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Fourth, Fifth and Sixth Amendment Considerations for Admissibility of Defendants’ Admissions and Confessions

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From October 2008 through June 2011, the U.S. Supreme Court issued opinions that have direct bearing on the admissibility of a defendant’s admissions and confessions. Many of these opinions and their importance have been overlooked by both the media and legal journalism. In light of the judicial trend toward erosion of the protections of the Fifth and Sixth Amendments, and of dilution of the holdings of Miranda v. Arizona and Massiah v. United States, it is timely to review the state of Federal and Colorado law controlling admissibility of a defendant’s admissions and confessions. This article will survey Fourth, Fifth and Sixth Amendment Federal constitutional cases and their Colorado counterparts which govern the admissibility of a defendant’s admissions and confessions.

Introduction

The Bill of Rights affords a defendant several bases for challenging the admissibility and use of his statements at trial. The safeguards granted by the Fourth, Fifth and Sixth Amendments and their counterparts in the Colorado Constitution provide grounds for suppressing a defendant’s admission or confession. The guarantees of each Amendment are unique. Depending on the circumstances, a defendant’s statement may require analysis under more than one constitutional basis, however the legal analysis is not overlapping. To assure a full and fair hearing and to preserve the issue for state and federal appeal, an objection must be raised for each constitutional violation asserted.

The matter is not simple. The rationale for and elements that constitute each Amendment’s violation are different. Should a defendant’s statement be suppressed in the prosecution’s case-in-chief, the subsequent admissibility of that statement differs depending on the constitutional grounds for suppression. In some jurisdictions, the procedural requirements of notice, pleading and timing also differ depending on the constitutional grounds for suppression. The U.S. Supreme Court does little to succinctly describe the nature, remedy and

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2 An admission is defined as any voluntary incriminating statement by the accused, relating to some particular fact or circumstance but not the whole charge, which indicates a consciousness of guilt and tends to connect him with the crime charged. People v. Lowe, 660 P.2d 1261,1265 (Colo.,1983). A confession is an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it. (Wigmore, Evidence (3.d ed.) § 821.)
procedural requirements associated with mixed Fourth, Fifth and Sixth Amendment violations. Indeed, *Kansas v. Ventris*, 129 S. Ct. 1841 (2009) reflects the complexity of the Court’s analysis of the consequences of suppression of a defendant’s statements:

Whether a confession that was not admissible in the prosecution’s case in chief nonetheless can be admitted for impeachment purposes depends on the nature of the constitutional guarantee violated. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. The Fourth Amendment, on the other hand, guarantees that no person shall be subjected to unreasonable searches or seizures, and says nothing about excluding their fruits from evidence; exclusion comes by way of deterrence sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but we have instead applied an exclusionary-rule balancing test. The same is true for violations of the Fifth and Sixth Amendment prophylactic rules forbidding certain pretrial police conduct. The core of the Sixth Amendment right to counsel is a trial right, but the right covers pretrial interrogations to ensure that police manipulation does not deprive the defendant of ‘effective representation by counsel at the only stage when legal aid and advice would help him.’ This right to be free of uncounseled interrogation is infringed at the time of the interrogation, not when it is admitted into evidence. It is that deprivation that demands the remedy of exclusion from the prosecution's case in chief.3

The purpose of this paper is to explain the constitutional rationale and required legal showing necessary to suppress a defendant’s statement on grounds of Fourth, Fifth and Sixth Amendment violations. Suppression motion content, procedure in Colorado state courts, and subsequent use of suppressed statements is also discussed.

**DISTINCTION BETWEEN FOURTH, FIFTH AND SIXTH AMENDMENT VIOLATIONS**

The Fourth, Fifth and Sixth amendment protections for a defendant’s statements can best be understood as protections defined by chronology and circumstance.

The Fourth Amendment protection against unlawful search and seizure applies to statements made by a defendant during an unlawful search or arrest before charges are filed.4

The Fifth Amendment protection against self-incrimination applies to statements made by a defendant in response to questioning by a government agent during an interrogation conducted while the defendant is in custody.

The Sixth Amendment protection against government interference with a defendant’s right to counsel applies to statements made by a defendant in response to questioning by a government agent during an unlawful search or arrest before charges are filed.

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3 *Kansas v. Ventris*, supra, at 1842-1843 [citations omitted.]

government agent after he has been formally charged with a crime and after he has asked for and availed himself of the assistance of counsel.

FOURTH AMENDMENT CHALLENGES TO ADMISSIBILITY OF A DEFENDANT’S STATEMENT

The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures” by the government. It also guarantees that “no Warrant shall issue except upon probable cause” describing with particularity “the place to be searched, and the persons or things to be seized.”

Seizure defined.

Unreasonable searches and seizures arise from a wide range of police action. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person. If, given the totality of the circumstances, an encounter between a police officer and a citizen is so intimidating as to demonstrate that a reasonable, innocent person would not feel free to decline the officers’ requests or otherwise terminate the encounter then a seizure has occurred. This test is objective and presupposes an innocent person.

Seizure of a minor presents unique problems. Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) held that a two-hour warrantless interview of a minor in school (about molestation by her father) without exigent circumstances or parental consent was a seizure for Fourth Amendment purposes. [Camreta v. Greene, 563 U.S. ____ (2011) vacated the 9th Circuit Court of Appeals ruling on other grounds and did not review the Fourth Amendment issue.]

