

POINT of VIEW



A publication of the Alameda County District Attorney's Office

Nancy E. O'Malley, District Attorney

In this issue

- **Miranda invocations**
- **Post-invocation questioning**
- **Walking onto private property**
- **Parole searches of vehicles**
- **Interrogation**
- **Protective sweeps**
- **Executing search warrants**
- **Police dog reliability**
- **Redefining "hot pursuit"**

**Spring - Summer
2013**



Point of View

Since 1970



Copyright © 2013

Alameda County District Attorney

Executive Editor

Nancy E. O'Malley
District Attorney

Writer and Editor

Mark Hutchins

Point of View Online

Featuring new and archived
articles and case reports, plus
updates, alerts, and forms
le.alcoda.org

• Volume 41 Number 2 •

Point of View is published in January, May, and September. Articles and case reports may be reprinted by any law enforcement or prosecuting agency or for any educational or public service purpose if attributed to the Alameda County District Attorney's Office. Send correspondence to Point of View, District Attorney's Office, 1225 Fallon St., 9th Floor, Oakland, CA 94612. Email: POV@acgov.org.

This edition of Point of View
is dedicated to the memory of
Sergeant Butch Baker
Detective Elizabeth Butler
of the Santa Cruz Police Department
who were killed in the line of duty
on February 26, 2013

Contents

ARTICLE

1 Miranda Invocations

Perhaps the most significant changes in *Miranda* law over the years have been the Supreme Court's rulings on when and how suspects can invoke. In this article, we discuss the state of the law.

15 Post-Invocation Questioning

It is often possible to question a suspect who has invoked his *Miranda* rights. In this article, we explain the rules.

RECENT CASES

23 Florida v. Jardines

The Supreme Court restricts "knock and talks" and other such "intrusions."

24 People v. Schmitz

Parole searches of vehicles.

25 People v. Westmoreland

Police interrogation.

28 People v. Ikeda

Protective sweeps.

29 Bailey v. United States

Detentions incident to the execution of search warrants.

30 Florida v. Harris

Proving that a police K9 is reliable.

31 Sims v. Stanton

The Ninth Circuit narrows its definition of "hot pursuit."

FEATURES

33 The Changing Times

35 War Stories

Miranda Invocations

I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. That's it. I shut up!

Not quite an invocation¹

When can a suspect invoke his *Miranda* rights? And what constitutes an invocation? Both of these questions are important because, if officers prematurely terminate an interview as a result of their mistaken belief that the suspect invoked, any confession or incriminating statement he would have made will be lost forever. And if they ignore an invocation, or if they fail to clarify the suspect's intent, any incriminating statement he made might be suppressed by the courts. Fortunately, the law today is much clearer than it was in the past, so it is now much easier to make the right call.

As we will discuss, the most significant change in the law was the Supreme Court's ruling that a remark by a suspect will no longer constitute an invocation if it merely indicated he *might* be invoking. Furthermore, officers may now consider the suspect's words in context, including body language and inflection. The courts also eliminated the rule that an invocation will result if it appeared the suspect was unwilling to discuss his case "freely and completely," thereby recognizing "limited" or "contingent" invocations. Other improvements included the courts' rejection of anticipatory and third-party invocations, and the relaxation of the rules pertaining to post-invocation questioning.

These changes became necessary because, although *Miranda* was intended to provide officers with "clearcut" rules for interrogating suspects,² some courts were interpreting these rules so strictly that interrogations had become procedural minefields where one little mistake could detonate an entire investigation. The situation was especially

acute in major felony cases in which officers frequently confront suspects who, although they waived their *Miranda* rights, will admit to virtually nothing unless the officers were somehow able to "unbend their reluctance"³ which often requires relentless probing, confrontation, accusation, and even verbal combat. And the longer this goes on, the more likely the suspect will say something that could conceivably be deemed an invocation. In other words, *Miranda* had become an impediment to the fair and efficient administration of justice.

But that has changed, and the purpose of this article is to discuss those changes and the current state of the law. Among other things, we will explain when a suspect can and cannot invoke his rights, the test for determining when a suspect has invoked, when officers may clarify possible invocations, and how they can recognize and respond to "limited" invocations. As for questioning suspects who previously invoked their rights, we will cover that subject in the article entitled "Post-Invocation Questioning" which begins on page 15.

When a Suspect Can Invoke

The courts do not permit anticipatory invocations. This means that suspects cannot invoke their *Miranda* rights unless (1) they were "in custody" at the time, and (2) the invocation occurred during actual or impending "interrogation." In so ruling, the Supreme Court observed in *McNeil v. Wisconsin*, "Most rights must be asserted when the government seeks to take the action they protect against."⁴

CUSTODY: A suspect who is not "in custody" cannot invoke. This means that an invocation cannot occur unless the suspect had been arrested or unless his freedom of action had been curtailed to the degree associated with a formal arrest.⁵ For example, in *Bobby v. Dixon*⁶ a murder suspect named

¹ *People v. Jennings* (1988) 46 Cal.3d 963, 978-79.

² *Miranda v. Arizona* (1966) 384 U.S. 436, 469.

³ *Culombe v. Connecticut* (1961) 367 U.S. 568, 572.

⁴ (1991) 501 U.S. 171, 182, fn.3. ALSO SEE *Bobby v. Dixon* (2011) __ U.S. __ [132 S.Ct. 26, 29].

⁵ See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189]; *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

⁶ (2011) __ U.S. __ [132 S.Ct. 26, 29].

Archie Dixon walked into a police station in Ohio to retrieve his car which had been impounded for traffic violations. When a homicide detective happened to see him, the detective decided to use the opportunity to question him about the murder. But Dixon refused to answer any questions unless his lawyer was present. A few days later, having developed probable cause, the detective arrested Dixon and, after *Mirandizing* him, obtained an incriminating statement. On appeal, the Sixth Circuit ruled the statement was obtained in violation of *Miranda* because Dixon had invoked his right to counsel during his visit to the police station. This was “plainly wrong,” said the Supreme Court, because it was obvious that Dixon was not in custody during his “chance encounter” with the detective.

Similarly, most suspects who are being detained cannot invoke their *Miranda* rights because detainees are not in custody for *Miranda* purposes unless the surrounding circumstances had taken on the outward appearance of an arrest.⁷ For example, in *People v. Farnam*⁸ LAPD officers detained Farnam because they had reason to believe he had just attempted to burglarize a room at a nearby Holiday Inn. But when they asked him to identify himself, he responded, “Fuck you. I’m not going to answer any of your fucking questions.” He then fought with the officers and was arrested. The next day, a homicide detective visited him in jail and, after obtaining a *Miranda* waiver, questioned him about a murder for which he was a suspect. Farnam made several admissions which were used against him at trial. On appeal, he argued that his remark during the detention constituted an invocation and, therefore, his admissions should have been suppressed. The California Supreme Court disagreed, pointing out that “the term ‘custody’ generally does not include a temporary detention for investigation.”

ACTUAL OR IMPENDING INTERROGATION: Even if the suspect was “in custody,” he cannot invoke unless officers were interrogating him or unless interroga-

tion was imminent.⁹ For example, in *People v. Nguyen*¹⁰ officers in Buena Park had just arrested the defendant for drug trafficking and were attempting to handcuff her when she grabbed her cell phone and said she wanted to call her lawyer. The officers told her that she would have to wait until she arrived at the police station. But when they arrived, Nguyen did not renew her request and, instead, waived her rights and made several incriminating statements. On appeal, she argued that her statements were obtained in violation of *Miranda* because she had invoked when she attempted to phone her lawyer. The court disagreed, saying, “To conclude defendant asserted her *Miranda* right to counsel before the officer had completed the arrest or sought to question her would permit invocation of *Miranda* rights ‘anticipatorily,’ and contravene the views expressed [by the U.S. Supreme Court].”

Similarly, in *People v. Buskirk*¹¹ a San Bernardino County sheriff’s deputy had just arrested Buskirk for a parole violation when Buskirk said he wanted to know why he was being revoked. The deputy said he would find out later, at which point Buskirk said, “Well, I want a lawyer right now.” Later at the sheriff’s station, a detective obtained a *Miranda* waiver from Buskirk and, after explaining that he was a suspect in a robbery, obtained a confession. On appeal, Buskirk contended that his statement—“I want a lawyer right now”—constituted an invocation, but the court ruled that he could not have invoked then because he was not being interrogated at the time.

It should be noted that one reason for the rule against anticipatory invocations is that, if suspects could invoke before being arrested and interrogated, criminals would be flooding their local law enforcement agencies with notarized letters announcing, “I hereby invoke my *Miranda* rights, so don’t even think about questioning me about any crimes I have already committed or might commit in the future.” Something like that actually happened

⁷ See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-40; *People v. Manis* (1969) 268 Cal.App.3d 653, 669.

⁸ (2002) 28 Cal.4th 107.

⁹ See *People v. Avila* (2000) 75 Cal.App.4th 416, 422; *People v. Farnam* (2002) 28 Cal.4th 107, 180; *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1449; *People v. Morris* (1991) 53 Cal.3d 152, 202 [request for counsel at arraignment was not a *Miranda* invocation].

¹⁰ (2005) 132 Cal.App.4th 350, 356.

¹¹ (2009) 175 Cal.App.4th 1436.

in Orange County where several defense attorneys had their clients sign “Invocation Notices” which they filed with the courts; e.g., “The above-named defendant hereby invokes his *Miranda* rights.” This practice resulted in two published cases, *People v. Beltran*¹² and *People v. Avila*,¹³ in which the courts abruptly ended it. As the court in *Avila* observed, “Allowing anticipatory invocation of the *Miranda* right to counsel would extend an accused’s privilege against self-incrimination far beyond the intent of *Miranda* and its progeny.”¹⁴

One other thing. The only person who can invoke a suspect’s *Miranda* rights is the suspect—not his attorney, not his family, not his friends.¹⁵ As the U.S. Supreme Court explained, “[T]he privilege against compulsory self-incrimination is a personal one that can only be invoked by the individual whose testimony is being compelled.”¹⁶

What Constitutes an Invocation: The “Unambiguous” Requirement

Perhaps the most significant change to *Miranda* law took place in 1994 when the Supreme Court ruled in *Davis v. United States*¹⁷ that *Miranda* invocations would no longer result merely because a suspect’s words *might* have indicated he wanted to remain silent or that he *might* have wanted an attorney. Instead, the Court ruled that officers would be required to terminate an interview only if the

suspect demonstrated an obvious or unambiguous intent to invoke. As the California Supreme Court later explained, “In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect must *unambiguously* assert his right to silence or counsel.”¹⁸

The reason for requiring explicit invocations was that the old rule was transforming *Miranda* safeguards into “wholly irrational obstacles to legitimate police investigative activity,”¹⁹ and was forcing officers to “make difficult decisions about an accused’s unclear intent and face the consequence of suppression if they guess wrong.”²⁰

It should be noted that, although the Court technically ruled that invocations must be both “unambiguous” and “unequivocal,” and although these words have slightly different meanings, it intended only a single requirement: the suspect’s intention to invoke must have been reasonably apparent.²¹ Thus, the Ninth Circuit observed that a remark is ambiguous if it was subject to “more than one interpretation or reference,” or if it had “a double meaning or reference.”²²

Later in this article we will discuss the various types of remarks that tend to cause uncertainty. But first, it is necessary to examine the general principles that the courts apply in determining whether a suspect invoked.

¹² (1999) 75 Cal.App.4th 425. ALSO SEE *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn.3.

¹³ (1999) 75 Cal.App.4th 416.

¹⁴ At p. 423. ALSO SEE *U.S. v. Grimes* (11th Cir. 1998) 142 F.3d 1342, 1348; *Alston v. Redman* (3rd Cir. 1994) 34 F.3d 1237, 1240.

¹⁵ See *People v. Avila* (1999) 75 Cal.App.4th 416, 419; *People v. Beltran* (1999) 75 Cal.App.4th 425, 430; *People v. Calderon* (1997) 54 Cal.App.4th 766, 770-71 [invocation made by the suspect to a public defender investigator was ineffective].

¹⁶ *Moran v. Burbine* (1986) 475 U.S. 412, 433, fn.4 [edited].

¹⁷ (1994) 512 U.S. 452, 461-62 [“If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”]. ALSO SEE *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 [a suspect’s words will constitute an express invocation of the right to counsel only if they demonstrated an unequivocal and unambiguous “expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police”]. NOTE: The requirement of unambiguousness applies to both the right to remain silent and the *Miranda* right to counsel. See *Berghuis v. Thompson* (2010) __ U.S. __ [130 S.Ct. 2250, 2260]; *People v. Nelson* (2012) 53 Cal.4th 367, 379-80; *People v. Martinez* (2010) 47 Cal.4th 911, 947.

¹⁸ *People v. Stitely* (2005) 35 Cal.4th 514, 535.

¹⁹ *Davis v. United States* (1994) 512 U.S. 452, 460. ALSO SEE *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125 [“Prior to *Davis*, decisions of this court and the Court of Appeal had indicated that a request for counsel need not be unequivocal in order to preclude questioning by the police.”].

²⁰ *Berghuis v. Thompson* (2010) __ U.S. __ [130 S.Ct. 2250, 2260].

²¹ Re “ambiguous”: See *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 218 [court notes with apparent approval the Ninth Circuit’s ruling that “a response that is reasonably open to more than one interpretation is ambiguous.”]; *People v. Williams* (2010) 49 Cal.4th 405, 428. Re “equivocal”: See *The New Shorter Oxford English Dictionary* (4th ed. 1993), p.843 [“equivocal . . . Capable of more than one interpretation”].

²² *U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1080, fn.3.

The “reasonable officer” test

A suspect’s remark will be deemed an unambiguous invocation only if it would have been so interpreted by a reasonable officer.²³ As the California Supreme Court explained, the standard “is an objective one that asks what a reasonable officer would have understood the nature of the suspect’s request to be under all the circumstances.”²⁴ In other words, “The question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying.”²⁵

Consider words in context

In determining how a reasonable officer would have understood the suspect’s remark, the courts will consider it in context.²⁶ This is important because a remark that appears to be an invocation in the abstract may take on an entirely different meaning when considered in light of what the suspect and the officers said or did beforehand. “In certain situations,” said the California Supreme Court, “words that would be plain if taken literally actually may be equivocal in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends.”²⁷

Here we return to the epigraph at the beginning of this article where a murder suspect said, “I’ll tell you something right now. You’re scaring the living shit out of me. I’m not going to talk. That’s it. I shut up!” On the surface this remark would appear to be an unambiguous invocation. But the court noted that, in light of the preceding interplay between the suspect and the officers, it was apparent that it was directed at only one of the three officers in the room, and that it reflected only “a momentary frustration and animosity” toward that officer because he had been pressing the suspect to recall details about his whereabouts on the day the victim’s body had been found.²⁸

Similarly, in *People v. Thompson*²⁹ the suspect told an officer that his attorney told him “not to say nothin’ about the case or anything, unless I had a lawyer present.” In ruling this was not an invocation, the court observed that, in context, the statement was “only an explanation of why he was willing to proceed without counsel.”

Context can be especially important if (1) the suspect made the remark shortly after he unequivocally agreed to speak with the officers, and (2) there was no apparent reason for a sudden change of mind. For example, in *People v. Williams*³⁰ the following occurred:

OFFICER: Do you wish to give up your right to remain silent?

SUSPECT: Yeah.

OFFICER: Do you wish to give up the right to speak to an attorney and have him present during questioning?

SUSPECT: You talking about now?

OFFICER: Do you want an attorney here while you talk to us?

SUSPECT: Yeah.

OFFICER: Yes, you do?

SUSPECT: Uh huh.

OFFICER: Are you sure?

SUSPECT: Yes.

OFFICER: You don’t want to talk to us right now?

SUSPECT: Yeah. I’ll talk to you right now.

OFFICER: Without an attorney?

SUSPECT: Yeah.

In ruling that the suspect’s words did not constitute an invocation of his right to counsel, the California Supreme Court noted that he “had indicated to the officers that he understood his rights and would relinquish his right to remain silent. When asked whether he would also relinquish the right to an attorney and to have an attorney present during questioning, defendant responded with a question concerning timing.” The court then ruled:

²³ See *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Nelson* (2012) 53 Cal.4th 367, 377.

²⁴ *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 217-18.

²⁵ *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126.

²⁶ See *Connecticut v. Barrett* (1987) 479 U.S. 523, 528; *People v. Bacon* (2010) 50 Cal.4th 1082, 1107.

²⁷ *People v. Williams* (2010) 49 Cal.4th 405, 429 [edited].

²⁸ *People v. Jennings* (1988) 46 Cal.3d 963, 978.

²⁹ (1990) 50 Cal.3d 134, 166.

³⁰ (2010) 49 Cal.4th 405. ALSO SEE *Mann v. Thalacker* (8th Cir. 2001) 246 F.3d 1092, 1100.

In light of defendant's evident intent to answer the question, and the confusion observed by [the officer] concerning when an attorney would be available, a reasonable listener might be uncertain whether defendant's affirmative remarks concerning counsel were intended to invoke his right to counsel.

Note that, although the courts will consider the suspect's words in context, they will not consider what he said *after* his alleged invocation. As the United States Supreme Court explained, "[A]n accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."³¹

Body language, inflection

If officers had recorded or videotaped the interview, the context of the suspect's words may include the "tone, inflection, body language, and the infinite other minute qualities of demeanor and affect that cannot be ascertained from words alone."³² For example, in *People v. Clark*³³ a murder suspect argued that he had invoked his right to counsel because, while being *Mirandized*, he asked, "[W]hat can an attorney do for me?" In rejecting the argument, the California Supreme Court noted that its review of an audio recording of the statement, "including the tone and inflections of defendant's voice, reveals that defendant's questions were rhetorical in nature and linked to his repeated explanation of the reasoning behind the waiver of his rights."

