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Is It Admissible?: Tips for Criminal Defense Attorneys on Assessing the Admissibility of a Criminal Defendant's Statements, Part Two

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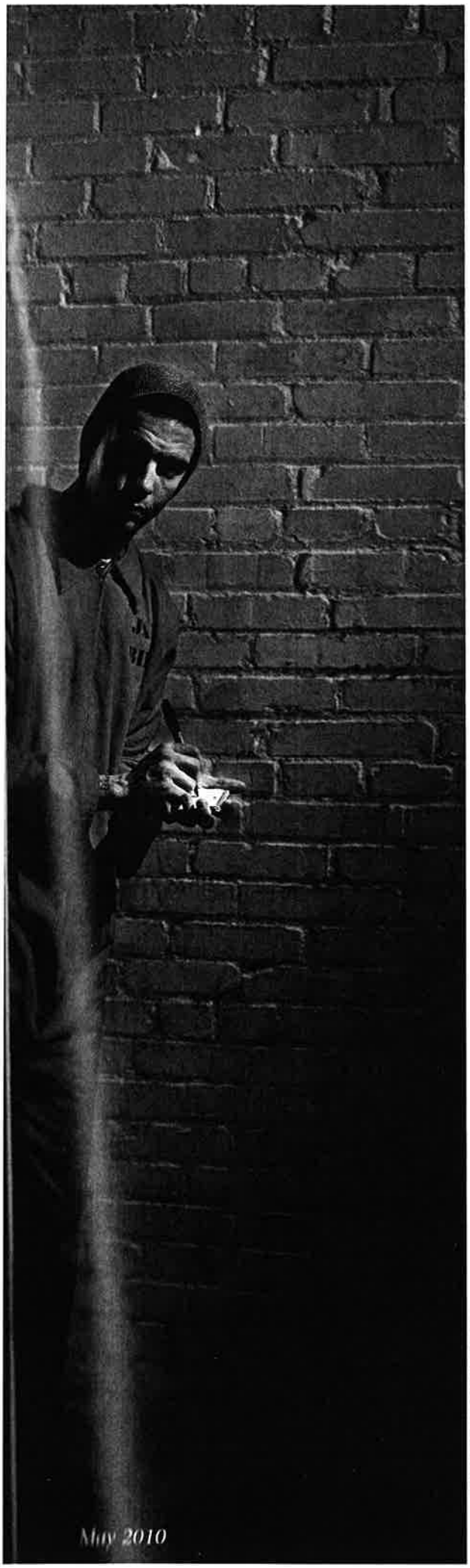

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Is It Admissible?

Tips For Criminal Defense Attorneys on Assessing the Admissibility of a Criminal Defendant's Statements

Part Two

By John H. Blume and Emily C. Paavola

Part One of this article addressed the Fifth Amendment issues to be considered when analyzing the admissibility of a criminal defendant's out-of-court statements. Part Two discusses the Sixth Amendment, the 14th Amendment's Due Process Clause and impeachment issues.

Was the statement obtained in violation of the Sixth Amendment?

The Sixth Amendment guarantees that in all criminal prosecutions "the accused shall enjoy the right to ... have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The essence of this right is the opportunity for a defendant to consult with an attorney and to have her investigate the case and prepare a defense for trial. *Powell v. Alabama*, 287 U.S. 45, 58 (1932). "The right is grounded in the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *State v. Quattlebaum*, 338 S.C. 441, 446, 527 S.E.2d 105, 107 (2000) (quotation omitted).

In *Michigan v. Jackson,* 475 U.S. 625 (1986), the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that

right. Transposing the reasoning of *Edwards v. Arizona*, 451 U.S. 477 (1981), which announced an identical "prophylactic rule" in the Fifth Amendment context, the Court held that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case in chief. *Jackson*, 475 U.S. at 636.

The Court recently overruled *Jackson*, however, in a 5-to-4 decision in *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009). *Montejo* originally raised only the narrow issue of whether a criminal defendant "asserts" his Sixth Amendment right to counsel when he simply stands mute while a judge orders the appointment of counsel, as Montejo did, or whether the defendant must do something more to affirmatively request counsel and thereby trigger the protections of the Sixth Amendment. But after oral argument in January 2009, the Supreme Court ordered supplemental briefing as to whether it should entirely overrule its former decision in *Jackson*, and ultimately the Court did just that.

