POINT of VIEW

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Dear Readers: This will be my last *Point of View*. As you might imagine, writing *POV* has been more than a job and, after 35 years, I will certainly miss it. But I am now 77-years old and . . . well, that pretty much says it all. I will, however, continue to write and edit our two sister publications *California Criminal Investigation* and CCI Online. Wishing you all the best, Mark Hutchins

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"A group of friends and I are going on a road trip and I was wondering what are some of the best methods you have come across to secure our drugs?"
Posted on Reddit.com.

Most people who commit crimes have learned that the safest and most convenient place to hide drugs, weapons, and other incriminating evidence is often inside their cars, SUVs, and trucks. This is mainly because motor vehicles are relatively secure, highly mobile and, as an added bonus, they are fully protected by the Fourth Amendment. As one website advised its criminal readership, "Forget your house—your car is your most private place."[1]

In the past, vehicles were even more attractive to criminals because the rules pertaining to vehicle searches were quite confusing. In fact, officers often had to guess at whether they could search a vehicle, and could only speculate as to the permissible scope and intensity of these searches. As we will show in this article, the rules are much less confusing nowadays, even though there are several types of vehicle searches, each with its unique rules.

One other thing: Although warrantless searches are permitted in many situations, it may nevertheless be better practice to seek a warrant so as to eliminate the issue, especially if the search will cause damage.

Probable Cause Searches

Here is probably the most straightforward rule of all the searches of any type that officers may conduct: If there is probable cause to search a vehicle that is located in a public place, it may be searched without a warrant. As the Supreme Court explained, a vehicle search "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."[2]

Note that this rule applies even if officers had time to obtain a warrant,[3] or if there were no exigent circumstances that required an immediate search, or even if the vehicle had already been towed and was sitting securely in a police garage or impound lot. Again quoting the Supreme Court, "The justification to conduct such a warrantless search does not vanish once the car has been immobilized."[4] Officers may not, however, retain the vehicle for an unreasonable amount of time, especially if the owner had requested its return.[5]

Scope of search

Officers who are conducting a probable cause search of a vehicle may look for the evidence in any place or thing in which it could reasonably be found—including the trunk and closed containers. This is because, as the Supreme Court explained, "nice distinctions between glove compartments, upholstered seats, trunks, wrapped packages" must "give way to the interest in the prompt and efficient completion of the task at hand."[6] Thus, in upholding a probable cause vehicle search in *People v. Gallegos* the Court of Appeal observed that "the officers did not seek an elephant in a breadbox, but limited their search to areas that reasonably might have contained [the evidence]."[7]

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[1] http://jalopnik.com. April 17, 2013.
[2] *United States v. Ross* (1982) 456 U.S.798, 809. Also see *People v. Carpenter* (1997) 15 Cal.4th 312, 365 ["The police had probable cause to search the vehicle. Under the 'automobile exception' to the warrant requirement, they did not need a warrant at all."].
[3] See *United States v. Johns* (1985) 469 U.S. 478, 487, 487 ["we do not think that delay in the execution of the warrantless search is necessarily unreasonable"]; *People v. Superior Court (Nasmeh)* (2007) 151 Cal. App.4th 85, 101 ["the length of time during which the police held Nasmeh's Jeep Cherokee did not make the search unreasonable"]; *U.S. v. Noster* (9th Cir. 2009) 590 F.3d 624 [search eight days later OK because probable cause continued to exist].
[4] *Michigan v. Thomas* (1982) 458 U.S. 259, 261. Also see *U.S. v. Short* (8th Cir. 2021) 2 F.4th 1076 ["an easily repairable flat tire did not cause the vehicle to lose its inherent mobility"].
[5] See *United States v. Johns* (1985) 469 U.S. 478, 487.
[6] *United States v. Ross* (1982) 456 U.S. 798, 821-22.
[7] (2002) 96 Cal.App.4th 612, 626.

Officers may also search the possessions of passengers, but only if they have reason to believe that the sought-after evidence would be found there.[8] This is mainly because the privacy expectations of passengers are "considerably diminished," and because passengers "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits of the evidence of their wrongdoing."[9]

There are two significant exceptions to this rule: First, officers may not search the clothing worn by the occupants unless they had reason to believe that the evidence was located there. Thus, in *People v. Temple* the court ruled that the search of an occupant's pockets did not qualify as a probable cause search because pockets are "part of his person and therefore were not 'containers' within the scope of the vehicle search."[9A] Second, if officers have probable cause to search a cellphone or other electronic storage device in the vehicle, they may not do so without a warrant.[10] They may, however, seize the device and promptly seek a warrant.[11]

LIMITED PROBABLE CAUSE: If officers know that the evidence is located *only* in a certain area or container in the vehicle, they may search *that* area or open *that* container but they may not search elsewhere.[12] For example, if officers were tracking a container of drugs, and if they saw someone put the container in a vehicle, they would have probable cause to enter the vehicle, seize the container and search it. But they could not ordinarily search anything else in the vehicle without a warrant.

INTENSITY OF SEARCH: Officers may conduct a "probing" or reasonably thorough search.[13] But they may not damage the vehicle unless it was reasonably necessary and only if the damage was not excessive; e.g., taking paint samples from a hit-and-run vehicle.[14]

Vehicle Inventory Searches

Unlike investigative vehicle searches whose objective is to find evidence of a crime, vehicle inventory searches are classified as "community caretaking" searches because their objectives are limited to (1) providing a record of the property inside the vehicle so as to furnish the owner with an accounting; (2) protecting officers, their departments (and ultimately taxpayers) from false claims that property in the vehicle was lost, stolen, or damaged; and (3) protect officers and others from harm if the vehicle contained a dangerous device or substance.[15]

Despite their obvious benefits, vehicle inventory searches are subject to certain restrictions that help ensure that they are not used as a pretext to search for evidence. Consequently, as we will now explain, these searches are permitted only if both of the following circumstances existed:

(1) **Towing reasonably necessary**: The officer's decision to impound or store the vehicle was a reasonable under the circumstances.

(2) **Standard search procedures**: The search was conducted in accordance with departmental policy or standard procedure.

Towing reasonably necessary

As noted, vehicle inventory searches are permitted only if officers reasonably believed it was necessary to take temporary custody or control of the vehicle.[16] As the Court of Appeal explained, "The ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the [inventory search rationale] was reasonable under all the circumstances."[17]

This does not mean that towing must have been imperative. Instead, as the First Circuit noted, "Framed precisely, the critical question is not

[8] See *Wyoming v. Houghton* (1999) 526 U.S. 295, 307.
[9] *Wyoming v. Houghton* (1999) 526 U.S. 295, 304-305.
[9A] *People v. Temple* (1995) 36 Cal.App.4th 1219, 1227.
[10] See Penal Code § 1546 *et seq*.
[11] See *United States v. Place* (1983) 462 U.S. 696, 701; *Riley v. California* (2014) 573 U.S. 373, 388.
[12] See *California v. Acevedo* (1991) 500 U.S. 565; *United States v. Ross* (1982) 456 U.S. 798, 824.
[13] See *California v. Acevedo* (1991) 500 U.S. 565, 570. Also see *U.S. v. Snow* (2nd Cir. 1995) 44 F.3d 133, 135.
[14] See *People v. Robinson* (1989) 209 Cal.App.3d 1047, 1055. Also see *United States v. Ramirez* (1998) 523 U.S. 65, 71
[15] See *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1.
[16] See *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247; *People v. Williams* (2006) 145 Cal.App.4th 756, 762.
[17] *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247.

whether the police needed to impound the vehicle in some absolute sense, but whether the decision to impound and the method chosen for implementing that decision were within the realm of reason."[18] Or, in the words of the Ninth Circuit, "Whether an impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft."[19]

PROTECTION OF THE VEHICLE: Towing is reasonably necessary if there was a legitimate threat that the vehicle would be stolen or damaged if left at the scene. For example, the courts have ruled that it was reasonably necessary to tow a vehicle under following circumstances:

- "The alternative would be to leave a new Mercedes in a high-crime area."[20]
- The car was parked on the street, and it had "no windshield."[21]
- The car was parked off the highway in a "dark, lonely and isolated" area located approximately three miles from the nearest town.[22]
- The vehicle was parked in a parking lot and the FBI agents "had every reason to believe that [the driver] would not be returning anytime soon."[23]

