

# *Legal Update*

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## *Sixth Amendment Right to an Attorney and to Confrontation*

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### *Sixth Amendment Right to Counsel:*

*The Sixth Amendment* provides in pertinent part: “*In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.* (sic)”

#### *General Rules:*

“If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the **Sixth Amendment** stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.” (*Johnson v. Zerbst* (1938) 304 U.S. 458, 468 [82 L.Ed. 1461, 1468].)

“The essence of this right . . . is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial.” (*Michigan v. Harvey* (1990) 494 U.S. 344, 348 [108 L.Ed.2<sup>nd</sup> 293, 301].)

The constitutional right to counsel is designed to assist the accused in coping with “the intricacies of substantive and procedural law. . . . The right to counsel exists to protect the accused during the trial-type confrontations with the prosecutor.” (*United States v. Gouveia* (1984) 467 U.S. 180, 189-190 [81 L.Ed.2<sup>nd</sup> 146, 155].)

One’s right to select his own counsel is limited to retained, but not appointed, counsel. (*People v. Mungia* (2008) 44 Cal.4<sup>th</sup> 1101, 1122.)

When a defendant does not require appointed counsel, and he is able to retain his own attorney, he is constitutionally entitled to have the attorney of his own choice. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [165 L.Ed.2<sup>nd</sup> 409].)

See also **P.C. § 987**, which provides that if a defendant appears for arraignment without counsel, the court shall inform the defendant of

his or her right to counsel and shall ask the defendant whether he or she desires the assistance of counsel.

The court is required to appoint the public defender if available. If not, an attorney on contract with the county must be appointed if available. Only then may private counsel not on contract with the county be appointed. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of a county-contracted attorney after making a finding of good cause and stating the reasons therefore on the record. (**P.C. § 987.2**)

The finding of good cause is a matter of the trial court's discretion, taking into account such factors as whether the request was timely, agreement of appointed counsel, defendant's preference, and a prior relationship with the attorney requested establishing trust and confidence. (*Gressett v. Superior Court of Contra Costa County* (2010) 185 Cal.App.4<sup>th</sup> 114, 118-123; citing *Harris v. Superior Court* (1977) 19 Cal.3<sup>rd</sup> 786, 799.)

And see **P.C. § 859**, providing similar requirements upon the filing of a complaint.

**Massiah Error** (*Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2<sup>nd</sup> 246].): Questioning a suspect after an arraignment where the suspect has requested the appointment of an attorney, when the questioning (or “*deliberately eliciting*” incriminating statements) is attempted without the presence (or consent) of the subject's attorney, is a **Sixth Amendment** violation. (See also *Michigan v. Jackson* (1986) 475 U.S. 625 [89 L.Ed.2<sup>nd</sup> 631]; and *Minnick v. Mississippi* (1990) 498 U.S. 146 [112 L.Ed.2<sup>nd</sup> 489].)

*Massiah* involved an undercover officer soliciting incriminating information from an out-of-custody defendant after the defendant's arraignment. The Supreme Court has ruled, however, that had the officer first advised defendant of his **Sixth Amendment** right to counsel and obtained a waiver of that right (a procedure obviously not conducive to an undercover situation), there would have been no error in talking to the defendant without the presence of his attorney. (See *Montejo v. Louisiana* (May 26, 2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

*Note:* The Supreme Court has indicated that there is a difference between an “*interrogation*,” as applies to a **Fifth Amendment**, self-incrimination situation, and “*deliberately eliciting*” incriminating statements, as applies to a **Sixth Amendment**, right-to-an-attorney-situation, giving the later a much broader application. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300, fn. 4

[64 L.Ed.2<sup>nd</sup> 297, 307]; see also *Fellers v. United States* (2004) 540 U.S. 519, 524 [157 L.Ed.2d 1016].)

**“Offense-Specific:”** One’s **Sixth Amendment** right to counsel is “*offense-specific*,” i.e., it applies only to the offense for which he or she is then charged. (*McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2<sup>nd</sup> 158]; see also *Maine v. Moulton* (1985) 474 U.S. 159, 279-280, fn. 16 [88 L.Ed.2<sup>nd</sup> 481, 498-499]; *People v. Plyler* (1993) 18 Cal.App.4<sup>th</sup> 535, 545-548; *Texas v. Cobb* (2001) 532 U.S. 162 [149 L.Ed.2<sup>nd</sup> 321].)

*Rule:* Questioning on any other case not yet charged, is *not* precluded by the **Sixth Amendment**. (*United States v. Baez-Acuna* (10<sup>th</sup> Cir. 1995) 54 F.3<sup>rd</sup> 634; *People v. Carter* (2003) 30 Cal.4<sup>th</sup> 1166, 1209-1210; a stabbing in the jail while awaiting trial on a capital case.)

A pending state parole violation does not trigger defendant’s **Sixth Amendment** rights in federal court even though the parole violation and the later federal charges all stem from the same bank robbery. (*United States v. Mandley* (9<sup>th</sup> Cir. 1974) 502 F.3<sup>rd</sup> 1103.)

Neither having an attorney for purposes of *extradition* nor the existence of an *arrest warrant* (absent the filing of a criminal complaint or indictment in court) triggers the suspect’s **Sixth Amendment** right to counsel. (*People v. Wheelock* (2004) 117 Cal.App.4<sup>th</sup> 561, 565-569; *United States v. Yousef* (2<sup>nd</sup> Cir. 2003) 327 F.3<sup>rd</sup> 56, 142, fn. 66; *DeSilva v. DiLeonardi* (7<sup>th</sup> Cir. 1999) 181 F.3<sup>rd</sup> 865, 868-869; *Chewing v. Rogerson* (8<sup>th</sup> Cir. 1994) 29 F.3<sup>rd</sup> 418, 420; *Judd v. Vose* (1<sup>st</sup> Cir. 1987) 813 F.2<sup>nd</sup> 494, 497; *Anderson v. Alameida* (9<sup>th</sup> Cir. 2005) 397 F.3<sup>rd</sup> 1175..)

**P.C. § 804**, in making reference to a prosecution having been “*commenced*” when an arrest or bench warrant is issued, applies to the running of a “*statute of limitations*” and not the **Sixth Amendment**. (*People v. Wheelock*, *supra*, at pp. 565-566.)

*The “Closely Related,” “Inextricably Intertwined,” or “Inextricably Enmeshed” Doctrine:*

*Old Rule:* “(T)he **Sixth Amendment** right to counsel extends to interrogations on new charges where ‘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.’” (*United States v. Hines* 963 F.2<sup>nd</sup> 255, 257 (9<sup>th</sup> Cir. 1992).” (*United States v. Doherty* (6<sup>th</sup> Cir. 1997) 126 F.3<sup>rd</sup> 769, 776.)

This theory was the product of some lower courts' interpretation of two U.S. Supreme Court decisions, *Maine v. Moulton* (1985) 474 U.S. 159 [88 L.Ed.2<sup>nd</sup> 481], where defendant had already been indicted for theft when interrogated and later charged with burglary, based upon the same circumstances; and *Brewer v. Williams* (1977) 430 U.S. 387 [51 L.Ed.2<sup>nd</sup> 424], where defendant was convicted of murder based upon statements obtained after his indictment for kidnapping of the same victim: Both cases reversed.

See also *United States v. Covarrubias* (9<sup>th</sup> Cir. 1999) 179 F.3<sup>rd</sup> 1219: Examining and comparing all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including victims) and the timing, motive and location of the crimes, defendants' **Sixth Amendment** rights were violated when defendants were questioned by I.N.S. concerning a federal transporting of illegal aliens charge after being arraigned in state court on a charge of kidnapping where one of the transported illegal aliens was the victim of the kidnapping.

*New Rule:* There is no such thing as “*closely related*” “*inextricably intertwined*,” or “*inextricably enmeshed*.”

The “*inextricably intertwined*” theory was first called into question in *People v. Keller* (2001) 87 Cal.App.4<sup>th</sup> 40. Per the Third District Court of Appeal, absent a finding that officers questioned a charged suspect about the exact same facts and circumstances which serve as the basis for the charges already filed, *McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2<sup>nd</sup> 158], holding that the **Six Amendment** is “*offense-specific*” (i.e., applies only to the charges actually filed in court), the **Sixth Amendment** will not prevent the use of the defendant's responses in a separate trial on any newly filed, but different charges, even though they may be factually related.

The United States Supreme Court settled the issue altogether in *Texas v. Cobb* (2001) 532 U.S. 162 [149 L.Ed.2<sup>nd</sup> 321], where it was held that there is no such theory as “*closely related*” or “*inextricably intertwined*.”

In *Cobb*, the High Court, in a 5-to-4 decision, found that there is no legal basis for an exception to the “*offense-specific*” rule of *McNeil*. Rather, whether

or not an uncharged offense falls under the protection of the **Sixth Amendment** right-to-an-attorney provisions because of the charging of another factually related offense is tested by the same standards as is used in determining the applicability of the **Fifth Amendment** “*Double Jeopardy*” clause.

**Blockburger v. United States** (1932) 284 U.S. 299 [76 L.Ed. 306] provides the double jeopardy test: I.e.; double jeopardy does *not* preclude separately prosecuting each case so long as each charge “requires proof of an addition fact which the other does not.” (*Id.*, at p. 304 [76 L.Ed. at p. 309].) In other words, is one charge a “*lesser included offense*” of the other?” If so, then, and only then, does arraiging a defendant on one charge trigger the **Sixth Amendment** protections as to both.

**Cobb** involved the questioning of a burglary suspect about the murder of the burglary victims when it was determined, after defendant was arraigned on the burglary charge, that he was also responsible for the disappearance of the residents of the house he burglarized. Doing so *did not* violate the **Sixth Amendment**.

See also **People v. Slayton** (2001) 26 Cal.4<sup>th</sup> 1076, where questioning defendant about a residential burglary, after he had been arraigned on a charge of driving the burglary victim’s car taken in that same burglary, was held to be proper (although the charge of **V.C. § 10851** [taking] had to be dismissed where he had already been arraigned on a charge of **V.C. § 10851** [driving] for the same vehicle).

*Problems:*

*Keeping the Offenses Separate:* The problem for the interrogator will often be to keep the questioned suspect from talking about the pending case protected by **Massiah**. The interrogator's intent to discuss *only* the unprotected crimes must be made clear to the suspect and strictly adhered to throughout the interview.

*Ethical Issues:* Prosecutors must also be wary of **Rule 2-100** of the **California Rules of Professional Conduct**, which

prohibits any communication, directly or indirectly, with a defendant on a pending charge without the consent of the defendant's attorney, except as “*authorized by law*.” The application of this rule is subject to some conflict:

This rule is not implicated when an attorney represents the defendant on a separate, unrelated charge. (*People v. Maury* (2003) 30 Cal.4<sup>th</sup> 342, 408; the Court erroneously referring to **Rule 7-103**, which is actually the former version of **Rule 2-100**.)

Whether or not **Rule 2-100** applies to uncharged criminal suspects is still at issue. (See *United States v. Talao* (9<sup>th</sup> Cir. 2000) 222 F.3<sup>rd</sup> 1133.)

The Supreme Court has ruled that a prosecutor's ethical standards dealing with contacting represented defendants (e.g., **The American Bar Association's Model Rules of Professional Conduct, Model Rule 4.2** (2008) [or, via the same argument, in California, the **Rules of Professional Conduct, Rule 2-100**]) are not applicable to police officers. (*Montejo v. Louisiana* (May 26 2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

The California Attorney General is of the opinion that **Rule 2-100** *does not* prohibit a prosecutor's (or his investigator's) contact with an uncharged defendant who has retained legal counsel. This conclusion is based upon an analysis of **subd. (c)(3)** of **Rule 2-100** which provides that “This rule shall not prohibit . . . communications otherwise authorized by law,” and prior case authority holding that prosecutors should not be inhibited in their duties by a rule prohibiting such contacts. (*75 Ops. Cal. Atty. Gen. 223* (1992))

The Ninth Circuit is of the same opinion, at least where there is no direct communication between the defendant and the prosecutor. Also, the use of fake subpoenas, provided to defendant by an undercover agent, did not make the police the “alter-ego” of the prosecution. (*United States v. Carona* (9<sup>th</sup> Cir. 2011) 2011 U.S. App. Lexis 319.)

*Also, Subd. (c)(1)* of **Rule 2-100** does not prohibit a party's “(c)ommunication with a public officer.” It is

arguable that an elected district attorney comes within the “*public officer*” exception in a situation where a charged defendant contacts the District Attorney and requests to speak to him or her without the defense attorney’s knowledge. (See *People v. Hamilton* (1989) 48 Cal.3<sup>rd</sup> 1142, 1155, fn. 5.)

*When Attaches:* A subject's **Sixth Amendment** right to counsel attaches at the filing of a “*formal charge, preliminary hearing, indictment, information, or arraignment*” and continues even if released from custody so long as that case against him exists (i.e., through the completion of post-conviction appeal). (See *Massiah v. United States, supra.*)

*Rule:* “(T)he **Sixth Amendment** right to counsel attaches only when adversary judicial proceedings have been initiated against the defendant.” (*United States v. Gouveia* (1984) 467 U.S. 180, 187-188 [81 L.Ed.2<sup>nd</sup> 146, 153-154]; *Kirby v. Illinois* (1972) 406 U.S. 682, 689 [32 L.Ed.2<sup>nd</sup> 411, 417]; *Brewer v. Williams* (1977) 430 U.S. 387, 398 [51 L.Ed.2<sup>nd</sup> 424, 436]; *Fellers v. United States* (2004) 540 U.S. 519 [157 L.Ed.2<sup>nd</sup> 1016].)

A criminal defendant’s initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the **Sixth Amendment** right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct. (*Rothgery v. Gillespie* (2008) 554 U.S. 191 [171 L.Ed.2<sup>nd</sup> 366]; “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”)

A criminal suspect’s **Sixth Amendment** right to counsel is *not* implicated until that point where he has been formally charged in court; i.e., “*after the first formal charging proceeding.*” (Italics added; *People v. Woods* (2004) 120 Cal.App.4<sup>th</sup> 929, 939-941.)

As to whether the filing of a criminal “*complaint*” is sufficient to trigger one’s **Sixth Amendment** right to counsel, see discussion, “*Filing of a Complaint,*” below.

The U.S. Supreme Court has recently ruled, however, that if an officer first advises a defendant of his **Sixth Amendment** right to counsel and obtains a waiver of that right, there is no error in talking to the defendant without the presence of his attorney, even after his arraignment. (See *Montejo v. Louisiana* (May 26, 2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

*Rights Applicable to All “Critical Stages:”* After a defendant’s **Sixth Amendment** right to counsel attaches, he or she has a right to the advice of counsel at all “critical stages” of the proceedings, defined as “any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused right to a fair trial.” (*Holloway v. Arkansas* (1978) 435 U.S. 475 [55 L.Ed.2<sup>nd</sup> 426]; *United States v. Wade* (1967) 388 U.S. 218, 226 [18 L.Ed.2<sup>nd</sup> 1149, 1157].)

A criminal defendant is entitled to the assistance of counsel at all “critical stages” of a prosecution; i.e., “where substantial rights of a criminal accused may be affected.” (*Mempa v. Rhay* (1967) 389 U.S. 128 [19 L.Ed.2<sup>nd</sup> 336].)

This is normally from defendant’s initial court appearance and arraignment through the completion of his first appeal. (See *United States v. Wade, supra.*)

The “critical stages” of a criminal prosecution typically extend, therefore, from arraignment (and perhaps even before arraignment; see below) through the completion of the first appeal. (*Douglas v. California* (1963) 372 U.S. 353 [9 L.Ed.2<sup>nd</sup> 811].) Between these two events, a criminal defendant has been held to be entitled to an attorney at:

- Post-Charging live lineup. (*Gilbert v. California* (1967) 388 U.S. 263 [18 L.Ed.2<sup>nd</sup> 1178].)
- Interrogation. (*Montejo v. Louisiana* (May 26 2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)
- Arraignment and Plea. (*Moore v. Michigan* (1957) 355 U.S. 155 [2 L.Ed.2<sup>nd</sup> 167].)
- Preliminary Examination. (*Coleman v. Alabama* (1970) 399 U.S. 1 [26 L.Ed.2<sup>nd</sup> 387].)
- Juvenile Court Proceedings. (*In re Gault* (1967) 387 U.S. 1 [18 L.Ed.2<sup>nd</sup> 527].)
- Probation Revocation Proceedings. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778 [36 L.Ed.2<sup>nd</sup> 656].)
- A Parole Revocation Hearing. (*Morrissey v. Brewer* (1972) 408 U.S. 471 [33 L.Ed.2<sup>nd</sup> 484].)
- Trial: A criminal defendant is entitled to counsel at any criminal trial where an accused is actually deprived of liberty. (*Argersinger v. Hamlin* (1972) 407 U.S. 25 [32 L.Ed.2<sup>nd</sup> 530].) However, even though incarceration is an option, if none is imposed, there is no constitutional right to the assistance of an attorney. (*Scott v. Illinois* (1979) 440 U.S. 367 [59 L.Ed.2<sup>nd</sup> 383].)
- Closing arguments. (*People v. Noel* (2005) 128 Cal.App.4<sup>th</sup> 1391, 1383.)
- Appeal. (*Douglas v. California, supra.*)



Certain events are *not* considered to be “*Critical Stages*:”

*Consent to Search*: Requesting a consent to search is *not* a “*critical stage*” requiring the assistance of counsel. (*United States v. Kon YuLeung* (2<sup>nd</sup> Cir. 1990) 910 F.2<sup>nd</sup> 33, 38-40, consent valid despite having been indicted; *United States v. Hidalgo* (11<sup>th</sup> Cir. 1993) 7 F.3<sup>rd</sup> 1566, 1570.)

But see *Tidwell v. Superior Court* (1971) 17 Cal.App.3<sup>rd</sup> 780, 789, where it was ruled that obtaining a consent search from a charged juvenile was a **Sixth Amendment** violation.

*Preindictment Lineup*: A preindictment lineup is *not* a “*critical stage*” requiring the presence of defense counsel. (*Kirby v. Illinois* (1972) 406 U.S. 682 [32 L.Ed. 2<sup>nd</sup> 411].)

California law still requires counsel at a preindictment/pre-arraignment lineup (*Raven v. Deukmejian* (1990) 52 Cal.3<sup>rd</sup> 336.), but does not exclude evidence of identification obtained at the lineup even when conducted in violation of this rule. (*People v. Johnson* (1992) 3 Cal.4<sup>th</sup> 1183, 1222.)

*Booking Questions*: Questioning a person to obtain routine biographical information at the subject’s booking does *not* involve an attempt to elicit incriminating information, and therefore does not constitute a **Sixth Amendment** violation even though done without his attorney being present. (*United States v. Godinez* (6<sup>th</sup> Cir. 1997) 114 F.3<sup>rd</sup> 583, 589.)

*Collection of Evidence*: Defendant is not entitled to the presence of counsel during the collection of a *urine sample* after an arrest for driving under the influence. (*United States v. Edmo* (9<sup>th</sup> Cir. 1998) 140 F.3<sup>rd</sup> 1289, 1293.)

*Sex Registration*: Defendant registering as a sex registrant (per **P.C. § 290(a)**) at a police station is not entitled to the assistance of his attorney in that the process is not the equivalent to a custodial interrogation, and is not a critical stage requiring the assistance of an attorney. (*People v. Sanchez* (2003) 105 Cal.App.4<sup>th</sup> 1240, 1245-1246.)

*During Investigation*: After defendant had received a “target letter” (telling him he was the target of a criminal investigation), after depositions were taken from material witnesses, and during

the time when defendant had retained counsel, but prior to being indicted, is *not* a critical stage providing defendant with a **Sixth Amendment** right-to-counsel protection. (*United States v. Hayes* (9<sup>th</sup> Cir. 2000) 231 F.3<sup>rd</sup> 663.)

“(T)he right to counsel of a person who has not so requested does not arise when he is ‘under investigation,’ but rather the right attaches when the process has shifted from being one of investigation to one of accusation [Citations.]” (*In re Brindle* (1979) 91 Cal.App.3<sup>rd</sup> 660.)

*An extradition proceeding* does not trigger one’s **Sixth Amendment** protections. (*Anderson v. Alameida* (9<sup>th</sup> Cir. 2005) 397 F.3<sup>rd</sup> 1175; *People v. Wheelock* (2004) 117 Cal.App.4<sup>th</sup> 561, 565-569.)

A pre-trial status conference merely confirming the trial date is not a “critical stage” requiring competence counsel. (*United States v. Benford* (9<sup>th</sup> Cir. 2009) 574 F.3<sup>rd</sup> 1228, 1231-1233.)

A court hearing where the court grants the prosecution’s motion to collect a DNA sample from the defendant, where the defendant fails to show any prejudice. (*McNeal v. Adams* (9<sup>th</sup> Cir. 2010) 623 F.3<sup>rd</sup> 1283.)

*When the **Sixth Amendment** Has Not Attached:*

Preparing to arrest defendant while search warrants are being executed at his home and businesses does *not* trigger defendant’s **Sixth Amendment** right to counsel. (*People v. Woods* (2004) 120 Cal.App.4<sup>th</sup> 929, 939-941.)

The **Sixth Amendment** is *not* implicated merely because an informant is being used to pump the defendant for information while, unbeknownst to the defendant, the scene is surrounded by law enforcement officers waiting to arrest him and while search warrants are being executed at the defendant’s residence and businesses. The Court noted that a criminal suspect’s **Sixth Amendment** right to counsel is *not* implicated until that point where he has been formally charged in court; i.e., “*after the first formal charging proceeding.*” (*Ibid.*)

The fact that an officer deliberately delays making an arrest until after a “*non-custodial*” interrogation can be completed is irrelevant. The suspect has no right to an earlier arrest so as to trigger his **Sixth Amendment** right to counsel. “*There is no constitutional right to be arrested.*” (See *Hoffa*

*v. United States* (1966) 385 U.S. 293, 319-310 [17 L.Ed.2<sup>nd</sup> 374, 386]; and *People v. Webb* (1993) 6 Cal.4<sup>th</sup> 494, 527.)

Arresting a defendant in an Indian tribal court *does not* trigger the defendant's **Sixth Amendment** right to an attorney when later prosecuted in a federal district court. (*United States v. Charley* (9<sup>th</sup> Cir. 2005) 396 F.3<sup>rd</sup> 1074, 1082-1083.)

Because the “*Bill of Rights*,” including the **Sixth Amendment**, does not apply to Indian tribes, “since the Indian tribes are ‘distinct, independent political communities, retaining their original rights’ [Citation],” a tribal court arraignment *does not* trigger the defendant's **Sixth Amendment** protections. (*United States v. Doherty* (6<sup>th</sup> Cir. 1997) 126 F.3<sup>rd</sup> 769, 777-783; defendant questioned by federal investigators after his arraignment in tribal court.)

