoked his right to an attorney, and where the suspect was then placed back in the general prison population after he invoked his Miranda right to an attorney, the 14-day-break-in-custody rule applied. Thus, a law enforcement officer acted lawfully in initiating contact with the suspect and seeking a Mirandized custodial interrogation after waiting at least 14 days.

It appears that Shatzer's holding that a break in custody can lawfully occur while a convicted person remains continuously in prison applies to persons in local jails (1) who previously asserted the right to counsel and who have remained in jail ever since, but (2) who have since been convicted and sentenced, and (3) who are serving their sentences in the local jails. But it also appears that Shatzer's break-in-custody rule will not ever apply to a detainee in a local jail prior to the detainee's trial, conviction, sentencing, and placement in prison or jail as a convicted person serving a sentence. In part, we base this view on the discussion in the lead Shatzer opinion that distinguished, as follows, the case factually from the U.S. Supreme Court decisions that collectively gave us the initiation-of-contact rule:

> [The prisoners'] detention is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. This is in stark contrast to the circumstances faced by the defendants [involved in the Supreme Court's initiation-of-contact precedents], whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

There presently appears to be no limit on police initiation of contact and request for a non-custodial, voluntary conversation with a suspect (1) who previously asserted the right to counsel during custodial interrogation, and (2) who was subsequently released into the civilian community at large (i.e., released into society). Thus, we agree with the following statement regarding Shatzer and the "Initiation of Contact" rule in the March 2010 edition of The Federal Law Enforcement Informer (The Informer - - Internet address: [http://www.fletc.gov/legal]), a monthly publication of the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC), Legal Training Division (see 3 INFORMER 10 at page 3):

> If a suspect invokes counsel under Miranda while in custody and is then released, nothing prohibits law enforcement from approaching, asking questions, and obtaining a [voluntary] statement without the Miranda lawyer present from the suspect who remains out of custody.

[Bracketed word "voluntary", underlining added by LED Editors; note that the article acknowledges that an argument to the contrary can be made]

The article can be accessed by an internet search for "3Informer10.pdf + FLETC" or "The Informer: March 2010 (PDF) | Federal Law Enforcement Training Centers"
Department of Homeland Security

Accordingly, although officers must wait 14 days before taking suspects back into custody for re-Mirandizing and re-interrogation, officers apparently do not need to wait 14 days to try to initiate a voluntary, non-custodial discussion with the suspect. But we think that officers should apply common sense and (1) wait a reasonable time before re-engaging in such a non-custodial contact and (2) not abuse this option. For example, officers would be well advised (1)

not to walk the invoking suspect out of the police station and then immediately attempt "voluntary, non-custodial" questioning as the suspect walks to his or her car, and (2) not to sit outside the suspect's home to greet the suspect and attempt such "voluntary, non-custodial" questioning each morning during the next 14 days when he or she leaves the house to go to work.

As we noted in Section I of this article, to date, our Washington appellate courts have not identified "independent grounds" in our Washington constitution on Miranda issues (this is in sharp contrast to our Washington Supreme Court's multiple "independent grounds" rulings on search-and-seizure issues). Therefore, federal agency interpretations of Miranda rulings by the U.S. Supreme Court (and by other federal courts), such as that quoted in this article from FLETC's Informer, are instructive to Washington officers.

7. Consultation With Counsel Does Not Lift Bar

In Minnick v. Mississippi, 498 U.S. 146 (1990), the U. S. Supreme Court held that consultation with counsel, regardless of how extensive the consultation may be, during the time that a person remains in continuous custody following assertion of the right to an attorney, does not lift the bar on police initiation of contact. As previously noted, however, a 14-day break in custody lifts the Fifth Amendment bar on further police-initiated custodial interrogation. See discussion above in subsection III.C.6.

IV. EXCLUSION OF EVIDENCE BASED ON INITIATION VIOLATIONS

Statements obtained in violation of Miranda are excluded from evidence in the State's case-in-chief. Such statements are, however, admissible to impeach a defendant who takes the witness stand and testifies at his own trial inconsistently with those statements. See Harris v. New York, 401 U.S. 222 (1971).