In contrast, the courts have ruled that towing was not reasonably necessary in the following situations:

- "The car was parked in or alongside an apartment complex. It was not blocking the roadway, the sidewalk, or a driveway, and the arrestee "offered to have someone else come pick it up so it would not need to be impounded."[24]
- "The car was legally parked at the curb of a residential street two houses away from [the driver's] home. The possibility that the vehicle would be stolen, broken into, or vandalized was no greater than if the police had not arrested [him] as he returned home."[25]
- "The car was legally parked in front of appellant's residence, appellant had a valid driver's license, the car was properly registered to a car rental company, the car had not been reported stolen, and [the officer] had no reason to believe appellant was not in lawful possession of the car."[26]

Note that if the driver of a vehicle had been arrested it is usually unnecessary to tow it if he wanted a friend to take custody of the vehicle and the friend was licensed, insured, and was present at the scene or could have arrived within a reasonable amount of time. For example, the Ninth Circuit in *Sandoval v. County of Sonoma* invalided an inventory search because the driver "was able to provide a licensed driver who could take possession of the truck" and thus "the City's community caretaking function was discharged."[27] The California Court of Appeal reached the same conclusion in *People v. Lee* when it observed that "Lee offered to have someone come pick up the car for him but [the officer] told him, 'That's not going to work' but the officer did not explain why it wouldn't work.'"[28]

VEHICLE WAS AN OBSTRUCTION OR HAZARD: It is, of course, necessary to tow vehicles that were obstructing traffic or constituted a hazard to other motorists. As the Ninth Circuit observed in *Miranda v. City of*

[18] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780. 786. Edited.
[19] *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864.
[20] *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1248.
[21] *People v. Scigliano* (1987) 196 Cal.App.3d 26, 30 [towing of a Corvette was reasonable because the owner had been arrested, the car was parked on the street, and it had no windshield]..
[22] *People v. Benites* (1992) 9 Cal.App.4th 309, 326.
[23] *U.S. v. Kornegay* (10th Cir. 1989) 885 F.2d 713, 716.
[24] *People v. Lee* (2019) 40 Cal.App.5th 853, 868.
[25] *U.S. v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1075. Also see *U.S. v. Rosario-Acosta* (1st Cir. 2020) 968 F.3d 123, 127 ["The car was parked legally on a quiet residential street ... It created no more danger than did any other car lawfully parked"].
[26] *People v. Williams* (2006) 145 Cal.App.4th 756, 762.
[27] (9th Cir. 2018) 912 F.3d 509, 516. Also see *Sandoval v. County of Sonoma* (9th Cir. 2018) 912 F.3d 509, 516 ["Once Ruiz was able to provide a licensed driver who could take possession of the truck, the City's community caretaking function was discharged."].
[28] (2019) 40 Cal.App.5th 853, 858.

Cornelius, towing will usually be deemed reasonable if it "fits within the authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience."[29] Thus, in the landmark case of *Cady v. Dombrowski*, the Supreme Court ruled there was sufficient reason to tow a vehicle because it was "disabled as a result of the accident, and constituted a nuisance along the highway."[30]

It is also reasonable to tow a vehicle in the following situations: the driver had been arrested and his vehicle "was on the verge of a busy highway,[31] the officer "testified that the position of the Mustang, as it was left by Defendant, prevented other cars from passing by to enter the gated community,"[32] the suspect's motorcycle was "in the street" and "created a safety hazard,"[33] the vehicle was parked illegally in a handicap parking spot,[34] and the vehicle had been abandoned.[35]

DRIVER UNLICENSED, SUSPENDED, REVOKED: If the driver is merely cited and released, it is arguable that towing is reasonably necessary because it is possible—maybe even probable, considering his demonstrated contempt for California's licensing statutes—that he will reassume control of the vehicle after officers have left. Thus, in *People v. Burch*[36] the Court of Appeal upheld an inventory search that occurred after the officer had cited the driver for violating Veh. Code § 14601 and who decided to impound the vehicle because he testified usually so "to prevent the cited driver from simply getting back into the vehicle and driving away."

Standard search procedures

The second requirement for a vehicle inventory search is that the scope and intensity of the search must have been restricted by means of "standardized criteria or established routine."[37] The main purpose of this requirement is to ensure that "the owners and occupants of those vehicles are protected against the risk that officers will use selective discretion, searching only when they suspect criminal activity and then seeking to justify the searches as conducted for inventory purposes."[38]

CHP 180 FORMS: A law enforcement agency may satisfy the "standardization" requirement by mandating that officers complete a CHP 180 form which requires, among other things, that officers list all "property" in the vehicle, including radios, tape decks, firearms, tools, and ignition keys; and list damage to the vehicle.[39]

DEPARTMENTAL POLICY: This requirement may also be satisfied if towing was required or permitted pursuant to departmental policy. Such a policy—which may be written or unwritten[40]—need only specify the general areas and things in the vehicle that should be searched.[41] As the First Circuit pointed out, this would be impractical:

> Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot. The police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities.[42]

[29] (9th Cir. 2005) 429 F.3d 858, 864. Also see *U.S. v. Coccia* (1st 2006) 446 F.3d 233, 238*; U.S. v. Cervantes* (9th Cir. 2012) 678 F.3d 798, 805 [there was no testimony that the vehicle "was parked illegally, posed a safety hazard"].
[30] (1973) 413 U.S. 433, 443.
[31] *U.S. v. Sylvester* (1st Cir. 2021) 993 F.3d 16, 23-24.
[32] *U.S. v. Trujillo* (10th Cir. 2021) 993 F.3d 859, 869.
[33] *U.S. v. Nevatt* (8th 2020) 960 F.3d 1015, 1021.
[34] *U.S. v. Davis* (1st Cir. 2018) 909 F.3d 9, 17.
[35] See Veh. Code § 22669.
[36] (1986) 188 Cal.App.3d 172, 180.
[37] *Florida v. Wells* (1990) 495 U.S. 1, 4. Also see *People v. Williams* (1999) 20 Cal.4th 119, 127.
[38] *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 371. Also see *U.S. v. Marshall* (8th Cir. 1993) 986 F.2d 1171, 1176.
[39] See *People v. Williams* (1999) 20 Cal.4th 119, 123.
[40] See *People v. Williams* (1999) 20 Cal.4th 119, 127.
[41] See *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 371.
[42] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 787.

For example, the policy may require that officers search all containers, or it may give officers some discretion in determining which containers to search.[43] If discretion is given, the policy should provide officers with some guidelines on how to exercise it; e.g. officers may search only those containers whose contents cannot be determined from the outside.[44] A policy may also authorize a search of the trunk,[45] under the spare tire,[46] and the engine compartment.[47] As for documents in the vehicle, officers may be allowed to read them,[48] and to look through notebooks and other multi-page documents to "ensure that there was nothing of value hidden between the pages."[49]

Protective Vehicle Searches

Searches of vehicles for weapons is permitted if officers (1) had arrested or detained an occupant of a vehicle, (2) had reason to believe there was a "weapon" inside the vehicle, and (3) the arrestee or detainee had potential access to the passenger compartment when the search occurred; i.e., the arrestee had not yet been subjected to a "full custodial arrest."[50] Under these circumstances, a search is permitted because "the officer remains particularly vulnerable" and "must make a quick decision as to how to protect himself and others."[51]

Weapon inside?

An officer's belief that a weapon is inside the passenger compartment is usually based on direct evidence; e.g., officers saw a weapon or receive a tip from a reliable source that driver is currently armed.[52] In some cases, an officer's belief that there is a weapon inside may be based on circumstantial evidence.

Although there is little law on how much or what kind of circumstantial evidence will suffice, it is likely that the relevant circumstances would include those that officers and judges consider in determining whether a pat search is warranted,[53] such as the nature of the crime under investigation (e.g., armed robbery) and crimes in which the perpetrators commonly possess heavy or sharp objects.[54]

Types of "weapons"

There are two types of weapons that will justify a protective vehicle search: conventional and virtual. Conventional weapons are those that are manufactured primarily to harm or kill, such as guns, knives, brass knuckles, saps, billy clubs, and nunchakus.[55] A search for conventional weapons will ipso facto justify a protective search.