Civil proceedings in Juvenile Court to determine the placement of a child, where the minor was suspected of molesting a child and was appointed an attorney, *does not* shield him from questioning by criminal investigators. The **Sixth Amendment** right to an attorney only attached after being charged with the offense in a criminal court. (*People v. Chutan* (1999) 72 Cal.App.4<sup>th</sup> 1276.)

*Neither* having an attorney for purposes of *extradition* nor the existence of an *arrest warrant*, absent the filing of a case, triggers the suspect's **Sixth Amendment** right to counsel. (*People v. Wheelock* (2004) 117 Cal.App.4<sup>th</sup> 561, 565-569; *United States v. Yousef* (2<sup>nd</sup> Cir. 2003) 327 F.3<sup>rd</sup> 56, 142, fn. 66; *DeSilva v. DiLeonardi* (7<sup>th</sup> Cir. 1999) 181 F.3<sup>rd</sup> 865, 868-869; *Chewing v. Rogerson* (8<sup>th</sup> Cir. 1994) 29 F.3<sup>rd</sup> 418, 420; *Judd v. Vose* (1<sup>st</sup> Cir. 1987) 813 F.2<sup>nd</sup> 494, 497; *Anderson v. Alameida* (9<sup>th</sup> Cir. 2005) 397 F.3<sup>rd</sup> 1175.)

**P.C. § 804**, in making reference to a prosecution being commenced when an arrest or bench warrant is issued, applies to the running of a “*statute of limitations*” and not the **Sixth Amendment**. (*People v. Wheelock, supra*, at pp. 565-566.)

*Note:* The existence of an arrest warrant, however, may mean that a complaint has been filed with the court. See below for a discussion as to whether the filing of a complaint triggers a defendant's **Sixth Amendment** trial rights.

A couple of federal cases seem to be out of step with the above rules:

A sealed, secret indictment, unknown to the defendant, when defendant had already retained counsel, was held to be sufficient to trigger defendant's

**Sixth Amendment** rights. (*United States v. Arnold* (3<sup>rd</sup> Cir. 1997) 106 F.3<sup>rd</sup> 37, 40.)

See also *United States v. Harrison* (9<sup>th</sup> Cir. 2000) 213 F.3<sup>rd</sup> 1206; a case where the Ninth Circuit Court of Appeal determined that an uncharged criminal suspect's **Sixth Amendment** rights were violated when he was questioned after:

- The defendant retained counsel on an ongoing basis to assist with a pending criminal investigation;
- The government knew, or should have known, that the defendant had an ongoing legal representation relating to the subject of that investigation; *and*
- The eventual indictment brought charges precisely anticipated by the scope of the pre-indictment investigation.

*Filing of a "Complaint:"* Most of the appellate authority, above, only talks about the initiation of criminal proceedings by "*formal charge, preliminary hearing, indictment, information, or arraignment.*" (See *Kirby v. Illinois* (1972) 406 U.S. 682, 689 [32 L.Ed.2d 411, 417], above.) The filing of a "*complaint*" in state court is typically not mentioned. An issue may arise as to whether the simple filing of a complaint, such as when necessary to obtain an arrest warrant but without the defendant making a court appearance, comes within the "*formal charge*" provision.

There has for some time been state authority to the effect that filing a complaint does in fact constitute the initiation of criminal proceedings against the defendant, triggering the protections of the **Sixth Amendment**. (*People v. Engert* (1987) 193 Cal.App.3<sup>rd</sup> 1518.)

See also *People v. Lebell* (1979) 89 Cal.App.3<sup>rd</sup> 772: Surreptitiously interrogating a criminal suspect who had been charged by complaint, but had not been informed of this fact, without advising him of his right to an attorney, *is* a **Sixth Amendment** violation.

And see *People v. Henderson* (1990) 225 Cal.App.3<sup>rd</sup> 1129, where the Court did not contest the validity of the rule in *Engert* and *Lebell*, but merely held that the defendant's statements were admissible in that defendant, knowing that a complaint had been filed, waived her right to the assistance of counsel and was not subjected to any "trickery of deceptive means . . . by the police."

And see *People v. Wader* (1993) 5 Cal.4<sup>th</sup> 610, 653-654, where it was held, without analyzing the issue, that the filing of the complaint had triggered defendant's **Sixth Amendment** right to counsel, but that because

he had not yet “invoked” such a right, law enforcement was not precluded from initiating an interrogation.

And see *People v. Frye* (1998) 18 Cal.4<sup>th</sup> 894, 987, where it was assumed, without arguing the issue, that the filing of a complaint triggered the defendant’s **Sixth Amendment** right to counsel.

Federal authority has held to the contrary, specifically holding that the filing of a complaint *does not* trigger the **Sixth Amendment**. (*United States v. Duvall* (2<sup>nd</sup> Cir. 1976) 537 F.2<sup>nd</sup> 15, 22; *United States v. Pace* (9<sup>th</sup> Cir. 1986) 833 F.2<sup>nd</sup> 1307, 1312; *United States v. Langley* (11<sup>th</sup> Cir. 1988) 848 F.2<sup>nd</sup> 152, 153.)

However, in these federal cases, it is noted that the “principal function of a (federal) complaint ‘is as a basis for an application for an arrest warrant’” (See *United States v. Pace*, *supra*; and *United States v. Duvall*, *supra*.), and, arguably, not necessarily the formal initiation of a criminal case as occurs under California law. (See P.C. § 949)

“(E)very (federal) circuit that has considered the issue has concluded that a federal complaint does not qualify as such, primarily because of its limited roll as the precursor to an arrest warrant (as opposed to a ‘formal charge’). (Citations, including *United States v. Pace*, *supra*., omitted)” *United States v. Boskic* (1<sup>st</sup> Cir. 2008) 545 F.3<sup>rd</sup> 69, 83, referring to **Federal Rules of Criminal Procedure, Rules 3 & 4**, noting that a “federal complaint” is merely a statement of probable cause filed by a law enforcement officer, without the necessary participation of a prosecutor, as a legal prerequisite to the issuance of an arrest warrant.)

And see *Anderson v. Alameida* (9<sup>th</sup> Cir. 2005) 397 F.3<sup>rd</sup> 1175, where it was held that a California state complaint, filed by a police officer for the purpose of obtaining an arrest warrant, *did not* trigger the defendant’s **Sixth Amendment** rights.

The issue was recently met head-on in *People v. Viray* (2005) 134 Cal.App.4<sup>th</sup> 1186, where the Sixth District Court of Appeal found that the filing of a complaint *does* in fact trigger one’s **Sixth Amendment** right to counsel.

*Note:* A possible distinction between *Viray* and the federal decisions, including *Anderson v. Alameida*, although not discussed in either case, is that in *Viray*, the complaint was filed by a prosecutor and intended to be the initiation of the criminal

prosecution of the defendant pursuant to **P.C. § 806**. In *Anderson*, the complaint was apparently filed by a law enforcement officer for the sole purpose of obtaining an arrest warrant, as authorized by **P.C. § 813**. *Viray* and *Anderson* can be reconciled if it is assumed that the two procedures were intended to set up different uses of a complaint.

It is also arguable that *Rothgery v. Gillespie* (2008) 554 U.S. 191 [171 L.Ed.2<sup>nd</sup> 366], holding that; “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the **Sixth Amendment** right to counsel,” has overruled, by implication, *Viray*.

But see *Patterson v. Illinois* (1988) 487 U.S. 285 [101 L.Ed.2<sup>nd</sup> 261], noting that the filing of an indictment triggered defendant’s **Sixth Amendment** right to counsel. Assuming *Patterson* is still good law (and there’s no reason for assuming that it is not), then *Viray* is also still good law, and *Rothgery* only applies to one way to trigger a defendant’s **Sixth Amendment** rights without intended to exclude others.

*Waiver of Sixth Amendment Rights*: A charged criminal defendant may “waive” his right to counsel, so long as such a waiver is made knowingly, voluntarily and intelligently. (*Johnson v. Zerbst* (1938) 304 U.S. 1458, 464 [82 L.Ed.1461, 1466]; *Patterson v. Illinois* (1988) 487 U.S. 285, 292, fn. 4 [101 L.Ed.2<sup>nd</sup> 261, 272]; *Coughlan v. United States* (9<sup>th</sup> Cir. 1968) 391 F.2<sup>nd</sup> 371.)

“In order to invoke the right of self-representation successfully, a defendant's waiver of counsel must be ‘timely, not for the purposes of delay, unequivocal, and knowing and intelligent.’ (Cites omitted; *McCormick v. Adams* (9<sup>th</sup> Cir. 2010) 621 F.3<sup>rd</sup> 970, 976.)

“If instigated by an accused specifically waiving the right to counsel, interrogation out of counsel’s presence may be permissible.” (*People v. Manson* (1976) 61 Cal.App.3<sup>rd</sup> 102, 164-165.)

*Burden of Proof*: It is incumbent upon the State to prove “an intentional relinquishment or abandonment of a known right or privilege.” (*Johnson v. Zerbst, supra*; *Brewer v. Williams* (1977) 430 U.S. 387, 404 [51 L.Ed.2<sup>nd</sup> 424, 439].)

It is the state’s burden to prove a voluntary, knowing, and intelligent relinquishment of the defendant’s **Sixth Amendment** right to

counsel. (*Patterson v. Illinois* (1998) 487 U.S. 285, 293 [101 L.Ed.2<sup>nd</sup> 261, 272].)

“This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.” (*Brewer v. Williams*, *supra*, at p. 404 [51 L.Ed.2<sup>nd</sup> at p. 440]; citing *Schneekloth v. Bustamonte* (1972) 412 U.S. 218, 238-240 [36 L.Ed.2<sup>nd</sup> 854, 869-870].)

*In Court:* A criminal defendant has a constitutional right to waive the assistance of counsel and represent himself, so long as he is sufficiently mentally competent to understand what it is he is giving up. (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2<sup>nd</sup> 562].)

“Generally, ‘[a] trial court must grant a defendant’s request for self-representation if three conditions are met:”

- The defendant must be mentally competent, and must make his request knowingly and intelligently, having been appraised of the dangers of self-representation.
- Defendant must make his request unequivocally.
- Defendant must make his request within a reasonable time before trial.

(*People v. Tena* (2007) 156 Cal.App.4<sup>th</sup> 598, 604-605; quoting *People v. Welch* (1999) 20 Cal.4<sup>th</sup> 701, 729; *People v. Stanley* (2006) 39 Cal.4<sup>th</sup> 913, 931-932; *People v. Jackson* (2009) 45 Cal.4<sup>th</sup> 662, 689.)

A “*Faretta* waiver:”

In order for a “*Faretta* waiver” to be “*knowing and intelligent*,” the trial court must insure that he understands:

- The nature of the charges against him;
- The possible penalties;
- The dangers and disadvantages of self-representation;  
*and*
- The defendant’s inability to rely upon the trial court to give personal instruction on courtroom procedure

or to provide the assistance that otherwise would have been rendered by counsel.

*(United States v. Erskine* (9<sup>th</sup> Cir. 2004) 355 F.3<sup>rd</sup> 1161, 1167; *People v. Sullivan* (2007) 151 Cal.App.4<sup>th</sup> 524, 545; *People v. Barnum* (2003) 29 Cal.4<sup>th</sup> 1210, 1214-1215.); *McCormick v. Adams* (9<sup>th</sup> Cir. 2010) 621 F.3<sup>rd</sup> 970, 977.)

Defendant should also be told that:

- Self-representation is almost always unwise and that the defense he conducts might be to his detriment;
- He will have to follow the same rules that govern attorneys;
- The prosecution will be represented by experienced, professional counsel who will have a significant advantage over him in terms of skill, training, education, experience, and ability;
- The court may terminate his right to represent himself if he engages in disruptive conduct; *and*
- He will lose the right to appeal his case on the grounds of ineffective assistance of counsel.

*(People v. Phillips* (2006) 135 Cal.App.4<sup>th</sup> 422, 428; noting that the above list is *not* necessarily exhaustive. See also *People v. Sullivan*, *supra*, at p. 546.)

A defendant who chooses to represent himself in a felony case must be advised by the court of his right to the assistance of counsel on at least two separate occasions:

- When first brought before a magistrate and advised of the filing of the complaint. **(P.C. § 859)**
- After the preliminary examination when the defendant is arraigned in superior court on the information. **(P.C. § 987)**

A defendant must understand his constitutional right to have a lawyer perform certain core functions, and the possible



consequences of mishandling these core functions and the lawyer's superior ability to handle them. (*United States v. Gerritsen* (9<sup>th</sup> Cir. 2009) 571 F.3<sup>rd</sup> 1001; such understanding shown where the record indicated that defendant had represented himself in at least six jury trials in state court and a civil trial in federal court.)

It is the defendant's burden to show that he was *not* properly advised and that his waiver was not "*knowingly and intelligent.*" (*People v. Sullivan*, *supra*, at p. 546-552; noting that where the record is not available, defendant has failed to meet his burden.)

There is no requirement that the defendant be advised of the factors that are unique to a death penalty case. "The trial court is not required to ensure that the defendant is aware of legal concepts such as the various burdens of proof, the rules of evidence, or the fact that the pursuit of one avenue of defense might foreclose another. . . ." (*People v. Riggs* (2008) 44 Cal.4<sup>th</sup> 248, 274-278.)

At footnote 10, pg. 277, the *Riggs* Court notes that "the defendant's technical legal knowledge is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself," quoting from *People v. Windham* (1977) 19 Cal.3<sup>rd</sup> 121, 128.

A defendant who represents herself cannot later complain on appeal that an issue was not properly raised at the trial court level, and thus has waived that issue, even if she had counsel at one point who had the opportunity to raise the issue and should have, so long as she also had the opportunity to raise it herself while representing herself. (*People v. Polk* (2010) 190 Cal.App.4<sup>th</sup> 1183, 1195-1196; i.e., an inadequate advisal of her *Miranda* rights which, because not raised at the trial level, allowed for the admission of incriminating statements that should have been suppressed.)

Failure of the court to advise a pro. per. defendant of his right to the assistance of a lawyer is error (*People v. Sohrab* (1997) 59 Cal.App.4<sup>th</sup> 89, 95-102.), but does not necessarily require reversal of a subsequent conviction. (*People v. Crayton* (2002) 28 Cal.4<sup>th</sup> 346.)

However, an improper denial of a request to represent one's self is "not amenable to harmless error analysis. The right is either

respected or denied; its deprivation cannot be harmless.” (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8 [79 L.Ed.2<sup>nd</sup> 122].)

Making a motion to substitute counsel (i.e, a “*Marsden motion*.” *People v. Marsden* (1970) 2 Cal.3<sup>rd</sup> 118.) does not, by itself, encompass a motion to represent oneself as well. Failure to separate the two and specifically move to represent oneself waives the issue. (*Robinson v. Kramer* (9<sup>th</sup> Cir. 2009) 588 F.3<sup>rd</sup> 1212.)

A court’s promise that the issue would be revisited “at any time” should the defendant change his mind was not sufficient to show that his waiver of counsel was not intelligently made when the record was clear that he was determined to represent himself even before the court made this statement. (*McCormick v. Adams* (9<sup>th</sup> Cir. 2010) 621 F.3<sup>rd</sup> 970.)

A defendant’s right to represent himself, however, may be forfeited through his own misconduct, unless the misconduct is unrelated to and independent of the underlying prosecution and thus presents no danger of impairing the integrity of the trial. (*Ferrel v. Superior Court* (1978) 20 Cal.3<sup>rd</sup> 888; abusing his pro. per. status by using his legal runner for gambling purposes, and by damaging a jail telephone, insufficient cause to revoke defendant’s pro. per. status.)

Demonstrating his inability to follow the court’s rules by being disruptive and refusing to comply with the court’s orders is sufficient cause to deny a defendant his right to represent himself. (*People v. Watts* (2009) 173 Cal.App.4<sup>th</sup> 621.)

One form of serious and obstructionist misconduct is witness intimidation, which, by its very nature, compromises the fact-finding process and constitutes a quintessential “subversion of the core concept of a trial.” (*United States v. Dougherty* (D.C. Cir. 1972) 473 F.2<sup>nd</sup> 1113, 1125.)

A defendant’s forfeiture of his right to represent himself may result from activities outside the courtroom. “Ultimately, the effect, not the location, of the misconduct and its impact on the core integrity of the trial will determine whether termination is warranted.” *People v. Carson* (2005) 35 Cal.4<sup>th</sup> 1, 9.)

Factors to consider include:

- The availability and suitability of alternative sanctions;
- Whether the defendant has been warned that particular misconduct will result in termination of in propria persona status;
- Whether the defendant has “intentionally sought to disrupt and delay his trial.” (*Id.*, at p. 10.)

A waiver of one’s request to represent himself may be found where defendant has abandoned the request, as determined by his subsequent conduct. (*People v. Stanley* (2006) 39 Cal.4<sup>th</sup> 913, 929; *People v. Tena* (2007) 156 Cal.App.4<sup>th</sup> 598, 609-612.)

In order to invoke his right to represent himself, defendant must make an unequivocal assertion of that right (*People v. Tena, supra*, at pp. 607-609.) within a reasonable time prior to the commencement of trial. (*People v. Bradford* (1997) 15 Cal.4<sup>th</sup> 1229, 1365; *Moon v. Superior Court* (2005) 134 Cal.App.4<sup>th</sup> 1521; *People v. Jackson* (2009) 45 Cal.4<sup>th</sup> 662, 690.)

A defendant’s objection to his attorney’s request for a continuance, indicating to the court that he is prepared to proceed without the assistance of his attorney, is *not* an unequivocal request to represent himself. (*Woods v. Sinclair* (9<sup>th</sup> Cir. 2011) 655 F.3<sup>rd</sup> 886, 896-899.)

Defendant’s request to relieve his attorney and to represent himself two weeks before trial, where granting it would necessarily delay the trial and disrupt the proceedings, and when there are elderly witnesses, was properly denied. (*People v. Lynch* (2010) 50 Cal.4<sup>th</sup> 693, 711-728.)

“The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant’s conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant’s conduct or words reflecting ambivalence about self-representation may support the court’s decision to deny the defendant’s motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.” (*People v. Marshall* (1997) 15 Cal.4<sup>th</sup> 1, 23.)

Asking to represent himself after being frustrated by a court commissioner's refusal to order defendant's public defender to subpoena certain witnesses for preliminary examination, and then later a judge's denial of his motion to have his attorney replaced by a new attorney, where the issue was thereafter abandoned, held to be "impulsive reactions" to not getting his way as opposed to an unequivocal desire to represent himself. (*People v. Tena, supra.*)

*Faretta* motion made after a preliminary examination was underway was timely because defendant specifically did not want a continuance and indicated that he was ready to proceed without any delays. (*Moon v. Superior Court, supra*, at p. 1531.)

A defendant does not have an absolute constitutional right to reappointment of counsel mid-trial after his intelligent and knowing waiver of his right to counsel. (*John-Charles v. California* (9<sup>th</sup> Cir. 2011) 646 F.3<sup>rd</sup> 1243, 1248-1251.)

Issues that are *not* proper reasons for denying a defendant's motion to represent himself:

A defendant's ability to effectively represent himself is not a proper consideration under *Faretta*. (*People v. Welch* (1999) 20 Cal.4<sup>th</sup> 701, 733.)

A defendant's technical legal knowledge is also not a reason to deny his right to represent himself. (*People v. Dunkle* (2005) 36 Cal.4<sup>th</sup> 861, 908.)

Defendant having been a "slow learner" in school, and having a limited education, therefore, is not cause to deny a *Faretta* motion. (*People v. Doolin* (2009) 45 Cal.4<sup>th</sup> 390, 454.)

A jailed defendant may still represent himself in a murder trial even though disciplinary restrictions would hinder his trial preparation. (*People v. Butler* (2009) 47 Cal.4<sup>th</sup> 814; death row inmate on trial in this case for stabbing to death another inmate.)

*However*: "The Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they

are not competent to conduct trial proceedings by themselves.” (*Indiana v. Edwards* (2008) 554 U.S. 164, 178 [171 L.Ed.2<sup>nd</sup> 345].)

A state, however, may constitutionally allow a “gray-area” defendant to waive his right to counsel and represent himself, if it chooses to do so. (*Id.*, at p. 173; citing *Godinez v. Moran* (1993) 509 U.S. 389 [125 L.Ed.2<sup>nd</sup> 321] where the issue was whether defendant was sufficiently competent to plead guilty.)

“*Edwards* does not *compel* a trial court to deny a defendant the exercise of his or her right to self-representation; it simple *Permits* a trial court to require representation for a defendant who lacks mental competency to conduct trial proceedings.” (*United States v. Ferguson* (9<sup>th</sup> Cir. 2009) 560 F.3<sup>rd</sup> 1060, 1070, fn. 6.)

Where the record reflects the trial court’s recognition that defendant’s competence to stand trial was not the test for determining whether defendant had the mental capacity to represent himself, allowing him to do so was not an abuse of discretion. (*United States v. Thompson* (9<sup>th</sup> Cir. 2009) 587 F.3<sup>rd</sup> 1165, 1171-1173.)

California courts may deny self-representation when the United States Constitution permits such denial. California courts have discretion to deny self-representation to those defendants who, although competent to stand trial, may not represent themselves because to refuse to recognize such discretion would be inconsistent with California’s own law. Because California law provided no statutory or constitutional right of self-representation, such denial also does not violate a state right. The Supreme Court here determined that the trial court acted within its discretion in revoking defendant’s self-representation status. The trial judge, who had permitted defendant to represent himself for several months, revoked defendant’s self-representation status following a very careful and thorough discussion. The trial judge had previously appointed three mental health experts to evaluate defendant’s competence to stand trial and had heard their testimony at the trial competency hearing. The record supported the trial court’s conclusion that defendant, although competent to stand trial, was not competent to conduct trial proceedings by himself. (*People v. Johnson* (2012) 53 Cal.4<sup>th</sup> 519.)

A defendant who asks to represent himself, or who asks for an attorney after already being granted the right to represent himself, such request being made mid-trial, may be granted that right by the court in exercising its discretion. The factors for the court to consider include, but are not limited to:

- Defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation.
- The reasons set forth for the request.
- The length and stage of the trial proceedings.
- Disruption or delay which reasonably might be expected to ensue from the granting of such a motion, *and*
- The likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

(*People v. Elliott* (1977) 70 Cal.App.3<sup>rd</sup> 984; *People v. Windham* (1977) 19 Cal.3<sup>rd</sup> 121; *People v. Lawley* (2002) 27 Cal.4<sup>th</sup> 102.)

But a request for reappointment of an attorney mid-trial may be denied in the trial court's discretion as untimely, and causing a "significant disruption" already set to begin with a jury selected. (*People v. Lawrence* (2009) 46 Cal.4<sup>th</sup> 186, 191-196.)

