Miranda:
When Compliance Is Compulsory

In applying Miranda, one normally begins by asking whether custodial interrogation has taken place.[1]

It sounds fairly simple: Officers must obtain a waiver and comply with *Miranda's* other rules only if they want to "interrogate" someone who is "in custody."[2] As the California Supreme Court put it, "Absent custodial interrogation, *Miranda* simply does not come into play."[3]

The clarity of this rule is, however, illusory. In fact, most officers have learned from experience that determining whether *Miranda* applies can be a crapshoot. This is mainly because the courts have written hundreds of opinions in which they have defined, redefined, and interpreted the terms "custody" and "interrogation" so as to strip them of their everyday meanings. For example, a suspect who is being questioned in the comfort of his home may be in custody, while most convicted felons who are locked up in state prisons are not. This situation is especially problematic because officers need to know exactly when they need a *Miranda* waiver and, just as important, when they don't.

There is, of course, an easy way for officers to avoid this problem: *Mirandize* every suspect they question. Indeed, that's how they do it on many television shows. But actor-cops can be confident that actor-crooks will confess if it's in the script, while real officers know that *Mirandizing* real crooks often causes them to become more guarded and less likely to spill the beans. After all, those ominous words—*"Anything you say may be used against you in court"*—were not intended to make suspects feel chatty.[4]

Consequently, officers often find themselves in a dilemma: If they provide an unnecessary *Miranda* warning, the suspect may clam up. But if they provide no warning or a tardy one, anything he says may be suppressed.

Fortunately, the situation has improved lately as the courts have made it clear that officers must comply with *Miranda* only if the surrounding circumstances generated the degree of intimidation that the *Miranda* procedure was designed to alleviate. As a result, officers can now usually determine when compliance is required if they are familiar with a few rules and concepts which we will cover in this article. We will start with the two types of custody: actual and de facto. Then we will discuss "interrogation" and the custodial situations that are exempt from *Miranda*.

Actual Custody

It has always been easy to determine when a suspect was in actual custody because it automatically occurs at the moment officers notify him that he is under arrest. As the Court of Appeal observed, "We ordinarily associate the concept of being 'in custody' with the notion that one has been formally arrested."[5] Thus, in *Berkemer v. McCarty* the U.S. Supreme Court summarily ruled that the defendant was in custody "at least as of the moment he was formally placed under arrest."[6]

Suspect in custody for another crime: If the suspect was arrested for one crime, he is in custody even if officers wanted to question him about a crime for which he had not yet been arrested.[7] This

[1] *People v. Mayfield* (1997) 14 Cal.4th 668, 732.
[2] See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 ["It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation."].
[3] *People v. Mickey* (1991) 54 Cal.3d 612, 648.
[4] See *New York v. Quarles* (1984) 467 U.S. 649, 657 [a *Mirandized* suspect "might well be deterred from responding"].
[5] *People v. Taylor* (1986) 178 Cal.App.3d 217, 227. ALSO SEE *California v. Beheler* (1983) 463 U.S. 1121, 1125.
[6] (1984) 468 U.S. 420, 434.
[7] See *Arizona v. Roberson* (1988) 486 U.S. 675, 684; *Mathis v. United States* (1968) 391 U.S. 1, 4-5.

is because it is custody—not the subject matter of the interview—that generates pressure on a suspect who is being questioned. Thus, if a suspect had been arrested for robbing a gas station, and if officers wanted to question him about a bank robbery, they would need a waiver.

SUSPECT RELEASED: An arrested suspect is no longer in custody after he was released, whether by officers pursuant to Penal Code section 849(b), or after posting bail or obtaining an OR. "Once released," explained the Court of Appeal, "the suspect is no longer under the inherently compelling pressures of continuous custody where there is a reasonable possibility of wearing the suspect down by badgering police tactics."[8]

De Facto Custody

Unlike actual custody, de facto custody is a rather ambiguous concept because it occurs whenever the surrounding circumstances combine to create the "functional equivalent" of an arrest.[9] To be slightly more specific, a suspect is in de facto custody if his freedom had been restricted to "the degree associated with a formal arrest."[10] Thus, the Court of Appeal pointed out that the term de facto custody is "a term of art that describes when a citizen has been subject to sufficient restraint by the police to require the giving of *Miranda* warnings."[11]

Rules and principles

While de facto custody is a obscure predicament, it is usually possible for officers to determine whether a suspect is in such a pickle if they keep following rules and principles in mind.