Whether the search or seizure is reasonable is a two-part inquiry: was the officer’s action was justified at its inception, and was reasonably it related in scope to the circumstances which justified the interference in the first place. To establish that a search or seizure was reasonable, the police must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The prosecution has the burden to show that a warrantless search or seizure was reasonable.

Effect of a Fourth Amendment violation

When the police elicit incriminating statements from a suspect as the result of an unreasonable search, seizure, detention, or arrest of the suspect, the police violate the

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5 The Colorado Constitution has the additional requirement that probable cause for a search warrant must be supported by an oath or affirmation reduced to writing. Article II, Section 7; c.f. Hernandez v. People, 153 Colo.316, 321 (1963).
6 For a thorough discussion see Colorado Criminal Practice and Procedure, Vol. 15, § 3.1 et seq.
7 Terry v. Ohio, 392 U.S. 1, 16 (1968); People v. Taylor, 41 P.3d 681(Colo.,2002).
8 People v. Jackson, 39 P.3d 1174, 1183 (Colo.2002)
10 Terry, supra, at 20.
11 Terry, supra, at 21.
defendant’s Fourth Amendment right. Any evidence illegally obtained by law enforcement is inadmissible in the government’s case in chief because it is “fruit of the poisonous tree”. This axiom, known as the Exclusionary Rule, applies equally to defendant’s statements and physical evidence. The case of People v. Perez, --- P.3d ----, 2010 WL 1840829 (Colo.,2010) explains:

In cases where a confession follows an illegal arrest, the fact of illegal custody is just one factor to be considered when determining the voluntariness of a confession.

Further,

[I]n cases where confessions follow an illegal search, the confession is often elicited solely because of the illegal search-a defendant sees that an officer has obtained the incriminating evidence and then speaks. The causal connection between the illegal search and the confession is a tight one. “[I]t is crystal clear that giving the defendant the Miranda warnings will not break the causal chain between an illegal search and a subsequent confession.” 15

The U.S. Supreme Court explained that in regard to a defendant’s statement, the law of search and seizure “is the product of the interplay” of the Fourth and Fifth Amendments. “It reflects a dual purpose- protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him.”16

Admissibility of statements suppressed for Fourth Amendment violation: “fruit of the poisonous tree”

Subsequent statements by a defendant and testimony of witnesses who were discovered as a result of a unlawfully obtained statement are suppressible as fruits of the illegal search or seizure. Where illegally seized evidence is used to induce or coerce a suspect’s confession, the statements are inadmissible.

A defendant’s statements obtained by unlawful search or seizure are generally admissible for impeachment. [Note: when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his pre-trial testimony may not thereafter be admitted against him at trial except for impeachment] However, physical evidence

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12 To determine whether evidence was obtained as a direct result of police illegality, the court considers whether the evidence was “come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” People v. Rodriguez, 945 P.2d 1351, 1363-64 (Colo.1997) quoting Wong Sun v. United States, 371 U.S. 175, 176-77 (1963).


14 Note that where evidence was obtained in reasonable reliance on binding appellate precedent, (e.g. before a new rule of procedure is established) the evidence is obtained in good faith and is not subject to the exclusionary rule. Davis v. U.S., 564 U.S. _____, slip op. 20, (2011).

15 People v. Perez, supra, at p. 7 [citations omitted].


17 Briggs, supra, at 917.


20 CRE Rule 104.

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obtained as the result of a voluntary statement is admissible in the prosecution’s case-in-chief if it was not tainted by or the fruit of the illegal search or seizure\textsuperscript{21} or could have been obtained from an Independent Source\textsuperscript{22}, or through the Inevitable Discovery, Public Safety\textsuperscript{23} or Good Faith\textsuperscript{24} exceptions to the “fruit of the poisonous tree” doctrine.

**FIFTH AMENDMENT CHALLENGES TO ADMISSIBILITY OF DEFENDANT’S STATEMENTS**

The Fifth Amendment guarantees that no person shall be compelled in any criminal case to be a witness against himself. In the most extreme aspect of the Fifth Amendment’s protection, the Fourteenth Amendment’s guarantee of Due Process bars statements that are the result of force, threat or physical or psychological coercion.\textsuperscript{25}

The Fifth and Fourteenth Amendments have taken the brunt of judicial erosion of those constitutional rights which historically protected the use of a defendant’s compelled confessions or admissions. Now, rather than focusing on “voluntariness” or the coercive actions of law enforcement, the courts have shifted the burden to the defendant to explain any action or articulation which could be characterized as a waiver of his right against self-incrimination. In 1936 in *Brown v. State of Mississippi*\textsuperscript{26} the Supreme Court established that a statement which is the result of police brutality is most likely an unreliable statement. And, when introduced in trial, the admission of that unreliable statement - the product of coercion or police brutality – creates a violation of the defendant’s Fourteenth Amendment right to due process.

Beginning in the 1960s, the Supreme Court's Fifth and Fourteenth Amendment jurisprudence shifted. The Court abandoned its decades-long focus on reliability of confessions. Instead, the Court adopted a deferential voluntariness test examining the “totality of the circumstances” of a confession\textsuperscript{27}. Shortly thereafter the Court replaced the “totality of the circumstances” test with the requirement that police utter the *Miranda*\textsuperscript{28} warnings, which if properly provided, the Court suggests, give police “a virtual ticket of admissibility.”\textsuperscript{29} The Court has since acknowledged “litigation over voluntariness tends to end with the finding of a valid waiver.”\textsuperscript{30}

*Miranda v. Arizona*

\textsuperscript{21} *People v. Trujillo*, 733 P.2d 1086, 1091 (1989) [The derivative evidence rule allows the prosecution to “establish that the challenged evidence was obtained from an independent source, or that the connection between the initial illegality and the evidence has become so attenuated as to dissipate the initial taint.”]; also, *U.S. v. Patane*, 542 U.S. 630, 632(2004).