E.g. In *People v. Lawrence*, *supra*, it was held by the appellate court to be an abuse of discretion for the trial court to refuse to allow defendant to have a court-appointed attorney when, during and then again after jury selection, defendant asked for an attorney while indicating to the court that voir dire made him realize that he couldn't competently represent himself. This is despite the fact that he had properly waived counsel just before jury selection and no attorney (including his previously retained attorney) was available to help him at that time without causing a two-week delay in the trial. The California Supreme Court reversed the court of appeal finding the trial court's denial of defendant's request for reappointment of an attorney was not an abuse of discretion under the circumstances.

In a death penalty case, the guilt and the penalty phase are considered to be one trial. Therefore, a motion to represent oneself between phases is considered to be untimely, and subject to the discretion of the court. (*People v. Mayfield* (1997) 14 Cal.4<sup>th</sup> 668, 810.)

The same rule is true for a motion to represent oneself for sentencing, after the verdict in the penalty phase. (*People v. Doolin* (2009) 45 Cal.4<sup>th</sup> 390, 455.)

Asking for a continuance, when it implicates a defendant's **Sixth Amendment** right to counsel, requires the court to balance several factors in determining whether denial of a continuance was "fair and reasonable:"

- Whether the continuance would inconvenience witnesses, the court, counsel, or the parties;
- Whether other continuances have been granted;
- Whether legitimate reasons exist for the delay;
- Whether the delay is the defendant's fault; *and*
- Whether a denial would prejudice the defendant.

(*United States v. Thompson* (9<sup>th</sup> Cir. 2009) 587 F.3<sup>rd</sup> 1165, 1173-1175; citing *United States v. Studley* (9<sup>th</sup> Cir. 1986) 783 F.2<sup>nd</sup> 934, 938.)

In *Thompson*, denial of a motion to reappoint counsel and for a continuance was properly denied where 3½ years had passed since the initial pretrial conference, trial was scheduled for the next day, and defendant had already been granted 12 or 13 prior continuances. Defendant's conduct was determined to be "clearly dilatory."

After defendant indicated a desire to represent himself, responding to the court's warnings that the trial was to begin the next day and that he might not be ready to represent himself that early, defendant agreed that the court "had a point." The court never conducted further hearings into how much time defendant would need, if any, to be prepared, nor provided any specific reasons for denying defendant's motion to represent himself. Failure to do so, while failing to honor defendant's request to represent himself, was error. (*United States v. Farias* (9<sup>th</sup> Cir. 2010) 618 F.3<sup>rd</sup> 1049, 1051-1055.)

A defendant is entitled to represent himself at sentencing, and even re-sentencing after the case is remanded by an appellate court for resentencing. But because this proceeding is not likely to be

“*structural*” (as it might be at trial), an inappropriate denial of this right may be held to be non-prejudicial. (*United States v. Maness* (9<sup>th</sup> Cir. 2009) 566 F.3<sup>rd</sup> 894.)

*Advisory Counsel:* Once the court has determined that a defendant’s waiver of his right to counsel is knowing and intelligent, it may appoint standby or “advisory” counsel to assist the pro per defendant without infringing on his right to self-representation. (*United States v. Moreland* (9<sup>th</sup> Cir. 2007) 509 F.3<sup>rd</sup> 1201; 1208-1209; citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 176-177 [79 L.Ed.2<sup>nd</sup> 122].)

A defendant who waives his right to counsel, however, does not have a right to advisory counsel. (*United States v. Salemo* (9<sup>th</sup> Cir. 1996) 81 F.3<sup>rd</sup> 1453, 1460; *United States v. Kienenberger* (9<sup>th</sup> Cir. 1994) 13 F.3<sup>rd</sup> 1354-1356.)

The role of standby counsel is vague and undefined, and the defendant must retain control over his case. (*McKaskle v. Wiggins, supra*, at pp. 177-178; *United States v. Moreland, supra*.)

The trial court did not err in denying defendant’s requests for the appointment of co-counsel. Defendant, who represented himself during the pretrial stages of the proceedings but eventually chose to have an attorney represent him for part of the guilt phase of the trial, failed to make any compelling showing that the appointment of co-counsel instead of advisory counsel was justified. (*People v. Moore* (2011) 51 Cal.4<sup>th</sup> 1104, 1119-1123.)

Defendant also had complained that his access to a law library was restricted and his phone access had been limited. This is due to discovery of a “shank” found in his cell. The shank was fashioned from a metal rod taken from a typewriter in the library. “(A) defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense.’ ” Although the general rule is that the federal and state constitutional provisions concerning the assistance of counsel for criminal defendants include the right to access reasonably necessary defense services, this privilege for a pro per defendant may be restricted “for cause,” depending upon the circumstances. The Court found that despite the



restrictions, defendant had been provided with reasonable resources to present a defense. (*Id.*, at pp. 1124-1127.)

Other Waiver Issues: A charged criminal defendant may also waive his right to counsel, at least to a limited extent, by raising certain issues during trial that trigger a prosecution expert's right to administer certain tests to the accused for the purpose of determining the validity of the issue raised by defendant. For instance:

Pleading “*not guilty by reason of insanity*” carries with it a court obligation to appoint two psychiatrists or licensed psychologists with a doctoral degree in psychology for the purpose of interviewing and evaluating the defendant's mental state, thus waiving the defendant's **Sixth Amendment** right to the extent necessary to permit a proper examination of that condition. (*Centeno v. Superior Court [Los Angeles]* (2004) 117 Cal.App.4<sup>th</sup> 30; P.C. § 1027)

Similarly, a capital case defendant who claims mental retardation, done for the purpose of avoiding the death penalty (See *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2<sup>nd</sup> 335].), may be tested by a prosecution-selected expert for the purpose of rebutting such an allegation. (*Centeno v. Superior Court [Los Angeles]*, *supra*; P.C. § 1376.)

The expert's testimony, however, is admissible only for the purpose of litigating these issues in rebuttal to the defendant's presentation of evidence attempting to prove a mental defense or mental retardation. (*People v. Danis*, *supra*; *Centeno v. Superior Court [Los Angeles]*, *supra*; P.C. § 1376(b)(1))

*But*, note that cases allowing for a prosecution psychiatric expert to interview and evaluate a charged criminal defendant when the defendant raises an issue as to a possible mental defect or disease in mitigation to charged offenses (e.g., *People v. Danis* (1973) 31 Cal.App.3<sup>rd</sup> 782.) were overruled in *Verdin v. Superior Court* (2008) 43 Cal.4<sup>th</sup> 1096, where it was held that passage of **Proposition 115** in 1990, enacting **article I, section 30, subdivision (c)** of the **California Constitution**, and **P.C. § 1054 et seq.**, established the exclusive means of providing discovery (except where provided for in other statutes).

*Non-Criminal Hearings:* A defendant does *not* have a *Faretta* right to represent himself in proceedings other than criminal prosecutions. For example:

Criminal appeals. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 154 [145 L.Ed.2<sup>nd</sup> 597].)

Mentally Disordered Offender proceedings. (**P.C. §§ 2970, 2972**) (*People v. Williams* (2003) 110 Cal.App.4<sup>th</sup> 1577, 1585; although the court found a statutory right to represent himself; see also *People v. Hannibal* (2006) 143 Cal.App.4<sup>th</sup> 1087, 1092-1093; and *People v. Wrentmore* (2011) 196 Cal.App.4<sup>th</sup> 921, 928.)

Complaining on appeal that the trial court should not have granted him the right to represent himself at an MDO extension hearing, defendant will not be granted relief absent a showing that there was “*a reasonable probability*” that having an attorney would have made any difference. (*People v. Wrentmore, supra*, at pp. 929-931.)

Juvenile dependency proceedings. (*In re Angel W.* (2001) 93 Cal.App.4<sup>th</sup> 1074, 1080, although the court found a statutory right in **W&I § 317(b)**)

Conservatorship proceedings. (*Conservatorship of Joel E.* (2005) 132 Cal.App.4<sup>th</sup> 429, 435.)

Proceedings under the **Sexually Violent Predators Act** (i.e., **W&I §§ 6600 et seq.**) (*People v. Fraser* (2006) 138 Cal.App.4<sup>th</sup> 1430.)

“When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (*People v Fierro* (1991) 1 Cal.4<sup>th</sup> 173, 204.)

The decision whether to grant a motion to relieve a complaining defendant's attorney is within the discretion of the trial court. An abuse of discretion will not be found unless the failure to remove appointed counsel and appoint a replacement would "substantially impair" the defendant's right to effective assistance of counsel. (*People v. Roldan* (2005) 35 Cal.4<sup>th</sup> 646, 681; *People v. Abilez* (2007) 41 Cal.4<sup>th</sup> 472, 487-488.)

Once a defendant has an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when "the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*People v. Clark* (2011) 52 Cal.App.4<sup>th</sup> 856, 912-914.)

#### *Out of Court:*

*Suspect Initiates the Questioning:* As when the suspect has previously invoked and later seeks to waive his or her **Fifth Amendment** rights, a charged criminal suspect may also validly choose to waive his or her **Sixth Amendment** rights and initiate questioning with law enforcement. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [68 L.Ed.2<sup>nd</sup> 378, 385-386]; *Oregon v. Bradshaw* (1983) 462 U.S. 1039 [77 L.Ed.2<sup>nd</sup> 405]; *Wyrick v. Fields* (1982) 459 U.S. 42 [74 L.Ed.2<sup>nd</sup> 214]; see also *People v. McClary* (1977) 20 Cal.3<sup>rd</sup> 218, 226; *Patterson v. Illinois* (1988) 487 U.S. 285 [101 L.Ed.2<sup>nd</sup> 261].)

"(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." (*Michigan v. Harvey* (1990) 494 U.S. 344, 352 [108 L.Ed.2<sup>nd</sup> 293, 303]; *Montejo v.*

*Louisiana* (May 26 2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

Even where a defendant has already been appointed counsel on a pending case, he or she may validly choose to talk to law enforcement without the assistance of his or her attorney. (*People v. Stephens* (1990) 218 Cal.App.3<sup>rd</sup> 575, 583-586.)

The Court also noted the lack of any requirement that the defendant's attorney be notified prior to complying with defendant's request to talk to law enforcement. (*Id.*, at p. 583.)

See also; *People v. Arauz* (1970) 5 Cal.App.3<sup>rd</sup> 523, 530-531: Defendant, who had had an attorney appointed for him at a juvenile hearing, insisted on talking to his parole officer despite warnings that he should talk to his lawyer first: No violation.

And see *Adams v. Aiken* (4<sup>th</sup> Cir. 1992) 965 F.2<sup>nd</sup> 1306, 1315-1316; citing *Oregon v. Elstad* (1985) 470 U.S. 298 [84 L.Ed.2<sup>nd</sup> 222] as its authority: Four days after arrest, and after appointment and consultation with counsel, defendant, against his lawyer's advice, provided a written confession to the police. Defendant's written, signed confession, obtained with his attorney's presence and participation (although contrary to his attorney's advice), overcame any prior uncoerced **Fifth Amendment** self-incrimination and **Sixth Amendment** right to counsel violations.

A charged criminal defendant (after preliminary examination) who erroneously believed that he was no longer represented by a retained attorney because he had run out of money, validly waived his **Sixth Amendment** rights by contacting the police investigator and sought an interview, at least where he was advised of his *Miranda* rights including the right to appointed counsel if he could not afford one. (*People v. Sultana* (1988) 204 Cal.App.3<sup>rd</sup> 511, 518-521.)

It was noted, at page 521, that the police were under no obligation to notify his retained attorney of his client's wish to talk.

And it was also noted, at page 521, that the result would be different had the police improperly induced defendant to believe that his privately retained attorney was no longer working for him.

*Courts Critical of Contacts Without Attorney:* Even when the defendant chooses of his or her own accord to participate in direct communications without the assistance of his/her attorney, California courts have been extremely critical of such activities, particularly when done by (or, arguably, authorized by) the prosecutor. (See *People v. Manson* (1976) 61 Cal.App.3<sup>rd</sup> 102, 164-165.)

Courts tend to attach greater importance to a defendant's **Sixth Amendment** right to an attorney, with correspondingly harsher sanctions when a violation occurs, up to and including outright dismissal of a criminal case. (See *People v. Moore* (1976) 57 Cal.App.3<sup>d</sup> 437.)

Again, prosecutors must be wary of **Rule 2-100** of the **California Rules of Professional Conduct** (see also **Rule 4.2** of the **ABA Model Rules of Professional Conduct**), which prohibits any communication, directly or indirectly, with a defendant on a pending charge without the consent of the defendant's attorney, except as authorized by law. (*United States v. Lopez* (9<sup>th</sup> Cir. 1993) 4 F.3<sup>rd</sup> 1455; *Triple A Machine Shop v. State of California* (1989) 213 Cal.App.3<sup>rd</sup> 131; see above.)

#### *Right to Substitution of Counsel:*

A trial court has the discretion to permit a defendant to discharge his appointed counsel and to substitute another attorney during the trial. (*People v. Marsden* (1970) 2 Cal.3<sup>rd</sup> 118, 123.)

When a defendant asks that his appointed counsel be discharged and that new counsel be appointed, the trial court must provide the defendant with an opportunity to explain to the court the reasons for the request. “(A) judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of counsel.” (*Id.*, at p. 124.)

In determining whether a denial of a *Marsden* Motion violates one’s **Sixth Amendment** right to counsel requires a consideration of three factors:

- Timeliness of the motion;
- Adequacy of the court’s inquiry into the defendant’s complaint; *and*

- Whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.

(*People v. Abilez* (2007) 41 Cal.4<sup>th</sup> 472, 490-491.)

“A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation *or* that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (Citations omitted; *People v. Memro* (1995) 11 Cal.4<sup>th</sup> 786 857; *People v. Jackson* (2009) 45 Cal.4<sup>th</sup> 662, 682; *People v. Taylor* (2010) 48 Cal.4<sup>th</sup> 574, 599.)

The decision whether to substitute counsel is a discretionary call for the trial court. An appellate court will not find an abuse of discretion unless the trial court’s failure to substitute counsel would “substantially impair” defendant’s right to effective assistance of counsel. (*People v. Gutierrez* (2009) 45 Cal.4<sup>th</sup> 789, 803-804; *People v. Taylor, supra.*)

“Tactical disagreements between the defendant and his attorney do not by themselves constitute an “irreconcilable conflict.” The attorney is the one who has the authority to “make all but a few fundamental decisions for the defendant.” (*People v. Welch* (1999) 20 Cal.4<sup>th</sup> 701, 728-729; *People v. Nakahara* (2003) 30 Cal.4<sup>th</sup> 705, 719; *People v. Jackson, supra*, at p. 688.)

Requesting a new trial based upon a defendant’s claim of ineffective assistance of counsel *does not* trigger the court’s duty to conduct a *Marsden* hearing if the defendant’s desire for substitute counsel is not made clear. (*People v. Richardson* (2009) 171 Cal.App.4<sup>th</sup> 479, 484-485.)

Even if a competency hearing (per **P.C. § 1368**) is pending, a *Marsden* hearing must be held. The court “may and indeed must promptly consider a motion for substitution of counsel when the right to effective assistance ‘would be substantially impaired’ if his request were ignored.” (*People v. Taylor, supra*, at pp. 600-601; citing *People v. Stankewitz* (1990) 51 Cal.3<sup>rd</sup> 72, 88; see also *People v. Solorzano* (2005) 126 Cal.App.4<sup>th</sup> 1063, 1069-1071.)

However, denial of a request to conduct a *Marsden* hearing due solely to the pendency of a competency hearing is not prejudicial where the *Marsden* hearing is later held before

competency is determined. (*People v. Taylor, supra*, at p. 601; *People v. Govea* (2009) 175 Cal.App.4<sup>th</sup> 57.)

Lunging at the defense attorney and referring to her by a vulgar, sexist term, does not necessarily establish that the attorney-client relationship has been irretrievably damaged, and does not require the substitution of counsel. (*People v. Taylor, supra*, at p. 600.)

Defendant indicated to the trial court a desire to withdraw his plea of guilty to a charge of cultivation of marijuana. Without holding a *Marsden* hearing or asking defendant to explain his reasons, the trial court appointed conflict counsel for the sole purpose of looking into a plea withdrawal. The Appellate Court held that a trial court was obligated to conduct a *Marsden* hearing on whether to discharge defendant's trial counsel for all purposes and appoint new counsel when a criminal defendant clearly indicates after conviction a desire to withdraw the plea on the ground of ineffective assistance by current counsel and to obtain a substitute attorney. When such a request was made at any time during criminal proceedings, the trial court was obligated to give the defendant an opportunity to state any grounds for dissatisfaction with current counsel. Upon a showing that the right to counsel had been substantially impaired, substitute counsel had to be appointed as attorney of record for all purposes. The Appellate Court specifically disapproved the procedure of appointing a substitute or conflict attorney solely to evaluate whether a criminal defendant had a legal ground for plea withdrawal on the basis of the current counsel's incompetence. (*People v. Sanchez* (2011) 53 Cal.4<sup>th</sup> 80.)

*Forfeiture of Right to an Attorney:* It is also possible for a charged criminal defendant to “forfeit” his right to counsel by engaging in “*dilatory tactics*,” abuse directed towards his attorney, or other misconduct, although, in some circumstances, a forfeiture may be appropriate only after having been warned by the court. (*United States v. Goldberg* (3<sup>rd</sup> Cir. 1995) 67 F.3<sup>rd</sup> 1092, 1099-1101; *Gilchrist v. O’Keefe* (2<sup>nd</sup> Cir. 2001) 260 F.3<sup>rd</sup> 87.)

“(A)n accused may forfeit his right to counsel by a course of serious misconduct towards counsel that illustrates that lesser measures to control defendant are insufficient to protect counsel and appointment of successor counsel is futile.” (*King v. Superior Court* (2003) 107 Cal.App.4<sup>th</sup> 929.)

However, a defendant is entitled to “*due process*,” such as a hearing and an opportunity to be heard on the issue. (*Ibid.*)

The hearing, however, may not be necessary in all circumstances, such as when the defendant has physically assaulted his attorney in open court. (*United States v. Leggett* (3<sup>rd</sup> Cir. 1998) 162 F.3<sup>rd</sup> 237.)

*The “Jackson Rule:” Law Enforcement Initiated Questioning:*

Until May, 2009, it was a constitutional rule that statements obtained from a criminal suspect through a *police-initiated interrogation* after the defendant’s **Sixth Amendment** rights have been triggered by a “*formal charge, preliminary hearing, indictment, information, or arraignment*” (see above), were presumed to be invalid. (*Michigan v. Jackson* (1986) 475 U.S. 625 [89 L.Ed.2<sup>nd</sup> 631]; see also *Fellers v. United States* (2004) 540 U.S. 519 [157 L.Ed.2<sup>nd</sup> 1016].)

Known as the “*Jackson Rule*,” an important exception involved the situation where a defendant had been formally charged by the filing of a formal charge, preliminary hearing, indictment, information or an arraignment, but had *not yet* been to court to formally request the appointment of counsel. In such a case, so long as the defendant has been advised of his right to the assistance of an attorney and a waiver of that right obtained, law enforcement could initiate contact and question the charged criminal defendant. (*Patterson v. Illinois* (1988) 487 U.S. 285 [101 L.Ed.2<sup>nd</sup> 261].)

*Jackson*, however, was specifically overruled in *Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

In *Montejo*, it was held that an in-custody defendant may be contacted by law enforcement and, after a “*voluntary, knowing, and intelligent*” waiver of his **Fifth** (*Miranda*) and **Sixth** (right to counsel) **Amendment** rights, questioned, even if he has already been arraigned and even if, at arraignment, he has asserted his right to the assistance of counsel.

The *Montejo* Court held that the protections provided by the *Miranda*, *Edwards*, and *Minnick* cases (below) are sufficient and that the rule of *Jackson* is superfluous and unnecessary.

- *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2<sup>nd</sup> 694]; requiring an admonishment of rights, including to the assistance of an attorney, and a free, *voluntary and knowing waiver*.
- *Edwards v. Arizona* (1981) 451 U.S. 477, 483 [68 L.Ed.2<sup>nd</sup> 378, 386]; providing that an in-custody



suspect who has invoked his *Miranda* right to counsel may not be contacted again unless such contact is initiated by the defendant or he is released from custody.

- *Minnick v. Mississippi* (1990) 498 U.S. 146 [112 L.Ed.2<sup>nd</sup> 489]; providing that an in-custody suspect who has invoked his *Miranda* right to counsel may not be contacted again unless his attorney is present.

In *Montejo*, it was also noted that neither *Jackson* nor *Edwards* is necessary to protect an out-of-custody defendant because he “is in control, and need only shut his door or walk away to avoid police badgering.” Similarly, other “non-interrogative interactions with the State” (e.g., police lineups) do not involve the “inherently compelling pressures” that typically necessitate the need for a rule protecting a defendant from police badgering. An out-of-custody charged criminal defendant, therefore, may also be contacted and, upon advisal of his **Sixth Amendment** right to counsel and a wavier, may also be questioned out of the presence of his attorney. (*Montejo v. Louisiana, supra*, at pp. 2090-2091.)

*Admonishment of Rights:* A *Miranda*-style admonishment and waiver has been held “as a general matter” to be enough to waive one’s **Sixth Amendment** right to counsel when questioning a charged criminal suspect.

*Rule:* “The standard for waiver of the **Fifth** and **Sixth Amendment** rights to counsel is the same: the waiver must be (1) voluntary, and (2) a knowing and intelligent relinquishment of a known right or privilege.” (*United States v. Karr* (9<sup>th</sup> Cir. 1984) 742 F.2<sup>nd</sup> 493, 495-496; citing *Edwards v. Arizona* (1981) 451 U.S. 477, 482 [68 L.Ed.2<sup>nd</sup> 378, 385, **Fifth Amendment**; and *Brewer v. Williams* (1977) 430 U.S. 387, 404 [51 L.Ed.2<sup>nd</sup> 424, 439-440], **Sixth Amendment**; *Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955].)

There is no basis for finding the suspect’s **Sixth Amendment** right to counsel to be more important, or deserves greater protection, than his **Fifth Amendment** right to counsel. (*Patterson v. Illinois* (1988) 487 U.S. 285, 297-298 [101 L.Ed.2<sup>nd</sup> 261].)

There are not a lot of examples yet on what must be said in the form of an admonishment. Probably, merely telling him that a complaint has been filed before admonishing him, and then giving him a standard *Miranda* admonishment and waiver, would be enough:

If the subject knows that an accusatory pleading has been filed against him, a standard *Miranda* admonishment and waiver has been held to be sufficient. (*Patterson v. Illinois* (1988) 487 U.S. 285 [101 L.Ed.2<sup>nd</sup> 261].)

“As a general matter ... an accused who is admonished with the warnings prescribed by this Court in *Miranda* ... has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.” (*Montejo v. Louisiana* (2009) 556 U.S. 778 [173 L.Ed.2<sup>nd</sup> 955; citing *Patterson*, *supra*, at 296.])

