

# THIRD DEGREE COMMUNICATIONS, INC.

## TRAINING BULLETIN: LEGAL UPDATE

### *Ambiguous Invocations* *“Maybe I should talk to a lawyer.”*

By Charles Gillingham

Many officers have been taught that when they hear the words, “lawyer,” “counsel” or “attorney” come out of a suspect’s mouth after a *Miranda* advisement the interview is over. Not true.<sup>1</sup> An invocation of the right to an attorney by the suspect must be so unequivocal that a reasonable peace officer would understand the request. And the request for the lawyer must be for that interview.

All officers know that when a suspect clearly asserts his right to counsel all questioning must stop.<sup>2</sup> What happens when there is an ambiguous statement about a lawyer? At this point an officer has options. You can follow up and attempt to clarify the statement, but because there is no requirement to do so you can do nothing and continue to question or alternatively stop questioning.<sup>3</sup> Wise officers can and should ask follow up questions when there is ambiguity in the invocation of the right to an attorney. The reviewing court will evaluate the reason for the follow up questions. The court will seek to determine whether the questions were designed to keep the defendant talking or whether they were clearly designed to clarify. So what are the ambiguous requests for counsel that allow for clarification and further questioning?

### *Supreme Court Clarifies*

The United States Supreme Court, in *Davis v. United States* (1994) 512 U.S. 452, determined that a suspect's remark --"Maybe I should talk to a lawyer"-- was *not* a request for counsel. The Investigators testified that they told the defendant they would stop any kind of questioning until they were clear on whether he had asked for an attorney. Defendant ultimately stated that he did not want a lawyer and questioning continued.

The court in *Davis* stated: "As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' Although a suspect need not 'speak with the discrimination of an Oxford don[ ]', he 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. The Court went on to say that law enforcement officers are not required to stop questioning when there is an ambiguous or equivocal reference to a lawyer. The Court also stated that police questioning does not need to stop when a suspect might want an attorney. Finally, the U.S. Supreme Court

stated that while police *may* seek to clarify a suspect's ambiguous reference to counsel, they are not required to do so.

Our California Supreme Court is in agreement. In *People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 130, the suspect said “I should have a lawyer.” The Court held that this was an ambiguous statement and not an express invocation of the right to a lawyer. The Court held that an ambiguous statement was not an invocation and that the officers may continue talking to the suspect to clarify whether he is waiving or invoking his rights. In *Crittenden*, after the defendant’s statement, the officer responded by repeating that defendant could have an attorney “if he wanted one.” The Court found that this opens the door to the assertion of that right but that the defendant there did not respond, thus indicating his lack of desire for an attorney. The Court held that the officers could respond, clarify, and continue questioning as long as the clarifying is not an attempt to get the suspect to change his mind.

### ***Interview v. Court Proceedings***

Most of the confusion in this area occurs when a suspect indicates he wants an attorney in court. This is frequently mistaken for an invocation. It is not. The suspect has a Sixth Amendment guarantee to have an attorney present when the suspect appears in court for the institution of criminal proceedings. *Miranda* addresses the right to have an attorney present during questioning. Most suspects do not understand the difference. But you do. “A desire to have an attorney in the future, coupled with an unambiguous willingness to talk in the meantime, is not an invocation of the [*Miranda*] right to counsel requiring the cessation of the interview.”<sup>4</sup> The legally updated officer understands the difference and knows to clarify any ambiguous request for an attorney.

### ***Some examples of ambiguous requests for an attorney:***

- “I should have a lawyer.”
- “I just thinkin’, maybe I shouldn’t say anything without a lawyer and then I thinkin’ ahh.”<sup>5</sup>
- “Did you say I could have a lawyer?”<sup>6</sup>
- “I don’t know if I should have a lawyer...It ain’t going to do me no ....”<sup>7</sup>
- “If you guys are going to charge me...I want to talk to a public defender.”<sup>8</sup>
- “How long before I see a lawyer?”<sup>9</sup>
- “I think I would like to talk to a lawyer.”<sup>10</sup>

- “I think you ought to have somebody protecting me right now because I ain’t to, oh here man.”<sup>11</sup>
- “I’ll want a lawyer eventually but I’m willing to talk now until he gets here.”<sup>12</sup>
- “There wouldn’t be [an attorney] running around here would there? I just don’t know what to do.”<sup>13</sup>
- “I’ve talked to my mom and she says I should get an attorney.”<sup>14</sup>
- “My mom will get me a lawyer from New York.”<sup>15</sup>
- “I don’t know if I should without an attorney”<sup>16</sup>

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<sup>1</sup> *U.S. v. Cheely* (9<sup>th</sup> Cir. 1994) 36 F3d. 1439, 1447.

<sup>2</sup> *People v. Sims* (1993) 5 Cal.4<sup>th</sup> 405; *Edwards v. Arizona*, 451 U.S. 477; 68 L.Ed.2d 378, (1981).

<sup>3</sup> *People v. Crittenden* 9 Cal.4<sup>th</sup> 83.

<sup>4</sup> *People v. Clark* (1992) 3 Cal.4<sup>th</sup> 41, 121.

<sup>5</sup> *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 528.

<sup>6</sup> (Ibid.)

<sup>7</sup> *People v. Michaels* 28 Cal.4<sup>th</sup> 486, 510.

<sup>8</sup> *People v. Gonzalez* (2005) 34 Cal.4<sup>th</sup> 1111. The statement was conditional. Court held that suspect wanted a lawyer if he was going to be charged.

<sup>9</sup> *U.S. v. Doe* 99 D.A.R. 2475, Miranda was then given.

<sup>10</sup> *Clark v. Murphy* (2003) (9<sup>th</sup>) 317 F.3d 1038.

<sup>11</sup> *People v. Pack* 201 Cal.App.3d 679. (Clarification okay.)

<sup>12</sup> *People v. Clark* (1992) 3 Cal. 4<sup>th</sup> 41.

<sup>13</sup> *People v. Scaffidi* (1992) 11 Cal.App.4<sup>th</sup> 145.

<sup>14</sup> *People v. Tyson* (1987) 195 Cal.App.3d 1620. 29 year-old defendant; officers then clarify.

<sup>15</sup> *People v. Johnson* (1993) 6 Cal.4<sup>th</sup> 1.

<sup>16</sup> *People v. Michaels* (2002) 28 Cal.4<sup>th</sup> 486. In response to question about his crime, suspect was found to have made a conditional request.

