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QUESTION: Is a *suspect's* "waiver" of the right to the presence of counsel during a custodial interrogation (a protection announced in *Miranda* to avoid violations of the Fifth Amendment) the same as an *accused's* "waiver" of the right to the presence of counsel at all critical stages of the proceedings, including custodial interrogations, as guaranteed by the Sixth Amendment?

ANSWER: No. The *Miranda* warning is limited to a suspect's Fifth Amendment based right to have counsel present during custodial interrogation so as to counteract the risk of compelled self-incrimination. An accused's right to counsel under the Sixth Amendment is not waived by a waiver of the "lesser" right to the presence of a lawyer during custodial interrogation.

CASE: *In Re: Darryl P.*, Court of Special Appeals of Maryland,
Decided March 25, 2013

The "laws" governing interrogations and confessions continues to evolve—and become more complex. This case is just the most recent example. The facts showed that Darryl P., then aged 17, was charged as an adult with having been involved in the January 6, 2011 shooting of Terrell Swales during an attempted armed robbery. On February 22, 2011, Darryl P. turned himself in on an arrest warrant that had been issued by the District Court of Maryland for St. Mary's County. He and his mother told detectives at the station that they had retained a lawyer, so there was no questioning of Darryl P. Darryl P. was released the next day on \$10,000 bail. While the case was still pending in the District Court, Darryl P. retained counsel and counsel entered his appearance.

On May 6, 2011, Darryl P. was re-arrested on the basis of an indictment returned by the Grand Jury for St. Mary's County. The indictment was handed down on April 6, 2011, and the arrest warrant based on the indictment issued on April 15, 2011. The indictment charged Darryl P. as an adult with the same charges that had been issued in the District Court, namely first and second degree assault and use of a handgun, as well as several additional charges. On the date of his arrest, Darryl P. was read his *Miranda* rights and then made an inculpatory statement. On October 11, 2011, jurisdiction over the case was waived from criminal court to the juvenile court. After the waiver to juvenile court, Darryl P.'s attorney filed a motion to suppress the inculpatory oral statement Darryl P. made to the police following his arrest on May 6. A hearing was held and the motion to suppress was denied. Upon an agreed statement of facts, Darryl P. was found to be delinquent for his role in the shooting. He appealed.

Darryl P. argued that the second arrest warrant, that of April 15, 2011, should never have issued because he had already been permitted bail by the District Court essentially for the same offense,

and that, pursuant to Maryland statutory law and rule of procedure, the original bail should have continued to guarantee his court appearance. Thus, any inculpatory statement he gave at the time of his re-arrest should have been suppressed. The Court of Special Appeals agreed that since the indictment arose out of the substantially same set of facts, Darryl P.'s bail status as set in the District Court should have continued. However, this finding did not necessarily mean that Darryl P.'s incriminating statement made at the time of his re-arrest had to be suppressed under the Fourth Amendment. This was because although the arrest was made in violation of state law, *it was based on the probable cause embodied in the charging documents embodied in the arrest warrants themselves*. As such, there was no Fourth Amendment violation, and, thus no applicability of the "Exclusionary Rule." In short, there is a critical distinction between an "unlawful arrest" under state law and an "unlawful", or, more correctly, "unconstitutional" arrest pursuant to the Fourth Amendment. Similarly, because there was no Fourth Amendment violation, Darryl P.'s argument that his statement was "fruit of the poisonous tree" also failed.

Also, since there was no "custodial interrogation" of Darryl P. when he voluntarily turned himself in on February 22, the protections afforded by *Miranda v. Arizona* and *Edwards v. Arizona* did not apply. In other words, there was nothing to prevent a custodial interrogation of Darryl P. at the time of his re-arrest. The lengthy break in custody from February to May was just one more reason why the protections of *Miranda* and *Edwards* did not apply in this case. And, since Darryl P. had been read his *Miranda* rights at the time of the arrest on May 6, and chose to waive his right to counsel, his inculpatory statement was not excludable under *Miranda* and *Edwards*.

But the analysis did not end here. The Court of Special Appeals reversed the lower court's denial of Darryl P.'s motion to suppress not on Fourth or Fifth Amendment grounds, but on Sixth Amendment (an accused's right to counsel at all critical stages of the criminal proceedings) grounds. Why? Because one becomes "an accused" by way of formal charge, preliminary hearing, indictment, information, or arraignment. Thus, absent a "waiver," the police could not question Darryl P. without his attorney being present. The "waiver of counsel" needed under the Sixth Amendment is not the "waiver of counsel" fashioned in *Miranda* to protect against compelled self-incrimination. **Thus, Darryl P.'s "waiver" of his right under *Miranda* to have counsel present during his interrogation was not sufficient to "waive" his right to have his already retained attorney present at all police questioning.** The Court said: "We hold that [Darryl P.] had a Sixth Amendment right to counsel during the early morning hours of May 6 (when he was re-arrested based on the indictment) that went beyond the mere Fifth Amendment-based right to the presence of a lawyer during custodial interrogation."

NOTE: This case establishes the critical difference in "waivers" of counsel under the Fifth Amendment (*Miranda* warnings/custodial interrogation of *suspect*) and the Sixth Amendment (*an accused*'s right to the presence of counsel at all critical stages of the proceedings, including interrogations). The constitutional right to counsel under the Sixth Amendment comes into existence automatically, whether invoked or not, at the moment the suspect is formally charged. Unlike the right to counsel identified in *Miranda*, the right can only be waived if the suspect is made fully aware of his entitlement to counsel. **In other words, the accused must be informed that he or she has the right not to be interrogated at all without his or her lawyer being present. The waiver cannot rest upon merely informed silence or the act of confessing itself after having been given *Miranda* rights.** This case also pointedly demonstrates how officers may be hurt by what they don't know about a particular defendant and the charges against him. In this case, the problem could only have been addressed if the fact of the indictment had been

communicated to Darryl P.'s lawyer at the time it was returned and long before Darryl P. was subjected to uncounseled interrogation at the time of his re-arrest. Since it was not, the violation of the Sixth Amendment was just lying in wait. In other words, as someone retained months before, counsel's role would have been much more than that contemplated by *Miranda* and he likely would have prevented any further questioning of his client.

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