California authority has held that if the subject *does not* know that an accusatory pleading has been filed against him, then he should be informed of this fact so that he knows what he is waiving. (*People v. Engert* (1987) 193 Cal.App.3<sup>rd</sup> 1518.)

At least one court has held that a person who wishes to discuss his or her case with law enforcement without the assistance of, or knowledge of, his or her attorney, should be given “a clear and explicit explanation of the **Sixth Amendment** rights defendant is giving up.” (*United States v. Mohabir* (2<sup>nd</sup> Cir. 1980) 624 F.2<sup>nd</sup> 1140, 1150-1153; requiring that his rights be explained by a neutral judicial officer, with an explanation of the significance and seriousness of the charges and the defendant’s position.)

The U.S. Supreme Court has specifically rejected *Mohabir*. (*Patterson v. Illinois*, *supra*, at p. 295.) Other courts have taken a more lenient view as well, requiring only that the subject receive a full *Miranda* admonishment, including the standard reference to his right to counsel, and be told that there are formal judicial proceedings pending against him. (*United States v. Karr*, *supra*, at p. 496; explaining that *Mohabir* is a minority position, and describing the many less stringent opinions by other federal circuit courts.)

The U.S. Supreme Court has held that; “As a general matter, . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda*, . . . has been sufficiently apprised of the nature of his **Sixth Amendment** rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing

and intelligent one. [fn. Omitted]” (*Patterson v. Illinois*, *supra*, at pp. 295-296 [101 L.Ed.2d at p. 275]; *Michigan v. Harvey* (1990) 494 U.S. 244, 349 [108 L.Ed.2<sup>nd</sup> 293, 301].)

There has been some Supreme Court dissent from this rule, noting that waivers of the **Sixth Amendment** right to counsel should be measured by a stricter standard. (*Fields v. Wyrick* (1983) 464 U.S. 1020, 1022 [78 L.Ed.2<sup>nd</sup> 728, 729]; Justice Marshall’s dissent from the Court’s denial of certiorari.)

*Note:* Absent more defining case law, we are certainly on firmer ground if he is also specifically told that charges have been filed against him and that by waiving his *Miranda* rights he is also waiving his **Sixth Amendment** right to the assistance of counsel.

*Important:* For those cases decided under the rule of *Michigan v. Jackson*, it is important to note that the rule was but a “prophylactic rule” intended to protect one’s **Sixth Amendment** rights and was not, when violated, a **Sixth Amendment** violation in itself. Statements obtained in violation of *Jackson*, therefore, at least if otherwise voluntarily obtained, are admissible for impeachment purposes should the defendant testify contrary to his statements to the police. (*Michigan v. Harvey* (1990) 494 U.S. 344, 353 [108 L.Ed.2<sup>nd</sup> 293, 304].)

#### *Use of Undercover Agents and Other Informants:*

*Rule:* Intentionally creating a situation likely to induce an in-custody defendant, represented by counsel appointed at his arraignment, to make incriminating statements by having an undercover agent engage defendant in conversation, is a **Sixth Amendment** violation. (*United States v. Henry* (1980) 447 U.S. 264 [65 L.Ed.2<sup>nd</sup> 115].)

“Knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State’s obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.” (*Maine v. Moulton* (1985) 474 U.S. 159, 176 [88 L.Ed.2<sup>nd</sup> 481, 496].)

The intention to generate incriminating statements from the accused will likely be presumed. “Even if the (government) agent’s statement that he did not intend that (the undercover agent) would take affirmative steps to secure incriminating information is accepted (in fact, the undercover agent was specifically instructed not to do so), he (the government agent) must have known that such

propinquity likely would lead to that result.” (*United States v. Henry*, *supra*, at p. 271 [65 L.Ed.2<sup>nd</sup> at p. 122].)

Even without questioning the defendant, an informant who “stimulates” conversation with the defendant for the purpose of attempting to elicit incriminating statements, as opposed to acting as a “mere listening post,” is violating the defendant’s **Sixth Amendment** rights. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 458-459 [91 L.Ed.2<sup>nd</sup> 364], analyzing the rule of *Henry*.)

The Court in *Henry* found significant *three* factors in determining whether the government had “deliberately elicited” statements from the accused:

- The informant was acting under instructions from the government and was paid for his actions;
- The informant was ostensibly no more than a fellow inmate, causing the defendant to trust him and thus be more likely to make incriminating statements; *and*
- The defendant was in custody and under indictment. (*Ibid.*)

The Court also in *Henry* noted that the defendant’s status as a jail inmate made him “particularly susceptible to the ploys of undercover Government agents, . . . (who appeared to be) sharing a common plight,” (*Id.*, at p. 274 [65 L.Ed.2<sup>nd</sup> at p. 124].) differentiating an in-custody situation from the situation when the defendant is not in-custody, and not yet charged, as described in *Hoffa v. United States* (1966) 385 U.S. 392 [17 L.Ed.2<sup>nd</sup> 374]. (*Id.*, at p. 272.)

Similarly, a co-principle, working at the request of the police and who purposely “stimulates” conversation with the defendant about the charged offenses, even when the defendant knew the co-principle was supplying information to the police, is a **Sixth Amendment Massiah** violation. (*In re Neely* (1993) 6 Cal.4<sup>th</sup> 901, 909-920.)

*But see Bey v. Morton* (3<sup>rd</sup> Cir. 1997) 124 F.3<sup>rd</sup> 524, where a corrections officer, assigned to watch death row inmates, engaged defendant, whose appeal was pending, in various conversations about the details of two homicides during which defendant confessed to both. After reversal of defendant’s conviction, the officer was allowed to testify as to defendant’s statements over a **Sixth Amendment** objection. Reason: The officer, “while a state actor, was not

a state actor deliberately engaged in trying to secure information from the defendant for use in connection with the prosecution that was the subject matter of counsel's representation.”

Note, however, footnote 7, *Id.*, at p. 531, where the Court notes that the result might be different under circumstances where inculpatory statements should be foreseen.

A prosecutor (and, inferably, a police officer) doing anything to facilitate an informant's visit with a charged defendant, to obtain the defendant's statements, will raise **Sixth Amendment** issues, even when it is the informant's idea. (*Franklin v. Duncan* (9th Cir. 1995) 70 F.3<sup>rd</sup> 75, adopting factual and legal conclusions of the trial court's decision at 884 F.Supp. 1435.)

Purposely returning a jail inmate to the defendant's cell, knowing that the inmate is desirous of obtaining a favorable plea bargain in exchange for obtaining incriminating statements from a cellmate (i.e., the defendant), makes the inmate a state agent. Whether or not, however, the defendant's **Sixth Amendment** rights are violated depends upon what the inmate does to obtain such incriminating statements. (*Randolph v. California* (9<sup>th</sup> Cir. 2004) 380 F.3<sup>rd</sup> 1133.)

Putting a potential co-suspect into a charged defendant's jail cell to see what the two of them will talk about, at least where the co-suspect knows nothing about the investigator's plan, is *not* a **Sixth Amendment** violation. (*People v. Hartsch* (2010) 49 Cal.4<sup>th</sup> 472.)

*Without Questioning:* Using an undercover agent or informant who merely acts as a “*listening post*,” without encouraging the defendant to talk about his offense, is *not* a *Massiah* violation. (*People v. Hovey* (1988) 44 Cal.3<sup>rd</sup> 543, 559-561; *United States v. Birbal* (2<sup>nd</sup> Cir. 1997) 113 F.3<sup>rd</sup> 342, 345-346.)

The **Sixth Amendment** is *not* violated when an informant does nothing to encourage the defendant to talk about his case. The **Sixth Amendment** *does not* protect a talkative defendant from volunteering incriminating statements. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 456-461 [91 L.Ed.2<sup>nd</sup> 364, 382-385]; see also *People v. Howard* (1988) 44 Cal.3<sup>rd</sup> 375, 401.)

Surreptitiously recording a conversation between defendant and a fellow prisoner after defendant had invoked his right to have counsel present during interrogation is *not* a *Massiah* violation, even if the prisoner is intentionally placed there to see what they might say, so

long as the prisoner is not a police agent. (*People v. Lucero* (1987) 190 Cal.App.3<sup>rd</sup> 1065, 1067-1069.)

*But*, “The right to counsel may also be violated when a cooperating defendant participates with noncooperating defendants and their attorneys in joint strategy sessions.” (*United States v. Miller* (2<sup>nd</sup> Cir. 1997) 116 F.3<sup>rd</sup> 641, 665.)

*Exception*: “Where the presence of the government’s agent or informant at the defense conference is either unintentional or justified by the necessity of protecting the informant’s identity, there can be no violation of the **Sixth Amendment** without some communication of valuable information derived from the intrusion to the government . . .” (*United States v. Ginsberg* (2<sup>nd</sup> Cir. 1985) 758 F.2<sup>nd</sup> 823, 833.)

In such an instance, a *Massiah* claim will fail unless it is shown that the government benefited from the cooperating defendant’s attendance. (*United States v. Miller, supra.*)

#### *Non-Law Enforcement Acting on their Own:*

Another inmate acting on his own, without encouragement from law enforcement, questioning a suspect, is not a **Sixth Amendment** violation even though he takes his information to the police after the fact. (*People v. Valasquez* (1987) 192 Cal.App.3<sup>rd</sup> 319, 329; *People v. Williams* (1997) 16 Cal.4<sup>th</sup> 153, 203-205.)

The defendant has the burden of “demonstrat(ing) that . . . the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.” (*In re Neely* (1993) 6 Cal.4<sup>th</sup> 901, 915.)

“If an informant ‘acts on his own initiative,’ even if he interrogates the accused, ‘the government may not be said to have deliberately elicited the statements.’ [Citation]” (*People v. Fairbank* (1997) 16 Cal.4<sup>th</sup> 1223, 1247.)

An informant who has agreed to provide the government with “any and all information in his possession relating directly or indirectly to any and all criminal activities or other matters of which he has knowledge” is not a government agent for purposes of obtaining what he can elicit from a particular defendant not specifically contemplated when the agreement was made. (*United States v.*

**Birbal** (2<sup>nd</sup> Cir. 1997) 113 F.3<sup>rd</sup> 342, 345-346: “The **Sixth Amendment** rights of a talkative inmate are not violated when a jailmate acts in an entrepreneurial way to seek information of potential value, without having been deputized by the government to question that defendant.”)

But, an agreement between the police and an informant need not be explicit, “but may be inferred from the circumstances through evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a period of time. [Citation]” (*In re Neely, supra.*)

*But see also People v. Fairbank, supra*, at pp. 1247-1249; contacts with law enforcement where nothing was done to encourage the informant to talk to defendant did not establish even an implicit agreement.

Defendant’s phone calls to his wife from jail, recorded by the wife at the suggestion of law enforcement, does not violate **Massiah**, at least where the wife did not actively attempt to elicit incriminating responses. (*People v. Wojtkowski* (1985) 167 Cal.App.3<sup>rd</sup> 1077, 1081.)

Information volunteered by defendant to another inmate was admissible. The fact that the officers then sent the informant back telling him to “remember anything further (defendant) might tell (him), with no promises of reward, was held *not* to be a violation of **Massiah** or **Henry**. (*Brooks v. Kincheloe* (9<sup>th</sup> Cir. 1988) 848 F.2<sup>nd</sup> 940.)

Defendant’s girlfriend, who was supplied a tape recorder by law enforcement with which to record telephone conversations with defendant concerning threats he made to her and her children, even without instructions to avoid discussions about the murder prosecution that was already underway, resulting in the girlfriend, on her own initiative, interrogating defendant about the charged murder, was *not* a **Sixth Amendment** violation given the lack of law enforcement encouragement to do what she did. (*People v. Martin* (2002) 98 Cal.App.4<sup>th</sup> 408.)

*And*, just knowing that an inmate has been used as an informant in the past, putting her into a cell with the defendant without any instructions or stated intentions for her to collect information from the defendant, does not necessarily result in a **Massiah** violation. The informant, collecting incriminating statements on her own, may

lawfully pass this onto police. (*People v. Coffman* (2004) 34 Cal.4<sup>th</sup> 1, 67-68.)

A jailhouse informant providing unsolicited information (i.e., incriminating notes written by defendant) to law enforcement is not a *Massiah* violation. (*Fairbank v. Ayers* (9<sup>th</sup> Cir. 2011) 632 F.3<sup>rd</sup> 612, 622-623, as amended at 650 F.3<sup>rd</sup> 1243.)

*Uncharged Crimes*: Questioning a defendant, accomplished through an undercover police agent, concerning crimes for which defendant had not yet been charged, is *not* a **Sixth Amendment** violation. (*Hoffa v. United States* (1966) 385 U.S. 293 [17 L.Ed.2<sup>nd</sup> 374].)

Being represented by counsel on one case does not preclude using an undercover government agent to elicit incriminating statements relating to some new, uncharged crime. However, the resulting statements are inadmissible in the trial for the already-pending charges. (*In re Wilson* (1992) 3 Cal.4<sup>th</sup> 945, 954; government agent posing as a “hit man” being solicited by defendant to murder a witness to the pending charges.)

*Massiah-Error Statements Used as Substantive Evidence*: The United States Supreme Court has yet to decide whether a *Miranda* advisal and waiver is sufficient to purge the taint of a prior **Sixth Amendment**, *Massiah* rule violation (i.e., where a charged criminal defendant is surreptitiously questioned while out of custody), thus making the post-*Miranda* statements admissible as substantive evidence of guilt. (See *Fellers v. United States* (2004) 540 U.S. 519, 525 [157 L.Ed.2<sup>nd</sup> 1016]; issue remanded to the Eight Circuit Court of Appeal for consideration of this issue.)

*Massiah Error Statements Used for Impeachment*: There is a split of authority on the propriety of using defendant's statements taken in violation of his **Sixth Amendment** (i.e., *Massiah*) rights, even when otherwise voluntary, for *purposes of impeachment*:

*Majority view: Yes.* (*People v. Brown* (1996) 42 Cal.App.4<sup>th</sup> 461, 471-473; *United States v. McManaman* (10<sup>th</sup> Cir. 1979) 606 F.2<sup>nd</sup> 919; *United States v. Ortega* (9<sup>th</sup> Cir. 2000) 203 F.3<sup>rd</sup> 675, 681; *United States v. Martin* (Ill. 1997) 974 F.Supp. 677.)

*Minority view: No.* *People v. Cribas* (1991) 231 Cal.App.3<sup>rd</sup> 596, 606; *People v. Harper* (1991) 228 Cal.App.3<sup>rd</sup> 843.)

*Jackson-Error Statements Admissible for Purposes of Impeachment*: The United States Supreme Court has determined that statements obtained in violation of the “*Jackson rule*,” (i.e., law enforcement-initiated questioning of an in-custody defendant after criminal proceedings have commenced; see above), at least when the



defendant has provided a voluntary waiver of his right to counsel, are admissible for impeachment purposes. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350-353 [108 L.Ed.2<sup>nd</sup> 293, 302-304].)

However, the Court specifically reserved for future determination the issue of whether or not a knowing and voluntary waiver is in fact a necessary prerequisite to using a defendant's statements against him for impeachment purposes. (*Id.*, at p. 354 [108 L.Ed.2<sup>nd</sup> at p. 305].)

*Relevance at Trial:* A prosecutor's reference at trial to a defendant having retained and consulted with an attorney, where relevant to impeachment, or when the defense has "opened the door," is not improper. (*United States v. Ross* (9<sup>th</sup> Cir. 1977) 123 F.3<sup>rd</sup> 1181, 1187; see also *Geders v. United States* (1976) 425 U.S. 80, 89-90 [47 L.Ed.2<sup>nd</sup> 592, 600]; asking whether defendant reviewed testimony with a lawyer (i.e., was "coached") is proper impeachment.)

*Test on Appeal:* "Massiah error" is subject to the "harmless error" doctrine on appeal. (*Moore v. Illinois* (1977) 434 U.S. 220, 232 [54 L.Ed.2<sup>nd</sup> 424, 436]; *Milton v. Wainwright* (1972) 407 U.S. 371 [33 L.Ed.2<sup>nd</sup> 1]; *People v. Brown*, *supra*, at p. 474.)

Although there is a split of authority, the majority rule seems to be that a defendant is *not* required to have testified in order to preserve this issue for appeal. (*United States v. Chischilly* (9<sup>th</sup> Cir. 1994) 30 F.3<sup>rd</sup> 1144, 1150-1151; *People v. Brown*, *supra*, at pp. 468-471.)

### ***Right to Competent Counsel:***

The **Sixth Amendment** right to counsel requires that defendant's counsel be competent. It is the defendant's burden to show that his attorney failed to act in a manner to be expected of reasonable competent attorneys acting as diligent advocates. (*People v. Pope* (1979) 23 Cal.3<sup>rd</sup> 412, 425.)

When the claim of ineffective assistance of counsel is based on an act or omission not amounting to withdrawal of a defense, he must prove that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of his counsel's failings. (*People v. Fosselman* (1983) 33 Cal.3<sup>rd</sup> 572, 584.)

"In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness [Citation], and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation]" (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375 [91 L.Ed.2<sup>nd</sup> 305].)

To prevail on an ineffective assistance of counsel claim, a petitioner must establish both that counsel's performance was deficient and that he was prejudiced by the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L. Ed. 2<sup>nd</sup> 674].)

“Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (*Id.*, at p. 689.)

The test for prejudice in a capital case is “whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” (*Id.*, at p. 695.)

Examples:

The court held that defendant failed to meet his burden of showing he was prejudiced by trial counsel's alleged failure to present at the penalty phase of a capital case mitigating evidence of childhood sexual abuse by his mother because he had not shown that further investigation by counsel would have revealed evidence of the abuse. Petitioner never told his trial counsel of being sexually abused by his mother, and his first and only mention of such abuse occurred 17 years after his arrest for the murder of his wife. Petitioner was also not prejudiced by trial counsel's alleged failure to present at the penalty phase mitigating evidence of his family history. The mitigating evidence petitioner presented at the reference hearing of his dysfunctional family might have elicited some jury sympathy for him at the penalty phase, but he showed no causal connection between his family environment and his cold-blooded and calculated decision to brutally murder his wife a few months after they were married, for the sole purpose of obtaining her money and possessions. There was no reasonable probability that, but for trial counsel's alleged failings, the result of the penalty phase would have been different. (*In re Crew* (2011) 52 Cal.4<sup>th</sup> 126.)

Defendant's argument that his lawyer should have had an expert testify that the surviving victim was using a .380 caliber Mac-12 handgun whose modifications made it prone to jamming was rejected by the Court. Specifically, defendant contended that the state court's rejection of this ineffective assistance of counsel

argument was an “unreasonable application” of *Strickland v. Washington*. Because the state court could reasonably have come to the same conclusion as the three judge panel—which found no reasonable probability that the jury would have changed its verdict had they heard additional testimony stating that the Mac-12 could possibly malfunction in some manner—its rejection of defendant’s argument was not an unreasonable application of *Strickland*. (*Richter v. Harrington* (9<sup>th</sup> Cir. 2011) 643 F.3<sup>rd</sup> 1238.)

Overruling prior precedent, the California Supreme Court determined in *People v. Trujillo* (2006) 40 Cal.4<sup>th</sup> 165, that a defendant’s post-plea admission to a probation officer regarding a prior criminal action is not part of that action’s “record of conviction,” and that the statement cannot be admitted to establish that the prior conviction qualified as a strike. Defendant complained that such an admission in his post-plea probation report, made prior to the Supreme Court’s decision on this issue, were used against him, qualifying his current conviction as a strike. In a writ of habeas corpus, defendant challenged the competency of his attorney for not having raised this issue. The Court here, however, held that it was not incompetence of counsel not to have predicted this change in the law. (*In re Richardson* (2011) 196 Cal.App.4<sup>th</sup> 647, 657-660.)

The federal district court did not err in rejecting the defendant’s claim that his attorneys were ineffective for failing to investigate and present mitigating evidence of his brain damage, mental illness, substance abuse, childhood abuse and neglect, and redeeming characteristics. Defense counsel provided the defense expert with the information necessary to form an expert opinion, the expert investigated the potential defense, and defense counsel made a strategic decision to not place the prisoner’s mental state in play to avoid the introduction of aggravating evidence. The defendant’s ineffective assistance claim that stemmed from trial counsel’s presentation of allegedly aggravating and prejudicial evidence failed because the defense expert’s testimony was generally favorable to the prisoner, and any negative inferences were based on a trial strategy of gaining credibility with the jury. (*Fairbank v. Ayers* (9<sup>th</sup> Cir. 2011) 632 F.3<sup>rd</sup> 612, 617-622, as amended at 650 F.3<sup>rd</sup> 1243.)

***Relationship to the Fifth Amendment Right to Counsel:***

***Fifth Amendment Right to an Attorney:*** Applies, typically, to that time period between (1) the taking of the suspect into custody and (2) the initiation of criminal proceedings.

Although not specifically mentioned in the **Fifth Amendment**, a criminal suspect's right to the assistance of an attorney during a custodial interrogation prior to the filing of an accusatory pleading can be inferred due to the Supreme Court's decision in *Miranda v. Arizona* (1966) 384 U.S. 436, 445 [16 L.Ed.2<sup>nd</sup> 694, 708].)

*Arraignment and the Fifth Amendment:* Requesting an attorney at an arraignment, line-up or bail review, has been held to be an invocation of the offense-specific **Sixth Amendment** right to counsel, but *not* the non-offense-specific **Fifth Amendment** implied right to counsel. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 178-179 [115 L.Ed.2<sup>nd</sup> 158, 169]; *People v. Lisper* (1992) 4 Cal.App.4<sup>th</sup> 1317, 1324-1326; *United States v. McKinley* (7<sup>th</sup> Cir. 1996) 84 F.3<sup>rd</sup> 904; *United States v. Doherty* (6<sup>th</sup> Cir. 1997) 126 F.3<sup>rd</sup> 769, 774-775; *United States v. Melgar* (4<sup>th</sup> Cir. 1998) 139 F.3<sup>rd</sup> 1005, 1011.)

However, ignoring one's **Fifth Amendment**, *Miranda* rights does not become an actual **Fifth Amendment** violation, triggering sanctions, until some use of the defendant's resulting statements is made during the prosecution phase of the criminal case. (*Chavez v. Martinez* (2003) 538 U.S. 760 [155 L.Ed.2<sup>nd</sup> 984].)

The current debate is whether the point in time where sanctions are appropriate is when the resulting statements are actually used at the criminal trial itself, or at some point in the prosecution before trial; e.g., when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and/or to determine pretrial custody status. The Ninth Circuit is of the opinion that the earlier stages are when the **Fifth Amendment** requires sanctions to be imposed. (*Stoot v. City of Everett* (9<sup>th</sup> Cir. 2009) 582 F.3<sup>rd</sup> 910, 922-925.)

