Surreptitious Questioning

[Surreptitious questioning] is one of its most effective law enforcement techniques for investigating complex crime.[1]

In the accompanying article, "Questioning Defendants," we discussed a situation in which a defendant was questioned by an officer about the crime for which he was charged—and the defendant knew the officer was an officer. In this article, we will change the scenario: The person asking the questions was an undercover officer, informant, or other third person.

In these situations, *Miranda* does not present a problem because the Supreme Court has ruled that questioning by a police agent is an exception to the rule that a waiver is required. But the Sixth Amendment right to counsel *can* present a problem because, unlike *Miranda* (which is concerned solely with coercion), the purpose of the Sixth Amendment is to prevent officers from interfering with the attorney-client relationship. And such interference will result regardless of whether the questioner was a known officer or police agent

The reason this presents a problem is that, as discussed in "Questioning Defendants," a suspect who has been charged with a crime cannot be questioned about that crime unless he waives his Sixth Amendment right to counsel. And it's impossible for a police agent to obtain a waiver because suspects tend to become suspicious when undercover officers or informants start advising them of their rights. Fortunately, the Supreme Court solved this problem by ruling that a waiver is unnecessary if the agent did not "deliberately elicit" the information. What constitutes "deliberate elicitation"? We will address that question shortly. But first, it is necessary to explain the term "police agent."

"Police Agents"

In addition to undercover officers (who are necessarily police agents), there are two types of civilian police agents: (1) people who were promised something for obtaining incriminating information from a defendant, and (2) people who were given sufficient encouragement or a sufficiently strong incentive to do so.

Express promises

A person will be deemed a police agent if officers promised him something in return if he obtained incriminating information from a defendant, or if there was a "preexisting arrangement" whereby the person reasonably believed he would receive a specific benefit or advantage.[2] Examples of such promises and arrangements include promises to pay the informant for his assistance,[3] promises to provide him with safe housing,"[5] and agreements "to assist [the informant's] parole application by detailing the extent of his cooperation with the government,"[4]

Implied promises

Even if officers did not expressly promise the informant a particular benefit, a promise will be implied if it was reasonably likely to be interpreted as one. For example, in *In re Neely*[6] the defendant was arrested and charged with murder. His accomplice, Centers, confessed but claimed Neely was the shooter. So officers requested that Centers ask Neely where he had hidden the murder weapon. He succeeded, but the court ruled that Centers was a police agent because the officer had told him that he"could be charged with anything from first degree murder to a parking ticket, depending upon the degree of Centers's cooperation with the authorities." Simi-

[1] *U.S. v. Powe* (9th Cir. 1993) 9 F.3d 68, 70.
[2] *People v. Dement* (2011) 53 Cal.4th 1, 33-34.
[3] *United States v. Henry* (1980) 447 U.S. 264, 271-72 ["The arrangement between [the informant] and the agent was on a contingent-fee basis; [the informant] was to be paid only if he produced useful information."].
[4] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1358.
[5] *People v. Memro* (1995) 11 Cal.4th 786, 828.
[6] (1993) 6 Cal.4th 901, 910.

larly, a person will be deemed a police agent if he had been outfitted with recording equipment before meeting the defendant or if he engaged the defendant is a recorded telephone conversation.[7]

In contrast, in *People v. Moore*[8] the defendant had been charged with shooting a police officer and had been placed in a cell with a prisoner named White. Because Moore was considered a suicide risk, an officer asked White to "babysit" him. One day while talking with Moore, White asked him why he was in jail, and Moore said he had "shot a cop." Moore argued that his statement should have been suppressed because White was a police agent, but the court disagreed because the request to "babysit" did not directly or impliedly include a request to elicit incriminating information from Moore.

