MINNESOTA JUDICIAL TRAINING UPDATE

ADMISSIBILITY OF PRE-ARREST SILENCE

This Update Replaces and Reverses Update #10-7

WHEN RULING ON THE ADMISSIBILITY OF A DEFENDANT'S PRE-ARREST, PRE-MIRANDA SILENCE (FOR USE IN THE STATE'S CASE-IN-CHIEF) THERE ARE 4 PRIMARY QUESTIONS THE COURT MUST ANSWER:

QUESTION #1: WOULD ADMISSION OF DEFENDANT'S PRE-ARREST, PRE-MIRANDA SILENCE VIOLATE DEFENDANT'S 5th AMENDMENT PROTECTION AGAINST SELF INCRIMINATION?

Constitutional Question Of 1st Impression: Neither the U.S. or the Minnesota Supreme Court have ever addressed whether the Fifth Amendment protection against compelled self-incrimination prevents the State from presenting evidence during its case in chief of a defendant's pre-arrest silence when defendant was not in custody. *State v. Borg, A09-0243, September 21, 2011.*

The New Minnesota Rule: In *State v. Borg, A09-0243, September 21, 2011*, the Minnesota Supreme Court, in a close decision (4-3) with a strongly worded dissent, reversed the Court of Appeals and established the following new rule:

1) **The 'Borg' Majority Holding:** The 5th amendment does not prohibit the state from presenting evidence during its case in chief of a defendant's silence when the defendant was not under arrest or in custody **IF** defendant's silence was not in response to a choice compelled by the government to speak or remain silent *(i.e. police questioning).* When a citizen is under no official compulsion, either to speak or to remain silent, the 5th amendment does not apply. In that event, you look to the Rules of Evidence to determine admissibility. Id. at 13. *(emphasis added).*

Hon. Alan F. Pendleton, Anoka County District Court, Anoka, Mn 55303; 763-422-7309

2) **Does Police Questioning Trigger The 5th Amendment? (YES)** Every state and federal appellate court that has considered this issue has held that the 5th Amendment prohibits use of a defendant's pre-arrest, pre-Miranda silence in response to police questioning. The Minnesota Court of Appeals has adopted this universal rule. Id at 34, 35. The U.S. Supreme Court and Minnesota Supreme Court have never directly addressed this issue.

3) **'Borg' Majority Limits Definition of Police Questioning:** The majority in *"State v. Borg"* discussed the above rule but declined to adopt or reject it, stating only that under the facts and circumstances of this case, the actions of the police in "mailing a letter to the defendant requesting an interview did not constitute Police Questioning." Id. at 14. Because the police did nothing to compel defendant to speak or remain silent, defendant's silence in failing to respond to the letter was NOT the product of government compulsion and thus the 5th Amendment did not apply. Id at 14.

4) **The Rule Restated In Simple Terms:** If police attempt to question a defendant who is not in custody (pre-arrest) and, in response to actual police questioning, the defendant chooses to remain silent, the 5th Amendment would preclude admission of defendant's pre-arrest silence.
   a) **Rationale:** To allow the state to comment on a defendant's pre-arrest decision to remain silent when that decision was the product of a choice compelled by the government to speak or remain silent would violate the core purpose of the 5th Amendment which is to protect a defendant from being compelled to testify against himself at trial. However, in the absence of pre-arrest police questioning or other police compulsion, the 5th Amendment does not apply. Id. at 12.

NOTE: Invoking the Right To Counsel Is Irrelevant for purposes of a 5th Amendment Analysis. The 5th Amendment right to counsel does not attach until a defendant is in custody and subject to custodial interrogation. Id at 18.

QUESTION #2: WOULD ADMISSION OF DEFENDANT'S PRE-ARREST, PRE-MIRANDA SILENCE VIOLATE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS?

THE ANSWER DEPENDS ON WHETHER DEFENDANT "INVOKED THE RIGHT TO COUNSEL" IN RESPONSE TO POLICE QUESTIONING.

CURRENT RULE IN MINNESOTA: According to the MN Court of Appeals, it is a violation of due process to use a criminal defendant's pre-arrest silence against him at trial when that silence follows the defendant's invocation of his right to counsel. *State v. Dunkel, 466 N.W.2d 425, 428 (Minn. App. 1991). See also, State v. Ford, No. A09-632, 2010 WL 1439364, at 4 (Minn. App. Apr. 13, 2010).*

MINNESOTA SUPREME COURT CLARIFICATION - DICTA: The Minnesota Supreme Court has never adopted or rejected the above rule. In *State v Borg*, although the Supreme Court had the opportunity to rule on this exact issue it declined to do so stating that Borg had waived any due process claim by failing to object on due process grounds in the district court. In dicta, the majority rejected the Court of Appeal's ruling that Borg "invoked his right to counsel" when he told a police investigator during a telephone conversation that he [Borg] had talked with counsel and would not talk with the police. The majority stated (again in dicta) that such a rule, if adopted, would mean that an "uncharged person who is not in custody invokes a right to counsel when the person simply informs the police of counsel's advice. This has no support in the law." Id. at 21.

SUPREME COURT STANDARD FOR "INVOCATION OF RIGHT TO COUNSEL": The majority in *Borg* intimated that if there was a pre-arrest, pre-Miranda due process right to counsel (and they fell short of saying there was such a right), in order to "invoke the right to counsel" a suspect would have to "unambiguously request the assistance of or access to counsel" which is the same standard for invoking the right to counsel under the 5th amendment and Miranda for a suspect who is in custody

QUESTION #3: IF YOU DETERMINE THAT ADMISSIBILITY OF PRE-ARREST SILENCE IS NOT A CONSTITUTIONAL QUESTION, THEN ADMISSIBILITY BECOMES A ROUTINE EVIDENTIARY QUESTION: THUS, IS EVIDENCE OF DEFENDANT'S PRE-ARREST SILENCE RELEVANT AND ADMISSIBLE UNDER THE RULES OF EVIDENCE?

Rule of Evidence 401: Definition of Relevant Evidence: "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.

Rule of Evidence 403: Probative vs Prejudicial: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

QUESTION #4: IF YOU DETERMINE THAT EVIDENCE OF DEFENDANT'S PRE-ARREST SILENCE IS NOT ADMISSIBLE IN THE STATE'S CASE-IN-CHIEF, IS IT ADMISSIBLE FOR IMPEACHENT PURPOSES IF DEFENDANT TESTIFIES?

1) **A Defendant's Non-Counseled Pre-Miranda Silence Is Admissible For Impeachment Purposes During Cross Examination (Assuming Proper Foundation Is Laid); Id. at 11.**

2) **A Defendant's Counseled Pre-Miranda Silence Is Not Admissible For Impeachment Purposes: *State v. Dunkel, 466 N.W.2d 425, 428 (Minn. App. 1991)*.**
   - ***a)*** **Exception:** the above prohibition applies unless and until defendant thru his testimony somehow 'opens the door' necessitating the limited admission of otherwise inadmissible evidence.
     - *i) For example: defendant pre-arrest, on advice of counsel, refuses to give police a statement but at trial testifies the police never asked him to give a statement…..defendant has 'opened the door' allowing limited evidence of his Counseled pre-Miranda silence to rebut his testimony.*