*Legal Implications:* If, after a *Miranda* admonishment, a suspect invokes his **Fifth Amendment** "right to counsel" (as opposed to his **Fifth Amendment** "right against self-incrimination"), the officer must cease questioning (See *Taylor v. Maddox* (9<sup>th</sup> Cir. 2004) 366 F.3<sup>rd</sup> 992.) and may *never* (absent a lawful exception) come back and question him or her again about *that case or any other case* as long as he or she remains in custody. (*Edwards v. Arizona*, (1981) 451 U.S. 477 [68 L.Ed.2d 378]; sometimes called the "*Edwards Rule*.")

This is true even if the officer conducting the second interrogation is *unaware* of the prior invocation of the subject's rights. (*Arizona v. Roberson* (1988) 486 U.S. 675, 687 [100 L.Ed.2<sup>nd</sup> 704, 717].)

This is also true even though before the officer's return, the in-custody defendant has had the opportunity to, or did in fact consult with an attorney. (*Minnick v. Mississippi* (1990) 498 U.S. 146 [112 L.Ed.2<sup>nd</sup> 489].)

“*Edwards v. Arizona* added a second layer of protection to the *Miranda* rules, holding that ‘when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [Citation]’” (*Michigan v. Harvey* (1990) 494 U.S. 344, 350 [108 L.Ed.2<sup>nd</sup> 293, 302].)

*Necessity for a clear, unambiguous, invocation:*

The **Fifth Amendment** right to counsel can only be invoked by a clear, express, and unambiguous request for an attorney. Any ambiguous attempts to ask for an attorney will be held to be legally ineffective. (*Davis v. United States* (1994) 512 U.S. 452 [129 L.Ed.2<sup>nd</sup> 362].)

“During an interrogation, moreover, an officer has no obligation to clarify the ambiguous statement by the accused.” (*United States v. Muhammad* (7th Cir. 1997) 120 F.3<sup>rd</sup> 688, 698; citing *Davis v. United States, supra*, at p. 461 [129 L.Ed.2<sup>nd</sup> at p. 372].)

*Compare:* Any ambiguity in an invocation of the “*right to remain silent*” may be decided in the defendant’s favor (*People v. Green* (1987) 189 Cal.App.3<sup>rd</sup> 685, 693.), although recent authority seems to hint that such an invocation must also be unambiguous in order to be legally effective. (See *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 534-536; and *Arnold v. Runnels* (9<sup>th</sup> Cir. 2005) 421 F.3<sup>rd</sup> 859, 870.)

“Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” (*Davis v. United States, supra*.)

*Examples:*

*Davis v. United States, supra*, at p. 459 [129 L.Ed.2<sup>nd</sup> at p. 371]; The defendant’s statement that; “*Maybe I should talk to a lawyer,*” was held to be ambiguous as an invocation and subject to clarification.

See also *People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 129, for a summary of pre-**Proposition 8** California cases where equivocal comments concerning the need for an attorney were held to be

effective invocations. However, the Supreme Court recognized in *Crittenden* that California now abides by the federal rule as announced in *Davis*. (*Id.*, at pp. 129-131; “*Did you say I could have a lawyer?*” held *not* to be an effective invocation.)

“*I just thinkin’, maybe I shouldn’t say anything without a lawyer and then I thinkin’ ahh.*” No invocation. Defendant did not clearly and unambiguously request an attorney. (*People v. Bestelmeyer* (1985) 166 Cal.App.3<sup>rd</sup> 520, 528.)

“*Do you think I need a lawyer?*” No invocation. (*Diaz v. Senkowski* (2<sup>nd</sup> Cir. 1996) 76 F.3<sup>rd</sup> 61, 63.)

“*I think I need a lawyer.*” No invocation. (*Burket v. Angelone* (4<sup>th</sup> Cir. 2000) 208 F.3<sup>rd</sup> 172, 198.)

“*I don’t know if I should without a lawyer,*” together with defendant’s later comment, “*Okay, that one,*” held *not* to be an invocation when taking into consideration the circumstances (i.e., defendant’s later comment about “*that one*” held to be referring to a particular question, and not one of his enumerated rights) and his later actions. (*People v. Michaels* (2002) 28 Cal.4<sup>th</sup> 486, 510.)

*Clark v. Murphy* (9<sup>th</sup> Cir. 2003) 317 F.3<sup>rd</sup> 1038: Defendant’s statement; “*I think I would like to talk to a lawyer,*” held to be equivocal, and ineffective as an invocation. Also, his later statement; “*Should I be telling you or should I talk to a lawyer*” was found to not even be close.

*People v. Sapp* (2003) 31 Cal.4<sup>th</sup> 240, 264-269: “*Maybe I should have an attorney:*” Too ambiguous, even though as to pre-**Proposition 8** offenses (June 8, 1982), such a comment is legally effective, it is clearly *not* sufficient for any offenses occurring after that date.

Announcing, while being arrested, that she intended to call her lawyer was held *not* to be a clear and unequivocal invocation in *People v. Nguyen* (2005) 132 Cal.App.4<sup>th</sup> 350, 357-358.

Asking, “*How long would it take for a lawyer to get here for me?*” several times is not an invocation. (*People v. Simons* (2007) 155 Cal.App.4<sup>th</sup> 948, 953-959.)

*Test:* Whether or not a defendant’s comments are an invocation depends upon how a “*reasonable officer*” would have understood what he said, under the circumstances. (*People v. Gonzalez, supra*, at pp. 1123-1124;

citing *Davis v. United States*, *supra*. See also *People v. McMahon*, *supra*, at p. 96.)

*Issue: Need for a prior waiver?:* In *Davis v. United States*, *supra*, the defendant had waived his *Miranda* rights and answered questions for a period of time before unsuccessfully attempting to invoke this right to an attorney.

Some of the language in *People v. Gonzalez*, *supra*, where the defendant had also waived his rights and answered some questions before raising the issue of his right to an attorney, could be interpreted as requiring a prior waiver before the rule of *Davis* is applicable.

The California Supreme Court in *People v. Stitely* (2005) 35 Cal.4<sup>th</sup> 514, 534-536 (a “right to silence” case), although not discussing the issue, infers strongly that there is in fact a requirement for a prior waiver before an equivocal attempt at an invocation will be held to be legally insufficient.

In *People v. Nelson* (2012) 53 Cal.4<sup>th</sup> 367, the California Supreme Court makes it very clear that the rule that an invocation of either the defendant’s right to remain silent or to the assistance of counsel must be clear and unequivocal to be legally effective applies only after a prior waiver and an alleged attempt to invoke mid-interrogation.

*Compare:* A criminal defendant’s **Sixth Amendment** right to counsel automatically kicks in upon the initiation of criminal proceedings. (See above.)

*A Fifth Amendment right to counsel is said to be “non-offense-specific.”*

This means that it *attaches to any and all crimes*, whether or not charged, *so long as he or she remains in custody*. (*McNeil v. Wisconsin* (1991) 501 U.S. 171 [115 L.Ed.2<sup>nd</sup> 158]; *Arizona v. Roberson*, *supra*.)

*Query #1:* Is an in-custody defendant therefore perpetually immune from questioning for *any new offenses* committed *while still in custody*? *Probably not:*

Answers to questions during an investigation of an in-custody defendant’s plan to kill a witness were obtained in violation of his **Sixth Amendment** (*Massiah*) rights as far as the pending case was concerned, but were held to be admissible in the separate prosecution

of any, as of yet uncharged, new case. (*Maine v. Moulton* (1985) 474 U.S. 159 [88 L.Ed.2<sup>nd</sup> 481].)

An in-custody defendant's statements to an undercover officer posing as a "hit man" about eliminating a witness were held to be inadmissible in the trial of the then pending charges only. (*In re Wilson* (1992) 3 Cal.4<sup>th</sup> 945, 951-955; discussing the *Massiah* issue; and see *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2<sup>nd</sup> 246]; see below.)

*Query #2*: Is an in-custody defendant also therefore perpetually immune from questioning about all *prior offenses* committed before having been taken into custody, when defendant is serving an extended term? For instance, is law enforcement precluded from questioning a "lifer" about a 10 or 15-year-old homicide? *Probably not*.

See *United States v. Green* (D.C. App. 1991) 592 A.2<sup>nd</sup> 985, cert. granted, (1992) 504 U.S. 908; (1993) 507 U.S. 545 [123 L.Ed.2<sup>nd</sup> 260]; vacating order granting cert. Arguments heard, 52 Crim. L. Rev. (BNA) 3096-97 (Nov. 30, 1992); where the lower appellate court found that interviewing an in-custody juvenile about a separate, uncharged offense, five months after he invoked his right to an attorney on the prior, charged case, but *before* being sentenced, was a violation of the *Edwards* rule. (The appeal was never resolved by the Supreme Court because the defendant was murdered before a decision could be reached.)

*But also see Clark v. State* (2001) 140 Md.App. 540, 584-600, in a detailed analysis of the issue, holding that after a defendant is *convicted and sentenced*, the inherent pressures of incarceration dissipate to the extent that the purposes behind the *Edwards* rule are no longer applicable. Questioning on a prior, uncharged case, therefore, should be permissible.

The United States Supreme Court recently solved this dilemma in *Maryland v. Shatzer* (Feb. 24, 2010) 559 U.S. \_\_ [130 S.Ct. 1213; 175 L.Ed.2<sup>nd</sup> 1045], where it was held that after a *Miranda* invocation of a suspect's right to counsel, the interrogation may be reinitiated following a 14-day break in custody. The defendant in this case was a prison inmate, serving time on a prior conviction. Recognizing the uniqueness of this type of situation, the Court further held that returning the defendant to the general prison population is such a break in custody.



Compare: One's **Sixth Amendment** "right to Counsel" is "offense-Specific," meaning that it protects the defendant from being questioned only about offenses already charged. (See above)

Where the suspect fails to specify which right ("right to counsel" vs. "right to remain silent") following a *Miranda* advisal, he or she will be held to be invoking a right to silence only. (*People v. Lispier* (1992) 4 Cal.App.4<sup>th</sup> 1317, 1322; see also *People v. DeLeon* (1994) 22 Cal.App.4<sup>th</sup> 1265, 1269-1272.)

*Attorney's Attempts to Invoke Client's Fifth or Sixth Amendment Rights prior to Arraignment:*

Note that the **Sixth Amendment** does not attach until the defendant has been charged in court (i.e., formal charge, indictment, information, arraignment, or the suspect's first appearance in court; see *Michigan v. Jackson* (1986) 475 U.S. 625, 633 [89 L.Ed.2<sup>nd</sup> 631, 640].), and therefore does not prevent police from questioning a suspect until that point, even when the attorney calls police beforehand and commands them not to question his or her client. (See *People v. Stephens* (1990) 218 Cal.App.3<sup>rd</sup> 575, 585.)

The **Sixth Amendment** right is not applicable until defendant has been charged in court (i.e., *arraigned*). (*United States v. Gouveia* (1984) 467 U.S. 180, 187-188 [81 L.Ed.2<sup>nd</sup> 146, 153-154].)

“(T)he suggestion that the existence of an attorney-client relationship itself triggers the protections of the **Sixth Amendment** misconceives the underlying purposes of the right to counsel. The **Sixth Amendment’s** intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more that it is to protect a suspect from the consequences of his own candor.” (*Moran v. Burbine* (1986) 475 U.S. 412, 430 [89 L.Ed.2<sup>nd</sup> 410, 427]; *United States v. Harrison* (9<sup>th</sup> Cir. 2000) 213 F.3<sup>rd</sup> 1206, 1212-1213.)

Attempts by defense counsel to invoke a criminal defendant’s **Fifth** or **Sixth Amendment** rights merely by filing a document in court purporting to do so are legally ineffective. (*United States v. Grimes* (11<sup>th</sup> Cir. 1998) 142 F.3<sup>rd</sup> 1342, 1347-1348; *Alston v. Redman* (3<sup>rd</sup> Cir. 1994) 34 F.3<sup>rd</sup> 1237; *United States v. Thompson* (2<sup>nd</sup> Cir. 1994) 35 F.3<sup>rd</sup> 100; *People v. Avila* (1999) 75 Cal.App.4<sup>th</sup> 416; *People v. Beltran* (1999) 75 Cal.App.4<sup>th</sup> 425.)

This means that any attempts by an attorney to insulate his client from questioning during a police investigation, prior to indictment, by “warning” the police not to talk to his client has no legal effect. (*Moran v. Burbine*, *supra*.)

*But see United States v. Harrison* (9<sup>th</sup> Cir. 2000) 213 F.3<sup>rd</sup> 1206; a case where the Ninth Circuit Court of Appeal determined that an uncharged criminal suspect's **Sixth Amendment** rights were violated when defendant had retained counsel, the government knew that he had counsel for purposes of the pending investigation, and an eventual indictment brought charges precisely anticipated by the scope of the pre-indictment investigation. A questionable decision in light of other case law.

Also, an attorney's attempt to invoke his or her clients' **Fifth Amendment** rights does not shield the defendant:

*Only the defendant* may invoke the protections of the **Fifth Amendment**, and then only at the time questioning is attempted. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3 [115 L.Ed.2<sup>nd</sup> 158, 171]; *United States v. Wright* (9<sup>th</sup> Cir. 1992) 962 F.2<sup>nd</sup> 953, 955; *People v. Calderon* (1997) 54 Cal.App.4<sup>th</sup> 766.)

His or her attorney cannot do it for him. (*Moran v. Burbine, supra.*)

Events occurring outside the presence of a suspect, such as an attempt by the suspect's attorney to contact him, and entirely unknown to him, can have no bearing on the suspect's capacity to comprehend and knowingly relinquish a constitutional right. (*Moran v. Burbine, supra*, at p. 422 [89 L.Ed.2<sup>nd</sup> at p. 421].)

California's prior contrary rule, under *People v. Houston* (1986) 42 Cal.3<sup>rd</sup> 595, was abrogated by **Proposition 8**. (*People v. Ledesma* (1988) 204 Cal.App.3<sup>rd</sup> 682, 689.)

Note, however, that if the defendant in such a circumstance has been formally charged in court, such as by the filing of an indictment, then ignoring an attorney's attempt to make contact with his client while an interrogation is proceeding would be a **Sixth Amendment** violation. (*Patterson v. Illinois* (1988) 487 U.S. 285, 296 [101 L.Ed.2<sup>nd</sup> 261].)

There is no requirement that the police notify defendant's retained attorney before beginning any questioning that is constitutionally allowable. (*People v. Duck Wong* (1976) 18 Cal.3<sup>rd</sup> 178, 187; *People v. Sultana* (1988) 204 Cal.App.3<sup>rd</sup> 511, 521.)

### ***Right to Confrontation:***

The right to confront one's accusers, as guaranteed by the **Sixth Amendment**, is an element of federal "*due process.*" (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 106 [78 L.Ed. 674, 678]; *Pointer v. Texas* (1965) 380 U.S. 400 [13 L.Ed.2<sup>nd</sup>

923, 926]; *Michigan v. Bryant* (2011) \_\_ U.S. \_\_, \_\_ [131 S.Ct. 1143; 179 L.Ed.2<sup>nd</sup> 93].)

The **Sixth Amendment** provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

The **Sixth Amendment**, as an element of “due process,” applies equally to the states. (*Pointer v. Texas, supra.*)

See **Cal. Const., art. I, § 15.**

See also **P.C. 686**: “In a criminal action the defendant is entitled: . . . **subd. 3** . . . to be confronted with the witnesses against him, in the presence of the court . . . (with listed exceptions).”

In *Pointer*, a robbery victim testified against defendant (who was not represented by counsel) and another codefendant at a preliminary examination. Defendant did not cross-examine the victim. At trial, the victim was out of state, so the preliminary examination transcript of the victim’s testimony was used over defendant’s objection. This was held to be a **Sixth Amendment** confrontation violation. The Court noted, however, that had defendant had an attorney who had an *opportunity* to cross-examine the victim, the result would have been different.

The confrontation right includes the right to a *face-to-face confrontation*. “The perception that confrontation is essential to fairness has persisted over the centuries because there is so much truth in it. . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.” (*Coy v. Iowa* (1988) 487 U.S. 1012 [101 L.Ed.2<sup>nd</sup> 857, 865].)

See *Winzer v. Hall* (9<sup>th</sup> Cir. 2007) 494 F.3<sup>rd</sup> 1192, 1196-1198, for a discussion of the history behind the implementation of the “*confrontation clause*.”

In *Winzer*, use of California’s “*spontaneous declaration*” (**E.C. § 1240**) exception to the hearsay rule held to be improper where there was no evidence that the victim’s declaration was in fact “spontaneous.”

Allowing a child molest victim to testify from behind a screen, blocking the defendant’s view of the victim, was error. (*Coy v. Iowa, supra.*)

Devising a seating arrangement whereby the defendant was able to hear, but not see, the five-year-old victim held to be a violation of the defendant's **Sixth Amendment** right to confrontation. (*Herbert v. Superior Court* (1981) 117 Cal.App.3<sup>rd</sup> 661, 671.)

Use of a one-way glass during an adult victim's testimony, shielding the victim from the defendant so that she could not see the defendant during her testimony, was a **Sixth Amendment** violation. The trial court failed to hold an evidentiary hearing or make any determinations that such a procedure was necessary under the circumstances. (*People v. Murphy* (2003) 107 Cal.App.4<sup>th</sup> 1150.)

However, "this right is not absolute." (*People v. Seijas* (2005) 36 Cal.4<sup>th</sup> 291, 303; *Michigan v. Bryant* (2011) \_\_ U.S. \_\_, \_\_ [131 S.Ct. 1143; 179 L.Ed.2<sup>nd</sup> 93].)

Recognizing that there are exceptions, the Supreme Court allowed a child abuse victim to testify from a separate room in the presence of both counsel and a one-way closed circuit television so that the defendant (who had communication with his attorney), judge and jury, all in the courtroom, could see the victim as he testified. This was after the judge made a finding that requiring the child to testify in the courtroom "will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." (*Maryland v. Craig* (1990) 497 U.S. 836 [111 L.Ed.2<sup>nd</sup> 666].)

The confrontation right does not bar admission of statements of an unavailable witness if the statements "bea[r] adequate 'indicia of reliability.'" We held that reliability can be established if "the evidence falls within a firmly rooted hearsay exception," or if it does not fall within such an exception, then if it bears "particularized guarantees of trustworthiness." *Michigan v. Bryant*, *supra*, at p. \_\_, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S. Ct. 2531, 65 L. Ed. 2<sup>nd</sup> 597].)

Per the Supreme Court, the right to confrontation may be satisfied without face-to-face confrontation *only* where:

- The denial of such confrontation is necessary to further an important public policy; *and*
- The reliability of the testimony is otherwise assured.

(*Maryland v. Craig*, *supra*, at p. 837 [111 L.Ed.2<sup>nd</sup> at p. 682].)

Both requirements are met where the purpose is to protect child witnesses from the trauma of giving testimony in child abuse cases and all the other

elements of the confrontation right (i.e., competency of the witness, testimony under oath, contemporaneous cross-examination, and observation of the child's demeanor by the defendant and the trier of fact) are present. (*Ibid.*)

See also *People v. Williams* (2002) 102 Cal.App.4<sup>th</sup> 995, 1006, where it was held that the trial judge *did not* err in admitting a videotape recording of an adult victim on the ground that she suffered from physical and mental disabilities and would be traumatized by having to face defendant.

Defendant's confrontation rights at a probation revocation hearing outweighed by the prosecutor's good faith attempt to produce the victim to prove a domestic violence allegation, where there were corroborative facts tending to establish the reliability of the victim's report to law enforcement. The officer's hearsay testimony was properly admitted. (*United States v. Hall* (9<sup>th</sup> Cir. 2005) 419 F.3<sup>rd</sup> 980.)

However, hearsay testimony at a probation revocation hearing is inadmissible where the declarant is readily available and no good cause is shown. (*People v. Shepherd* (2007) 151 Cal.App.4<sup>th</sup> 1193.)

The use of hearsay at a preliminary examination violates neither the defendant's **Sixth Amendment** right to confrontation nor his **Fourteenth Amendment** right to due process. (*Peterson v. State of California* (9<sup>th</sup> Cir. 2010) 604 F.3<sup>rd</sup> 1166, 1169-1171.)

Nothing in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2<sup>nd</sup> 177] (see below) changes this conclusion. (*Id.*, at p. 1170.)

See also:

**P.C. § 1346:** Use at trial of a videotape recording of the preliminary examination testimony of a victim of physical or sexual assault/abuse, such victim being 15 years of age or less, or developmentally disabled as a result of mentally retardation, upon a finding by the trial court that further testimony would cause the victim emotional trauma so that the victim is medically or otherwise unavailable, per **E.C. § 240**.

**P.C. § 1346.1:** Use at trial of the videotaped preliminary examination testimony of a spousal rape or spousal battery victim when otherwise legally admissible.

**P.C. § 1347:** Use at trial or preliminary examination of the two-way closed circuit TV testimony, out of the presence of the judge, jury, defendant and attorneys, of a child sexual assault or violent felony victim, or victim of child endangerment (per **P.C. § 273a**) or child abuse (per **P.C. § 273d**) when the victim is 13 years of age or younger and other statutory requirements are met.

**P.C. § 1347.5:** Use of close circuit TV to communicate the testimony of a disabled physical or sexual assault victim.

As to the various exceptions to the “*Hearsay Rule*” that have **Sixth Amendment** confrontation implications, see “*Hearsay*,” below: E.g.:

- **E.C. § 1228:** Sex abuse child’s statements admissible for foundational purposes.
- **E.C. § 1230:** Declaration against interest.
- **E.C. § 1223:** Admission of a co-conspirator.
- **E.C. § 1231:** Statement of deceased declarant in gang cases.
- **E.C. § 1238:** Prior Identification (e.g., at a curbstome lineup.)
- **E.C. § 1240:** Spontaneous statements.
- **E.C. § 1241:** Contemporaneous statements.
- **E.C. § 1242:** Dying declaration.
- **E.C. § 1250:** Statement of declarant’s then existing mental or physical state.
- **E.C. § 1251:** Statement of declarant’s previously existing mental or physical state.
- **E.C. § 1253:** Child neglect or abuse victim’s statement made for purposes of medical diagnosis or treatment.
- **E.C. § 1270:** Business records.
- **E.C. § 1360:** Statement of child abuse victim.
- **E.C. § 1370:** Victim’s report of physical injury.

***Right to Cross-Examine:*** Right to confront one’s accusers includes the right to cross-examine those witnesses. (*Pointer v. Texas* (1965) 380 U.S. 400, 406-407 [13 L.Ed.2<sup>nd</sup> 923]; *Douglas v. Alabama* (1965) 380 U.S. 415, 418 [13 L.Ed.2<sup>nd</sup> 934]; *United States v. Larson* (9<sup>th</sup> Cir. 2007) 495 F.3<sup>rd</sup> 1094, 1102.)

