CELLMATE INFORMANTS:

A CONSTITUTIONAL GUIDE TO THEIR USE

By

Kimberly Kingston Crawford, J.D.

Special Agent and Legal Instructor

FBI Academy

Quantico, Virginia

In recent years, legal scholars have debated the legality and propriety of using cellmate informants. While some scholars find the practice a "mere strategic deception [that takes] advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner," (1) others view the use of cellmate informants as being "so offensive to a civilized system of justice that [the practice] must be condemned." (2) Despite this debate, law enforcement officers appear to have a unanimous opinion regarding the use of cellmate informants--it is a technique that works. Fortunately, the U.S. Supreme Court recently decided Illinois v. Perkins, (3) which is a case that while not putting an end to the debate, answers some questions regarding the constitutionality of using cellmate informants and paves the way for law enforcement officers to take advantage of this most effective technique.

This article focuses on the decision in Perkins and examines similar cases that deal with the constitutional issues involved in using cellmate informants. More specifically, this article addresses the fifth and sixth amendment considerations that must be taken into account when placing an informant in a suspect's cell.

FIFTH AMENDMENT--SELF-INCRIMINATION CLAUSE

While serving a 6-year sentence for burglary at the Graham Correctional Facility in Hillsboro, Illinois, Donald Charlton met and befriended fellow inmate Lloyd Perkins. In the course of their friendship, Perkins confided in Charlton the details of a murder he had committed in East St. Louis. Believing that "people should not kill people," (4) Charlton eventually relayed this information to law enforcement officials. Because the information provided by Charlton tracked very closely the facts of an unsolved case under investigation in East St. Louis, officers found Charlton's story to be credible and decided to pursue the matter further. Accordingly, it was decided that undercover agent John Parisi, assuming the alias "Vito Bianco," would accompany Charlton to the Montgomery County Jail, where Perkins was incarcerated on an unrelated charge of aggravated assault.

After being booked and photographed, Parisi and Charlton were placed in a cellblock with Perkins. Charlton introduced

Parisi to Perkins as a fellow inmate from the Graham Correctional Facility. Parisi and Charlton led Perkins to believe that they had escaped from a work release program at Graham and had gotten as far as Montgomery County when their money and their luck ran out. During the conversation that ensued, Parisi advised Perkins that he "wasn't going to do any more time," (5) and suggested that they attempt another escape. Perkins readily agreed and volunteered his girlfriend to smuggle in a pistol. When asked if he had ever "done" anyone, Perkins described at length the details of the East St. Louis killing. The following day, Perkins was charged with murder.

Prior to trial, Perkins moved to suppress the statements made to Charlton and Parisi while in the Montgomery County Jail. Because no Miranda (6) warnings had been given to Perkins prior to his conversation with Parisi and Charlton, the trial court granted Perkins' motion to suppress. The Appellate Court of Illinois, holding that all undercover contacts with prisoners that are reasonably likely to elicit incriminating responses violate the rule in Miranda, affirmed the suppression order. (7) The U.S. Supreme Court reviewed the decision of the Appellate Court of Illinois and reversed. In doing so, the Court focused on the fifth amendment protection against self-incrimination, which is the linchpin of the Miranda rule.

The fifth amendment to the U.S. Constitution provides in part that "no person...shall be compelled in any criminal case

to be a witness against himself...." (8) Over 2 decades ago, the Supreme Court in Miranda v. Arizona (9) held that custodial interrogation of an individual creates a psychologically compelling atmosphere that works against this fifth amendment protection. (10) In other words, the Court in Miranda believed that an individual in custody undergoing police interrogation would feel compelled to respond to police questioning. This compulsion, which is a byproduct of most custodial interrogation, directly conflicts with every individual's fifth amendment protection against self-incrimination. Accordingly, the Court developed the now-familiar Miranda warnings as a means of reducing the compulsion attendant in custodial interrogation. The Miranda rule requires that these warnings be given to individuals in custody prior to the initiation of interrogation. This rule, however, is not absolute. (11)

In Perkins, the Supreme Court recognized that there are limitations to the rule announced in Miranda. The Court expressly rejected the argument that "Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." (12) Rather, the Court concluded that not every custodial interrogation creates the psychologically compelling atmosphere that Miranda was designed to protect against. When the compulsion is lacking, so is the need for Miranda warnings.