Another example is found in the interrogation of Richard Allen Davis who kidnapped and murdered 12-year old Polly Klass in Petaluma.³⁴ After Davis waived his rights, an officer suggested to him that investigators had obtained DNA and unspecified trace evidence that linked him to the crime. Davis then stood up and said, "Well then book me and let's get a lawyer and let's go for it, you know. . . . Let's shit or get off the pot." The officer then asked Davis if he still wanted to talk, and Davis replied, "Get real. You think I should?" The officer then asked Davis why he

had abducted Polly, at which point Davis sat down and said, "I can't answer that question. Get real. I ain't done it, how can I answer it. . . . I didn't kidnap that little fucking broad, man." The questioning continued, and Davis made several denials that were used against him at trial.

On appeal, Davis contended that he had invoked his right to counsel when he said "let's get a lawyer and let's go for it." Although these words in the abstract would have signaled an invocation, the California Supreme Court viewed a videotape of the interview and concluded that Davis was simply "employing his own technique by standing up and issuing a challenge to his questioners," essentially saying, "If you can prove it, go for it." Moreover, he then sat down, thereby "indicating his willingness to continue the interrogation."

Pre- and post-waiver ambiguities: Are they treated differently?

So far, we have been discussing situations in which a suspect made an ambiguous remark while being interviewed; i.e., *after* he had waived his rights. In such cases, it is clear that an ambiguous remark will not constitute an invocation. But what if the suspect made the remark shortly *before* he waived? Specifically, are pre-waiver remarks subject to the old rule that an invocation results if the suspect merely indicated that he *might* be invoking?

The answer is uncertain. That is because the Supreme Court's opinion in *Davis* contained language that could be interpreted as limiting its decision to ambiguous remarks that occur *after* the suspect waived; e.g., "We therefore hold that, *after a knowing and voluntary waiver*, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."³⁵ Emphasis added. In fact, the Ninth Circuit ruled or indicated in three cases that *Davis* applies only to post-waiver remarks,³⁶ and there are passing references in two California Supreme Court decisions in which

³¹ *Smith v. Illinois* (1984) 469 U.S. 91, 99. ALSO SEE *People v. Nelson* (2012) 53 Cal.4th 367, 385.

³² *Sessoms v. Runnels* (9th Cir. 2010) 650 F.3d 1276, 1288.

³³ (1993) 5 Cal.4th 950.

³⁴ *People v. Davis* (2009) 46 Cal.4th 539.

³⁵ *Davis v. United States* (1994) 512 U.S. 452, 461.

³⁶ *U.S. v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1448; *U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1078-79; *Sessoms v. Runnels* (9th Cir. 2011) 650 F.3d 1276, 1283 ["Davis's reach was explicitly limited by the Court to statements made post-waiver."].

the court noted there might be a distinction between pre- and post-waiver ambiguities.³⁷

On the other hand, the U.S. Supreme Court in its post-*Davis* decision in *Berghuis v. Thompson* spent some time discussing the reasons that an ambiguous remark should not be deemed an invocation, and nowhere in its discussion did it say or intimate that the reasons included the fact that the suspect had previously waived his rights.³⁸ This makes sense because, as the Court previously observed, “[A] statement either is such an assertion of the right to counsel or it is not,”³⁹ which would indicate that the sequence in which it occurred would not be critical. Still, until the courts resolve this question, officers who encounter a pre-waiver ambiguous remarks should consider trying to clarify the suspect’s intent.

Invocations of the Right to Remain Silent

Having discussed the general principles of invocations, we will now examine the rules pertaining to invocations of the right to remain silent and, later, the right to counsel.

A suspect unambiguously invokes the right to remain silent if he said something that demonstrated either (1) a present unwillingness to submit to an impending interview with officers (“I don’t want to talk to you”⁴⁰; “I plead the Fifth”⁴¹), or (2) a desire to terminate an interview in progress (“I don’t want to answer any more questions”⁴²). Located between unambiguous invocations and unambiguous waivers is “a significant middle ground—one all too familiar to those with law enforcement experience—occupied by those suspects who are simply

unsure of how they wish to proceed.”⁴³ This “middle ground” also includes situations in which suspects are merely expressing reluctance to answer questions, frustration with an officer or their predicament, a desire to speak with someone other than an attorney, an unwillingness to give a recorded statement, or a refusal to sign a waiver. As we will now discuss, none of these expressions ordinarily constitute an invocation.

EXPRESSIONS OF RELUCTANCE: A suspect’s expression of uncertainty or reluctance to talk with officers, discuss the details of the crime, or answer certain questions does not constitute an invocation. As the Eighth Circuit observed, “Being evasive and reluctant to talk is different from invoking one’s right to remain silent.”⁴⁴ Here are some examples:

- **SUSPECT:** I don’t know if I wanna talk anymore since it’s someone killed.

COURT: “[D]efendant’s statement here does not amount to even an equivocal assertion of his right to remain silent. Defendant expressed uncertainty as to whether he wished to continue.”⁴⁵

- **OFFICER:** Okay, we’re talking deadly serious stuff here partner. We’re through bantering around. You’ve got to think what’s best for me. Now what do these guys know and what don’t they know. If they got enough to do me, what’s my best thing to do. What’s best for me.

SUSPECT: I don’t want to talk about this. You all are getting me confused. I don’t even know what you’re talking about. You’re making me nervous here telling me I done something I ain’t done. Kill somebody, come on, give me a break.

COURT: This was “something less” than an invocation.⁴⁶

³⁷ See *People v. Williams* (2010) 49 Cal.4th 405, 428 [*Davis* applied to “a postwaiver invocation”]; *People v. Nelson* (2012) 53 Cal.4th 367, 377 [“Hence, after a suspect makes a valid waiver of the *Miranda* rights, the need for effective law enforcement weighs in favor of a bright-line rule that allows officers to continue questioning unless the suspect clearly invokes”].

³⁸ (2010) __ U.S. __ [130 S.Ct. 2250, 2260]. ALSO SEE *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 123; *U.S. v. Wysinger* (7th Cir..2012) 683 F.3d 784, 795 [court applied *Davis* to a pre-waiver remark].

³⁹ *Smith v. Illinois* (1984) 469 U.S. 91, 97-98.

⁴⁰ *U.S. v. DeMarce* (8th Cir. 2009) 564 F3 989, 994.

⁴¹ *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 784.

⁴² *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1412.

⁴³ *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 125.

⁴⁴ *Mann v. Thalacker* (8th Cir. 2001) 246 F.3d 1092, 1100. ALSO SEE *Fare v. Michael C.* (1979) 442 U.S. 707, 727 [although defendant sometimes told officers that he “would not answer the question,” these remarks “were not assertions of his right to remain silent”];

⁴⁵ *People v. Wash* (1993) 6 Cal.4th 215, 238-39. ALSO SEE *People v. Scott* (2011) 52 Cal.4th 452, 482.

⁴⁶ *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238-40.

- OFFICER: We know about [the robberies at] Vermont and Florence, Tom's Hamburger. We know about the market, 84th and Main. What we'd like from you is your side of it. We're just getting what these people are telling us.

SUSPECT: Well, I did [the robberies] but [the murder] was self-defense . . . that dude was reaching for a gun, so I just shot him . . .

OFFICER: Well, I know it, but what happened?

SUSPECT: Do I gotta still tell you after I admit it?

OFFICER: Yeah. All you're saying is, you admit it. We don't know what you're admitting to.

SUSPECT: I admit I shot somebody.

COURT: "[T]aken in context defendant's remark meant that although he was willing to confess to the crimes he was uncomfortable about going into their details. Such reluctance is an understandable reaction to a confession of multiple robbery-murder, and does not rise to the level of an implied assertion of the defendant's constitutional right to cut off questioning."⁴⁷

- OFFICER: What did you see when you saw the [murdered] cashier?

SUSPECT: Do I have to talk about this right now?

OFFICER: Yeah, I'm afraid you have to.

COURT: The suspect "merely demonstrated his discomfort with the particular question about seeing the body of the clerk, who had been shot in the head with a large-caliber slug."⁴⁸

THAT'S ALL I HAVE TO SAY: Similarly, an invocation will not result if the suspect merely indicated he had nothing more to tell the officers (e.g., "That's all I can tell you,"⁴⁹ "That's all I have to say,"⁵⁰ "What else can I say?"⁵¹) or if he remained "largely silent" during the interview.⁵² As we will discuss later, however, a suspect's absolute refusal to answer a certain question or discuss a certain subject may constitute a "limited" invocation.

EXPRESSIONS OF FRUSTRATION: For suspects who are guilty of the crime under investigation, an interrogation is, among other things, stressful. After all, making up stories on-the-fly, attempting to explain away incriminating evidence, and trying to keep track of all the lies and disinformation—this can be exhausting. Consequently, suspects who are being interviewed will frequently express frustration which might sound like an invocation but it's usually not.

For example, in *People v. Stitely*⁵³ the following occurred after a Los Angeles County sheriff's detective accused the defendant of murdering a woman:

SUSPECT: Okay. I'll tell you. I think it's about time for me to stop talking.

DETECTIVE: You can stop talking.

SUSPECT: Okay.

DETECTIVE: It's up to you . . .

SUSPECT: Well, I mean. God damn accused of something that I didn't do. I'm telling you the truth. And you're not believe [sic] me.

DETECTIVE: Richard, the only problem is, I can prove otherwise.

SUSPECT: The only thing you can prove is I took her out of that bar.

On appeal, the court ruled that a reasonable officer in such a situation "would have concluded that defendant's first remark ('I think it's about time for me to stop talking') expressed apparent frustration, but did not end the interview."

Similarly, in *People v. Thomas*⁵⁴ a suspect in a drive-by murder was being interrogated by homicide detectives in San Diego. As things progressed, the investigators repeatedly accused him of lying, and he repeatedly denied it. At one point a detective said to him: "By you sitting here lying it just makes us think you're hiding something." The suspect replied, "Well, I know I wasn't there. I ain't talking

⁴⁷ *People v. Hayes* (1985) 38 Cal.3d 780, 786

⁴⁸ *People v. Castille* (2005) 129 Cal.App.4th 863, 885.

⁴⁹ *People v. Martinez* (2010) 47 Cal.4th 911, 949-50. ALSO SEE *People v. Ashmus* (1991) 54 Cal.3d 932, 970 [in context, the suspect's statement "now I ain't saying no more" was an attempt "to alter the course of the questioning. But he did not attempt to stop it altogether"].

⁵⁰ *In re Joe R.* (1980) 27 Cal.3d 496, 516 [suspect was essentially saying, "That's my story, and I'll stick with it"].

⁵¹ *U.S. v. Ferrer-Montoya* (8th Cir. 2007) 483 F.3d 565, 569.

⁵² *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2256-60.

⁵³ (2005) 35 Cal.4th 514, 535.

⁵⁴ (2012) ___ Cal.App.4th ___ [2012 WL 6177447].

no more and we can leave it at that.” In rejecting the suspect’s argument that this statement constituted an invocation, the Court of Appeal said, “When viewed in conjunction with his earlier expressions of frustration during the interview, this statement . . . was another expression of momentary frustration and, at most, was an ambiguous invocation of the right to remain silent.”

In another case, *People v. Williams*,⁵⁵ the defendant was arrested by Pasadena police for murdering a woman he had abducted as she left her workplace in Los Angeles. In the course of an interview with a detective, the following occurred:

DETECTIVE: How did you meet her that day?

SUSPECT: I don’t know.

DETECTIVE: What did you do that day with her? Why did it turn out the way it did?

SUSPECT: I don’t want to talk about it.

This remark, said the California Supreme Court, was merely “an expression of defendant’s repeated insistence that he was not acquainted with the victim as proof that he had not encountered her on the night of the crime.”

REQUEST TO TALK WITH SOMEONE: A request by the suspect—adult or juvenile—to speak with someone other than an attorney is not a *Miranda* invocation.⁵⁶ For example, the courts have ruled that a juvenile does not invoke his right to remain silent by requesting to talk with his probation officer or one of his parents.⁵⁷ Although the California Supreme Court has ruled that such a request by a juvenile is not irrelevant,⁵⁸ we are unaware of any case in which it was a factor. As we will discuss later, however, a suspect’s *demand* to speak with a third person might be deemed a limited invocation.

REFUSAL TO SIGN A WAIVER: It frequently happens that a suspect will verbally waive his *Miranda* rights but refuse to sign a waiver form. It is settled that such a refusal does not constitute an invocation.⁵⁹ As the Eighth Circuit explained in *U.S. v. Binion*, “Refusing to sign a written waiver of the privilege against self incrimination does not itself invoke that privilege and does not preclude a subsequent oral waiver.”⁶⁰

Invocation of Right to Counsel

In the past, whenever a suspect uttered or even mumbled the word “lawyer,” some courts would rule that he had invoked his right to counsel. *Davis* changed that.⁶¹ As the Ninth Circuit observed, a suspect “does not necessarily invoke his rights simply by saying the magic word ‘attorney’; that word has no talismanic qualities, and a defendant does not invoke his right to counsel any time the word falls from his lips.”⁶² For example, the following were not invocations:

- Yes, I understand [my rights] and I was told to talk to an attorney but I’m going to tell you the same thing I’m going to tell him.⁶³
- I want to have an attorney present. I will talk to you now until I think I need one. I don’t need one present at this time.⁶⁴

An invocation will, however, result if the suspect’s words unambiguously demonstrated an intent to speak with a lawyer before being questioned or to have an attorney present during questioning. Here are some examples of unambiguous invocations:

- I want to have an attorney.⁶⁵
- Well, if I’m under arrest (he was) I wanna lawyer.⁶⁶

⁵⁵ (2010) 49 Cal.4th 405, 434.

⁵⁶ See *People v. Robertson* (1982) 33 Cal.3d 21, 40; *People v. Barrow* (1976) 60 Cal.App.3d 984, 994; *People v. Dreas* (1984) 153 Cal.App.3d 623, 631.

⁵⁷ See *Fare v. Michael C.* (1979) 442 U.S. 707; *People v. Lessie* (2010) 47 Cal.4th 1152, 1165.

⁵⁸ See *People v. Nelson* (2012) 53 Cal.4th 367, 381; *People v. Lessie* (2010) 47 Cal.4th 1152, 1170.

⁵⁹ See *Berghuis v. Thompson* (2010) __ U.S. __ [130 S.Ct. 2250, 2256]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78; *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1315; *U.S. v. Oehne* (2nd Cir. 2012) 698 F.3d 119, 123.

⁶⁰ (8th Cir. 2009) 570 F.3d 1034, 1041.

⁶¹ See *Davis v. United States* (1994) 512 U.S. 452, 461; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.

⁶² *U.S. v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1447-48. ALSO SEE *People v. Cortes* (1999) 71 Cal.App.4th 62, 71 [“Defendant’s passing references to an attorney does not relect a request or desire to consult with an attorney”]..

⁶³ *People v. Cortes* (1999) 71 Cal.App.4th 62, 68, 71.

⁶⁴ *People v. Cunningham* (2001) 25 Cal.4th 926, 994.

⁶⁵ *People v. Sapp* (2003) 31 Cal.4th 240, 268. ⁶⁶ *People v. Boyer* (1989) 48 Cal.3d 247.

- I'd like an attorney because this is serious.⁶⁷
- I won't say anything until I see my lawyer.⁶⁸
- I didn't do any murders. I want to talk to a lawyer.⁶⁹
- Get me a lawyer.⁷⁰
- I am ready to talk to my lawyer.⁷¹
- Fuck you. I want to talk to my lawyer.⁷²

REMARKS ABOUT HAVING AN ATTORNEY IN COURT: Most people who have been arrested will want to be represented by an attorney when they appear before a judge. And the Sixth Amendment gives them that right.⁷³ *Miranda* does not.

That's because the sole objective of the *Miranda* (Fifth Amendment) right to counsel is to make an attorney available to an arrestee before and during police interrogation—not during court proceedings.⁷⁴ This means that a suspect's demand that he be represented by counsel in court or at a later time does not constitute an invocation of his *Miranda* right to counsel.⁷⁵ As the California Supreme Court explained, "A desire to have an attorney in the future, coupled with an unambiguous willingness to talk in the meantime, is not an invocation of the [*Miranda*] right to counsel requiring cessation of the interview."⁷⁶

For example, in *People v. Clark*⁷⁷ the suspect said, "I'd like to know how long it will take to get an attorney. I would like to talk to you in the interim period but I would like to try to get one—you know, get the process started." An officer responded, "Do you want an attorney right now?" and the suspect replied, "No, I'm willing to start but I'm sure during the process I'm going to want one." In ruling that this was not an invocation, the court noted that, "[a]lthough he expressed the desire to have the

process of getting an attorney started, he never showed the slightest reluctance to talk in the meantime." Similarly, in *People v. Turnage*⁷⁸ the following exchange occurred between a murder suspect and a Contra Costa County sheriff's detective after the suspect had been *Mirandized*:

SUSPECT: [A]ttorneys and stuff like that I can't afford one right at the moment.

OFFICER: Well, this says that an attorney can be appointed for you.

SUSPECT: Well, I feel I need one.

OFFICER: Okay. You'd rather not talk about the case.

SUSPECT: No, I don't mind talking about the case, but I just feel I want it noted that I want an attorney.