In contrast, virtual weapons are instruments that are manufactured for some other purpose but can readily be used to harm or kill; e.g., baseball bats, hammers, crowbars, and tennis racquets. The courts understandably will not authorize searches of stopped cars based merely on the presence of a virtual weapon. Consequently, it appears that the presence of a virtual weapon will justify a protective search only if there was circumstantial evidence that it was being used to harm or kill; e.g., a baseball bat positioned handle-up between bucket seats, a Mag flashlight located about nine inches from the driver who was acting suspiciously.[56]

Scope of the search

If officers see a weapon in the passenger compartment they may enter and seize it. If their belief that a weapon is inside is based on circumstantial

[43] See *Florida v. Wells* (1990) 495 U.S. 1, 4; *People v. Williams* (1999) 20 Cal.4th 119, 138.
[44] See *Florida v. Wells* (1990) 495 U.S. 1, 4; *People v. Williams* (1999) 20 Cal.4th 119, 138.
[45] See *U.S. v. Johnson* (5th Cir. 1987) 815 F.2d 309, 314; *U.S. v. Tueller* (10th Cir. 2003) 349 F.3d 1239, 1244.
[46] See *U.S. v. Johnson* (5th Cir. 1987) 815 F.2d 309.
[47] See *U.S. v. Pappas* (8th Cir. 2006) 452 F.3d 767, 772; *U.S. v. Lumpkin* (6th Cir. 1998) 159 F.3d 983, 987-88.
[48] See *People v. Hovey* (1988) 44 Cal.3d 543, 571.
[49] *U.S. v. Khoury* (11th Cir. 1990) 901 F.2d 948, 959. Also see *U.S. v. Andrews* (5th Cir. 1994) 22 F.3d 1328, 1335.
[50] See *Arizona v. Gant* (2009) 556 U.S. 332; *U.S. v. Vaccaro* (7th Cir. 2019) 915 F.3d 431, 437.
[51] *Michigan v. Long* (1983) 463 U.S. 1032, 1052.
[52] See *Michigan v. Long* (1983) 463 U.S. 1032, 1052; *People v. Perez* (1996) 51 Cal.App.4th 1168, 1178-79.
[53] See *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074; *People v. Methey* (1991) 227 Cal.App.3d 349, 358 [a pry bar].
[54] See *Michigan v. Long* (1983) 463 U.S. 1032; *People v. Lafitte* (1989) 211 Cal.App.3d 1429.
[55] See *Michigan v. Long* (1983) 463 U.S. 1032, 1047-48.
[56] See *Terry v. Ohio* (1968) 392 U.S. 1, 28; *People v. Lee* (1987) 194 Cal.App.3d 975.

evidence, they may search those places and things in the passenger compartment in which a weapon may be placed or hidden,[57] such as under the seats, inside the glove box, and under the armrest.

Furthermore, officers who have retrieved a weapon may continue searching the passenger compartment for more. As the court noted in *People v. Molina*,[58] "Once the officers discovered the knives, they had reason to believe that their safety was in danger and, accordingly, were entitled to search the [passenger compartment] and any containers therein for weapons." Also note that officers may seize any other item they happen to find if they have probable cause to believe it is evidence of a crime.[59]

Other Vehicle Searches

INSTRUMENTALITY SEARCHES: If officers have probable cause to believe that a vehicle, itself, was the means by which a crime was committed (e.g., hit-and-run vehicle, kidnap vehicle), or if it was the locus of the crime (e.g., murder in vehicle), they may search it under an exception to the warrant requirement known as the "instrumentality exception."[60] As a practical matter, however, the instrumentality exception has become virtually superfluous because, as discussed earlier (see the section on probable cause searches), officers who have probable cause to believe that a vehicle was an instrumentality or locus of a crime will almost always have probable cause to search it for the fruits, instrumentalities, and evidence of that crime.[61]

EXIGENT CIRCUMSTANCES: Officers may enter and search a vehicle if it was reasonably necessary to protect lives from imminent danger or property from imminent damage; e.g., child locked in vehicle, sick or injured person inside, gun or dangerous chemical inside. It may also be necessary for officers to enter a vehicle that has been burglarized or is otherwise insecure for the purpose of locking it or searching for registration that will enable them to notify the owner.

SEARCHES INCIDENT TO ARREST: In the past, officers were permitted to search the passenger compartment of vehicles for weapons and evidence whenever they made a custodial arrest of an occupant. In 2009, however, the Supreme Court ruled that such searches—known as *"Belton"* searches[62]—were permissible only if, at the time the search was conducted, the arrestee had immediate access to the passenger compartment.[63] But because officers will seldom permit arrestees to have unfettered access to anything, *Belton* searches have become virtually extinct.[64]

SEARCHES BY VEHICLE THEFT INVESTIGATORS: Officers whose primary responsibility is to conduct vehicle theft investigations may search unoccupied vehicles to determine the lawful owner if the vehicle was located "on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment."[65]

SEARCHES OF EVENT DATA RECORDERS: Information stored in a vehicle Event Data Recorder (a.k.a. "Black box" or "Sensing and Diagnostic Module") may not be downloaded or otherwise retrieved unless officers had obtained (1) a search warrant or other court order, or (2) the registered owner consented.[66] Officers may, however, seize the recorder and seek a warrant to search it if they reasonably believed that (1) evidence stored in the camera's memory constituted evidence of a crime, and (2) they reasonably believed the evidence might be destroyed if they waited for a warrant to seize it.[67] POV

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[57] See *Michigan v. Long* (1983) 463 U.S. 1032; 1032, 1049.
[58] (1994) 25 Cal.App.4th 1038, 1042.
[59] See *Michigan v. Long* (1983) 463 U.S. 1032, 1050.
[60] See *People v. Diaz* (2013) 213 Cal.App.4th 743, 756.[vehicular manslaughter].
[61] See *People v. Lopez* (2019) 8 Cal.5th 353.
[62] See *New York v. Belton* (1981) 453 U.S. 454.
[63] See *Arizona v. Gant* (2009) 556 U.S. 332.
[64] See *Arizona v. Gant* (2009) 556 U.S. 332, 350.
[65] Veh. Code § 2805.
[66] See Veh. Code § 9951(c). Also see *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1086, fn.4
[67] See *United States v. Place* (1983) 462 U.S. 696, 701; *People v. Tran* (2019) 42 Cal.App.5th 1, 34.

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!
Apparent *Miranda* invocation[1]

When can suspects invoke their *Miranda* rights? And what constitutes an invocation? Knowing the answers to these questions is essential because crucial evidence is often lost whenever an officer fails to spot an invocation, or if they terminate an interview in the mistaken belief that the suspect had invoked. This is especially so in major felony cases in which officers frequently confront suspects who, although they have waived their *Miranda* rights, will admit to nothing unless officers are able to "unbend their reluctance."[2] And this often requires relentless probing, confrontation, and even verbal combat. Moreover, the longer this goes on, the more likely the suspect will say something that could conceivably be deemed an invocation.

Fortunately, the law pertaining to *Miranda* invocations has become much more understandable over the past years. As the result, officers who have a good understanding of the most recent *Miranda* rulings will seldom run into problems. And that is the purpose of this article.

What Constitutes an Invocation?

The most significant change in *Miranda* law occurred in 1994 when the Supreme Court ruled in *Davis v. United States* that *Miranda* invocations would no longer result merely because a suspect's words *might* have indicated a desire to terminate the interview. Before then, the courts would ordinarily rule that invocations would result if the suspect said something that *might* have demonstrated an intent to invoke. This created problems because there were no standards for determining whether an invocation had occurred.

The Court in *Davis* changed this, ruling that *Miranda* invocations could result only if the suspect demonstrated an obvious or unambiguous intent to invoke. As the Court explained:

> Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal our precedents do not require the cessation of questioning.[3]

It must be acknowledged that the rule requiring that invocations be unambiguous "may disadvantage suspects who, for emotional or intellectual reasons, have difficulty expressing themselves."[4] For this reason, an ambiguous remark may constitute an invocation if the suspect had not yet waived his rights.[5] When this happens, however, officers may attempt to clarify the ambiguity.