\textsuperscript{22} *Trujillo*, supra.


\textsuperscript{24} *Nix v. Williams*, 467 U.S. 431, 443(1984); *People v. Quintero*, 657 P.2d 948, 950 (Colo.1983)


\textsuperscript{26} 297 U.S. 278 (1936),


\textsuperscript{28} *Miranda v. Arizona*, 384 U.S. 436 (1966); c.f., *infra*.


\textsuperscript{30} *Id.*
**Miranda v. Arizona** was the watershed case which shifted the burden of proving voluntariness to the defendant. Post-*Miranda*, the prosecution has no burden to prove that a defendant’s incriminating statement was voluntary in order to show that the defendant waived his constitutional rights. *Miranda* reduced the analysis of reliability and “voluntariness” to the simple question, “was the defendant advised of his rights, and did he waive them?” The Supreme Court established the *Miranda* warning as a prophylactic measure intended to advise a suspect of his right to silence and right to speak to counsel prior to interrogation by law enforcement officers in a custodial situation. The intent of the *Miranda* warnings was to insure that a suspect was fully aware of his right not to be forced to make incriminating statements; this opinion was written with the false hope that the *Miranda* exercise would guarantee the reliability of a defendant’s statements. Decades of post-*Miranda* studies demonstrate that “the pressure of custodial interrogation [with or without *Miranda* admonishment] is so immense that it can induce a frightening high percentage of people to confess to crimes they never committed.”

The *Miranda* court identified that the principal threat to the privilege against self-incrimination is the compulsive nature of psychological coercion which occurred during a custodial interrogation. Coercive tactics serve no purpose other than to “subjugate the individual to the will of his examiner.” When the police or any agents of the police elicit a confession from a suspect in custody under threat, promise or coercion and without a *Miranda*, warning they violate the self-incrimination and due process clauses of the Fifth Amendment. *Miranda* is a federal constitutional decision; state law enforcement officers are bound by its requirements. However, post-*Miranda* case law defines the boundaries of *Miranda* giving great deference to law enforcement.

**Custodial Interrogation defined**

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33 *J.D.B. v. North Carolina*, 566 U.S. at slip op. 5-6, (2011) [citations omitted.]
34 *Miranda*, supra at 451.
35 *Miranda*, supra at 457; also People v. Matheny, 46 P.3d 453,462 (Colo.,2002).
Police are required to give *Miranda* warnings only where there has been such a restriction on a person's freedom as to render him 'in custody.'\(^{38}\) Per *Miranda*, custodial interrogation occurs when questioning is initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.\(^{39}\)

The *Miranda* custody determination is a “one-size-fits-all reasonable person test”\(^{40}\). The circumstances of each case will determine whether a suspect is in custody for purposes of receiving a *Miranda* warning, however the ultimate inquiry is whether a reasonable person in the same circumstances would have felt he or she was at liberty to terminate the interrogation and leave.\(^{41}\) All circumstances surrounding the interrogation including any circumstance that would affect how a reasonable person would perceive his freedom to leave should be considered.\(^{42}\) But, subjective views harbored by neither the interrogating officers nor the person being questioned are relevant\(^{43}\) and law enforcement is not required to consider the suspect’s “actual mindset.”\(^{44}\) If a child’s age is known or would have been objectively apparent to a police officer, that fact must be considered in a *Miranda* custody analysis. Nevertheless age is not necessarily a determinative or even significant factor in every juvenile case.\(^{45}\)

A person may be subject to “custodial interrogation” regardless of whether he has been charged with a crime\(^{46}\). There is no requirement to give a *Miranda* warning to a person not in custody even is the person is the subject of a criminal investigation.\(^{47}\) An officer’s unarticulated plan at the outset of an interview to arrest the suspect does not determine whether a suspect was in custody at the time of the interview.\(^{48}\)

‘Custody’ for purposes of *Miranda* is more narrowly circumscribed than ‘custody’ for the purposes of a writ of habeas corpus\(^{49}\). A defendant meeting with his probation officer at the probation department is not in a “custodial interrogation” situation requiring *Miranda* warnings\(^{50}\). A suspect who arrives voluntarily at a police station, and who was informed that he was not under arrest, and, who leaves after talking briefly with police is not in a custodial situation. Further, a noncustodial situation is not automatically converted to a custodial situation requiring *Miranda* warnings simply because questioning occurs in a police station.\(^{51}\)


\(^{39}\) *Miranda*, supra, at 444; *People v. Polander*, 41 P.3d 698 (Colo.2001); *People v. Mangum*, 48 P.3d 568(Colo.2002).

\(^{40}\) J.D.B., supra, (Alito, J., dissenting)


\(^{43}\) Ibid.; see also, *People v. Klinck*, --- P.3d ---- slip op. 5, (Colo.,2011)


\(^{45}\) J.D.B., supra, at slip op. 14.

\(^{46}\) *People v. Vickery*, 229 P.3d 278, 280(Colo.2010); also *People v. Matheny*, 46 P.3d 453, 462 (Colo.2002).

