

[CAPTION]

**MOTION TO SUPPRESS STATEMENTS (SIXTH AMENDMENT,
ARTICLE I, SECTION 13)**

The Defendant, by counsel, respectfully requests this Court to suppress any statements made by the Defendant in violation of the Defendant's Sixth Amendment and Article I, Section 13 right to be represented by counsel. In support of this Motion, the Defendant states the following:

1. On [insert date], the Defendant was charged with [insert offenses].
2. On [insert date], after the Defendant had been formally charged, the police or any agent of the State, without lawful authority, questioned the Defendant outside of the presence of his/her attorney in violation of Article I, Section 13 right to representation. OR The police, without lawful authority, questioned the Defendant while knowing the Defendant's attorney was present at the station requesting to speak with his/her client.
3. Moreover, the police failed to advise the Defendant of his right to counsel OR the interrogation continued after the Defendant had elected to remain silent and/or had elected to consult with an attorney prior to further questioning in violation of the Defendant's Sixth Amendment and Article I, Section 13 right to representation and the Fifth Amendment right to remain silent.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to:

1. Suppress and bar from use as evidence in the trial of this cause the statements made by the Defendant during the illegal questioning, and any evidence obtained as a result of the illegal questioning; and
2. Suppress and bar from use in trial of this cause all testimony relating to the statements made by the Defendant during the illegal questioning, and any evidence obtained as a result of the illegal questioning.

(Signature)

CASELAW

CASEBANK I.3; I.8; I. 10

Kerr, 16 Indiana Practice § 7.3(b), 582 (1991) (a person who is undergoing police interrogation may have a right to assistance of counsel under the Sixth Amendment that is separate and distinct from the right to counsel under the Fifth Amendment).

Caraway v. State, 891 N.E.2d 122 (Ind.Ct.App. 2008) (trial court erred in denying Defendant's motion to suppress when Defendant was not advised of his right to counsel prior to signing an Agreement to Take Polygraph and stipulation agreement; pre-charge polygraph is a critical stage of the proceedings).

Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (law enforcement officials have a duty under the Indiana Constitution to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the police station seeking access to him; courts have specifically distinguished between attempts to contact client in person, as in this case, and attempts over the phone).

McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (the Sixth Amendment right to counsel is offense-specific and cannot be invoked for future prosecutions because it does not attach until the prosecution commences).

Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (the Sixth Amendment right to counsel does not attach to uncharged crimes, even though they may be factually related to a charged offense, unless they would be considered the same offense under the Blockburger double jeopardy test).

Jewell v. State, 957 N.E.2d 625 (Ind. 2011) (under broader protections of Article 1, § 1 of Indiana Constitution, right to counsel also attaches to police questioning regarding offenses that are inextricably intertwined with the charge on which counsel is already representing the defendant).

Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 101 L.E.d.2d 261 (1988) (a person being interrogated by law enforcement officers after being charged with an offense must be "made sufficiently aware" of his Sixth Amendment right to counsel; Miranda warnings are sufficient to advise the defendant of his Sixth Amendment right to counsel).

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2 378 (1981) (once an accused has expressed his desire to deal with the police only through counsel, he should not be subjected to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further conversation.). See also Heffner v. State, 530 N.E.2d 297 (Ind. 1988).

Maryland v. Shatzer, 599 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010) (the Edwards rule, regarding subsequent custodial interrogation after a suspect has invoked his right to counsel, applies when the subsequent interrogation pertains to a different crime, when it is conducted by a different law enforcement authority, and even when the suspect has met with an attorney after the first interrogation).

Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (the government may not use an undercover agent, an informant or an accomplice to circumvent the Sixth Amendment right to counsel once a suspect is charged). See also U.S. v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 68 L.Ed.2d 359 (1981) (the Sixth Amendment right to counsel is violated where a psychiatrist's testimony concerning an examination is admitted into evidence when counsel was not advised of the scope of the interview).

Montejo v. Louisiana, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (overruling Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), Supreme Court held that police may initiate interrogation of a criminal defendant even though the defendant has requested counsel at an arraignment or similar proceeding; the right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent; we should not presume, as did the Court in Jackson, that such a waiver is invalid simply because the defendant is represented).

NOTE:

Despite Montejo, *supra*, the right to counsel afforded by the Indiana Constitution arguably protects a represented defendant from police initiation of interrogations without counsel present. Indiana provides a broader right to counsel than does the Sixth Amendment. Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (the right to counsel under the Indiana Constitution is broader than its federal counterpart; law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at police station seeking access to him). Moreover, a prosecutor has an ethical duty to tell police officers not to talk about the case with a represented defendant. Although the majority of the Supreme Court states that the Rules of Professional Conduct apply to attorneys, and not police officers, this may not be true in Indiana. See Rule 5.3 discussing the responsibility regarding non-lawyer agents. The commentary to Rule 4.2 prohibiting lawyers from talking with represented individuals also suggests that the Rule applies to "investigative agents." The commentary also states "when communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule." For the same reasons, a prosecutor or law enforcement officer should not seek to have a cell mate act as their agent.

It also can be argued that the police must obtain a voluntary waiver of a defendant's right to counsel when interviewing that defendant even if the defendant is not in custody. Justice Scalia hints that a non-custodial interrogation may not be a critical stage of a proceeding involving the right to counsel. However, under the Indiana Constitution, custodial interrogation is not a pre-requisite to the right to counsel. Pirtle v. State, 323 N.E.2d 634 (Ind. 1975); Sims v. State, 413 N.E.2d 556 (Ind. 1980) (Indiana Constitution provides right to counsel for person who is in custody and being asked to consent to a search), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995). If an unrepresented person in custody but not being interrogated is entitled to be advised of his right to an attorney, then so should a represented person being interrogation but not in custody.

For now, it is unclear how the Supreme Court's decision in Montejo v. Louisiana, *supra*, affects Indiana cases reversing due to police initiated interrogations of represented defendants. See, e.g., Finney v. State, 786 N.E.2d 764 (Ind.Ct.App. 2003) (when a defendant, whose Sixth Amendment right to counsel has attached, has retained an attorney and that attorney makes his representation of the Defendant known to the State, the Sixth Amendment right to counsel has been invoked and cannot be waived even after being read Miranda rights if the police initiated the contact; It is presumed that once a defendant requests a lawyer's services, those services are desired at every critical stage of the prosecution, including interrogations).