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Videotaped interrogations can help defense suppress statements

It used to be that police interrogation rooms were legal black holes. The only information that escaped came out at suppression of confession hearings in "he said/she said" conflicts between the interrogators and the defendant.

But the new century has brought new technology. Increasingly, interrogations are videotaped. See, e.g., 725 ILCS 5/103-2.1. Defense attorneys need to understand some of the real advantages this practice can bring in suppressing statements. A good place to start is a recent decision of the 7th U.S. Circuit Court of Appeals, *U.S. v. Wysinger*, 683 F.3d 784 (7th Cir. 2012).

John Wysinger was convicted in federal court of several drug-related offenses. On appeal, he challenged the admission at trial of a video of his interrogation conducted by an agent of the Drug Enforcement Agency (DEA). Wysinger contended that, even though he properly invoked his right to counsel under *Miranda*, the agent improperly continued the interrogation. See *Miranda v. Arizona*, 384 U.S. 436 (1966). He thus argued that all statements obtained after the invocation of counsel must be suppressed.

The law is clear. If, in response to *Miranda* warnings, a suspect unambiguously asserts his right to counsel, then all interrogation must immediately cease (*Smith v. Illinois*, 469 U.S. 91 (1984)); however, if the suspect's reference to a lawyer is merely equivocal or ambiguous, then the agent is free to simply continue the interrogation (*Davis v. U.S.*, 512 U.S. 452 (1994)).

Smith's "unambiguous assertion" rule goes back almost three decades. But for years it was virtually a dead letter. That is because *Smith* examined an audiotape of a confession; therefore, the court was able to examine the exact wording of the questions

and answers to determine if *Smith* had made an "unambiguous assertion" of the right to counsel. But in the years following the *Smith* decision, the vast majority of interrogations were unrecorded and thus had to be reconstructed through a "he said/ she said" process. And this method made it difficult, if not impossible, to determine both whether and when an "unambiguous assertion" of counsel was made.

But look at the difference a tape makes. Near the beginning of the video, and before the interrogation actually started, Wysinger asked "Do I need a lawyer before we start talking?" The 7th Circuit concluded as a matter of law that this was an ambiguous comment and that the agent was justified in simply continuing.

But nine minutes later, Wysinger said "I mean, do you think I should have a lawyer? At this point?" When the agent responded "If you want an attorney, by all means, get one," Wysinger said, "I mean, but can I call one now? That's what I'm saying." The 7th Circuit found this latter statement to be an "unequivocal request for counsel that no reasonable officer could interpret otherwise." Thus, the officer should have immediately terminated the questioning and the court suppressed all of Wysinger's subsequent statements on the tape. Without the tape, it would have been practically impossible to get the agent and the defendant to agree on the exact wording of these statements. And, as you can see, the exact wording is vital to a decision.

And not only did the 7th Circuit suppress the latter part of the tape; it went on to also suppress the first nine minutes of the tape as well. Although the court used a different theory to suppress the first part of the tape, again the verbatim record of the interrogation enabled the court to make

CRIMINAL PROCEDURE

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this decision as well.

The gist of the *Miranda* warnings is that a person in custodial interrogation must be told that he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires.

Because of the tape, we have the exact words of the agent who gave the warnings: "Before we ask any questions, you must understand you have a right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for

advice before we ask any questions or have one — have an attorney with you during questioning. If you can't afford a lawyer, one will be appointed for you before we ask any questions."

The 7th Circuit noted that correct *Miranda* warnings assure the suspect that he is entitled to access to a lawyer both before questioning and during questioning. Yet the agent's warnings to Wysinger incorrectly suggested that he could not have both — that he would have to choose between speaking with a lawyer prior to questioning or during questioning, but not both. The agent's changing the "and" to an "or" compromised the warnings.

The court conceded that perhaps this error might not be enough per se to necessitate the exclusion of the first portion of the tape. Yet it went on to find that this error, in conjunction with various tactics used by the agents to confuse Wysinger as to whether the interrogation had actually begun and whether it was time to assert his rights, led the court to find that the *Miranda* warnings were both inadequate and misleading. The court thus excluded the first part of the tape based on this error.

In sum, these two different *Miranda* errors resulted in the suppression of the entire tape. The types of errors the court found would have been almost impossible to find if the court had to rely merely on the memories of the agents and the defendant presented at the suppression hearing. The existence of the tape's verbatim record of exactly what was said by everyone in the interrogation room enabled the court to perform an analysis that simply would not have been possible in the old days.

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