The Court in Perkins found the facts at issue to be a clear

example of a custodial interrogation that created no compulsion. Pointing out that compulsion is "determined from the perspective of the suspect," (13) the Court noted that Perkins had no reason to believe that either Parisi or Charlton had any official power over him, and therefore, he had no reason to feel any compulsion. On the contrary, Perkins bragged about his role in the murder in an effort to impress those he believed to be his fellow inmates. Miranda was not designed to protect individuals from themselves. Consequently, the Court held there was no need to advise Perkins of his rights prior to his conversation with Parisi and Charlton.

The controlling facts present in Perkins would most likely exist in any case where statements are obtained by a cellmate informant or an officer operating undercover in a prison. Although there is custodial interrogation in the technical sense, there is no compulsion if the suspect is unaware of the officer's or informant's true identity or purpose. Therefore, there is no need to advise jailed suspects of their Miranda rights prior to using a cellmate informant. (14) There are, however, other fifth and sixth amendment rights that can limit the use of cellmate informants as an investigative technique.

FIFTH AMENDMENT--DUE PROCESS CLAUSE

In addition to the self-incrimination clause, the fifth amendment to the U.S. Constitution also provides that "no person

shall be...deprived of life, liberty, or property, without the due process of law." (15) This due process clause has been interpreted by the Supreme Court as requiring that all defendants in criminal prosecutions be treated with fundamental fairness. (16) With respect to confessions, the Court has held that to be fair, a confession must be voluntary. (17) To coerce a suspect into making an involuntary statement or confession would be unfair, and thus, the use of that statement against the suspect would constitute a violation of due process.

On the other hand, no unfairness or due process violation would result from the use of an uncoerced statement voluntarily made by the suspect. To avoid due process problems, a law enforcement officer contemplating the use of a cellmate informant must take steps to ensure that an informant does nothing to coerce the suspect into making an involuntary statement. The case of State v. Fulminate (18) is illustrative of this point.

In Fulminate, defendant was serving a 2-year sentence on a weapons violation when he met and became friends with fellow inmate Anthony Sarivola, an FBI informant masquerading as an organized crime figure. Following the inception of their friendship, Sarivola heard a rumor that defendant was responsible for the murder of a young girl in Arizona. Although defendant denied the rumor, Sarivola relayed the information to his contact in the FBI and was instructed to find out more. Knowing that defendant was receiving "rough treatment" from other inmates

because of the rumor, Sarivola offered defendant his protection in exchange for the truth. In response, defendant confessed to shooting his 11-year-old stepdaughter in the head after first raping her and making her beg for her life. At the defendant's trial for first-degree murder, Sarivola was permitted, over defense objections, to repeat to the jury the confession defendant had previously made. (19) The jury subsequently found defendant guilty of murder in the first degree and sentenced him to death.

On appeal, defendant argued, among other things, (20) that his confession to Sarivola was involuntary, and therefore, the use of that confession against him was a violation of due process. In support of this argument, defendant reminded the court that his reputation in the prison as a child murderer subjected him to a very serious threat of physical abuse at the hands of the other inmates. Sarivola, it was argued, recognized defendant's vulnerability and used it as a tool to extract the confession. After reviewing the facts, the Arizona Supreme Court agreed with defendant's due process argument and concluded as follows:

> "To be deemed free and voluntary within the meaning of the fifth amendment, a confession must not have been obtained by `any direct or implied promises, however slight, nor by the exertion of any improper influence.'" (21)

Believing Sarivola's offer of protection to be "an exertion of improper influence," the court found the resulting confession to be involuntary and its use at trial a violation of due process. Defendant's conviction was, therefore, reversed.

The U.S. Supreme Court has agreed to review the Fulminate case. (22) While it is possible that the decision of the Arizona Supreme Court will be reversed after review, the State court's opinion still serves as a poignant reminder to law enforcement officers of the need to keep a close rein on cellmate informants.