Although there is no simple test for determining whether a remark was ambiguous, the California Supreme Court has provided some guidelines. First, a suspect's words are ambiguous if the ambiguity would have been detected by a reasonable officer under the circumstances. As the 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 circumstances."[6] 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."[7]

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[1] *People v. Jennings* (1988) 46 Cal.3d 963, 978-79.
[2] *Culombe v. Connecticut* (1961) 367 U.S. 568, 572.
[3] *Davis v. United States* (1994) 512 U.S. 452, 459. Edited. Also see *People v. Nelson* (2012) 53 Cal.4th 367, ["The requirement of an unambiguous and unequivocal assertion likewise applies to a suspect's invocation of the right to silence."].
[4] *People v. Stitely* (2005) 35 Cal.4th 515, 535.
[5] See *Davis v. United States* (1994) 512 U.S. 452, 461; *People v. Duff* (2014) 58 Cal.4th 527, 553; *People v. Williams* (2010) 49 Cal.4th 405, 428; *U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1078-79.
[6] *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 217-18.
[7] *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126.

Second, a remark is ambiguous only if the officer would have concluded that it was "reasonably open to more than one interpretation,"[8] or if the officer would have understood only that the suspect "might" be invoking.[9] Also note that if an invocation was unambiguous, officers may not "play dumb" and try to "clarify" a remark that requires no clarification.[10]

Consider words in context

In determining how a reasonable officer would have understood the suspect's words, the courts must consider them in context. This is important because words that appear 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," observed 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 a reasonable officer what the defendant intends."[11]

We now 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 shit out of me. I'm not going to talk. That's it. I shut up!" On the surface this remark was 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."[12] Similarly, in *People v. Thompson*[13] the suspect informed an officer that his attorney told him "not to say nothin' about the case or anything, unless I had a lawyer present." This was not an invocation, said the court, because it 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 officers, and (2) there was no apparent reason for a sudden change of mind. This might be deemed ambiguous unless he said or otherwise acknowledged that he had changed his mind about talking with the officers. For example, in *People v. Williams*[14] the following occurred after the suspect waived his right to remain silent:

Officer: Do you wish to give up the right to speak to an attorney and have him present?
Suspect: You talking about now?
Officer: Do you want an attorney here while you talk to us?
Suspect: Yeah.
Officer: Yes, you do?
Suspect: Un 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 pointed out 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, the defendant responded with a question concerning timing." The court then ruled:

> 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.

[8] *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218. Also see *U.S. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1080.
[9] *People v. Johnson* (2019) 32 Cal.App.5th 26, 55.
[10] See *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d. 781, 788 ["the officer decided to 'play dumb'"]
[11] See *People v. Carey* (1986) 183 Cal.3d 99, 103; *People v. Harris* (1989) 211 Cal.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"].
[12] *People v. Williams* (2010) 49 Cal.4th 405, 429. Edited.
[13] *People v. Jennings* (1988) 46 Cal.3d 963, 978-79.
[14] (1990) 50 Cal.3d 134, 166.

One other thing: While the courts will consider the suspect's words in context, they will not consider what he said *after* an alleged invocation. As the Supreme Court explained, "An accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."[15]

Body language, inflection

Although the term "body language" is, itself, somewhat ambiguous, it generally refers to the "tone, inflection, and the infinite other minute qualities of demeanor and affect that cannot be ascertained from words alone."[16]

For example, in *People v. Clark*[17] a murder suspect argued that he had invoked his right to counsel because, while being *Mirandized*, he asked "What can an attorney do for me? In rejecting the argument, the California Supreme Court explained that it had reviewed an audio recording of the statement "including the tone and inflections of defendant's voice," and that this recording demonstrated that "the defendant's questions were rhetorical in nature" and that they were "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 in 1993.[18] After Davis waived his rights, an officer suggested to him that investigators had obtained DNA and unspecified trace evidence that linked him to the crimes. Davis then stood up and said, "Well then book me and let's get a lawyer and let's go for it. 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 he sat down and said, "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 lets go for it." The California Supreme Court disagreed, pointing out that is had viewed a videotape of the interrogation 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."

Note that in the absence of a video recording of the interview, a court may be unable to detect the ambiguity, and officers may have difficulty explaining it.

Invocations of the Right to Remain Silent

Having discussed the general principles, we will now examine the rules pertaining to the two types of invocations, beginning with the right to remain silent. A suspect will be deemed to have unambiguously invoked the right to remain silent if he said something that demonstrated either (1) a present unwillingness to submit to impending interrogation, or (2) a desire to terminate an interview in progress." An invocation of the right to remain silent—but not the right to counsel—will also result if the suspect said he was invoking but did not specify which right he was invoking; e.g., "Having these rights in mind do you want to talk with us?" No."[19] Also see "General *Miranda* invocations," below.

In some cases, the suspect's intent will be apparent; i.e., "I ain't talking to you no more." But in most cases in which this issue arises the suspect will say something that falls somewhere between an unambiguous invocation and an unambiguous waiver. One court described this as a "significant middle ground" that it is "all too familiar" to officers.[20]

EXPRESSIONS OF RELUCTANCE: A remark is not ambiguous if it merely demonstrated uncertainty or reluctance to talk with officers. Some examples:

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[15] (2010) 50 Cal.4th 405, 428. Edited.
[16] *Smith v. Illinois* (1984) 469 U.S. 91, 99.
[17] *Sessions v. Runnels* (9th Cir. 2010) 650 F.3d 1276, 1288. Edited.
[18] *People v. Davis* (1993) 5 Cal.4th 950.
[19] See *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1322 ["We hold that a general *Miranda* invocation is not the specific expression of the exercise of the right to counsel under *Miranda*"].
[20] *U.S. v. Plugh* (2nd Cir. 2011) 658 F.3d 118, 125.

- "Do you mind if I go back to my cell and think about tonight and talk to you guys tomorrow?"[21]
- "I don't know what to do. I want to help you guys, I want you guys to find [the perpetrator], but I don't want to incriminate myself."[22]
- "I don't know if I wanna talk anymore since it's someone killed."[23]
- "I don't know what you, 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, give me a break."[24]
- After claiming he murdered the victim in self-defense, the suspect said, "Do I gotta still tell you after I admit it?"[25]
- After admitting that he had killed a store employee during a robbery, the suspect said, "Do I have to talk about this right now?"[26]

EXPRESSIONS OF FRUSTRATION: For suspects who are guilty of the crime under investigation, an interrogation is especially stressful. After all, making up stories on-the-fly, attempting to explain away incriminating evidence, and trying to keep track of all his lies and disinformation is exhausting. But an expression of frustration—without more—is not an invocation.[27]

For example, in *People v. Thomas*[28] a suspect in a drive-by murder was being interrogated by homicide detectives in San Diego. As things progressed, the investigators repeatedly accused Thomas of lying, and he repeatedly denied it. At one point a detective told him, "By you sitting here lying it just makes us think you're hiding something." Thomas responded, "Well, I know I wasn't there. I ain't talking no more and we can leave it at that." In ruling that these words did not constitute an unambiguous invocation, the court said, "When viewed in conjunction with his earlier expressions of frustration," this statement was another expression of momentary frustration and, at most, was an ambiguous invocation of the right to remain silent."

Some other expressions of frustration that were not invocations:

- "I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me," and, "I'm not saying shit to you no more, man. You, nothing personal man, but I don't like you."[29]
- "You're gonna try to con me, now I ain't saying no more."[30]
- "Okay. I'll tell you. I think it's about time for me to stop talking, well, I mean. God damn accused of something that I didn't do."[31]

REQUEST TO TALK WITH RELATIVE, FRIEND: A request by the suspect—adult or juvenile—to speak with someone other than an attorney is not an invocation; e.g., a parent, probation officer.[32]

REFUSAL TO SIGN A WAIVER: It frequently happens that a suspect will waive his rights but refuse to sign a waiver form. This is not an invocation. As the Eighth Circuit observed, "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."[33]

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[21] *People v. Hoyt* (2020) 8 Cal.5th 892, 932-33.
[22] *People v. McCurdy* (2014) 59 Cal.4th 1063, 1089-90.
[23] *People v. Wash* (1993) 6 Cal.4th 215, 238-39.
[24] *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238-40.
[25] *People v. Hayes* (1985) 38 Cal.3d 780, 786.
[26] *People v. Castille* (2005) 129 Cal.App.4th 863, 885.
[27] *People v. Stitely* (2005) 35 Cal.4th 514, 535 [the suspect "expressed apparent frustration but did not end the interview"].
[28] *People v. Thomas* (2012) 211 Cal.App.4th 987, 1007.
[29] *People v. Jennings* (1988) 46 Cal.3d 963, 978-79.
[30] *People v. Ashmus* (1991) 54 Cal.3d 932, 970.
[31] *People v. Stitely* (2005) 35 Cal.4th 514, 535.
[32] See *Fare v. Michael C.* (1979) 442 U.S. 707; *People v. Lessie* (2010) 47 Cal.4th 1152, 1165 [request to talk with father]; *Ahmad A. v. Superior Court* (1989) 215 Cal.3d 528, 538 [talk to parent]; *People v. Hector* (2000) 83 Cal.3d 228, 235-36 [talk with parent]; *Hall v. Thomas* (11th Cir. 2010) 611 F.3d 1259, 1289 ["there is no clearly established federal constitutional requirement … that interrogation cease upon a juvenile's request for the presence of a parent or guardian"].
[33] *U.S. v. Binion* (8th Cir. 2009) 570 F.3d 1034, 1041. Also see *People v. Maier* (1991) 226 Cal.3d 1670, 1677-78.

