The Importance of the *Berghuis Decision* for the Criminal Defense Investigator

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Criminal Defense Investigators are often tasked with reviewing transcripts and video- and/or audio recordings of clients who were interviewed and interrogated by law enforcement officers prior or subsequent to arrest. Such review and evaluation could provide the defense team with useful information which then develop into legal arguments to partly or fully suppress the interview. During this review, the Criminal Defense Investigator usually evaluates if the interview is legally, morally, and lawfully sound, and brings findings to the attention of the legal team. For this article, only the *custodial interview setting* is of relevance.

The 8th Circuit Court of the United States ruled in *US v. Axsom* (2002) that a *custodial interview setting* addresses the "physical and psychological restraints on the person's freedom during the interview". Several factors and the so-called *totality of circumstances* are included in the evaluation of each custodial setting; however, it is not the perception of the interviewer that is assessed by the court, but the experience of the interviewee and whether a reasonable person in the same position as the interviewee would have felt free to leave. Hence, the evaluation of the interviewee's perspectives and experiences must be one of the Criminal Defense Investigator's first steps when reviewing recorded interviews for admissibility. If the interview takes place in a *custodial setting*, the investigator should, in a second step, decide whether the interviewee was *mirandarized* prior to the first question of the interview. The *Miranda Warnings* are a result of the Supreme Court decision in *Miranda v. Arizona* (384 U.S. 436, 1966), which protects an interviewee's rights against self-discrimination in criminal cases as defined by the 5th Amendment of the Constitution of the United States of America (Cornell School of Law, 2018a, para. 1). At this point of the investigator's interview analysis, the focus shifts to the questions whether *Miranda Warnings* were provided correctly and completely, if the interviewee understood the constitutional rights, and if he or she was capable and allowed to decide freely whether to answer the interviewer's case related questions.

Berghuis (560 U.S. 370, 2010) decided by the U.S. Supreme Court in 2013 under Docket 08-1470, comes now into play. Let's assume the interviewee in custody was made aware of *Miranda* and, among other components, understood the right to remain silent. However, and this is the major component of the *Berghuis decision*, let's further assume the interviewee acknowledged and understood the provided *Miranda Rights* and "[…] did not invoke them but did not waive them" (Cornell School of Law, 2018b, para 2, sec. 1). In the *Berghuis* case, the Supreme Court recognized the defendant Thompkins, after his arrest for a murder charge, was interviewed by local police on the third day of custody. On record, he verbally confirmed that he understood the *Miranda Warnings* – *w*hich were read properly and completely to him before the interview – however, he refused to sign a prepared *Miranda* form. Thompkins did not make any case relevant statements. The police descripted the interview as a police-driven monologue. After approximately three hours of being silent, police changed strategies and tactics and appealed to Thompkins' religious belief. He replied with 'yes' when asked if he had asked God for forgiveness for shooting the alleged victim. This inculpatory statement was introduced as evidence. Thompkins argued that this specific statement could not be used because, after acknowledging Miranda, he did not answer any questions for approximately three hours, and by using his right to remain silent, the police should have stopped asking questions. The Supreme Court, however, upheld the conviction and argued that Thompkins failed to "explicitly invoke nor waive his right to remain silent" (Cornell School of Law, 2018b, sec. 5, para 3), and because he did not provide "an unambiguous declaration of his intention to invoke his right to remain silent, he has not invoked such a right" (sec. 6, par, 2). Police officers were therefore allowed to continue asking questions, and the provided answers were accepted as evidence. What is the quintessence of this specific case for the Criminal Defense Investigator? The answer is two folded:

Primarily, when reviewing a recorded interview for the defense team, the Criminal Defense Investigator should not only analyze the interview in light of lawful, ethical, and moral standards, but should simultaneously question three interview components: (a) is the interview of custodial nature, (b) if so, are *Miranda Warnings* provided properly and completely before any questioning, and (3) if so, did the interviewee, upon *Miranda*, expressively deny waiving constitutional rights and unambiguously declare the intention to remain silent? In addition, the Criminal Defense Investigator should also evaluate if the interviewee was in the physical and mental condition to express his or her decision to remain silent; and may consider consulting with experts to answer this important question. Nevertheless, if the interviewee provides such expressive statement to the police, officers must

stop initiating questions, or, the provided answers, with some exceptions, may not be admissible. One exception of *Miranda* and *Berghuis*, for example, is the *Public Safety Exception* under *New York v. Quarles* (1984), which allows the continuance of questioning and the admissibility of statements into evidence in cases of immediate risks for public safety. In summary, the Criminal Defense Investigator should identify expressive statements in the interview as defined in *Berghuis* and should, to assist the attorney's legal analysis of the interview's admissibility, update the legal team immediately if such statements are found – or if the interviewee only acknowledged his or her constitutional rights without further specific *Berghuis* expressions.

Secondarily, *Berghuis* is of importance when members of the defense team educate clients about legal proceedings and constitutional rights. We often hear that clients receive the advice that they should not talk with the police. This is certainly not wrong, but it may, under *Berghuis*, not be sufficient. The client should be educated that in addition to 'not talking with the police', he or she should *expressively* and *unambiguously* declare that no questions will be answered nor the constitutional right to remain silent waived under any circumstances. Otherwise, police may continue asking questions and may eventually develop access to the client.

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