As is evident in Fulminate, even the most innocuous of statements can be made to appear threatening or coercive when dissected by the courts. To avoid fifth amendment due process problems, careful planning must occur prior to any contact between a cellmate informant and a suspect. In particular, law enforcement officers should instruct cellmate informants to avoid making any statements that may be construed as threats or promises of leniency.

SIXTH AMENDMENT--RIGHT TO COUNSEL

The final constitutional concern confronting a law enforcement officer contemplating the placement of a cellmate informant is whether the use of the informant will violate the suspect's sixth amendment right to counsel. The sixth amendment to the U.S. Constitution guarantees that "[i]n all criminal

prosecutions, the accused shall...have the Assistance of Counsel for his defense." (23) The U.S. Supreme Court has interpreted the sixth amendment as guaranteeing not merely the right to counsel but, more importantly, the right to the effective assistance of counsel. (24) To be effective, an attorney must be permitted to form a relationship with the accused some time prior to trial, (25) and the government cannot needlessly interfere with that relationship. (26) Thus, to resolve all sixth amendment concerns, a law enforcement officer contemplating the use of a cellmate informant must determine two things: 1) Did the suspect's right to counsel attach? and 2) if so, what can a cellmate informant do without interfering with that right?

Right to Counsel Attaches at Critical Stage

Determining whether a suspect's right to counsel has attached simply requires the law enforcement officer to discover whether the suspect has reached a critical stage in the prosecution. As previously mentioned, the sixth amendment right to counsel would be meaningless if the suspect and attorney were not permitted to form a relationship some time prior to trial. However, the Supreme Court has held that it is not necessary to allow this relationship to form simply because an individual becomes a suspect in a case. (27) Instead, the Court has found that the sixth amendment guarantee of the effective assistance of counsel is satisfied if the attorney and suspect are permitted to form their relationship once the prosecution has

reached a critical stage. (28)

The Court has defined the critical stage as the filing of formal charges (i.e. an indictment or an information) or the initiation of adversarial judicial proceedings. (29) Thus, if no formal charges have been filed against the suspect and no initial appearance before the court has been conducted, then no critical stage in the prosecution has been reached, and a cellmate informant can be placed without concern for the suspect's sixth amendment right to counsel. If, on the other hand, a critical stage has been reached, then the suspect's sixth amendment right to counsel has attached and extreme caution must be used to ensure that the cellmate informant does not interfere with that right.

Post-Critical Stage Uses for Cellmate Informants

Once it is determined that a suspect's sixth amendment rights have attached, the law enforcement officer must realize that there are only two functions a cellmate informant can lawfully perform without interfering with that suspect's right to counsel. These two functions are: 1) Gathering information regarding an unrelated crime, (30) or 2) acting as a listening post. (31)

Unrelated crimes

Even though the suspect's right to counsel has attached, a cellmate informant may gather information about an unrelated crime because the sixth amendment is crime specific. (32) Under the sixth amendment, a suspect only has the right to the assistance of counsel with respect to the crimes formally charged against him. (33) If, then, a cellmate informant is used to elicit information from a suspect that pertains to some unrelated, uncharged crime, there is no unlawful interference with the suspect's right to counsel. The facts in Perkins demonstrate this point well.

As noted earlier, Perkins was in the Montgomery County Jail pending trial on a charge of aggravated assault when Charlton and Parisi were placed in his cellblock to gather information about an unrelated murder. Because Perkins had been formally charged with aggravated assault, he had a right to counsel with respect to that particular crime and the informants could do nothing to interfere with that right. (34) Perkins had not, however, been formally charged with, or even arrested for, the murder that occurred in East St. Louis. Thus, the actions of the informants that resulted in the acquisition of information about the murder neither interfered with nor violated Perkins' sixth amendment right to counsel. (35)

Listening post

Unlike the situation present in Perkins, if a cellmate

informant is placed with the intent of gathering information about a crime that is the subject of formal charges against the suspect, the only role the cellmate informant may play is that of a listening post. The Supreme Court has determined that simply placing an informant in the cell of a suspect who has been formally charged does not, in and of itself, constitute a sixth amendment violation. (36) Rather, there must be some deliberate attempt on the part of the informant to elicit information regarding those charges from the suspect. (37) It is the act of deliberate elicitation that creates the sixth amendment violation. Consequently, a law enforcement officer who places an informant in the cell of a formally charged suspect in an attempt to obtain information relating to those charges should be prepared to demonstrate that there was no deliberate elicitation on the part of the informant. (38) While not impossible, demonstrating the lack of deliberate elicitation may be very difficult indeed. United States v. Henry, (39) which was decided in 1980, is a case in point.

