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 invocation[1]

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 or was undecided. 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" 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 interrogation 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 it progeny."[14]

One other thing. The only person who can invoked 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.

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[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. Thompkins* (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. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2260].
[21] Re "ambiguous": See *People v. Sauceda-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:

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

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[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. Thompkins* 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

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[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]

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.[63]
- Well, if I'm under arrest (he was) I wanna lawyer.[64]
- I'd like an attorney because this is serious.[65]
- I won't say anything until I see my lawyer.[66]
- I didn't do any murders. I want to talk to a lawyer.[67]
- Get me a lawyer.[68]
- I am ready to talk to my lawyer.[69]
- Fuck you. I want to talk to my lawyer.[70]

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[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; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 538.
[58] See *People v. Nelson* (2012) 53 Cal.4th 367, 381; *People v. Lessie* (2010) 47 Cal.4th 1152, 1170.
[59] See *Berghuis v. Thompkins* (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.
[63] *People v. Sapp* (2003) 31 Cal.4th 240, 268. [64] *People v. Boyer* (1989) 48 Cal.3d 247. [65] *People v. McClary* (1977) 20 Cal.3d 218, 222.
[66] *People v. Jablonski* (2006) 37 Cal.4th 774, 811. [67] *People v. Hayes* (1985) 169 Cal.App.3d 898, 907. [68] *People v. Davis* (2009) 46 Cal.4th 539, 588. [69] *People v. Neal* (2003) 31 Cal.4th 63, 73. [70] *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1527.

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.[71] *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.[72] 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.[73] 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."[74]

For example, in *People v. Clark*[75] 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*[76] 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*[77] 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."

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:

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[71] 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."].

[72] *Arizona v. Roberson* (1988) 486 U.S. 675, 684.

[73] See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 ["To invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest."]; *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 ["Invocation of the Sixth Amendment right to counsel alone does not constitute an invocation of the *Miranda-Edwards* Fifth Amendment right to counsel."].

[74] (1992) 3 Cal.4th 41, 121.

[75] (1992) 3 Cal.4th 41, 121.

[76] (1975) 45 Cal.App.3d 201, 211, fn.5.

[77] (1993) 6 Cal.4th 1, 28.

- How long would it take for a lawyer to get here?[78]
- Am I going to be able to get an attorney?[79]
- What time will I see a lawyer?[80]
- Do I get a lawyer?[81]
- Did you say I could have a lawyer?[82]
- I don't have a lawyer. I guess I need to get one, don't I?[83]
- There wouldn't be [a lawyer] running around here now, would there?[84]
- I can't afford a lawyer but is there any way I can get one?[85]
- Can I call a lawyer or my mom to talk to you?[86]
- Do I need a lawyer before we start talking?[87]
- Do you think I need a lawyer?[88]
- But will [having an attorney] make a difference?[89]
- Should I be telling you or should I talk to a lawyer?[90]
- What can an attorney do for me?[91]

EXPRESSIONS OF UNCERTAINTY: At the start of an interview, or at some point after it begins, suspects may express some uncertainty as to whether they should talk to officers (or whether they should continue talking with them) without a lawyer. So long as the suspect's words demonstrated only uncertainty—not resolve—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 recently 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] The following are some examples:

- I don't know if I need a lawyer.[92]
- I don't know if I should without a lawyer.[93]
- Maybe I should talk to a lawyer.[95]
- I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh.[96]
- 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.[97]
- I think it'd probably be a good idea for me to get an attorney.[98]
- I guess you better get me a lawyer then.[99]
- I think I would like to talk to a lawyer.[100]
- 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.[101]
- 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.[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 any other 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. Likewise, an invocation of the *Miranda* right to counsel does not result merely because the suspect appeared in court on the crime under investigation and was represented by counsel or requested a court-appointed attorney.[104]

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[78] *People v. Simons* (2007) 155 Cal.App.4th 948, 958. [79] *U.S. v. Shabaz* (7th Cir. 2009) 579 F.3d 815, 819.
[80] *U.S. v. Doe* (9th Cir. 1999) 170 F.3d 1162, 1166. [81] *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677, 685.
[82] *People v. Crittenden* (1994) 9 Cal.4th 83, 130. [83] *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259].
[84] *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 154-55. [85] *Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1221.
[86] *People v. Roquemore* (2005) 131 Cal.App.4th 11, 25. [87] *U.S. v. Wysinger* (7th Cir. 2012) 683 F.3d 784, 795. [88] *U.S. v. Ogbuehi* (9th Cir. 1994) 18 F.3d 807, 813. [89] *People v. Maynarich* (1978) 83 Cal.App.3d 476, 481. [90] *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1072. [91] *People v. Clark* (1993) 5 Cal.4th 950, 990. [92] *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 126. [93] *People v. Michaels* (2002) 28 Cal.4th 486, 510.
[94] *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259].
[95] *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"]. [96] *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 527. [97] *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219-20.
[98] *People v. Bacon* (2010) 50 Cal.4th 1082, 1107 [edited]. [99] *U.S. v. Havlik* (8th Cir. 2013) __ F.3d __ [2013 WL 1235259]. [100] *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1071. [101] *People v. Cortes* (1999) 71 Cal.App.4th 62, 68, 71. ALSO SEE *U.S. v. Hampton* (7th Cir. 2012) 675 F.3d 720, 728 [the "hedge word" "but" was a qualifier]. [102] *People v. Cunningham* (2001) 25 Cal.4th 926, 994.
[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.]

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[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 Santaf 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

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[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. Thompkins*[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]

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[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

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[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.