Two other things should be noted about express and implied promises. First, an agency relationship will not result merely because the informant received some after-the-fact benefit. For example, the courts have ruled that an informant did not become a police agent merely because an officer later testified on his behalf at the penalty phase of his capital trial,[9] or because the informant "subsequently received what appears to have been favorable treatment as to various penalties,"[10] or because the informant "may have gotten the [prison] placement he desired."[11]

Second, a penal institution's policy of rewarding inmates who provide useful information will not render all inmates who furnish such information police agents. As the California Supreme Court explained, "[A] general policy of encouraging inmates to provide useful information does not transform them into government agents."[12]

Providing an incentive

As noted, an informant will also be deemed a police informant if officers provided him with a sufficient incentive to obtain incriminating information from the defendant. Thus, the California Supreme Court said that "the critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused."[13]

The most common (and most powerful) incentive is a promise to an informant with a pending case that officers would notify prosecutors if he assisted them. Although there is an inference that the person would receive some benefit from prosecutors, he will not be deemed a police agent if, for example, officers merely notified him that his cooperation "might be useful in later plea bargain negotiations."[14] Similarly, in ruling that an informant was not a police agent, the courts noted the following:

- "The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way."[15]
- The officer told the suspect his cooperation would be brought to the DA's attention "for consideration."[16]
- The informant was told that the DA would be informed that he was "honest."[17]

In light of these rulings, the question arises: How should officers respond when they are being cross examined at a suppression hearing, and defense counsel suggests that they promised the informant something more than merely notifying the DA of his cooperation? An example of a good response is found in *In re Williams*[18] where an officer who was

[7] See *Massiah v. United States* (1964) 377 U.S. 201; *Maine v. Moulton* (1985) 474 U.S. 159, 174.
[8] (1985) 166 Cal.App.3d 540.
[9] *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249-50.
[10] *People v. Williams* (1997) 16 Cal.4th 153, 204.
[11] *People v. Howard* (1988) 44 Cal.3d 375, 401.
[12] *People v. Williams* (1988) 44 Cal.3d 1127, 1141; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240.
[13] *People v. Whitt* (1984) 36 Cal.3d 724, 742. Also see *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1139.
[14] *People v. Jones* (1998) 17 Cal.4th 279, 298.
[15] *People v. Carrington* (2009) 47 Cal.4th 145, 174. Also see *People v. Dement* (2011) 53 Cal.4th 1, 3.
[16] *People v. Ramos* (2004) 121 Cal.App.4th 1194.
[17] *People v. Jones* (1998) 17 Cal.4th 279, 298.
[18] (1994) 7 Cal.4th 572, 598-99.

testifying at a motion to suppress was asked the following question: "And did you ever in any way indicate to [the informant] that in some way, he should be given consideration in [his pending] case for his testimony in Williams' case?" The investigator responded:

> My statement to him has been the same that I've made to many people that wind up in the county jail for one reason or another. "I will go to the District Attorney with the information you give me. I will make it known to the District Attorney, whatever information you have given me in the past. And that's all I can do."

The court ruled the informant was not a police agent.

Targeting the suspect

A person might be deemed a police agent if officers identified the defendant to him as someone who had information they wanted. For example, the courts have ruled that a person (such as a co-conspiractor or cellmate) became a police agent when officers told him they had a special interest in the person's activities.[19] Similarly, in *U.S. v. York*[20] an FBI agent told a jailhouse informant about "the type of information he was interested in receiving" which, said the Seventh Circuit, "was tantamount to an invitation to [the informant] to go out and look for that type of information."

Officers fail to intervene

Officers will sometimes become aware that an informant has been deliberately eliciting information from a defendant on his own initiative. The question arises: Will an agency relationship result if they took no action to stop him? The cases indicate that the answer is no unless they said something that could reasonably be interpreted as encouraging the informant to continue his activities.

For example, in *People v. Pensinger*[21] the defendant was charged with murdering and mutilating a five-month old girl in San Bernardino County. While being held in the county jail, Pensinger confessed to an inmate named Howard who later notified investigators. They listened to his story but did not ask him to do anything further. During the next four weeks, Howard initiated five more meetings with the investigators, during which he told them about additional incriminating statements that Pensinger had made. In ruling that Howard was not a police agent, the California Supreme Court said, "[T]hough the police interviewed Howard about defendant's statements on six occasions, each interview was at Howard's instigation," and furthermore the investigators told him "he was not their agent, and to expect no reward."