V. WAPA 2025 CONFESSIONS MANUAL

Case law on the Miranda initiation-of-contact issues discussed in this article and essentially all other key Confessions and Interrogations law subtopics are addressed comprehensively in the 2025 WAPA (Washington Association of Prosecuting Attorneys) CONFESSIONS MANUAL that is also referenced above in this article at pages 1-2. The 2025 WAPA manual is accessible at https://waprosecutors.org/manuals/. It includes discussion of the requirements of two enactments from the 2021 Washington Legislature that do not address Fifth Amendment Initiation of Contact rules, as noted above at pages 1-2. Thus, the 2025 WAPA Manual addresses in detail the 2021 legislation in RCW 13.40.170, which generally requires, with a few exceptions, that juveniles be provided access to an attorney prior to any custodial interrogation, as well as in certain other circumstances. Second, the 2025 WAPA Manual discusses the 2021 legislation in Chapter 10.122 RCW, which codifies the Uniform Electronic Recordation of Custodial Interrogations Act, which requires, with some exceptions, recording of custodial interrogations by Washington law enforcement officers (A) of juveniles regarding suspected misdemeanors or felonies, and (B) of adults regarding suspected felonies. No published Washington appellate court decision has yet interpreted either of the two 2021 enactments. The 2025 WAPA Manual is comprehensive and updates and replaces the discussion at pages 1-64 of the publication, Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors May 2015, by Pamela B. Loginsky, former Staff Attorney, Washington Association of Prosecuting Attorneys (WAPA). Ms. Loginsky's 400+ page Guide continues to be accessible under "Special

Topics" on the Internet CJTC LED page [https://www.cjtc.wa.gov/resources/law-enforcement-digest]

Ms. Loginsky's 2015 Guide is also accessible on the "Manuals" part of the website of WAPA. Except for the Confessions law part of her Guide that was recently updated by WAPA staff as noted above, the remainder of the Guide has not been updated since 2015. Ms. Loginsky has pointed this out for the information of anyone who would use the Guide, and she for this reason has urged caution by anyone who would use the 2015 Guide. As author of this "Initiation of Contact" article, I believe that there have been no significant decisions overruling key decisions on Search and Seizure since the Ms. Loginsky's Guide was last updated in 2015. Note, however, that a number of post-2015 Washington appellate court decisions have placed some judicial gloss on prior precedents in some subareas of Search and Seizure law.

VI. CONCLUSION

In summary regarding the "initiation of contact" topic of this article, Edwards v. Arizona and Arizona v. Roberson clearly establish a Fifth Amendment rule requiring that, where suspects assert their right to counsel during custodial interrogation, police must not only immediately cease their interrogation efforts, but they must also refrain from initiating further custodial interrogation contacts with the custodial suspects on all matters, other than (perhaps) subsequent newly arising crimes. Edwards and Roberson have their limits, however. Case law is now fairly well resolved that this Miranda/Fifth Amendment restriction is triggered only in the custodial interrogation context and that the restriction is lifted upon breaks in custody as discussed in this article. And, under Michigan v. Mosley, a less restrictive bar in terms of duration is imposed by the assertion of the right to silence (as opposed to an assertion of the "right to counsel") during custodial interrogation. There are numerous nuances in the court-made rules in this area, and I have tried to address many of them in the above article. I repeat, however, a part of my warning given at the start of this outline the following note:

Note: These materials are provided as a research source only, are not intended as legal advice, and should not be relied on without independent research and legal analysis. Any views expressed are those of Mr. Wasberg alone and do not necessarily reflect the opinions of any other person or any agency.

BULLET POINTS: MIRANDA INITIATION RESTRICTIONS

A. Right to silence: Michigan v. Mosley (1975) held that contact with a continuous custody suspect was ok where contact was by other officers investigating different crime 2 hours after the assertion. Based on lower court decisions since, maybe even same officer on same crime may re-contact if initial assertion of right to silence was fully respected, reasonable time has passed, and full re-Mirandizing occurs before any questioning.

B. Right to counsel - - Edwards (1981), Roberson (1988), and Minnick (1990) in combination hold officers may not initiate contact with continuous custody suspect on any prior crime where suspect asserted right to counsel during custodial interrogation.

As to both right-to-silence *and* right-to-counsel rules:

