Questioning Defendants

The Right to Counsel in Criminal Investigations

To bring in a lawyer means a
real peril to solution of the crime.[1]

Suspects who have been charged with a crime have a Sixth Amendment right to have an attorney present during any questioning about that crime. In most cases, this is not something the investigating officers need to worry about because, by the time the case is charged, the suspect will have been either interviewed or he will have invoked. But sometimes the investigating officers or DA's investigators will want to talk to the suspect after he had become a "defendant." Frequently, the purpose of such questioning is to confront him with new evidence, such as a confession by an accomplice or to clarify something he said earlier.

For over two decades, however, this was strictly prohibited. That's because the Supreme Court ruled in 1986 that anyone who had been charged with a crime was incapable of waiving his Sixth Amendment right to counsel. The case was *Michigan v. Jackson,*[2] and it was a shocker because it meant (1) that officers could not question a defendant about the crime with which he had been charged unless his attorney was present, and (2) the first thing an attorney is apt to tell his client is "keep your mouth shut," or words along those lines. Consequently, *Jackson* made it virtually impossible to question a charged suspect.

But in 2009, there was another shocker. In *Montejo v. Louisiana*[3] the Supreme Court overturned *Jackson* and ruled that a defendant—even one who is represented by counsel—is fully capable of deciding for himself whether he wants to waive his Sixth Amendment rights and talk with officers. In other words, post-charging questioning is now permitted.

The facts in *Montejo* will help show how this issue can arise.

Jesse Montejo was arrested for murdering a man whose body had been found one day earlier. While being questioned, Montejo admitted that he shot and killed the victim during a botched burglary. He was promptly arraigned on the murder charge and an attorney was appointed to represent him. A few hours later, investigators visited Montejo in the jail and asked if he would be willing to write a letter of apology to the victim's widow. He said he would and, after being *Mirandized,* he wrote the letter which was used against him at trial. He was convicted.

When this occurred, *Michigan v. Jackson* was still the law, which meant that the letter should have been suppressed. But when the case reached the Supreme Court, the Justices were having second thoughts about *Jackson* and its strict prohibition against post-charging questioning. In fact, as noted, they agreed that *Jackson* needed to be overturned.

There were essentially three reasons for the Court's decision. First, the Court concluded that "it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer."[4] Second, the Court noted that a suspect who does not want to talk with officers without counsel "need only say as much when he is first approached and given the *Miranda* warnings." Third, the Court pointed out that it made no sense to give a suspect a constitutional right not to talk with officers, and then *compel* him to exercise that right. Such an outcome, said the Court, would effectively "imprison a man in his privileges."

As the result of *Montejo v. Louisiana*, officers may now meet with a defendant—even one who is represented by counsel—and ask if he is willing to talk with them about the crime with which he was

[1] *Watts v. Indiana* (1949) 338 U.S. 49, 59 (conc. Opn. of Jackson, J.). Edited.
[2] (1986) 475 U.S. 625
[3] (2009) 556 U.S. 778, 785.
[4] **NOTE**: The Court also ruled that a defendant need not expressly assert his right to counsel during arraignment; instead, an invocation will also result if he merely stood mute while the arraignment judge appointed counsel.

charged (or any other crime for that matter). And if he says yes, they may question him if he waives his Sixth Amendment right to counsel.

We will discuss the subject of Sixth Amendment waivers shortly, but first we will address a more basic question: When does a suspect acquire a Sixth Amendment right to counsel? After discussing that subject and waivers, we will review an ethics issue that might arise if prosecutors question a suspect who is represented by counsel or who had been charged with a crime. We will conclude our discussion in the accompanying article in which we explain how the Sixth Amendment affects the ability of officers to use informants and undercover officers to question defendants surreptitiously.

When a "Suspect" Becomes a "Defendant"

As noted, a suspect acquires a Sixth Amendment right to counsel when he is "charged" with a crime. The reason "charging" is the triggering event is that it represents the point at which the government crosses "the constitutionally-significant divide"[5] between criminal investigation and criminal prosecution.[6] Said the Supreme Court, "[A]fter a formal accusation has been made, a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment."[7]

When a suspect is "charged"

Because "charging" is the pivotal event, you would think there must be a clearly defined point at which it occurs. But for many years, no one knew for sure where that point was located. That is because, in case after case, the Supreme Court would routinely say (and the lower courts would routinely repeat) that it might occur when prosecutors filed a criminal complaint against the suspect, or maybe when a judge issued a holding order at the conclusion of a preliminary hearing, or possibly when the suspect was indicted by a grand jury, or at least when he was arraigned on the charge.[8]