Similarly, in *People v. Dominick*[22] the court rejected the argument that an informant was a police agent merely because he told a DA's investigator that he would let him know if he "came across something" while he was in jail. As the court pointed out, "The investigator told him to 'stay in touch' but at no time instructed him to seek out any information from inmates concerning criminal activity."

Not police agents

INFORMANT "HOPED" FOR REWARD: An informant does not become a police agent merely because he hoped or expected some reward.[23] As the Seventh Circuit observed, "Undoubtedly, most inmates who provide information to law enforcement officials harbor the hope that their service will not go unrewarded. But we must not confuse speculation about [an informant's] motives for assisting the police for evidence that the police promised [the informant] consideration for his help or, otherwise, bargained for his active assistance."[24]

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[19] *In re Neely* (1993) 6 Cal.4th 901, 915.
[20] (7th Cir. 1991) 933 F.2d 1343.
[21] (1991) 52 Cal.3d 1210. Also see *People v. Williams* (1997) 16 Cal.4th 153, 204; *People v. Coffman* (2004) 34 Cal.4th 1, 67.
[22] (1986) 182 Cal.App.3d 1175.
[23] See *People v. Dement* (2011) 53 Cal.4th 1, 29; *People v. Fairbank* (1997) 16 Cal 4th 1223, 1248 ["Of course, [the informant] may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative."].
[24] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1357.

For example, in *U.S. v. York*,[25] the court pointed out that while a jailhouse informant "had some expectation that he would benefit" by seeking information from the defendant, there was "no evidence that the government had directed or steered the informant toward the defendant." The court added, "That informants realize there is a market for information about crime does not make each inmate who enters the market a government agent." The D.C. Circuit put it this way: Although the informant was "acting as an entrepreneur" and was hoping to "make a sale to the Government," that "does not make the Government responsible for his actions."[26]

PRIOR RELATIONSHIP WITH OFFICERS: An informant does not become a police agent just because he had worked as an informant in the past. As the California Supreme Court explained, "[N]o constitutional question arises unless the informant is an agent of the state *at the time* he or she elicited the statements that would be the subject of later testimony."[27] A prior working relationship may, however, be relevant, if the informant had previously received some benefit for providing information."[28]

INFORMANT WORKING ON HIS OWN: An informant or other person who deliberately elicits information from a charged suspect is not a police agent if he did so on his own initiative.[29] As the court said in *People v. Catelli*,[30] "When on his or her own initiative, rather than at the state's behest, an informant obtains incriminating information from an accused, there is no [Sixth Amendment violation]." Or in the words of the Seventh Circuit, "There is a distinct difference between passively receiving information provided by enterprising inmates and striking deals with inmates."[31] Furthermore, even if the informant and officers had spoken about engaging in such conduct, he will likely not be deemed a police agent if officers told him in no uncertain words that they did not want his assistance and that he should stay out of the matter.[32]

"Deliberately elicit"

As noted, even if someone is deemed a police agent, his attempt to obtain incriminating information from a charged suspect will not violate the Sixth Amendment unless he "deliberately elicited" the information.[33] What is "deliberate elicitation?"

In one way, the meaning is virtually the same as that of "interrogation" as used in *Miranda* because both terms encompass both direct questioning about a crime and casual or devious attempts to obtain information. The only difference is that, as the name implies, "deliberate elicitation" under the Sixth Amendment can occur only if the agent's objective was to obtain incriminating information, while "interrogation" under *Miranda* does not technically require such a specific intent.