"GENERAL" MIRANDA INVOCATIONS: An unambiguous invocation of the right to remain silent results if the suspect said he was invoking but did not specify which right he was invoking. These are known as "general" invocations and they commonly occur when the suspect says "no" when asked, "Having these rights in mind, will you talk with us now?" Significantly, a "general" *Miranda* invocation constitutes only an invocation of the right to remain silent.[34]

"When viewed in conjunction with his earlier expressions of frustration, this statement was another expression of momentary frustration and, at most, was an ambiguous invocation of the right to remain silent."

Invocations of the Right to Counsel

In *Miranda's* "Dark Ages," it seemed as if invocations of the right to counsel would occur whenever a suspect uttered the word "attorney," "lawyer," or "mouthpiece" in whatever context. But now, like invocations of the right to remain silent, invocations of the *Miranda* right to counsel can occur only if the suspect made an unambiguous request to have an attorney present during custodial interrogation. Here are some examples of remarks that constituted invocations:

- I'm being set up. I want to see my lawyer![35]
- Well, if I'm under arrest I wanna lawyer.[36]
- I'd like an attorney because this is serious.[37]
- I won't say anything until I see my lawyer.[38]
- I didn't do any murders. I want to talk to a lawyer.[39]
- I am ready to talk to my lawyer.[40]

Expressions of uncertainty

An invocation of the right to counsel will not result if the suspect merely indicated some uncertainty as to whether he should talk to officers without counsel. Such expressions of uncertainty are often qualified by words such as "I don't know," "if," "I think," "I guess," or "probably." Some examples:

- I guess you better get me a lawyer then.[41]
- I don't know if I need a lawyer.[42]
- They always tell you get a lawyer."[43]
- I'd sort of like to know what my lawyer wants me to do.[44]
- 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.[45]

Questions about attorneys

Asking a question about an attorney is ordinarily ambiguous. For example, the courts have ruled that the following remarks did not constitute an invocation of the right to counsel:

- Should I have somebody here talking for me, is this the way it's supposed to be?[46]
- There wouldn't be [an attorney] running around here now, would there?[47]
- 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.[48]

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[34] See *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1322.
[35] *People v. Hensley* (2014) 59 Cal.4th 788, 810.
[36] *People v. Boyer* (1989) 48 Cal.3d 247.
[37] *People v. McClary* (1977) 20 Cal.3d 218, 222.
[38] *People v. Jablonski* (2006) 37 Cal.4th 774, 811.
[39] *People v. Hayes* (1985) 169 Cal.3d 898, 907.
[40] *People v. Neal* (2003) 31 Cal.4th 63, 73.
[41] *U.S. v. Havlik* (8th Cir. 2013) 710 F.3d 818, 822.
[42] *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 126.
[43] *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087.
[44] *Petrocelli v. Baker* (9th Cir. 2017) 869 F.3d 710, 725.
[45] *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219-20.
[46] *People v. Cunningham* (2015) 61 Cal.4th 609, 646.
[47] *People v. Clark* (1992) 3 Cal.4th 41, 120.
[48] *U.S. v. Wysinger* (7th Cir. 2012) 683 F.3d 784, 795.

- Do I need a lawyer before we start talking?[49]
- Am I going to be able to get an attorney?[50]
- Can I call a lawyer or my mom to talk to you?[51]
- But will [having an attorney] make a difference?[52]

Wanting an attorney "in court"

Most people who have been arrested will want to be represented by counsel when they appear before a judge. And the Sixth Amendment gives them that right. *Miranda* does not. That's because the sole objective of the *Miranda* right to counsel is to have counsel present *during* custodial interrogation. Thus, a suspect's demand to be represented by counsel in court, or at any later time, does not constitute an invocation of the *Miranda* right to counsel. 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 counsel requiring cessation of the interview."[53]

For example, in *People v. Clark*[54] 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." When the officer asked if he wanted an attorney "right now" he said "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, "although 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*[55] the following exchange occurred between a murder suspect and a Contra Costa County sheriff's detective after the suspect had been *Mirandized*:

> **Suspect**: Attorneys 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 wanted 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 that the suspect's remark—"I want it noted that I want an attorney"—was not an invocation of the right to counsel 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. Johns*on[56] a detective in Daly City 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 was not an invocation, the California Supreme Court observed, "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."

Suspect retains an attorney on another case

Just as a suspect's request for an attorney in court has no bearing on whether he thinks he needs an attorney during questioning, neither is a request for counsel in a separate case. For example, in *People v. Sully*[57] an attorney was appointed to represent Sully in a murder case in Burlingame. Sully was also a suspect in the uncharged murders of three people whose bodies had been found in Golden Gate Park. So, when

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[49] *U.S. v. Shabaz* (7th Cir. 2009) 579 F.3d 815, 819 ["Shabaz's question was not a clear request for counsel"].
[50] *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 154-55.
[51] *People v. Roquemore* (2005) 131 Cal.App.4th 11, 25.
[52] *People v. Maynarich* (1978) 83 Cal.3d 476, 481.
[53] *People v. Clark* (1992) 3 Cal.4th 41, 121.
[54] (1992) 3 Cal.4th 41, 121. Also see *People v. Simons* (2007) 155 Cal.App.4th 948, 958 ["How long would it take for a lawyer to get here?]; P v. Art T. (2015) 234 CA4 335, 355 ["Could I have an attorney? Because that's not me."]; Sessoms v. Grounds (9C 2015) 776 F3 615, 634 ["Yeah, that's what my dad asked me to ask you guys ... uh, give me a lawyer."].
[55] (1975) 45 Cal.App.3d 201, 211, fn.5.
[56] (1993) 6 Cal.4th 1, 28.
[57] (1991) 53 Cal.3d 1195, 1234. Also see *U.S. v. Oehne* (2nd Cir. 2012) 698 F.3d 119, 123.

SFPD investigators learned he was in custody in the San Mateo County Jail on a murder in Burlingame they visited him there, obtained a *Miranda* waiver and questioned him about their case.

On appeal, Sully argued that his request for an attorney to represent him in court in the Burlingame case also constituted an invocation of the *Miranda* right to counsel and, thus, his statement to the SFPD officers should have been suppressed. The California Supreme Court disagreed, saying, "Defendant's appearance and acceptance of appointed counsel on one charge does not amount to an invocation of [*Miranda*} rights with respect to another, uncharged offense."

Similarly, in *McNeil v. Wisconsin*[58] an attorney was appointed to represent McNeil on a robbery charge. A detective who was investigating an unrelated murder visited him in jail, obtained a *Miranda* waiver, and interviewed him about the murder. In the course of the interview, McNeil made some incriminating statements, and they were used against him at trial. On appeal, the Supreme Court ruled that McNeil's invocation of his Sixth Amendment right to counsel as to the robbery did not also constitute an invocation of the *Miranda* right to counsel as to the uncharged murder.

