

# One Minute Brief

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## **ISSUE: How does the Sixth Amendment limit law enforcement's ability to obtain statements from a defendant after a criminal case has been filed?**

After a case is filed, an accused has a Sixth Amendment right to counsel, which limits how police may elicit information from the defendant. While there is significant overlap between this right and *Miranda*—which protects the *Fifth Amendment* privilege against self-incrimination—there are important differences. Most significantly, the Sixth Amendment prevents using **undercover agents** to deliberately elicit information about the filed case. This will often come up when a case is filed for warrant or extradition, so it is important to know when the Sixth Amendment right attaches and how it limits activities that are permissible under *Miranda*.

### **When does the Sixth Amendment right to counsel attach in California?**

While *Miranda* applies during any “custodial interrogation,” the Sixth Amendment attaches upon commencement of adversarial proceedings. For California cases, this is with the **filing of a criminal complaint** (or indictment, if proceeding by grand jury). (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1205–1206.) Previously, OMB 2008-11 argued, contra *Viray*, that the right attached at *arraignment*, but over the past 17 years no case has undermined *Viray*, and California trial courts must follow it.

### **What is prohibited after the right attaches?**

The right to counsel prohibits law enforcement from “deliberately elicit[ing]” incriminating statements in the absence of counsel, absent a waiver. (*Massiah v. United States* (1964) 377 U.S. 201.) This applies not only to formal interrogations, but also to **undercover officers** and **nonpolice informants** if they are acting as **agents** of law enforcement. (*United States v. Henry* (1980) 447 U.S. 264.) And unlike *Miranda*, the Sixth Amendment right applies even if the defendant is **out of custody**. (See *id.* at p. 273, fn. 11.)

Because of this, after a case is filed, police may generally **not** use an undercover officer or informant to prompt the defendant to speak about a crime. (See *Illinois v. Perkins* (1990) 496 U.S. 292). This is so even if the defendant is **out of custody**.

## What is allowed after the right attaches?

Law enforcement still has tools available after a case has been filed. For example:

**Interviewing the defendant with *Miranda* warnings and a waiver.** A defendant may knowingly and voluntarily waive the Sixth Amendment right to counsel. Typically, *Miranda* warnings and waivers also waive the Sixth Amendment right, and a defendant may waive the right without counsel present. (*Patterson v. Illinois* (1988) 487 U.S. 285, 296; *Montejo v. Louisiana* (2009) 556 U.S. 778, 797.) (**Caution:** Under *Patterson*, a defendant likely does *not* need to know about the pending charges, but there is some pre-*Patterson* California authority to the contrary, *People v. Engert* (1987) 193 Cal.App.3d 1518, 1526.)

**Conducting a *Perkins* operation for uncharged crimes.** The Sixth Amendment right to counsel is **offense specific** and applies only to the **charged crimes**; police may still seek information about other uncharged crimes. (*Texas v. Cobb* (2001) 532 U.S. 162, 168.)

**Use an agent as a “listening post,” or record the defendant with no agent present.** The Sixth Amendment forbids *deliberately eliciting* statements; it does not prevent a police agent from merely being present and listening, without inducing the defendant to speak. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459.) Likewise, the Sixth Amendment does not prevent simply recording a defendant alone or with other suspects (e.g., in a holding cell or in a police car). (*People v. Lucero* (1987) 190 Cal.App.3d 1065, 1068.)

**Accept information from an informant.** The Sixth Amendment does not prevent accepting information from an informant that elicited information from a defendant on his or her own initiative, not as a police agent. (*In re Neely* (1993) 6 Cal.4th 901, 915.)

**Alternatives to filing:** In a situation where law enforcement needs an arrest warrant, but still wants to conduct a *Perkins* operation, consider obtaining a *Ramey* warrant instead of filing criminal charges (Pen. Code, § 817). The Sixth Amendment will not attach.

**BOTTOM LINE:** After a complaint is filed, the Sixth Amendment limits deliberately eliciting information from the defendant about the charged crimes. Beware attempting undercover operations in such cases.

*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.*