Confrontation Clause issues are reviewed by appellate courts de novo. (*United States v. Nielsen* (9<sup>th</sup> Cir. 2004) 371 F.3<sup>rd</sup> 574, 581.)

“Effective cross-examination is critical to a fair trial because ‘[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.’” (*United States v. Larson, supra.*, citing *Davis v. Alaska* (1974) 415 U.S. 308, 318 [39 L.Ed.2<sup>nd</sup> 347].)

In *Larson*, it was held that while it is *not* error to prohibit opposing counsel from cross-examining a witness about the potential *maximum* sentence he might face in the absence of leniency being offered by the government for his cooperation in testifying against the defendant, it *is* error to prevent counsel from asking about the potential *minimum* sentence he would have been exposed to absent that cooperation. (*Id.*, at pp. 1102-1107.)

“(A) criminal defendant states a violation of the **Confrontation Clause** by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed . . . ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’” (*Fowler v. Sacramento County Sheriff’s Department* (9<sup>th</sup> Cir. 2005) 421 F.3<sup>rd</sup> 1027, 1035; quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2<sup>nd</sup> 674].)

The **Confrontation Clause** may be violated by excluding testimony of other witnesses relevant to the veracity of a victim’s statements regarding the allegations made against the defendant. (*Holly v. Yarborough* (9<sup>th</sup> Cir. 2009) 568 F.3<sup>rd</sup> 1091.)

“(T)he **Confrontation Clause** is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness’ testimony.” (*Davis v. Alaska* (1974) 415 U.S. 308, 318 [39 L.Ed.2<sup>nd</sup> 347]; *Fowler v. Sacramento County Sheriff’s Department*, *supra*, at pp. 1036-1037.)

Cross-examination of the detective who interviewed the missing witness is insufficient to meet this standard. (*Ocampo v. Vail* (2011) 649 F.3<sup>rd</sup> 1098, 1113.)

The Ninth Circuit uses three factors in evaluating an alleged right-to-effective-cross-examine issue:

- Whether the excluded evidence was relevant;
- Whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; *and*
- Whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness.

(*United States v. Gano* (9<sup>th</sup> Cir. 2008) 538 F.3<sup>rd</sup> 1117, 1125; excluding cross-examination related to the credibility of a witness likely error, but harmless beyond a reasonable doubt under the circumstances.)

**Hearsay:** The rules on the use of “*hearsay*” (i.e., an extra-judicial statement made to a witness who now proposes to testify in court to the statement as he heard it, when offered in evidence to prove the truth of that statement; E.C. § 1200) were recently changed by the United States Supreme Court in the case of *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2<sup>nd</sup> 177].

Prior to *Crawford*, it had been held that the “*Confrontation Clause*” of the **Sixth Amendment** was not automatically violated just because a witness was permitted to testify to someone else’s out-of-court statements; i.e., “*hearsay*.” Testimony relating to such a statement might still be admissible whenever such a statement “*bears ‘adequate indicia of reliability.’*” To meet this test, the evidence must either fall within a “*firmly rooted hearsay exception*” or otherwise bear “*particularized guarantees of trustworthiness.*” (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2<sup>nd</sup> 597, 608]; see also *People v. Cervantes* (2004) 118 Cal.App.4<sup>th</sup> 162, 172; *Michigan v. Bryant* (2011) \_\_ U.S. \_\_, \_\_ [131 S.Ct. 1143; 179 L.Ed.2<sup>nd</sup> 93].)

*Crawford* announced a *new rule*: A declarant’s statements to police (or others) are *inadmissible* at trial, despite an applicable exception to the hearsay rule, unless it is proved that the declarant is (1) now unavailable *and* (2) the defendant has had a prior opportunity to confront and cross-examine the declarant.

This rule, however, only applies to “*testimonial*” statements: “(W)here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.” (*Crawford v. Washington, supra*, at p. 36.)

The problem is defining “*testimonial*.”

Without specifically defining the term, the *Crawford* Court held that “*testimonial*” includes (but is not necessarily limited to) prior testimony at a preliminary hearing, grand jury hearing, or trial. It also includes statements made during police interrogations. (*Crawford v. Washington, supra*, at pp. 51-52.)

“*Testimonial*” may also include statements contained in affidavits and depositions, depending upon which of the various legal definitions of “*testimonial*” is used. (*Ibid.*)

In general, “*testimonial*” statements would include any “pretrial statements that declarants would reasonably expect to be used prosecutorially.” (*Ibid.*)



*Crawford* identified three proposed alternate “formulations” for identifying a testimonial statement:

- Ex parte in-court testimony or its equivalent; i.e., material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
- Extrajudicial statements contained in formalized testimonial materials, such as affidavit, deposition, prior testimony, or confessions.
- Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

(*In re Fernando R.* (2005) 137 Cal.App.4<sup>th</sup> 148, 161; *People v. Jefferson* (2008) 158 Cal.App.4<sup>th</sup> 830, 842-844.)

“ . . . *Crawford* supports a conclusion that the test for determining whether a statement is ‘testimonial’ is not whether its use in a potential trial is foreseeable, but whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge should issue.” (*People v. Taulton* (2005) 129 Cal.App.4<sup>th</sup> 1218, 1224.)

The Supreme Court later expanded upon the above third category of testimonial statements in the context of a 9-1-1 call to police for assistance in *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2<sup>nd</sup> 224] (and *Hammon v. Indiana*), where two distinctly different cases were analyzed:

- A recording of a domestic violence victim’s 9-1-1 telephone call, requesting help in an on-going situation, was found to be *non-testimonial*, where the following circumstances existed:

- The victim was speaking of events as they were actually happening.
  - The victim was facing an on-going emergency.
  - The statements elicited from the victim were necessary to enable the police to resolve the present emergency rather than simple to learn what had happened in the past.
  - The formality of the situation was less than where a victim is interviewed about a past event.
- The statements of a domestic violence victim from an interview obtained by police officers responding to a 9-1-1 call for assistance, about an event that although recent, was over, with the victim and suspect separated, were held to be *testimonial* because:
    - The interview of the victim was part of an investigation into possibly past criminal conduct.
    - There was no emergency in progress.
    - The interview was to determine not what was happening, but rather what had happened.
    - The primary, if not sole, purpose of the interview was to investigate a possible crime.

Even though both the scenarios involved in the *Davis* case were domestic violence related, it has been noted that non-testimonial statements are not restricted to such cases. (See *Michigan v. Bryant* (2011) \_\_ U.S. \_\_, \_\_ [131 S.Ct. 1143; 179 L.Ed.2<sup>nd</sup> 93].)

*Davis v. Washington* further provided the following summary of the difference between “*testimonial*” and “*non-testimonial*” statements:

- “Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”
- “They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

(Italics added; *Id.*, at p. 822; where the Court also notes that the term “*interrogation*” is not to be taken literally (fn. 1). It would include what might more often be referred to as a “witness interview.”)

See also *People v. Byron* (2009) 170 Cal.App.4<sup>th</sup> 657, 668.

It is also noted in *Davis v. Washington*, *supra*, at p. 828, that what is a non-testimonial statement at the beginning may devolve into a testimonial statement at that point when the emergency is over and the police move onto an effort to obtain information concerning a crime that is no longer occurring.

The rule of *Davis* was analyzed by the California Supreme Court in *People v. Cage* (2007) 40 Cal.4<sup>th</sup> 965, at page 984, where it summarized the issue:

“First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.

Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. [fn. omitted.]

Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to

testimony—to establish or prove some past fact for possible use in a criminal trial.

Fourth, the primary purpose for which a statement was given and taken is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. [fn. omitted.]

Fifth, sufficient formality and solemnity are present when, in a non-emergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses.

Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.” (see also *People v. Osorio* (2008) 165 Cal.App.4<sup>th</sup> 603, 612-613; and *People v. Byron* (2009) 170 Cal.App.4<sup>th</sup> 657, 668.)

The United States Supreme Court further held that when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the primary purpose of the interrogation by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation. The existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public. (*Michigan v. Bryant* (2011) \_\_ U.S. \_\_ [131 S.Ct. 1143, 1162-1163; 179 L.Ed.2<sup>nd</sup> 93].)

Prior statements that are *not* testimonial were identified in *Crawford* as information obtained from “*business records*” (E.C. § 1270) and statements made in “*furtherance of a conspiracy*” (E.C. § 1223), and maybe even “*dying declarations*.” (E.C. § 1242)

(*Crawford v. Washington*, *supra*, at p. 56, and fn. 6; *In re Fernando R.* (2005) 137 Cal.App.4<sup>th</sup> 148, 160.)

See “*Dying Declarations*,” below.

Also, an “*off-hand, overheard remark*” does not necessarily involve the **Sixth Amendment**. Further, it is apparent that statements offered on some other issue than to establish the “*truth of the matter asserted*” in the statement (e.g., information used by a police officer to establish probable cause, or, arguably, statements used to impeach a witness when he or she testifies and lies) are not “*testimonial*.” (*Crawford v. Washington*, *supra*, at pp. 51-52.)

Hearsay statements that are determined *not* to be testimonial are tested for admissibility as dictated in *Pointer v. Texas* (1965) 380 U.S. 400 [13 L.Ed.2<sup>nd</sup> 923] and *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2<sup>nd</sup> 597]; (*Parle v. Runnels* (9<sup>th</sup> Cir. 2004) 387 F.3<sup>rd</sup> 1030, 1037-1042; homicide victim’s diary entries describing prior incidents of domestic abuse inflicted by the defendant held to be admissible non-testimonial hearsay, pursuant to **E.C. § 1370** [Infliction of, or threat to inflict, physical injury].)

Examples of “*Testimonial*” statements that will *not* be admitted into evidence:

An interview at the scene of a recent domestic violence incident, after the victim and suspect are separated and the victim is interviewed about what had occurred after the fact, for the purpose of investigating a possible crime. (*Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2<sup>nd</sup> 224].)

Statements made by a child abuse victim (e.g., four years old) to a police officer and, separately, a professionally trained child interviewer, after the child is ruled to be incompetent to testify due to her age, such statements thus meeting the hearsay rule exception requirements of **Evid. Code § 1360** (Statements of a child under the age of 12, describing an act of child abuse), are “*testimonial*” and thus inadmissible as a violation of the defendant’s **Sixth Amendment** right to confrontation. (*People v. Sisavath* (2004) 118 Cal.App.4<sup>th</sup> 1396.)

A police videotaped interview of a “dependent adult” (per **P.C. § 368(h)**) in an elder and dependent adult financial

abuse case, where the victim dies a few days later. (*People v. Pirwani* (2004) 119 Cal.App.4<sup>th</sup> 770.)

The interviews of a slashing victim conducted by a police officer, both in the hospital emergency room and later at the police station, are clearly *testimonial*, although the victim's statements to the emergency room doctor, asked for the purpose of determining treatment that was to be given, is not testimonial. (*People v. Cage* (2007) 40 Cal.4<sup>th</sup> 965; the issue being the admissibility of the victim's hearsay statements under E.C. §§ 1240 [spontaneous statements] and 1370 [victim's report of physical injury].)

A witness's testimony in front a grand jury is testimonial. Where defendant is precluded from cross-examining the witness at trial on her grand jury testimony, after she had been questioned on it in the Government's case-in-chief during which she disavowed what she had told the grand jury under oath, and thereafter made herself "unavailable" by invoking her **Fifth Amendment** right against self-incrimination, the defendant was deprived of his **Sixth Amendment** right to confrontation under *Crawford*. (*United States v. Wilmore* (9<sup>th</sup> Cir. 2004) 381 F.3<sup>rd</sup> 868.)

A declaration previously sworn to by a homicide victim in her application for a restraining order is *testimonial*, and *not* admissible against the defendant in his later murder prosecution. (*People v. Pantoja* (2004) 122 Cal.App.4<sup>th</sup> 1, 9.)

Tape-recorded statements of two witnesses to defendant's crime were held to be inadmissible hearsay statements, and violated defendant's **Sixth Amendment** confrontation rights when admitted into evidence. (*People v. Lee* (2004) 124 Cal.App.4<sup>th</sup> 483, 487-491.)

The statements to a police detective by defendant's six-year-old step daughter, where the victim was unable to reiterate her prior account to the detective of being molested. (*Bockting v. Bayer* (9<sup>th</sup> Cir. 2005) 399 F.3<sup>rd</sup> 1010, as amended at 408 F.3<sup>rd</sup> 1127; the Court finding the rule of *Washington* to be a new rule, that it was retroactive, and that admission of the victim's hearsay statements were *not* harmless error.)

Admission into evidence of non-testifying co-defendant's statement to an investigator implicating the other defendants in a jail assault, where the declarant did not testify and was therefore not subject to cross-examination, violated the rule of *Crawford*. (*People v. Pena et al.* (2005) 128 Cal.App.4<sup>th</sup> 1219.)

The statements by a robbery victim given to one of the initial officers at the scene of the suspect's arrest after it was already clear that a robbery had occurred. (*In re Fernando R.* (2005) 137 Cal.App.4<sup>th</sup> 148.)

An interview of an elder adult by a law enforcement officer after any exigencies have expired, and where most of the interview consisted on questions pertaining to the defendant's conduct, the victim's deteriorating opinion of him, and her desire that he not inherit any of her property. (*People v. Cooper* (2007) 148 Cal.App.4<sup>th</sup> 731, 745.)

Victim's statements to a police officer a full week after being assaulted in a domestic violence incident. (*People v. Quitiquit* (2007) 155 Cal.App.4<sup>th</sup> 1, 14; conc. Opinion.)

A forensic report prepared by a laboratory technician is testimonial, and thus inadmissible under *Crawford* as a **Sixth Amendment** confrontation issue, requiring the technician himself to testify. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2<sup>nd</sup> 314].)

*Melendez-Diaz* appears to be contrary to California's rule on this issue. (*People v. Geier* (2007) 41 Cal.4<sup>th</sup> 555, 593-607; a DNA analysis report, from which a DNA expert testified, held to be admissible as non-testimonial without the live testimony of the examiner who prepared the report. The continuing validity of *Geier*, in light of *Melendez-Diaz*, *supra*, is under review (petitions granted, 12/2/09) in five California cases: *People v. Rutterschmidt* (2009) 176 Cal.App.4<sup>th</sup> 1047, S176213, *People v. Dungo* (2009) 176 Cal.App.4<sup>th</sup> 1388, S176886, *People v. Lopez* (2009) 177 Cal.App.4<sup>th</sup> 202, S177046, *People v Gutierrez* (2009) 177 Cal.App.4<sup>th</sup> 654, S176620, and *People v. Benitez (Samuel)* (2010) 182 Cal.App.4<sup>th</sup> 194.)

Petition for review was granted on May 12, 2010, by the California Supreme Court in *Benitez*, making this case no longer available for citation.

See *People v. Vargas* (2009) 178 Cal.App.4<sup>th</sup> 647, 659-660, noting the conflict, but declining to decide whether *Melendez-Diaz* did in fact overrule *Geier* in that even if error, the evidence was harmless.

Also see *People v. Sanchez* (2011) 193 Cal.App.4<sup>th</sup> 928, holding that the use in evidence of a certified letter from the California Department of Justice, Firearms Division, attesting to the fact that defendant was *not* listed as the registered owner of a firearm found concealed on his person, making the possession of the firearm a felony (P.C. § 12025(b)(6)), was a violation of defendant's **Sixty Amendment** right of confrontation.

The California Supreme Court granted review in this case on July 20, 2011, making it unavailable for citation.

Also see *People v. Davis* (2011) 199 Cal.App.4<sup>th</sup> 1254, where it was held that reports prepared by non-testifying physicians are not testimonial out-of-court statements and as such, they are admissible under the **Sixth Amendment**.

The California Supreme Court granted review in this case on January 11, 2012, making it unavailable for citation.

A sexual assault victim's statements made to a nurse during a sexual assault examination which was done for the purpose of documenting and collecting evidence, are testimonial and inadmissible. (*People v. Vargas* (2009) 178 Cal.App.4<sup>th</sup> 647.)

The fact that testimonial statements were introduced by defendant's co-defendant's counsel is irrelevant to the issue whether the **Sixth Amendment** was violated. It is also irrelevant whether the statements directly inculpated defendant. The issue is whether defendant was deprived of



his right to cross-examine the declarant. (*United States v. Nguyen* (9<sup>th</sup> Cir. 2009) 565 F.3<sup>rd</sup> 668.)

The affidavit of a Washington Department of Employment Security Assistant Records Officer, prepared for use at defendant's trial to prove the absence of any record of defendant having legitimate employment, should not have been admitted without the testimony of the affiant. (*United States v. Norwood* (9<sup>th</sup> Cir. 2010) 603 F.3<sup>rd</sup> 1063, 1068; error held to be harmless.)

In a federal prosecution for re-entering the United States without permission after once having been removed, introduction of a "Certificate of Non-existence or Record" (or "CNR"), in which a District Director of the Citizenship and Immigration Services of the Department of Homeland Security certifies that "after a diligent search [of two agency databases,] no record was found to exist indicating that the defendant obtained consent . . . for readmission in the United States," is a violation of the defendant's right to confrontation. (*United States v. Orozco-Acosta* (9<sup>th</sup> Cir. 2010) 607 F.3<sup>rd</sup> 1156, 1161-1162, and fn. 3.)

See also *United States v. Valdovinos-Mendez* (9<sup>th</sup> Cir. 2011) 641 F.3<sup>rd</sup> 1031, 1034; finding that despite the **Sixth Amendment** violation of allowing the CNR into evidence, such evidence was harmless beyond a reasonable doubt where sufficient other evidence existed to prove the same fact.

Admission of a written report of defendant's blood alcohol level violated defendant's right to confront the analyst who prepared the report. The report was clearly testimonial in nature as a statement made in order to prove a fact at defendant's criminal trial, and the testimony of the substitute analyst who did not perform or observe the reported test did not satisfy the right to confrontation. Further, the report did not consist exclusively of a machine-generated number but also indicated that the analyst properly received defendant's sample, performed testing on the sample adhering to a precise protocol, and observed no circumstance or condition affecting the integrity of the sample or the validity of the analysis. The substitute analyst could not convey what the reporting analyst knew or observed, or expose any lapses or inaccuracies on the

part of the reporting analyst. (***Bullcoming v. New Mexico*** (June 23, 2011) \_\_ U.S. \_\_ [131 S.Ct. 2705; 180 L.Ed.2<sup>nd</sup> 610].)

A detective's testimony that indisputably conveyed some of the critical substance of the witness's statements to the jury was found to be in violation of the Confrontation Clause even though his testimony was not detailed. Altogether, the detective's testimony indicated that the unavailable witness had confirmed the defendant's presence at the scene of the crime. The admission of testimony regarding the unavailable witness's statements, in combination with the prosecutor's closing remarks, had a substantial and injurious effect or influence in determining the jury's verdict. (***Ocampo v. Vail*** (2011) 649 F.3<sup>rd</sup> 1098, 1107-1113.)

Examples of "Non-Testimonial" statements that *may* be admitted into evidence:

A recording of a domestic violence victim's 9-1-1 telephone call, requesting help in an on-going situation, is *non-testimonial*. (***Davis v. Washington*** (2006) 547 U.S. 813 [165 L.Ed.2<sup>nd</sup> 224]; ***People v. Byron*** (2009) 170 Cal.App.4<sup>th</sup> 657, 675-676; ***People v. Banos*** (2009) 178 Cal.App.4<sup>th</sup> 483, 493-496.)

Statements are *not* testimonial when made to a friend of the declarant's under circumstances where the declarant did not believe that they would later be used against him in court. (***People v. Cervantes*** (2004) 118 Cal.App.4<sup>th</sup> 162, 169-174.)

The interviews of a slashing victim conducted by a police officer, both in the hospital emergency room and later at the police station, are clearly *testimonial*, although the victim's statements to the emergency room doctor, asked for the purpose of determining treatment that was to be given, is not testimonial. (***People v. Cage*** (2007) 40 Cal.4<sup>th</sup> 965; the issue being the admissibility of the victim's hearsay statements under E.C. §§ 1240 [spontaneous statements] and 1370 [victim's report of physical injury].)

A 9-1-1 call from the victim in a domestic violence incident, telling the 9-1-1 operator that her husband had just hit her, qualified both as a "spontaneous statement," per

**E.C. § 1240**, for purposes of the hearsay rule, and a non-testimonial statement for purposes of *Crawford v. Washington*. (*People v. Corella* (2004) 122 Cal.App.4<sup>th</sup> 461.)

Also, the initial responding officer's interview of the victim at the scene were held to be non-testimonial. "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.'" (*Id.*, at p. 469.)

But see *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2<sup>nd</sup> 224], above.

Similarly, a 9-1-1 call from the victim of a physical confrontation and stabbing, telling the 9-1-1 operator that defendant had just stabbed him in the stomach, qualified both as a "spontaneous statement," per **E.C. § 1240**, for purposes of the hearsay rule, and a non-testimonial statement for purposes of *Crawford v. Washington*. (*People v. Brenn* (2007) 152 Cal.App.4<sup>th</sup> 166.)

Also, the victim's brief description of what happened ("(The victim) seemed befuddled and in agony, saying only that someone had stabbed him next door with a kitchen knife."), responding to the brief questioning of the first officer on the scene, held to be non-testimonial under the circumstances. (*Ibid.*)

Although structured interviews of a domestic violence assault victim by a law enforcement officer, generally admissible under **E.C. § 1370** (victim's report of physical injury), are testimonial and therefore inadmissible when the victim later refuses to testify, the first initial statements obtained from the victim by responding police officers before they know what, if any, crime they may have had, are *not* testimonial and thus admissible under the prior *Ohio v. Roberts* standard. (*People v. Kilday* (2004) 123 Cal.App.4<sup>th</sup> 406; *People v. Banos* (2009) 178 Cal.App.4<sup>th</sup> 483, 493-496, 497.)

*Note: Kilday* has been granted review by the California Supreme Court and is therefore not citable authority.

An anonymous 9-1-1 call from a witness giving a suspect's vehicle description and license number, as a "*spontaneous statement*" (E.C. § 1240), is admissible as non-testimonial. (*People v. Caudillo* (2004) 122 Cal.App.4<sup>th</sup> 1417.)

A laboratory report introduced at probation revocation hearing and reflecting the analysis of contraband (i.e., rock cocaine in this case), is *not* testimonial. (*People v. Johnson* (2004) 121 Cal.App.4<sup>th</sup> 1409.)

Testimony by a supervising criminalist who reviewed the report of another laboratory employee in a cocaine possession case, who did not testify, held to be non-testimonial. Also, the content of the report is not being offered as a substitute for live testimony and the defendant had a full opportunity to cross-examine the supervising criminalist. (*People v. Salinas* (2007) 146 Cal.App.4<sup>th</sup> 958.)