Limited and Conditional Invocations

In the past, the courts would rule that an invocation would result if the suspect expressed any reluctance to discuss his case "freely and completely."[59] That has changed. The courts now recognize that a suspect's refusal or reluctance to discuss a particular subject or answer a certain question, or his lack of response to the officers' questions, do not necessarily demonstrate a desire to terminate the interview. On the contrary, his act of placing restrictions on the manner in which the interview is conducted demonstrates a willingness to speak with officers if they agree to these restrictions. Thus, the court in *People v. Johnson* explained that a suspect does not automatically invoke his rights "by imposing conditions governing the conduct of the interview."[60]

REFUSAL TO DISCUSS A CERTAIN SUBJECT: A suspect's absolute refusal to discuss a certain subject or answer a certain question constitutes an invocation of the right to remain silent only as to *that* subject or question. Said the Ninth Circuit, "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."[61]

For example, in *People v. Silva*[62] an officer who was questioning Silva about a murder asked if he had driven a certain truck. Silva responded, "I really don't want to talk about that." In ruling that Silva had not invoked the right to remain silent, the California Supreme Court said, "A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress." In a similar case, the California Supreme Court said, that the suspect's statement "I don't want to talk about it" was "an expression of frustration, not an unambiguous invocation."[63]

An invocation of the right to counsel can also be limited or conditional. For example, in *U.S. v. Rought*[64] FBI agents were questioning James Rought who had been arrested for selling fentanyl to a person who had died from an overdose. About 24 minutes into the interview, an agent said he wanted to talk about the victim and Rought replied, "I don't really want to talk about that aspect without my lawyer." The agent agreed to the request and began asking about Rought's drug connection. A few minutes later, while Rought was claiming he was not a drug dealer and he was talking about the dangers of drug addition, he said that drug dealers "are killing my friends just as much as, right now, you're trying to say that I killed

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[58] (1991) 501 U.S. 171.
[59] See *People v. Burton* (1971) 6 Cal.3d 375, 382.
[60] (1993) 6 Cal.4th 1, 25-26.
[61] *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664, fn.2. Also see *People v. Vance* (2010) 188 Cal.App.4th 1182, 1211 ["I don't want to talk about it" was not an unequivocal invocation].
[62] (1988) 45 Cal.3d 604, 629-30.
[63] *People v. Williams* (2010) 49 Cal.4th 405, 434.
[64] (3rd Cir. 2021) 11 F.4th 178. Also see *People v. Clark* (1992) 3 Cal.4th 41, 122.

my friend." The interview continued and Rought made several statements that were used against him at trial. He was convicted.

On appeal, he argued that his statements should have been suppressed because he had invoked his right to counsel when he said "I don't really want to talk about that aspect without my lawyer." Specifically, he argued that the words "that aspect" of the matter encompassed any subject related to his drug dealing. The court disagreed, saying, "Given this context and the course of the interrogation up to the point of Rought's invocation, 'that aspect' is most naturally understood to refer to [the victim's] death." And because it was Rought, not the agent, who opened up the subject of the overdose, the court ruled that the agent had not violated *Miranda*.

REFUSAL TO SPEAK WITH A CERTAIN OFFICER: A suspect's refusal to speak with a certain officer is a limited invocation of the right to remain silent as to *that* officer.[65] This issue commonly arises in the course of a "good cop—bad cop" routine. Thus, in *People v. Jennings*,[66] the California Supreme Court ruled that such a refusal did not constitute an invocation because it reasonably appeared that the suspect "was refusing to talk further with [Officer] Cromwell whom he did not like or trust, as opposed to [Officers] Maich or Rose."

REQUEST TO SPEAK "OFF THE RECORD." If a suspect requests to go "off the record" in response to a certain question, and if officers agree to the request, his answers to questions about *that* subject will be suppressed. Officers may, however, continue to question the suspect about other subjects.

For example, in *People v. Johnson*[67] the suspect in a murder case was being interviewed by police in Daly City. At one point he said "This is off the record" and then asked if he could get a ten-year deal from the D.A. The officer made a noncommittal response and continued to question him about the murder, and Johnson responded by making some incriminating statements. On appeal, the court ruled the discussion about sentencing was properly suppressed because the officer impliedly agreed it would be off the record. But his subsequent statement about the circumstances surrounding the murder was ruled admissible because there was no reason for Johnson to believe it was included in his "off the record" request.

An invocation may, however, result if the suspect asked to go off the record but did not specify a particular subject. It appears that such a request will constitute an unconditional invocation if officers agreed to the request (which they should not usually do). For example, in *People v. Bradford*[68] a murder suspect, after invoking the right to counsel agreed to go "off the record" and then confessed. The court ruled the confession was obtained in violation of *Miranda* because, among other things, it appeared that he expected that the entire interview would be off the record.

"NO RECORDING": A suspect's request that the interview not be recorded does not constitute an invocation—limited or otherwise—even if the suspect was unaware that the interview was being recording secretly. Thus, when this issue arose in *Lopez v. United States*, the Supreme Court responded,

> 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.[69]

Similarly, the California Supreme Court observed, "It is well established that a suspect does not invoke his or her right to remain silent by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others."[70] POV

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[65] See *People v. Parker* (2017) 2 Cal.5th 1184, 1221; *People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1450.
[66] (1988) 46 Cal.3d 963, 979.
[67] (1993) 6 Cal.4th 1.
[68] (1997) 14 Cal.4th 1005, 1037.
[69] (1963) 373 U.S. 427, 439.
[70] *People v. Samayoa* (1997) 15 Cal.4th 795, 829-30.

Recent Cases

People v. McDaniel

(2021) 12 Cal.5th 97

Issue

Under what circumstances may officers order a passenger in a stopped vehicle to remain inside?

Facts

At about 3:30 a.m., at the a housing complex in Los Angeles, Don'te McDaniel walked into the apartment of Annette Anderson and started shooting. Anderson and another person were killed; two others were shot but survived. McDaniel fled. The shooting was gang-related. At the scene, LAPD officers found cartridges for a nine-millimeter handgun and a shotgun.

Five days later, two LASD deputies happened to stop a Toyota because there were no license plates. As the car came to a stop, the passenger door came open and "a man stepped out and made a motion and tried to run out of the vehicle." That man was McDaniel. One of the deputies yelled "Get back in the car" and he complied. As things progressed, the driver was arrested for not having a license, and the deputies decided to impound his car.

But before conducting an inventory search, one of them ordered McDaniel to step outside. As he did so, the deputy noticed a bulge "that resembled a gun" in his right pocket. So he conducted a pat search and found a loaded nine-millimeter Ruger semiautomatic handgun. McDaniel was arrested and the deputies seized the Ruger which was later determined to be the murder weapon.

Before trial, McDaniel argued that the search was unlawful and the gun should have been suppressed. The court disagreed, and McDaniel was convicted of two counts of first-degree murder. He was sentenced to death.

Discussion

McDaniel argued that the Ruger should have been suppressed because it was the fruit of an unlawful detention. Specifically, he contended that the deputies had seized him illegality when they ordered him to remain in the car. The California Supreme Court disagreed.

Because detentions are "one of the most perilous duties imposed on law enforcement officers,"[1] the courts "allow intrusive and aggressive police conduct without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."[2]

During traffic stops it is usually the driver who poses the greater threat, and that is why officers may, as a matter of routine, order the driver to exit or remain in the vehicle. But can they also order a passenger to remain inside?

McDaniel argued that such an order is unlawful unless officers had reason to believe that the passenger constituted a threat. But the California Supreme Court ruled that, even if such a threat was required, it certainly existed in this case. Said the court, the deputy "surely was not required to give McDaniel an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, the officer was not permitting a dangerous person to get behind him."

Consequently, the court ruled that McDaniel's motion to suppress the gun was property rejected, and it affirmed his conviction.

People v. Cuadra

(2021) 71 Cal.App.5th 348

Issue

Was the defendant unlawfully detained?

Facts

As the result of widespread violence and looting resulting from Black Lives Matter protests, the County of Los Angeles established a curfew between the hours of 6 p.m. and 6 a.m. At about 2:15 a.m. two LASD deputies on patrol drove into the parking lot of a motel in the City of Commerce. As they did so, they saw a man, identified as Oscar Cuadra,

[1] *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.
[2] *U.S. v. Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123.

standing near a parked car. While they remained inside their patrol car, they asked Cuadra if he knew about the curfew. He said no. The deputies did not intend to cite or arrest Cuadra for violating the curfew since he was standing on private property. Nevertheless, they were wondering why, with so much violent crime and destruction going on in the area, a person would be walking around at 2 a.m. for no apparent reason. So they decided to contact him.

