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"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.' " Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)).
PREFACE

Since its original publication in 2004 the *Miranda Primer* has proven to be a useful resource for law enforcement. The *Primer* explains through the use of text, case studies, and problems, the legal issues relevant to obtaining a lawful custodial confession. In particular the *Primer* answers fundamental questions such as when *Miranda* warnings are necessary, when a person is in custody, when an individual may be approached for questioning, and what actions are needed if the individual either asserts his or her right to silence or demands an attorney.

The law governing *Miranda* issues is dynamic and over the last year there have been dramatic changes in what constitutes custody, and when police can approach a represented subject to initiate an interrogation. Accordingly, I asked Assistant Attorneys General David Perlman and Tom Fallon to revise the manual to keep it timely and accurately reflect the most recent changes in *Miranda* law. The result of their work is the *Miranda Primer-Revised*. This revision maintains the concise informative style of the original and both incorporates and explains the recent significant changes in *Miranda* jurisprudence. The revised *Miranda Primer* reflects the Wisconsin Department of Justice’s commitment to providing law enforcement with timely resources to assist them in fulfilling their critical mission.

J.B. Van Hollen
Attorney General
I. INTRODUCTION

Confession is not only good for the soul, it is a goal of every criminal investigation. A confession furthers the overall objective of the criminal system virtually assuring that only the guilty are convicted. Not only is a confession likely to result in a conviction but it often lessens the likelihood of a trial. Even if the suspect does not admit her criminal conduct to the police, just about any statement made furthers an investigation and will be useful to the prosecutor. Consequently, it is critical for the police to have command of the basic legal principles involved in the questioning of a suspect. This Primer is designed to provide law enforcement with a handy, portable reference guide to basic but significant legal concepts. The Primer answers questions that include: when is Miranda necessary; when may a suspect be approached; and what is the procedure when suspects assert their Miranda right to silence or to a lawyer?

The Primer is divided into three basic sections. The first section deals with the 5th amendment of the United States Constitution; more specifically, the right not to incriminate ourselves in criminal matters. This section closely examines the Miranda rule, which the United States Supreme Court fashioned to protect suspects’ 5th amendment right during police contacts. The Miranda decision created the derivative rights to silence and to counsel in an effort to help suspects take advantage of their right not to self incriminate. The section looks at the factors that control whether the Miranda warning is required, thus answering the questions: What is “custody” and what is “interrogation.” The section also examines what the police must do in situations when the Miranda warning is required and the proper procedure to follow if the suspect waives or asserts her right to silence or counsel. Finally, the section looks at certain circumstances in which the Miranda warning would normally be required but may be lawfully omitted.

The second section deals with the 6th amendment of the United States Constitution; more specifically, our right to have an attorney represent us in a criminal matter after we have been charged. This section examines fundamental questions that include: when is a suspect considered to be charged; what are the responsibilities of the police in initiating contact with a charged suspect; and may an attorney assert the 6th amendment right to counsel on behalf of her client.

The third section examines the voluntariness requirement. This section was placed at the end purposefully, since all statements obtained, either before or after a waiver of rights, must be voluntary regardless of whether the questioning occurs in the 5th or 6th amendment context. This section looks at the various factors courts consider in determining whether a statement by a suspect is voluntary and therefore admissible or conversely the involuntary product of police coercion and thus inadmissible for any purpose. The section will discuss strategies and techniques a police investigator can employ to obtain a voluntary confession. After exploring these principles, the Primer offers an opportunity to review the concepts through a case study, a comparative chart and a checklist. In addition, the reader may test her knowledge with a sample quiz.

We have called this manual the “Miranda Primer-Revised” even though not every subject discussed involves the Miranda right, because “Miranda” has become so ingrained in our culture that the term is synonymous with arrest and police questioning of suspects for any purpose. While this manual should never be used as a substitute for the advice you receive from a prosecutor in your jurisdiction, it is our hope that it will provide meaningful assistance to the Wisconsin law enforcement officer during a critical phase of a criminal investigation.

II. THE FIFTH AMENDMENT RIGHT

The 5th amendment of the United States Constitution provides, in pertinent part, that citizens have a right not to incriminate themselves in criminal matters. The United States Supreme Court developed a rule to safeguard this right in the landmark case of Miranda v. Arizona, 384 U.S. 436 (1966), by requiring the police to read the Miranda warning to a suspect if two factors are present:

1) the suspect is in custody, and
2) the police are interrogating the suspect.

Accordingly, an officer must understand what is meant by the terms “custody” and “interrogation” to know when reading the Miranda warning is required.
What is Custody?

The test for whether a person is in custody for *Miranda* purposes is whether a reasonable person in the defendant’s position would consider himself to be in custody given the degree of restraint under the circumstances. The test is an objective one. The officer or the defendant’s subjective belief is immaterial to the analysis. While the term custody is normally associated with an arrest, it is possible for a person to be in custody for *Miranda* purposes without being arrested.

Courts will look at the totality of the circumstances in determining whether a reasonable person in the suspect’s position would believe that he is in custody. Courts will look at the following factors in evaluating the custody issue:

1) the suspect’s freedom to leave;
2) the purpose, place, and length of the interrogation; and
3) the degree of restraint.

In analyzing the degree of restraint factor, courts will look at the following circumstances:

a) was the suspect handcuffed;
b) were guns drawn;
c) was a “Terry” frisk performed;
d) was the suspect moved;
e) was the suspect questioned in a police vehicle or police station; and
f) how many officers were involved.

Typically a “Terry” stop—investigative detention—is not considered custody for *Miranda* purposes and, consequently, the warning is not required before questioning. However, if the “Terry” stop requires extraordinary measures such as drawn guns or handcuffing, then it will likely be viewed as custodial even though no formal arrest has been made. At its inception, an ordinary traffic stop is not custody for *Miranda* purposes even though the suspect is technically not free to go. Crime scene questioning of suspects is also non-custodial unless handcuffing, weapons drawn, or other coercive measures are also present. Similarly, questioning of a suspect at a police station is not custodial if the police officer advises the suspect at the beginning that he is not under arrest and is free to go. This is true even if the officer has the intent to ultimately arrest the suspect if the officer does not convey this intent.

Mere confinement to a hospital bed, without arrest, is not custody for *Miranda* purposes even if the suspect is completely immobile. This is true because the restraint on the suspect is a product of medical necessity and not police action. However, if the suspect is arrested by citation or otherwise for a criminal offense en route or prior to transport to the hospital, he is considered in custody while in the hospital and the *Miranda* warning is required before questioning.

In *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), the United States Supreme Court clarified two issues relative to custody for *Miranda* purposes. The first issue dealt with whether a person in prison was in “custody” when in prison, and the second dealt with “when” the police can reinitiate contact with a person who asserted his *Miranda* right to an attorney and is later released from custody.