The Court's decision in *Montejo* hinges on the argument that *Jackson* provides only a "meager benefit" that is not outweighed by its substantial costs. The majority ignored the traditional core of the Sixth Amendment and claimed instead that the real issue is protection from police badgering, not the defendant's right to the assistance of counsel. *Montejo*, 129 S.Ct. at 2089–90. The Court held that Fifth Amendment precedent, including *Miranda*, *Edwards* and *Minnick*, already provides sufficient protection from coercive police practices. *Id.* at 2090. Although the Court acknowledged that *Jackson's* protection was designed to encompass situations broader than those protected by the Fifth Amendment, it dismissed that issue by simply asserting that the relevant reasoning is the weighing of the rule's benefits against its costs. And since the majority believed that "the marginal benefits of *Jackson* ... are dwarfed by its substantial costs (*viz.*, hindering society's compelling interest in finding, convicting, and punishing those who violate the law)," the Court struck down its 23-year-old precedent in *Jackson* as "superfluous." *Id.* (quotation omitted).

Thus, police are now free to initiate interrogation and attempt to obtain a waiver of rights even after the Sixth Amendment right to counsel has attached through the initiation of formal proceedings. In the aftermath of *Montejo*, the Sixth Amendment protection carries significantly less force. The issue can be analyzed by considering the following three questions.

1. Did the defendant have a Sixth Amendment right to counsel?

The Sixth Amendment right to counsel attaches once formal adversary proceedings have commenced against an individual. *Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("[T]he right to counsel guaranteed by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.") (internal quotation omitted); *see also, State v. Register*, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996) ("The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages.") (citing *Michigan v. Harvey*, 494 U.S. 344 (1990)).

The Sixth Amendment right to counsel is offense specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) ("It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced."). In other words, once the Sixth Amendment right to counsel attaches to a formal prosecution, police may not interrogate a defendant about *that particular prosecution* without the presence of counsel, unless the defendant initiates the interrogation or makes a valid waiver.

Note, however, that after *Montejo*, the police may approach a defendant, seek to obtain a waiver even after the Sixth Amendment right has attached, and then interrogate the defendant about the particular offense to which the right has attached. If, at that point, the defendant asserts his right to counsel, then the analysis shifts back to Fifth Amendment considerations. If the defendant makes a clear assertion of his right to counsel, then no interrogation should take place unless the defendant initiates it. Even if the defendant subsequently agrees to waive his rights, that waiver is invalid under *Edwards* if it follows an unequivocal election of the right to counsel. *See Montejo*, 129 S.Ct. at 2091 ("Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, we think that Montejo should be given an opportunity to contend that [his statement] should still have been suppressed under the rule of *Edwards*.").

2. Did the police "deliberately elicit" incriminating statements?

If the Sixth Amendment right to counsel has attached, the next consideration is whether the police "deliberately elicited" incriminating statements from the defendant. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *see also Brewer v. Williams*, 430 U.S. 387, 405 (1977) (holding police officer's "Christian burial speech" was tantamount to interrogation because it was a deliberate attempt to elicit incriminating statements). The core concern is not only with direct interrogation, but also with "indirect and surreptitious interrogations" brought about by "investigative techniques that [are] the functional equivalent to interrogation." *Kuhlmann v. Wilson*, 477 U.S. 436, 457 (1986). Deliberately elicited statements, without an express waiver of the right to counsel, are inadmissible. *See Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Brewer*, 430 U.S. 387 (1977); *Massiah*, 377 U.S. 201 (1964). The

subjective motivation of the police officer or government agent *does* matter. Relevant considerations are:

- What was the purpose of the questions or comments?
- Who set up the encounter?
- Was there an attempt to exploit or otherwise take advantage of the encounter?

See Maine v. Moulton, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached .... [However], the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.").

Note that *Montejo* presumably does not affect the Sixth Amendment analysis in cases where the defendant does not know that he is speaking with a law enforcement officer or government agent. In this context, the Sixth Amendment protections differ from the Fifth Amendment safeguards. The Sixth Amendment right to counsel is not limited to the context of custodial interrogation by police officers. Unlike the Fifth Amendment right, it applies to statements that were deliberately elicited by other government agents such as "snitches" and "informants." In *United States v. Henry*, 447 U.S. 264 (1980), the Court held that the defendant's Sixth Amendment right to counsel was violated when a government informant "developed a relationship of trust" with the defendant and "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." *Id.* at 269–70. Although the informant did not directly question the defendant, the informant "stimulated" conversations with the defendant in order to "elicit" incriminating information. *Id.* at 273. The Court held that the situation in *Henry* was "quite a different matter" from the Fifth Amendment context in which an undercover agent may obtain incriminating statements without advising the suspect of his *Miranda* rights. *Id.* at 272 (citing *United States v. White*, 401 U.S. 745 (1971) (holding that the Fifth Amendment is not implicated by the use of undercover government agents before charges are filed because of the absence of potential for compulsion)); *see also, Hoffa v. United States*, 385 U.S. 293, 302 (1966) (holding that "no interest legitimately protected by the Fourth Amendment is involved" because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."). In the Sixth Amendment context, the relevant inquiry is "whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements." *Henry*, 447 U.S. at 272. The informant's participation in *Henry* was the functional equivalent of interrogation. Thus, the government violated Henry's Sixth Amendment right to counsel by surreptitiously encouraging the informant to deliberately elicit information from Henry after

the Sixth Amendment protections had attached. *See also, Maine v. Moulton*, 474 U.S. 159 (1985) (finding Sixth Amendment violation where accomplice, who had agreed to cooperate with police, wore a wire transmitter, discussed with the defendant the charges pending against him, repeatedly asked the defendant to remind him of the details of the crime, and encouraged the defendant to describe his plan for killing witnesses).