\(^{47}\) Beheler, supra [a witness testifying before a grand jury is not entitled to a *Miranda* warning]; *People in re J.C.*., 844 P.2d 1185(Colo.1993) [a telephone interview is not a custodial interrogation], also *People v. Smith*, 926 P.2d 186 (Colo.App.1996);


\(^{50}\) Minnesota v. Murphy, supra, at 425.

However, questioning in a prison setting regarding a prisoner’s involvement on another case\textsuperscript{52}, or questioning in a suspect’s home after he has been arrested\textsuperscript{53}, are both “custodial interrogations”. Questioning a suspect immobilized in a hospital bed, with police guard outside his hospital room is custodial interrogation\textsuperscript{54}.

An “interrogation” is not only express questioning; it is also “any words or actions on the part of police that are reasonably likely to elicit an incriminating response from the suspect”.\textsuperscript{55} Whether questioning is reasonably likely to elicit an incriminating response is measured by an objective perspective, focusing on the perceptions of the suspect rather than the intent of police.\textsuperscript{56} Both “question and answer” and “casual conversation” style create an interrogation when the words of actions are such that the officer should know they will be perceived as provocative and lead to an incriminating response.\textsuperscript{57}

If a defendant waives his \textit{Miranda} rights during a custodial interrogation, the police are not required to repeat Miranda warnings at the beginning of each subsequent interrogation.\textsuperscript{58}

\textbf{Miranda Warning – sufficiency}

To protect a suspect's Fifth Amendment right against self-incrimination, \textit{Miranda} prohibits the prosecution from introducing in its case-in-chief any statement procured by custodial interrogation, unless the police precede their interrogation with particular warnings.\textsuperscript{59} Police must advise a suspect that he has the right to remain silent; that anything he says may be used against him; that he has the right to the presence of an attorney; and that if he cannot afford one, one will be appointed for him.

Standards for an adequate \textit{Miranda} warning have been greatly weakened by recent Supreme Court cases. No specific wording is required for a \textit{Miranda} warning. And, regardless of the words employed, if the warning given “reasonably conveyed” to a suspect his rights then the \textit{Miranda} warning was adequate\textsuperscript{60}. A defendant need not understand every consequence of his decision to waive his \textit{Miranda} rights\textsuperscript{61}. Absent intimidation, threats or coercion, an affirmative response is not necessary to waive \textit{Miranda} rights as long as the record reflects the defendant's awareness and comprehension of his rights.\textsuperscript{62}

\begin{footnotes}
\footnotetext[52]{Mathis, supra.}
\footnotetext[53]{Orozco v. Texas, 394 U.S. 324(1969).}
\footnotetext[54]{Effland v. People, 240 p.3d 868, 875 (Colo., 2010).}
\footnotetext[56]{People v. Rivas, 13 P.3d 315(Colo.2000); see also, Innis, supra.}
\footnotetext[57]{People v. Hamilton, 831 P.2d 1326(Colo.1992).}
\footnotetext[58]{People v. Thiret, 685 P.2d 193, 204 n. 11 (Colo.1984)}
\footnotetext[59]{Miranda, supra, at 444.}
\footnotetext[60]{Florida v. Powell, 130 S. Ct. 1195 (2010).}
\footnotetext[61]{People v. Gonzalez-Zamora, --- P.3d ----, slip op. 3, (Colo., 2011).}
\footnotetext[62]{Id., slip op. 4.}
\end{footnotes}
A suspect who makes a statement after receiving an adequate *Miranda* admonishment is generally presumed to have waived his Fifth Amendment rights.  

**5th Amendment right to silence**

A suspect may terminate custodial interrogation by indicating that he wishes to remain silent. After a suspect invokes his Fifth Amendment right to silence, police must “scrupulously honor” that right. There are no specific words which must be employed to invoke the right to remain silent. However, it is essential that the suspect unambiguously and unequivocally express a present lack of willingness to cooperate with further questioning. The recent case of *Berghuis v. Thompkins* holds that a suspect’s silence during an interrogation is not sufficient to invoke his right to silence – even after three hours of interrogation of a silent suspect. If a suspect makes a statement concerning his right to remain silent, officers are not required to end the interrogation if the suspect’s intent to remain silent is unclear. Police may continue the interrogation and are not required to ask a suspect if he wishes to remain silent. Any subsequent statement by a suspect may be viewed as a waiver of his right to remain silent.

**5th Amendment right to counsel**

When a suspect has expressed his desire to deal with the police only through counsel, he may not be subject to further interrogation until counsel has been made available to him.

A defendant may waive his Fifth Amendment right to counsel but the waiver must be “knowing, voluntary, and intelligent.” For a waiver to be voluntary, it must be the product of free and deliberate choice rather than intimidation, coercion, or deception. The waiver given must be “knowing and intelligent” which means that the waiver was made “with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it”. After invoking his right to counsel a suspect may waive that right if he initiates further communication or conversations with the police. Also, after a defendant invokes his right to counsel, after an indeterminate amount of time passes, the defendant must reinvoke his right to counsel. The circumstances of the subsequent communication will determine if the right to counsel still attaches. However, in *Maryland v. Shatzer* 130 S.Ct. 1213 (2010) the Court set out a bright line rule and determined that a prison inmate who does not yet have counsel appointed

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63 North Carolina v. Butler, 441 U.S. 369, 372-376; (1979); Connelly, supra, at 169-170 [“there is no reason to require more in the way of a ‘voluntariness’ inquiry in the *Miranda* waiver context than in the confession context.”]


