QUESTIONING A CHARGED SUSPECT

"The police have an interest in investigating new or additional crimes after an individual is formally charged with one crime."(1)

After a suspect has been arrested for one crime, officers who are investigating another crime may want to question him. In fact, this happens a lot because for some people committing crime is a way of life. They may be career criminals, they may have gone on a crime spree, or they may just commit crimes whenever it suits their purposes. In any event, when they are eventually arrested for one of their crimes, officers who are investigating other crimes may be lined up, waiting to question them. Can they lawfully do so?

The answer depends mainly on whether the suspect has been charged with the crime that will be the subject of interrogation. If not, officers will ordinarily be free to question him so long as they comply with Miranda. On the other hand, if the suspect has been charged, officers must also comply with a set of rules that come from an area of law known as the Sixth Amendment right to counsel.

Under the Sixth Amendment a suspect has a right to have counsel present whenever he is questioned about a crime with which he has been charged.(2) As we will explain, the suspect may, however, waive this right or he may invoke it.

Although this may sound a lot like Miranda, it is quite different. For example, Miranda and Sixth Amendment rights attach at different times during an investigation, they are invoked in different ways, and the consequences of an invocation differ. In addition, the Sixth Amendment regulates some things not covered by Miranda, such as when officers must comply with a defense attorney's instructions not to question his client. (For more information on the differences between the Sixth Amendment and Miranda, see the appendix at the end of this article.)

To complicate things, a suspect may have Sixth Amendment and Miranda rights at the same time. When this happens, officers may be forced to juggle a variety of rules that pertain to both of these rights. This can be difficult but, as we will show, it is manageable if the rules are understood--which is the purpose of this article.

WHEN THE SIXTH AMENDMENT APPLIES

The first issue that officers must address is whether the suspect actually has Sixth Amendment rights. In this context, a suspect acquires Sixth Amendment rights only if he will be questioned about either of the following:

(1) A crime with which he has been charged; or

(2) An uncharged crimes that is "inextricably intertwined" with a charged crime.

In discussing this subject, the courts often point out the Sixth Amendment is ""offense specific," meaning its restrictions apply only to charged crimes and to uncharged crimes that are quite closely related to charged crimes.(3) It simply does not apply to other crimes.

For example in People v. Booker,(4) Billy Joe Booker murdered a woman and her 14-month old daughter in Los Angeles County. He then fled to New Mexico where he committed a robbery for which he was soon arrested, charged, arraigned, and assigned an attorney. Meanwhile, Los Angeles authorities connected Booker to their murder. So when they learned he was in custody in New Mexico, they went there to question him. Booker waived his Miranda rights and confessed to the murders.

Although Booker clearly acquired Sixth Amendment rights as to the New Mexico robbery when he was charged with that crime, he had no Sixth Amendment rights as to the murder because, as the court noted, "[N]o adversary proceedings had commenced against defendant concerning the crime about which he was being interrogated. No arrest warrant had issued on the murder charges and no extradition proceeding were underway. . . . Accordingly, although counsel had been appointed on the New Mexico charges, the interrogations investigating the California crimes were permissible."

Similarly, in McNeil v. Wisconsin(5)) an attorney was appointed to represent McNeil on an armed robbery charge. Later, a detective visited McNeil in jail, obtained a Miranda waiver and interviewed him about an unrelated murder for which McNeil was an uncharged suspect. He was subsequently charged with the murder, and his statements to the detective were used against him at his trial. On appeal, the United States Supreme Court ruled the statements could not be suppressed on Sixth Amendment grounds because McNeil "provided the statements at issue here before his Sixth Amendment right to counsel with respect to the [murder] had been (or even could have been) invoked . . . ."

When a suspect is "charged"

A suspect becomes "charged" with a crime at the point the prosecution files a complaint with the court alleging the suspect committed the crime.(6) In those cases in which the suspect is indicted by a grand jury, he becomes "charged" at the point the indictment is issued.(7)

Although the courts have made it clear that these are the only situations in which a suspect is "charged," defense attorneys have made many attempts to expand the situations in which the Sixth Amendment right to counsel attaches so as to limit the ability of officers to question uncharged suspects. But in each case, the contention has been rejected. For example, the courts have ruled that a suspect does not acquire Sixth Amendment rights merely because he has become the "focus" of a criminal investigation,(8) or because there were sufficient grounds to charge him with a crime,(9) or because he invoked his Miranda right to counsel,(10) or because he was named in a pre-complaint arrest warrant (Ramey warrant).(11)

Nor does a suspect secure Sixth Amendment rights by hiring an attorney to represent him on an uncharged case. As the United States Supreme Court noted, "[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purpose of the right to counsel."(12)

For example, in People v. Duck Wong,(13) the defendant was an uncharged suspect in a vehicular manslaughter and felony hit-and-run case in Los Angeles. While officers were looking for him, he retained an attorney to represent him on the case. Shortly thereafter, he was arrested and, after waiving his Miranda rights, made several incriminating statements that were used against him at his trial. On appeal, he contended his statements were obtained in violation of the Sixth Amendment. The California

Supreme Court disagreed, ruling that his Sixth Amendment rights had not attached because "the incriminating statements [were] made in the investigatory stage of the case before the institution of any criminal charge."

