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ONE MINUTE BRIEF

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NUMBER: 2018-14 **DATE:** 07-20-18 **BY:** Devallis Rutledge **TOPIC:** No Sixth Amendment "Spillover"

ISSUE: If a defendant has an attorney on pending charges, may police still question him about other, uncharged crimes?

After adversary **judicial** proceedings begin on a case and the defendant requests, retains or is appointed counsel, statements deliberately elicited by police or their agents about **that** case, **without a waiver of counsel**, are inadmissible in the prosecution case-in-chief. This rule protects the Sixth Amendment right to counsel. *Massiah v. US* (1964) 377 US 201, 206 (rule); *Montejo v. Louisiana* (2009) 556 US 778, 789 (waiver). See 1MB 2009-10.

But what if police are investigating a **separate, uncharged** crime? **Assuming no separate *Miranda* issues** (see final paragraph and 1MB 2017-20), may police take an admissible statement on the uncharged case?

- The US Supreme Court has described the Sixth Amendment right to counsel as being "**offense-specific**," meaning that it only applies to the specific offenses (and lesser-included offenses) as to which adversary judicial proceedings have commenced (typically, by arraignment). *McNeil v. Wisconsin* (1991) 501 US 171, 175. This is true, **even if** the uncharged offenses still under investigation are "*closely-related*" or "*inextricably intertwined*" with the charged offenses. *Texas v. Cobb* (2001) 532 US 162, 172 (OK to question represented defendant charged with burglary about uncharged murders of burglary victims). California cases include these:

- *People v. Clair* (1992) 2 Cal.4th 629, 657-58 (OK to question about uncharged burglary and murder, even though defendant had counsel on an earlier charged burglary).

- *People v. Bradford* (1997) 15 Cal.4th 1229, 1312-13 (OK to question about uncharged murders, even though defendant had counsel on a charged rape).

- *People v. Webb* (1993) 6 Cal.4th 494, 527-28 (OK to question about uncharged murders, despite counsel on narcotics and PV, and **even if police deliberately delayed arresting** for the murders to allow an opportunity for questioning).

- *In re Robert E.* (2000) 77 Cal.App.4th 557, 562-63 (OK to question convicted minor about **perjury at his trial**, even though trial attorney was handling appeal).

- *People v. Slayton* (2001) 26 Cal.4th 1076, 1080, 1085 (OK to question on new burglary case, even though defendant had counsel on a charged 10851, and **even though both cases were later consolidated for trial**).

- *People v. Martin* (2002) 98 Cal.App.4th 408, 424 (OK to question defendant about **witness intimidation**, while he was **in trial and represented by counsel** on murder charges).

- *People v. DePriest* (2007) 42 Cal.4th 1, 33-34 (OK to question suspect about uncharged murder while he was represented by counsel in Missouri on charges in that state).

- *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 284-85 (OK to question about uncharged murders despite representation on pending drug charges, and such questioning **does not violate Rules of Professional Conduct**, Rule 2-100 [renumbered Rule 4.2, effective November 1, 2018]).

- *People v. Cunningham* (2015) 61 Cal.4th 609, 647 (OK to question about uncharged murders while represented on pending PV, **even during a delay in arraignment**).

- *People v. Gallardo* (2017) 18 Cal.App.5th 51, 77-79 (**PC § 4001.1(b)**, prohibiting police and in-custody informants from eliciting incriminating remarks from a jailed suspect, **does not apply to uncharged crimes**).

► Statements **must comply with both *Miranda* and *Massiah*** to be admissible in court. No admissible statement can be obtained **on any case** by police-initiated interrogation of a custodial suspect who has invoked his ***Miranda* right to counsel**, without at least a 14-day break in custody. *Maryland v. Shatzer* (2010) 559 US 98, 111. See 1MBs 2010-05, 2016-01.

BOTTOM LINE: Police questioning of a person about a non-included offense, when s/he has been arraigned and has an attorney on a charged offense, does not violate the “offense-specific” Sixth Amendment right to counsel.

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.