THE REASONABLE PERSON TEST: In determining whether a suspect was in de facto custody, the courts apply the "reasonable person" test, meaning they look to see if a reasonable person in the suspect's position would have believed he was under arrest.[12] If so, he's in custody. Otherwise, he's not. "[T]he only relevant inquiry," said the Supreme Court, "is how a reasonable man in the suspect's position would have understood his situation."[13]

Although the "reasonable person" is a phantom, the courts have equipped him with two significant personality quirks:

(1) HE'S OBJECTIVE: In determining whether he is in custody, the reasonable person will consider only the objective circumstances; i.e., the things he actually saw and heard.[14]

(2) HE'S INNOCENT: Being a reasonable person, he was not even remotely involved in the planning or commission of the crime under investigation.[15] This is significant because it means he "does not have a guilty state of mind"[16] and will therefore view the circumstances much less ominously than the perpetrator.

THE OFFICERS' STATE OF MIND: Because the reasonable person will consider only what he saw or heard, it is irrelevant that, unbeknownst to him, the officers believed he was guilty, or that they thought they had probable cause to arrest him, or even that they intended to arrest him at the conclusion of the interview.[17]

For example, in *Berkemer v. McCarty*[18] a motorist who had been stopped for DUI contended that he was in custody from the moment the officer saw him stumble from his car. That was because the officer

[8] *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 583.
[9] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 442; *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189].
[10] *California v. Beheler* (1983) 463 U.S. 1121, 1125.
[11] *People v. Taylor* (1986) 178 Cal.App.3d 217, 228.
[12] See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.
[13] *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.
[14] See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394, 2402] ["whether a suspect is 'in custody' is an objective inquiry"]; *Stansbury v. California* (1994) 511 U.S. 318, 323 ["the initial determination of custody depends on the objective circumstances of the interrogation"].
[15] See *United States v. Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."]; *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881, fn.1; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 469.
[16] *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1239.
[17] See *Stansbury v. California* (1994) 511 U.S. 318, 326 ["[A]ny inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*."]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.
[18] (1984) 468 U.S. 420.

had testified that, based on the suspect's stumbling and bad driving, he had decided to arrest him. But the Supreme Court ruled that the officer's plan of action was irrelevant because he never communicated it to the driver.

Similarly, in *People v. Blouin*[19] an officer went to Blouin's house to arrest him for possessing a stolen car. But before placing him under arrest, the officer asked him some questions about the car, and Blouin responded by making an incriminating statement. On appeal, Blouin argued that he was in custody when he was questioned because the officer intended to arrest him. But the court ruled it didn't matter what the officer intended to do because his "intent to detain or arrest, if such did in fact exist, had not been communicated to defendant."

TEMPORARY RESTRICTIONS: A suspect is not in custody merely because he knew or reasonably believed that he was not free to walk away or move about. This is because a temporary restriction is not nearly as coercive or intimidating as the restrictions imposed on arrestees who will be transported to jail. As the Supreme Court recently observed:

> Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have declined to accord talismanic power to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.[20]

Thus, the court in *People v. Pilster* noted that the issue "is not whether a reasonable person would believe he was free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest."[21] Similarly, in *People v. Brown* the court said, "Even if we make the assumption that defendant felt that he was not free to leave, we certainly would not be warranted in assuming that he felt he was arrested."[22]

