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Remember 9/11/01*: *Support Our Troops

This Edition Dedicated to the Memory of James Pippin,
Deputy District Attorney, Retired
7/26/42 – 9/30/12
Extraordinary Man; Extraordinary Friend

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THIS EDITION'S WORDS OF WISDOM:

"*Start every day off with a smile, and get it over with*." (W.C. Fields)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

***Police Officers Negotiating Traffic Citation Plea Deals*:** It has recently come to light that police officers, subpoenaed into court on traffic citation trials, are being approached by defense attorneys in the courthouse hallway and asked to agree to a reduced charge (typically one that avoids the necessity of traffic school and/or points on the defendant's driving record) in exchange for a guilty plea. (See http://www.utsandiego.com/news/2012/sep/19/sdpd-orders-officers-stop-cutting-deals-traffic-ti/) There usually being no representative of any prosecutor's office present, the defense attorney takes advantage of the citing officer's willingness to avoid having to wait around in court for another hour or two, and not having to testify. The problem is that this practice is illegal. "Whether or not the People provide a prosecuting attorney, the citing officer who testifies as to the circumstances of the citation is a witness, no more, no less." (*People v. Marcroft* (1992) 6 Cal.App.4th Supp 1, 4-5.) For a police officer to engage in such "negotiations" might also be considered practicing law without a license. (B&P §§ 6125, 6126) So when approached by an attorney representing the defendant in a pending traffic citation case with an offer to plead guilty to a reduced traffic offense, the officer's response *must necessarily* be; "*Thank you counsel, but I'm not authorized to agree to such a deal. See you in court*." Should the defense attorney make such a request in open court to the trial judge, motivating the judge to ask if you, as the citing police officer, have any objection, your response should be made in accordance with your particular department's policy, if any, on such a circumstance. But my suggestion is that you not take it upon yourself, even at the court's suggestion, to waive the People's right to a fair trial. You felt it worth the time and effort to write the ticket in the first place. Don't let a defense attorney and/or a trial judge or court commissioner intimidate you into abandoning the good work you do in the field.

***Confiscating Video Evidence*:** I am periodically asked whether officers can legally seize from private citizens videotaped evidence depicting criminal acts. Such videos are commonly contained in a video camera, a cellphone or iPad. The video evidence typically is recorded by an uninvolved private citizen who merely happened upon the scene of some incident. The video may be of a criminal act in progress or of an officer's use of force upon a suspect. The question I get is; "*If the citizen objects, can I legally seize such evidence anyway*?" My answer to this question is: "*I haven't the faintest idea*." But analyzing the issue, I see it as requiring a balancing of a law enforcement officer's legal authority to seize evidence of a crime, with the private citizen's due process right not to be deprived of his property absent a prior judicial hearing on the issue and a court order authorizing such seizure. I am not aware of any appellate court decisions telling us which right takes precedence. So when asked about this issue, my suggestion has always been to go ahead and seize the camera, cellphone or iPad, copy the relevant contents as soon as possible, and then immediately return the camera, etc., with its video, to the owner. Even if held to be an unconstitutional seizure, the criminal defendant isn't going to have standing to challenge its admissibility

against him in his criminal case. But also know that even such a minimal, temporary interference with a citizen's property rights might get you sued by the owner of the camera unless and until some appellate court case upholding such a procedure is published, although I would think that being an unsettled issue, qualified immunity would protect you from civil suit. I have also been asked whether you can detain the citizen, or even use force, if necessary, in order to affect the seizure of his camera. Again, I don't know. But until we get an appellate court ruling on the lawfulness of the seizure of a camera in the first place, I would strongly suggest that you not aggravate the situation by detaining or using force on the private citizen. A purposeful detention, and even more so, the use of force, will greatly enhance the damages should a court eventually rule that you were not allowed to take his camera. Also, a lawful detention requires that the detainee be suspected of being involved in a criminal act himself. Merely recording some criminal act with one's video camera is not a criminal act. If anyone is aware of any court (or statutory) authority on this issue, or has any other helpful comments ("*Phillips, you're full of crap*," is not helpful.), please forward it to me and I'll publish an update on this problem in the next *Legal Update*.

