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Court Overrules *Michigan v. Jackson* Which Had Barred Officers From Initiating Interrogation of a Defendant After Defendant Requested Counsel at Arraignment or Similar Proceeding – Pgs. 1- 3

United States Supreme Court

On May 26, 2009, the United States Supreme Court issued an opinion in *Montego v. Louisiana* which may have a significant and favorable impact upon a law enforcement officer's authority to interrogate a defendant who has a Sixth Amendment right to counsel. This issue of the Police Law Bulletin discusses the facts of the case, the ruling, and its impact on law enforcement practice and procedure.

FACTS

Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari. Montejo waived his *Miranda* rights and was interrogated by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven a disgruntled former employee of the victim to the victim's home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. On September 10, Montejo was brought before a judge for a preliminary hearing required by Louisiana law. At the hearing, Montejo was charged with first-degree murder and the court ordered the appointment of counsel. Later that same day, two detectives visited Montejo in prison and asked that he accompany them on an excursion to locate the murder weapon. Montejo was again advised of his *Miranda* rights and agreed to go along. During the trip, he wrote an inculpatory letter of apology to the victim's widow. Only after returning from the trip did Montejo finally meet with his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence. (Remember that "interrogation" for purposes of *Miranda* includes not only express questioning, but also words or actions by an officer that he or she should know are reasonably likely to elicit an incriminating response from the defendant.)

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder and he was sentenced to death. Affirming, the Louisiana State Supreme Court rejected his argument that the letter should have been suppressed under the rule of *Michigan v. Jackson*, 475 U.S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The Louisiana court reasoned that *Jackson's* protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

ANALYSIS and HOLDING

The United States Supreme Court found that the Louisiana State Supreme Court's interpretation of *Jackson* presented practical problems. Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise assert his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant. Almost half the States appoint counsel without request from the defendant, and in many more appointment can be made either upon the defendant's request or by the court's own will. Thus, the Louisiana State Supreme Court's interpretation of *Jackson* would lead to arbitrary and inconsistent distinctions between defendants in different States.

The Supreme Court also rejected Montejo's suggestion that once a defendant is represented by counsel, police should not be able to initiate any further interrogation. The Court found that such a position would depart fundamentally from the rationale of *Jackson*, which was meant to prevent police from badgering defendants into changing their minds about the right to counsel once they have invoked it. "No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring."

Finding both positions problematic, instead of deciding whether *Jackson* barred the officers from initiating interrogation of Montejo after a lawyer had been appointed for him, the United States Supreme Court decided to overrule *Jackson* and sent Montejo's case back to a Louisiana court to determine other unresolved factual and legal issues.

In deciding whether to overrule *Jackson*, the Court considered, among other things, the rule's benefits against its costs. The Court noted that even without *Jackson*, few badgering-induced waivers, if any, would be admitted at trial because the Court has taken substantial other, overlapping measures to exclude them. For instance, under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. Under *Edwards v. Arizona*, 451 U.S. 477, once such a defendant has invoked his *Miranda* rights, interrogation must stop. And, under *Minnick v. Mississippi*, 498 U.S. 146, no subsequent interrogation may take place until counsel is present. On the other hand, the principal cost of continuing to apply *Jackson*'s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions. The Court concluded that the *Jackson* rule does not "pay its way," and that it should, therefore, be overruled.

EFFECT UPON INTERVIEWS

The Sixth Amendment right to counsel attaches (begins) at the initial appearance before a magistrate or other judicial official. If the defendant has yet to invoke that right (by indicating he or she wants an attorney, hires an attorney, is appointed an attorney, etc.), then officers may approach the defendant, advise the defendant of his or her Sixth Amendment rights, and attempt to obtain a waiver of those rights. Prior to *Montejo*, under *Jackson*, once the defendant requested counsel at the initial appearance before a magistrate or at the first appearance in district court, an officer was prohibited from initiating interrogation of the defendant about the offense for which he or she had the right to counsel. An officer could only advise the defendant of his or her rights and attempt to obtain a waiver if the defendant's attorney was present or the defendant initiated the conversation. The Court's overruling of *Jackson*

removes that prohibition. So, if a defendant's Sixth Amendment rights have attached, and the defendant has invoked his or her Sixth Amendment rights by indicating at an initial appearance before a magistrate or first appearance in district court that he or she wants an attorney, has hired an attorney, or is appointed an attorney, an officer is no longer prohibited under the Sixth Amendment from approaching the defendant, advising the defendant of his or her Sixth Amendment rights, and attempting to obtain a waiver of those rights. The officer does not have to wait for the defendant's attorney to be present or for the defendant to initiate the conversation.

BE CAREFUL OF….

The Right to Counsel Based on the Fifth Amendment

An officer's ability to solicit a waiver of rights and interview a defendant may be limited by the Fifth Amendment even if permissible under the Sixth Amendment.

The United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), established a rule requiring warnings and a 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 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 (or the defendant initiates communication with an officer.) 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). For example, a defendant is arrested for armed robbery and requests counsel during custodial interrogation. Officers are prohibited from continuing or later attempting to initiate interrogation about the armed robbery or any other crime as long as the defendant remains in continuous custody. M*ontejo does not change this.*

Montejo will be useful when there is no Fifth Amendment issue because, for example, the defendant is not in custody.

"Badgering"

If an officer seeks to interview a defendant and the defendant, after being advised of his or her rights, refuses to waive his or her Sixth Amendment right to counsel, neither that officer nor any other officer should attempt to try again later. While the court in *Montejo* did not directly address this issue, it did discuss the improper "badgering" of a defendant to obtain a waiver of counsel. Thus, it appears that a second or subsequent attempt to initiate interrogation after a refusal to waive counsel would be questionable.