This does not mean that freedom to leave is irrelevant. On the contrary, if a reasonable person in the suspect's position would have believed that he was, in fact, free to leave, the suspect would necessarily *not* be in custody. Thus, the Second Circuit observed, "It makes sense to begin any custody analysis by asking whether a reasonable person would have thought he was free to leave the police encounter at issue. If the answer is yes, the *Miranda* inquiry is at an end."[23]

It is important not to confuse *Miranda* custody with Fourth Amendment custody as they are subject to different tests. Specifically, a person is in custody for Fourth Amendment purposes (i.e., "seized") if he reasonably believed that he was not free to leave.[24] But, as noted, such a restriction does not constitute *Miranda* custody unless it was so severe that it was tantamount to an arrest. For example, if officers question a suspect on the street, and if that person reasonably believed that he was not free to leave, he is deemed "detained." But, as noted, *Miranda* custody requires more than a temporary restriction on freedom. Thus, in rejecting the argument that a detainee was in *Miranda* custody, the court in *U.S. v. Luna-Encinas* pointed out that, "[e]ven accepting that Luna-Encinas had been 'seized' . . . we are convinced that a reasonable person in his position would not have understood his freedom of action to have been curtailed to a degree associated with formal arrest."[25]

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[19] (1978) 80 Cal.App.3d 269.

[20] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189-90].

[21] (2006) 138 Cal.App.4th 1395, 1403, fn.1. ALSO SEE *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881 ["'seizure' is a necessary prerequisite to *Miranda*"]; *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 672 ["a court must ask whether, in addition to not feeling free to leave, a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest."].

[22] (1972) 26 Cal.App.3d 825, 848. Edited.

[23] *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d. 659, 672. ALSO SEE *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189 ["In determining whether a person is in custody in this sense, the *initial step* is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." Emphasis added.].

[24] See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *Brendlin v. California* (2007) 551 U.S. 249, 254.

[25] (11th Cir. 2010) 603 F.3d 876, 881. ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 672 ["not every seizure constitutes custody for purposes of *Miranda*"].

QUESTIONING CHILDREN: In 2011, the Supreme Court ruled in *J.D.B. v. North Carolina* that officers who question juvenile suspects must take the suspect's age into account in determining whether he would have reasonably believed that his freedom had been restricted to the degree associated with an arrest.[26] The Court observed that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."

Although it is too early to tell how the courts will interpret *J.D.B.*, there is reason to believe that a minor's age will have little or no significance when, as is usually the case, the minor was at least 16.[27] That is because, as Justice Alito observed in his dissenting opinion (which was cited with apparent approval by the majority), "Most juveniles who are subjected to police interrogation are teenagers nearing the age of majority. These defendants' reactions to police pressure are unlikely to be much different from the reaction of a typical 18–year–old in similar circumstances."[28] Still, officers who are questioning unarrested minors should consider informing them they are free to leave. See "Questioning in police stations" ("You're free to leave"), below.

THE TOTALITY OF CIRCUMSTANCES: There are essentially only two circumstances that will automatically render a suspect in custody: (1) pointing a gun at him, and (2) compelling him to go to the police station for questioning. Other than that, it will depend on the totality of circumstances.[29] As the Court of Appeal put it, "[W]e look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest."[30]

The circumstances that officers are likely to encounter will usually depend on the setting in which the suspect was questioned. For example, while handcuffing is often a significant circumstance when the suspect was detained on the street, it is seldom a factor when the questioning occurred in a police station. We will therefore examine the various *situations* in which officers question suspects and, for each, the circumstances that commonly exist.

Questioning in police stations

We begin with the place in which most incriminating statements are obtained: the police station. While most of these statements are made by suspects who have been arrested (and who are therefore plainly in custody), officers frequently arrange to question unarrested suspects in police stations, usually because it is convenient and it may give the officers a tactical advantage.

While an interview with an unarrested suspect is not custodial merely because it occurred in a police station,[31] it is a relevant circumstance because people who are visiting police stations to discuss their guilt or innocence are more apt to be intimidated by the setting, which is usually "police-dominated" and maybe even "cold" and "hostile."[32] For this reason, officers must not only be alert for coerciveness, they must take affirmative steps to reduce it.