**Imprisonment is Not Always Custody**

The *Shatzer* court held that prison is not a custodial setting for *Miranda* purposes. The court reasoned that people are in prison for substantial periods of time and typically are not dealing with an ongoing case. Such an environment is less dynamic and less potentially coercive than the typical custodial situation. Accordingly, the police can treat defendants who invoke their right to counsel and are ultimately imprisoned similarly to people who are released from custody. Thus, once a person is imprisoned, the slate is wiped clean and the police are free to initiate contact with the subject, regardless of whether the subject had previously asserted his *Miranda* right to counsel. It is unclear whether the *Shatzer* holding is applicable to a person in jail awaiting disposition or after sentencing as it is a more fluid situation.

Although the Wisconsin Supreme Court has previously determined that “custody” in prison is always “custody” for *Miranda* purposes, Wisconsin will likely adopt the *Shatzer* rule because Wisconsin has historically followed Supreme Court interpretations of the 5th amendment. Therefore, once a subject starts serving his prison sentence, he is “fair game” to be approached by the police. However, despite the new rule that a prison is not a custodial setting the police should *Mirandize* any person they interrogate in prison. There is a distinction between being non-custodial for a reinstatement of contact and being sufficiently custodial for triggering the need to read the *Miranda* warning.

**When can the Police Reinitiate Contact with a Subject who has Asserted his Right to a Lawyer and then is either Released or Placed in a Non-custodial Setting?**

The *Shatzer* case also held that once a person who has asserted their *Miranda* right to counsel is released from custody, they are not immediately available for a police initiated interrogation. The court reasoned there must be a “cooling off” period between release and renewed interrogation. The *Shatzer* court decided that 14 days is the requisite waiting period. So, if a subject in custody asserts
their right to counsel after being advised of their *Miranda* rights and then is released from custody, the police must wait 14 days before they can approach the subject and attempt a new interrogation. Similarly, once a person is placed in prison after invocation or when a person invokes his *Miranda* right to counsel in prison, the police must wait 14 days before they can try again.

Courts use an objective test in determining whether specific questioning constitutes interrogation. The focus is simple: “whether an objective observer could foresee that the officer’s conduct or words would elicit an incriminating response.”15 Although it is an objective test, there is a subjective component as well. For instance, an officer’s actual awareness of a suspect’s unusual susceptibility to a particular form of persuasion is also relevant in determining whether interrogation or its functional equivalent has occurred.16

The test reflects both an objective foreseeability component and a component involving the police officer’s specific knowledge of the suspect. If an objective observer with the police officer’s knowledge of the suspect could, by hearing the officer’s remarks or observing the officer’s conduct, conclude that the officer’s conduct or words would likely elicit an incriminating response; that is, that such could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.17

Sometimes, interrogation occurs in the absence of direct police contact with the suspect. For example, if a family member or a probation agent acts on behalf and under the direction of the police, interrogation occurs.18 A key factor in determining whether questioning by civilians constitutes interrogation is the source of the plan by which the civilian speaks with the custodial suspect. For instance, if law enforcement suggested the meeting as well as the content of the conversation, or specific questions to be asked, then it is very likely a court will find that the civilian is acting as an agent for the police. Courts look at four primary questions to determine if the citizen is acting as a police agent. First, did the citizen or the police initiate the contact? Second, did the citizen or police suggest a particular course of action regarding the interview? Third, did the citizen or the police suggest what was to be said to the suspect? Fourth, to what degree is the citizen interview with the suspect controlled at all by the police?19

The use of undercover informants to question suspects is particularly problematic. An undercover officer posing as a fellow inmate is not required to give the *Miranda* warning to a suspect before questioning that might elicit an incriminating response.20 Nevertheless, using informants, whether police officers or inmates is

<table>
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<tr>
<th>Key Points: CUSTODY</th>
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<tr>
<td><em>Miranda</em> is only required when the suspect is in custody.</td>
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<tr>
<td>Custody for <em>Miranda</em> purposes is determined from the mindset of a reasonable person in the same position as the suspect.</td>
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<tr>
<td>The test is whether a reasonable person would feel that they are under arrest or restrained in a way equivalent to an arrest.</td>
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<tr>
<td>The court will look at the totality of the circumstances when evaluating custody.</td>
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<td>The courts will look at factors such as location, duration of contact, use of weapons, handcuffing, and the number of officers involved.</td>
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<tr>
<td>The subjective belief of the police officer or the suspect is immaterial in a custody analysis.</td>
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<tr>
<td>Generally speaking, a “Terry” stop is not custody.</td>
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<td>A traffic stop is usually not custody.</td>
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<td>A defendant in prison is considered “released” from custody for renewed interrogation purposes.</td>
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What is Interrogation?

Interrogation is police initiated custodial questioning designed to elicit an incriminating response. Questions that are routinely attendant to arrest, custody, and incarceration are not considered interpolation for *Miranda* purposes. Express questioning aimed at securing a confession or admission is simple to categorize as an interrogation. Moreover, a person is considered “interrogated” for *Miranda* purposes if she is subjected to any words or actions that the police should know are reasonably likely to elicit an incriminating response.14 Therefore, one can be interrogated even if not subjected to direct and specific questioning. For instance, confronting a suspect with physical evidence recovered from a crime scene would, in many cases, be the “functional equivalent” of direct and explicit questioning and, thus, would constitute interrogation.
difficult to implement successfully. For example, if the subject matter of the questioning relates to charges that have been filed against a suspect, the questioning would likely constitute a violation of the suspect’s 6th amendment right to counsel. It does not matter if the suspect was in custody during the questioning. It would be wise to consult with the local prosecutor’s office before using such a strategy.

Another area of concern is the questioning that occurs before, during, and after the administration of polygraphs. There are pre-test, test, and post-test interviews. If the suspect is in custody, the polygrapher must administer the Miranda warning prior to the pre-test interview as well as before any post-test interview.

Finally, the Miranda warning may be required if assistance in interviewing a particular suspect is sought from a psychiatrist or a psychologist. For example, if law enforcement should contact a mental health professional to interview a custodial suspect to evaluate sanity, the mental health professional must administer the Miranda warnings.

Content of the Miranda Warning

The Miranda warning consists of four parts. These are: 1) informing the suspect of his right to silence; 2) informing the suspect that anything said “may” (or “can and will” or “might” or “would” or “could”) be used against him in court; 3) informing the suspect that he has a right to consult with an attorney and to have the attorney present during questioning; and 4) informing the suspect that if he is indigent an attorney, if desired, would be appointed for him. These rights are typically summarized as “the right to silence and the right to counsel.”

Although the Miranda warnings need not be given in exact form, it is strongly recommended that police use a Miranda warning card to minimize the possibility of a fatally defective omission of required information. While the Miranda decision recognized that a suspect has a right to stop answering questions at any time, it does not require that the suspect be advised of this particular right.

If the police officer wishes to interrogate a suspect who has difficulty speaking or understanding English, an interpreter should be used. Miranda safeguards a constitutional right and therefore it is imperative that a police officer be sure the suspect understands the warning. It is also a good idea to draw upon community resources to develop a written Miranda warning and waiver form in the suspect’s native language. This will help convince the court that any waiver from a person whose primary language is not English was free, knowing, and voluntary.