CASE LAW:

***Traffic Stops and Prolonged Detentions*:**
***Traffic Stops and the Need for a Miranda Admonishment*:**
***Consent to Search*:**
***Miranda*; *Reinitiation of Questioning*:**
***Offers of Leniency*:**
***Miranda*; *An Unequivocal Request for Counsel*:**
***Miranda*; *A Moment of Silence as an Invocation*:**
***Defendant's Statements*; Voluntariness *and Coercion*:**

People v. Tully **(July 30, 2012) 54 Cal.4th 952**

Rule: (1) A detention during a traffic stop is not unlawfully prolonged, even though being questioned about issues unrelated to the stop, so long as the detention lasts no longer than the time it would take to write a citation. The detention may then be lawfully prolonged when based upon other information developed during that time period. (2) Questioning during a traffic stop-related detention is not a custodial interrogation requiring *Miranda* warnings. (3) The scope of a suspect's consent to be searched is determined by what a reasonable person would have understood from the exchange between the officer and the suspect. (4) After invoking one's *Miranda* rights, a suspect reinitiates an interrogation by beginning the conversation himself. (5) A police officer does not unlawfully provoke incriminating admissions by an offer of leniency unless the admissions are motivated by the offer. (6) A request for the assistance of counsel, made in the context of whether to submit to a polygraph examination, is not an unequivocal *Miranda* invocation. (7) A suspect's moment of silence, after being confronted by evidence against him, may not be an attempt to invoke his right against self-incrimination, depending upon the circumstances. (8) A suspect's admissions are not

coerced by an officer who offers the suspect protection out of a concern for the suspect's welfare. Also, confronting defendant with information voluntarily provided by his wife does not make defendant's resulting admissions involuntary.

Facts: Fifty-nine year old Sandy Olsson lived alone in Livermore near her work at the Veterans Administration medical center where she was a registered nurse. On July 25th, 1986, Ms. Olsson failed to show up at work. A concerned co-worker, with the assistance of a neighbor, found her naked body in the bedroom of her home, with 23 stab wounds. She'd also been strangled and had injuries to her lip and head consistent with being hit by her front door as it was forced open. Defendant was known to have stayed off and on at a friend's residence two doors down. The murder weapon, a knife of the same type owned by defendant, was found in some bushes nearby. Despite an FBI profile describing the killer as someone who possibly lived in the area of the victim, and who was likely a drug abuser, Olsson's murder went unsolved for about six months. Then, in March, 1987, Officer Scott Trudeau of the Livermore Police Department was conducting a narcotics-related surveillance when he observed defendant drive by the narcotics suspect's home. With the help of two other officers (Officer Timothy Painter being one of them), defendant was identified as a recent suspect in a vandalism case and whose license was suspended. A passenger in the car was identified as a person with an outstanding arrest warrant. Knowing that defendant was driving on a suspended license, and to arrest the passenger, Officer Trudeau stopped defendant's car. The passenger was arrested on the outstanding arrest warrant and put into a patrol car. Then, while Officer Trudeau was writing out a traffic citation, Officer Painter contacted defendant, who he knew to be a drug abuser and who liked to use a knife, and asked him about the vandalism case in which he was a suspect. Telling defendant what had been said about him being a narcotics user and being armed with a knife, Officer Painter asked him for permission to search him. Defendant responded, "Sure, I don't have anything on me." A bindle of methamphetamine was found in the coin pocket of defendant's pants. While this was going on, Officer Trudeau was returning to ask defendant a few more questions necessary to finish the ticket and to have him sign it. Upon receiving the meth bindle from Officer Painter, Officer Trudeau turned his attention to that issue, asking defendant for permission to search his car. Defendant responded, "Sure, go ahead. Three hypodermic syringes and a bent, burnt spoon were recovered. Defendant was arrested. A booking search resulted in the recovery of eight more bindles of methamphetamine hidden in his underwear. In preparation for questioning defendant, Officer Trudeau read him his *Miranda* rights, which he waived. But when told that he was going to be questioned about the drugs found on him, defendant said that he didn't want to talk to the officer. So the questioning was stopped. But then defendant reinitiated the conversation, saying that he didn't want to go to jail on that particular evening. Officer Trudeau told defendant that he might be able to "work off his offense" by becoming an informant. When defendant expressed an interest in this idea, Officer Trudeau called for a narcotics officer to talk with him. While they were awaiting the arrival of the narcotics officer, defendant and Officer Trudeau engaged in small talk. Defendant told the officer that he used methamphetamine four or five times a day, burglarizing cars and houses to support his habit. He also told Trudeau that he was being treated for stomach problems at the local VA hospital (where Sandy Olsson had worked). During this conversation, Officer