OFFICER: [So] you do want an attorney but not necessarily at this particular second. Is that right?

SUSPECT: Yes.

On appeal, the court ruled the suspect's remark—"I want it noted that I want an attorney"—was not an invocation because it was "abundantly" clear that he "was willing to talk about the case and also that he wished to utilize the assistance of an attorney at a later time rather than on that occasion."

Finally, in *People v. Johnson*⁷⁹ a Daly City police detective was questioning a murder suspect who said at one point, "My mother will put out money for a high price lawyer out of New York." In ruling that this remark did not constitute an invocation, the court observed, "Yet we have found no case suggesting that a suspect's statement concerning the possible retention of a lawyer for *future* proceedings would require termination of a police interrogation."

⁶⁷ *People v. McClary* (1977) 20 Cal.3d 218, 222. ⁶⁸ *People v. Jablonski* (2006) 37 Cal.4th 774, 811. ⁶⁹ *People v. Hayes* (1985) 169 Cal.App.3d 898, 907. ⁷⁰ *People v. Davis* (2009) 46 Cal.4th 539, 588. ⁷¹ *People v. Neal* (2003) 31 Cal.4th 63, 73. ⁷² *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1527.

⁷³ See *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 213 ["[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."].

⁷⁴ *Arizona v. Roberson* (1988) 486 U.S. 675, 684.

⁷⁵ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178; *Texas v. Cobb* (2001) 532 U.S. 162, 177 (conc. opn. of Kennedy, J.) ["It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred."]; *U.S. v. Charley* (9th Cir. 2005) 396 F3 1074, 1082.

⁷⁶ (1992) 3 Cal.4th 41, 121.

⁷⁷ (1992) 3 Cal.4th 41, 121.

⁷⁸ (1975) 45 Cal.App.3d 201, 211, fn.5.

⁷⁹ (1993) 6 Cal.4th 1, 28.

QUESTIONS ABOUT ATTORNEYS: Asking a question about an attorney is, by its very nature, not an unambiguous request for one. For example, the courts have ruled that the following remarks did not constitute *Miranda* invocations:

- How long would it take for a lawyer to get here?⁸⁰
- Am I going to be able to get an attorney?⁸¹
- What time will I see a lawyer?⁸²
- Do I get a lawyer?⁸³
- Did you say I could have a lawyer?⁸⁴
- I don't have a lawyer. I guess I need to get one, don't I?⁸⁵
- There wouldn't be [a lawyer] running around here now, would there?⁸⁶
- I can't afford a lawyer but is there any way I can get one?⁸⁷
- Can I call a lawyer or my mom to talk to you?⁸⁸
- Do I need a lawyer before we start talking?⁸⁹
- Do you think I need a lawyer?⁹⁰
- But will [having an attorney] make a difference?⁹¹
- Should I be telling you or should I talk to a lawyer?⁹²
- What can an attorney do for me?⁹³

EXPRESSIONS OF UNCERTAINTY: At the start of an interview or after it begins, suspects may express some uncertainty as to whether they should talk to officers (or whether they should continue talking) without a lawyer. So long as such an expression demonstrated only indecisiveness, it is not apt to be deemed an invocation.

Note that expressions of uncertainty are often qualified by words such as "I don't know," "if," "I think," or "probably." Thus, the Eighth Circuit observed that the phrase "I guess" is ordinarily used to indicate that "although one thinks or supposes something, it is without any great conviction or strength of feeling."⁹⁴ Thus, the courts have ruled that the following remarks did not constitute invocations:

- I don't know if I need a lawyer.⁹⁵
- I don't know if I should without a lawyer.⁹⁶
- Maybe I should talk to a lawyer.⁹⁷
- I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh.⁹⁸
- If you can bring me a lawyer that way I can tell you everything I know and everything I need to tell you and someone to represent me.⁹⁹
- I think it'd probably be a good idea for me to get an attorney.¹⁰⁰
- I guess you better get me a lawyer then.¹⁰¹
- I think I would like to talk to a lawyer.¹⁰²

SUSPECT RETAINED AN ATTORNEY: A suspect does not invoke his right to counsel by notifying officers that he had hired an attorney to represent him in the case under investigation or in another case.¹⁰³ This is because such an expression does not unambiguously demonstrate an intent to speak with an attorney before an interview began or to have an attorney present during one. For the same reason, a *Miranda* invocation does not result merely because the suspect appeared in court on the crime under investigation and was represented by counsel or had requested a court-appointed attorney.¹⁰⁴

⁸⁰ *People v. Simons* (2007) 155 Cal.App.4th 948, 958.

⁸¹ *U.S. v. Shabaz* (7th Cir. 2009) 579 F.3d 815, 819.

⁸² *U.S. v. Doe* (9th Cir. 1999) 170 F.3d 1162, 1166. ⁸³ *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677, 685.

⁸⁴ *People v. Crittenden* (1994) 9 Cal.4th 83, 130. ⁸⁵ *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259].

⁸⁶ *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 154-55. ⁸⁷ *Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1221.

⁸⁸ *People v. Roquemore* (2005) 131 Cal.App.4th 11, 25. ⁸⁹ *U.S. v. Wysinger* (7th Cir. 2012) 683 F.3d 784, 795. ⁹⁰ *U.S. v. Ogbuehi* (9th Cir. 1994) 18 F.3d 807, 813. ⁹¹ *People v. Maynarich* (1978) 83 Cal.App.3d 476, 481.

⁹² *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1072.

⁹³ *People v. Clark* (1993) 5 Cal.4th 950, 990.

⁹⁴ *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259].

⁹⁵ *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 126. ⁹⁶ *People v. Michaels* (2002) 28 Cal.4th 486, 510. ⁹⁷ *Davis v. United States* (1994) 512 U.S. 452, 462. ALSO SEE *People v. Sapp* (2003) 31 Cal.4th 240, 268 ["Maybe I should have an attorney"]. ⁹⁸ *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 527. ⁹⁹ *People v. Saucedo-Contreras* (2012) 55 Cal.4th 203, 219-20. ¹⁰⁰ *People v. Bacon* (2010) 50 Cal.4th 1082, 1107 [edited]. ¹⁰¹ *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259].

¹⁰² *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1071. ALSO SEE *U.S. v. Hampton* (7th Cir. 2012) 675 F.3d 720, 728 [the "hedge word" "but" was a qualifier].

¹⁰³ See *McNeil v. Wisconsin* (1991) 501 U.S. 171; *People v. Sully* (1991) 53 Cal.3d 1195, 1234.

¹⁰⁴ See *Montejo v. Louisiana* (2009) 556 U.S. 778.

REQUEST TO TALK WITH SOMEONE: A suspect's request to speak with any person (other than an attorney) does not constitute an invocation of the *Miranda* right to counsel. Thus, in *Fare v. Michael C.* the United States Supreme Court rejected the argument that a juvenile's request to speak with his probation officer was an invocation because, said the Court, it is the "pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend."¹⁰⁵

Limited Invocations

In the past, an invocation would result if the suspect said something that was inconsistent with a willingness to discuss his case "freely and completely."¹⁰⁶ That has changed. Now the courts recognize that a suspect's act of placing restrictions or conditions on an interview does not demonstrate a desire to terminate it. On the contrary, it demonstrates a willingness to speak with officers *if* they will agree to his demands.¹⁰⁷ So, if an invocation is so "limited," officers need not end the interview if they accede to his terms.

Limited invocation of right to remain silent

REFUSAL TO DISCUSS A CERTAIN SUBJECT: It often happens that a suspect will absolutely refuse to discuss a certain subject or answer a certain question. That's his right. But such a refusal will constitute only a limited invocation.¹⁰⁸ As the Ninth Circuit observed, "A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others."¹⁰⁹

For example, in *People v. Silva*¹¹⁰ the Lassen County Undersheriff was questioning Silva about a murder and, at one point, asked him if he had driven a certain truck. Silva responded, "I really don't want to talk about that." In ruling that Silva had merely invoked his right to remain silent as to the question about the truck, the California Supreme Court pointed out:

A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress.

In another murder case, *People v. Michaels*,¹¹¹ two Oceanside police detectives were questioning Kurt Michaels whom they had arrested for murdering his girlfriend's mother. Michaels and his girlfriend conspired to commit the murder in order to cash in on the victim's life insurance policy. In the course of the interview, the following occurred:

DETECTIVE: Do you know why you're here?

SUSPECT: Yes.

DETECTIVE: Tell me, in your own words.

SUSPECT: Murder

DETECTIVE: Murder of who?

SUSPECT: Murder of JoAnn Clemons.

DETECTIVE: Well, what's your side of the story? What happened?

The suspect responded that he did not know if he should answer the question without an attorney, and the detective informed him that "[i]f at any time that you do not want to talk with us, you can stop at any particular time. If there's any time that we ask you a question that you don't want to answer, you can stop at any time." At that point, the suspect said, "Okay, *that one*" (Laughter). [Court's emphasis.]

¹⁰⁵ (1979) 442 U.S. 707, 722.

¹⁰⁶ See, for example, *People v. Burton* (1971) 6 Cal.3d 375, 382; *People v. Carey* (1986) 183 Cal.App.3d 99, 105.

¹⁰⁷ See *Connecticut v. Barrett* (1987) 479 U.S. 523, 525 ["The Connecticut Supreme Court nevertheless held as a matter of law that respondent's limited invocation of his right to counsel prohibited all interrogation. . . . Nothing in our decisions, however, or in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant's response to these warnings."]; *People v. Johnson* (1993) 6 Cal.4th 1, 25-26 [a suspect does not automatically invoke his rights "by imposing conditions governing the conduct of the interview"].

¹⁰⁸ See *Michigan v. Mosley* (1975) 423 U.S. 96, 103-104 ["Through the exercise of his option to terminate questioning he can control . . . the subjects discussed"]; *McGraw v. Holland* (6th Cir. 2001) 257 F.2d 513, 518 [limited invocation occurred when the suspect said "I don't want to talk about it. I don't want to remember it."].

¹⁰⁹ *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664, fn.2.

¹¹⁰ (1988) 45 Cal.3d 604, 629-30. ALSO SEE *People v. Michaels* (2002) 28 Cal.4th 486, 510; *U.S. v. Brown* (7th Cir. 2011) 664 F.3d 1115, 1118 [not a general invocation when defendant refused to name the person who put out a "hit" on him].

¹¹¹ (2002) 28 Cal.4th 486.

On appeal, Michaels contended that he invoked the right to remain silent when he responded “that one” when asked if there was any question he did not want to answer. But the court disagreed, saying:

Defendant did not assert a right to refuse to answer any questions, ask that the questioning come to a halt, or request counsel. Instead, he was showing that he knew he could refuse to answer any or all questions and would exercise this right on a question-by-question basis.

REFUSAL TO SPEAK AT THE PRESENT TIME: A suspect’s statement that he was willing to speak with officers—but not at the present time—constitutes an invocation as to immediate questioning but not as to questioning that officers initiate after the passage of some time.¹¹² For example, in *People v. Brockman*¹¹³ a murder suspect who had been arrested by Santa Rosa police invoked his right to remain silent but added that he would make a statement in a “couple of days.” In ruling that the officers did not violate *Miranda* by recontacting the suspect two days later, the court said, “Since defendant offered to make a statement the police were entitled to act upon the offer after the elapse of two days.”

Similarly, in *People v. Riva*¹¹⁴ the defendant was arrested by police in Long Beach for inadvertently shooting a pedestrian while firing at the occupants of a vehicle. At one point, Riva said “I don’t want to say anything else right now.” The officers terminated the interview but, about one hour later, recontacted him and determined that he was now willing to speak with them. In ruling that the officers had not violated *Miranda*, the court said, “Riva’s statement he did not want to talk anymore ‘right

now’ clearly indicated he might be willing to talk in the future. A one-hour period between the end of the first interrogation and the start of the second was not so short as to constitute badgering or harassing the suspect.”

REFUSAL TO SPEAK WITH A CERTAIN OFFICER: It’s not uncommon that a suspect will refuse to speak with one of the officers in the room (especially when officers are employing the good-cop/bad-cop routine). Even if a court were to rule that this constituted an invocation, it would be considered only a limited invocation of the right to remain silent as to *that* officer but not any others. Thus, in *People v. Jennings*¹¹⁵ the court ruled that the defendant’s statement “I’m not going to talk” reflected “only momentary frustration and animosity” toward one of the officers “whom he did not like or trust, as opposed to [the other officers].”

GOING “OFF THE RECORD”: It appears that a suspect’s request to go “off the record” constitutes a request that something he is about to say will not be used against him in court; i.e., a limited invocation of the right to remain silent. Thus, if officers agree to the request, the off-the-record portion of the interview may be suppressed.¹¹⁶

“NO RECORDING”: There is not much recent case law on when, or under what circumstances, a limited invocation would result if the suspect demanded that an interview not be recorded. This is probably because most interviews are now secretly recorded or videotaped which means that, even if officers pretended to go along with the demand, or if they assured the suspect that the room was not bugged, a recording of the interview would be available. And because the suspect understood that

¹¹² See *People v. Martinez* (2010) 47 Cal.4th 911, 951 [“I don’t want to talk anymore right now.”]; *People v. Bolden* (1996) 44 Cal.App.4th 707, 713; *People v. Conrad* (1973) 31 Cal.App.3d 308, 321-22; *People v. Mickey* (1991) 54 Cal.3d 612, 652 [“I would like to continue our conversation at a later time.”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1066, 1077 [“I’ve got something to tell you, but not now.”]; *People v. Rundle* (2008) 43 Cal.4th 76, 116 [suspect requested to stop the interview “because he had a headache”].

¹¹³ (1969) 2 Cal.App.3d 1002, 1010.

¹¹⁴ (2003) 112 Cal.App.4th 981, 994 [officers waited one hour].

¹¹⁵ (1988) 46 Cal.3d 963, 979. ALSO SEE *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1450 [court noted that the defendant made a “conditional request for counsel if [a certain officer] were to stay” in the interview room].

¹¹⁶ See *People v. Johnson* (1993) 6 Cal.4th 1, 30-32 [an off-the-record request “effectively insulates the affected portion of the interview from subsequent courtroom use.”]. **NOTE:** In the past, officers were deemed to have misrepresented the *Miranda* rights if they granted a suspect’s request to speak “off the record.” The courts reasoned that it is deceptive to inform a suspect he is speaking “off the record” when, in fact, anything he says may be used against him. See, for example, *People v. Braeseke* (1979) 25 Cal.3d 691, 702. In reality, as the court in *Johnson* recognized, this is not a misrepresentation because a suspect can, in fact, have an “off the record” conversation with an officer if the officer grants the suspect’s request to speak privately.

anything he said could be used against him, it seems unlikely that such a recording would be suppressed on grounds that the officers' deception somehow violated *Miranda*. Although not a *Miranda* case, the Supreme Court's reasoning in *Lopez v. United States* indicated how it might address such an allegation:

Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the [IRS] agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.¹¹⁷

It should be noted that, one year before the Supreme Court ruled in *Davis v. U.S.* that invocations must be unambiguous, the California Supreme Court ruled that a "no recording" demand would constitute an invocation if it was accompanied by other circumstances that disclosed a "clear intent" to invoke.¹¹⁸ This is probably still good law because it seems consistent with *Davis*, although we are unaware of any case in which a defendant attempted to establish such a "clear intent."¹¹⁹

There is, however, a Ninth Circuit case, *Arnold v. Runnels*, in which the court ruled that an unambiguous invocation resulted when, after the suspect made his "no recording" request, he began saying "no comment" to most of the officers' questions. This ruling, however, appears to be contrary to the U.S. Supreme Court's subsequent decision in *Berghuis v. Thompson*¹²⁰ in which the defendant argued that he had invoked the right to remain silent because he

"was largely silent during the interrogation" and gave only a "few limited verbal responses," such as "yeah," "no," and "I don't know." In rejecting the argument, the Court simply observed, "Thompkins did not say that he wanted to remain silent or that he did not want to talk to the police."

Limited invocation of right to counsel

REQUEST FOR AN ATTORNEY RE CERTAIN QUESTIONS: A suspect's refusal to discuss a certain subject without first consulting with a lawyer or without having an attorney present constitutes an invocation of the *Miranda* right to counsel only as to questioning about *that* subject. Thus, in rejecting an argument that such a request constituted an absolute invocation, the court in *People v. Clark* pointed out that the "[d]efendant did not refuse to talk at all without an attorney. Rather, he indicated he would not talk about one limited subject—unrelated to the offenses here charged—without an attorney."¹²¹

REFUSAL TO GIVE A WRITTEN STATEMENT: A suspect's refusal to give a written statement without having first consulted with an attorney is a limited invocation, which means that officers may take a verbal statement.¹²²

REQUEST FOR ATTORNEY IF CHARGED: If the suspect had not been arraigned on the crime under investigation, his request for an attorney "if charged" does not constitute even a limited invocation.¹²³

REFUSAL TO TAKE A LIE DETECTOR TEST: A suspect's refusal to take a polygraph test without having consulted with an attorney is a conditional invocation that is limited to the administration of a polygraph test.¹²⁴

¹¹⁷ (1963) 373 U.S. 427, 439.

¹¹⁸ *People v. Johnson* (1993) 6 Cal.4th 1, 26. ALSO SEE *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78 [there was no indication that the defendant's refusal to be tape recorded constituted an absolute invocation].