VOLUNTARY APPEARANCE: As noted, it is essential that the suspect voluntarily consented to be questioned at the station. It doesn't matter whether he accompanied officers in a police car or whether he took the bus—what counts is that he did so freely. As the California Supreme Court pointed out, "A reasonable person who is asked if he or she would come to the police station to answer questions, and who is

[26] (2011) __ U.S. __ [131 S.Ct. 2394, 2406].
[27] See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394, 2406] ["This is not to say that a child's age will be a determinative, or even a significant, factor in every case."].
[28] At 131 S.Ct. 2406.
[29] See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189; *J.D.B. v. North Carolina* (2011) __U.S. __ [131 S.Ct. 2394, 2402.
[30] *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.
[31] *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 ["[A] noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a coercive environment. Any police interview of an individual suspected of a crime has 'coercive' aspects to it."]. ALSO SEE *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [the U.S. Supreme Court has "rejected the idea that a 'coercive environment' is itself sufficient to require *Miranda* warnings"].
[32] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1190] ["police dominated atmosphere"]. ALSO SEE *People v. Bennett* (1976) 58 Cal.App.3d 230, 239 [a "cold and normally hostile atmosphere"].

offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody."[33] Similarly, the Ninth Circuit noted, "Where we have found an interrogation non-custodial, we have emphasized that the defendant agreed to accompany officers to the police station or to an interrogation room."[34]

For example, in ruling that unarrested suspects were not in custody when questioned in police stations, the courts have noted the following:

- "Beheler voluntarily agreed to accompany the police to the station house."[35]
- "The police did not transport Alvarado to the station or require him to appear at a particular time."[36]
- "[The officers] requested he come to the station for an interview but did not demand that he accompany them."[37]
- "[The officer] asked defendant to accompany him to his office for an interview and said 'if at any time he needed to come back, we'd drive him back, not to worry about a ride.'"[38]

But even if the suspect technically consented, his presence at a police station will be deemed involuntary if it was obtained by means of coercion. For example in *United States v. Slaight*[39] nine officers arrived at Slaight's home to execute a search warrant. After breaking in "with pistols and assault rifles at the ready," they asked Slaight if he "would be willing" to follow them to the police station for an interview. He agreed and, in the course of an *unMirandized* interview, he made an incriminating statement. The Seventh Circuit ruled, however, that the statement was obtained in violation of *Miranda* because the officers "made a show of force by arriving at Slaight's house en mass," and it is "undeniable" that the "presence of overwhelming armed force in the small house could not have failed to intimidate the occupants."

"YOU'RE FREE TO LEAVE": While not technically an absolute requirement,[40] officers who interview unarrested suspects in police stations should begin by notifying them that they are free to leave.[41] That is because such an advisement—commonly known as a *Beheler* admonition[42]—is considered "powerful evidence" that the suspect was not in custody.[43]

There are, however, four things about *Beheler* admonitions that should be kept in mind. First, they are worthless if it appeared that, despite what the officers said, the suspect was not free to leave. As the Fourth Circuit observed, "Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is 'not under arrest' is sufficient to end the inquiry into whether the suspect was 'in custody' during an interrogation."[44]

Consequently, the courts have ruled that, despite *Beheler* admonitions, suspects were in custody when the following circumstances existed:

- He was handcuffed.[45]
- He was kept under guard.[46]
- An officer told him that he could leave only after he told them the truth.[47]
- When he asked if he was under arrest, the officer "evaded" the question.[48]