As they stepped out of their car, one of the deputies asked—but did not order—Cuadra "to walk over to the hood of our patrol vehicle." Instead of complying, Cuadra "raised his hands and stepped backward, away from the patrol car, all the while asking why the deputies were attempting to detain him when he had done nothing wrong." As Cuadra raised his hands, one of the deputies saw a "pretty big" bulge in his right front pants pocket. The deputy also noticed that the bulge was consistent with the shape of a firearm.

At this point, Cuadra spontaneously said he had a gun. So the deputy ordered him to get on the ground and, after conducting a pat search, removed a loaded .38 caliber revolver. Cuadra was subsequently charged with possession of a firearm by a convicted felon. When his motion to suppress the gun was denied, he pled no contest.

Discussion

Cuadra argued that his handgun should have been suppressed because it was the fruit of an unlawful detention. And in a 2-1 decision, the court agreed.

It was apparently undisputed by prosecutors that Cuadra had, in fact, been detained when he was asked to raise his hands and walk over to the patrol car (even though he was not commanded to do so). Consequently, the central issues were (1) did the deputies have grounds to detain him, and (2) did he comply with the deputy's command.

GROUNDS TO DETAIN: Officers may detain a person only if they have "reasonable suspicion," which is a much lower standard of proof than probable cause. As the Supreme Court explained, "The reasonable suspicion inquiry falls considerably short of 51% accuracy,"[3] and that "reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence."[4]

Moreover, in determining whether officers had grounds to detain a person, the courts are required to consider the totality of the surrounding circumstances. Thus, in reversing a circuit court in *District of Columbia v. Wesby,* the Supreme Court said that the two circuit judges in the majority had "viewed each fact in isolation rather than as a factor in the totality of circumstances."[5] And yet, the two justices who ordered the suppression of Cuadra's gun (the third dissented) not only ignored this requirement, but blatantly misrepresented the nature of the threat that the deputies were facing.

Specifically, in discussing why the deputies were on high alert, they merely said "there was a curfew in effect." But, for discerning readers who thought it would be helpful to know why the area was under curfew, and why Cuadra's early morning activities were of concern to the deputies, it was necessary to read the dissenting opinion of Justice Elizabeth Grimes:

> National Guard troops and police officers guarded the barricaded steps of Los Angeles City Hall and tried to restore order in Santa Monica and Long Beach. For two days, looters spent hours vandalizing and breaking into stores, stealing items and setting fires in Los Angeles, Santa Monica, and Long Beach.

Not only did the majority ignore these seemingly important facts, they shamefully referred to the rioters as "protesters." (Isn't there a significant difference between a "rioter" and a "protester?")

DID CUADRA COMPLY WITH THE DEPUTY'S REQUEST? As noted, the two justices in the majority also ruled that Cuadra had complied with the deputy's request to walk over to the patrol car. But even if Cuadra had been illegally detained at that point, the detention would have automatically terminated if he did not comply with the deputy's request or command. As the Supreme Court explained in

[3] *Kansas v. Glover* (2020) __ U.S. __ [140 S.Ct. 1183].
[4] *Illinois v. Wardlow* (2000) 528 U.S. 119, 123.
[5] (2018) __ U.S. __ [138 S.Ct. 577, 588].

Brendlin v. California, "There is no seizure without actual submission; otherwise, there is at most an attempted seizure."[6]

Did Cuadra submit when the deputy asked him to "walk over to the hood of our patrol vehicle?" In the view of the majority, a detainee who is asked to walk over to a patrol car will have complied if, instead of walking over to the car, he stepped back, stood his ground, and started arguing. In their words, Cuadra's act of raising his hands and stepping backward "is not, by any stretch of the imagination, an indication that he believed he was not being seized and was, instead, free to leave."

Apart from the obvious fact that Cuadra did not comply with the deputy's command, the majority compounded their error when, as noted, they said that in determining whether a person was detained it is significant that the person subjectively believed so. And yet, the Supreme Court has expressly ruled that a person's beliefs are irrelevant in determining whether he had been detained. As the Court explained in *California v. Hodari D.*, the issue is "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."[7]

There's more. The majority also claimed that Cuadra had been illegally detained because the deputies had *intended* to detain him. In their words, "It is objectively apparent the officers intended to detain and frisk appellant." Apart from the fact that the majority had no way of knowing the deputies' intentions, it was error to even consider them. As the Supreme Court said in *United States v. Mendenhall,* "The subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent."[8] Thus, in *In re Manuel G.* the California Supreme Court explained that "the officer's uncommunicated state of mind [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred."[9]

It would be pointless to go further. Fortunately, this decision was so blatantly wrong that it will likely be recognized as an aberration.

People v. Sumagang

(2021) 69 Cal.App.5th 712

Issue

Did a detective conduct an illegal two-part interrogation in obtaining a confession from the defendant?

Facts

A Monterey County sheriff's deputy was dispatched to investigate a 911 hangup call of a suspicious vehicle in a remote area of the county. When she arrived she found the car with the hood up, and a large crack in the windshield. In the backseat were Byron Sumagang and 20-year old Carole Sangco. Sangco was lying on top of Sumagang. When the deputy knocked on the window, Sumagang woke up but Sangco was dead.

Sumagang told the deputy that he and Sangco had made a suicide pact and that they had both taken "a bunch" of Klonopin and "drank as much tequila as they could." He also said "he was not supposed to wake up."

After Sumagang was released from the hospital, a detective went to the county jail to question him about the murder. The deputy did not, however, seek a *Miranda* waiver because he "wanted to see what he had to say first."

During this part of the interrogation, which lasted about 25 minutes, Sumagang said that after he and Sangco drank the tequila and took the pills, Sangco repeatedly asked him, "Can you please choke me out in the back seat please." He admitted that he did so and provided a detailed account.

After a two-minute break, the detective returned and *Mirandized* Sumagang. During this part of the interrogation—which lasted 45 minutes—Sumagang said that he and Sangco had been together for five years, that she had "depression problems" and had often talked about suicide. He explained that he and Sangco had initially attempted to kill themselves by cutting their wrists and setting the car on fire. But when that didn't work, Sumagang repeatedly asked him to strangle her. He explained that he "didn't want to hurt her" but she "just kept

[6] (2007) 551 U.S. 249, 254.
[7] (1991) 499 U.S. 621, 628. Also see *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254.
[8] (1980) 446 U.S. 554, fn.6.
[9] (1997) 16 Cal.4th 805, 821. Also see *People v. Ross* (1990) 217 Cal.App.3d 879, 884.

on telling me do." So he began to strangle her. At one point, he said, Sangco "closed her eyes, her arms went limp, and she just stopped moving." When asked why he didn't kill himself, Sumagang "I forgot."

Before trial, Sumagang filed a motion to suppress all of his statements to the detective on grounds he failed to obtain a *Miranda* waiver at the start of the interview. The court agreed in part, ordering the suppression of everything he said during prewaiver portion of the interview, but it admitted the statements he made after he had been *Mirandized*. Sumagang was convicted.

Discussion

It is settled that officers may interrogate a suspect in custody only if the suspect had been advised of his *Miranda* rights. This was why the trial court suppressed Sumagang's first confession. Sumagang argued that the post-warning potion should also have been suppressed because it was the product of an illegal two-step interrogation process.

The "two step" was a tactic in which officers would begin an interrogation before *Mirandizing* the suspect. Then, if he confesses or makes a damaging admission, they would seek a waiver and, if he waives, they will try to get him to repeat the statement. As the Ninth Circuit explained, "A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession."[10]

The two-step works on the theory that the suspect will usually waive his rights and repeat his incriminating statement because he will think (erroneously) that his first statement could be used against him and, thus, he had nothing to lose by repeating it.

In 2004, however, the U.S. Supreme Court ruled that a two-step interrogation is illegal the officer's objective was to avoid the *Miranda* restrictions.[11] Thus, the issue in *Sumagang* was whether the detective's decision to employ a two-step procedure was to circumvent *Miranda*. Although the courts will consider the totality of circumstances, the following are indications of such an intent.

Intense prewaiver conversation: The prewaiver portion of the interview consisted of detailed questioning pertaining to the crime.

Interrogation tactics: During the prewaiver interview, the officers utilized interrogation tactics that were designed to produce an admission; e.g., "good cop/bad cop."

Overlapping content: During the postwaiver interview, the officers referred to the suspect's prewaiver admission or otherwise reminded him that he had already "let the cat out of the bag?"