For the same reasons, the courts have also rejected arguments that officers should at least be required to notify an uncharged suspect's attorney that they intend to question the suspect.(14)

Questioning about "intertwined" crimes

Although the restrictions imposed by the Sixth Amendment do not ordinarily apply to uncharged crimes, it appears they may apply to uncharged crimes that are "inextricably intertwined" with a charged crime. We say "appears" because the case law in this area is somewhat conflicting.(15)

There is language in at least three cases that could be interpreted to mean the Sixth Amendment simply does not apply to uncharged crimes, no matter how closely related they are to charged crimes.(16) The problem with these cases is that the uncharged crimes in question were clearly not closely related to the charged crimes, thus the courts' comments were merely dicta, which means it is not binding precedent.(17) For this reason, it cannot be said with certainty that the Sixth Amendment does not apply to crimes that are very closely related to charged crimes.

Until this issue is resolved, it would be safe for officers to view the Sixth Amendment as applying only to uncharged crimes that are so closely related to charged crimes--so "inextricably intertwined"--that it would be virtually impossible to separate one from the other.(18) A good example is found in People v. Boyd.(19)

Boyd set fire to an apartment building to cover up a burglary he had committed. For some reason, he was charged only with the burglary, not arson, and an attorney was appointed to represent him on the burglary. A few days later, the investigating officer met with Boyd in jail and, after obtaining a Miranda waiver, questioned him about the arson. Boyd was later charged with arson (in addition to the burglary) and his statements were used against him at his trial.

The court ruled, however, the statements concerning the fire were obtained in violation of Boyd's Sixth Amendment rights and should, therefore, have been suppressed. Said the court:

We cannot hypothesize two offenses more closely involved and related than the burglary and arson in the instant case. Both involved the same premises, the same victim; they were also closely connected in time. . . . As the burglary and arson were part of a continuing and related course of conduct, we cannot separate the charges and appointment of counsel on the burglary charges from the subsequent arson charge . . . .

Another instructive case is U.S. v. Covarrubias(20) in which the defendant kidnaped one of eight illegal immigrants he was transporting from Los Angeles to Washington state. Washington authorities charged him with kidnaping, and an attorney was appointed to represent him on the kidnaping charge. Later that day, an INS agent questioned Covarrubias about a federal crime that arose out of the same trip; i.e., transporting illegal aliens.

Although Covarrubias had not been charged with the federal crime, the court ruled the questioning violated his Sixth Amendment rights because the state and federal crimes were part of what was essentially a single transaction. Among other things, the court noted, "The federal crime of transporting illegal immigrants was a continuing offense; it was in progress as long as the defendants were transporting [the kidnaping victim]--and thus the timing of the federal and state crimes did in fact overlap. Moreover . . .the two offenses involved a continuous course of conduct."

On the other hand, a series of independent crimes will not be deemed "inextricably intertwined" even if the motive and circumstances were essentially identical.(21) For example, in In re Michael B,(22)the petitioner committed three residential burglaries in the same neighborhood during the same week. He was subsequently charged with only one of the burglaries and an attorney was appointed to represent him. When the investigating officer learned Michael might also have committed the other two burglaries, he visited him in juvenile hall and, after obtaining a Miranda waiver, questioned him about the uncharged burglaries. Michael confessed.

On appeal, the court rejected the argument that Michael had acquired Sixth Amendment rights as to the uncharged burglaries merely because the burglaries were so similar. The court acknowledged there were similarities between the crimes--namely, "three burglaries, close in time, same modus operandi, same general locale." But this was not enough. What is required, said the court, is an "intertwining of facts [as in Boyd, discussed above] which will dilute effective representation either in preparing for trial or at trial."

Similarly, in People v. Clair,(23) the defendant burglarized a home, then returned a week later and burglarized it again. During the second burglary, he murdered a babysitter. About a month later, Clair was arrested while committing a third residential burglary. The next day, he was questioned about the burglary-murder.

Although he was not then charged with the burglary-murder, he contended that his Sixth Amendment rights had attached as to the other two burglaries, and because they were so closely related to the burglary-murder, he should be deemed to have Sixth Amendment rights as to the burglary-murder. The California Supreme Court ruled, however, that even if Clair had been charged with the two burglaries, they were not sufficiently connected to the burglary-murder so as to raise a Sixth Amendment issue. Said the court, "As to the November 7 burglary, no attachment occurred. As to the Owens burglary, any attachment was insufficient. . . . [T]he [burglary-murder] simply cannot be deemed to embrace the completely unrelated Owens burglary within a single offense."

SIXTH AMENDMENT PROCEDURE

Assuming that officers want to talk to the suspect about a crime with which he has been charged or an intertwined crime, what then? As we will now explain, a suspect who has Sixth Amendment rights with regard to a certain crime may nevertheless be questioned about that crime if both of the following occur:

(1) No invocation: The suspect did not invoke his Amendment right to counsel; and

(2) Waiver: The suspect waived his Sixth Amendment rights.