67 Id.


69 People v. Platt, 81 P.3d 1060, 1065 (Colo.2004).


71 Platt, supra.

72 Edwards, supra.
may be interrogated 14 days after he previously invoked the right to counsel and any statements made thereafter represent a waiver of his Fifth Amendment right against self-incrimination.\textsuperscript{73}

**Use in trial of statements suppressed for Fifth Amendment violation**

The Fifth Amendment's Self-Incrimination Clause bars the prosecution from using compelled testimony in its case-in-chief.\textsuperscript{74} Unlike evidence obtained through a Fourth Amendment violation, the *Miranda* holding does not require that the fruits of unlawfully obtained confessions be discarded as inherently tainted\textsuperscript{75}; the Supreme Court has rejected automatic application of the "fruits" doctrine to violations of the *Miranda* rule on several occasions. The admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of *Miranda*, will depend on whether the inculpatory statement was knowingly and voluntarily made.\textsuperscript{76}

The prosecution may introduce statements taken in violation of *Miranda* for impeachment purposes on cross-examination\textsuperscript{77}. The prosecution may introduce testimony of a third party whose whereabouts were determined through statements obtained in violation of *Miranda*\textsuperscript{78}. The prosecution may also introduce physical evidence seized as a result of a *Miranda* violation\textsuperscript{79}.

The prosecution must demonstrate the voluntariness of a confession and the validity of a *Miranda* waiver by a preponderance of the evidence\textsuperscript{80}. [Note: If a defendant's pre-*Miranda* statements are given voluntarily, then defendant's post- *Miranda* statements are admissible so long as they were voluntary\textsuperscript{81}.]

**SIXTH AMENDMENT CHALLENGES TO ADMISSIBILITY OF DEFENDANT'S STATEMENTS**

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense. The core of this right has historically been, and

\textsuperscript{73} *Shatzer*, supra, at p. 1213. When suspect has invoked his right to counsel during custodial interrogation, and counsel has not been appointed, there is a sufficient “break in custody” that he must once again invoke his right to counsel.

\textsuperscript{74} *Oregon v. Elstad*, 470 U.S. 298, 306-307(1985). [Note: Some courts hold that eliciting a statement in violation of *Miranda* is not, without more, a constitutional violation. These courts hold that the violation does not occur until the statement is used against the defendant in trial. *U.S. v. Patane*, 452 U.S. 630. See also, *v. Callahan*, 129 S.Ct. 808, 818(2009).]

\textsuperscript{75} *Elstad*, supra, at 307; see also *Missouri v. Seibert*, 542 U.S. 600, 619 (2004) (Kennedy, J., concurring) ["the scope of the Miranda suppression remedy depends on a consideration" of whether the central concerns of Miranda are implicated as well as the objectives of the criminal justice system].

\textsuperscript{76} See *United States v. Pettigrew*, 468 F.3d 626, 633-634(10\textsuperscript{th} Cir.NM,2003).

\textsuperscript{77} *Harris v. New York*, 401 U.S. 222 (1971)


\textsuperscript{79} *Patane*, supra.


\textsuperscript{81} *People v. Dracon*, 884 P.2d, 712,720 (Colo.1994); Aslo, *Taylor*, id.

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remains today, the right of a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.  

6th Amendment right to counsel  

The Sixth Amendment guarantees the right to counsel at all “critical stages” of the prosecution. Critical stages are any judicial proceedings have been initiated against a defendant by way of formal charge, preliminary hearing, indictment, information, or arraignment. When the police, the prosecutor, or their agents (such as a jailhouse snitches) deliberately elicit incriminating statements after the suspect’s Sixth Amendment right to counsel has attached they violate the Sixth Amendment.

Michigan v. Jackson strictly construed the Sixth Amendment right to counsel. The holding in Jackson forbids police to interrogate a defendant after he invoked his right to counsel at an arraignment or other proceeding. Jackson was overruled in 2009 by Montejo v. Louisiana which holds that a defendant must make a clear assertion of his right to counsel. Neither the request for appointment of counsel nor the actual appointment of counsel necessarily bars further questioning by police. Montejo suggests that the defendant has the burden of proving that he clearly asserted his right to counsel.

Suppression on Sixth Amendment grounds does not require that the suspect was in custody at the time of the questioning. Nor does it require that the statement was involuntary.

The prosecution bears the burden of proving that the defendant validly waived his or her Sixth Amendment right to counsel. In order to prevail on a Massiah claim involving the use of a government informant, the defendant must demonstrate that both the government and the informant took some action, beyond merely listening, and that action was deliberately designed to elicit incriminating remarks. The Sixth Amendment right to counsel is infringed at the time of the interrogation by the government or its agent.

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87 Montejo v. Louisiana, 129 S. Ct. 2079(2009), overruling Michigan v. Jackson 106 S.Ct. 1404 (1986). In Montejo, the defendant was arraigned and appointed counsel. Prior to meeting with counsel, police asked the defendant to go to the crime scene with them. The defendant agreed and during that trip the defendant wrote a letter containing incriminating statements. The case was remanded to determine whether the defendant actually asserted his right to counsel.
88 Fellers, supra, at 524
90 United States v. Massiah, 377 U.S. 201 (1964)
92 Massiah, supra.
Use in trial of statements suppressed for Sixth Amendment violation

If a deliberate Sixth Amendment violation occurs while charges are pending, and the defendant has made a clear assertion of his right to counsel, the prosecution may not use the defendant’s uncounseled incriminating statements in his case in chief on those pending charges or closely related subsequent charges. However, a defendant’s statement to police or a government agent, even when the government concedes that the statement was elicited in violation of the Sixth Amendment, is admissible to impeach his inconsistent testimony at trial.

