The United States Supreme Court Ruling in *Montejo v. Louisiana*

Robert L. Farb
Professor of Public Law and Government
School of Government
The University of North Carolina at Chapel Hill
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On May 26, 2009, the United States Supreme Court issued a ruling in *Montejo v. Louisiana* that affects a law enforcement officer's authority to interrogate a defendant who has a Sixth Amendment right to counsel. The Court overruled *Michigan v. Jackson*, 475 U.S. 652 (1986), which had ruled that when a defendant requests counsel at an arraignment or similar proceeding, an officer thereafter is prohibited under the Sixth Amendment from initiating interrogation of the defendant. This memorandum discusses the ruling and its impact on law enforcement interrogation practices. The text of the *Montejo* opinion is available at http://www.supremecourtus.gov/opinions/08pdf/07-1529.pdf.

I. Summary of Facts and Court's Ruling

The defendant (Montejo) was arrested for murder, waived his *Miranda* rights, and gave statements in response to officers' interrogation. He was brought before a judge for a preliminary hearing, who ordered that the defendant be held without bond and appointed the Office of Indigent Defender to represent him. Later that day, two officers visited the defendant in prison and requested that he accompany them to locate the murder weapon. He was read his *Miranda* rights again and agreed to go with the officers. During the trip, he wrote an inculpatory letter of apology to the murder victim's widow. Only on his return did the defendant finally meet his court-appointed attorney. The issue in this case was whether the letter of apology was erroneously admitted in the defendant's trial based on a violation of his Sixth Amendment right to counsel. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court had ruled that when a defendant requests counsel at an arraignment or similar proceeding that takes place at or after the attachment (beginning) of the Sixth Amendment right to counsel, an officer is thereafter prohibited under the Sixth Amendment from initiating interrogation of the defendant.[1] (To put it another way, any waiver of counsel for the interrogation is automatically invalid.) Instead of deciding whether *Jackson* barred the officers from initiating interrogation of Montejo after a lawyer had been appointed for him, the Court overruled *Jackson* and remanded the case to a Louisiana court to determine unresolved factual and legal issues. (See the Court's opinion why it overruled *Jackson*.) Below is a discussion of issues related to the Court's overruling of *Jackson*.

II. Counsel Issues Based on the Fifth Amendment.

The United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), established a prophylactic rule requiring warnings and waiver of rights to protect a defendant's Fifth Amendment right against compelled self-incrimination during custodial interrogation. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court ruled that once a defendant has invoked his

[1] As stated later in the text, the attachment of the Sixth Amendment right to counsel occurs in North Carolina at the initial appearance before a magistrate or other judicial official, based on the ruling in *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). Before *Rothgery*, attachment occurred at the first appearance for a felony before a district court judge.

or her right to have counsel present during custodial interrogation, the defendant is not subject to further interrogation until counsel has been made available to be present during custodial interrogation (or the defendant initiates communication with an officer).[2] The *Edwards* rule was designed to prevent officers from badgering a defendant into waiving his or her previously asserted *Miranda* rights. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court ruled that *Edwards* applies not only to the crime for which the defendant is being interrogated, but also to interrogation about unrelated crimes (as long as the defendant remains in continuous custody).[3]

III. Counsel Issues Based on the Sixth Amendment

The Sixth Amendment right to counsel provides a defendant with the right to counsel at trial and at critical pretrial stages, which include interrogation of a defendant about the offense for which the defendant has the right to counsel. Unlike counsel under the Fifth Amendment, the Sixth Amendment right to counsel exists whether or not the defendant is in custody. The Sixth Amendment right to counsel attaches (begins) for a felony in North Carolina at the initial appearance before a magistrate or other judicial official, which is considered the initiation of adversary judicial proceedings under the ruling in *Rothgery v. Gillespie County,* 128 S. Ct. 2578 (2008).[4] At any critical stage thereafter, such as an officer's interrogation, the Sixth Amendment right to counsel exists unless the defendant knowingly and voluntarily waives the right to counsel. Under *Jackson*, if the defendant had requested counsel at the initial appearance for a felony before a magistrate or at the first appearance before a district court judge, an officer was prohibited from initiating interrogation of the defendant about the offense for which he or she had the right to counsel. The Court's overruling of *Jackson* removes that prohibition, provided the defendant is advised of his or her rights and knowingly and voluntarily waives his or her Sixth Amendment right to counsel (see below for the content of warnings and waiver). A defendant may execute a waiver of counsel without the presence of his or her attorney.[5]