If these requirements are met, and if the suspect is willing to talk to them, officers are free to question the suspect about the charged crime if they also comply with Miranda.(24))

Sixth Amendment invocations

If a suspect has invokes his Sixth Amendment right to counsel, police-initiated questioning is prohibited.(25) In the words of the United States Supreme Court, "[O]nce this right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective."(26)

A Sixth Amendment invocation does not, however, occur automatically at the point the suspect is formally charged with a crime. Something more is required--specifically, one of the following:

(1) Suspect obtains private counsel: The suspect will have invoked his Sixth Amendment rights if he retained private counsel to represent him on the charged case.(27) An invocation does not, however, occur as the result of the suspect's retaining counsel to represent him on an uncharged case or a charged case that will not be the subject of questioning.(28)

(2) Court appoints counsel: The suspect will also have invoked his Sixth Amendment rights by accepting or requesting court-appointed counsel to represent him on the charged case.(29) This typically occurs at arraignment when a judge appoints the public defender to represent the suspect or refers the suspect to the public defender's office.

(3) Suspect requests counsel: Finally, a suspect may invoke his Sixth Amendment rights by telling an officer, prosecutor, or judge that he wants to be represented by counsel as to a charged crime, or otherwise desires the services of an attorney to assist him in court with regard to a charged crime.(30) This type of invocation should not be confused with a suspect's request to speak with a lawyer before questioning or to have a lawyer present during questioning. Requests such as these constitute a Miranda invocation which acts as a bar to all further police-initiated questioning, regardless of whether the suspect has been charged with the crime being discussed.

Officer unaware of invocation: In many cases, officers who seek to question a charged suspect will not know whether the suspect has retained or requested counsel to represent him. This is because the invocation may have occurred, for example, when a judge appointed an attorney to represent him. Nevertheless, if the suspect has invoked, all officers who seek to question him are deemed to have actual notice of the invocation. As the United States Supreme Court explained, "One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)."(31)

Consequently, officers should not seek to question a suspect about a charged crime unless they have determined from police reports, court records, prosecutors, the suspect himself, or other sources that he is neither represented by counsel as to the charged crime, nor has he requested such representation.

Sixth Amendment waivers

After officers have determined the suspect has not invoked his Sixth Amendment rights, they are free to contact him to see if he is willing to talk about the crime. If so, they may question him--but first they must obtain a Sixth Amendment waiver.(32) As we will now explain, there are two ways of obtaining a Sixth Amendment waiver. The one that officers should use will usually depend on whether the suspect is in custody or out of custody.

Suspect in-custody: In most cases, a suspect who has been charged with a crime will be in custody when officers seek to question him. If so, officers will, of course, be required to seek a Miranda waiver.

If the suspect waives his Miranda rights, he will automatically be deemed to have also waived his Sixth Amendment rights. This is because the United States Supreme Court has ruled that, for all intents and purposes, a suspect who waives his Miranda rights is effectively waiving his Sixth Amendment right to counsel. As the Court observed in Patterson v. Illinois, "By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one of his own, [the officer] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him."(33)

Suspect out of custody: If the suspect is out of custody, officers can obtain a Sixth Amendment waiver in either of two ways: (1) obtain a Miranda waiver (probably the only situation in which officers will seek a Miranda waiver from a suspect who is not in custody), or (2) seek a specific Sixth Amendment waiver.

To obtain a specific Sixth Amendment waiver, officers should advise the suspect of the following:

(1) Anything you say may be used against you in court.

(2) You have the right to consult with an attorney before questioning.

(3) You have the right to have counsel present during questioning.

(4) You have the right to have counsel appointed at no cost if you cannot afford an attorney.(34)

After advising the suspect of these rights, officers must then ask the suspect if he is willing to waive his Sixth Amendment rights; e.g., "Having these rights in mind, do you wish to speak to me now? If so, questioning may proceed.

Miscellaneous notes on Sixth Amendment waivers

* A suspect may ask officers if his act of waiving the right to have an attorney present during questioning also constitutes a waiver of the right to have an attorney represent him in court. (Most suspects are understandably not willing to give up their right to have an attorney represent them in court.) If this comes up, officers should advise the suspect that his waiver does not affect his right to be represented by counsel in court. It simply operates as a waiver of the right to have an attorney present during questioning.(35)
* A suspect who waives his Sixth Amendment right to counsel may invoke it at any time during the interview.(36)

* Although officers are not required under Miranda to inform a suspect that his attorney wants to talk to him, they are required to do so if the suspect has been charged with the crime that is the subject of questioning.(37)
* In one case, the Court of Appeal ruled that a Sixth Amendment waiver was not knowing and intelligent--and was therefore invalid--because the suspect was unaware he had been charged with the crime and he was unaware he was under arrest.(38) Thus, officers who choose not to inform a suspect that formal charges had been filed should make sure the suspect knows he is under arrest.