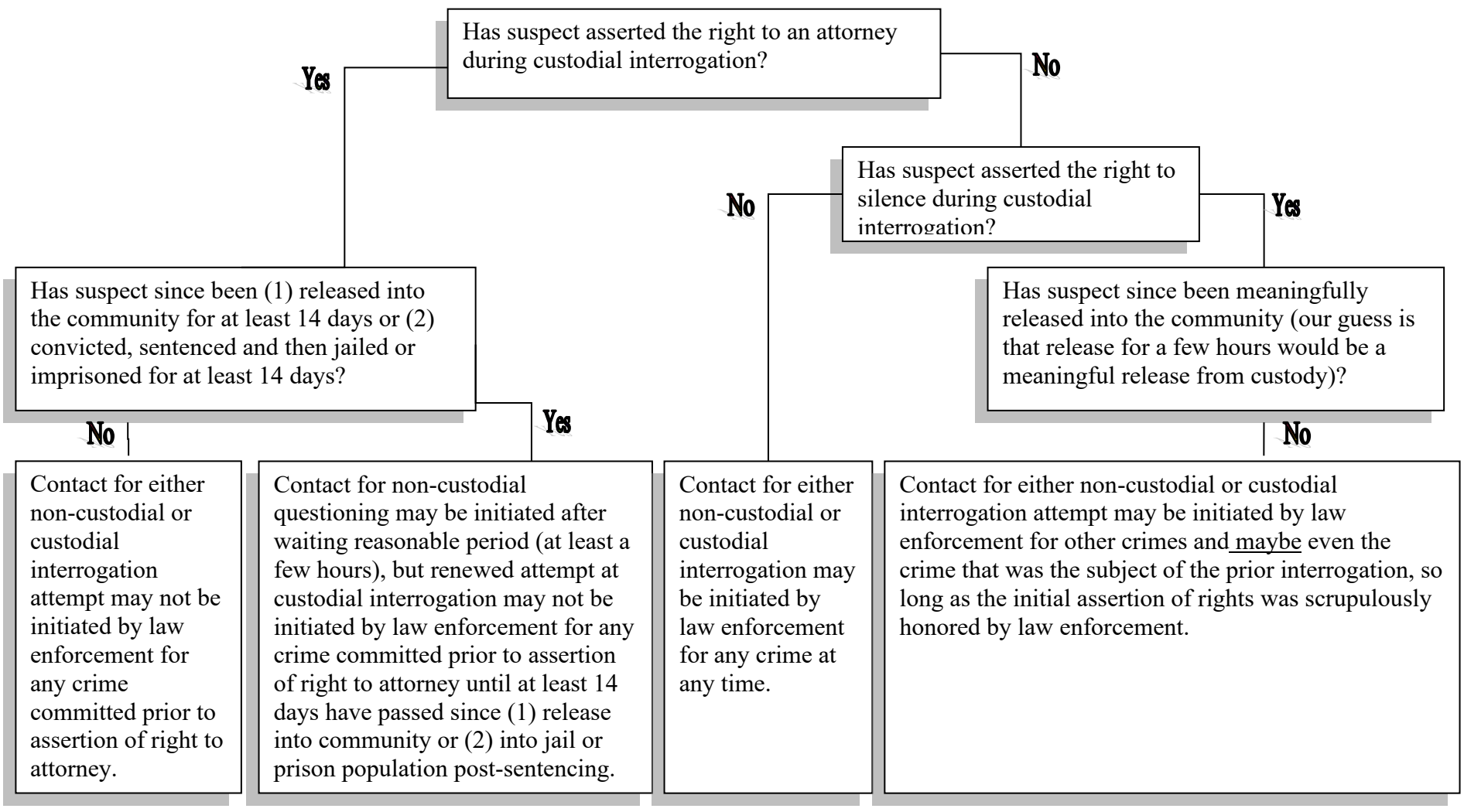
- **Consultation with counsel does not lift bar.**
- **Bar exists regardless of whether officer knows of prior invocation by continuous custody suspect.**
- **Right cannot be anticipatorily invoked outside of custodial interrogation setting.**
- **Initiation of contact by continuous custody suspect lifts bar.**
- **New crimes committed after the invocation may or may not be covered (case law has not resolved the question), but common sense suggests that new crimes are not covered by the initiation-of-contact bar.**

For right to silence, a meaningful break in custody (at least a few hours), probably lifts bar to initiating contact for either custodial or non-custodial interrogation.

For right to attorney, under the 2010 Maryland v. Shatzer decision, a 14-day rule governs the "break in custody" exception to the initiation bar:

- **A break in custody of 14 days or more lifts the bar to resumed custodial interrogation by law enforcement.**
- **The 14-day break-in-custody rule applies to a person who has remained in jail or prison continuously after having asserted right to counsel, but only after the suspect has been convicted and sentenced.**
- **Break in custody probably allows officer to contact a suspect and request a non-custodial, voluntary conversation before 14 days have passed if officer waits a reasonable period (at least a few hours) prior to re-contact and otherwise acts reasonably in the contact(s).**

Current through July 1, 2026

MIRANDA INITIATION-OF-CONTACT FLOWCHART

FIFTH AMENDMENT RULE BARRING POLICE-INITIATED CONTACT WITH SUSPECT WHO HAS ASSERTED HIS OR HER FIFTH AMENDMENT RIGHTS DURING CUSTODIAL QUESTIONING (Note: Undercover or informant contacts are permitted at any time so long as the Sixth Amendment right to counsel for a charged matter is not violated.)