Third Degree Communications, Inc.

TRAINING BULLETIN: LEGAL UPDATE

Miranda *and the Sixth Amendment –*
Right to Counsel, Waivers, Invocations and Renewing Questioning

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Right to Counsel

As we have seen, a person who is "in custody" must be given the Miranda warning to protect his Fifth Amendment right against self-incrimination. However, the second part of the Miranda warning protects a suspect's Sixth Amendment right to counsel, and this is triggered not by the suspect's custodial status but whether criminal charges have been filed against him.

Take, for example, *People v. Viray* (2005) 134 Cal.App.4th 1186. In that case a criminal complaint for felony elder fraud had been filed against the defendant. Before the arraignment, and before the defendant had retained an attorney or been assigned a public defender, she was interviewed by the prosecutor. This violated the rule of *Massiah v. United States* (1964) 377 U.S. 201 that a police officer (or a police agent) violates the Sixth Amendment when he deliberately elicits a statement from a suspect about a *charged* crime. The key word there is "charged", which means either when the prosecution files a criminal complaint or when a grand jury returns an indictment.

Note the difference here between Fifth Amendment rights and Sixth Amendment rights. An undercover officer would not need to give the Miranda warning before questioning an uncharged suspect "in custody" (a reasonable person would believe he is not free to leave) because the inherently coercive atmosphere that the Miranda warning was supposed to combat disappears (*Illinois v. Perkins* [1990] 496 U.S. 292). However, a *charged* suspect could not be questioned at all about that crime, whether or not the officer was undercover.

If no criminal complaint has been issued yet, a suspect does not become charged with a crime (even if he has an attorney) if the suspect is the subject of

- extradition proceedings (*People v. Wheelock* [2004] 117 Cal.App.4th 561)
- a pre-complaint (Ramey) warrant (*Wheelock, supra* at p. 565)
- a search warrant (*People v. Woods* [2004) 120 Cal.App. 929)
- an investigation or detention (*People v. Clair* [1992] 2 Cal.4th 629)

A suspect in custody, charged with a crime, who is represented by an attorney for that crime, can nevertheless be questioned about an *uncharged* crime without violating *Massiah.* In *Texas v. Cobb* (2001) 532 U.S. 162 the defendant committed a residential

burglary and killed the occupants. He confessed to the burglary but denied the murders. He was charged with the burglary, was assigned an attorney for the burglary, and while awaiting trial on the burglary he confessed the murders to his father. Mr. Cobb's father contacted to the police, who issued an arrest warrant for the murders.

Mr. Cobb was Mirandized, waived his rights, and confessed to the murders. His attorney on the burglary case was not notified and was not present. The USSC held that the Sixth Amendment is "offense specific". That is, if the defendant is charged with a crime his Sixth Amendment rights are limited to that crime, and do not extend to *uncharged* crimes even if they are "closely related" to or "inextricably intertwined" with the charged crime.

Waivers and Invocations

This is really a cross-over between Fifth Amendment rights and Sixth Amendment rights, but it just seemed logical to put it here.

The burden of proof is on the People to establish by a preponderance of the evidence that a suspect's waiver of his Miranda rights was knowing, intelligent and voluntary. Note that even if the waiver was voluntary, the suspect's statement will still be excluded if the statement itself was *involuntary,* which is the subject for the next article in this three part series.

Once a suspect indicates that he understands his rights, a waiver can be express ("Sure, I'll talk") or implied (he just starts talking) (*People v. Sully* [1991] 53 Cal.3d 1195). Likewise, there is no problem when the invocation is clear and unambiguous ("I want my attorney"). The biggest problem is a statement that is somewhere in the middle, neither a clear invocation nor a clear waiver, like "I don't know, do I need an attorney?" or "I don't know what to tell you, I don't know anything." Trial courts can (and have) gone either way on that issue. The best thing you can do is to clarify the Miranda rights to make sure the suspect understands them and keep explaining them until you get a clear waiver or a clear invocation. Clarifying Miranda rights does not constitute "interrogation" for purposes of Miranda (*People v. Wash* [1993] 6 Cal.4th 215).

A suspect can make a limited invocation. He may agree to talk about one crime but not another, or to one officer but not another, or agree to talk later but not now. As long as the officers honor the conditions the suspect places on the interview, they may continue questioning the suspect (*Michigan v. Mosley* [1975] 423 U.S. 96).

An invocation must be personal; a suspect's attorney, spouse, or parent can't do it for him (*Moran v. Burbine* (1986) 475 U.S. 412). An invocation is valid only if it is made *after* the Miranda warning is given; there are no valid "preemptive strike" invocations (*People v. Nguyen* [2005] 132 Cal.App.4th 350).

Renewing Questioning After an Invocation

There is a big difference between an invocation of Sixth Amendment rights ("I want my lawyer" and an invocation of Fifth Amendment rights ("I'm not talking").

Police may renew questioning of a suspect who invoked his Sixth Amendment right to counsel only if the attorney is present at both the initial second contact and at the interview itself, and the suspect agrees to talk (*Minnick v. Mississippi* [1990] 498 U.S. 146). (Hey, it *could* happen.)

Police may renew questioning of a suspect who invoked his Fifth Amendment right against self-incrimination only if the police "scrupulously honored" his invocation in the first place, waited a "significant" period of time before renewing questions (at least a few days, to be safe under current case law), did not pressure him to change his mind, and re-Mirandized him if he was in custody (*People v. Lispier* [1992] 4 Cal.App.4th 1317).

A suspect could initiate questioning after an invocation (of either type), provided that he did so freely, and not in response to pressure from the police, and provided that the suspect opens up a "general discussion" about the crime (*People v. Superior Court (Zolnay)* [1975] 15 Cal.3d 729) as opposed to routine questions about custody or court procedures (*People v. Sims* [1993] 5 Cal.4th 405).

I'm not sure what a "general discussion" is either, but so far questions about the disposition and status of the evidence (*People v. Mattson* [1990] 50 Cal.3d 826), offers to assist in the investigation (*People v. Waidla* [2000] 22 Cal.4th 690) and the possibility of getting an accomplice released (*People v. Thompson* [1990] 50 Cal.3d 134) all qualify.

Finally, (and weren't you longing for that word?) there is an exception for suspects who have invoked (either Fifth or Sixth Amendment rights) and are released. If there is a true break in custody, a break long enough for the suspect to contact an attorney, such as a two day period, police could recontact the suspect (*People v Storm* [2002] 28 Cal.4th 1007). Whether or not they would need to give the Miranda warning depends on whether he was "in custody" at the time, which is back where we started.

Voluntariness

Now *there's* a mine field. We will tiptoe through those tulips in the next article. Stop me before I come up with another mixed metaphor.

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