Trudeau told defendant that these admissions would not be used against him. Defendant was in fact released that night after agreeing to act as a police informant. At that time, Officer Trudeau knew little about the Olsson murder case. But then he discovered that defendant lived only two doors down from the victim. He also remembered that defendant had said that he visited the Veterans Administration hospital where Olsson had worked, and that the FBI profile indicated that the murder suspect was likely a drug abuser who lived in the area. With this information, Trudeau talked to homicide detective Sergeant Scott Robertson, suggesting that he check defendant's fingerprints with the latent prints on the murder weapon. Defendant's prints matched the latents. Defendant was arrested shortly thereafter, on March 27th. After being advised of his *Miranda* rights, defendant admitted living two doors from the victim, but denied having had any contact with her. During this conversation, the possibility of defendant submitting to a polygraph examination was broached. Defendant declined, however, saying that he needed to talk with a lawyer about this first. Three days later, defendant's wife came to the police station and told officers that defendant had told her that he had in fact been in Olsson's home when she was killed, but that a member of the Hell's Angels by the name of "Doubting Thomas" had actually committed the murder. So on March 30, Sergeant Robertson questioned defendant again and told him what his wife had said. Defendant hesitated for almost a minute, causing Sgt. Robertson to believe that defendant might be afraid of Doubting Thomas. He therefore told defendant that he and his wife might qualify for the witness protection program. Defendant asked about the program, prompting some discussion about how it worked. Defendant then asked to talk to his wife. After they talked privately, Sgt. Robertson turned on a tape recorder and re-*Mirandized* him. Defendant asked that their witness protection discussion be reviewed. Sgt. Robertson agreed, noting that defendant and his wife "might" qualify for witness protection "in the event that the testimony and what information that he has meets that criteria," and that "(t)his testimony may be involving . . . the Hells Angels." Defendant then admitted being in Olsson's home with Doubting Thomas to buy drugs, and even that he'd raped her, but claimed that it was Doubting Thomas who had actually murdered her. Charged with first degree murder with special circumstances, defendant was convicted and sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed. Among the issues raised on appeal in a 153-page decision were the following: (1) *Prolonged Detention*: Defendant argued that when Officer Trudeau stopped him, the resulting duration was excessive; i.e., a "*prolonged detention*." Defendant's complaint was that once defendant's passenger had been arrested and the traffic citation written, he should have been released. The rule is that it is legal for an officer to temporarily detain a traffic offender at the scene of the stop for the period of time that's necessary to discharge the duties related to the purpose of the stop. This would include the time it takes to write out the ticket, explain the violation, listen to the offender's excuses, obtain his promise to appear, and, if parked in a dangerous spot, even have the offender move the car to a safer location. In this case, *while* the ticket was being written by Officer Trudeau, Officer Painter contacted defendant and asked him about the vandalism case in which he was a suspect. Knowing that defendant was a suspected drug user and that he commonly carried a knife, Officer Painter also asked defendant for permission to search him. The Courts have held that