There are three possible responses to the Miranda warning. The suspect can assert the right to silence, the right to an attorney, or waive the rights and agree to answer questions.

Proper Procedure if Miranda is Required

If the suspect is in custody and the police officer wishes to interrogate him, a Miranda warning is required. While the Miranda warning is not required at the initial moment of police contact with the suspect, the warning is required immediately prior to the interrogation.

Key Points: INTERROGATION

- Interrogation is custodial questioning, or the functional equivalent, by law enforcement officers or their agents, designed to elicit an incriminating response.
- The test for determining functional equivalency to questioning is whether a reasonable person with the officer’s knowledge of the suspect would believe that the officer’s words or acts were designed to elicit an incriminating response.
- The courts look at many factors to determine if a civilian is acting as a police agent when questioning a suspect.

Key Points: WARNINGS

- The Miranda warning must inform the suspect that his words may be used against him in a court of law, that he has a right to silence and to counsel, and that an attorney will be appointed for him if he wishes one and he is indigent.
- It is important that an officer be sure the suspect understands the Miranda warning.
- Use community resources to develop warning and waiver forms for non-English speaking suspects.
The Assertion of the Right to Silence

A suspect may respond to a Miranda warning by asserting her right to silence. When asserting this right, the suspect is telling the police that she does not wish to talk about this particular matter at this particular time. The invocation of the Miranda right to silence must be clearly expressed. Moreover, the idea that silence alone may be sufficient to assert the right was rejected by the United States Supreme Court in Berghuis v. Thompkins. The suspect must by oral, written, or non-verbal conduct clearly and unambiguously inform the police officer that she wishes to remain silent. If the suspect ambiguously indicates a wish to remain silent, the police may proceed with questioning. However, if the suspect clearly expresses her right to silence, the interrogation must cease.

The Miranda right to silence is a personal right. The right can only be asserted by the suspect and not by any of her family members or by an attorney. The right to silence cannot be invoked before custody or interrogation occurs. To invoke the right to silence the suspect must be in custody and interrogation must be underway or imminent.

Although the police must immediately stop the interrogation after the suspect asserts the right to silence, the police, under certain circumstances, may reinitiate contact with the suspect even though she remains in continuous custody. The circumstances necessary to permit a re-interrogation of a suspect who previously asserted her right to silence and who remains in continuous custody are:

1) The police scrupulously honor the original invocation of the right to silence by immediately terminating the questioning; and
2) The police wait at least two hours before re-interrogating the suspect; and
3) The police provide the suspect with a fresh Miranda warning; and
4) The police obtain a clear, knowing, free and voluntary waiver.

The suspect has the right to reinitiate contact at any time with the police after asserting her right to silence but the police must provide a fresh Miranda warning prior to the interrogation. If, after a suspect asserts her right to silence and she is released from custody, the slate is wiped clean. If she is again placed in custody, the police start at the beginning as far as Miranda is concerned.

Key Points: RIGHT TO SILENCE

- The invocation of the Miranda right to silence must be clearly expressed.
- The right to silence is a personal one that can only be asserted by the suspect.
- Once the suspect asserts her right to silence the interrogation must cease.
- The police may reinitiate contact with a suspect in continuous custody who asserts her right to silence if they wait at least 2 hours, provide the suspect with fresh Miranda warnings, and obtain a clear, knowing, free and voluntary waiver of the right.

The Assertion of the Right to Counsel

A suspect may respond to the Miranda warning by requesting counsel. When asserting this right, the suspect is telling the police that he does not wish to talk about any matter while in custody unless he has counsel. The invocation of this right to an attorney must be clearly expressed. The police can ignore an ambiguous reference to an attorney but the safer practice is to seek clarification from the suspect. A statement such as “Do you think I need an attorney?” is not an invocation of the Miranda right to counsel. However, once the right to counsel is clearly asserted, the interrogation must cease immediately. The Miranda right to an attorney is a personal right, which can only be asserted by the suspect and cannot be asserted by a family member or an attorney.

The law is quite strict and clear once the Miranda right to counsel is asserted. After the right is asserted, the police cannot reinitiate contact with the suspect to interrogate him for any crime so long as the suspect remains in continuous custody.

Moreover, once a suspect asserts the right to counsel to one officer, it is presumed by law that he is asserting this right to all officers everywhere. There is no good faith exception. Consider this example: Assume that a suspect is arrested for a misdemeanor offense in Illinois, and he requests counsel during the interrogation. He remains in custody and is eventually extradited to Wisconsin for a serious felony. Once in Wisconsin he is Mirandized, waives his right, and confesses. The Wisconsin officers were unaware of the previous request for counsel. Even though there are
different crimes, states, and police involved, there is still a violation and the confession would be suppressed. Therefore, the only way an officer can re-interrogate a suspect who asserts his right to counsel is if the suspect initiates the contact or there is a break in the custody, i.e., the suspect is released or imprisoned after the original request for an attorney, and the police wait 14 days.

A suspect may respond to the Miranda warning by waiving her rights and agreeing to talk to the police. The key to the validity of the waiver is whether it is voluntarily and knowingly given. The waiver must be a free and deliberate choice by the custodial suspect, rather than the product of intimidation, coercion, or deception by the police. Generally speaking so long as the police do not engage in impropriety the waiver is voluntary even if the suspect has a low IQ, is in a highly emotional state, or is intoxicated. In addition to being voluntary, the waiver must be made with the suspect’s awareness of her Miranda rights and the consequences of her decision to abandon them. This is why it is imperative for the police to fully advise the suspect of her Miranda rights prior to asking for the waiver.

Although not required, it is strongly recommended that the suspect sign the waiver form. If the suspect refuses to sign the form but is willing to talk, the officer must record in the report and state in any testimony the basis for her understanding that the suspect was waiving her rights. Also, once a suspect waives her Miranda rights she is still able to assert her rights at any time during the interrogation. Once the right to silence or to counsel is asserted the interrogation must stop. A suspect may waive a right but still refuse to answer a particular question. If this occurs the officer should honor the refusal and move on to another question.

### Key Points: WAIVER

- A waiver of the Miranda rights must be both voluntary and knowing.
- A written waiver of the Miranda rights is desirable when possible. If the suspect refuses to sign a written waiver but is nonetheless willing to talk, clear documentation of the verbal waiver is needed.
- After waiving her rights a suspect can change her mind at any time during the interrogation and reassert her right to silence or to counsel.

### Exceptions to Miranda

Wisconsin courts have recognized a number of situations when Miranda warnings are not required. To start, general on-the-scene questioning that is investigatory rather than accusatory in nature as to the facts surrounding a crime does not constitute custodial interrogation. In addition, Miranda warnings are not required for questioning about noncriminal activity such as ordinance violations. However, in a situation where a suspect is in custody following an arrest for a first offense drunk driving, ordinarily a civil forfeiture violation, it is probably a good idea if Miranda warnings are given. This is especially true if the potential exists for other charges to grow out of the investigation; e.g., causing injury by intoxicated use of a motor vehicle.