MIXED CLAIMS

It is possible to have any two or all three of these constitutional violations in a given case. The dividing lines are not always clear, but there are analytically distinct bases for suppressing statements. The Colorado Supreme Court articulated the different bases for 4th, 5th and 6th Amendment claims.

In Elstad, the Supreme Court held that the “fruit of the poisonous tree” doctrine does not apply to confessions obtained after an initial confession that was voluntary but not preceded by Miranda warnings. This holding is grounded in the “fundamental difference between the role of the Fourth Amendment exclusionary rule and the function of Miranda in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment.” Because its purpose is to deter unreasonable searches and seizures, no matter how probative their fruits, the Fourth Amendment exclusionary rule applies only when there has been an actual violation of the Fourth Amendment. In contrast, because Miranda is a prophylactic rule, it “may be triggered even in the absence of a Fifth Amendment violation.” The Fifth Amendment only prohibits the use of compelled testimony by the prosecution in its case in chief. Miranda creates a presumption of such compulsion. Thus, “the failure of police to administer Miranda does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against self-incrimination has not been intelligently exercised.” Accordingly, Elstad reasoned that errors made by the police in administering Miranda warnings “should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.”

RIGHT TO COUNSEL: FIFTH AMENDMENT v. SIXTH AMENDMENT

The Fifth and Sixth Amendments both provide criminal defendants a right to counsel, though their protections are not the same.

When does the right counsel attach?

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94 Ventris, supra, at 1847.
95 People v. Taylor, 41 P.3d 681 (Colo., 2002)
97 People v. Vickery, 229 P.3d 278, 280(Colo., 2010)
A suspect has a Fifth Amendment right to counsel which attaches when he is presently being, or is just about to be, subjected to in-custody interrogation. Neither a suspect nor his attorney can effectively invoke his rights to counsel or silence before a custodial interrogation, even by filing a document in court purporting to do so. The suspect must personally invoke his Fifth Amendment right to counsel and right to silence. An attorney cannot invoke either on the suspect’s behalf, even if the attorney is standing right outside the interrogation room. The suspect must unambiguously request an attorney in order to effectively invoke his Fifth Amendment right to counsel.

A Sixth Amendment right to counsel has not yet attached when a suspect is being interrogated after arrest, because the Sixth Amendment right to counsel does not attach prior to charges being filed, even if the suspect was represented by an attorney at the time of the interrogation. The Sixth Amendment right to counsel only attaches when adversary proceedings have been initiated, typically upon the filing of formal charges or indictment. The Sixth Amendment right to counsel applies even if the defendant who is represented by counsel is not in custody. This forbids contact with a represented client by the police and their agents, prosecutors and their agents. The Sixth Amendment right to counsel is triggered at the moment charges are filed.

Fifth Amendment/Sixth Amendment Right to Counsel: which is Offense Specific

The Sixth Amendment right to counsel is offense specific. The “offense specific” nature of the Sixth Amendment right to counsel attaches only to the crime for which adversarial proceedings have been initiated by the filing of charges. It cannot be invoked once for all future prosecutions because the Sixth Amendment right to counsel does not attach until adversarial proceedings have been instituted. The police may question the defendant regarding an uncharged offense, even if it is closely related to the charged offense. This is true even if the defendant is already represented by counsel on other pending charges and is in custody at the time.

The Fifth Amendment right to counsel per Miranda is not offense specific. It applies whenever a suspect is in custody and is subject to police interrogation. When an in-custody

100 Moran v. Burbine 475 U.S. 412, 433, fn. 4 (1986); Avila, supra, at 419-424; Beltran, supra, at 430-432.
101 Davis v. United States, 512 U.S. 452; (1994)
102 Vickery, supra.
104 See, e.g., Massiah, supra; Rothgery, supra; Maine v. Moulton, 474 U.S. 159 (1985).
105 Moulton, supra, at 170-171.
109 Mathis v. United States, 391 U.S. 1, 4-5(1968).
defendant invokes his right to counsel, it is improper under *Miranda* for the police to initiate further interrogation without the presence of counsel\(^\text{110}\).

A major exception to these rules is when, after having invoked his right to counsel, the suspect himself voluntarily initiates further discussion with the police about the alleged crime(s), and the police then obtain a valid *Miranda* waiver\(^\text{111}\).

**STATE COURT PROCEDURE TO SUPPRESS STATEMENTS**

A defendant’s statement obtained in violation of the Fourth\(^\text{112}\), Fifth or Sixth Amendment is the proper subject of a suppression motion\(^\text{113}\). The motion should be made pre-trial\(^\text{114}\) unless the defendant was not aware of the grounds for the motion\(^\text{115}\). In that case, the court has discretion to hear the motion at the trial in camera. The admissibility of a defendant’s statement is determined solely by the judge\(^\text{116}\). The weight and credibility of the statement is determined by the jury\(^\text{117}\).

The defendant has the burden of raising his objections to admissibility of his statements by written motion. The defendant’s motion must state factually sufficient grounds and legal justification for suppression of the statement. The prosecution then has the burden of proving lawfulness of the search or seizure (4th Amendment)\(^\text{118}\), voluntariness of the statement (Fifth Amendment and Due Process)\(^\text{119}\) and/or lawful contact between a government agent and a represented criminally charged defendant (6th Amendment).