there is no reason why an officer can't discuss other matters unrelated to the stop so long as the stop is not prolonged beyond the time it takes to write the ticket. Officer's Painter didn't discover the drugs in defendant's pants pocket until Officer Trudeau was coming up to discuss the citation with defendant and to obtain his promise to appear. Once the meth was discovered, with this newly developed cause to arrest defendant, the officers were no longer prevented from holding onto him for longer than the citation would have taken. (2) *Miranda*: Defendant next argued that neither officer read him his *Miranda* rights when questioning him about the vandalism case. When questioned, however, the only cause for detaining defendant was to write him a ticket for driving on a suspended license. Routine traffic stops, although a detention, are not tantamount to a formal arrest. Questioning during such a detention is not a custodial interrogation requiring a *Miranda* admonishment. (3) *Consent to Search*: Defendant next argued that the scope of the consent he gave to Officer Painter, allowing him to search his person, included the right to look for weapons only, and not for drugs. Looking into a coin pocket, where a weapon wasn't likely to be found, exceeded the scope of his consent. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "*objective reasonableness*;" i.e., "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" In this case, when the officer told defendant that he'd heard that defendant used drugs and carried a knife, and then asks for permission to search him, any reasonable person would have believed that they were talking about looking for both drugs and weapons. Officer Painter, therefore, did not exceed the scope of defendant's consent under these circumstances. (4) *Miranda*: The Court further rejected defendant's argument that his admissions related to his drug use and to doing burglaries to support his habit were obtained in violation of *Miranda*, defendant having invoked his right to silence before making these statements. The record shows that although defendant did in fact invoke his right to silence, he himself reinitiated the conversation after the officer had honored his invocation by cutting off the questioning. Therefore, there was no *Miranda* violation. (5) *Offer of Leniency*: The Court also noted that Officer Trudeau did not improperly provoke defendant's incriminating statements by promising not to use them against him; i.e., an "*offer of leniency*." Admissions that are the product of an offer of leniency are inadmissible in court. But to be the product of an offer of leniency, the offer must in fact be what motivated the defendant to talk. The record here shows that Officer Trudeau's promise not to use defendant's statements was made *after* defendant had made the statements, and were therefore not what motivated him to talk. (6) *Miranda*: Defendant next argued that he had invoked his *Miranda* rights during the March 27 (the first) interrogation by asking for the assistance of counsel, and that any statements he made after that point should have been suppressed. Defendant did in fact tell his interrogators that "*I think it would behoove me to consult a lawyer*." However, defendant made this statement during a conversation concerning whether he would submit to a polygraph examination, and not as an attempt to interrupt the interrogation by bringing in an attorney. "A suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Also, there is no requirement that the officer must ask clarifying questions. Here, where defendant's request was in response to whether he would submit to a polygraph exam, and later statements confirmed that his request to consult with an

attorney was limited to the polygraph issue, defendant did not invoke his right to counsel under *Miranda*. (7) *Invocation by Silence*: Defendant further argued that during the March 30 (second) interview, when informed that his wife had told the officers that he had admitted to being present during Sandy Olsson's murder, that his failure to respond for a moment was an invocation of his right against self-incrimination. However, it was immediately after this moment of silence that defendant and the detective started talking about the witness protection program, followed by defendant asking to see his wife. This circumstance doesn't show an intent to invoke, but rather a concern for his own personal safety. (8) *Voluntariness*: Lastly, defendant argued that admissions he made during his March 30 (second) interview, admitting to being present during Sandy Olsson's murder, were coerced, and thus involuntary. This contention was based upon the detectives' alleged "manipulation" of his wife, causing him to incriminate himself. Also, dangling the possibility of entering the witness protection program, per the defendant, made his resulting statements involuntary. First, defendant's wife came in on her own to talk to the detectives, and it was defendant who then asked to talk with her. Second, the offer to enter the witness protection program, made to both defendant and his wife, was made in good faith at that point in time when there was the possibility that a Hell's Angel member committed the murder and that defendant and his wife might have something to fear from him. The witness protection offer was also expressly conditioned on defendant being legally qualified for the program, and with the approval of a prosecutor. Under these circumstances, defendant's admissions were not coerced.

Note: I'm not going to make this brief any longer by adding a bunch of notes. So I'll keep this short. My only problem with the case is the Court's concern with the defendant's "moment of silence," and whether by his silence, he had intended to invoke his self-incrimination rights (see point #7). The issue, however, is how a reasonable officer would have interpreted the defendant's intent in remaining silent, and not what defendant actually intended. Also, the U.S. Supreme Court has already ruled that silence alone is not an unequivocal invocation of one's right to silence. (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250.) But aside from that, this case, as long as it is, is worth studying point by point.

***Miranda*; *Seeking Clarification of an Equivocal Invocation*:**

People v. Sauceda-Contreras **(Aug. 13, 2012) 55 Cal.4th 203**

Rule: Where a suspect's attempt to invoke his right to counsel at the initiation of an interrogation is equivocal, an interrogator is entitled to seek clarification.