SUSPECT-INITIATED QUESTIONING

A suspect who is represented by counsel on a charged case or who has otherwise invoked his Sixth Amendment rights will sometimes send word to officers that he wants to talk to them about the crime with which he is charged. If this happens, officers are free to visit the suspect, confirm he wants to talk to them about the crime, obtain a Miranda waiver, then question him.(39) This is true even if the suspect also invoked his Miranda rights.(40) As the United States Supreme Court observed, "Although a defendant may sometimes later regret his decision to speak with the police, the Sixth Amendment does not disable a criminal defendant from exercising his free will.(41)

Furthermore, officers are not required to notify the attorney before questioning the suspect. For example, in People v. Sultana(42) the defendant, after retaining private counsel to represent him on a murder charge, told jailers he wanted to speak with a certain police officer. The officer went to the jail, obtained both a Miranda waiver and an acknowledgment from Sultana that he had, in fact, initiated questioning about the charged crime, then questioned him. During questioning, Sultana made certain incriminating statements that were used against him.

The court rejected the argument that the officer was required to notify Sultana's attorney before any questioning. Said the court, "The State is not required . . . to contact a defendant's attorney of record prior to questioning where the defendant has initiated interrogation and waived his right to counsel following Miranda warnings."

DEMANDS BY THE SUSPECT'S ATTORNEY

If an attorney contacts officers, says he represents someone in their custody, and makes certain demands or requests, officers may be required to comply, as follows:

"Don't question my client": If the attorney tells officers that he does not want them to question his client or places any restrictions or conditions on the questioning of his client, officers must comply only if the suspect has been charged with the crime that is the subject of questioning. As the United States Supreme Court explained, "O]nce the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a medium between the suspect and the State during the interrogation."(43)

On the other hand, if officers want to question the suspect about an uncharged crime, they are not required to honor the attorney's requests or demands. For example, in People v. Ledesma(44) the defendant was arrested for murder, but a complaint had not yet been filed. While officers were transporting Ledesma to the police station, his attorney telephoned the station and, according to the

attorney, requested that officers not talk to Ledesma "until such time that I should arrive, that I was going to be leaving almost immediately." Shortly thereafter, the arresting officers arrived at the station, obtained a Miranda waiver, and began questioning Ledesma who made certain statements that were used against him at his trial.

On appeal, the court ruled the failure of the officers to honor the attorney's request did not constitute a violation of Ledesma's Sixth Amendment rights because he had not been charged with the murder and, consequently, his Sixth Amendment rights as to the murder had not attached."

The United States Supreme Court has indicated it is possible that an officer's conduct in his dealings with a suspect's attorney regarding a charged or uncharged crime could be so egregious that it might rise to the level of a due process violation, which could result in the suppression of the suspect's statement.(45) The Court did not, however, indicate what type of conduct would fall into this category.

Requests to visit: Under California statutory law, it is a misdemeanor for an officer to refuse or neglect a request by a licensed attorney to meet with a suspect in custody if the suspect or a member of his family requested the meeting.(46) This applies even if the suspect has not been charged with the crime for which he has been arrested. Although the statute does not say the meeting must occur immediately after the request is made, or that officers must interrupt or postpone questioning of the suspect when the attorney arrives, it would seem the request should be honored within a reasonable time after it is made.(47)

CONSEQUENCES OF VIOLATION

A statement obtained in violation of the Sixth Amendment is inadmissible in the prosecution's case-in-chief.(48) Under certain circumstances, however, the statement may be used to impeach the defendant if he testifies at his trial and his testimony is inconsistent with his statement.

Suspect waived Sixth Amendment rights: If the suspect waived his Miranda or Sixth Amendment rights but the statement was, nevertheless, obtained in violation of the Sixth Amendment, the statement will be admissible to impeach the suspect is the statement was voluntary.

For example, in Michigan v. Harvey,(49) the defendant's Sixth Amendment right to counsel was invoked when an attorney was appointed to represent him on a rape charge. About two months later, Harvey told an officer he wanted to make a statement but he did not know whether he should talk to his lawyer. The officer told Harvey that he did not need to speak with his attorney, because "his lawyer was going to get a copy of the statement anyway." Harvey then waived his Miranda rights and made a statement that was used against him at trial.

On appeal, it was conceded that the officer's comment to Harvey that he did not need to speak with a lawyer rendered the statement police-initiated, not suspect-initiated. Consequently, the statement was obtained in violation of the rule that officers may not initiate questioning of a suspect who has invoked his Sixth Amendment right to counsel. Nevertheless, the United States Supreme Court ruled that because Harvey had, in fact, waived his Sixth Amendment rights, his statement would be admissible for the limited purpose of impeaching his trial testimony at trial if it were shown the statement was made voluntarily.

Suspect did not waive Sixth Amendment rights: There is currently a split of authority in California over whether a voluntary statement obtained in violation of the Sixth Amendment is admissible for impeachment purposes if the suspect did not waive his Sixth Amendment or Miranda rights. In two cases where a police agent obtained a voluntary statement without obtaining a waiver, the courts ruled the statement was inadmissible for any purpose.(50) In a more recent case, however, the court ruled such a statement was admissible for impeachment.(51) Meanwhile, the United States Supreme Court has deliberately left the issue up in the air.(52)

ETHICS ISSUES FOR PROSECUTORS

Prosecutors who are investigating a case or preparing a case for trial will sometimes want to question a suspect who is represented by counsel. If the suspect has been charged with the crime that would be the subject of questioning, the prosecutor could not lawfully do so, as discussed earlier.