Following the prosecution’s presentation of evidence, the defendant has the burden to prove by a preponderance of evidence that the defendant’s statement was acquired in an unconstitutional manner. The defendant may testify at his suppression motion and his testimony may not be used by the prosecution in their case in chief\(^\text{120}\). However, a defendant’s pre-trial testimony may be used to impeach him.

The rules of evidence, except those of privilege, do not apply at a suppression hearing\(^\text{121}\). Credible hearsay is admissible\(^\text{122}\). The trial court must make factual and legal

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\(^{112}\) *People v. McCoy*, 832 P.2d 1043, (Colo.App.,1992)

\(^{113}\) Crim.P.Rule 41(g).


\(^{115}\) *People v. Tyler*, 974 P.2d 1037(Colo.1994) [a defendant may raise at trial a challenge to admissibility of his statement when the grounds for suppression were not known prior to trial or the grounds could not reasonably have been discernible by the exercise of due diligence.

\(^{116}\) CRE 104(a),(c).

\(^{117}\) CRE 104(e).

\(^{118}\) *McCoy, supra*.


\(^{120}\) In *Simmons v. United States*, 390 U.S. 377, at 393-394(1968), the defendant’s testimony was necessary to establish his standing to challenge an unwarranted search. "W when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."

\(^{121}\) CRE 104(a).
findings to support his ruling and may reconsider and modify his ruling when that ruling would result in error or when the ruling is no longer sound due to changed conditions.\(^{123}\)

The suppression motion findings must be recorded by the court. The findings are critical to the direct appeal. On review, the court of appeals is bound by the trial court's factual findings where they are supported by adequate evidence in the record.\(^{124}\) The denial of a motion to suppress a defendant’s statement is generally not subject to interlocutory appeal by the defendant. The right to appellate review of denial of a suppression motion is forfeited by entry of a plea of guilty.\(^{125}\) A defendant must move to suppress his statement or the issue is waived.\(^{126}\)

In Colorado the prosecution is entitled to request an interlocutory appeal of a court’s order to suppress a defendant’s statements whenever the evidence constitutes a substantial part of the case-in-chief.\(^{127}\) Higher courts are critical of the standards governing suppression of statements regardless of constitutional basis\(^{128}\) and trial court suppression orders are frequently overturned.

**POSTCONVICTION RIGHTS**

An appellant’s Fifth Amendment right against self-incrimination endures through direct appeal and postconviction.

Federal law recognizes a right to counsel on first appeal as a Fourteenth Amendment Due Process right.\(^{129}\) There is no federal constitutional right to appointed counsel for collateral attacks upon a conviction.\(^{130}\) Colorado grants statutory and constitutional right to counsel for direct appeal and a limited right to postconviction counsel for meritorious postconviction motions.\(^{133}\)

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\(^{124}\) Gimmy, supra, citing *People v. Scott*, supra; *People v. Parks*, 195 Colo. 344 (1978); *People v. Pineda*, 182 Colo. 385 (1973); *People v. Medina*, 180 Colo. 56 (1972).

\(^{125}\) *People v. Neuhaus*, --- P.3d ---- 2009 WL 4069568 Colo.App., 2009 [defendant's guilty plea forfeits the right to appellate review of the trial court’s denial of a motion to suppress.]

\(^{126}\) CRE 1.3(a)(1); see *Larkin v. People*, 177 Colo. 156 (1972) [an appellate court will not consider issues not properly raised at trial unless serious prejudicial error was made and justice requires the consideration.]

\(^{127}\) *People v. Mendoza-Rodriguez*, 790 P.2d 810 (Colo., 1990); C.A.R. 4.1(a); *People v. MacCallum*, 925 P.2d 758 (Colo., 1996)

\(^{128}\) See *People v. Hughes*, --- P.3d ----, (Colo., 2011).


\(^{130}\) *Pennsylvania v. Finley*, 481 U.S. 551 (1987)

\(^{131}\) C.R.S.A. § 16-12-101.

\(^{132}\) Colo. Const. art. VI, § 2(2).

\(^{133}\) *Silva v. People*, 156 P.3d 1164, 1168 (Colo., 2007)
TRIAL CIRCUMSTANCES INVOLVING A DEFENDANT’S STATEMENT

Mens Rea

A defendant’s admission or confession is the most common source of evidence of culpable mental state or mens rea. Colorado criminal law defines four culpable mental states: intentionally, knowingly, recklessly and criminally negligent. Admissions and confessions can be used as direct or circumstantial evidence of mens rea and are of sufficient weight to satisfy the mens rea element of a criminal offense.134

Corpus Delicti

Corpus delicti bars the conviction of a defendant for a crime where the only evidence of the crime is a defendant’s statement. The intent of the common law corpus delicti rule was to avoid convicting a person for an imaginary crime rather than a real crime. “There should always be something more than a mere naked confession of one accused, to justify a verdict of guilty.”135 Courts require very thin evidence corroborating the actuality of a crime136. And, “[t]he other evidence need not tend to show that the crime was committed by the defendant, only that a crime was committed.” Though courts look at whether the defendant offered facts corroborated by the investigation, they also look generally to the circumstances of the confession and whether it appeared voluntary. Thus, few courts currently conduct a full examination of a confession’s reliability.

Mental Condition and Sanity Proceedings

A defendant’s Fifth Amendment right to silence and his right to protection against self-incrimination are both implicated when the court orders a sanity hearing137.

