

## **People v. Keller**

(February 14, 2001) \_\_ Cal.App.4th \_\_

### **ISSUE**

Did officers violate a suspect's Sixth Amendment rights when an undercover officer, posing as a hit man, spoke with the suspect about intimidating or killing the suspect's wife?

### **FACTS**

Keller was in custody on charges he beat and kidnapped his wife. When officers learned from a jailhouse informant that Keller was looking for someone to threaten or kill his wife, they arranged to have the informant give Keller the name and phone number of professional thug. The "thug" was actually an undercover officer.

During several telephone conversations between Keller and the undercover officer, Keller explained what he wanted done. Their conversations included the following: Keller: I need you to scare the shit out of my wife. Officer: What do you want me to do to scare her? Keller: Whatever comes to mind. I don't care. Shake her up. . . . You're gonna stop her somewhere, tell her she's gonna recant . . . Officer: And what if she says no man? Keller: Cut her up. . . . [Tell her] 'Look, you're gonna do this or we're gonna start shooting your kids.'

Keller agreed to give the officer a watch for scaring his wife and an additional \$800 if he had to "cut her up" or kill her.

The next day, the officer phoned Keller and told him he had killed his wife. Keller agreed to sign over his watch if the officer showed him a photograph of his "dead" wife. Another undercover officer went to the jail with a "staged" photograph of Keller's wife, covered with blood and apparently dead. After looking at the photo, Keller released his watch to the officer.

He was subsequently convicted of soliciting the commission of assault with a deadly weapon and dissuading a witness from testifying.

### **DISCUSSION**

Keller contended the undercover officer violated his Sixth Amendment right to counsel when he spoke with him about a crime that was related to a crime with which he had been charged. The Sixth Amendment gives suspects a right to have counsel present whenever officers question them about a crime with which they have been formally charged.<sup>1</sup> Although they may waive the right, a waiver is impractical when, as in Keller, the officer is working undercover.

At first glance, there would appear to be no Sixth Amendment problem because, although Keller had been charged with beating and kidnapping his wife, he had not been charged with soliciting her murder or any other crime related to keeping her from testifying. There is, however, some authority to support the proposition that a suspect may have Sixth Amendment rights if he has been charged with a crime

that is related to the crime that is the subject of a conversation between the suspect and an undercover officer.<sup>2</sup>

The court in *Keller*, however, rejected this idea. It ruled that a violation of the Sixth Amendment right to counsel does not occur unless officers questioned the suspect about the same crime with which he has been formally charged. Consequently, *Keller's* Sixth Amendment rights were not violated because, as noted, at the time the undercover officer spoke with *Keller*, he had not been formally charged with the crime they discussed; i.e., preventing *Keller's* wife from testifying against him.<sup>3</sup>

*Keller's* conviction was affirmed.

## DA's COMMENT

*Keller* brings to light a problem that has been plaguing officers and prosecutors for much too long, but which may soon be resolved. For many years the courts routinely referred to the Sixth Amendment right to counsel as "offense specific," meaning it applied only to crimes with which the suspect had been formally charged.<sup>4</sup> Then came a case-*People v. Boyd*<sup>5</sup> -in which the court said that Sixth Amendment rights also apply when officers engage a suspect in a conversation about a crime that is "closely related" to a charged crime. In another case, *People v. Slayton*,<sup>6</sup> the court ruled that Sixth Amendment rights attach even if there is merely a "factual relationship" between the charged and uncharged crime.

However, on April 19, 2000 the California Supreme Court granted review of *Slayton*. This means the court will likely be addressing the issue of whether the Sixth Amendment is "offense specific" or whether it can be triggered by some sort of relationship between the charged and uncharged crimes. We will let you know what the court decides.

One other thing: Undercover officers and police agents who are having a conversation with a charged suspect about an uncharged crime may, despite their best efforts, be unable to keep the suspect from talking about the charged crime. As the court in *Keller* observed, if this happens the statement will be inadmissible as to the charged crime but admissible as to the uncharged crime.

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<sup>1</sup> See *Michigan v. Jackson* (1986) 475 US 625, 629; *Brewer v. Williams* (1977) 430 US 398, 399; *People v. Webb* (1993) 6 Cal.4th 494, 527; *People v. Wader* (1993) 5 Cal.4th 610, 636; *People v. Clair* (1992) 2 Cal.4th 629, 657-8.

<sup>2</sup> See *People v. Boyd* (1978) 86 Cal.App.3d 54; *In re Robert E.* (2000) 77 Cal.App.4th 557, 561; *U.S. v. Hines* (9th Cir. 1992) 963 F.2d 255; *U.S. v. Covarrubias* (9th Cir. 1999) 179 F.3d 1219.

<sup>3</sup> **NOTE:** The court also ruled that even if Sixth Amendment rights attached when the charged and uncharged crimes were "inextricably intertwined," the crimes would not satisfy this test unless they were "factually and conceptually virtually impossible to distinguish." The court then ruled the charged and uncharged crimes in *Keller* did not meet this test.

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<sup>4</sup> See *McNeil v. Wisconsin* (1991) 501 US 171, 175; *People v. Clair* (1992) 2 Cal.4th 629, 657.

<sup>5</sup> (1978) 86 Cal.App.3d 54. Also see *In re Michael B.* (1981) 125 Cal.App.3d 790, 798.

<sup>6</sup> (2000) 77 Cal.App.4th 564.