

EXAMINERS' ANALYSIS OF QUESTION NO. 3

The issue presented is whether Kelly invoked his right to remain silent by being silent, or whether he was required to do more to invoke his right to remain silent in the face of police interrogation. Kelly is correct that, if indeed he properly invoked his right to silence, the detective was obligated to cease questioning at once. *Michigan v Mosely*, 423 US 96, 103; 96 S Ct 321, 46 L Ed 2d 313 (1975). Before a state actor can interrogate an in-custody suspect, the suspect must be advised of his *Miranda* rights, which collectively allow the suspect to remain silent until counsel is present. For these rights to have meaning, once invoked, questioning must cease, and the suspect controls the interrogation by invocation.

However, precisely at issue in the given factual scenario is whether Kelly invoked his right to remain silent. He claims his right to silence was invoked by remaining silent, not by speaking any particular words.

Kelly's contention must be rejected and his suppression motion denied.

The present scenario has recently been addressed by the United States Supreme Court in *Berghuis v Thompkins*, 560 US 370, 381; 130 S Ct 2250, 176 L Ed 2d 1098 (2010). In *Thompkins*, the defendant contended that his remaining silent for two hours and 45 minutes manifested his invocation of his right to silence. In rejecting that claim, the United States Supreme Court held that Thompkins had not invoked his Fifth Amendment right to remain silent by staying silent for two hours and 45 minutes. *Id.* at 382.

In reaching this conclusion, the Court cast the analysis in the same vein as that used to evaluate invocation of the right to counsel. To invoke the right to counsel, a suspect must do so "unambiguously." An ambiguous or equivocal statement regarding counsel, or no statement at all, does not require police to cease interrogation. In this regard, the Court found a parallel between the right to silence and to counsel as embodied in *Miranda* warnings. Placing those rights on par, as they both protect the privilege against self-incrimination, requires that their invocation be treated similarly. Accordingly, to invoke the right to remain silent in a custodial

setting requires the suspect to unambiguously invoke that right. *Id.* at 381-382.

Applying *Thompkins* to the instant case yields the conclusion that Kelly did not, by his silence, unambiguously invoke his right to remain silent. More than his silence was required to exercise his right to cut off questioning. He simply never stated that he wished to remain silent or not talk to the detective.

Although not the thrust of the call of the question, answers that mention sufficiency of the waiver of *Miranda* rights and/or the voluntariness of the statement, due to the reference to God by the interrogator, will receive some credit. However, credit will only be given where these concepts are mentioned as a way-station to rejecting any claim that *Miranda* rights were not waived or that the statement was not voluntary, consistent with *Berghuis*.