As the result of this uncertainty, defense attorneys would argue (and some still do[9]) that a suspect's Sixth Amendment rights should attach at some point while the criminal investigation was underway. For example, they have argued that a "suspect" was transformed into a "defendant" when he became the "focus" of a criminal investigation or otherwise a "person of interest," or when a judge issued a warrant to search his home, or when officers had probable cause to arrest him, or when he had been charged with another crime that was "closely related" to the crime under investigation.[10]

All of these arguments were ultimately rejected, but it was not until 2008 that the Supreme Court decided on an explicit and workable definition of the term. The case was *Rothgery v. Gillespie County*,[11] and the Court announced that a suspect would become "charged" with a crime if—and only if—he had been arraigned on that crime in a criminal courtroom. Said the Court:

> [A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Although *Montejo* and *Rothgery* helped clarify a lot of things, there is still some confusion about a few other aspects of the Sixth Amendment's Right to Counsel. As we will now discuss, much of the confusion centers on Sixth Amendment waivers, Sixth Amendment invocations, and suspect-initiated questioning.

[5] *U.S. ex rel. Hall v. Lane* (7th Cir. 1986) 804 F.2d 79, 82.
[6] See *Kirby v. Illinois* (1972) 406 U.S. 682, 689 [when a suspect is "charged" he must face "the prosecutorial forces or organized society"]; *Moran v. Burbine* (1986) 475 U.S. 412, 430 ["By its very terms, [the Sixth Amendment] becomes applicable only when the government's role shifts from investigation to accusation."].
[7] *Michigan v. Jackson* (1986) 475 U.S. 625, 632. Edited.
[8] See, for example, *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 198.
[9] See, for example, *People v. Cunningham* (2015) 61 Cal.4th 609, 648.
[10] See, for example, *Hoffa v. United States* (1966) 385 U.S. 293, 310; *People v. Clair* (1992) 2 Cal.4th 629, 657; *People v. Woods* (2004) 120 Cal.App.4th 929, 941; *People v. Webb* (1993) 6 Cal.4th 494, 527; *People v. Cunningham* (2015) 61 Cal.4th 609, 648.
[11] (2008) 554 U.S. 191, 213.

Sixth Amendment Waivers

There are two ways to obtain a Sixth Amendment waiver. First, if the suspect was in custody, officers can do so by obtaining a *Miranda* waiver (which they would have to do anyway). The reason a *Miranda* waiver will suffice is that the Supreme Court has ruled that a suspect who waives his *Miranda* rights necessarily waives his Sixth Amendment right to have counsel present during interrogation. As the Court explained in *Patterson v. Illinois*, "By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [the officer] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him."[12]

If the suspect was out of custody, a *Miranda* waiver would not be required, but it is still an option. (This is the only situation in which officers would seek a *Miranda* waiver from a suspect who was not in custody.) The other option is to obtain a customized Sixth Amendment waiver by advising the suspect of the following: (1) You have the right to consult with an attorney before questioning. (2) You have the right to have counsel present during questioning. (3) If you cannot afford an attorney, one will be appointed at no cost. (4) Anything you say may be used against you in court.[13]

One other thing: While being advised of their Sixth Amendment right to counsel, suspects often ask if a waiver also constitutes a waiver of their right to be represented by an attorney in court. The answer is no.[14]

Sixth Amendment Invocations

Although officers may question a defendant if he waives his Sixth Amendment right to counsel, the question arises: What if he had previously *invoked* his Sixth Amendment rights by, for example, requesting court appointed counsel? Does that mean that, as in *Miranda*, any such questioning is unlawful? As we will now explain, the answer is no because of a significant difference between *Miranda* and Sixth Amendment invocations.

Miranda invocations almost always occur on the street or in interview rooms, and they can occur only during or shortly before custodial interrogation. More important, the objective of a *Miranda* invocation is to notify officers that the suspect either does not want to answer any questions or he wants to have an attorney present while he does so. For these reasons a *Miranda* invocation signifies the end of the interview.

In contrast, Sixth Amendment invocations almost always occur in courtrooms—usually at arraignment—when a defendant either arrives with an attorney or he asks the court to appoint one. This constitutes a Sixth Amendment invocation because it demonstrates to the judge that the suspect wants to be represented by counsel during all further court proceedings. But because it does not demonstrate that the defendant is unwilling to talk with officers without an attorney, they are free to question him if he waives his Sixth Amendment rights. As the Supreme Court observed in *Montejo*, "[I]t would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer."