Time lapse: There was only a short time lapse between the two portions of the interview.

Same officers: Both portions were conducted by the same officers.

It was, therefore, apparent that Sangco's first confession had been obtained as the result of an illegal two-step. Among other things, the court noted that during the 25-minute prewaiver portion the detective "elicited a detailed narrative of the night that Sangco died, including all the facts needed to inculpate Sumagang." The court added that the detective had also obtained the prewaiver confession by asking leading questions which resembled "cross-examination."

In addition, the court observed that "there was no substantial break in time or circumstances between the two parts of the interrogation." For example, the "postwarning questioning started two minutes after the prewaiver portion of what amounted to a continuous interaction between the detective and the suspect." Accordingly, the court ruled that Sumagang's postwaiver confession should have been suppressed, and it overturned his conviction.

People v. Jimenez

(2021) __ Cal.App.5th __ [2021 WL 5905719]

Issue

Did an officer coerce a murder suspect into confessing?

Facts

At about midnight, a San Bernardino County sheriff's deputy spotted Enrique Jimenez and two young men standing in an open field near some

[10] *US v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973.

[11] (2004) 542 U.S. 600. Also see *People v. Krebs* (2019) 8 Cal.5th 265.

trash cans. When the men saw the deputy, they all ran to a Chevy Suburban parked nearby and sped off. Thinking that the men were illegally dumping garbage, the deputy gave chase. In a bizarre twist, Jimenez detoured back to the lot, stopped next to the trash can, opened the lid, and used a lighter to set fire to the contents—one of which was the dead body of Morris Barnes. Jimenez sped off again and later stopped briefly to let his two accomplices out. They ran, and Jimenez sped off, but all were quickly apprehended. It turned out that the two other people in the Suburban were Jimenez's teenage boys, aged 14 and 17.

Back at the lot, deputies determined that Barnes had been stabbed several times and that the reason the fire in the trash can started so quickly was because Jimenez or one of his sons had poured gasoline over the body.

At the sheriff's office, Jimenez waived his *Miranda* rights and was interviewed by a detective.[12] Although he claimed that his sons "didn't know nothin'" about the dead body, the detective informed him that his sons "told me everything that they were asked to do." He also said that they would be charged unless there was reason to believe they were not involved. And he pointed out that Jimenez was in a position to "help them" because, otherwise, "I'm gonna have to charge them with the death of this guy." Jimenez then confessed and was convicted of murder.

Discussion

On appeal, Jimenez argued that his confession should have been suppressed because the detective essentially threatened to charge his sons with murder if he refused. In a split decision, the court agreed.

A statement is deemed coerced if there was "police overreaching," meaning "coercive police activity" that generated the kind of stress that compelled the suspect to confess or make a damaging admission—the kind of pressure that has "drained [his] capacity for freedom of choice."[13] The question, then, was whether it was inherently coercive to inform Jimenez that his sons might not be charged if he explained what they had done.

Officers may not, of course, threaten to punish a suspect's friends or relatives if he refused to give a statement. If, however, they reasonably believed that the friend or relative participated in the crime or was an accessory they may inform the suspect that he might be able to reduce or eliminate their legal problems by making a statement. As the First Circuit observed, "An officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the family member's culpability."[14]

Accordingly, the main issue in the case was whether the detective had reason to believe that Jimenez's sons were involved in the murder as prinipals or accessories. Here's what he knew:

(1) When the deputy arrived at the lot, Jimenez's sons were standing at or near a trash can that contained the body of a man who had been stabbed to death.

(2) As the deputy arrived, Jimenez and his sons ran to the Suburban and fled.

(3) Jiminez led deputies on a dangerous, high-speed chase.

(4) As the chase continued, Jimenez detoured back to the lot where he "leaned out the window, lifted the lid the trash can, and used a lighter to set fire to the body of Mr. Barnes.

(5) While Jimenez was doing this, his sons could have jumped out and surrendered but they remained inside. The pursuit resumed.

(6) A few minutes later, Jimenez briefly stopped to let his sons out and both of them fled from deputies on foot.

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[12] Note: The court did not say if Jimenez had been *Mirandized*; but because he did not allege that the detective violated *Miranda*, he presumably did so.

[13] Quotes from: *Culombe v. Connecticut* (1961) 367 U.S. 568, 576; *Colorado v. Connelly* (1986) 479 U.S. 157, 167, 169.

[14] *U.S. v. Hufstetler* (1st Cir. 2015) 782 F.3d 19, 24. Also see *Peoplev. McWhorter* (2009) 47 Cal.4th 318, 350 [defendant's comments about his wife, mother, and brother made them legitimate subjects of conversation]; *People v. Daniels* (1991) 52 Cal.3d 815, 863 ["Both had apparently helped defendant escape and hide from the police, and could in fact have been charged as accessories"]; *People v. Howard* (1988) 44 Cal.3d 375, 398 [officers "did not imply that the fate of defendant's son and of Stevens depended upon defendant stating what they wanted to hear."].

(7) After the deputies apprehended the sons, they said, euphemistically, that they knew there were "some things" in the garbage can.

It seems apparent that the detective had good reason to believe that the sons were participants in the murder itself or were assisting Jiminez in disposing of the body. As the dissenting justice pointed out, "There was ample suspicion to investigate whether any, or all, of the three might have committed, or assisted or conspired with each other in committing, the murder itself." In fact, Jimenez admitted as much when, during the interview, he said "I shouldn't have involved any of them." But he *did* involve them, and it was the detective's responsibility to determine the extent of their involvement. The majority thought this was unreasonable.

Finally, the majority alleged that the detective "knew defendant's sons were not guilty of murder, but he intended to charge them with murder anyway, unless defendant confessed." Accusing an officer of corruption is a serious allegation that most judges would not make in the absence of direct proof. So, what proof did the majority present? None. What's more, in an ironic twist, Jimenez's attorney disagreed with the majority's allegation when, during the trial, he told the jury, "I think you will agree with me that [the detective is] an exemplary officer who did not do anything improper in this case, and certainly didn't do anything to force anybody to say what they said." Enough said.

French v. Merrill

(1st Cir. 2021) 9 F.4th 129

Issue

Did officers violate the Fourth Amendment while conducting a "knock and talk"?

Facts

Christopher French and Samantha Nardone, both students at the University of Maine, had a stormy on-and-off relationship that resulted in several 911 calls to the police. In one of those cases, officers arrested French for domestic violence, but the charges were eventually dropped for "insufficient evidence."

About seven months later, at about 3 a.m., officers responded to a report that French had broken into Nardone's home and stole a cellphone while she and her roommate were sleeping. When they arrived, they spoke with Nardone, but French had already left. So, they decided to go over to his home and conduct a "knock and talk."

French did not respond when the officers knocked on the door, so they continued knocking and yelling for him to come to the front door. He eventually did so, and admitted that he had visited Nardone's home earlier that evening." But he denied that he stole anything. Having concluded that French's story was "not credible," the officers arrested him for burglary. The charge was later dismissed because Nardone refused to cooperate.

French then sued the officers, contending that their "knock and talk" violated the Fourth Amendment. The trial court ruled the officers were entitled to qualified immunity on grounds that their conduct did not violate "clearly established" law. French appealed to the First Circuit.

Discussion

A "knock and talk" is simply a visit by officers to a suspect's home, usually for the purpose talking with the suspect to confirm or dispel their suspicion that he had committed a crime under investigation. Knock and talks have been described as "an accepted investigatory tactic,"[15] and a "legitimate investigative technique."[16] There are, however, a few restrictions. The main one is that officers must conduct themselves in a manner that is consistent with that of uninvited guests.[17]

Was this the type of conduct that people expect from visitors? Hardly. As the court pointed out, "police officers not armed with a warrant engaged in conduct in pursuit of a criminal investigation within the curtilage that was inconsistent with the implied social license pursuant to which an officer may enter the curtilage of a home." Consequently, the court ruled that "any reasonable officer would have understood that their actions on the curtilage of French's property exceeded the limited scope of the customary social license," and it ruled the officers were not entitled to qualified immunity. POV

[15] *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 310. Also see *U.S. v. Jones* (5th Cir. 2001) 239 F.3d 716, 720.
[16] *U.S. v. Lucas* (6C 2011) 640 F.3d 168, 174.
[17] *Florida v. Jardines* (2013) 569 U.S. 1, 8.

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