¹¹⁹ **NOTE:** In *People v. Nicholas* (1980) 112 Cal.App.3d 249, 268 the court ruled that an invocation resulted because the defendant asked whether the interview room was bugged, plus he had sought "assurances of complete privacy." This was, however, a pre-*Davis* case and did not address the subsequent requirement that invocations be unambiguous. In *People v. Memro* (1995) 11 Cal.4th 786, 834 the court said that "[e]ven if defendant's request to sweep the room for bugs can be construed as evidence of his preparing to act on a mistaken belief that he could talk privately to Officer Carter without his statements being used against him—a state of affairs the record does not support—he abandoned any such hypothetical course of action when he acceded to Officer Carter's indication that the other police officers would have to return so that the interrogation could resume."

¹²⁰ (2010) __ U.S. __ [130 S.Ct. 2250, 2260].

¹²¹ (1992) 3 Cal.4th 41, 122.

¹²² See *Connecticut v. Barrett* (1987) 479 U.S. 523, 525; *Arizona v. Roberson* (1988) 486 U.S. 675, 683; *U.S. v. Martin* (7th Cir. 2011) 664 F.3d 684, 689.

¹²³ See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126.

¹²⁴ See *People v. Tully* (2012) 54 Cal.4th 952, 991; *People v. Nelson* (2012) 53 Cal.4th 367.

REFUSAL IF AN ATTORNEY COULD BE PROVIDED NOW: In *People v. Williams* the court ruled that a suspect's request to speak with an attorney if one were available at the present time would constitute an invocation only if an attorney could have been provided immediately.¹²⁵

REFUSAL "IF I'M A SUSPECT": In *Smith v. Endell*¹²⁶ the court ruled that a limited invocation resulted when the defendant told officers that he wanted a lawyer if "you're looking at me as a suspect," and they were.

Clarifying the Suspect's Intent

It used to be the rule that, when a suspect said something that *might* constitute an invocation, officers were required to stop the interview and attempt to clarify his intentions.¹²⁷ But the Supreme Court said in *Davis v. U.S.* that, because an ambiguous remark does not constitute an invocation, "we decline to adopt a rule requiring officers to ask clarifying questions."¹²⁸

Officers may not, however, "play dumb"¹²⁹ and try to "clarify" an explicit invocation.¹³⁰ As the Court of Appeal observed in *People v. Carey*, "The 'clarification rule' requires ambiguity as a precedent which is not here present."¹³¹

Also note that in close cases it may be prudent to seek clarification because a remark that appears ambiguous to officers might be viewed as an unambiguous invocation by a judge.¹³² As the Supreme Court pointed out:

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. [This] will minimize the chance of a confession being suppressed due to subsequent judicial second guessing.¹³³

Finally, as discussed earlier in the section on pre-waiver ambiguities, it is possible that an ambiguous remark might constitute an invocation if it was made before the suspect waived his rights. Consequently, until this issue is resolved, it might be wise to seek clarification in such a situation.

Procedure When Suspect Invokes

If the suspect invokes the right to remain silent or the right to counsel, officers must terminate the interrogation if it is in progress.¹³⁴ If the invocation occurred while officers were reading the *Miranda* warning, they must not insist that the suspect listen to all warnings before he can invoke.¹³⁵ Furthermore, they must not urge the suspect to change his mind or even ask why he won't talk.¹³⁶

Finally, if a suspect invokes in the field, or if officers thought he did, they should write in their report *exactly* what he said. This will enable investigators to determine if he had, in fact, invoked and, if so, which right he invoked. They will need this information because, as we discuss in the following article on post-invocation questioning, the rules vary depending on which right was invoked. POV

¹²⁵ (2010) 49 Cal.4th 405, 426.

¹²⁶ (9th Cir. 1988) 860 F.2d 1528, 1531.

¹²⁷ See *U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1077 ["Prior to 1994, this circuit, along with a number of other jurisdictions [ruled that] officers were required to clarify [ambiguous statements]."].

¹²⁸ (1994) 512 U.S. 452, 461-62. ALSO SEE *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1127 ["*Davis* specifically rejects a rule that requires police to seek clarification of a suspect's ambiguous or equivocal request for counsel."]; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 358; *People v. Bacon* (2010) 50 Cal.4th 1082, 1107, fn.5.

¹²⁹ *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 788 ["[T]he officer decided to 'play dumb,' hoping to keep Anderson talking"].

¹³⁰ See *People v. Harris* (1989) 211 Cal.App.3d 640, 649 ["But here there was nothing ambiguous about appellant's initial assertion of his right to remain silent. Thus, there was nothing for Sgt. Ward to clarify"].

¹³¹ (1986) 183 Cal.App.3d 99, 103.

¹³² See *People v. Simons* (2007) 155 Cal.App.4th 948, 958; *Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1221.

¹³³ *Davis v. United States* (1994) 512 U.S. 452, 461. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 951 [officer "employed good police practice" by attempting to clarify]; *U.S. v. Wysinger* (7th Cir. 2012) 683 F.3d 784, 795 ["we encourage law enforcement officers to heed the Supreme Court's suggestion in *Davis*"].

¹³⁴ See *Miranda v. Arizona* (1966) 384 U.S. 436, 473-74; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-85; *People v. Wash* (1993) 6 Cal.4th 215, 238.

¹³⁵ See *Smith v. Illinois* (1984) 469 U.S. 91.

¹³⁶ See *Smith v. Illinois* (1984) 469 U.S. 91 98.

Post-Invocation Questioning

[A] permanent immunity from further interrogation [after an invocation] would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.¹

We all know that officers are not permitted to question suspects who have invoked their *Miranda* rights.² But we also know that it would be madness if this prohibition lasted forever. Thus, the Seventh Circuit pointed out that, unlike the “Energizer Bunny,” a *Miranda* invocation does not keep “going, and going, and going.”³

So, then, what’s the life span of an invocation? As we will explain in this article, it depends on whether the questioning was initiated by officers or the suspect. If it was the suspect, they may question him immediately if certain circumstances existed. But if the questioning was initiated by the officers, some time must pass, and the amount of time will depend on whether the suspect invoked the right to remain silent or the right to counsel.

It should be noted that post-invocation questioning is also permitted if the questions were reasonably necessary to reduce or eliminate a serious threat to life or property (i.e., the public safety exception), or if the person who asked the questions was an undercover officer or police agent (i.e., the undercover agent exception). We covered both of these subjects in the Fall 2012 *Point of View* in the article “*Miranda*: When Compliance Is Compulsory.”

Two other things. First, *Miranda* invocations are not offense-specific. This means that if a suspect

invoked, officers may not seek to question him about the crime for which he invoked or any other crime except under the circumstances discussed in this article.⁴

Second, the legality of post-invocation questioning was a hot topic a few years ago when the courts became aware that some law enforcement agencies and *Miranda* instructors were encouraging officers to deliberately ignore unambiguous invocations and continue questioning suspects to obtain leads or statements that could be used for impeachment. Known by the euphemism “outside *Miranda*,” this tactic was uniformly condemned by the courts and is apparently no longer being taught or practiced.⁵

Invoked the Right to Remain Silent The “Scrupulously Honored” Test

If the suspect invoked only the right to remain silent, or if he just refused to waive his rights,⁶ officers may seek to question him if they had “scrupulously honored” the invocation. This rule came from the Supreme Court’s decision in *Michigan v. Mosley*,⁷ and it has been quite useful because suspects who have had some time to consider their predicament will often change their minds about talking to officers. The rule is also helpful because, if the suspect decides to speak with them, they may question him about the crime for which he invoked or any other crime.⁸

The question, then, is what must officers do to “scrupulously honor” an invocation? The cases indicate there are five requirements:

¹ *Michigan v. Mosley* (1975) 423 U.S. 96, 102.

² *Miranda v. Arizona* (1966) 384 U.S. 436, 474.

³ *U.S. v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 338.

⁴ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177; *Arizona v. Roberson* (1988) 486 U.S. 675.

⁵ See *People v. Neal* (2003) 31 Cal.4th 63, 82; *People v. Jablonski* (2006) 37 Cal.4th 775, 816; *People v. Bey* (1993) 21 Cal.App.4th 1598, 1623, 1628 [“This is a very troubling case, presenting a deliberate violation of *Miranda*”]; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602 [“When the police deliberately step over the line and disobey Supreme Court pronouncements, respect for the rule of law necessarily diminishes.”]; *California Attorneys for Criminal Justice v. Butts* (9th Cir. 1999) 195 F.3d 1039; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1237; *Garvin v. Farmon* (9th Cir. 2001) 258 F.3d 951, 954-55.

⁶ See *People v. Lisper* (1992) 4 Cal.App.4th 1317, 1322.

⁷ (1975) 423 U.S. 96.

⁸ See *Michigan v. Mosley* (1975) 423 U.S. 96 [different crime]; *People v. Martinez* (2010) 47 Cal.4th 911, 950 [“different crime”]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 [“an identity of subject matter in the first and second interrogations is not sufficient to render the second interrogation unconstitutional”]; *People v. Lisper* (1992) 4 Cal.App.4th 1317, 1324 [different crime].

- (1) **Interrogation terminated:** When the suspect invoked, the officers must have immediately terminated the interview.
- (2) **No pressure:** After they stopped the interview, the officers must not have pressured or otherwise coaxed the suspect into changing his mind about invoking.
- (3) **Time lapse:** The officers must have waited a “significant period of time” before recontacting the suspect.
- (4) **No pressure:** When they recontacted him, the officers must not have started by questioning him or encouraging him to talk. Instead, they must have simply asked if he had changed his mind about invoking. As the Ninth Circuit observed, there is a “critical distinction” between interrogation and merely asking whether the suspect “has changed his mind.”⁹
- (5) **Miranda waiver:** If the suspect said he was willing to speak with officers, they must obtain a *Miranda* waiver before questioning him.¹⁰

Interrogation immediately terminated

The first requirement is that officers must have stopped interrogating the suspect when he invoked. In other words, they must have respected his decision to invoke. This does not mean, of course, that they may not thereafter communicate with him. Instead, they must not have said anything that was reasonably likely to elicit an incriminating response.¹¹ For example, in ruling that this requirement was satisfied, the courts have noted the following:

- [The officer] immediately ceased the interrogation.¹²
- [Q]uestioning ceased once Riva told [the officer] “I don’t want to say anything else right now.”¹³
- [The invocation] was respected by the original arresting officers, and all interrogation ceased.¹⁴
- [T]he agents here cut off the first round of questioning as soon as Hsu expressed a desire not to speak.¹⁵

In contrast, in *United States v. Rambo*¹⁶ the defendant invoked his right to remain silent while he was being questioned about a series of robberies. At that point an officer said to him, “If you think back over the last two months since you’ve been out of prison, all the shit you’ve been involved in. Think about the towns that are going to want to talk to you, OK?” Rambo then waived his rights and confessed. The Tenth Circuit ruled, however, that the confession should have been suppressed because the officer had not scrupulously honored his invocation. Said the court:

When Rambo stated that he did not want to discuss the robberies, [the officer] made no move to end the encounter. Instead he acknowledged Rambo’s request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo’s present request to terminate discussion of the topic, he would be questioned further.

⁹ *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 665. ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412 [“Agent Hill exerted no pressure upon Hsu whatsoever. He merely read Hsu his rights a second time”].

¹⁰ See *Michigan v. Mosley* (1975) 423 U.S. 96, 102 [“He was given full and complete *Miranda* warnings at the outset of his second interrogation.”]; *People v. Mickey* (1991) 54 Cal.3d 612, 652; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 [“the provision of a fresh set of *Miranda* rights” is the “most important factor”]. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 950 [reminder was sufficient].

¹¹ See *People v. Dement* (2011) 53 Cal.4th 1, 26-27; *People v. Roldan* (2005) 35 Cal.4th 646, 735 [“statements volunteered when not in response to an interrogation are admissible against a defendant even after an initial assertion of the right to remain silent”]; *People v. Clark* (1993) 5 Cal.4th 950, 985 [“The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.”].

¹² *Michigan v. Mosley* (1975) 423 U.S. 96, 104.

¹³ *People v. Riva* (2004) 112 Cal.App.4th 981, 994.

¹⁴ *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324.

¹⁵ *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412.

¹⁶ (10th Cir. 2004) 365 F.3d 906. ALSO SEE *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664 [“Lopez-Diaz said that he did not want to talk about the drugs in the van but [after a short conversation] he was asked about the drugs in the van.”].

No pressure

After terminating the interview, officers must not pressure the suspect to reconsider his decision to invoke or otherwise attempt “to undermine the suspect’s resolve” to invoke.¹⁷ Such pressure can be blatant or subtle.

PRODDING: Officers may neither urge the suspect to change his mind about invoking, nor say something that was reasonably likely to incite him to do so. Thus, in *Mosley* the Supreme Court ruled that Detroit police officers had scrupulously honored the defendant’s invocation because they “did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position”¹⁸

On the other hand, in ruling that officers failed to scrupulously honor a suspect’s invocation, the courts have noted the following:

- The officers “repeatedly spoke to [the suspect] for the purpose of changing his mind.”¹⁹
- The officer’s command to “tell the truth” after the invocation was “the antithesis of scrupulously honoring” his invocation.²⁰
- The officer “confronted appellant with a description of federal prison.”²¹
- The officer confronted the defendant “with a discrepancy in his story.”²²

Similarly, in *People v. Davis*²³ the defendant was arrested for murdering two people who had been shot with an Uzi. At the police station, Davis invoked his right to remain silent and was placed in a holding cell. Later that day, a detective entered the cell and the following exchange occurred:

DETECTIVE: Remember that Uzi?

DAVIS: Yeah.

DETECTIVE: Think about that little fingerprint on it. We’ll see ya. (Jail door closes).

Although the issue in the case was not whether the detective had scrupulously honored Davis’s invocation, it was apparent that the court thought that the detective’s remark constituted prodding. As it pointed out, when the detective said, “Think about that little fingerprint on [the Uzi],” he implied that the defendant’s fingerprint had been found on the weapon and “thus indirectly accused defendant of personally shooting the victims.” This comment, said the court, “was likely to elicit an incriminating response and thus was the functional equivalent of interrogation.”

WHY ARE YOU INVOKING? Nor may officers ask the suspect to explain why he was invoking or why he was refusing to talk with them. As the Second Circuit observed, an officer “never needs to know why a suspect wants to remain silent.”²⁴

For example, in *People v. Harris*²⁵ the court ruled that the defendant’s confession to a murder was obtained in violation of *Miranda* because, after he invoked the right to remain silent, the officer said “I thought you were going to come back and straighten it out.” This comment, said the court, was “a prodding invitation to further discussion about the incident.” Similarly, in *People v. Peracchi* the court suppressed a statement because the officer responded to an invocation by asking, “And you’re saying the reason is because [. . . ?]” Said the court, “[T]he officer here had no reason to question Peracchi about his motivation for remaining silent.”²⁶

DISCLOSING EVIDENCE: Although there is not much law on the subject, there is some authority for the proposition that officers will not be deemed to have pressured the suspect if they briefly, factually, and dispassionately informed him about the evidence of his guilt. For example, in the Ninth Circuit’s case of *U.S. v. Davis*²⁷ the defendant invoked his right to remain silent after he was arrested for bank robbery.

¹⁷ *U.S. v. Montgomery* (7th Cir. 2009) 555 F.3d 623, 634.

¹⁸ *Michigan v. Mosley* (1975) 423 U.S. 96, 104.

¹⁹ *U.S. v. Barone* (1st Cir. 1992) 968 F.2d 1378, 1384.

²⁰ *U.S. v. Tyler* (3rd Cir. 1998) 164 F.3d 150, 155.

²¹ *U.S. v. Olof* (9th Cir. 1975) 527 F.2d 752, 753.

²² *People v. Boyer* (1989) 48 Cal.3d 247, 274.

²³ (2005) 36 Cal.4th 510.

²⁴ *Anderson v. Smith* (2nd Cir. 1984) 751 F.2d 96, 105.

²⁵ (1989) 211 Cal.App.3d 640. BUT ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410 [“Our reading of *Mosley* is not so wooden. Far from laying down inflexible constraints on police questioning and individual choice, *Mosley* envisioned an inquiry into all the relevant facts to determine whether the suspect’s rights had been respected.”].

²⁶ (2001) 86 Cal.App.4th 353, 363.

²⁷ (9th Cir. 1976) 527 F.2d 1110.

An FBI agent then handed him a surveillance photo that plainly showed Davis robbing the bank. As Davis studied the photograph of himself, the agent asked, "Are you sure you don't want to reconsider?" He responded, "Well, I guess you've got me." He then waived his rights and confessed. Citing *Mosley*, the Ninth Circuit ruled that the agent's act of showing Davis the photograph did not constitute prodding or interrogation because "the agent merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture." In a subsequent case, the court pointed out that the "central" issue in *Davis* was the "key distinction between questioning the suspect and presenting the evidence available against him."²⁸ Apart from *Davis*, however, we are unaware of any case in which this issue has been addressed.

Time lapse

The final requirement is that officers must wait a "significant" period of time before they recontact the suspect to see if he had changed his mind. What is "significant"? Obviously, a mere technical break will not suffice. As the Court noted in *Mosley*, "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda*."²⁹ The Court did rule, however, that a break lasting "more than two hours" was sufficiently "significant."³⁰ Meanwhile, in *U.S. v. Hue* the Ninth Circuit observed that a time lapse of only 30 minutes "might ordinarily incline us toward a conclusion that [the] right to cut off questioning was not respected."³¹ So, to be on the safe side, officers should probably wait at least two hours.

