

After a defendant was indicted on federal bank fraud charges and released on bail, his attorney filed notice of the defendant's intent to offer an insanity defense. The prosecutor then enlisted the help of a forensic psychologist who was willing to participate in an "undercover" mental examination of the defendant. The psychologist contacted the defendant and pretended to represent an executive personnel agency. She told the defendant about an attractive employment opportunity and invited him to a "preliminary screening interview" to determine his qualifications for the job. As part of the purported screening process, the psychologist gave the defendant psychological tests that enabled her to form a reliable opinion about his mental state at the time of the alleged offense.

What is the strongest basis for a defense objection to the psychologist's testimony regarding the defendant's mental state?

- A. The federal common law privilege for confidential communications between psychotherapist and patient.
- B. The Fourth Amendment prohibition against unreasonable searches and seizures.
- C. The Fifth Amendment privilege against compelled self-incrimination.
- D. The Sixth Amendment right to the assistance of counsel.

Explanation:

A court should sustain a defendant's objection to testimony based on evidence obtained in violation of his/her constitutional rights, including the **Sixth Amendment right to counsel**. This right:

automatically attaches once judicial proceedings commence (eg, filing of formal charges, indictment) *and*

guarantees a criminal defendant assistance of counsel at all **critical stages of prosecution**—any event where the absence of counsel may prejudice the defendant's right to a fair trial.

An **interrogation** is a critical stage of prosecution because the government (eg, prosecutor, undercover government informant) engages in conduct that is reasonably likely to **elicit an incriminating response** that can be used against the defendant at trial. Therefore, a defendant's Sixth Amendment right to counsel is violated when the government interrogates him/her post-indictment without counsel present.

Here, the defendant's right to counsel automatically attached once he was indicted (judicial proceedings commenced). The prosecutor then enlisted the forensic psychologist to interrogate the defendant by conducting an "undercover" examination of his mental state at the time of the alleged offense (critical stage). And since the defendant did not have access to counsel during that interrogation, the strongest basis for an objection is that the psychologist's testimony is based on evidence obtained in violation of his Sixth Amendment right to counsel.

(Choice A) Under the federal psychotherapist-patient privilege, a patient can prevent the disclosure of confidential communications with his/her psychotherapist that were made for the purpose of diagnosis or treatment. But this privilege does not apply here since the defendant spoke with the undercover psychologist for a preliminary employment screening—not for diagnosis or treatment.

(Choice B) The Fourth Amendment is inapplicable since no Fourth Amendment *search* occurred: (1) the defendant had no reasonable expectation of privacy in the information he freely disclosed to the psychologist and (2) the psychologist did not invade a **constitutionally protected area**. And no Fourth Amendment *seizure* occurred since the psychologist did not confiscate the defendant's property or restrict his freedom of movement.

(Choice C) The Fifth Amendment privilege against self-incrimination applies when a suspect is compelled to make a self-incriminating statement while he/she is in custody or testifying in court. This privilege does not apply here since the psychologist questioned the defendant while he was released on bail (not in custody) and outside the courtroom (not testifying in court).

Educational objective:

The Sixth Amendment right to counsel automatically attaches once judicial proceedings commence and requires the presence of counsel during all critical stages of prosecution—including interrogations conducted by undercover government agents.

References

U.S. Const. amend. VI (right to counsel).

Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that deliberately eliciting statements from defendant in the absence of counsel violates defendant's Sixth Amendment right to counsel).

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