IV. Limitation on Interrogation Based on Fifth Amendment Even If Interrogation Would Be Permitted Under Sixth Amendment

Although an officer after the overruling of *Jackson* may not be prohibited from initiating interrogation under the Sixth Amendment right to counsel, the officer may still be prohibited from interrogation by the Fifth Amendment under *Edwards* or *Roberson*. For example, a defendant is arrested for armed robbery and requests counsel during custodial interrogation. Under *Edwards* and *Roberson*, officers are prohibited from continuing or later initiating interrogation about the armed robbery or any other offense, whether related or not to the armed robbery, as long as the defendant remains in continuous custody. If the defendant did not request counsel but asserted the right to remain silent, that assertion bars continuing interrogation or reinitiating interrogation except under limited circumstances.[6]

If there is no Fifth Amendment issue because, for example, the defendant is not in custody, an officer may initiate interrogation of a defendant who has a Sixth Amendment right to

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[2] The text states the *Edwards* rule as described in *Minnick v. Mississippi*, 498 U.S. 146 (1990).
[3] Nothing stated in this paragraph of the text was affected by *Montejo*. It simply provides background for later discussion of the issues.
[4] When a charge begins with an indictment and subsequent arrest, the Sixth Amendment right to counsel attaches with the indictment. The Sixth Amendment right to counsel would attach at the initial appearance for a misdemeanor if a defendant has a constitutional right to counsel for that misdemeanor.
[5] Slip opinion at 7 and 9.
[6] See pages 204-205 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).

counsel if the officer advises the defendant of his or her rights and obtains a valid waiver of those rights (see below for the content of warnings and waiver).

V. Initiating Interrogation of Defendant Who Has Sixth Amendment Right to Counsel—How Often?

Assuming the defendant has not asserted the right to counsel during custodial interrogation that would bar interrogation of an in-custody defendant under the Fifth Amendment, the overruling of *Jackson* raises the issue to what extent an officer may initiate interrogation under the Sixth Amendment. If an officer sought to interrogate a defendant, but the defendant refused to waive his or her Sixth Amendment right to counsel, could the officer try again later? The Court in *Montejo* did not address the issue. However, the Court did discuss in a different context the improper badgering of a defendant to obtain a waiver of counsel. Thus, it would appear that a second attempt to initiate interrogation after a refusal to waive counsel would be questionable.

VI. Content of Warnings and Waiver of Sixth Amendment Right to Counsel

Does the warning and waiver of the Sixth Amendment right to counsel differ from the Fifth Amendment-based *Miranda* warnings and waiver of the right to counsel? Probably not. The Court in *Patterson v. Illinois*, 487 U.S. 285 (1988), ruled that *Miranda* warnings and waiver were sufficient in that case to waive the Sixth Amendment right to counsel. The Court in *Montejo* approvingly cited *Patterson* on this issue.[7] However, because the issue has not been definitively decided, a cautious officer in a case in which the defendant has already retained or been appointed an attorney may want to include the name of that attorney, if known, to the warnings and waiver. Or if the attorney's name is unknown, include the organization representing the defendant, such as the public defender's office. Some law enforcement agencies in North Carolina have devised specific warnings and a waiver for interrogations involving a defendant's Sixth Amendment right to counsel. Warnings and a waiver must be executed whether or not the defendant is in custody because the Sixth Amendment right to counsel exists under either circumstance.

VII. Overruling of *Jackson* and Surreptitious Questioning of a Defendant Who Has a Sixth Amendment Right to Counsel

The overruling of *Jackson* does not change case law that prohibits an officer from surreptitiously questioning a defendant who has a Sixth Amendment right to counsel through an informant or undercover officer.[8]

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[7] The Court stated: "And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment . . . ." and then quoted from *Patterson v. Illinois*, 487 U.S. 285, at 296 (1988). Slip opinion at 7.

The North Carolina Supreme Court in *State v. Wynne*, 329 N.C. 507 (1991), assuming the defendant had a Sixth Amendment right to counsel when interrogation occurred, upheld the admissibility of the defendant's confession when *Miranda* warnings were given and a waiver of those rights was executed.

[8] For a discussion of surreptitious questioning of a defendant, see pages 207-209 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).