Facts: Defendant lived with his two brothers in Anaheim. Martha Mendoza, a meth freak and prostitute, had lived with defendant elsewhere about eight years earlier. After losing custody of her five children, she wanted to get back together with defendant. On January 9, 2007, Mendoza visited defendant, seeking to move in with him while at the same time hitting him up for money with which to buy drugs. When defendant refused, they had a violent argument; loud enough to be heard by the neighbors. Despite the argument, Mendoza stayed with defendant that night in his room. The next morning, the

neighbors, while in their backyard, smelled the odor of burning hair and flesh. Looking over the fence, they saw defendant burning something in a large trashcan, pouring gasoline onto the fire. What looked like an arm protruded from the top of the can until defendant pushed it back down into the fire. The neighbors called the fire department. Firefighters arrived and followed the smoke to the backyard where they encountered defendant. When asked what he was burning, defendant, who spoke little English, responded; "*Nothing. No problem, no problem*." When the firefighters tried to approach the trashcan, defendant blocked their way. They called the police as defendant followed them back to the fire truck, telling them in broken English that he was only trying to cook a pig for a party he was planning. When the police arrived, they found a human skull and burnt body, later determined to be Mendoza, in the trashcan. Defendant was arrested. At the Anaheim police station, Detective Blazek interviewed defendant with Officer Trapp, who was fluent in Spanish, translating for him. Defendant was advised of his rights per *Miranda v. Arizona*. When asked if he understood his rights, he said that he did. Then, when asked if he was willing to discuss the case with Detective Blazek, defendant responded: "*If you can bring me a lawyer, that way I, I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me*." To this, Officer Trapp said: "*Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present*?" Defendant responded: "*Oh, okay that's fine*." Officer Trapp: "*The decision is yours*." Defendant: "*Yes*." Officer Trap: "*It's fine*?" Defendant: "*A huh, it's fine*." Officer Trapp: "*Do you want to speak to him now*?" Defendant: "*Yes*." Believing he had a valid waiver, Detective Blazek went on to interrogate defendant, obtaining some conflicting admissions. Charged with murder, defendant's motion to suppress his statements was denied by the trial court. Convicted of first degree murder, defendant appealed, arguing that his statements were improperly admitted into evidence against him. The Fourth District Court of Appeal (Div. 3), in a split, 2-to-1 decision, agreed and reversed his conviction. The People petitioned to the California Supreme Court.

Held: The California Supreme Court unanimously reversed. Defendant's argument on appeal was that his above statement was an unequivocal invocation of his right to counsel and that being so, any attempts to clarify an unambiguous invocation were improper. As such, the interrogation should have stopped at that point. His statements, therefore, should not have been admitted into evidence against him. The People, on the other hand, argued that defendant's response to whether he was willing to talk with the detective was sufficiently ambiguous to justify Officer Trapp's seeking clarification. The Court agreed with the People. When dealing with an attempt to invoke at the *initial stages* of an interrogation, without a prior waiver, "interrogators may clarify the suspect's comprehension of, and desire to invoke or waive, the *Miranda* rights." But a defendant's attempt to invoke must in fact be ambiguous. Police may not seek clarification of a suspect's response that was not ambiguous in the first place (the fear being that the police may use this as an excuse to try to confuse a suspect, or talk him out of his intent to invoke his *Miranda* rights). So the issue here was whether defendant's statement, in response to Officer Trapp's question about whether he was willing to discuss the case with Detective Blazek, was in fact ambiguous. In determining what is ambiguous and

what is not, the test is an objective one: "(W)hat would a listener understand to be the defendant's meaning." Ambiguous or equivocal responses are those that "a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel." "(A) response that is reasonably open to more than one interpretation is ambiguous, and officers may seek clarification." Looking at defendant's references to bringing him an attorney, the Court found them to be "conditional, ambiguous, and equivocal." It was conditional in that it began with an inquiry as to whether a lawyer "*could*" be brought to him. It was equivocal in that defendant went on to plainly state his desire to waive his rights, and to "tell you everything that I know and everything I need to tell you." From an objective standpoint, a reasonable officer under the circumstances would *not* have understood defendant's response to be a clear and unequivocal request for counsel. Officer Trapp, therefore properly sought clarification. Also, defendant's wavier, which could be interpreted to be implied only, was held to be sufficient to waive his rights. Implied waivers are legally sufficient so long as a suspect actually intended to waive. Here, defendant clearly intended to tell his side of the story. Lastly, the Court rejected defendant's argument that Officer Trapp badgered him into waiving his rights as not supported by the evidence.

Note: You may be asking yourself right now; "*Hey, wait a minute. I thought asking for clarification of an ambiguous wavier was always an option, although not legally required.*" That, however, is the apparent rule (if at all) for a suspect's attempts to invoke mid-interrogation after a previous waiver. See *Sessoms v. Runnels*, below. This case here involves the rules for an equivocal attempt to invoke that occurs at the outset of an interrogation, without a prior wavier. There is growing authority for the argument that these are two completely different circumstances with a different set of rules. Read *Sessoms*, below, for a further explanation.