Invoked the Right to Counsel The 14-Day Waiting Requirement

The rules on recontacting a suspect who invoked the right to counsel are more restrictive than those that apply when he invoked the right to remain silent or if he simply refused to waive his rights. This is because the courts presume that a suspect who invoked the right to counsel feels incapable of dealing with the pressures of police questioning without consulting an attorney.³² And such incapacity applies to the crime that was under discussion when he invoked and any other crimes.³³

This does not mean that officers may never recontact a suspect to see if he has changed his mind and is now willing to talk with them without an attorney. Instead, it means that it's a little more involved than simply "scrupulously honoring" the invocation. Specifically, the Supreme Court in *Maryland v. Shatzer*³⁴ ruled that officers must ordinarily wait for 14 days before recontacting the suspect, and that the waiting period begins at different times depending on whether the suspect was released from custody or whether he remained in custody and was segregated from the general inmate population.

Arrestee released from custody

RELEASE ON BAIL, O.R.: If the suspect posted bail or was released on his own recognizance after he invoked, officers may recontact him if they wait at least 14 days from the time he was released. Although it might seem odd that officers would need to wait to interview someone who was not in police custody, the Supreme Court in *Shatzer* made it clear that a

²⁸ *U.S. v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 366. ALSO SEE *U.S. v. Montgomery* (7th Cir. 2009) 555 F.3d 623, 634 [outlining the evidence against the suspect was a "misstep . . . but was not by itself a violation of *Mosley*"]; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 ["[O]bjective, undistorted presentations by police of the evidence against the suspect are less constitutionally suspect than is continuous questioning."]. COMPARE *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1533 ["[T]he single statement in *Davis* is in sharp contrast with the repeated recitation of incriminating circumstances to which Smith was exposed"].

²⁹ *Michigan v. Mosley* (1975) 423 U.S. 96, 102.

³⁰ *Michigan v. Mosley* (1975) 423 U.S. 96, 104. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 950 ["overnight"]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 ["overnight"]; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324 ["a few days"]; *Sessoms v. Runnels* (9th Cir. 2011) 650 F.3d 1276, 1291 [five days].

³¹ (9th Cir. 1988) 852 F.2d 407, 412.

³² See *Arizona v. Roberson* (1988) 486 U.S. 675, 681.

³³ See *Arizona v. Roberson* (1988) 486 U.S. 675, 683; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 ["Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."].

³⁴ (2010) __ U.S. __ [130 S.Ct. 1213].

release from custody will not, in and of itself, suffice; i.e., a certain amount of time must pass.³⁵

OUTRIGHT RELEASE: If the suspect was released for lack of evidence pursuant to Penal Code section 849(b), it seems likely that officers need not wait an entire 14 days before recontacting him. But the Court in *Shatzer* did not address this issue.

Time-servers

Officers will sometimes seek to question a jail or prison time-server about a crime that occurred before or during his incarceration. If the suspect invoked his right to counsel when officers initially attempted to interview him, they may recontact him as follows:

RETURNED TO GENERAL POPULATION: If the suspect returned to the general inmate population after he invoked, the 14-day waiting period begins on the date he invoked.³⁶ For example, in *Shatzer* officers received a report that the defendant had sexually abused his 3-year old son. They also learned that he was currently serving time in a Maryland state prison for sexually abusing another child. So an officer went to the prison to interview him about the new allegation but *Shatzer* invoked his right to counsel.

The investigation then stalled but, about two years later, officers obtained additional incriminating information and returned to the prison to see if *Shatzer* might now be willing to speak with them without an attorney. He said yes, waived his rights, and made admissions which were used against him at trial. He was convicted. In applying its new 14-day waiting requirement, the Supreme Court ruled that, because *Shatzer*'s return to the general prison population had lasted more than 14 days, the officers did not violate *Miranda* when they sought to question him.

SUSPECT SEGREGATED: For various reasons, some inmates must be segregated from the general inmate

population. The question arises: May officers recontact them 14 days after they invoked the right to counsel? Or are they absolutely immune from police-initiated interrogation? Although we are unaware of any case that has addressed this issue, the logic behind *Shatzer* would indicate that recontact would not be prohibited if (1) the inmate had been in administrative segregation for a sufficient amount of time that segregation had become his "normal" or "familiar" environment; and (2) despite being segregated, he could make phone calls to his attorney or others. This issue was not, however, addressed in *Shatzer*.

Unsentenced detainees

In most cases, the suspect will be an unsentenced detainee, meaning that he is temporarily incarcerated in a city or county jail where he is awaiting trial, sentencing, or a charging decision by prosecutors. Unfortunately, *Shatzer* contained conflicting language as to whether detainees may be recontacted.

On the one hand, it distinguished sentenced prisoners (who are supposedly living "normal" lives) from unsentenced detainees (who presumably are not). In addition, it said that unsentenced detainees are more susceptible to police coercion because they are being "held in uninterrupted pretrial custody" while the crime for which they were incarcerated is "being actively investigated."

Still, there is reason to believe that officers may recontact unsentenced detainees after 14 days if they had been incarcerated for so long that they had become accustomed to the jail environment. After all, many inmates who are awaiting trial or sentencing have been living in jail for years or at least many months and, thus, may view their environment as "normal" in the sense that it is not "unfamiliar."

³⁵ (2010) __ U.S. __ [130 S.Ct. 1213] ["[When] a suspect has been released from his pretrial custody *and* has returned to his normal life *for some time* before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced." At p. 1221 [Emphasis added]; "The only logical endpoint of *Edwards* disability is termination of *Miranda* custody *and* any of its lingering effects." At p. 1222 [Emphasis added]; "[W]hen a suspect who initially requested counsel is reinterrogated after a break in custody *that is of sufficient duration* to dissipate its coercive effects . . ." At p. 1222 [Emphasis added]; the 14-day wait "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." At p. 1223. **ALSO SEE** *U.S. v. Guzman* (1st Cir. 2010) 603 F.3d 99, 106 ["In this case, Guzman was released on bail for about four months between the time that he originally invoked his right to counsel and the ATF agents' subsequent attempt to question him. This far exceeds the time period required by *Shatzer* and thus its break-in-custody exception to *Edwards* applies."].

³⁶ *Maryland v. Shatzer* (2010) __ U.S. __ [130 S.Ct. 1213, 1224].

It should also be noted that, unlike police interview rooms, jail facilities are hardly designed to (in *Shatzer* terminology) undermine the detainee's "will to resist and to compel him to speak." In addition, like state prison inmates, most jail inmates "live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone."

Moreover, unsentenced detainees are not "isolated with their accusers," and most of them are aware that, because their cases are in the hands of the courts, the investigators who are seeking to interview them have no authority to release them as a reward for making a statement.³⁷ As we said, however, this issue is currently unresolved.

Suspect-Initiated Questioning

Regardless of whether the suspect invoked the right to remain silent or the right to counsel, officers may question him if he subsequently notified them that he had changed his mind and was now willing to talk to them without an attorney.³⁸ Furthermore, if the suspect initiated questioning about one crime, officers may question him about that crime and any other crime he is suspected of having committed unless he said otherwise.³⁹

As we will now discuss there are three requirements that must be met before such questioning will be permitted: (1) the questioning must, in fact, have been initiated by the suspect; (2) the suspect's decision to initiate questioning must have been made freely; and (3) when the suspect initiated questioning, it must have reasonably appeared that he was willing to open up a general discussion about the crime. (There is, of course, a fourth requirement: officers must obtain a *Miranda* waiver before they question him.⁴⁰)

"Suspect-initiated"

Post-invocation contact typically occurs when the suspect phones officers from the jail and tells them he wants to talk to them, or when he passes the word along through a corrections officer, another inmate, or a relative. In any event, if officers confirmed with him that he does, in fact, want to talk with them, this requirement will be satisfied.

OFFICER INVITES POST-INVOCATION TALK: After a suspect invokes, officers do not violate *Miranda* by leaving a business card and explaining that, if he changes his mind, he should notify them.⁴¹

SUSPECT INVITES POST-INVOCATION TALK: If the suspect invoked but also said he might be willing to answer questions "later," officers may check with him later to see if he now wants to talk. For example, in *People v. Mickey*⁴² a murder suspect who had just invoked the right to counsel told a Placer County sheriff's detective, "Curt, I would like to continue our conversation at a later time." About two days later, the detective went to the jail and asked Mickey if he was now willing to talk about the crime. He said yes, waived his rights, and made some incriminating statements which were used against him. On appeal, the court ruled that Mickey had effectively initiated further discussion when he told the detective that he would like to talk with him "at a later time."

Suspect "freely" initiated

The second requirement is that the suspect's decision to initiate questioning must have been made freely, which simply means it must not have been the result of continued interrogation or badgering. As the California Supreme Court explained, the decision to talk with officers "cannot be a product of police interrogation, badgering, or overreaching, whether explicit or subtle, deliberate or unintentional."⁴³

³⁷ QUOTES FROM *Maryland v. Shatzer* (2010) __ U.S. __ [130 S.Ct. 1213, 1219-25].

³⁸ See *Minnick v. Mississippi* (1990) 498 U.S. 146, 156; *People v. Davis* (2009) 46 Cal.4th 539, 596; *In re Frank C* (1982) 138 Cal.App.3d 708, 713.

³⁹ See *People v. Thomas* (2012) 54 Cal.4th 908, 927.

⁴⁰ See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1418; *People v. Waidla* (2000) 22 Cal.4th 690, 728.

⁴¹ *People v. Sapp* (2003) 31 Cal.4th 240, 268.

⁴² (1991) 54 Cal.3d 612, 652. ALSO SEE *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1235; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1010; *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737-38.

⁴³ *People v. Davis* (2009) 46 Cal.4th 539, 596. ALSO SEE *People v. Hayes* (1985) 169 Cal.App.3d 898, 909; *People v. McClary* (1977) 20 Cal.3d 218, 226.

For example, in *People v. Superior Court (Zolnay)*⁴⁴ a sheriff's deputy was questioning two burglary suspects when one of them invoked the right to counsel. The deputy then left the room for a while after telling them he believed they were guilty, that the investigation would continue, that they could make his job "easy or tough," and suggested that they "talk the matter over." When he returned about ten minutes later, the suspects said they had decided not to invoke after all, and then confessed. But the California Supreme Court ruled the confessions were inadmissible because, even if the suspects could be said to have initiated the questioning, it was not done freely in view of the deputy's assertion that the defendants could make his job "easy or tough" and asking whether they had reached a decision.

Similarly, the courts have ruled that a suspect did not "freely" initiate questioning when an officer told him that, if he refused to confess, the system was "going to stick it do you,"⁴⁵ or that he would be charged as a "principal" and would be "subject to the death penalty."⁴⁶

Intent to open "generalized" discussion

The final requirement—and the most troublesome—is that it must have been reasonably apparent that, when the suspect initiated questioning, he wanted to open up a general discussion about the crime, as opposed to merely discussing incidental or unrelated matters or "routine incidents of the custodial relationship."⁴⁷ As Justice Rehnquist observed in *Oregon v. Bradshaw*:

There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.⁴⁸

The problem for officers is that suspects rarely make their intentions crystal clear. Although it is conceivable that a suspect would say something like "I have decided to open up a broad and unrestricted discussion of all facets of the crimes for which I was arrested," he is much more likely to say "Dude, I wanna talk to you," or "What's gonna happen now?" Fortunately, the courts have ruled that an intent to open up a general discussion may be based on either direct or circumstantial evidence.⁴⁹

DIRECT EVIDENCE OF INTENT: The following are examples of inquiries that constituted direct evidence that the suspect wanted to open up a general discussion of the crime for which he was arrested:

TALK ABOUT SUSPECT'S CASE: The suspect said he wanted to talk about his case, or that he wanted to ask questions about his case, or that he decided to waive his rights.⁵⁰

SUSPECT WANTS ACCOMPLICE RELEASED: The suspect told officers that he wanted to discuss getting his accomplice released or that he wanted to talk about getting his accomplice's charges reduced. The reason this demonstrates an intent to discuss the case in general is that the accomplice's liability will usually depend on both his and the suspect's roles in the crime.⁵¹

⁴⁴ (1975) 15 Cal.3d 729.

⁴⁵ *People v. Neal* (2003) 31 Cal.4th 63, 81, 84-85.

⁴⁶ *People v. McClary* (1977) 20 Cal.3d 218, 227.

⁴⁷ *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.

⁴⁸ (1983) 462 U.S. 1039, 1045.

⁴⁹ See *People v. Waidla* (2000) 22 Cal.4th 690, 727 [the suspect's comment may relate "directly or indirectly to the investigation"].

⁵⁰ See *People v. San Nicolas* (2004) 34 Cal.4th 614, 641; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1190; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573; *U.S. v. Palega* (8th Cir. 2009) 556 F.3d 709, 715; *Hennessey v. Bagley* (6th Cir. 2011) 644 F.3d 308.

⁵¹ *People v. Thompson* (1990) 50 Cal.3d 134, 164 ["Defendant's request to talk about Lisa was not an innocuous request, comparable to asking for a drink of water. Lisa was under arrest as an accessory after the fact, and police willingness to release her depended on her noncomplicity in the crime. Defendant's request for Lisa's release might reasonably be met with a suggestion that defendant discuss the crime to show Lisa's noninvolvement."]; *People v. Gamache* (2010) 48 Cal.4th 347, 386 [Defendant, "without prompting, raised the subject of his wife's involvement in the case, assuring [the detective] that she did not know anyone was going to be killed. This statement can be fairly said to represent a desire on his part to open up a more generalized discussion"]; *People v. Morris* (1991) 53 Cal.3d 152, 200-201 [suspect said he would talk if officers would agree not to prosecute his friends, and the officers explained they could not make such a promise]. **NOTE:** In *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1418 the court ruled that the defendant's statement "Well I want to know if [my accomplice] is going to stay here how much time" pertained only to "routine incidents of the custodial relationship." But because the court neglected to analyze the issue, its opinion is questionable.

WHAT'S NEXT? A suspect may demonstrate an intent to discuss the crime if he subsequently asked what is going to happen next and did not indicate that he was only asking about certain technical matters. For example, in *Oregon v. Bradshaw* the U.S. Supreme Court ruled that a suspect had opened up a general discussion when, after being transferred to the county jail, he asked, "Well, what is going to happen to me now?"⁵² In contrast, in *People v. Sims*⁵³ the California Supreme Court ruled that a suspect did not open up a general discussion when, immediately after invoking, he asked what was going to happen with regard to extradition. Said the court, "By his offhand question as to what was going to happen from this point on (coupled with a reference to extradition) . . . defendant did not open the door to interrogation after previously having invoked his *Miranda* rights."

SUSPECT STARTS TALKING: The suspect spontaneously started talking about his case.⁵⁴

TALK ABOUT A DEAL: The suspect asked about obtaining a reduced sentence.⁵⁵

TALK ABOUT OTHER CASE: The suspect told officers that she wanted to talk to them about a crime for which she had not yet been arrested.⁵⁶

QUESTION ABOUT EVIDENCE: The suspect wanted to know about an item of evidence in the case.⁵⁷

SUSPECT OFFERS TO HELP: After being extradited, a murder suspect, upon seeing an officer he recognized, asked "What can I do for you?" or "What do you want from me?"⁵⁸

CIRCUMSTANTIAL EVIDENCE OF INTENT: A suspect's intent to open up a general discussion of the crime

will also be found if (1) he asked to speak with officers, and (2) he did not indicate he was only willing to speak about incidental or unrelated matters. Thus, in *People v. Mattson*,⁵⁹ the court ruled that a murder suspect who had invoked the right to counsel had opened up a general discussion because, just before a lineup, he told one of the investigators, "I'd like to talk to you." Said the court, "There was no indication in defendant's request to speak to [the officer] that defendant wished to discuss only routine matters related to his incarceration."

Similarly, in the high-profile case of *People v. Davis*⁶⁰ the defendant, Richard Allen Davis, had been arrested in 1993 for kidnapping and murdering 12-year old Polly Klass in Petaluma. While being questioned at the Mendocino County Jail, Davis invoked his right to counsel. A few days later, he told a corrections officer that he wanted to talk to a certain Petaluma investigator. The investigator phoned Davis who began by saying "I fucked up big time" and asked to be placed in protective custody. When the investigator asked if Polly was still alive, Davis said no. Later that day, the officer and an FBI agent obtained a *Miranda* waiver from Davis who gave them a video-taped statement and led them to Polly's body.

The officer's question as to whether Polly was still alive was, of course, admissible under *Miranda*'s "rescue" exception. As for recontacting Davis at the jail, the court ruled that he had effectively initiated the interview because his "comments during that telephone conversation with [the investigator] indicated a willingness to waive his previously asserted right to counsel and to make a statement."

POV

⁵² (1983) 462 U.S. 1039, 1045-46.

⁵³ (1993) 5 Cal.4th 405.

⁵⁴ *In re Frank C.* (1982) 138 Cal.App.3d 708, 713.

⁵⁵ *People v. Tully* (2012) 54 Cal.4th 952, 985 [after invoking, defendant "reinitiated the conversation when he told [the officer] he did not want to go to jail that night, after which [the officer] suggested defendant might 'work off' his offense by becoming an informant"].

⁵⁶ *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737-38 [suspect said she "needed to talk to somebody about a murder"].

⁵⁷ *People v. Mattson* (1990) 50 Cal.3d 826, 859-62 [suspect asked an officer what the police had done with the car he had used in several of his crimes]. ALSO SEE *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413 [suspect reinitiated when he said he wanted to tell officers about the car that was used in the commission of the crime under investigation].

⁵⁸ *People v. Waidla* (2000) 22 Cal.4th 690, 731 [Waidla's words "can fairly be said" to represent a desire to talk about his crimes].