In addition to the investigative situations described above, Wisconsin has adopted two limited “safety” exceptions to Miranda: the public safety exception and the “rescue doctrine” or private safety exception. Both of these exceptions are based on the concept that the police need not choose between protecting the public or saving lives and obtaining evidence from a custodial suspect. The basis for these exceptions is found in the United States Supreme Court case of New York v. Quarles. In Quarles, the United States Supreme Court explained that the need for answers to questions in a situation posing a threat to the public safety outweighs Miranda’s intended safeguarding of the 5th amendment right against self-incrimination. The Supreme Court refused to
place police officers in the untenable position of having to consider, often in a matter of seconds, whether it best serves society to give the *Miranda* warning in order to preserve the admissibility of evidence, but at the risk of their ability to neutralize a volatile situation.\(^{32}\) The exception does not depend on the inquiring officer’s motivations as long as the questions asked are reasonably prompted by a concern for public or private safety.

Another situation where *Miranda* may not apply involves the administrative process of “booking.” The United States Supreme Court has recognized that certain questions directed to a suspect or defendant about biographical data, such as name and address, that are not intended to elicit incriminating responses, may be exempted from the *Miranda* requirement.\(^{42}\) Wisconsin has adopted this “booking” exception.\(^{44}\) The test of whether routine booking questioning constitutes interrogation is this: in light of all the circumstances, should the police have known that a question was reasonably likely to elicit an incriminating response?\(^{43}\) The test is an objective one. The subjective intent of the police officer is relevant but not conclusive.

The critical factor is the relationship between the booking questions asked and the criminal activity for which the person is suspected. For the exception to apply, the booking questions must be asked: 1) by routine booking personnel; 2) during the booking process; and 3) shortly after the suspect is taken into custody.\(^{46}\)

Finally, there are certain circumstances when one would ordinarily think *Miranda* applies, but does not. Consider, for instance, the situation where the police have surrounded a particular residence; i.e., a siege has occurred and police carry on a dialogue with the suspect either telephonically or through other means in an effort to get him to surrender.\(^{47}\) The dialogue under these circumstances is not interrogation and *Miranda* is not required, even though the suspect is not “free” to leave the scene. Similarly, courts have not defined interrogation to include situations in which a custodial suspect questions police about the amount and nature of evidence they have accumulated against the suspect.\(^{48}\) Lastly, any “truly volunteered” statement is always admissible, subject only to any rule of privilege or confidentiality that might apply to a particular situation.

### Key Points: EXCEPTIONS

- *Miranda* is not required for general on-the-scene questioning that is investigatory and not accusatory in nature.
- *Miranda* is not required under the public safety or rescue doctrine if the police are confronted with a life-saving emergency situation.
- *Miranda* is not required if a strong need for private safety is present.
- *Miranda* is not required for routine administrative booking questions.
- *Miranda* is not required if talking to a suspect in a siege situation when the goal is to obtain a peaceful surrender.

### III. THE 6\(^{th}\) AMENDMENT RIGHT TO COUNSEL

#### When does the Right to Counsel Attach?

In addition to the 5\(^{th}\) amendment right to counsel during a custodial interrogation, there is a 6\(^{th}\) amendment right to have legal representation once charged with a crime. Unlike the 5\(^{th}\) amendment right, which is triggered by custody and applicable to any criminal matter, the 6\(^{th}\) amendment right is triggered by charging and is “charge/offense specific.” Therefore, the 6\(^{th}\) amendment right to counsel “attaches” or becomes available when a person is charged with an offense. The right to counsel is for the charged offense and only that offense.\(^{49}\) For example, if the police know a suspect has been charged with armed robbery, they can question a suspect regarding an unrelated burglary without concern for the 6\(^{th}\) amendment because the suspect has not yet been charged with the burglary. Charging does not mean or include arrest. Under Wisconsin law, a person is charged when the prosecutor files either a complaint, a complaint and warrant or a complaint and summons with the court.\(^{50}\) So, the moment a complaint is filed, the 6\(^{th}\) amendment right to counsel attaches as to all charges contained in the complaint. However the 6\(^{th}\) amendment right to counsel is not self-executing. This means the suspect/defendant must invoke the right to counsel to receive its benefits. But, the state must advise the person that the right is available prior to interrogating the defendant.\(^{51}\)
When can the Right to Counsel be Invoked?

The interpretation of when the 6th amendment right to counsel may properly be invoked changed dramatically when the United States Supreme Court decided Montejo v. Louisiana, 129 S. Ct. 2079 (2009). The ruling clarified the circumstances in which the right to counsel can be invoked and overruled years of federal and state case law in Wisconsin.\(^52\)

In Montejo, the Supreme Court affirmed that the right attaches; i.e., becomes available, once a person is charged with a crime. But the Montejo court overruled years of federal and state court decisions based on the earlier Supreme Court case of Michigan v. Jackson, 475 U.S. 625 (1986). Montejo rejected the notion that no represented defendant can ever be approached by the state and asked to consent to an interrogation. The Montejo court determined that police can approach a charged and represented person to see if the person wishes to speak with the police. But, if the defendant asserts her right to counsel after being advised of her right to counsel, the inquiry must end. The police are not permitted to try again and again. Such efforts would constitute “badgering” and the Montejo court rejected such efforts, relying on Edwards v. Arizona, 451 U.S. 477 (1981) which prohibited such tactics. The police have one and only one opportunity to approach a charged and represented defendant. If the defendant invokes her right to counsel, all efforts to get the defendant to talk must therefore end.

The import of the Montejo decision reflects the Court’s continued efforts to harmonize 5th amendment right to counsel principles with 6th amendment right to counsel principles. The Montejo court determined that the protections afforded in the 5th amendment context, Miranda v. Arizona (the right against compelled self-incrimination); Edwards v. Arizona (the right to be free from further interrogation once the right is invoked); and Minnick v. Mississippi\(^55\) (no subsequent interrogation may occur without counsel regardless of whether the accused consulted with counsel), are more than sufficient protection for defendants in the 6th amendment context.\(^54\)

When Must the Police Notify the Defendant of the Right?

While it is the responsibility of the suspect to assert the 6th amendment right to counsel, it is the responsibility of the state to advise the suspect or defendant the right is available. Therefore, if the police wish to interrogate a person who has been charged, they must first advise the suspect of the 6th amendment right to counsel even if the suspect is not in custody.\(^55\) There are two primary methods by which to advise the suspect of the 6th amendment right to counsel. One is to read the Miranda warning, and the other is to simply tell the suspect that he has been charged with an offense and that he has the right to counsel before questioning. The simplest way to meet this obligation is to read the Miranda warning.

As a practical matter, a charged suspect will almost always be in custody when the interrogation begins and, consequently, the Miranda warning will be read for 5th amendment purposes. However, it is important to remember that Miranda should be read in the rare circumstance when you wish to interrogate a charged person who is not in custody.

