Montejo v. Louisiana

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Two big developments at the United States Supreme Court. First, President Obama nominated Judge Sonia Sotomayor to replace Justice David Souter. The New York Times story is here, some News and Observer coverage is here, and SCOTUSblog has some interesting tidbits here.

This post will focus not on Judge Sotomayor -- who, most think, won't change the balance of the Court much -- but on a significant criminal procedure decision that the Court issued yesterday. The case is *Montejo v. Louisiana*, and you can read it here.

The defendant in *Montejo* was arrested for murder. He went to court for a "72 hour hearing," as required by Louisiana law, and was appointed a lawyer as a matter of course. That same day, officers went to the jail, obtained a *Miranda* waiver from the defendant, and questioned him, obtaining, among other things, an "inculpatory letter of apology to the victim's widow."

The state sought to introduce the letter, and the defendant argued that it was obtained in violation of *Michigan v. Jackson*, 475 U.S. 625 (1986), which held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." The trial court admitted the letter, and the state supreme court affirmed, ruling that the defendant had never "asserted" his right to counsel at the 72 hour hearing, but rather had stood silent while counsel was appointed, and thus *Jackson* never came into play. The defendant sought review in the Supreme Court, which granted *certiorari* and indicated that it would consider not only the merits of the defendant's *Jackson* claim, but also whether *Jackson* itself should be overruled.

In a 5-4 decision, the Court overruled *Jackson*. Justice Scalia's majority opinion reasoned as follows: *Jackson* is difficult to apply in the two dozen or so states, including Louisiana, in which counsel is appointed as a matter of course, without a specific request by the defendant. Has a defendant in an automatic-appointment state asserted his right to counsel by "accepting" appointment, given that he has no choice about it? Must he do something further, such as thank the court for the appointment? Or must he jump in with an explicit request for counsel, even though no request is necessary to secure representation? Questions like these led the majority to conclude that *Jackson* has proved unworkable. Further, the majority determined that *Jackson* has resulted in unjustified discrepancies between states, since defendants in states where a request for counsel is a necessary precursor to appointment almost automatically fall within *Jackson*, while defendants in states where no request is necessary normally do not.

Next, the majority rejected the defendant's proposed solution to the problems described above: a rule that once a defendant is represented by counsel, whether by request or automatic appointment, police may not initiate further interrogation. The majority viewed such a position as inspired by legal ethics -- specifically, by the rule that an attorney may not communicate directly with a represented party -- not by the Constitution. It observed that the right to counsel is waiveable, and may be waived in the absence of counsel. Thus, the rule suggested by the defendant would be a prophylactic rule -- justifiable, if at all, to prevent police from badgering defendants to waive their right to counsel. The majority viewed such a prophylactic rule to be unnecessary, as defendants are already protected from coercive interrogation by the requirement that waivers be voluntary, by *Miranda,* and by other safeguards.

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Thus, the majority concluded, *Jackson* as decided is unworkable, and the defendant's suggested expansion of *Jackson* is unjustifiable, leaving the reversal of *Jackson* as the logical path. *Stare decisis* does not prevent the overruling of *Jackson*, the majority held, because the decision was poorly reasoned, "is only two decades old," and has not resulted in substantial reliance. (The role of *stare decisis* in this case and in the case of *Arizona v. Gant*, decided earlier this Term, was the subject of undignified sniping in Justice Alito's concurrence and Justice Stevens's dissent.)

What does the overruling of *Jackson* mean as a practical matter? It means that even after counsel is appointed -- in North Carolina, generally at a defendant's first appearance in district court -- officers may approach a defendant outside the presence of counsel and seek to question him, including about the charges for which counsel was appointed. Of course, if the defendant is in custody, the officers must obtain a valid *Miranda* waiver before proceeding, and they may not approach the defendant at all if the defendant has previously invoked his right to counsel under *Miranda*.

It is not entirely clear how the decision affects officers' interactions with defendants who have been appointed counsel but who are not in custody. Clearly, officers may approach such defendants, and officers don't need to comply with *Miranda* since it doesn't apply in non-custodial settings, but it appears that officers still must obtain a waiver of such defendants' Sixth Amendment rights before questioning may proceed. And what if a non-custody defendant invokes, rather than waives, his right to counsel? It is not clear -- to me, at least -- whether the officers may approach the defendant again later, or whether the defendant's invocation of his Sixth Amendment rights bars all future approaches. I welcome thoughts about that issue, as well as any of the other questions raised by, or addressed in, *Montejo.*

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