After being indicted on charges of bank robbery, the defendant in Henry was fortuitously placed in a cellblock with Nichols, a long-time FBI informant. Upon discovering this fact, FBI Agents instructed Nichols to refrain from questioning Henry about the bank robbery but, if by chance the robbery was mentioned, Nichols was told to pay close attention to what was said. Eventually, Henry revealed his part in the bank robbery to Nichols, who was thereafter called as a witness against him

at trial. On the basis of Nichols' testimony, Henry was convicted and sentenced to 25 years in prison. Henry subsequently appealed his conviction on the grounds that the use of the cellmate informant's testimony against him violated his sixth amendment right to counsel. Ultimately, Henry's case was reviewed by the Supreme Court and his conviction was reversed.

The reversal of Henry's conviction was based on the Supreme Court finding that the cellmate informant deliberately elicited the information about the bank robbery from Henry. Despite the fact that an FBI Agent testified that he directed the informant to neither question nor initiate any conversation with Henry regarding the bank robbery, the Court found deliberate elicitation on the part of the informant. This finding was a result of the Court's belief that an informant, who is paid on a contingent-fee basis, would naturally be inclined to take affirmative steps to secure information. Moreover, the Court held that the government should have realized the likelihood of such actions on the part of the informant, and merely instructing him to the contrary was insufficient to negate the presumption of deliberate elicitation.

In the wake of Henry, it appeared virtually impossible for a law enforcement officer to convince the Court that there was no deliberate elicitation on the part of a cellmate informant. After all, every cellmate informant that is either paid or promised special consideration works on a "contingent-fee" basis

and would be subject to the natural inclination to deliberately elicit information referred to by the Court in Henry. However, 6 years after the decision in Henry, the Supreme Court gave law enforcement officers new hope when it decided Kuhlmann v. Wilson, (40) and shifted the burden of proving deliberate elicitation clearly to the defendant.

The facts in Kuhlmann are substantially similar to those in Henry in that a cellmate informant was used to gather incriminating information from an indicted suspect who was subsequently convicted on the strength of that informant's testimony. Unlike Henry, however, the Supreme Court in Kuhlmann found no deliberate elicitation on the part of the informant and upheld the defendant's conviction. In doing so, the Court made the following statement:

> " `Since the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached,' a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (41) (emphasis added)

Even though the Court in Kuhlmann clearly placed the burden of proving deliberate elicitation on the defense, lower courts are undoubtedly going to look very closely at the actions and motivations of the informant. (42) Obviously, many cellmate informants are going to be less than completely credible on the witness stand. Consequently, the law enforcement officer should, if possible, be prepared to meet the defense claim of deliberate elicitation with evidence other than the informant's own testimony to the contrary. In Perkins, for example, the case did not rest solely on the word of the informant because an undercover agent was also placed in the cellblock with the suspect. Other strategies could include using more than one informant so there is corroborating testimony or planting a listening device in the suspect's cell. If none of these options are viable in a particular case, the law enforcement officer has no other choice than to carefully select and instruct the informant to ensure compliance with sixth amendment requirements.

CONCLUSION

Apparently, confined suspects often have an overwhelming desire to talk about their criminal activities with those they consider their peers. Clearly, in light of the Supreme Court's decision in Perkins, a law enforcement officer can take advantage of this phenomenon by placing an informant in the

prison population. When doing so, however, the officer must be ever mindful of the boundaries set by the fifth and sixth amendments. Through thoughtful selection, careful planning, and detailed instruction, the officer can ensure that an informant operates within those boundaries and conforms to fifth and sixth amendment standards.

FOOTNOTES

(1) Illinois v. Perkins, 110 S.Ct. 2394, 2397 (1990) [hereinafter cited as Perkins].