The lab report is admissible under the "public records exception" (E.C. § 1280) to the hearsay rule. (*People v. Parker* (1992) 8 Cal.App.4<sup>th</sup> 110.)

The words of a prospective purchaser of narcotics calling the defendant's home in a phone call answered by police officers executing a search warrant, is admissible when testified to by the officer as non-testimonial hearsay (and admitted as a judicially created hearsay exception). (*People v. Morgan et al.* (2005) 125 Cal.App.4<sup>th</sup> 935, 947.)

Statements made to co-workers, admissible at trial as prior inconsistent statements (E.C. §§ 770, 1235), are not testimonial even though later included in police reports. (*People v. Butler* (2005) 127 Cal.App.4<sup>th</sup> 49, 59.)

An officer's filled-out proof of service, attesting to the details of the service of a domestic violence temporary restraining order, is not *testimonial* in nature, and is therefore admissible hearsay, to be used in evidence pursuant to P.C. § 1102 and CCP § 2009 to prove the fact that defendant was served with notice of the order. (*People v. Saffold* (2005) 127 Cal.App.4<sup>th</sup> 979.)

Statements made by the defendant to another person (i.e., Sanchez) (admissible as a spontaneous statement; E.C. §

**1240**) who was not law enforcement, introduced into evidence through the testimony of a police officer who interviewed Sanchez as to those statements, were admissible as a prior inconsistent statement (**E.C. § 1235**) when Sanchez, who testified, denied having made those statements to the officer. The defendant's statements to Sanchez were non-testimonial. Sanchez relaying those statements to the officer were admissible despite *Crawford* because Sanchez testified and was subject to cross-examination. (*People v. Rincon* (2005) 129 Cal.App.4<sup>th</sup> 738, 749-757.)

Documentary evidence (i.e., court or prison records) used to prove the existence of one or more prior convictions and/or imprisonments for purpose of enhancing a defendant's present sentence, is non-testimonial. (*People v. Taulton* (2005) 129 Cal.App.4<sup>th</sup> 1218; the defendant's "P.C. § 969b packet," or prison records, in this case.)

Police officers' recorded statements on tape, recording during a high speed pursuit, even if testimonial (holding that they were probably not), did not violate *Crawford*. (*People v. Mitchell* (2005) 131 Cal.App.4<sup>th</sup> 1210.)

A co-conspirator's statement to another co-conspirator (testified to by the second co-conspirator), is not testimonial, and therefore admissible. (*United States v. Allen* (9<sup>th</sup> Cir. 2005) 425 F.3<sup>rd</sup> 1231, 1234-1235.)

Spontaneous declarations (per **E.C. § 1240**) made to a non-law enforcement witness, implicating a co-defendant, held to be admissible against the non-confessing co-defendant over **Sixth Amendment Aranda/Bruton** and *Crawford* objections. (*People v. Smith* (2005) 135 Cal.App.4<sup>th</sup> 914.)

A murder suspect's confession to his attorney, implicating defendant as a co-principal in the murder, was non-testimonial in nature. Therefore, after the murder suspect was himself murdered and thus not available for defendant's trial, his attorney's testimony as to what the suspect had told him was not precluded by the *Crawford v. Washington*, *supra*, decision. (*Jensen v. Pfliler* (9<sup>th</sup> Cir. 2006) 439 F.3<sup>rd</sup> 1086.)

Responses to an officer's initial questions upon arriving at the scene of an incident, where they "need to know whom

they are dealing with in order to assess the situation, the threat to their safety, and possible danger to the potential victim,” are not testimonial. The admissibility of the responses to these initial questions will not be precluded by **Crawford**. (*Davis v. Washington* (2006) 547 U.S. 813, 822-827 [165 L.Ed.2<sup>nd</sup> 224].)

Statements of an elder adult to a social worker and a nurse, even though a law enforcement investigator accompanied them, where the “primary purpose” of the interview “was to assess (the victim’s) mental and physical condition and deal with her potentially critical need for assistance and protection.” (*People v. Cooper* (2007) 148 Cal.App.4<sup>th</sup> 731, 743.)

Also held to be “non-testimonial” was a video-taped tour of the victim’s home. (*Id.*, at p. 746.)

A domestic violence victim’s statement (“He punched me in the face, look at my nose”) held to be non-testimonial when obtained as a result of an officer’s question; “What happened.” The officer had come to the front door and heard a woman screaming. Defendant answered the door with blood on his hands. The victim had a bloody, broken nose. “(A)lthough (the officer) might have suspected domestic violence, (the officer) did not know at that point whether or not a crime had been committed. Having interrupted an “ongoing emergency” and attempting to obtain information from the victim in order to assess the situation, the victim’s response to the officer’s question was held *not* to be testimonial. (*People v. Johnson* (2007) 150 Cal.App.4<sup>th</sup> 1467, 1477-1480.)

The excited utterances of defendant’s victims who, up to the moment of the arrival of the police, were being held captive by the defendant, were admissible through the testimony of the first police officer on the scene who at that point was merely trying to find out what had happened, and what may happen in the next few minutes. (*People v. Chaney* (2007) 148 Cal.App.4<sup>th</sup> 772.)

A victim of a domestic violence incident which had occurred some 30 minutes earlier, where her husband had battered her and threatened to kill her, even though she was at the police station reporting the incident, where the court held that the officer’s questions to her about what had happened were

asked for “the primary purpose . . . to enable police assistance to meet an ongoing emergency.” (*People v. Saracoglu* (2007) 152 Cal.App.4<sup>th</sup> 1584, 1591-1598; rejecting defendant’s argument [and the Attorney General’s concession] that the emergency was over.)

A police officer/gang expert’s hearsay testimony, testified to as a basis for his expert opinion that the predicate crimes were committed for the benefit of a criminal street gang, per **P.C. § 186.22**. (*People v. Thomas* (2005) 130 Cal.App.4<sup>th</sup> 1202, 1210; *People v. Ramirez* (2007) 153 Cal.App.4<sup>th</sup> 1422.)

Any statements “*offered for purposes of probable cause,*” i.e., is “offered as a basis for action, nor for its truth.” (*United States v. Mitchell* (9<sup>th</sup> Cir. 2007) 502 F.3<sup>rd</sup> 931, 966.)

Surreptitiously recorded statements between two homicide suspects in a holding cell are not “testimonial” and may be used against both of them at trial. (*People v. Jefferson* (2008) 158 Cal.App.4<sup>th</sup> 830, 842-844.)

A DNA analysis report, from which a DNA expert testified, held to be admissible as non-testimonial without the live testimony of the examiner who prepared the report. (*People v. Geier* (2007) 41 Cal.4<sup>th</sup> 555, 593-607.)

However, casting doubt on the continuing validity of *People. V. Geier, supra*, is *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2<sup>nd</sup> 314; 129 S.Ct. 2527], decided on June 25, 2009, where it was held that a forensic report prepared by a laboratory technician is testimonial, and thus inadmissible under *Crawford* as a **Sixth Amendment** confrontation issue, requiring the technician himself to testify.

See *People v. Vargas* (2009) 178 Cal.App.4<sup>th</sup> 647, 659-660, noting the conflict, but declining to decide whether *Melendez-Diaz* did in fact overrule *Geier* in that even if error, the evidence was harmless.

Petitions granted, 12/2/09, in four California cases dealing with this issue: *People v. Rutterschmidt* (2009) 176 Cal.App.4<sup>th</sup> 1047, S176213, *People v. Dungo* (2009) 176 Cal.App.4<sup>th</sup> 1388, S176886, *People v. Lopez* (2009) 177 Cal.App.4<sup>th</sup> 202,

S177046, and *People v Gutierrez* (2009) 177 Cal.App.4<sup>th</sup> 654, S176620.

A defendant's rap sheets offered into evidence for the purpose of proving his prior convictions are not testimonial because they are not prepared for the primary purpose of a criminal prosecution. Also, they are not facts related to the charged crime, but rather historical data only. (*People v. Morris* (2008) 166 Cal.App.4<sup>th</sup> 363.)

An injured victim's statements about how her neck had been cut and a description of the assailant, made initially to a paramedic and then to the first police officer on the scene, obtained by both individuals in response to an on-going emergency and for the primary purpose of determining what had happened, were non-testimonial and admissible in evidence at defendant's trial when this victim died prior to trial. (*People v. Osorio* (2008) 165 Cal.App.4<sup>th</sup> 163.)

Calling for police assistance from a phone booth, reporting her fear of defendant, did not constitute testimonial statements. (*People v. Banos* (2009) 178 Cal.App.4<sup>th</sup> 483, 497.)

A mortally wounded victim told police that defendant had shot him. The officers testified at trial about what the victim, who died shortly after the shooting, had told them. The United States Supreme Court held that the informality of the exchange suggested that the officers' purpose was to address what they perceived to be an ongoing emergency. The circumstances lacked any formality that would have alerted the victim to, or focused him on, the possible future prosecutorial use of his statements. Under these circumstances, the victim's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The **Sixth Amendment**, therefore, did not bar their admission at defendant's trial. (*Michigan v. Bryant* (2011) \_\_ U.S. \_\_ [131 S.Ct. 1143; 179 L.Ed.2<sup>nd</sup> 93].)

A witness to a murder perceived the event within the meaning of **Evid. Code, § 1240(a)** (Spontaneous Statements) and was sufficiently affected for the spontaneous statement exception to the hearsay rule to apply. The confrontation clause of the **Sixth Amendment** did not bar the witness's statements (who was unavailable



due to dementia) made to the initial officer on the scene, even though taking place about an hour after the shooting, because they were not testimonial but addressed an emergency. (*People v. Blacksher* (2011) 52 Cal.4<sup>th</sup> 769, 809-818.)

A “Warrant of Removal,” documenting the order that defendant be removed from the United States and his actual physical removal, is not made in contemplation of litigation and is therefore non-testimonial. (*United States v. Orozco-Acosta* (9<sup>th</sup> Cir. 2010) 607 F.3<sup>rd</sup> 1156, 1162-1164.)

A shooting victim’s statement to a firefighter while en route to the hospital in an ambulance, identifying the defendant as the person who shot him, was not testimonial even though made in response to the firefighter’s question. (*People v. Nelson* (2010) 190 Cal.App.4<sup>th</sup> 1453, 1460-1468.)

A federal “*Warning to Alien Ordered Removed or Deported*,” like a “*Warrant of Removal*,” is non-testimonial because it is prepared routinely and is not made in anticipation of litigation. The Warning is a standardized form with no personalized content or factual findings. (*United States v. Valdovinos-Mendez* (9<sup>th</sup> Cir. 2011) 641 F.3<sup>rd</sup> 1031, 1034-1035.)

Documentary evidence of a defendant’s prior convictions is non-testimonial. Therefore, determining the truth of defendant’s prior convictions based on those documents did not violate defendant’s **Sixth Amendment** confrontation rights. The materials included in a prior-conviction packet under **P.C. § 969b** are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. The records were made for other purposes in the ordinary course of other business of the courts and agencies and were maintained for other purposes. They were offered as evidence only if an accused committed another offense. Accordingly, the records were beyond the scope of the **Sixth Amendment** right of confrontation and cross-examination. (*People v. Larson* (2011) 194 Cal.App.4<sup>th</sup> 832, 836-838.)

Examples of “*Testimonial*” statements that *may* be admitted into evidence because defendant was accorded his right to cross-examine the hearsay declarant:

“(W)hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” (**People v. Cage** (2007) 40 Cal.4<sup>th</sup> 965, 975, fn. 6, citing **Crawford**, *supra*, at p. 59, fn. 9.)

A wife’s statement to the police about defendant having beaten her, admissible as a “*Threat of Infliction of Injury*,” per **E.C. § 1370**, was held to be admissible at trial after the victim/wife refused to testify at trial but where the defendant had had the opportunity to cross-examine her at the preliminary hearing. (**People v. Price** (2004) 120 Cal.App.4<sup>th</sup> 224.)

A four-year-old child’s statements to a Child Protective Services interviewer, although “*testimonial*” in nature and thus potentially in violation of **Crawford**, are admissible pursuant to **E.C. § 1360** so long as the defendant *did* have the opportunity to cross-examine her. (**People v. Warner** (2004) 119 Cal.App.4<sup>th</sup> 331; where the four-year-old was found competent to testify by the trial court and did in fact do so.)

The fact that the child/witness/victim was unable to remember much of what she had previously told the interviewer was held to be irrelevant. The **Sixth Amendment** confrontation protection only guarantees defendant an “*opportunity*” to cross-examine the witness; not a guarantee that such cross-examination will necessarily be effective. (*Ibid.*)

*Note:* Review was granted in **Warner** by the California Supreme Court (Sept. 15, 2004), making this case unavailable for citation pending decision by the High Court.

A defendant’s right to confrontation is not denied when the prosecution offers a witness a plea bargain in exchange for the witness’s truthful testimony, but does not allow for the execution of the plea agreement until after the completion of defendant’s case. When the prosecution decided not to use the witness’s testimony, and where the witness therefore refused to testify for the defense claiming the benefits of his **Fifth Amendment** self-incrimination

privilege, but the trial judge relaxed the hearsay rule thereby providing the defense a means to get the witness's proposed evidence before the jury through the testimony of other witnesses, there was no **Sixth Amendment** confrontation violation. (*People v. Woods* (2004) 120 Cal.App.4<sup>th</sup> 929, 934-939.)

A child's testimony, answering "*I don't know*" to many of the questions, did not make her unavailable. "The Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' (Citations.)" (Italics in original; *People v. Harless* (2004) 125 Cal.App.4<sup>th</sup> 70, 85-88.)

*Note:* Review was granted in *Harless* by the California Supreme Court (Mar. 23, 2004), making this case unavailable for citation pending decision by the High Court.

The same issue occurred in *People v. Guess* (2007) 150 Cal.App.4<sup>th</sup> 148, where the witness had testified during the preliminary examination, but the defendant received discovery concerning that witness's proposed testimony late and the magistrate denied defendant's motion for a continuance. Defendant complained that his ability to effectively cross-examine the witness at the prelim was compromised, depriving him of his right to confrontation when the preliminary hearing transcript was used at trial (per **E.C. § 1291**; former testimony) because the witness had disappeared by then. The Court ruled that *Crawford* and the **Sixth Amendment** only guarantee the "*opportunity*" to cross-examine the witness. (Review granted, June 27, 2007. As such, this decision is not citable.)

Statements made to co-workers, admissible at trial as prior inconsistent statements (**E.C. §§ 770, 1235**), are not testimonial. However, even if they were, the persons making such statements were available at trial for cross-examination. Just because they denied making such statements does not mean that defendant was deprived of his right to cross-examine them on the statements. (*People v. Butler* (2005) 127 Cal.App.4<sup>th</sup> 49, 59.)

A detective's testimony concerning a witness identifying the defendant in a photographic lineup, per **E.C. § 1238** (*Prior Identification*), was admissible when the witness also testified and was subjected to defendant's cross-examination. (*People v. Bayor* (2005) 130 Cal.App.4<sup>th</sup> 355, 364-368.)

*Note:* Review was granted in *Bayor* by the California Supreme Court (Sep. 21, 2004), making this case unavailable for citation pending decision by the High Court.

A witness's preliminary hearing testimony, where he was subject to the defendant's cross-examination, after the witness, at trial, asserted a **Fifth Amendment** right not to testify (*People v. Seijas* (2005) 36 Cal.4<sup>th</sup> 291, 303.) or was unavailable because he died between the prelim and trial (*People v. Carter* (2005) 36 Cal.4<sup>th</sup> 1114 1171-1174.), or disappeared after the preliminary hearing and couldn't be located by the prosecution executing "due diligence" to find her. (*People v. Byron* (2009) 170 Cal.App.4<sup>th</sup> 657, 674.)

Police officers' recorded statements on tape, recording during a high speed pursuit, even if testimonial (holding that they were probably not), did not violate **Crawford** because the officers testified at trial and were subject to cross-examination. (*People v. Mitchell* (2005) 131 Cal.App.4<sup>th</sup> 1210.)

Statements made by a bank robbery co-conspirator to an F.B.I. agent that were testified to by the agent, where the declarant also testified and was subject to cross examination. (*United States v. Allen* (9<sup>th</sup> Cir. 2005) 425 F.3<sup>rd</sup> 1231, 1234-1235.)

The results of a "conditional examination" of a witness, per **P.C. §§ 1335 et seq.**, are admissible at trial because the defendant has had the opportunity to cross-examine the witness, despite the fact that the facts known to defendant, which may have resulted in other questions being asked, changed after the examination, at least in the absence of any wrongful failure by the prosecution to provide timely discovery. (*People v. Jurado* (2006) 38 Cal.4<sup>th</sup> 72, 115-116.)

A witness who feigns forgetfulness, saying he has no memory of the event, is nonetheless subject to cross-examination. The jury is still able to evaluate his demeanor and assess his credibility. His prior recorded statement to the police about the event in issue is admissible as a prior inconsistent statement (**E.C. § 1235**). (*People v. Gunder* (2007) 151 Cal.App.4<sup>th</sup> 412, 419-120.)

Statements by a domestic violence victim to police after defendant had already fled the scene, in once instance, and after he was already arrested in another instance, were testimonial, but nevertheless admissible under the “*Rule of Forfeiture by Wrongdoing*” based upon evidence that defendant later murdered the victim to keep her from reporting the incidents to the police and from testifying. (*People v. Banos* (2009) 178 Cal.App.4<sup>th</sup> 483, 497-498, 499-504)

Admission at trial of a witness’s preliminary hearing testimony where the witness, prior to trial, properly asserted his right against self-incrimination, was proper, despite the fact that at the preliminary hearing, the witness was given “use immunity” by the prosecution, and then later, after the prelim, was charged with murder (with his use immunity withdrawn) prior to trial. Defendant had the opportunity to cross-examine the witness at the preliminary examination. The prosecutor’s decision to later charge that witness as an accomplice in the murder, precipitating his unavailability to testify at trial, did not improperly deprive defendant of his right to cross-examine him at trial. Absent an improper motive, the prosecution was not required to again provide the witness with immunity at the trial. (*People v. Hollinquest* (2010) 190 Cal.App.4<sup>th</sup> 1534, 1546-1553, as modified at 2011 Cal.App. LEXIS 36 (1/13/11).)

See also the “*Rule of Forfeiture by Wrongdoing*,” below.

*Testimonial Statements when offered for a Non-Hearsay Purpose:*

Admission of hearsay statements when admitted as the basis for an expert’s opinion, although maybe testimonial, do not involve the defendant’s **Sixth Amendment** rights. (*People v. Thomas* (2005) 130 Cal.App.4<sup>th</sup> 1202, 1208-1210; gang expert’s testimony about conversations had with gang members on the street, offered as to support his opinion as to defendant’s gang membership.)

The rule of *Crawford* does not apply in a civil, Sexually Violent Predator (“SVP”) commitment proceeding, and is not applicable to an expert’s testimony about hearsay statements that served as a basis for his or her opinion. (*People v. Fulcher* (2006) 136 Cal.App.4<sup>th</sup> 41, 53-57.)

Police officers’ recorded statements on tape, recording during a high speed pursuit, even if testimonial (holding that they were probably not), did not violate *Crawford* because they were not offered to prove the truth of the statements. (*People v. Mitchell* (2005) 131 Cal.App.4<sup>th</sup> 1210.)

Evidence of an elder adult’s mental state, even though in the form of an interview of the victim, is a non-hearsay purpose and thus does not invoke the rule of *Crawford*. (*People v. Cooper* (2007) 148 Cal.App.4<sup>th</sup> 731, 744-745.)

Also, when an expert’s testimony is based partially upon the victim’s statements, using those statements for the non-hearsay purpose of reaching an opinion, those statements are admissible to show the basis for the expert’s opinions. (*Id.*, at p. 746-747.)

There are no confrontation clause restrictions on the introduction of an out-of-court statement when introduced into evidence for a non-hearsay purpose. (*People v. Cage* (2007) 40 Cal.4<sup>th</sup> 965, 975, fn. 6.)

A slashing victim’s statement to an investigator at the hospital for days after she had been assaulted, that her assailant had tan skin, was admitted pursuant to **E.C. § 1202**, as a prior inconsistent statement and only for the purpose of impeaching her prior statement that her assailant had been white, was admissible. (*People v. Osorio* (2008) 165 Cal.App.4<sup>th</sup> 603, 615-616.)

A gang member’s out-of-court testimonial statement to a police officer that defendant directed a gang-related robbery, as basis evidence to support the opinion of the prosecution’s gang expert that defendant was an active, high-ranking gang member when he committed the charged crimes, and not as substantive evidence that defendant was an active, high-ranking gang member, was properly admitted into evidence. The Appellate Court held that the admission did not violate defendant's **Sixth Amendment**

rights. Out-of-court testimonial statements did not violate the Confrontation Clause when they were admitted solely as basis evidence and not as substantive or independent evidence of the truth of the matter asserted. (*People v. Archuleta* (2011) 202 Cal.App.4<sup>th</sup> 493, 508-513.)

Whether or not such evidence is admissible is tested under **E.C. § 352**, determining whether the probative value of such evidence outweighs its potential prejudicial effect. (*Id.*, at pp. 513-519.)

*Testimonial Statements when offered in a Hearing Related to other than a Criminal Prosecution:*

Testimonial hearsay statements of a child sexual molest victim are admissible in a civil child dependency case even though they would not have been admissible in a criminal case. “In a criminal case the issue is the guilt of the defendant, whereas in a dependency case the subject is the well-being of the victim . . . “ (*In re April C.* (2005) 131 Cal.App.4<sup>th</sup> 599, 610-612.)

*Crawford* does not apply in a probation revocation proceeding in that the **Sixth Amendment** right to confrontation applies only to “*criminal prosecutions.*” (*United States v. Hall* (9<sup>th</sup> Cir. 2005) 419 F.3<sup>rd</sup> 980; held not to apply in post-conviction proceedings for violations of conditions of release.)

A hearsay statement that qualifies as a “*spontaneous statement,*” admissible as an exception to the Hearsay Rule under **E.C. § 1240**, when used at a *probation revocation hearing*, automatically satisfies the probationer’s due process confrontation/cross-examination rights without the court having to find good cause for the witness’s absence or to perform a balancing test. (*People v. Stanphill* (2009) 170 Cal.App.4<sup>th</sup> 61, 78-81.)

The “*balancing test*” referred to by the court, and which the court declined to decide whether it applies to statements admitted under other hearsay exceptions, involves an analysis of the importance of the hearsay evidence to the court’s ultimate finding when balanced with the nature of the facts to be proven by the hearsay evidence, as described

in *United States v. Comito* (9<sup>th</sup> Cir. 1999) 177 F.3<sup>rd</sup> 1166.

*Crawford* applies to trial testimony only. Therefore, so long as otherwise reliable, hearsay evidence was admissible at defendant's sentencing. (*United States v. Littlesun* (9<sup>th</sup> Cir. 2006) 444 F.3<sup>rd</sup> 1196; wife's statements to an investigator as to how much methamphetamine defendant was dealing relevant to sentencing under federal sentencing guidelines.)