If, however, the suspect has not been charged, such questioning would not violate the Sixth Amendment. But it may violate Rule 2-100 of the California Rules of Professional Conduct. Under Rule 2-100, a prosecutor may not communicate directly or indirectly with a defendant who is represented by counsel if, (1) the communication concerns a crime for which the defendant is represented, and (2) the defendant's attorney did not consent to the communication.(53)

The question arises: Is such conduct a violation of Rule 2-100 if the suspect, although represented by counsel, has not been charged with the crime that would be the subject of questioning? The Rule, itself, does not say, and the California courts have not yet decided the issue.(54)

It is, however, the opinion of the California Attorney General, the Ethics Committee of the California District Attorneys Association, and several federal circuit courts, prosecutors may communicate ex parte with a represented suspect about a crime for which the suspect is represented if the suspect has not been charged with the crime that is under investigation.(55)

APPENDIX
COMPARE SIXTH AMENDMENT
AND MIRANDA INVOCATIONS

It is not uncommon for officers, prosecutors, and even judges to confuse invocations of the Sixth Amendment right to counsel with invocations of the Miranda right to counsel. Such confusion can probably be eliminated by keeping the following in mind.

First, a suspect who invokes his Miranda right to counsel is saying, in essence, that he does not feel "sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney."(56) On the other hand, a suspect who invokes the Sixth Amendment right to counsel is saying, essentially, that he feels incapable of dealing directly with the "state apparatus that has been geared up to prosecute him"(57)) and he, therefore, needs the services of an attorney to "investigate the case and prepare a defense for trial."(58)

Second, an invocation of the Miranda right to counsel occurs only when the suspect makes a clear and unambiguous statement that "can reasonably be construed to be expression of a desire for the assistance

of an attorney in dealing with custodial interrogation by the police."(59) In contrast, a Sixth Amendment invocation occurs when the suspect retains a private attorney or requests a court-appointed attorney to represent him in court.(60)

Third, an invocation of the Miranda right to counsel operates as a complete barrier to any police-initiated questioning about any crime--charged or uncharged--so long as the suspect remains in custody. For example, if the suspect invoked his Miranda right to counsel at the police station while he was being questioned about a robbery, officers could not lawfully contact him later at the jail to determine if he was willing to talk to them about an unrelated murder.

In contrast, a Sixth Amendment invocation bars only police-initiated questioning about the crime with which the suspect has been charged. In other words, the Sixth Amendment right to counsel is "offense specific."(61) So, for example, if a suspect invoked his Sixth Amendment rights by hiring an attorney to represent him on robbery charges, officers could lawfully seek to question him about any crime other than the charged robbery (assuming the suspect had not previously invoked his Miranda right to counsel).

1. McNeil v. Wisconsin (1991) 501 US 171, 175-6 [quoting from Maine v. Moulton (1985) 474 US 159, 179.

2. See Michigan v. Harvey (1990) 494 US 344, 348 ["The text of the (Sixth) Amendment provides in pertinent part that '(i)n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense.'"]; Maine v. Moulton (1985) 474 US 159, 176; Brewer v. Williams (1977) 430 US 387, 401; Moran v. Burbine (1986) 475 US 412, 428, 430; United States v. Gouveia (1984) 467 US 180, 190; People v. Hayes (1988) 200 Cal.App.3d 400, 408.

3. See McNeil v. Wisconsin (1991) 501 US 171, 175; People v. Webb (1993) 6 Cal.4th 494, 527; People v. Clair (1992) 2 Cal.4th 629, 657. NOTE: In contrast, Miranda is not "offense-specific," which means, among other things, that if the suspect is in custody for one crime, officers who want to question him about a crime for which he is not in custody must, nevertheless, comply with Miranda. In addition, a Miranda invocation affects questioning about all crimes, while a Sixth Amendment invocation, because it is "offense specific," affects only charged crimes.

4. (1977) 69 Cal.App.3d 654.

5. (1991) 501 US 171.

6. See Moran v. Burbine (1986) 475 US 412, 428; People v. Engert (1987) 193 Cal.App.3d 1518, 1525; People v. Acuna (1988) 204 Cal.App.3d 602, 607; People v. Superior Court (Sosa) (1983) 145 Cal.App.3d 581, 593 [AA prosecution has reached a critical stage after a complaint has been filed."]; People v. Brown (1996) 42 Cal.App.4th 461, 468, fn.3. NOTE: Although the courts frequently say that the Sixth Amendment right to counsel arises when judicial proceedings have been initiated against the suspect "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" (See, for example, Brewer v. Williams (1977) 430 US 387, 398; United States v. Gouveia (1984) 467 US 180, 188; Michigan v. Jackson (1986) 475 US 625, 629), as a practical matter the Sixth Amendment will have attached well before any arraignment, or the filing of an information, or the

beginning of a preliminary hearing. This is because a formal complaint will almost always have been filed well before any of these proceedings have occurred. Although the Court of Appeal in People v. Case (1980) 105 Cal.App.3d 826, 833 said, in dicta, that a suspect is not formally charged in a felony case until an information or indictment has been filed in the superior court, this seems at odds with United States v. Gouveia (1984) 467 US 180, 188.