A defendant who places his mental condition at issue by a plea of not guilty by reason of insanity138 may introduce expert opinion of his insanity after giving notice of his intent to introduce such evidence and after having undergone a court-ordered examination139. When there is communication between the defendant and any mental health expert who testifies on his behalf, the defendant waives any claim of confidentiality or privilege in any statements made to that doctor during an examination or treatment of his mental condition140. The

134 See Rogers v. U.S., 522 U.S. 242 (1998) [admission of possession of knowledge that a silencer was in a bag behind the driver’s seat was sufficient to satisfy mens rea element of possession of an unlawful firearm];
135 People v. Robson, 80 P.3d 912, 913 (Colo. App. 2003) (quoting Dougherty v. People, 1 Colo. 514, 524 (1872)).
137 C.R.S. § 16-8-106.
138 C.R.S. § 16-8-103.
139 C.R.S. § 16-8-107; see also, People v. Flippo, 159 P.3d 100 (Colo.,2007); People v. Roadcap, 78 P.3d 1108(Colo.App.,2003).
defendant’s statements may be used against him in the hearing on the issue of sanity or in a sentencing hearing\textsuperscript{141}, but not in the case-in-chief\textsuperscript{142}.

Statements made for the first time during the course of a court-ordered examination are admissible against the defendant on the issues raised by a plea of not guilty\textsuperscript{143} to rebut evidence of his mental condition or incapacity to form a culpable mental state. Statements made by a defendant in the course of a mental health evaluation are admissible against the defendant for impeachment.

A defendant’s Fifth Amendment right to remain silent is also a factor in cases with insanity and other mental health defenses. State and federal courts have held that a defendant’s sanity is not an element of an offense. Therefore testimony that a defendant was silent or uncooperative during a court-ordered sanity evaluation is not a violation of his Fifth Amendment right to remain silent.\textsuperscript{144}

**EVIDENTIARY ISSUES CONCERNING DEFENDANT’S STATEMENTS**

Under Federal and Colorado Rules of Evidence, admissions and confessions are not hearsay.\textsuperscript{145} Sections 801(d)(2) both define an admission as “a statement offered against a party” which is “the party’s own statement”. Neither definition construes admissions or confessions to be limited only to statements that are against the interest of the party.\textsuperscript{146} However evidence of an admission or confession must be relevant.\textsuperscript{147} The probative value of the admission or confession must substantially outweigh the danger of unfair prejudice, confusion of the issues, misleading the fact-finder, or create undue delay, waste of time, or be cumulative.\textsuperscript{148}

There are circumstances where a defendant’s statement is inadmissible. In general, statements made during a polygraph are inadmissible because polygraph evidence is does not meet the reliability standards of CRE 702\textsuperscript{149}.

In some circumstances, a defendant’s statements may be privileged and the statements may not be disclosed without a waiver of privilege by the defendant. C.R.S. § 13-70-107 grants privilege to statements made under certain circumstances by a defendant to a spouse\textsuperscript{150}, to an attorney\textsuperscript{151}, to a member of the clergy\textsuperscript{152}, to a physician or health care provider\textsuperscript{153}, to a

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\textsuperscript{141} Id.

\textsuperscript{142} People v. Rosenthal, 617 p.2d 551(Colo.1980).

\textsuperscript{143} C.R.S. § 16-8-107(1)(a).

\textsuperscript{144} Tally v. Ortiz, 252 Fed.Appx. 248, 256(10th Cir.Colo.2007) distinguishing Wainwright v. Greenfield, 474 U.S. 284(1986); Thomas, supra, at 269.

\textsuperscript{145} CRE 801(d)(2);FRE801(d)(2).

\textsuperscript{146} People v. Meier, 954 P.2d 1068, 1070 (1998).

\textsuperscript{147} CRE 401: “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

\textsuperscript{148} CRE 403.

\textsuperscript{149} People v. Wallace, 97 P.3d 262, 267 (Colo.App.2004); (People v. Shreck, 99 P.3d 69 (Colo.2001).

\textsuperscript{150} C.R.S. § 13-90-107(1)(a).

\textsuperscript{151} C.R.S. § 13-90-107(1)(b).

\textsuperscript{152} C.R.S. § 13-90-107(1)(c).
psychologist or psychotherapist\textsuperscript{154}, or to a certified public accountant\textsuperscript{155}. However, privilege is primarily an issue for discovery. Once privileged statements are disclosed, Fourth, Fifth, Sixth and Fourteenth amendment analysis should determine their admissibility and use.

**PRACTICE TIPS**

In most cases, a defendant’s statement – truthful or otherwise – is the most damaging evidence in his case. Analysis and great care should be devoted in assessing the chronology and circumstances of every statement. Objections to the admission of a defendant’s statement should be prepared in advance of trial and made for each asserted constitutional violation before the evidence is admitted. Objections must refer specifically to each and every ground for Fourth, Fifth, Sixth and Fourteenth Amendments violations. Objections should be made in writing citing federal and state court cases, and should distinguish/compare the circumstances of the asserted constitutional violation and case law precedent. General objections (e.g. “this statement was obtained in violation of the defendant’s constitutional rights”) do not provide a sufficient legal basis for suppression and do not preserve the objection for appeal. Limiting instructions should always be requested before the admission of any statement by the defendant and at the conclusion of the case. Put objections in writing and fully preserve the issue for appeal.


\textsuperscript{154} C.R.S. § 13-90-107(1)(g); see also C.R.S. 12-43-218.

\textsuperscript{155} C.R.S. § 13-90-107(1)(f).