⁵⁹ (1990) 50 Cal.3d 826, 861. ALSO SEE *People v. Thomas* (2012) 54 Cal.4th 908, 927 ["Even if the record in this case is read as establishing that defendant said only that he wanted to talk about the Flenbaugh crimes with the Hayward detective, it does not establish that he wanted to talk only about the Flenbaugh crimes"]; *People v. Ray* (1996) 13 Cal.4th 313, 334, 337 [suspect said he wanted to "clear up matters that were bothering him"]; *U.S. v. Oehne* (2nd Cir. 2012) 698 F.3d 119, 124 [after invoking, the suspect spontaneously discussed his case by telling an officer that he "was not a bad guy"].

⁶⁰ *People v. Davis* (2009) 46 Cal.4th 539, 597.

Recent Cases

Florida v. Jardines

(2013) __ U.S. __ [2013 WL 1196577]

Issues

(1) An officer walked a K9 to the front door of a suspect's home to see if the dog could detect drugs. Was this a "search"? (2) If so, was the search lawful under the implied consent rule?

Facts

A Miami-Dade police officer received a tip that Jardines was growing marijuana inside his home. So the officer and a K9 handler walked a marijuana-detecting dog named Franky up to the front porch, at which point Franky began "energetically exploring the area for the strongest point source of that odor." After sniffing the base of the front door, Franky sat down, "which is the trained behavior upon discovering the odor's strongest point." Having been on Jardines' property for one to two minutes, the officers left and obtained a search warrant which resulted in the seizure of marijuana plants. Jardines was charged with trafficking in cannabis.

On appeal, the Florida Supreme Court ruled that the marijuana plants should have been suppressed. Specifically, it ruled that the officers had conducted an unlawful "search" of the house when they and Franky entered Jardines' property. The State appealed to the United States Supreme Court.

Discussion

The Supreme Court ruled that whenever officers enter the front yard or other private property immediately surrounding a home (i.e., the "curtilage"), their conduct constitutes a "search" under the Fourth Amendment if their purpose was to "obtain information." And because that was the officers' purpose here, the Court ruled their entry constituted a search.

The question, then, was whether the search was permitted under some exception to the warrant requirement. The only exception that arguably applied was implied consent. That is because it is settled that officers, like other callers, are impliedly authorized by the residents to walk up to the front door for the purpose of speaking with them or delivering something. As the Court observed, "[A] police officer not

armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do."

Thus, if the officers had walked up to Jardines' door, knocked, and asked to speak with him, their "search" (i.e., their presence at the front door) would have been lawful because they were impliedly invited. As the Court explained:

This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.

On the other hand, the Court observed that the residents of homes do not impliedly consent to having officers stay on their property for an extended period of time or engage in the kinds of activities that are not impliedly consented to. And one such activity, said the Court, is "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." According to the Court:

To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.

For these reasons, the Court ruled that, because Jardines did not impliedly consent to the officers' entry for the purpose of sniffing the air for marijuana, their entry constituted an unlawful search, and the evidence was properly suppressed.

Comment

As the result of this decision, a "search" now results if an officer walks up to the front door of a home to, let's say, sell a ticket to the Policeman's Ball. That is because the purpose of the officer's visit was to "gather information"; i.e., to see if the occupants wanted to buy a

ticket. The “search” would, of course, be legal under the implied consent rule, but it seems silly that such conduct would be classified by the Supreme Court as an intrusion of constitutional magnitude.

It is noteworthy that the writer of this opinion, Justice Antonin Scalia, based his ruling on an opinion he wrote in 2012 in which he concluded that, regardless of whether a person had a reasonable expectation of privacy in a place or thing, a search would result if officers “trespassed” upon it for the purpose of obtaining information. Most of our readers are familiar with the case: it was *United States v. Jones* in which the Court ruled that an officer’s act of sticking a GPS tracker to the undercarriage of a car constituted a “search,” even if the car was parked in a public place.

In *Jones*, Justice Scalia claimed that, before the concept of “search” became tied to reasonable privacy expectations—which occurred in 1967 in the landmark case of *Katz v. U.S.*¹—a “search” would result if officers committed a common-law “trespass.” And he expressly based his ruling in *Jones* on these pre-*Katz* “trespassing” cases.² But no such cases exist.

That was the finding of Orin Kerr, a Fourth Amendment expert and respected law professor at George Washington University. As Prof. Kerr was reading *Jones* (and its 19 references to “trespassing”) it occurred to him that he could not remember a single pre-*Katz* case that was based on a trespassing theory. So he reexamined the relevant cases and found that none of them—none—supported Justice Scalia’s claim.³ In other words, the Court’s decision in *Jones* was without legal foundation.

It appears that Justice Scalia became aware of this little problem after he wrote *Jones* because, in writing *Jardines*, he entirely eliminated the word “trespass” from his discussion and replaced it with the more inexact word, “intrusion.” Why does this matter? Because *Jardines* was based on *Jones*, and *Jones* was based on cases that never existed. Thus, although both decisions purport to be based on preexisting law, they are not.

But despite its dubious pedigree, *Jardines* is not irrational and, in any event, it is now the law of the land. So officers need to know how it will affect them. Of particular importance is its impact on “knock and

talks.” Although the Court acknowledged that officers, like any other callers, have implied consent to walk to the front door of a home to speak with the residents, *Jardines* would likely render a “knock and talk” unlawful if they engaged in conduct on the property that was beyond the degree of intrusiveness that residents normally expect from uninvited callers.

That might occur, for example, if the officers remained standing at the front door for an extended period of time without knocking, or if the residents indicated they did not want to talk to the officers but they stayed nevertheless and tried to convince them to change their minds. In addition, as the dissent observed, officers “must stick to the path that is typically used to approach a front door, such as a paved walkway.” Accordingly, they “cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.”

Finally, it is possible that *Jardines* would not apply if the suspect lived in an apartment or condominium, and the officers and K9 simply walked to the front door on a walkway that could be used freely and without restriction by visitors, including Girl Scouts and trick-or-treaters. This is because their presence there would constitute neither an “intrusion” nor a “trespass.”

People v. Schmitz

(2013) 55 Cal.4th 909

Issue

What is the permissible scope of a parole search of a vehicle if the parolee was merely a passenger?

Facts

After seeing a car enter a dead-end street and make a U-turn, an Orange County sheriff’s deputy pulled alongside and asked the driver, Douglas Schmitz, if he was lost. He said no. There were three other people in the car: a man sitting on the front passenger seat, and a woman and child in back. At the deputy’s request, Schmitz handed her his driver’s license, at which point the deputy observed that his arms were covered with abscesses which she associated with drug use. She asked Schmitz if he was on probation or parole, and he

¹ (1967) 389 U.S. 347.

² *United States v. Jones* (2012) 565 U.S. __ [132 S.Ct. 945, 949] [“our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century”].

³ See “The Curious History of Fourth Amendment Searches,” 2013, *Supreme Court Review*, Univ. of Chicago School of Law.

said no. She then asked if he would consent to a search of his car; he refused. The deputy then asked the front-seat passenger if he was on probation or parole. He said he was on parole.

Consequently, the deputy conducted a parole search of the car and, in the backseat, found two syringes in a bag of chips and methamphetamine inside a shoe. As the result, Schmitz was charged with possession of a controlled substance and possession of a syringe. When his motion to suppress the evidence was denied, he pled guilty to reduced charges.

Discussion

Under California law, parolees are subject to warrantless searches of (1) their homes, and (2) any property under their “control.”⁴ Citing the “control” requirement, Schmitz argued the search was unlawful because the backseat was not within the control of the parolee. In fact, Schmitz argued that a parolee who is a passenger in a vehicle has control over nothing except property he was actually carrying and maybe property on the seat immediately next to him. The Court of Appeal agreed with this reasoning and ruled that the evidence in Schmitz’s car should have been suppressed. The California Supreme Court reversed.

The court noted that a strict “control” requirement for parole searches of vehicles would be “unworkable” because “a standard five-passenger automobile generally affords ready access to areas in both the front and back seats,” and that passengers do not ordinarily act “as if they were confined in separate divided compartments, coats and other possessions piled on their laps, elbows clamped at their sides.” The court also noted that “[a] front seat passenger, even if only a casual acquaintance of the driver, will likely feel free to stow personal items in available space at his or her feet, in the door pocket, or in the backseat, until they are needed or the journey ends.”

For these reasons, the court ruled that officers who are conducting a search of a vehicle based on a passenger’s parole status may search an area in the passenger compartment if they reasonably believed that the parolee could have stowed or discarded an item in the area when he entered the vehicle or when he became “aware of police activity” (which probably means when the officers began following the vehicle or when they lit it up). Such a bright-line rule, said the

court, was necessary because officers should not be required “to assess in each case the parolee’s immediate grasping distance and limit the search to that area,” and also because the nature of the typical passenger compartment is “relatively nonprivate.”

Applying this test to the facts, the court ruled the search of the shoe and bag of chips in the back seat was lawful because, “[c]onsidering the layout of a standard five-passenger car, it was objectively reasonable for the officer to expect that this parolee could have stowed his personal property in the backseat, tossed items behind him, or reached back to place them in accessible areas upon encountering the police.”

Comment

Two other things should be noted. First, the court cautioned that it was not deciding whether, based on a passenger’s parole status, officers could search closed compartments in the vehicle, such as the glove box, center console, or trunk. Instead, it said that the legality of these searches would depend on such factors as the parolee’s proximity to them, and whether they were locked or otherwise secured. Second, it did not decide when, or under what circumstances, officers could search a woman’s purse if the parolee was a man. It did, however, indicate that such a search might be unreasonable if the purse was closed and “closely monitored” by the woman (in which case it would presumably not be within the control of the parolee). On the other hand, a search of a purse or other closed container would probably still be permitted if it reasonably appeared to the officers that the parolee reached for it at some point before the car was stopped.⁵

People v. Westmoreland

(2013) __ Cal.App.4th __ [2013 WL 428642]

Issue

Did an officer impliedly promise a murder suspect that he would receive a reduced sentence if he confessed, thus rendering his confession involuntary?

Facts

Paul Westmoreland and his girlfriend, Erica Gadberry, devised a plan whereby Gadberry would pick up a patron in a bar and take him to a nearby vacant apartment where Westmoreland would rob

⁴ See 15 CA ADC § 2511(b)(4) [“You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer.”].

⁵ See, for example, *People v. Clayton* (1970) 13 Cal.App.3d 335; *U.S. v. Davis* (8th Cir. 2006) 457 F.3d 817, 822.

him. Gadberry ultimately enticed Francisco Sanchez into the apartment and Westmoreland fatally stabbed him during the robbery. Westmoreland and Gadberry then dumped the body down the stairs. Contra Costa County sheriff's deputies discovered the body the next day and, based on information from a bouncer at the bar, determined that Gadberry and Sanchez had left together. Detectives then obtained a warrant to search Gadberry's apartment. When they executed the warrant, they found Gadberry and Westmoreland together and arrested them.

At the sheriff's station, Gadberry confessed and implicated Westmoreland. Detectives then interviewed Westmoreland for about 45 minutes. Although he initially denied any involvement in the crime, he repeatedly expressed fear that he would spend the rest of his life in prison. The following are the pertinent parts (edited) of the interview:

Detective: Don't go hemming yourself up on a life case when it doesn't need to be.

Westmoreland: That's where I'm at.

Detective: Let me explain another thing, too.

Westmoreland: I'm not going to get life anyway?

Detective: No.

Detective: So at this juncture, at this point in your life where honesty is everything. You have a gentleman that went out to have a good time. He's a business owner with family. Something went bad. Maybe you just wanted to get something. Something went wrong and he's no longer with us. He's dead. We're homicide detectives, okay? So now we need to figure out how it went bad.

Westmoreland: Yeah, but check this out. I'm gonna get life for it?

Detective: No, that's not what I said.

Westmoreland: How you know I'm not gonna get life?

Detective: At this point in the investigation, we're going by what our evidence has and what [Gadberry] says. . . . But if there's logical explanations for some of the actions that happened and there's a reason why, maybe the guy did something else and provoked something or who knows. That's why I'm here.... You're in trouble, I'll be honest with you. But how much trouble you're in depends on you. . . . It

depends on is this jury gonna see you as a young man that feels sorry that something went wrong and that's not what intended to happen, or is this jury gonna see a man that says, fuck it. . . .

Detective: This is where your honesty is what will help you, okay?

Westmoreland: I'm gonna get life in prison.

Detective: You got to get past that, man.

Westmoreland: Shit don't matter man, I'm gonna get life.

Detective: That's not necessarily true, my friend.

Westmoreland then confessed. His motion to suppress his confession was denied, and he was convicted of murder and sentenced to life.

Discussion

Westmoreland contended that his conviction should be reversed because his confession was involuntary. The Court of Appeal agreed.

The U.S. Supreme Court has ruled that a statement is involuntary if it was obtained "by techniques and methods offensive to due process, or under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will."⁶ Similarly, the California Supreme Court observed that "[i]nvolutariness means the defendant's free will was overborne."⁷

In applying these definitions of "involuntariness," the courts have ruled that a statement is involuntary if officers threatened the suspect with a greater sentence if he refused to give a statement, or if they promised a reduced sentence if he gave one. Said the California Supreme Court, "Promises and threats traditionally have been recognized as corrosive of voluntariness."⁸

The question, then, was whether the detective who interviewed Westmoreland promised him that he would not receive a life sentence if he confessed. Although the transcript of the interview contained no direct threats or promises, the Court of Appeal concluded that a promise of a reduced sentence was implied. Said the court, "[The detective] repeatedly asserted appellant could avoid a life sentence if appellant provided an explanation for the murder that did not reflect premeditation. . . . [The detective] also repeatedly emphasized that the interrogation was the critical opportunity for appellant to help himself by being

⁶ *Oregon v. Elstad* (1985) 470 U.S. 298, 304.

⁷ *People v. Depriest* (2007) 42 Cal.4th 1, 34.

⁸ *People v. Neal* (2003) 31 Cal.4th 63, 84.

honest and showing remorse.” Finally, the court said the detective repeatedly told Westmoreland that “whether he would be sentenced to life depended on appellant’s explanation of why he killed the victim.” For these reasons, the court reversed Westmoreland’s conviction on grounds that his confession was involuntary and, therefore, should have been suppressed.

Comment

During this relatively short (42 minute) interview, we could find nothing that constituted an implied promise that Westmoreland would receive something less than a life sentence if he confessed. Not only were there no promises or threats, the detective told Westmoreland “I’m not even gonna get into what you may or may not get. There’s all kinds of variables in that.” And later, “So it’s hard for me to tell you what you may or may not get.” Furthermore, when Westmoreland said at one point “I’m gonna get life,” the detective responded “[t]hat’s not necessarily true” (emphasis added), thus implying that a life sentence was, in fact, a possibility.

The court also ruled that Westmoreland’s confession was involuntary because the detective told him that “his admission to killing the victim during a robbery would not, by itself, trigger a life sentence. Due to the felony-murder rule, this was false.” It is true that Westmoreland would have been facing a life sentence if the detectives obtained sufficient admissible evidence that he had committed the murder during a robbery, and if the District Attorney charged him with felony-murder, and if the trial court found that the charges were supported by the evidence, and if the jury ultimately agreed.⁹ But, none of these things were certain at this early stage of the investigation.

More to the point, before Westmoreland confessed, the detective did not *know* that the murder had occurred during a robbery or that Westmoreland was even the murderer. After all, until then the only person who had furnished information about how the crime occurred was Gadberry, and she would hardly qualify as a reliable source whose testimony would ensure a felony-murder conviction for her accomplice.

Furthermore, even if an officer makes a threat or promise regarding sentencing, a subsequent statement cannot not be suppressed unless it reasonably appeared the statement was made in response to the coercive influence; i.e., the coercion and statement must have been “causally related.”¹⁰ But it was apparent that, throughout the interview, Westmoreland firmly believed he would receive a life sentence and, thus, even if the detective had promised him otherwise, it would not have been the motivating factor.

The court also complained that the detective “repeatedly” told Westmoreland that he “could avoid a life sentence” if he “provided an explanation for the murder that did not reflect premeditation.” Even if the transcript supported this conclusion, such an assertion is not objectionable. As the court observed in *People v. Andersen*, “Homicide does possess degrees of culpability, and when evidence of guilt is strong, confession and avoidance is a better defense tactic than denial.”¹¹

For example, in *People v. Bradford* an officer told a murder suspect, “Well, it can go anywhere from, and this is just my opinion, I’m not telling you what’s going to happen, it can go anywhere from 2nd degree murder to 1st degree murder. . . . If there’s a trail of girls laying [sic] from here to Colorado, then it doesn’t look too good for you.” In ruling that this comment did not render the suspect’s subsequent statement involuntary, the California Supreme Court said, “[W]e believe defendant would reasonably understand these statements to mean that no promises or guarantees were being made.”¹²

Finally, the court faulted the detective for emphasizing “that the interrogation was the critical opportunity for appellant to help himself by being honest and showing remorse.” It is, however, settled that appeals such as “tell us what happened and help yourself,” “it’ll be in your best interests to tell the truth,” and “a cooperative attitude will be to your benefit,” will not render a confession involuntary if, as in this case, the officers did not promise anything specific.

For example, in addressing such an argument in *Fare v. Michael C.* the U.S. Supreme Court observed, “The police did indeed indicate that a cooperative

⁹ See Pen. Code § 190.2(17)(A).