7. See Brewer v. Williams (1977) 430 US 387, 398. NOTE: The reason the Sixth Amendment right to counsel is triggered at these points is that the filing of a complaint or the issuance of an indictment signals that "he government has committed itself to prosecute, and the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." See United States v. Gouveia (1984) 467 US 180, 189; Maine v. Moulton (1985) 474 US 159, 170; Arizona v. Roberson (1988) 486 US 675, 685 ["(The Sixth Amendment right to counsel) arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him."]; People v. Wader (1993) 5 Cal.4th 610, 636.

8. See People v. Plyler (1993) 18 Cal.App.4th 535, 546; People v. Clair (1992) 2 Cal.4th 629, 657; People v. Hovey (1988) 44 Cal.3d 543, 561.

9. See People v. Webb (1993) 6 Cal.4th 494, 527; Hoffa v. United States (1966) 385 US 293, 310 ["There is no constitutional right to be arrested."].

10. See People v. Acuna (1988) 204 Cal.App.3d 602, 607.

11. See People v. Case (1980) 105 Cal.App.3d 826, 833-4.

12. Moran v. Burbine (1986) 475 US 412, 430. ALSO SEE McNeil v. Wisconsin (1991) 501 US 171, 175; People v. Duren (1973) 9 Cal.3d 218, 243 ["(T)he fact that counsel had been appointed to represent defendant on a completely unrelated charge did not make ineffective his clear waiver of counsel."]; People v. Wader (1993) 5 Cal.4th 610, 636 ["Although defendant had obtained counsel in a case that was unrelated to this case, because defendant's Sixth Amendment right to counsel in this case had not attached it could not be violated."]; In re Michael B. (1981) 125 Cal.App.3d 790, 794 ["(B)efore charges are filed, questioning out of the presence of an attorney who already represents the defendant is not absolutely barred, but rather is permitted, provided the Fifth Amendment waiver is valid."]; People v. Ledesma (1988) 204 Cal.App.3d 682, 695; People v. Mack (1979) 89 Cal.App.3d 974, 977; People v. Chutan (1999) 72 Cal.App.4th 1276, 1283. NOTE: In Moran v. Burbine, supra, (1986) 475 US 412 the Court acknowledged that if the suspect confesses, "his attorney's case at trial will be that much more difficult" but added this fact is not decisive. At p. 431.

13. (1976) 18 Cal.3d 178.

14. See People v. Sultana (1988) 204 Cal.App.3d 511, 521; People v. Stephens (1990) 218 Cal.App.3d 575, 583; People v. Mattson (1990) 50 Cal.3d 826, 869 ["No violation of a defendant's Sixth Amendment right to counsel occurs as a result of a failure to notify counsel who represents a defendant in a prosecution for a separate offense of the intent to interview the defendant as a suspect in an

unrelated criminal investigation when the defendant has waived his right to have counsel present during the interview."].

15. See People v. Clair (1992) 2 Cal.4th 629, 658 ["It is true that the precise boundaries of the 'offense-specific' limitation [on the Sixth Amendment right to counsel] have yet to be fleshed out."].

16. See People v. Clair (1992) 2 Cal.4th 629, 658; People v. Plyler (1993) 18 Cal.App.4th 535, 547 ["The 'closely related' doctrine has been thoroughly undermined by the 'offense-specific' doctrine enunciated by the United States Supreme Court."]; People v. Chutan (1999) 72 Cal.App.4th 1276, 1283.

17. NOTE: Dicta consist of language in a published opinion that was not necessary for reaching the decision in the case and is, therefore, not binding precedent. See Bryant v. Superior Court (1986) 186 Cal.App.3d 483, 495; United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823, 834. ALSO SEE: People v. Deay (1987) 194 Cal.App.3d 280, 288; People v. Mata (1986) 180 Cal.App.3d 955, 958, fn.5 [AA decision is not authority for a proposition not considered."]; McGee v. Superior Court (1985) 176 Cal.App.3d 221, 226; People v. Superior Court (Williams) (1992) 8 Cal.App.4th 688, 703 [If facts of case are fairly distinguishable, the case is not precedent.].

18. See People v. Sully (1991) 53 Cal.3d 1195, 1234; United States v. Covarrubias (9th Cir. 1999) 179 F.3d 1219 ["On the basis of a uniform reading of two Supreme Court cases, every circuit to consider the question, including our own, has recognized that an exception to the offense-specific requirement of the Sixth Amendment occurs when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."].

19. (1978) 86 Cal.App.3d 54. ALSO SEE Brewer v. Williams (1977) 430 US 387, 398 [abduction and murder of a girl were treated as a single transaction; thus, the Court treated a Sixth Amendment invocation as to the charged abduction as a Sixth Amendment invocation as to the uncharged murder].

20. (9th Cir. 1999) 179 F.3d 1219.