***Miranda*; *Equivocal Attempts to Invoke*:**

Sessoms v. Runnels (9th Cir. Aug. 16 2012) __ F.3rd __ [2012 U.S.App. LEXIS 17206]

Rule: An attempt to invoke one's right to counsel before being admonished of his or her rights under *Miranda* need not be clear and unequivocal to be legally effective.

Facts: Defendant and two companions committed a "hot prowl" burglary, which culminated in the choking and stabbing of the resident. Defendant fled to Oklahoma where, at his father's urging, he turned himself in. Two Sacramento Police Department detectives flew to Oklahoma to interview him after defendant had been in custody for four days. Prior to their contact with him, but with a videotape running, defendant was observed commenting to himself in the interrogation room that, "*I know I want to talk to a lawyer*." The two detectives then entered the room and introduced themselves. After some initial small talk, but before being read his *Miranda* rights, defendant blurted out, "*There wouldn't be any possible way that I could have a – a lawyer present while we do this*? And then, "*Yeah, that's what my dad asked me to ask you guys . . uh, give me a lawyer*." Ignoring defendant's comments, one of the detectives told defendant that his two accomplices had already waived their rights and confessed, "lay(ing) it out from A to

Z," and that they were all being charged with the same crimes. The detective also told defendant that he didn't believe that he'd done any of the stabbing, but that if he chose not to make a statement before talking with an attorney, he wouldn't "get his version of it." After all this, defendant was advised of his *Miranda* rights, which he waived. Defendant's subsequent incriminating statements were used against him at trial. Convicted of first degree murder with special circumstances, defendant was sentenced to prison for life without the possibility of parole. He appealed, arguing that the detectives violated his clear and unequivocal invocation of his right to the assistance of counsel. The California Court of Appeal affirmed, holding that defendant's attempt to invoke was *not* clear and unequivocal, and the detectives therefore properly continued on with the interrogation. A writ of habeas corpus filed in federal court was denied. Defendant appealed from this denial.

Held: An en banc (11 justices) panel of the Ninth Circuit Court of Appeal, in a split 6-to-5 decision, reversed. In so ruling, the majority of the Court ruled that the U.S. Supreme Court's rule on the necessity for a clear and unambiguous invocation of a suspect's right to counsel (*Davis v. United States* (1994) 512 U.S. 452.) applies only to the situation where there had already been a previous waiver by the suspect of his rights. *Davis* established an exception to the rule of *Miranda* that if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney," all questioning must cease. (*Miranda*, at pp. 444-445.) Particularly in this case, where defendant's attempt at an invocation occurred prior to being advised of his rights, dispelling any argument that he necessarily understood what rights he might have, any attempt, equivocal or not, must be construed as an "indicat(ion) in any manner" that he was invoking his rights. "A person not aware of his rights cannot be expected to clearly invoke them." The interrogation, therefore, should have ceased at that point.

Note: It is unclear whether the Court here is telling us that it is only a *pre-admonishment* invocation that does not have to be clear and unequivocal. At one point, the Court takes it a step further and says that a *post-admonishment* attempt to invoke, so long as not preceded by an earlier wavier, also need not be clear and unequivocal to be legally effective. However, because the facts of this case involves a pre-admonishment attempt to invoke, it is arguable that, as mere dicta (i.e., not necessary to the decision), this case can not be cited as authority in the post-admonishment, pre-waiver situation. Either way, the *Davis* rule is clear: Any attempt to invoke mid-interrogation, after an earlier waiver, must be clear and unequivocal to be legally effective. And despite this case, there is still some debate as to whether an attempt to invoke after an admonishment, but without a prior wavier, must also be clear and unequivocal. The U.S. Supreme Court has hinted in *Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, that the need for a clear and unequivocal waiver also applies to the situation where there has *not* been an earlier waiver. But there really is no Supreme Court case with an in-depth discussion of the issue. In *Berghuis*, it was merely assumed to be the rule. It might also be noted that four justices from the majority in this new case also believed that defendant's request for the assistance of counsel was in fact clear and unequivocal. Also, the five dissenting justices didn't necessarily disagree with the majority opinion, but rather only whether the Ninth Circuit had the power to reverse the state appellate court's decision on these issues.