¹⁰ *People v. Guerra* (2006) 37 Cal.4th 1067, 1093. ALSO SEE *People v. Williams* (2010) 49 Cal.4th 405, 437 [“A confession is not involuntary unless the coercive police conduct and the defendant’s statement are causally related.”].

¹¹ (1980) 101 Cal.App.3d 563, 583.

¹² (1997) 14 Cal.4th 1005, 1044.

attitude would be to respondent's benefit, but their remarks in this regard were far from threatening or coercive."¹³ Similarly, the California Supreme Court said in *People v. Hill*, "Thus, advice or exhortation by a police officer to an accused to 'tell the truth' or that 'it would be better to tell the truth' unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary."¹⁴

For these reasons, it appears that the court's decision was contrary to both the facts and the law.

People v. Ikeda

(2013) 213 Cal.App.4th 326

Issue

If officers arrest or detain a suspect just outside his home, under what circumstances may they conduct a protective sweep of the premises?

Facts

A man reported to Ventura County sheriff's deputies that someone had stolen his GPS-equipped laptop computer. About two weeks later, the GPS company notified deputies that someone had changed the computer's password to "Arnold Ikeda," and that the laptop was currently in use at a Holiday Inn Express in Oxnard.

Having obtained a photo of Arnold Ikeda, deputies went to the motel and confirmed with the manager that Ikeda was a registered guest. They also learned that he was currently staying in a room on the ground floor but that he changed rooms every day. The deputies were aware that a daily room change "was consistent with someone selling narcotics." The manager also said that Ikeda had left a card key to the room at the front desk for a woman who "came and went."

One deputy then went to the front door of the room while the other went to the back where there was a sliding glass door. When the deputy in front knocked and announced, a man inside said "One moment," at which point Ikeda opened the back door and stepped outside. He was detained and handcuffed.

Ikeda told the deputies there was a BB gun in the room but no other people. Nevertheless, they decided

to conduct a sweep mainly because they thought they had heard the sounds of two men talking inside and because a woman had access to the room. While conducting the sweep, they saw and seized the stolen laptop, methamphetamine, and drug packaging paraphernalia. Apparently, no one was in the room. When Ikeda's motion to suppress the evidence was denied, he pled guilty to possession of meth for sale.

Discussion

A "protective sweep" or "walk through" occurs when officers make a quick tour through a residence, looking in places where a person might be hiding. Protective sweeps often take place after officers had entered the premises to make an arrest, and their purpose is usually to locate the arrestee or anyone else on the premises who posed a threat to them.

Because a sweep constitutes a "search," the Supreme Court has ruled that sweeps are permitted only if both of the following circumstances existed:

- (1) **Lawful entry:** Officers must have been lawfully on the premises; e.g., arrest warrant, search warrant, hot pursuit, exigent circumstances.
- (2) **Dangerous person on premises:** Officers must have had reason to believe there was someone on the premises who, (a) had not made himself known or was otherwise not accounted for, and (b) posed a threat to the officers or others.¹⁵

Ikeda contended the sweep was unlawful because he was detained outside the room, and the officers had insufficient reason to believe there was someone inside who posed a threat. The court disagreed.

At the outset, the court rejected Ikeda's argument that the "lawful entry" requirement cannot be satisfied unless the officers had an arrest warrant or other independent legal grounds to enter. Instead, it ruled that, if officers are carrying out their duties outside the premises, and if they reasonably believed there was someone inside who posed an immediate threat to them, they may try to alleviate the threat by entering the premises and conducting a sweep. In other words, the existence of the threat may constitute an exigent circumstance that justifies both the entry and sweep. This is consistent with the decision in *People v. Maier*

¹³ (1979) 442 U.S. 707, 727.

¹⁴ (1967) 66 Cal.2d 536, 549. ALSO SEE *People v. Vance* (2010) 188 Cal.App.4th 1182, 1212 [officer said "we are here to listen and then to help you out"]; *U.S. v. Preston* (9th Cir. 2013) __ F.3d __ [2013 WL 428642] [a statement was not involuntary merely because officers told the suspect that "confessing could minimize the consequences of his crime"].

¹⁵ See *Maryland v. Buie* (1990) 494 U.S. 325, 327.

in which the court observed, “The basic question is whether the limited inspection of the premises was reasonable in each case. . . . This, rather than on which side of a door an arrest is effected, is the issue in these limited-inspection cases.”¹⁶

The question, then, was whether the officers had sufficient reason to believe there was someone inside Ikeda’s motel room who posed a threat to them. In ruling they did, the court noted the following:

Based on the voices, the card key at the front desk, the report that a woman came and went to the room, appellant’s use of motel rooms consistent with drug trafficking, and appellant’s statement that a gun was in the room, a reasonably prudent officer would entertain a reasonable suspicion that a protective sweep of the room was required for officer safety purposes.

Accordingly, the court ruled that Ikeda’s motion to suppress was properly denied.

Comment

It is possible that officers who enter a residence for the sole purpose of conducting a protective sweep must have *probable cause* to believe there is someone on the premises who constitutes a threat; i.e., reasonable suspicion may be insufficient.¹⁷ But even if that is the law, it probably wouldn’t have mattered here because it appears that the circumstances cited by the deputies would have constituted probable cause.

Bailey v. United States

(2013) __ U.S. __ [133 S.Ct. 1031]

Issue

May officers detain a suspect incident to the execution of a search warrant if the detention did not occur in the immediate vicinity of the premises?

Facts

Officers in New York obtained a warrant to search a certain basement apartment for a handgun. Probable cause for the warrant was based on information from an informant who said he had seen the gun when he bought drugs in the apartment from a “heavyset black male with short hair.” Shortly before the search team

arrived, undercover officers saw two men leave the gated area above the apartment. Both men matched the physical description of the suspect. One of the men was Bailey. The men got into a car in the driveway and drove off. The officers followed them.

About five minutes later (and about one mile away), the officers stopped the vehicle and detained the men. At first, Bailey admitted that he lived in the apartment but, when the officers told him it was about to be searched, he said, “I don’t live there. Anything you find there ain’t mine.” The officers also found a key in Bailey’s possession, and they later determined that the key unlocked the door to the apartment. When the search team arrived at the apartment, they found drugs and a handgun.

Bailey filed a motion to suppress the evidence that was obtained as the result of the detention; i.e., the key and his incriminating statement. The motion was denied, and he was found guilty of drug trafficking and possession of the firearm by a felon in furtherance of a drug-trafficking offense. On appeal, the Second Circuit ruled the detention was lawful, and Bailey appealed to the U.S. Supreme Court.

Discussion

At the outset, it is important to note that there are two legal theories upon which officers may detain a suspect incident to the execution of a search warrant. First, pursuant to the Supreme Court’s decision in *Michigan v. Summers*, they may detain anyone who was an “occupant” of the premises when they arrived.¹⁸ Second, pursuant to the Court’s decision in *Terry v. Ohio*, they may detain any person—whether inside or outside the premises—whom they reasonably believed was implicated in the crime for which the warrant was issued.¹⁹ The reason it is necessary to distinguish *Summers* and *Terry* is that the only issue in *Bailey* was whether the detention was permitted under *Summers*. And the Court ruled it was not. (We will, however, examine the *Terry* issue.)

Specifically, the Court interpreted *Summers* as authorizing a detention of a suspect who is outside the premises to be searched only if the person was in the immediate vicinity of the premises when the detention occurred. The Court reasoned that, because the pur-

¹⁶ (1991) 226 Cal.App.3d 1670, 1675.

¹⁷ See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.1 [the lower standard of reasonable suspicion applies once the officers were inside]; *Sharrar v. Felsing* (3rd Cir. 1997) 128 F.3d 810, 824. ALSO SEE *People v. Celis* (2004) 33 Cal.4th 667, 678.

¹⁸ (1981) 452 U.S. 692, 705.

¹⁹ (1968) 392 U.S. 1.

pose of a *Summers* detention is to help ensure the safety of the search team and the integrity of the search, there is simply no justification for detaining a person who is not in a position to threaten either of these interests. It then ruled that because Bailey was detained about a mile away from his apartment, he “posed little risk to the officers at the scene.” The Court also pointed out that the officers had no reason to believe he was aware that his apartment was about to be searched.

The Court did, however, acknowledge that an occupant who leaves the premises may present such a threat if he returns while the search is underway. But if that happens, said the Court, *Summers* would permit officers to detain him when he arrived.

The question remains whether Bailey’s detention was permitted under *Terry*. It appears so because (1) the issuance of the search warrant demonstrated probable cause to believe the occupant of the premises possessed a firearm in connection with drug trafficking; (2) Bailey had apparently just left the apartment; and (3) although the physical description of the suspect was fairly general, it was somewhat relevant that Bailey matched it. The Court did not, however decide this issue. Instead, it remanded the case to the Second Circuit for a determination.

Florida v. Harris

(2013) __ U.S. __ [133 S.Ct. 1050]

Issue

If probable cause to search a vehicle was based on an alert by a drug-detecting dog, what is the test for determining whether the dog was sufficiently reliable?

Facts

A sheriff’s deputy in Florida made a traffic stop on a truck driven by Clayton Harris. Having noticed that Harris was “visibly nervous, unable to sit still, shaking, and breathing rapidly,” the deputy asked him for consent to search the vehicle. He refused.

The deputy then retrieved his K9—Aldo—from the patrol car and walked him around the truck. Aldo had been trained to detect, among other things, methamphetamine. When Aldo alerted to the driver’s side door handle, the deputy searched the truck but found no drugs. He did, however, find various things that are used to make methamphetamine, including pseu-

doephedrine pills (200 of them). So he arrested Harris for possessing pseudoephedrine for use in manufacturing methamphetamine.

While Harris was out on bail, the same deputy stopped him for a broken tail light. And once again, he walked Aldo around the truck and, once again, Aldo alerted to the driver’s door handle. So the deputy searched the truck again, but this time he found nothing illegal.

Harris filed a motion to suppress the pseudoephedrine pills on grounds that Aldo was unreliable. The deputy, however, testified that, two years earlier, Aldo had successfully completed a 120-hour course given by a local police department; and that, one year earlier, he had completed a 40-hour refresher course. The deputy also testified that he and Aldo conducted weekly training exercises for about four hours, and that Aldo’s performance was “really good.” In addition, the prosecution introduced written records showing that Aldo “always performed at the highest level” in his courses. On cross-examination, however, the deputy testified that he did not keep records of Aldo’s performance during traffic stops or other field work.” Furthermore, Aldo’s certification (which was not a state requirement) had expired a year earlier.

As for Aldo’s two alerts to the door handle after which no illegal drugs were found, the deputy explained that, because Harris apparently “cooked and used methamphetamine on a regular basis,” Aldo “likely responded to odors that Harris had transferred to the driver’s side door handle of his truck.”

The trial court ruled that Aldo’s alert had established probable cause to search, but the Florida Supreme Court disagreed, ruling that probable cause cannot exist unless the prosecution presents “comprehensive documentation” of the dog’s prior “hits and misses” in the field. The state appealed to the United States Supreme Court.

Discussion

In a unanimous decision, the U.S. Supreme Court ruled that, in determining the reliability of a K9, the courts must apply the same “totality of circumstances” test they use in determining the reliability of other sources of information, such as confidential informants. Thus, the Court ruled that the Florida Supreme Court erred when it ruled that drug-sniffing dogs must be deemed unreliable unless the prosecution presents “an exhaustive set of records, including a log of the

dog's performance in the field." As the Court explained, "In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements."

What, then, is the test for determining whether a K9 is sufficiently reliable? The Court ruled that, as with all probable cause determinations, it must be based on common sense. Specifically, it explained that "[t]he question—similar to every inquiry into probable cause—is whether all the facts surrounding the dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." The Court added, "A sniff is up to snuff when it meets that test."

The Court then ruled that the testimony and documents that were introduced by the prosecution at Harris's trial were sufficient to establish Aldo's reliability. Said the Court, "Aldo had successfully completed two recent drug-detection courses and maintained his proficiency through weekly training exercises. Viewed alone, that training record—with or without the prior certification—sufficed to establish Aldo's reliability."

Sims v. Stanton

(9th Cir. 2013) 706 F.3d 954

Issues

(1) Did an officer conduct a "search" of a home when he kicked open a gate and entered the front yard? (2) If so, was the search lawful on grounds of exigent circumstances?

Facts

At about 1 A.M., La Mesa police officer Mike Stanton was dispatched to a report of an "unknown disturbance" on a street in an area known for gang violence. When he arrived, the only people he saw were three men who were walking in the street. When the men saw the patrol car, two of them walked into an apartment complex and the third "walked quickly" across the street. Stanton yelled "police" and ordered the third man to stop. He refused.

Instead, he opened a gate outside a nearby home and entered the front yard which was completely enclosed by a fence that was "more than six feet tall,"

thus rendering the front yard "completely secluded." When the gate closed behind the third man, Stanton kicked it open. The homeowner, Drendolyn Sims, happened to be standing behind the gate talking with friends. When it flew open, it hit Ms. Sims and caused "serious injuries."

Ms. Sims sued the officer in federal court, alleging his entry into the yard constituted a "search" under the Fourth Amendment, and that the search was not justified by exigent circumstances. The district court ruled the officer was entitled to qualified immunity and Ms. Sims appealed to the Ninth Circuit.

Discussion

Because this was a civil case, the main issues on appeal were whether it was "clearly established" law that (1) an officer's entry into someone's front yard constituted a "search" and, (2) such a search was illegal if its only justification was to arrest a person for a misdemeanor.

A "SEARCH": The Ninth Circuit summarily ruled that a "search" results whenever officers enter the "curtilage" of a home. What's the "curtilage"? It is essentially the land immediately outside the home, and it ordinarily consists of the front, back and side yards, plus the driveway.²⁰ Moreover, the court ruled that, as far as the Fourth Amendment is concerned, there is no difference between the curtilage and the inside of the home. Thus, it ruled that Officer Stanton conducted a "search" of the home when he kicked open the gate and entered Ms. Sims' front yard.

EXIGENT CIRCUMSTANCES: Officer Stanton testified he entered the yard because he was in hot pursuit of the third man. In the context of exigent circumstances, a "hot" pursuit occurs when an officer attempts to arrest a suspect in a public place, but the suspect responds by running into a home or other private place. Although the officer did not have probable cause to arrest the third man for any crime relating to the disturbance, he apparently had grounds to detain him and, thus, the man's act of fleeing constituted a violation of Penal Code § 148.

When officers are in hot pursuit, they may ordinarily chase the suspect into a home or other private place.²¹ But the Ninth Circuit ruled that, except in "the rarest cases," the "hot pursuit" exception does not apply if the

²⁰ See *Oliver v. United States* (1984) 466 U.S. 170, 182, fn.12.

²¹ See *United States v. Santana* (1976) 427 U.S. 38, 43.

suspect was wanted for only a misdemeanor. And because the third man was wanted only for a misdemeanor, the court ruled the officer's entry was illegal and that the district court erred in granting him qualified immunity.

Comment

When we initially commented on this case on our website in early March, we were highly critical of the court's ruling that any entry by officers onto the curtilage of a home constitutes a "search." That was because this ruling was inconsistent with the general rule that an entry onto the curtilage does not constitute a Fourth Amendment search unless the residents had a reasonable expectation of privacy in the area.²² So you can imagine our surprise when, on March 26th, the Supreme Court ruled in *Florida v. Jardines*²³ that any entry by officers onto the front yard of a home, or any other area within the "curtilage," constitutes a "search" if their objective was to obtain information. (See the report on *Jardines* on page 23.) Thus, assuming a "search" also results if an officer entered to make an arrest, the Ninth Circuit may have been correct that the officer's act of kicking open the gate was a search. Nevertheless, we still question the court's conclusion that this rule was "clearly established" when the officer entered Ms. Sims' yard in 2009.

There is, however, a more basic problem with *Sims*—a problem that was not affected by *Jardines*. As noted, it ruled that the "hot pursuit" exception to the warrant requirement does not apply if officers were chasing a person who was suspected of having committed only a misdemeanor. Said the panel, "The possible escape of a fleeing misdemeanant is not generally a serious enough consequence to justify a warrantless entry."

In *U.S. v. Santana*, however, the Supreme Court ruled that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."²⁴ Although the panel cited this precise quotation, it felt that the Supreme Court didn't really mean what it said. In-

stead, it ruled that, although the Supreme Court's ruling in *Santana* was not restricted to felonies, that must have been what the Court intended because, after all, Ms. Santana had been wanted for a felony!

This was not the first time that the writer of this opinion, Judge Stephen Reinhardt, has attempted to avoid a bothersome Supreme Court ruling on grounds that there was some extraneous factual difference between it and the case at hand. In fact, in overturning his decision in *United States v. Knights*, the Supreme Court used the polite phrase "dubious logic" to describe just such a shabby tactic.²⁵

In addition to being contrary to the law, the panel's restriction on foot pursuits would create significant danger to the public. That is because officers who are chasing a fleeing suspect into residential property will seldom know for sure *why* he was running, his criminal history, or whether he lives in the residence. And they *never* know his state or mind or the level of his desperation. Consequently, there is usually a reasonable possibility that the suspect had just entered the property of an innocent family whose members would be in extreme danger if suddenly confronted by a desperate fugitive. And this danger would exist, of course, regardless of whether the officers had been trying to arrest him for a felony or a misdemeanor.