21. See People v. Sully (1991) 53 Cal.3d 1195, 1234 ["Although there was unquestionably a pattern to defendant's crimes, they involved distinct events, different victims, and different times. There were differences among the offenses in material witnesses and physical evidence."]; People v. Chutan (1999) 72 Cal.App.4th 1276, 1283 [uncharged child molesting suspect whose victim was removed from his home did not have Sixth Amendment rights as to child molesting charges merely because he was represented by counsel in the juvenile court placement proceeding for the victim]; People v. Plyler (1993) 18 Cal.App.4th 535, 546-7 [two child molesting cases involving separate victims were not closely related]; People v. Wader (1993) 5 Cal.4th 610, 636; In re Michael B. (1981) 125 Cal.App.3d 790, 797; People v. Clair (1992) 2 Cal.4th 629, 658-9; People v. Webb (1993) 6 Cal.4th 494, 527 [suspect charged and represented by counsel on narcotics charges had no Sixth Amendment rights regarding an uncharged murder].

22. (1981) 125 Cal.App.3d 790.

23. (1992) 2 Cal.4th 629.

24. See People v. Harper (1991) 228 Cal.App.3d 843, 853 [AA purportedly voluntary statement violates the Sixth Amendment if it is secured after a defendant has asserted the right to counsel and without any waiver of that right."].

25. See People v. Frye (1998) 18 Cal.4th 894, 987. NOTE: The fact that a suspect has a constitutional right to counsel does not mean he has invoked that right. See Patterson v. Illinois (1988) 487 US 285, 290-1; People v. Henderson (1990) 225 Cal.App.3d 1129, 1159.

26. McNeil v. Wisconsin (1991) 501 US 171, 175. ALSO SEE Michigan v. Jackson (1986) 475 US 625, 636 ["We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."]; Maine v. Moulton (1985) 474 US 159, 170; People v. Hayes (1988) 200 Cal.App.3d 400, 407; People v. Stephens (1990) 218 Cal.App.3d 575, 583.

27. See Michigan v. Harvey (1990) 494 US 344, 352 ["To be sure, once a defendant obtains . . . counsel as respondent had here, analysis of the waiver issue changes."]; Brewer v. Williams (1977) 430 US 387, 405; Michigan v. Jackson (1986) 475 US 625, 631; Patterson v. Illinois (1988) 487 US 285, 290, fn.3; People v. Henderson (1990) 225 Cal.App.3d 1129, 1159-60.

28. See McNeil v. Wisconsin (1991) 501 US 171.

29. See McNeil v. Wisconsin (1991) 501 US 171, 181; Michigan v. Harvey (1990) 494 US 344, 352 ["To be sure, once a defendant . . . requests counsel as respondent had here, analysis of the waiver issue changes."]; Michigan v. Jackson (1986) 475 US 625, 636; Patterson v. Illinois (1988) 487 US 285, 290, fn.3; In re Michael B. (1981) 125 Cal.App.3d 790, 793; People v. Frye (1998) 18 Cal.4th 894, 987; People v. Henderson (1990) 225 Cal.App.3d 1129, 1159-60.

30. NOTE: A juvenile's request to talk to a parent is not an invocation of the Sixth Amendment right to counsel. See Ahmad A. v. Superior Court (1989) 215 Cal.App.3d 528, 537.

31. Michigan v. Jackson (1986) 475 US 625, 634. ALSO SEE People v. Hayes (1988) 200 Cal.App.3d 400, 407.

32. See People v. Henderson (1990) 225 Cal.App.3d 1129, 1160 ["When a complaint has been filed and an arrest has been made and the accused is not represented by counsel, there is no absolute prohibition against the police eliciting a statement from the accused so long as the waiver of the right to have counsel present is free and voluntary."]; Michigan v. Harvey (1990) 494 US 344, 348-9; People v. Frye (1998) 18 Cal.4th 894, 987.

33. (1988) 487 US 285, 298. ALSO SEE Michigan v. Harvey (1990) 494 US 344, 349 ["(W)hen a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by Miranda v. Arizona, that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of postindictment questioning."]; People v. Sully (1991) 53 Cal.3d 1195, 1234.

34. See Patterson v. Illinois (1988) 487 US 285, 293-4.

35. See Patterson v. Illinois (1988) 487 US 285, 293, fn.5.

36. See Patterson v. Illinois (1988) 487 US 285, 293, fn.5.

37. See Patterson v. Illinois (1988) 487 US 285, 296, fn.9 ["(W)e have permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid."].

38. See People v. Engert (1987) 193 Cal.App.3d 1518, 1526; People v. Henderson (1990) 225 Cal.App.3d 1129, 1161. NOTE: In Patterson v. Illinois (1988) 487 US 285, the United States Supreme Court expressly declined to rule on whether a suspect must be told he has been formally charged, saying this is "a matter that can be reasonably debated." At p. 295, fn.8.