Proper Procedure after the Defendant has been Advised of the 6th Amendment Right to Counsel

After proper notification, the suspect can assert her Miranda rights by requesting an attorney or waive the rights for the moment and talk to the police without an attorney. If the suspect requests an attorney, the interrogation must cease immediately. Unless the suspect initiates contact, the police cannot have contact with a suspect who previously asserted her 6th amendment right to counsel about the charged matter until the case is completed regardless of whether the suspect is in custody. However, this prohibition is only about the particular charge. The police are free to reinitiate contact with the suspect about other uncharged matters unless that person is in custody and has previously asserted a 5th amendment right to counsel.\(^56\)

Just as the assertion of the 5th amendment right to counsel for custodial questioning must be clearly expressed, a suspect must also clearly assert her 6th amendment right to counsel at the time of interrogation or before, if interrogation is imminent.\(^57\) However, if a suspect who has been charged responds to the Miranda warning by making references to an attorney and does not clearly express a wish for counsel, it is still a good idea to clarify before proceeding with the interrogation.\(^58\) In addition, an attorney previously retained for the charged offense cannot assert a defendant’s right to counsel under the 6th amendment. This is a change in Wisconsin law brought about by the Montejo decision. The 6th amendment right to counsel, like the 5th amendment right to counsel is a personal right, which must be asserted by the defendant.

It is possible, although rare, that a suspect who has asserted her 6th amendment right to counsel and has retained counsel will contact the police and seek a meeting. While the police may approach the suspect under these circumstances, the record must be made clear that it was the suspect who initiated the contact and that she wished to talk
with the police without her attorney.59 These cases should be handled with great caution. Courts will carefully scrutinize these meetings when the suspect’s lawyer attacks the propriety of such a meeting.

**The use of Informants in the 6th Amendment Context**

In many cases, the police use informants or “plants” to get information from suspects. However, if the “plant” is used by the police to get information about a charged matter, under circumstances where the target has an attorney, these information seeking efforts would be a violation of the 6th amendment right to counsel even though such efforts would have been permissible in a 5th amendment context.60 But, it is not a violation of the 6th amendment right to use an informant in a jail when the informant is instructed not to ask any questions but merely to listen and report back on any incriminating statements a suspect might make.61

On the other hand, as discussed earlier in the 5th amendment context, informants such as jail cell “plants” may be used effectively without violating the right to counsel because the suspect has not been charged with a crime nor has the suspect experienced the inherent coercion associated with a police dominated atmosphere.62

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**Key Points: 6th AMENDMENT’S RIGHT TO COUNSEL**

- The 6th amendment right to counsel becomes available when a suspect is charged.
- A suspect is charged upon the filing of a criminal complaint, warrant and complaint or summons and complaint is filed.
- The suspect’s 6th amendment right to counsel is charge/offense specific.
- The suspect’s 6th amendment right to counsel must be asserted; but the police must inform the suspect the right is available.
- The best way for the police to notify the suspect of his 6th amendment right to counsel is to read the *Miranda* warning.
- A defendant must assert the 6th amendment right to counsel in an unambiguous manner. Also, counsel cannot assert the right for the suspect. The right is personal to the defendant.
- Once the 6th amendment right to counsel is asserted, the police may not reinitiate contact with the suspect on the charged matter, without the approval of counsel, regardless of whether the suspect is in custody.
- The 6th amendment does not prohibit the police from reinitiating contact with the suspect about an uncharged matter, although the 5th amendment might if the defendant is in custody.
- Informants, at the request of the police, cannot question suspects about charged matters.

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**IV. VOLUNTARINESS**

When suspects talk, their statements must be voluntary. A statement is never admissible at trial if the statement was not made voluntarily, regardless of compliance with *Miranda*, the 6th amendment right to counsel, or its reliability. Courts will look at the totality of circumstances surrounding the statement to determine whether it was voluntarily obtained.63 This totality test requires balancing a suspect’s personal characteristics against police pressures used to induce the statements.64 Generally speaking, there must be some police coercion before a finding of involuntariness will be made.65 Coercive police conduct may come directly in the form of a promise of leniency or indirectly in the form of subtle psychological persuasion. This is often the case when the mental condition of the suspect becomes a significant factor in the voluntariness determination. Essentially, courts have determined that egregious police conduct is not always necessary for a finding of involuntariness and also, that certain subtle pressures, not coercive for an ordinary person, could be coercive for a person suffering from mental difficulties. However, the police conduct must be causally related to the statement before a statement is found involuntary.66
When balancing the personal characteristics of a person against police pressures, courts consider a variety of “personal” factors. They include age; education and intelligence; the emotional state; the presence of a mental disease or defect; intoxicants, physical pain, injury, or distress; and prior experience with the police and/or knowledge of the law and the *Miranda* rights in particular.

The second part of the analysis examines the pressures or strategies employed by the police to induce the statement. Generally, the propriety of the police conduct is the most important factor in determining voluntariness and, thus, the admissibility of the statement. Courts have examined a wide range of police tactics and strategies in determining whether a particular statement was voluntary. For instance, courts have looked at the length and conditions of the interrogations, the psychological and physical pressures exerted by the examiner, threats, promises, confronting suspects with the evidence, polygraph failures, promises made in exchange for cooperation, and the use of deceit. Usually, none of these factors alone, with the possible exception of force, will necessarily result in a finding of involuntariness. However, use of some of these tactics will invite extremely close scrutiny by the courts; e.g., force, polygraph failure, promises, and the use of deceit.

Force is never recommended as an acceptable means to obtain a statement as such behavior will almost always render a statement involuntary. It may very well result in a lawsuit as well. While tactics involving the use of promises of leniency, and/or deceit or confronting a suspect with a failed polygraph, may not result in a finding of involuntariness, they are nonetheless problematic. Such tactics require great care.

For example, statements made in a post-polygraph interview may be admissible. But, if the post-polygraph interview is so closely related to the mechanical portion of the polygraph examination that the two are considered one event, the post-polygraph statements are inadmissible. The key to admissibility is whether the post-test interviews eliciting the statements are found to be totally discreet from the examination (test) which precedes them. Again, it is a totality of circumstances analysis. The courts ask: 1) was the test over? 2) Was the suspect told the test was over? 3) Was the suspect unhooked from the instrument? 4) Are the questions not so related to the mechanical test? 5) Has there been an adequate passage of time? 6) Does the interview take place in a different room?

Generally, law enforcement should not make “promises” about the likely outcome of the case or the suspect’s continued custody without approval from the prosecutor. Moreover, courts expect that promises made to suspects be kept. Similarly, the use of deceit presents difficult questions. Misrepresenting the existence of evidence against a suspect does not necessarily render statements involuntary. However, when coupled with other tactics such as a promise of leniency, the chance of a finding that the statement is involuntary increases significantly.