That is why California courts have consistently rejected such an unsound restriction. As the Court of Appeal noted in *People v. Lloyd*, "Where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant."²⁶ For example, in *In re Lavoyne M.* the court ruled that the hot pursuit exception applied when, as far as the officer knew, the suspect who ran from him was wanted only for a traffic violation. Said the court, "Several California cases hold that the minor nature of an offense does not preclude a finding of exigent circumstances in a situation such as the present one."²⁷

POV

²² See *U.S. v. Arboleda* (2nd Cir. 1980) 633 F.2d 985, 992 ["Terming a particular area curtilage expresses a conclusion: it does not advance Fourth Amendment analysis. The relevant question is whether the defendant has a legitimate expectation of privacy in the area." Edited.]; *People v. Smith* (1986) 180 Cal.App.3d 72, 84 ["the conclusion that an individual automatically has a reasonable expectation of privacy by virtue of a claim that a certain area is within the curtilage, is not supported by the law"].

²³ (2013) __ U.S. __ [2013 WL 1196557].

²⁴ (1976) 427 U.S. 38, 43.

²⁵ (2001) 534 U.S. 112, 117.

²⁶ (1989) 216 Cal.App.3d 1425, 1430.

²⁷ (1990) 221 Cal.App.3d 154, 159.

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Lieutenants **Craig Chew** and **Robert Chenault** were promoted to captain. Inspector IIIs **Kristy Milani** and **Bruce Brock** were promoted to lieutenant. Inspectors **Dan Lee**, **Pat Johnson**, and **Pete Carlson** were promoted to Inspector III. Insp. III **Frank Moschetti** was assigned as supervisor of the SAFE Task Force. Insp. III **Jon Kennedy** is attending the FBI National Academy.

The following inspectors retired: Capt. **Mark Scarlett** (19 years, formerly ACSO), Insp. III **Kathy Boyovich** (19 years, formerly ACSO), Insp. III **Hansen Pang** (18 years, formerly U.C. Berkeley PD), Insp. III **Larry Bellusa** (21 years, formerly Oakland PD), Insp. II **Larry Wallace** (10 years, formerly Hayward PD), and Insp. II **J.C. Hazeltine** (18 years, formerly ACSO). Newly appointed inspectors: **Lauren Tucker** (ACSO), **Gino Guerrero** (OPD), and **Jad Jadallah** (OPD). Former prosecutor **Joe Hurley** retired from the Superior Court bench after 37 years with the county.

ALAMEDA COUNTY NARCOTICS TASK FORCE

ACSO Sgt. **Kevin Willis** transferred out (see ACSO promotions). He had been assigned to the task force since 2009. Transferring in: ACSO Sgt. **Johnnie Graham**.

ALAMEDA COUNTY SAFE TASK FORCE

Insp. **Robert Chenault** (DA's Office) transferred out (see DA promotions). Insp. **Frank Moschetti** (DA's Office) transferred in as Task Force Commander.

ALAMEDA COUNTY SHERIFF'S OFFICE

Capt. **Thomas Wright** was promoted to division commander. The following lieutenants were promoted to captain: **Mark Flores**, **Erik Gulseth**, **Howard Jacobson**, **Shawn Sexton**, and **Colby Staysa**. The following sergeants were promoted to lieutenant: **Richard Carter**, **Craig Cedergren**, **Mario Felix**, **Michael Molloy**, **Martin Neideffer**, **Harold Stokes**, **Kevin Willis**, and **Stephen Wolf**. The following deputies were promoted to sergeant: **David Bonnell**, **Anthony De Sousa**, **Keith Gilkerson**, **Jeffery Hazelitt**, **John Johnson**, **Colin Jones**, **Patrick Kennedy**, **Gena Livenspargar**, and **Clinton Medeiros**.

The following deputies retired: Division Commander **Dean Stavert** (30 years), Capt. **Joseph Gomez** (31 years), Capt. **Gregory Morgado** (29 years), Capt. **Neal Christensen** (28 years), Capt. **Kerry Jackson** (24 years), Lt. **Darryl Griffith** (23 years), Lt. **Brian Cook** (25 years), Lt. **Allan Lamb** (25 years), Lt. **Stephen Brown** (28 years), Sgt. **Daniel Castro** (24 years), Sgt. **Keith Gums** (23 years), Sgt. **Darrell Burnett** (23 years), Sgt. **Kelly Martinez** (28 years), and deputies **Terence Jones** (25 years), **Cary Neabeack** (28 years), **James Messina** (24 years), **Christopher Pilot** (25 years), **Michael Godlewski** (29 years), **Byron Johnston** (26 years), **Robert Bakke** (24 years), **Lawrence Barbier** (25 years), **Curtis Bracey** (24 years), **Michael Davis** (23 years), **Rebecca Gandsey** (26 years), **Michael Hickey** (22 years), **Kecia Kemp** (24 years), **Balbir Khangura** (25 years), **Stephanie Trapps** (26 years), **Steven Pape** (23 years), **Edwin Suchman** (23 years), **Khuu Tu** (27 years), **Debra Coladonato** (24 years), **Joseph England** (25 years), **Robert Follrath** (6 years), **Robert Brock** (29 years), **Daniel Hemenway** (24 years), **Glenn Pace** (23 years), **Ignacio Rocha** (23 years), and **James Calbert** (24 years). Deputy **Scott Weinstein** died at the age of 38. He had been an ACSO deputy for seven years. New deputies: **Kevin Beyrodt**, **Adam Duffy**, **Edward Yuen**, **Michael Ziller**, and **Reginal Aaron**.

ALAMEDA POLICE DEPARTMENT

Chief of Police **Mike Noonan** retired after 27 years of service with Alameda PD. Capt. **Paul Roller** was appointed interim chief. **Matt McMullen** was promoted to acting sergeant. Lateral appointment: **George Koutsoubos** (Contra Costa SO). New officer: **Jordan Halog**. New dispatchers: **Andrea Walker** and **Keisha Brooks**. **Alan Kuboyama** transferred from Patrol to Investigations-Violent Crimes.

BART POLICE DEPARTMENT

Lt. **Horace Alkire** retired after 23 years of service. **Brandon Moore** retired after 10 years of service. Newly sworn officers: **Bryan Trabanino** and **Matthew Edgecombe**. New hires: **Antwinette Turner**, **Matthew Ford**, **Roger Williams**, **Carlos Dazhan**, **Karen Watts**, **Nolan Pianta**, and **David Touye**. New dis-

patcher: **Karen Tate**. Transfers: **Rick Martinez** to Detectives, and Community Service Officer **Crystal Raine** to COPPS Unit.

BERKELEY POLICE DEPARTMENT

Cesar Melero was promoted to sergeant. Retirements: Sgt. **Conrad Craig** (35 years), CSO **Curtis Coulter** (29 years), and CSO **Alcenia Wynn** (33 years). New officers: **Jay De Bruin**, **Juan Carlos Perez**, and **Megan Schaefer**. Retired officer **Willard Dawson** passed away; he served BPD from 1961 to 1973 before joining BART PD. Retired reserve officer **Richard Haas** passed away; he was a BPD officer from 1971 to 1996.

EAST BAY REGIONAL PARKS POLICE DEPARTMENT

Jeff Vignau accepted a position at Davis PD after three years of service. Police Student Aides **Zachary Egan** and **Joshua Wildman** were hired as Police Recruits. **William Deleon-Granados** rotated into the Detective Unit, and **Thomas Urquhart** was selected as the Marine Officer. **Danny Thomas** was selected as a K9 officer and partnered with K9 **Riso**.

EMERYVILLE POLICE DEPARTMENT

New officers: **Arthur Prudhel** and **Kyle Rice**. Both were 2010 graduates of the South Bay Regional Training Academy.

HAYWARD POLICE DEPARTMENT

Det. **Ryan Cantrell** was promoted to sergeant. New officers: **Michael Cristol**, **Joseph Ley**, **Sean Spillner**, and **Anthony Carrasco**.

Retired officer **Wayne Vossekuil** passed away in February; he worked for HPD from 1960 to 1986. Retired sergeant **Ron McCurdy** passed away in January following a seven-year battle with Alzheimers. Ron's 33 year career in law enforcement spanned three different agencies. Prior to his 13 years at HPD, he spent his first five years as an officer with the Oakland PD. When he joined the HPD family, his strong work ethic afforded him the experience as a patrol officer, detective sergeant, SWAT sergeant, and YFSB sergeant. In 1980 he was awarded the HPD's Police Officer of the Year. Ron finished the final 15 years of his career as an investigator with the Santa Clara County District Attorney's Office, where he earned the ranks of homicide investigator, child abduction investigator, and fraud investigator.

NEWARK POLICE DEPARTMENT

Ray Hoppe and **Vince Kimbrough** were promoted to sergeant. Lateral appointment: **Conrad Rodgers** (Sacramento County SD). Sgt. **David Lee** was named City of Newark Employee of the Year. Transfers: Sgt. **Chomnan Loth** from Patrol to Support Services, **Mike Allum** from Patrol to Motors, and **Jeff Revay** from Patrol to School Liaison Officer at Newark Junior High.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Jerry Williams retired after 26 years of service, and **Brian Czechowski** retired after 11 years of service.

OAKLAND POLICE DEPARTMENT

The following officers retired: Sgt. **E. Juarez** (25 years), Sgt. **C. Abdullah** (25 years), **M. Ross** (20 years), **J. Villalobos** (30 years), **D. Ward** (13 years), **A. Coaston** (26 years), **S. Francis** (12 years), **M. Thomas** (28 years), and **E. Martin** (6 years),

The following recruits graduated from the police academy and were sworn in on March 22, 2013: **Nicole Allen**, **James Ashford**, **Justin Belligan**, **Joshua Bianchi**, **Remy Binder**, **Robert Blakely**, **Ken Bui**, **Ross O'Halloran Burrue**, **Michael Chung**, **Daniel Cornejo Valdivia**, **Kyle Dickson**, **Jonathan Breck Douglass**, **Luis Espinoza**, **Rickey Han**, **Anthony Hutzol**, **Anthonie Francina Jones**, **Kristine Jurgens-Duenas**, **Kevin Kelly**, **Amerra Kesterson**, **Michel Khem**, **Curtis Kingman**, **Dana Lee**, **Austen Leffler**, **Brenton Lowe**, **Dung Le-Nguyen**, **Volodymyr Lipunov**, **Chau Dang Mai**, **Anthony Martinelli**, **Zender Molina-Yepsen**, **Brendan O'Brien**, **John Palmer**, **Nicholas Petersen**, **Michael Ransom**, **Cedric Remo**, **Tracie Shea**, **Karl Templeman**, **Thomas Thurston**, and **Julie Yu**.

PIEDMONT POLICE DEPARTMENT

San Jose PD Assistant Chief **Rikki Goede** was appointed chief. She succeeds **John Hunt** who retired last July.

SAN LEANDRO POLICE DEPARTMENT

Dan Leja was promoted to sergeant. New officer: **Daryl Pasut**. Retired lieutenant **Thomas Nathan Hull** has died; he served from 1963 to 1991.

UNION CITY POLICE DEPARTMENT

Reserve officer **Edward Ruckli** retired after contributing 30 years of volunteer service.

POV

War Stories

Trafficking in hot oboes

One day, two burglars broke into a house in Vallejo and stole three oboes. Apparently unable to sell such unusual musical instruments in Vallejo, the burglars drove to Berkeley and tried to sell them to the manager of Forrest Music. The manager stalled them while she notified Berkeley PD. When officers arrived and detained the two men, they asked the manager how she knew the oboes were stolen. She explained that they were *her* oboes, and that *she* was the victim of the burglary.

Having fun with two-way radios

One night, burglars broke into a charter school in Richmond and stole several laptop computers. They also stole two walkie-talkies, so the school district loaned a third radio to a Richmond police officer who listened as the burglars talked about their adventures and, more importantly, their whereabouts. As a result, officers arrested four suspects and recovered all but one of the laptops.

An FBI employment interview

After applying for a job with the FBI, Dominick Pelletier met with an agent at an FBI office in Illinois for a polygraph test. When he saw a list of the questions he would be asked, Pelletier said he was worried about the question on “sexual crimes” because he had downloaded child pornography on his home computer for “research” purposes. But he also said that he thought his “research” would help him “track down criminals.” After he left, agents obtained a warrant to search his home and, as a result, he was convicted of possessing child pornography. In ruling that the agent was not required to obtain a *Miranda* waiver from the man, the Seventh Circuit observed, “Obviously, Pelletier did not get the job.”

A drug dealer considers retirement

One morning, Oakland police narcotics officers went to a home in East Oakland to execute a search warrant. Wearing raid jackets with “POLICE” printed in front and back, the officers knocked on the door. A

few seconds later, a 67-year old woman answered the door, carrying a clear plastic bag filled with rock cocaine. After arresting her, one of the officers asked why she opened the door to police officers while holding a bag filled with drugs. The woman replied, “I looked out the peephole and saw you, but I couldn’t make out the word on your jacket. I thought it said PIZZA.”

Just curious

A Hayward police officer was giving a tour of the police station to a class of kindergartners. One of the children happened to notice some photographs of the Ten Most Wanted posted on a bulletin board:

Child: Is this man really wanted by the police?

Officer: He sure is.

Child: Well, why didn’t you keep him when you took this picture?

More police-student interactions

An Oakland police officer was visiting a third grade class to show the children how to report an emergency. Using a real telephone on the teacher’s desk, the officer demonstrated how easy it is to call for help. After the demonstration, he asked one of the children, Jerome, if he’d like to pick up the phone and dial 9-1-1. “Not me,” replied Jerome, “I ain’t no snitch.”

More fun and games with 9-1-1

Another OPD officer was dispatched to investigate a 9-1-1 hangup call. When he knocked on the door, a 7-year old boy answered:

Officer: Are your parents home?

Boy: No, sir.

Officer: Did you call 9-1-1?

Boy: No, sir.

Officer: Well, somebody did.

Boy: Oh, that’s right. I called, but I didn’t do it on purpose. I got the wrong number. I was trying to call my friend Ralph.

Officer: Oh yeah? What’s Ralph’s number?

Boy: Uh . . . 8-1-1.

From the greedy lawyer file

The Minnesota Bar Association suspended a divorce lawyer who was having an affair with his client. The reason for the suspension? The lawyer billed the woman for the time he spent having sex with her.

From the good-guy lawyer file

One night, a Vallejo police officer was in foot pursuit of a suspect who was running along a busy street. When the officer caught up with the suspect, there was a scuffle. A man who was driving by saw the fight and stopped to help the officer take the suspect into custody. It turned out the Good Samaritan was a criminal defense attorney who requested anonymity because, as he explained, "It could ruin my reputation."

Beware of nosy parole officers

An off-duty parole officer was waiting in line to buy some tires at America's Tire Company in Fremont when he noticed that the guy in front of him was one of his parolees. As the parolee presented a credit card to the clerk, the officer took a peek at the name on the card. It wasn't the parolee's name. The officer later determined that the card was stolen, and the parolee was revoked.

A funny thing happened on the way to get a marriage license

An off-duty San Jose police officer and his fiancée were riding a BART train in Oakland, on their way to San Francisco where they had an appointment to get a marriage license. Suddenly, there was a commotion and someone behind them yelled, "Stop him! He tried to rob me!" A few of the passengers grabbed the suspect but he broke free and tried to run to the next car. So the officer blocked his path, displayed his badge, and held him on the floor. A few minutes later the train pulled into the West Oakland BART station where BART officers arrested the suspect. The SJPD officer later notified BART that he and his fiancée arrived for their appointment right on time.

OPD radio: 4:27 a.m.

"1-L-23. A 415. The caller says a man and a woman have been having sex on his front porch for the past four hours, and he's getting tired of watching them."

An untrustworthy drug dealer

While executing a search warrant in a drug house, officers in Banning and Colton found the following business card:

Colton's Newest Crack House [Address deleted]

"If you are selling high-quality uncut cocaine at a reasonable price, Southern California will beat a path to your door."

This is our guiding principle, so why not give us a try? We offer fast service with experienced Colombian personnel to serve you. Open daily from noon to 4 a.m.

During the search, officers found \$13,000 in cash and about \$400,000 worth of meth—but no cocaine! To make matters worse, only one of the six employees they arrested was a genuine Colombian. The rest were from Encino.

The War Story Hotline
POV@acgov.org

Today's word to the wise: Thimk!

Oops. Oh well, it's just a typo. But, speaking of mistakes, if your profession requires that you know the law pertaining to police field operations or criminal investigations, a little mistake can be a big deal. And that's why we publish *Point of View* and *California Criminal Investigation*. How do they differ?

CCI covers just about everything we've written in *Point of View*, except the information is more condensed and it appears in an expanded outline form. This not only makes it easier to find exactly what you are looking for, it demonstrates the logical structure of each subject.

CCI is published in both a hard-copy manual (currently *CCI 2013*) and *CCI Online* which is a digital version that subscribers can access on the internet. Both now contain over 3,600 endnotes with examples, comments, and over 15,000 California and federal case citations.

But *CCI Online* also features an innovative software program which allows subscribers to view any endnote by just clicking on the endnote number in the text, at which point the endnote information appears instantly in a box on the right. Some additional features of *CCI Online*:

- ✓ All significant California and federal appellate rulings are ordinarily added daily. All other noteworthy cases are added within a week.
- ✓ A global search engine allows subscribers to quickly scan throughout the text—including endnotes—for key words and case names. It will also search articles and recent case reports in *Point of View Online*. As a result, subscribers receive hyperlinked lists similar to those provided by Google.
- ✓ Chapter names are also hyperlinked. This means that when the text refers to another chapter, subscribers can click on the chapter name and be transported there.

For more information or to order the
2013 edition of *California Criminal Investigation*,
a one-year subscription to *CCI Online* or both,
visit le.alcoda.org.