As a practical matter, however, there is no significant difference between deliberately eliciting and interrogating. That is because, although *Miranda* "interrogation" does not technically require an intent to obtain incriminating information, such an intent will almost always exist or be implied. After all, when a person is acting as a police agent and he talks with a suspect and asks questions that were reasonably likely to elicit an incriminating response, it is apparent that he intended to obtain incriminating information. As the California Supreme Court observed, deliberate elicitation results even if the agent merely "stimulates conversation with a defendant relating to the charged offense or actively engages the defendant in such conversation."[34]

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[25] (7th Cir. 1991) 933 F.3d 1343.
[26] *U.S. v. Watson* (D.C. Cir. 1990) 894 F.2d 1345, 1348.
[27] *People v. Memro* (1995) 11 Cal.4th 786, 828. Emphasis added.
[28] See *In re Williams* (1994) 7 Cal.4th 572, 598.
[29] See *People v. Coffman* (2004) 34 Cal.4th 1, 67; *People v. Dement* (2011) 53 Cal.4th 1, 35.
[30] (1991) 227 Cal.App.3d 1434, 1442.
[31] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1357.
[32] See *In re Wilson* (1992) 3 Cal.4th 945, 952 *People v. Memro* (1995) 11 Cal.4th 786, 828.
[33] See *Fellers v. United States* (2004) 540 U.S. 519, 524; *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459; *People v. Williams* (2013) 56 Cal.4th 165, 188-89.
[34] *In re Neely* (1993) 6 Cal.4th 901, 915.

For example, in the landmark case of *Massiah v. United States*[35] the defendant and his codefendant, Colson, were indicted on federal narcotics charges. After they bailed out, Colson agreed to assist federal agents in obtaining evidence against Massiah. Specifically, he permitted them to hide a radio transmitter under the seat of his car, and he agreed to engage Massiah in a conversation there about their drug trafficking. During the conversation, Massiah made several incriminating statements which were used against him at trial. Although Colson did not directly question Massiah about his criminal activities, the Supreme Court ruled that he implicitly did so because "the damaging testimony was elicited from the defendant without his knowledge."

About ten years later, the Court applied this principle in *Maine v. Moulton*,[36] ruling that a wired informant had deliberately elicited statements from the defendant when, during a casual conversation, he "reminisced" about their criminal activities" and also, after apologizing for his poor memory, he "repeatedly asked [the defendant]to remind him about the details of [their crimes]."

In contrast, in *People v Catelli*[37] the defendant, who was in custody on several sex charges, arranged to meet with an undercover officer who was posing as a thug-for-hire. Catelli asked him to "convince" his victims to "change their stories," and the officer asked Catelli "a number of questions designed to have [him] elaborate on his request." Catelli's responses to these questions were used against him at trial, but the court ruled they should have been suppressed because the officer's conversation with Catelli was "deliberately designed to elicit incriminating statements from defendant."

Inferring deliberate elicitation

Even if it is unclear whether an officer actually instructed a police agent to elicit incriminating information, an agency relationship may be inferred if he had given the person an incentive to do so, or had otherwise created a situation in which he was likely to try.[38]

For example, in *United States v. Henry*[39] the defendant was being held in the Norfolk city jail on a bank robbery charge. One of his fellow inmates was a man named Nichols who was not only a paid informant, he worked on "a contingent-fee basis," meaning he would not be paid unless he obtained "useful" information. An FBI agent who was investigating the bank robbery asked Nichols to "be alert" for any incriminating information from Henry, and Nichols later reported back that Henry "told him about the robbery." Even though there was no direct evidence that the agent had asked Nichols to obtain incriminating information, the Supreme Court ruled that he had effectively done so because he had created "a situation likely to induce Henry to make incriminating statements."

Similarly, in *In re Neely*[40] the California Supreme Court inferred that a jailhouse informant had deliberately elicited information from a murder suspect, Neely, based on the following: (1) a sheriff's deputy told the informant that he "was seeking specific information from [Neely] as to the whereabouts of the murder weapon, (2) the deputy "encouraged and instructed" the informant on how he could obtain this information, and (3) the deputy arranged for the informant and Neely to be placed in close contact so that the informant would have an opportunity to do so.