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**Key Points: VOLUNTARINESS**

- The voluntariness issue is resolved by the courts’ balancing of the suspects’ personal characteristics against the police pressures used to induce the statement. The personal characteristics examined by the court include but are not limited to:
  - Age;
  - Education and intelligence;
  - Emotional state;
  - Presence of mental illness, disease or defect;
  - Lack of sobriety;
  - Physical pain, injury or distress;
  - Prior experience with police;
  - Knowledge of the law; particularly of *Miranda* rights

- The police tactics routinely examined by the courts include but are not limited to:
  - Force;
  - Threats;
  - Promises;
  - Deceit;
  - Misrepresenting evidence;
  - Confronting suspect with failed polygraph; and
  - Involuntary statements are inadmissible in court for any purpose even if the police are in full compliance with *Miranda* or 6th amendment rules.
One final note of caution on voluntariness is advised. The Wisconsin Supreme Court has determined that under the right set of circumstances, statements from witnesses, not suspects or defendants, are subject to suppression if involuntarily obtained. In cases such as this, the coercion must constitute egregious police misconduct. The court is concerned with police misconduct that, by its nature, undermines confidence in the reliability of a witness’s statements. Witness statements obtained by police methods that induce lying have no place in our system of justice because a conviction based on unreliable evidence undermines the fundamental fairness of a trial.

Courts have looked at several factors to determine whether police misconduct is so egregious that it makes a witness’ statement unreliable as a matter of law. These factors include: 1) whether a witness was coached on what to say; 2) whether investigating authorities asked questions blatantly tailored to extract a particular answer; 3) whether the authorities made a threat with consequences that would be unlawful if carried out; 4) whether the witness was given an express and unlawful quid pro quo; 5) whether the state had a separate legitimate purpose for its conduct; and 6) whether the witness was represented by an attorney at the time of the coercion or statement. The presence of the first four factors weighs in favor of suppression of the statement while the presence of the last two factors weighs against it.

V. CASE STUDIES

McNeil v. Wisconsin

While there are hundreds of cases dealing with the 5th and 6th amendment and their impact on police investigatory practices, McNeil v. Wisconsin, 501 U.S. 171 (1991), is one of the most instructive. It explains the principles, rules, and policies that underlie the very separate and distinct rights to counsel provided by the 5th and 6th amendments. In McNeil, the United States Supreme Court explained at length the right to counsel under each amendment and then applied those principles to a case from Wisconsin.

Facts:

McNeil was arrested in Omaha, Nebraska, on an armed robbery warrant from Milwaukee, Wisconsin. Milwaukee police interviewed McNeil on the armed robbery charge and after the reading of Miranda, McNeil invoked his 5th amendment right to silence. McNeil was then transported back to Wisconsin and counsel was assigned to represent him on the armed robbery charge.

McNeil was not able to post bond and remained in custody. After a few days, police from Racine County approached McNeil. They wanted to interrogate him about an uncharged homicide and robbery in Racine. The police read McNeil his rights. McNeil waived his rights and ultimately made some admissions regarding his involvement in the uncharged Racine cases.

McNeil’s Argument:

McNeil moved to suppress his statements arguing that when an attorney was appointed for him on the Milwaukee charge, it precluded the police from approaching him on any other matter so long as he remained in continuous custody.

The State’s Argument:

The state argued that since McNeil had only invoked his 5th amendment right to silence, the police were allowed to reinitiate contact after a sufficient amount of time had passed. While the state conceded that the police could no longer approach McNeil on the charged Milwaukee matter since he had invoked his 6th amendment right to counsel, it argued the police were free to approach him about any other uncharged matter.

The Court’s Holding:

The Supreme Court agreed with the state. It held that an assertion of the 6th amendment right to counsel for representation on a particular charge is not an invocation of the 5th amendment right to counsel to assist in a custodial interrogation. Since McNeil only asserted his 5th amendment right to silence, the police were free to reinitiate contact with him on any matter, except the charged offense, as long as they waited an appropriate amount of time and gave McNeil a fresh Miranda warning. In this case, the police had waited a few days, had given McNeil a fresh Miranda warning, and were interrogating him about uncharged matters. Therefore, his subsequent statements were lawful and admissible.

Key Point: McNeil

The assertion of the 6th amendment right to counsel for representation as to a charge is not an assertion of the 5th amendment right to have an attorney assist in a custodial interrogation.
Montejo v. Louisiana

Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Montejo waived his *Miranda* rights, and was interrogated at the sheriff’s office by police detectives. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven Moore to the victim’s home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a “72-hour hearing”—a preliminary hearing required under state law. The defendant was charged with First Degree Murder, and the court ordered No Bond set in this matter. Further, the court ordered the Office of Indigent Defender be appointed to represent the defendant.

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim’s widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence. At trial, the letter of apology was admitted over defense objection.

Montejo’s Argument:

The rule announced in *Michigan v. Jackson* (1986) requires that the letter of apology be suppressed. *Jackson* held “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 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.” The appointment of counsel was the equivalent of an assertion of counsel.

Louisiana’s Argument:

Because Montejo stood moot at the hearing and did not “assert” his right to counsel at the hearing or even “accept” the appointment of counsel. He did not and could not invoke the 6th amendment protections.

The Court’s Holding:

The *Montejo* court determined that the protections afforded in the 5th amendment context, by *Miranda v. Arizona* (the right against compelled self-incrimination); *Edwards v. Arizona* (the right to be free from further interrogation once the right is invoked); and *Minnick v. Mississippi* (no subsequent interrogation may occur without counsel regardless of whether the accused consulted with counsel), are more than sufficient protection for defendants in the 6th amendment context.

The court reasoned that obtaining an attorney on a case is not the equivalent of asserting a right to counsel after being read ones rights. Consequently, the court overruled *Michigan v. Jackson* and held that the police could properly approach Montejo, since he had not personally invoked his right to counsel.

Key Point: **MONTEJO**

> The assertion of the 6th amendment right to counsel must be made at the time of interrogation, or immediately before; and it must be made by the suspect/defendant, not the attorney.

Maryland v. Shatzer

In 2003, the defendant was serving a sentence for an unrelated matter when he became suspected of having sexually abused his three-year-old son. A detective assigned to the abuse investigation interviewed the defendant at a Maryland prison. The defendant was read his *Miranda* rights invoked his right to counsel and was returned to the general prison population.

Two years and six months later more information connecting the defendant with the sexual abuse of his son came to light. The police went to the, prison and read the defendant his rights. This time the defendant waived his rights, talked to the police and made an inculpatory statement.

Defendant’s Argument:

The defendant argued the *Edward* s rule prohibited the police from approaching him about the sexual abuse matter because he had previously invoked his right to counsel and he remained in continuous custody. Under *Edwards*, once a person invokes his *Miranda* right to counsel the police can not reinitiate contact for interrogation purposes on that
matter as long as the subject remains in continuous custody. Since the defendant remained in continuous, uninterrupted custody between interrogations two and one-half years apart, the defendant argued the second interrogation violated the *Edwards* rule.