But, the Sixth Amendment protection does not extend to situations involving "passive" listeners. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). The Sixth Amendment does not forbid admission in evidence of an accused's statements to a jailhouse informant who merely listens and makes no effort to stimulate conversations about the crime charged. *Id.* at 456. 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." *Id.* at 459.

3. Did the suspect make a valid waiver?

To demonstrate a valid waiver, the State must prove a voluntary, knowing and intelligent relinquishment of the Sixth Amendment right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 292, and n.4 (1988); *Brewer*, 430 U.S. at 404. When a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda v. Arizona*, that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of post-indictment questioning. *Patterson*, 487 U.S. at 292 and n.4; *see also, Montejo v. Louisiana*, 129 S.Ct. at 2092 ("In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him 'of his right to have counsel present during the questioning,' and make him 'aware

of the consequences of his decision by him to waive his Sixth Amendment rights.'").

Was the statement obtained in violation of the Due Process Clause?

The Due Process Clause of the 14th Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV; *see also*, S.C. Const., Art. I, § 3. By virtue of the Due Process Clause, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned..." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Whether a statement was voluntary is determined by a totality of the circumstances test. The relevant inquiry is whether the particular suspect's will was overborne. *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991) (finding that the defendant's confession was coerced by a credible threat of physical violence where the defendant confessed to a government informant who promised to protect him from other inmates in exchange for information about the crime); *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996) (holding the pertinent inquiry is always whether the defendant's will was overborne); *see also, Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (holding that a confession was coerced because the interrogating police officer promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door). All of the relevant facts and circumstances should be considered, including but not limited to:

- The youth of the accused.
- His lack of education or his low intelligence.
- The lack of any advice to the accused of his constitutional rights.
- The length of detention.
- The repeated and prolonged nature of the questioning.
- The use of physical punishment such as the deprivation of food or sleep.

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *see also, State v. Pittman*, 373 S.C. 527, 566, 647 S.E.2d 144, 164 (2007) (citing *Schneckloth*). No single factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances. *Schneckloth*, 412 U.S. at 226.

The Due Process Clause voluntariness inquiry is not limited to the context of custodial interrogation, but the statement must be obtained by a police officer or other state agent. In other words, there must be a link between the coercive activity of the state and the confession. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."); *State v. Salisbury*, 330 S.C. 250, 272, 498 S.E.2d 655, 666 (S.C. App. 1998) ("Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment."). In *Connelly*, the Court held that there was no due process violation where the defendant, a chronic schizophrenic in a psychotic state, felt compelled by "voices" and "the voice of God" to approach a police officer and confess to murder. *Id.* at 161.

Can the statement be used for impeachment purposes?

Finally, bear in mind that even if a confession is not admissible during the prosecution's case-in-chief, it may still be admissible for impeachment purposes. A statement obtained in violation of *Miranda* may be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 225-226 (1971) ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.... The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."); *State v. Brown*, 296 S.C. 191, 193, 371 S.E.2d 523, 525 (1988) ("[A] statement obtained in violation of a defendant's fifth amendment right to counsel is admissible for impeachment, as is a confession obtained in violation of *Miranda*.") (citations omitted).

Moreover, a statement obtained in violation of the Sixth Amendment right to counsel may also be used for impeachment purposes. *Michigan v. Harvey*, 494 U.S. 344, 350–51 (1990) ("We have already decided that although statements taken in violation of only the prophylactic Miranda rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant.... There is no reason for a different result in a [Sixth Amendment] case."); *State v. Anderson*, 357 S.C. 514, 518, 593 S.E.2d 820, 822 (Ct. App. 2004) ("[S]tatements obtained in violation of [the Sixth Amendment] may not be admitted as substantive evidence in the prosecution's case in chief.").

On the other hand, an involuntary confession is inadmissible for any purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385, 401 (1978) (holding statements made by defendant to police officer while defendant was in the hospital in the intensive care unit, while he was in unbearable pain and unable to think clearly, and while he was encumbered by tubes, needles and a breathing apparatus, were not voluntary and could not be used against defendant, either as direct evidence, or to impeach his in-court testimony); *State v. Victor*, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989) ("An accused's involuntary incriminating statement is inadmissible for any purpose, including impeachment.").

For a quick reference guide to Fifth Amendment, Sixth Amendment, Due Process and Impeachment issues, visit www.scbar.org/sclawyer.

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