The Confrontation Clause has been held not to apply to civil forfeiture proceedings. (*United States v. \$40,955 in United States Currency* (9<sup>th</sup> Cir. 2009) 554 F.3<sup>rd</sup> 752, 758); citing *United States v. Zucker* (1896) 161 U.S. 475, 481 [40 L.Ed. 777].)

*Testimonial Statements Admitted Under Equitable Principles:*

*The "Doctrine of Forfeiture by Wrongdoing:"*

"(I)f a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." (*Reynolds v. United States* (1879) 98 U.S. 145, 158 [25 L.Ed. 244].)

See also *Davis v. Washington* (2006) 547 U.S. 813, 832-834 [165 L.Ed.2<sup>nd</sup> 224]; a domestic violence case, where the "rule of forfeiture by wrongdoing" was noted to be applicable any time a defendant does something to procure the absence of a witness.

Where it is shown that the defendant prevented a witness's testimony, when the witness is "kept back," "detained" by "means of procurement," whenever the defendant's acts are "designed to prevent the witness from testifying," then he will not be able to prevent otherwise admissible (under a hearsay exception) statements of the witness (or victim) from being admitted into evidence. (*Giles*



*v. California* (2008) 554 U.S. 353 [171 L.Ed.2<sup>nd</sup> 488; 128 S.Ct. 2678]; reversing the California Supreme Court which had held that merely being the cause of the witness's unavailability was sufficient, whether or not done to prevent his or her testimony in the instant case.)

The rule of *Giles*, to the effect that the forfeiture exception applies only if a defendant specifically intended to prevent the witness from testifying, as a new rule, is not to be applied retroactively. (*Ponce v. Felker* (9<sup>th</sup> Cir. 2010) 606 F.3<sup>rd</sup> 596.)

And see *People v. Costello* (2007) 146 Cal.App.4<sup>th</sup> 973, where the Appellate Court approved the admission of six separate prior spontaneous statements of the victim, admissible pursuant to **E.C. § 1109(a)** (prior acts of domestic violence), through the testimony of responding police officers at defendant's trial for murdering that same victim, under the "*forfeiture by wrongdoing*" theory, while providing a complete history of the theory from *Reynolds, supra* (in 1879), to *Crawford*.

Statements by a domestic violence victim to police after defendant had already fled the scene, in one instance, and after he was already arrested in another instance, were testimonial, but nevertheless admissible under the "*Rule of Forfeiture by Wrongdoing*," based upon evidence that defendant later murdered the victim to keep her from reporting the incidents to the police and from testifying. (*People v. Banos* (2009) 178 Cal.App.4<sup>th</sup> 483, 497-498, 499-504)

"*Dying Declarations*:" An example of a "*testimonial*" statement that may be admitted into evidence on "*equitable principles*." or because of its recognition as a hearsay exception before the establishment of the **Sixth Amendment** confrontation clause.

Because the "*dying declaration*" exception to the hearsay rule is one that was recognized at common law, and in existence at the time of the establishment of the **Sixth Amendment** right to

confrontation, admitting such hearsay is not a **Sixth Amendment** violation. (*People v. Monterroso* (2004) 34 Cal.4<sup>th</sup> 743, 762-765; A robbery victim's dying declaration properly admitted into evidence whether or not it was "testimonial.")

A murder victim's dying declaration, identifying defendant as the murderer, was admissible through the testimony of the officer (and a tape of the interview) who interviewed the witness to the dying declaration who, in recanting his statement to the officer, denied, at trial, that the victim had in fact identified defendant. (*People v. Mayo* (2006) 140 Cal.App.4<sup>th</sup> 535; *Crawford* not violated.)

*The "Rule of Completeness;"* per **E.C. § 356**:

Where defendant is allowed to use evidence of certain statements of a co-principal under the theory that they are being admitted for a non-hearsay purpose (e.g., to support defendant's claim that he acted in fear for his life), the prosecution will be allowed to introduce other testimonial statements obtained in the same police interview where necessary to prevent the co-principal's statements to police from being taken out of context, per **E.C. § 356**. (*People v. Parrish* (2007) 152 Cal.App.4<sup>th</sup> 263, 269-276.)

Other Exceptions to the Rule of *Crawford*:

Testimonial statements made by a co-suspect in the defendant's presence, where the co-suspect is later not available for cross-examination at trial, are still admissible under the theory that the statements become those of the defendant as "*adoptive admissions*" (**E.C. § 1221**) when the defendant fails to deny them at the time the declarations are originally made. (*People v. Combs* (2004) 34 Cal.4<sup>th</sup> 821, 842-844: Admissible for the non-hearsay purpose of giving meaning to the defendant's silence in face of the co-suspect's incriminatory statements to the police.)

Adoptive admissions made by three robbery/murder suspects, all interviewed together, where the investigator sought the agreement of each as questions were asked and

answers provided by one of more of the defendants. (*People v. Castille* (2005) 129 Cal.App.4<sup>th</sup> 863, 876-883.)

A probation revocation hearing is not a “*criminal prosecution*” to which the **Sixth Amendment** applies. Therefore a laboratory report introduced at the probation revocation hearing and reflecting the analysis of contraband (i.e., rock cocaine in this case), does not implicate a defendant’s right to confrontation under the **Sixth Amendment**. Rather, the issue is one of the defendant’s right to “*due process*” under the **Fourteenth Amendment**. (*People v. Johnson* (2004) 121 Cal.App.4<sup>th</sup> 1409; report held to be admissible.)

Failing to deny a sentencing judge’s comment that defendant “broke just about every bone in the victim’s body” was held by the California Supreme Court not to be an adoptive admission, per **E.C. § 1221**, reversing the lower court on this issue. As such, the use of the defendant’s silence to such an accusation may not be used to prove a prior conviction and a third strike when offered as proof of such conviction in a subsequent case. (*People v. Thoma* (2007) 150 Cal.4<sup>th</sup> 1096.)

Evidence admitted under **E.C. § 356** (i.e., the “*Rule of Completeness*.” “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . .”) does not violate **Crawford**. The propose of **E.C. § 356** is founded “not on reliability but on fairness so that one party may not use selected aspects of a conversation . . . so as to create a misleading impression on the subject addressed.” (*People v. Parrish* (2007) 152 Cal.App.4<sup>th</sup> 263; co-suspect’s hearsay statements admitted into evidence to rebut other parts of the same interview by law enforcement that were introduced by defendant to support his argument that he participated in the crime under duress.)

Hearsay statements of a co-defendant that have been redacted to eliminate any references to the defendant “serves to prevent **Crawford** error.” (*People v. Stevens* (2007) 41 Cal.4<sup>th</sup> 182, 199; citing *United States v. Chen* (2<sup>nd</sup> Cir. 2004) 393 F.3<sup>rd</sup> 139, 150.)

“A witness whose testimony is introduced at a joint trial is not considered to be a witness “against” a defendant if the jury is instructed to consider that testimony only against a codefendant.’ (Citation) The only exception to this rule is the narrow class of statements . . . that powerfully incriminate the defendant on their face because they directly implicate the defendant by name or do so in a manner the jury could not reasonably be expected to ignore. (Citations) Accordingly, redacted codefendant statements that satisfy *Bruton's* (*Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2<sup>nd</sup> 476].) requirements are not admitted ‘against’ the defendant for *Crawford* purposes. (Citation)” (*People v. Lewis* (2008) 43 Cal.4<sup>th</sup> 415, 506.)

See *Aranda/Bruton*, below.

Statements of a domestic violence victim which were testimonial but admitted into evidence anyway may not require reversal where they were merely *cumulative* to other evidence that was properly admitted (e.g., the victim’s preliminary hearing testimony). (*People v. Byron* (2009) 170 Cal.App.4<sup>th</sup> 657, 676.)

*Retroactivity of the Crawford Rule:*

The rule of *Crawford* is *not* retroactive, at least when attempting to apply it to a case that is otherwise final (i.e., the defendant’s direct appeals have been exhausted), and is thereafter tested in a “*collateral*” habeas corpus petition. (*In re Moore* (2005) 133 Cal.App.4<sup>th</sup> 68; habeas corpus petition challenging the competency of defense counsel.

The rule under *Crawford*, being a new procedural rule, and *not* one considered to be a “*watershed*” rule (i.e., one that implicates “the fundamental fairness and accuracy of the criminal proceeding”), is *not* retroactive for purposes of either direct or collateral appellate review. (*Whorton v. Bockting* (2007) 549 U.S. 406 [167 L.Ed.2<sup>nd</sup> 1]; see also *Woods v. Sinclair* (9<sup>th</sup> Cir. 2011) 655 F.3<sup>rd</sup> 886, 899, fn. 7.)

*Also*, it has been held that a limiting instruction is *insufficient* to cure a *Crawford* violation. (*People v. Song* (2004) 124 Cal.App.4<sup>th</sup> 973, 984.)

*Also note*, however, that a defendant must object to a **Sixth Amendment** violation at trial in order to preserve the issue on appeal. Merely complaining that he is not being allowed to cross-examine a missing

witness whose hearsay statements are being admitted, without specifying that the objection is based upon **Six Amendment** grounds, *does not* preserve the issue on appeal. (*People v. Chaney* (2007) 148 Cal.App.4<sup>th</sup> 772.)

*Admissibility of a Co-Defendant's Hearsay Admissions or Confession Implicating Defendant:*

***Aranda/Bruton Rule:***

Use of the hearsay admissions or confession of one defendant at trial, admissible against that defendant pursuant to **E.C. § 1220** (Party Admission), as testified to by that defendant's interrogator, which implicate a co-defendant, at least when there is no hearsay exception applicable to that co-defendant and the confessing defendant does not testify at trial and is therefore not subject to cross-examination by the co-defendant, has been held to be a violation of the co-defendant's **Sixth Amendment** right to confront and cross-examine his accuser (i.e., the confessing defendant). (*People v. Aranda* (1965) 63 Cal.2<sup>nd</sup> 518; *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2<sup>nd</sup> 476].)

*Note:* The Truth-in-Evidence provision of **Proposition 8** (**Cal. Const. Art. I, § 28(d)**) abrogated *Aranda* to the extent it required relevant evidence to be excluded when federal constitutional law did not require exclusion. (*People v. Fletcher* (1996) 13 Cal.4<sup>th</sup> 451, 465; *People v. Mitcham* (1992) 1 Cal.4<sup>th</sup> 1027, 1045, fn. 6.)

The "*Aranda/Bruton Rule*" does not apply unless the two co-defendants are "*jointly tried*." A defendant cannot complain under this theory when the declarant, whose hearsay statements he is challenging, is tried separately. Other admissibility rules (e.g., hearsay) must be considered instead. (*People v. Combs* (2004) 34 Cal.4<sup>th</sup> 821, 840-841; see also *People v. Brown* (2003) 31 Cal.4<sup>th</sup> 518, 537; *United States v. Mitchell* (9<sup>th</sup> Cir. 2007) 502 F.3<sup>rd</sup> 931, 965.)

Neither *Bruton* nor defendant's confrontation rights are violated merely by admitting testimony to the effect that a co-principal made a statement to police resulting in that co-principal being taken into custody, without any reference to the content of that statement or other references to the defendant. (*Mason v. Yarborough* (9<sup>th</sup> Cir. 2006) 447 F.3<sup>rd</sup> 693.)

“*Bruton* (and *Aranda*) must be viewed ‘through the lens of *Crawford* and *Davis*,’ if the challenged statement is not testimonial, the confrontation clause has no application. (Citation omitted) Because it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to non-testimonial statements.” (*People v. Arceo et al.* (2011) 195 Cal.App.4<sup>th</sup> 556, 571.)

Referring to *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2<sup>nd</sup> 177], and *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2<sup>nd</sup> 224].)

The *Aranda/Bruton Rule* also does not apply when there is a hearsay exception applicable to the non-confessing co-defendant, so long as the exception survives a “*confrontation analysis*.” For instance:

A “*declaration against interest*,” made by one codefendant to a witness, under circumstances where the proponent of the evidence establishes that the declarant is not available to testify (e.g., another defendant invoking his right to remain silent), and the statement has “*adequate indicia of reliability*” sufficient to justify dispensing with the requirement of confrontation, may be admissible. (*People v. Greenberger* (1997) 58 Cal.App.4<sup>th</sup> 298, 326-334.)

“The Court has applied this ‘*indicia of reliability*’ requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’ . . . [¶] . . . Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” (*Ibid*; citing *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [65 L.Ed.2<sup>nd</sup> 597, 608]; see also *People v. Cervantes* (2004) 118 Cal.App.4<sup>th</sup> 162, 174-177, using the rule of *Greenberger* to uphold the admission into evidence statements of a co-principal to others than law enforcement (and thus, not a “*testimonial*” statement, per *Crawford v. Washington, supra*.) over the hearsay and confrontation objections of the other co-principals.)

Also, a “*spontaneous statement*” per E.C. § 1220, implicating the defendant, made by a co-defendant to his girlfriend, were admissible against the non-confessing defendant. *Aranda* and *Bruton* were held not to apply because the “*party admission*” exception was not used as grounds for admissibility. *Crawford v. Washington, supra*, did not apply because the statements were not “*testimonial*.” (See above). As statements which “*bore adequate indicia of reliability*” because they fell “*within a firmly rooted hearsay exception*,” they were properly admitted into evidence despite the lack of opportunity for the defendant to cross-examine the co-defendant on those statements. (*People v. Smith* (2005) 135 Cal.App.4<sup>th</sup> 914.)

The admission of statements possessing sufficient indicia of reliability to fall within the hearsay exception for declarations against interest did not deny a defendant the right of confrontation. The witness statements in this case qualified as declarations against interest which were so trustworthy that adversarial testing would add little to their reliability. Also, another statement qualified as a statement in furtherance of a conspiracy. Accordingly, because the witness statements here were admissible under state law as exceptions to the hearsay rule, there was no error in the admission of that testimony. (*People v. Arceo et al.* (2011) 195 Cal.App.4<sup>th</sup> 556, 571-579.)

Where *Aranda* and *Bruton* do apply, the alternative solutions to this problem are to:

- Try the defendants in separate trials, using the confessing defendant’s statements *only* in his own trial.
- Try the defendants in the same trial, but with a separate jury for each defendant.
- Try the defendants in the same trial and use the confessing defendant’s statements in evidence but redact (i.e., remove) any references to the co-defendant.
- Try the defendants in the same trial but exclude the statements altogether.

(*Richardson v. Marsh* (1987) 481 U.S. 200 [95 L.Ed.2<sup>nd</sup> 176]; see also *People v. Aranda, supra*, at pp. 530-531; *People v. Song* (2004) 124 Cal.App.4<sup>th</sup> 973, 981; *People v. Stallworth* (2008) 164 Cal.App.4<sup>th</sup> 1079, 1091.)

Redacting the confessing defendant's statements, taking out any references to the co-defendant, creates a dilemma for the prosecutor:

“(T)he Confrontation Clause is not violated by the admission of a nontestifying codefendant’s confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant’s name, but any reference to his or her existence.” (*Richardson v. Marsh*, *supra*, at p. 211 [95 L.Ed.2<sup>nd</sup> at p. 188].)

A defendant, however, *is* deprived of his **Sixth Amendment** right of confrontation if references to defendant’s name are merely replaced by a symbol or by a blank space in place of the defendant’s name. (*Gray v. Maryland* (1998) 523 U.S. 185, 192 [140 L.Ed.2<sup>nd</sup> 294, 300-301].)

Prior to the decision in *Gray*, this prohibition on the use of a co-defendant’s redacted statements was not clearly established law. Under **28 U.S.C.S. § 2254(d)(1)**, clearly established federal law includes only the Supreme Court’s decisions issued before the relevant adjudication of the merits of a prisoner’s claim, regardless of when the prisoner’s conviction became final. A direct appeal was thus the relevant adjudication of the merits. (*Greene v. Fisher* (Nov. 8, 2011) \_\_ U.S. \_\_ [132 S.Ct. 38; 181 L.Ed.2<sup>nd</sup> 336].)

Similarly a reference to “*another guy*” is insufficient to overcome the **Sixth Amendment** confrontation issue. (*People v. Schmaus* (2003) 109 Cal.App.4<sup>th</sup> 846, 854-856.)

Redacting the codefendants’ hearsay statements to “*other*” or “*others*,” where the jury could easily determine that they were referring to defendant, was insufficient to avoid *Aranda/Bruton* error. (*People v. Burney* (2009) 47 Cal.4<sup>th</sup> 203, 230-236; error harmless beyond a reasonable doubt given the amount of other evidence of defendant’s guilt.

Whether or not such editing is sufficient to overcome the right-to-confrontation issues depends upon the circumstances of each particular case. “The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the co-participant designated in the confession by symbol or neutral pronoun.” (*People v. Fletcher* (1996) 13 Cal.4<sup>th</sup> 451, 455-456.)



Where the co-defendant's hearsay statements are redacted to the point where it is unknown who else was involved in a series of kidnappings and murders, but it is apparent that someone else was involved, and there are two or more other co-defendants being tried in the same case, may pose an *Aranda/Bruton* issue, depending upon the circumstances. (*People v. Lewis* (2008) 43 Cal.4<sup>th</sup> 415, 453-460; Court held that if error, it was harmless error.)

“Severance may be necessary when a defendant’s confession cannot be redacted to protect a codefendant’s rights without prejudicing the defendant. [Citation] A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory.” (*Id.*, at p. 457.)

The use of a non-testifying co-defendant’s statement to an investigator that the victim “had to be checked” (i.e., assaulted) because he had “disrespected the Nortenos,” where it was alleged that the other co-defendants were all members of the Nortenos gang, violated the other defendants’ confrontation rights despite not being named individually. (*People v. Pena et al.* (2005) 128 Cal.App.4<sup>th</sup> 1219.)

Admission of one defendant’s statement to police, saying “*Well, if you don’t find the gun, then you are going to let us go, right?*”, assumed to be *Aranda/Bruton* error when the only person who could have been the one to toss the gun was the non-confessing co-defendant. (*People v. Reyes* (2008) 159 Cal.App.4<sup>th</sup> 214; error held to be harmless given the weight of the rest of the evidence.)

Redaction of the defendant’s statements, eliminating any reference to the codefendant at trial, tended to render the defendant’s exculpatory account of a shooting implausible. As such, defendant was prejudiced and his convictions on the affected counts were reversed. (*People v. Stallworth* (2007) 164 Cal.App.4<sup>th</sup> 1079, 1091-1103.)

Another solution recently upheld by an appellate court is to question all suspects together while obtaining each defendant’s concurrence with each of the others’ accounts. The defendant’s statements (i.e., the one who talked to the police) are then admissible against him under the “*party admission*” exception to the hearsay rule (E.C. § 1220), with those same statements admissible against the co-defendants as an “*adoptive admission*.” (E.C. § 1221) Such “*deeply rooted*” exceptions to the hearsay rule, given their obvious trustworthiness, do not violate the **Sixth Amendment**. (*People v. Castille* (2005) 129 Cal.App.4<sup>th</sup> 863.)

*But see People v. Jennings* (2003) 112 Cal.App.4<sup>th</sup> 459, where the co-suspect did not always agree with her co-conspirator's incriminatory statements. On appeal, the Court held that a criminal suspect does *not* "adopt" the incriminatory admissions of a co-suspect when she challenges the truth of those admissions.

The interrogation technique upheld in *Castille* was used again in *People v. Jennings* (2010) 50 Cal.4<sup>th</sup> 616, 660-666 (co-defendant to the defendant Jennings in 112 Cal.App.4<sup>th</sup> 459, *supra.*), and found to be lawful. Specifically, the California Supreme Court held that this interrogation technique avoids any confrontation issues discussed in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2<sup>nd</sup> 177]; *People v. Aranda* (1965) 63 Cal.2<sup>nd</sup> 518, and *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2<sup>nd</sup> 476].

The prior *People v. Jennings*, found at 112 Cal.App.4<sup>th</sup> 459, cited above, was this Jennings' wife, and co-defendant, whose appeal, not involving the death penalty, was litigated separately.

There are other automatic exceptions to the *Aranda/Bruton* rule of exclusion:

*Court trials.* (*Cockrell v. Oberhauser* (1969) 413 F.2<sup>nd</sup> 256, 258; *Rogers v. McMackin* (1989) 884 F.2<sup>nd</sup> 252, 254; *People v. Walkkein* (1993) 14 Cal.App.4<sup>th</sup> 1401.)

At a *preliminary examination.* (*People v. Miranda* (2000) 23 Cal.4<sup>th</sup> 340.)

*When the confessing codefendant testifies* and is therefore available for cross-examination by the one implicated in the codefendant's confession. (*Nelson v. O'Neil* (1971) 402 U.S. 622 [29 L.Ed.2<sup>nd</sup> 222].)

*Aranda* is also inapplicable when the non-testifying co-defendant's admissions were introduced into evidence *not* for the truth of the content of such statements, but rather for the non-hearsay purpose of proving defendant's state of mind in admitting his own involvement and as relevant to the defendant's credibility when he testified that his admission was motivated by a desire to "*bring forth the truth.*" (*People v. Carter* (2003) 30 Cal.4<sup>th</sup> 1166, 1208-1209.)

While using the pronoun "he" or "she," if the person is still readily identifiable as the defendant, won't avoid an *Aranda* problem, it might be okay if the defendant is but one of a "*large group*" of possible co-suspects. (*People v. Fletcher* (1996) 13 Cal.4<sup>th</sup> 451, 466.)

Where defendant is one of only two other possible co-suspects, he might still qualify as part of a "*large group.*" (*People v. Jefferson*

(2008) 158 Cal.App.4<sup>th</sup> 830, 844-845; if error, held to be harmless error given the strength of the evidence against the defendant.)

*Redactions that Prejudice the Defendant:*

It is also possible that by redacting a defendant's statements by eliminating any references to the codefendants, the defendant himself is made to look even more culpable to his prejudice. This might be error if it does in fact prejudice the speaking defendant. "Ordinarily, . . . a trial court should review both the unredacted and the redacted statements to determine whether the redactions so distort the original statement as to result in prejudice to the defendant." (*People v. Gamache* (2010) 48 Cal.4<sup>th</sup> 347, 378-382.)

*On Appeal: Aranda/Bruton* error is not reversible per se. Because it implicates a constitutional right, it is scrutinized under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S.18 [17 L.Ed.2<sup>nd</sup> 705]. (*Brown v. United States* (1973) 411 U.S. 223, 231-232 [36 L.Ed.2<sup>nd</sup> 208, 215]; *People v. Anderson* (1987) 43 Cal.3<sup>rd</sup> 11.4, 1128; *People v. Song* (2004) 124 Cal.App.4<sup>th</sup> 973, 981; *People v. Burney* (2009) 47 Cal.4<sup>th</sup> 203, 236.)