**The State’s Argument:**

The state argued enough time had passed since the original invocation to allow the police to approach the defendant. The state also argued that since the defendant had been in prison for a substantial period of time the normal coercive circumstances inherent to “custody” were no longer applicable; and thus, the protections afforded by the *Edward*s rule were no longer necessary.

**The United States Supreme Court Holding:**

The United States Supreme Court ruled that *Edwards* was not applicable; and consequently, the defendant’s statements were admissible. Specifically, the court found the defendant’s release from the interrogation room back to the general prison population constituted a release from custody for *Miranda* purposes. Thus, the police were lawful in re-approaching the defendant and questioning him two and one-half year’s later because he had been released from custody after he first invoked his right to counsel. The release from custody, albeit from a prison interrogation room to the general prison population, works the same reasoned the court, as a release from a jail to the street.

In addition, the Supreme Court enunciated a new rule that once a person invokes his right to counsel after being *Mirandized* in custody, the police may not re-approach the subject under *Edwards*, as it is now revised, until the person has been released from custody for at least 14 days. Obviously under this new rule the statements in this case were fine as far more than 14 days had passed from the first interrogation to the second one.

**Practical Applications:**

This case in some ways helps the police and in some ways hurts the police.

**The good part:** This case accepts the argument that a prison can be like a home in that for *Miranda* purposes being in prison is not necessarily custody for interrogation purposes. However, being taken out of the general prison population to be interrogated is sufficiently custodial to trigger the *Miranda* warning requirement and the return to the general prison population after interrogation constitutes a sufficient release from custodial pressures to allow the police to reinitiate contact for interrogation purposes. The Wisconsin Supreme Court, most notably in *State v. Armstrong*, has previously rejected the notion that any kind of incarceration can be considered non-custodial; but in light of *Shatzer* and our Supreme Court’s general adherence to federal interpretations of 5th amendment principles it is predictable our courts will accept the prison as “home” concept for interrogation law purposes.

**The bad part:** Before this case, the rule was that once a person was released from custody the slate is wiped clean and the police could feel free to approach the subject as soon as they wished. That is no longer the case. Now, the rule is that once a person invokes their *Miranda* right to counsel while in custody, the police can not approach the subject again, as long as he/she is in custody. Once the person is released from actual custody or return to the general prison population the police must wait for 14 days until they can approach the subject. Since there will likely be debate as to what is meant by 14 days, the safest course is to wait 15 days to remove any doubt. Of course, the subject may always reinitiate contact with the police any time they wish.

**Key Points:** *SHATZER*

- Being sent to prison is considered a break in custody for *Miranda* purposes, though the *Miranda* warning should be read prior to a prison interrogation.
- Once a person in custody who has invoked the *Miranda* right to counsel is released, the police must wait 14 days before they can reinitiate contact.
VI. APPENDICES

A. **Checklists**

1. *Miranda* is required if all three of the following conditions exist:
   a. The suspect is in custody.
   b. The suspect will be interrogated about a crime.
   c. Law enforcement or an agent of law enforcement is doing the questioning.

2. **Exception**: Even if all three of these conditions exist, *Miranda* may not be required because:
   a. The “private” or “public” safety doctrine applies; or
   b. The questioning occurs during routine booking by booking personnel; or
   c. The nature and substance of the investigation or proceeding at hand does not require administration of *Miranda* warnings; e.g., CHIPS, TPR, and OWI first-offense cases.

3. When do you get a second chance at interrogating a suspect who has remained in continuous custody?
   a. **After assertion of silence**: If the suspect has remained in continuous custody since invoking his right to silence, you may reinitiate the interrogation if all of the following conditions exist:
      i. You scrupulously honored the suspect’s 5th amendment right to silence by immediately terminating the previous interrogation; and
      ii. An appropriate amount of time has passed since the previous interview, usually two or more hours; and
      iii. A fresh *Miranda* warning is given; and
      iv. A clear, knowing and voluntary waiver of *Miranda* rights occurs.
   b. **After requesting counsel**: If the suspect remains in continuous custody after invoking his right to counsel you cannot reinitiate the interrogation under any circumstances. However, the suspect can reinitiate the contact if all the following conditions are met:
      i. The suspect clearly initiates subsequent contact which demonstrates a desire to speak with the police; and
      ii. Fresh *Miranda* warnings are given; and
      iii. A clear, unequivocal, knowing and voluntary waiver of the 5th amendment right to counsel is obtained; and
      iv. If there is an actual break in custody of 14 days or more since the invocation, or if there is no change in custody but the suspect is sent to prison. However, if there is an invocation after *Miranda* is administered in prison no further inquiry is permitted until an additional 14 days passes.

4. What are the typical violations of the *Miranda* rule?
   a. *Miranda* warning was not given to a custodial suspect who was interrogated about a crime.
b. *Miranda* warning not given when police failed to realize an investigative detention became a “custodial” situation.

c. The custodial suspect did not validly waive *Miranda* rights before answering the questions.

d. The law enforcement officer failed to scrupulously honor a custodial suspect’s previous request to either remain silent or for counsel.

e. The officer reinitiated questioning within two hours after the custodial suspect invoked his 5th amendment right to silence.

f. The police reinitiated questioning of a custodial suspect who previously asserted his right to counsel.

g. The police reinitiated an interrogation of a suspect about a charged criminal offense after he had already asserted his right to counsel.

h. The police reinitiated contact to interrogate suspect on an unrelated matter where the suspect had previously asserted his 5th amendment right to counsel and had remained in continuous custody

*A violation of the *Miranda* rule renders any statement obtained by the police inadmissible in the prosecutor’s case-in-chief.*

**Any intentional violation of *Miranda* will result in the suppression of any fruits of the statement**

5. Voluntariness.

a. All statements must be voluntary.
   
   i. The courts look at various factors in a voluntariness analysis.

   ii. If the statement obtained by the officers was involuntary, it is inadmissible for any purpose in any criminal proceeding.
B. Sample Problems:

1. The defendant is arrested on a charge of burglary. The defendant is read his rights and asserts his right to counsel. The defendant has not yet retained counsel but is released from custody. May the police initiate contact with the defendant?

2. The defendant is arrested and formally charged with burglary. The defendant is read his rights and asserts his right to counsel. The defendant retains counsel and is released from custody. The police wait 14 days after the release. Can the police initiate contact with the subject?

3. A summons and complaint are filed charging a defendant with securities fraud. The deputy sheriff serves the summons and complaint on the defendant, and he is not taken into custody. The defendant does not have a lawyer. The deputy sheriff interviews the defendant. During the interview, the defendant provides exculpatory story. No right invoked. As soon as the deputy sheriff leaves, the defendant calls and retains a lawyer. Lawyer writes letter to DA with copy to deputy sheriff: “Do not interview my client regarding this offense or any other offense without my express written consent!” Can the officers go interview the defendant?