(2) Perkins, supra note 1, at 2400 (Brennan, J., concurring).

(3) Perkins, supra note 1.

(4) People v. Perkins, 531 N.E.2d 141, 142 (Ill. App. 1988). Charlton received no compensation for his cooperation with the police.

(5) Perkins, supra note 1, at 2396.

(6) Miranda v. Arizona, 384 U.S. 436 (1966).

(7) People v. Perkins, supra note 4.

(8) U.S. Const. amend. V.

(9) 384 U.S. 436 (1966).

(10) Id. at 467.

(11) See, e.g., Berkemer v. McCarthy, 468 U.S. 420 (1984) wherein the Supreme Court held Miranda inapplicable to traffic stops. See also, New York v. Quarles, 467 U.S. 649 (1984) recognizing a public safety exception to Miranda.

(12) Perkins, supra note 1, at 2397.

(13) Id. In Perkins, the Supreme Court used the words "coercion" and "compulsion" interchangeably.

(14) In his concurring opinion, Justice Brennan suggested that the use of a cellmate informant would violate Miranda, if the suspect had previously invoked his fifth amendment right to silence or right to counsel. Id., at 2399 n. ** (Brennan, J., concurring). It should be noted that no other members of the Court voiced agreement with Justice Brennan on this point. In fact, the reasoning of the majority in Perkins appears to contradict Justice Brennan's statement. If the use of a cellmate informant does not constitute custodial interrogation, then it should not matter, for purposes of Miranda, whether incarcerated suspects have previously invoked their rights or not. The

Miranda standard does not change when individuals invoke their rights--only custodial interrogation is prohibited.

(15) U.S. Const. amend. V, supra note 8.

(16) Brown v. Mississippi, 297 U.S. 278 (1938).

(17) Id.

(18) 778 P.2d 602 (Ariz. 1988), cert. denied, 110 S.Ct. 1522 (1990) [hereinafter cited as Fulminate].

(19) The informant was also permitted to repeat a statement defendant made almost a year after his initial confession. The second statement was made when the informant, already released from prison, and his girlfriend picked defendant up at a bus station following defendant's release. The Arizona Supreme Court suppressed the second statement, finding it a fruit of the earlier due process violaton.

(20) Defendant also raised a Miranda objection. However, the Arizona Supreme Court rejected that argument.

(21) Fulminate, supra note 18, at 609.

(22) 110 S.Ct. 1522 (1990).

(23) U.S. Const. amend. VI.

(24) Cuyler v. Sullivan, 100 S. Ct. 1708 (1980).

(25) United States v. Wade, 338 U.S. 218 (1967).

(26) In Weatherford v. Bursey, 429 U.S. 545 (1977), the Supreme Court held that some interference with the right to counsel may be justified.

(27) United States v. Gouveia, 104 S.Ct. 2292 (1984).

(28) Massiah v. United States, 377 U.S. 201 (1964).

(29) Id.

(30) Hoffa v. United States, 385 U.S. 293 1966) [hereinafter cited as Hoffa].

(31) Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986) [hereinafter cited as Kuhlmann].

(32) Hoffa, supra note 30.

(33) Id.

(34) In Maine v. Moulton, 106 S.Ct. 477 (1985), the Supreme

Court held that the government could not use statements made by a defendant to an informant about pending charges, even if acquired during investigation of separate offenses.

(35) Perkins, supra note 1.

(36) Kuhlmann, supra note 31.

(37) Id.

(38) Although the burden of proof rests with the defendant on this issue, the government should be prepared to counteract claims of deliberate elicitation.

(39) 447 U.S. 264 (1980).

(40) Kuhlmann, supra note 36.

(41) Id. at 2630.

(42) See, e.g., United States v. Watson, 894 F.2d 1345 (D.C. App. 1990); Endress v. Dugger, 880 F.2d 1244 (11th Cir. 1989); State v. Fain, 774 P.2d 252 (Idaho 1989); State v. Robinson, 448 N.W.2d 386 (Neb. 1989); State v. Bruneau, 552 A.2d 585 (N.H. 1988); and State v. Mastrofine, 551 A.2d 1174 (R.I. 1988).

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Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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