Defendant-Initiated Questioning

A defendant will sometimes contact investigators directly or through jail staff and say he wants to talk to them about the charged crime. Even if the defendant is represented by counsel, officers may meet with him and, if he waives his *Miranda* rights, question him about the crime with which he was charged or any other crime he wishes to discuss.

NO NOTICE TO ATTORNEY: If a suspect initiates questioning, officers are not required to notify his attorney of the impending interview. For example, in *People v. Sultana*[15] the defendant hired a lawyer to represent him on a murder charge in Santa Cruz. After he was held to answer, he notified the investigating officer that he wanted to meet with him. At the start of the meeting, Sultana waived his *Miranda*

[12] (1988) 487 U.S. 285, 298.
[13] See *Patterson v. Illinois* (1988) 487 U.S. 285, 298
[14] See *Patterson v. Illinois* (1988) 487 U.S. 285, 293, fn.5.
[15] (1988) 204 Cal.App.3d 511.

rights and later made some incriminating statements. On appeal, he argued that his statements should have been suppressed because the officer was required to notify his attorney before talking to him. But the court disagreed, saying, "The State is not required [under Supreme Court precedent] to contact a defendant's attorney of record prior to questioning where the defendant has initiated interrogation and waived his right to counsel following *Miranda* warnings."

Defendant initiates interview with known agent: A defendant will be deemed to have automatically waived his Sixth Amendment rights if he initiates a conversation about a charged crime with a civilian who he knows is a police agent or is otherwise assisting officers. For example, in *Jenkins v. Leonardo*[16] the defendant, after being charged with rape, made several phone calls to the victim from the jail. The victim notified police who asked her to try to get him to talk about the crime if he should call again. They also furnished her with a recording device. Jenkins called again and made some incriminating statements which were used against him. On appeal, he contended that his statements should have been suppressed because he did not waive his Sixth Amendment right to counsel. The Second Circuit ruled, however, that the Sixth Amendment "does not prohibit questioning when a charged and represented suspect initiates a conversation with someone he knew or should have known was a state agent."

Ethics Issues for Prosecutors

So far we have been discussing the restrictions imposed by the Sixth Amendment on the questioning of charged suspects. Apart from the constitutional issues, there is a California ethics regulation that might be interpreted to mean that prosecutors cannot play any role in such operations. Specifically, Rule 2-100 of the California State Bar's Rules of Professional Conduct prohibits prosecutors from questioning a suspect if (1) he is represented by counsel, (2) the communication pertained to a crime for which he was represented, and (3) the defendant's attorney did not consent to the communication.

Because these restrictions apply regardless of whether the suspect had been charged with a crime, and regardless of whether he was questioned by prosecutors or by officers acting under their direction, the courts and State Bar have had to address the apparent conflict between Rule 2-100 and the Supreme Court's interpretation of the Sixth Amendment. Specifically, they had to decide whether prosecutors violate Rule 2-100 if they advise, direct, or participate in the questioning of a charged suspect who had invoked his Sixth Amendment right to counsel. For the following reasons they determined that such conduct does not violate Rule 2-100 if it occurred before the defendant was charged.

As the State Bar explained in its "Discussion" of Rule 2-100, it "does not apply if the prohibition has been overridden by a "statutory scheme or case law." It then pointed out that one such overriding legal principle is that prosecutors have the authority to "conduct criminal investigations, as limited by the relevant decisional law." This is a strong indication that the rule does not apply to investigatory, precharging questioning by prosecutors because, as discussed in this article, there is nationwide and extensive case law in which such questioning is expressly permitted by the Sixth Amendment.

Consequently, in interpreting this language, the California Attorney General concluded, "During the investigative phase of a criminal or civil law enforcement proceeding, Rule 2-100 of the California Rules of Professional Conduct does not prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel."[17] POV

[16] (2nd Cir. 1993) 991 F.2d 1033.

[17] (1992) 75 Ops.Cal.Atty.Gen. 223. Also see *U.S. v. Carona* (9th Cir. 2011) 660 F.3d 360, 365 [the informant "was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court … has held such indirect contacts to violate Rule 2–100"]; Professionalism, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (2001, California District Attorneys Association) pp. VI-6 et seq.; Standard 24.6.