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[35] (1964) 377 U.S. 201.
[36] (1985) 474 U.S. 159.
[37] (1991) 227 Cal.App.3d 1434.
[38] See *People v. Whitt* (1984) 36 Cal.3d 724, 742 ["[T]he critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused."]; *In re Neely* (1993) 6 Cal.4th 901, 917-18 [a deputy told the informant that he "was seeking specific information from [the defendant] as to the whereabouts of the murder weapon," and the deputy "encouraged and instructed [the informant] as to the means by which [he] could procure this information from [the defendant]"]; *U.S. v. Sampol* (D.C.Cir. 1980) 636 F.2d 621, 638 [court inferred that an informant deliberately elicited incriminating statements from the defendant because the terms of his probation required that he "go all out" in obtaining such statements].
[39] (1980) 447 U.S. 264.
[40] (1993) 6 Cal.4th 901.

Monologues

In addition to restricting direct forms of questioning, the Sixth Amendment prohibits officers and other police agents from utilizing more subtle methods of inducing defendants to make incriminating statements. This was what happened in the famous Sixth Amendment case of *Brewer v. Williams*[41] in which an escaped mental patient named Robert Williams abducted and murdered a 10-year old girl in Des Moines, Iowa. After Williams had been charged with the crime, an attorney notified investigators that he was Williams' attorney and that Williams would shortly surrender himself to police in Davenport which was about 160 miles away.

Williams did, in fact, surrender, and two investigators were sent to Davenport to transport him back to DesMonies. Shortly after the trip began, Williams and one of the investigators began a "wide-ranging" conversation that included religion. Knowing that Williams claimed to be deeply religious, the investigator then delivered to Williams the so-called "Christian Burial Speech" in which he urged Williams to reveal where the girl's body had been buried so that she could get a proper Christian burial. Williams did so, and this fact was used against him at trial. Although the officer did not ask Williams any questions, the Supreme Court ruled "[t]here can be no serious doubt [that the officer] deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him."

What police agents may do

An undercover officer or informant does not deliberately elicit information if he acts merely as a passive listener—also known as a "listening post," or "ear"—and simply reports the suspect's words to officers.[42] For example, in *Kuhlmann v. Wilson*[43] the defendant, who had been charged with robbery and murder, was placed in a jail cell with an informant named Benny Lee. Officers had asked Lee to "keep his ears open" for the names of Wilson's accomplices. Although Wilson did not identify them to Lee, he made some admissions that were used against him at trial. In ruling that Wilson had failed to prove that his admissions were deliberately elicited, the Supreme Court said:

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

What to tell informants

Before an informant begins such an undercover operation, officers must tell him exactly what he can and cannot do and say. This is because, if the informant disregards the officers' instructions, a statement by the defendant may be admissible because the officer would have acted lawfully and reasonably, and the Supreme Court has ruled that the suppression of evidence is permitted only to deter police misconduct.[45]

It is not, however, sufficient to tell the informant not to "interrogate" or "question" the defendant, or to "act normally," or to just "be yourself."[45] Instead, they should explain that his role is that of an "ear," and that he may do nothing to stimulate a conversation about the charged crime.[46] For example, in *People v. Dement*[47] the California Supreme Court ruled that officers had properly instructed an informant when they told him to "not to elicit information from [defendant] on our behalf, that he was not to discuss the case with him," and "not ask defendant anything specific to this case." POV

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[41] (1977) 430 U.S. 387.
[42] See *In re Wilson* (1992) 3 Cal.4th 945, 950; *People v. Williams* (1997) 16 Cal.4th 153, 205; *P v. Pensinger* (1991) 52 C3 1210, 1249; *People v. Martin* (2002) 98 Cal.App.4th 408, 422.
[43] (1986) 477 U.S. 436.
[44] See *Herring v. United States* (2009) 555 U.S. 135, 144; *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2426].
[45] See *Maine v. Moulton* (1985) 474 U.S. 159, 177, fn.14; *People v. Whitt* (1984) 36 Cal.3d 724, 742.
[46] See *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18.
[47] (2011) 53 Cal.4th 1, 35.