39. See Michigan v. Harvey (1990) 494 US 344, 352 ["(N)othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney."]; Patterson v. Illinois (1988) 487 US 285, 291; People v. Booker (1977) 69 Cal.App.3d 654, 664; People v. Manson (1976) 61 Cal.App.3d 102, 164. ALSO SEE Faretta v. California (1975) 422 US 806, 820 ["To thrust counsel upon the accused, against his considered wish, thus violates the logic of the (Sixth) Amendment."]; People v. Dickson (1985) 167 Cal.App.3d 1047, 1057 ["The right to receive advice and assistance from counsel is not the right to reject the advice and then avoid the consequences."];

40. See People v. Dickson (1985) 167 Cal.App.3d 1047.

41. Michigan v. Harvey (1990) 494 US 344, 353.

42. (1988) 204 Cal.App.3d 511. ALSO SEE People v. Stevens (1990) 218 Cal.App.3d 575, 583; Brewer v. Williams (1977) 430 US 387, 405-6.

43. Moran v. Burbine (1986) 475 US 412, 428.

44. (1988) 204 Cal.App.3d 682. ALSO SEE People v. Duck Wong (1976) 18 Cal.3d 178.

45. See Moran v. Burbine (1986) 475 US 412, 432-3; Crooker v. California (1958) 357 US 433, 440.

46. Penal Code ' 825(b).

47. See Crooker v. California (1958) 357 US 433, 440 [Court ruled a violation of California Penal Code ' 825(b) under the facts of the case did not constitute a violation of due process].

48. NOTE: A motion to suppress a statement on Sixth Amendment grounds must be made pursuant to Evidence Code ' 402, not Penal Code ' 1538.5. See People v. Whitfield (1996) 46 Cal.App.4th 947, 958-9. Except in unusual circumstances, the remedy for a violation of the Sixth Amendment is suppression of the statement, not dismissal of the charges. See United States v. Morrison (1981) 449 US 361, 365.

RE STANDING: A defendant must have standing to bring a motion to suppress a statement based on a violation of the Sixth Amendment. See People v. Badgett (1995) 10 Cal.4th 330, 343 ["It is also the rule that defendants lack standing to complain of the violation of another's Sixth Amendment right to counsel."].

49. (1990) 494 US 344.

50. See People v. Cribas (1991) 231 Cal.App.3d 596, 606; People v. Harper (1991) 228 Cal.App.3d 843.

51. People v. Brown (1996) 42 Cal.App.4th 461, 471-2.

52. See Michigan v. Harvey (1990) 494 US 344, 354.

53. See Rule 2-100, California Rules of Professional Conduct; Professionalism, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (1998, California District Attorneys Association) pp. VI-1 et seq.

54. See People v Hamilton (1989) 48 Cal.3d 1142, 1155, fn.5.

55. See 75 Ops.Cal.Atty.Gen. 223, 232; Professionalism, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (1998, California District Attorneys Association) pp. VI-6 et seq.; Standard 24.6, National Prosecution Standards, Second Edition, 1991 [NPS-II] [Communications with Represented Defendants during Investigations]; U.S. v. Kenny (9th Cir. 1981) 645 F.2d 1323, 1338-9; U.S. v. Fitterer (8th Cir. 1983) 710 F.2d 1328, 1333; U.S. v. Ryans (10th Cir. 1990) 903 F.2d 731, 739-40; U.S. v. Powe (9th Cir. 1993) 9 F.3d 68. ALSO SEE People v. Hamilton (1989) 48 Cal.3d 1142, 1155, fn.5; People v. Dickson (1985) 167 Cal.App.3d 1047, 1057 [court indicates uncertainty over whether an ethics violation results when a prosecutor communicates directly with an adverse party when the communication concerns an uncharged crime that is under investigation by the prosecutor; People v. Dickson (1985) 167 Cal.App.3d 1047, 1057 [a violation of Rule 2-100 Ais not necessarily of constitutional dimension . . ."]. NOTE: Although a communication between a prosecutor and a represented suspect may be permitted by the Rules of Professional Conduct, prosecutors should consider having a DA's inspector or other law enforcement officer conduct the interview. In any event, an officer or inspector should always be present as a witness. See People v. Dickson (1985) 167 Cal.App.3d 1047, 1057 ["(A police officer) is not bound by standards of the legal profession."]; People v. Manson (1976) 61 Cal.App.3d 102, 164-5, fn 47.

56. See Arizona v. Roberson (1988) 486 US 675, 684.

57. See Arizona v. Roberson (1988) 486 US 675, 684.

58. See Michigan v. Harvey (1990) 494 US 344, 348.

59. See Davis v. United States (1994) 512 US 452, 459 ["Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the

suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." At p. 371. "We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." At p. 373.]; McNeil v. Wisconsin (1991) 501 US 171, 178; Smith v. Illinois (1984) 469 US 91, 95; People v. Lispier (1992) 4 Cal.App.4th 1317, 1324.

60. See Michigan v. Harvey (1990) 494 US 344, 348 ["(The essence of the Sixth Amendment right to counsel) is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial."].

61. See McNeil v. Wisconsin (1991) 501 US 171, 175; People v. Webb (1993) 6 Cal.4th 494, 527; People v. Wader (1993) 5 Cal.4th 610, 636; People v. Morris (1991) 53 Cal.3d 152, 202; People v. Sully (1991) 53 Cal.3d 1195, 1233-4.