4. The defendant is arrested on complaint and warrant for armed robbery and placed in custody. The defendant is interrogated by police but says nothing of use. He does not invoke any constitutional right. The defendant calls and retains a lawyer. The defendant makes his initial appearance. The police develop more evidence and want to interview the defendant again. Can they?

5. The defendant is arrested on attempted murder charge. The defendant is read his rights and asserts his right to counsel. The defendant gets counsel, remains in continuous custody, is tried and convicted, and sentenced to 20 years in prison. Five years later may the police approach the defendant in prison and seek to interrogate him?

6. The defendant is charged in a criminal warrant for burglary. The defendant is approached by the police in a public area and is questioned about the burglary without being read his Miranda rights. The defendant confesses. Is this confession admissible?

7. The suspect is arrested and interrogated for a burglary. The suspect invokes his right to silence. May the police reinitiate contact with the subject?

8. A complaint is filed charging the defendant with felony auto theft. The defendant is not interrogated but remains in custody. The defendant retains an attorney and the police know of this retention. The police approach the subject in custody, read the Miranda warning, and the subject waives his rights and confesses. Will this confession be admissible?

9. Suspect is arrested and interviewed on a charge of burglary. Suspect invokes his right to counsel. Police want to re-interview on the burglary before the filing of charges or the initial appearance. They also learn he is a suspect in an unsolved homicide from a month earlier and want to talk with him about that as well. Suspect does not have an attorney. Can police re-interview on the burglary?
C. Answers to Problems

Problem #1:

Yes, if they wait 14 days after the release. See the Shatzer case discussion in the case studies section of the Primer for a more complete explanation.

Problem #2:

No, as to the charged burglary as he now has an attorney on the charge. Montejo does not permit a second interrogation as he has been read his rights and “lawyered” up. A second attempt would be “badgering” and is prohibited by case law. Miranda, Edwards, and Montero. However, the police can approach as to any other matter after the 14 days as he is no longer in custody.

Problem #3:

Yes, Montejo says yes, 6th amendment right to counsel is personal to defendant. As with the 5th amendment right to counsel, the 6th amendment right to counsel must be asserted at the time of interrogation by the person.

Problem #4:

Yes, Montejo says, yes they can!

Problem #5:

Yes. Once the defendant was imprisoned, the slate was wiped clean and the police are free to approach the defendant though they must Mirandize him prior to questioning. See the Shatzer case discussion in the case studies section of the Primer for a more complete explanation.

Problem #6:

No, while the defendant does not have a 5th amendment right to counsel because he is not in custody, he does have a 6th amendment right to counsel because he has been formally charged in a warrant and complaint. Therefore, the police must advise the defendant of his 6th amendment right to counsel in some manner. The best way to do this is to read the Miranda warning. It is the one time the Miranda warning is given in a non custodial setting. Since the Miranda warnings were not read here, the statements are inadmissible.

Problem #7:

Yes, the police may initiate contact with the subject on the burglary or any other matter so long as they scrupulously honor the invocation of silence (that means, immediately cease all questioning), wait at least two hours, give fresh Miranda warning and obtain a free, knowing, and voluntary waiver of rights from the subject prior to questioning. The controlling case in this regard is State v. Badker, cited in the Endnotes.
Problem #8:

Yes, under *Montejo*. The retention of an attorney is not the same as the invocation of the 6th amendment right to counsel after *Miranda* rights.

Problem #9:

No and No. *Edwards v. Arizona* prohibits additional questioning on the burglary offense and *Roberson v. Arizona*, prohibits questioning on the homicide because the right invoked was the right counsel during interrogation. Subsequent interrogation absent a change in custodial status would be badgering in the eyes of the Supreme Court.
D. Endnotes

1 State v. Gruen, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998).
3 State v. Pounds, 176 Wis. 2d 315, 500 N.W.2d 373 (Ct. App. 1993).
4 State v. Gruen, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998).
5 State v. Pounds, 176 Wis. 2d 315, 500 N.W.2d 373 (Ct. App. 1993).
7 State v. Esser, 166 Wis. 2d 897, 480 N.W.2d 541 (Ct. App. 1992).
8 State v. Pheil, 152 Wis. 2d 523, 449 N.W.2d 858 (Ct. App. 1989).
10 State v. Schambow, 176 Wis. 2d 672, 482 N.W.2d 364 (1988).
13 State v. Pheil, 152 Wis. 2d 523, 449 N.W.2d 858 (Ct. App. 1989).
15 See, e.g., State v. Lindh, 161 Wis. 2d 324, 468 N.W.2d 168 (1991).
19 State v. Ross, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996).
21 State v. Coerper, 199 Wis. 2d 216, 544 N.W.2d 423 (1996).
22 United States v. Wyatt, 179 F.3d 532 (7th Cir. 1999).
25 State v. Jennings, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142.
26 State v. Hanson, 136 Wis. 2d 195, 401 N.W.2d 771 (1987).
28 State v. Lee, 175 Wis. 2d 348, 499 N.W.2d 250 (Ct. App. 1993), State v. Ward, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236.
29 State v. Schindler, 146 Wis. 2d 47, 429 N.W.2d 110 (Ct. App. 1988).
33 Village of Menomonee Falls v. Kunz, 126 Wis. 2d 143, 376 N.W.2d 359 (Ct. App. 1985).
38 State v. Stevens, 181 Wis. 2d 410, 434, 511 N.W.2d 591 (1990).
39 State v. Bryant, 2001 WI App 41, 241 Wis. 2d 554, 624 N.W.2d 865.
40 State v. Bryant, 2001 WI App 41, 241 Wis. 2d 554, 624 N.W.2d 865.
41 State v. Stearns, 178 Wis. 2d 845, 506 N.W.2d 165 (Ct. App. 1993).
Two other limitations are noteworthy. The 6th amendment right to counsel is not available for invocation in probation or extended supervision revocation cases because these proceedings are civil and not criminal in nature; State ex rel. Griffin v. Smith, 2004 WI 36, 270 Wis. 2d 235, 677 N.W.2d 259. Nor may it be invoked during presentence investigative interviews. State v. Jimmie R.R., 2004 WI App 168, 276 Wis. 2d 447, 688 N.W.2d 1.

State v. Harris, 199 Wis. 2d 227, 544 N.W.2d 54 (Ct. App. 1996).


Montejo v. Louisiana, 129 S. Ct. 2079 (2009), State v. Forbush, 2010 WI App 11, 323 Wis. 2d 258, 779 N.W.2d 476.


Montejo v. Louisiana, 129 S. Ct. 2079 (2009), State v. Forbush, 2010 WI App 11, 323 Wis. 2d 258, 779 N.W.2d 476.

Montejo v. Louisiana, 129 S.Ct. 2079 (2009), State v. Forbush, 2010 WI App 11, 323 Wis. 2d 258, 779 N.W.2d 476; State v. Jennings, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142.


State v. Hoppe, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407.


State v. Greer, 2003 WI App 112, 265 Wis. 2d 463, 666 N.W.2d 518; State v. Davis, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332.


State v. Samuel, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.