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[33] *People v. Stansbury* (1995) 9 Cal.4th 824, 831-32. ALSO SEE *People v. Leonard* (2007) 40 Cal.4th 1370, 1401.
[34] *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 884.
[35] *California v. Beheler* (1983) 463 U.S. 1121, 1122.
[36] *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664.
[37] *People v. Holloway* (2004) 33 Cal.4th 96, 120.
[38] *Green v. Superior Court* (1985) 40 Cal.3d 126, 131.
[39] (7th Cir. 2010) 620 F.3d 816.
[40] See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 665; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162-64, fn.7; *U.S. v. Redlightning* (9th Cir. 2010) 624 F.3d 1090, 1105; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 86.
[41] See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *People v. Moore* (2011) 51 Cal.4th 386, 402; *U.S. v. Crawford* (9th Cir. 2004) 372 F.3d 1048, 1060; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 958.
[42] See *California v. Beheler* (1983) 463 U.S. 1121.
[43] *U.S. v. Czichray* (8th Cir. 2004) 378 F.3d 822, 826. ALSO SEE *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1240.
[44] *U.S. v. Colonna* (4th Cir. 2007) 511 F.3d 431, 435. ALSO SEE *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1088.
[45] *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d. 659, 676.
[46] *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1482; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1088.
[47] *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166.
[48] *People v. Boyer* (1989) 48 Cal.3d 247, 271.

Note, however, that while the security precautions in place at police stations (such as escorts and doors that lock automatically) would make it impossible for most suspects to leave at will, these are not unusual circumstances and are therefore not a strong indication of custody.[49]

Second, even though the suspect was told he was free to leave, he will likely be deemed in custody at the point he confessed or otherwise reasonably believed that the officers had probable cause to arrest him and therefore he "couldn't have believed they would actually let him go."[50] (This subject is also discussed in the section "Tone of the interview," below.)

Third, it may be necessary to provide multiple *Beheler* advisories if the interview had become lengthy, especially if it was also accusatory. As the court said in *People v. Aguilera*, "[W]here, as here, a suspect repeatedly denies criminal responsibility and the police reject his denials, confront the suspect with incriminating evidence, and continually press for the 'truth,' [a *Beheler* admonition] would be a significant indication that the interrogation remained non-custodial."[51]

Fourth, it is best to tell the suspect that he is free to leave, as opposed to saying he is not under arrest.[52] This is because a suspect who is told he is free to leave will necessarily understand that he is not under arrest, while a suspect who is told he is not under arrest will not necessarily understand that he is free to leave. Thus, the Eighth Circuit said that telling a suspect she is free to leave "weighs heavily in favor of noncustody. However, when officers inform a suspect only that she is not under arrest, [this circumstance] is less determinative in favor of noncustody."[53]

QUESTIONING IN INTERVIEW ROOMS: Officers who question unarrested suspects in police stations will usually do so in an interview room. This is because most interview rooms are quiet and free from distractions, and also because many are equipped with concealed microphones and cameras.

Interview rooms are, however, considered an "inherently coercive environment"[54] because the suspect is "cut off from the outside world"[55] and because he is in a place that is almost always stark, windowless, and confining.[56] In fact, the Supreme Court in *Miranda v. Arizona* said "it is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[57]

For these reasons, the fact that the suspect was questioned in an interview room is a circumstance that is relevant in determining whether he was in custody.[58] It is not, however, a significant circumstance, especially if the suspect was told he was free to leave and there were no contrary indications. Thus, in *Green v. Superior Court* the court pointed out, "Notwithstanding the lock on the interview room door, the evidence does not compel the conclu-

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[49] See *People v. Stansbury* (1995) 9 Cal.4th 824, 834 [defendant was not in custody merely because he "had to pass through a locked parking structure and a locked entrance to the jail to get to the interview room"]; *In re Kenneth S.,* (2005) 133 Cal.App.4th 54, 65; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 957.

[50] *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 819. ALSO SEE *People v. Bejasa* (2012) 205 Cal.App.4th 26, 37 [a "reasonable person in defendant's position would know that possession of methamphetamine and related paraphernalia is a parole violation and a crime, and that arrest would likely follow"]; *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 87 [suspect was in custody after admitting "I killed him"].

[51] (1996) 51 Cal.App.4th 1151, 1164, fn.7.

[52] See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1164; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437.

[53] *U.S. v. Sanchez* (8th Cir. 2012) 676 F.3d 627, 631.

[54] *People v. Celaya* (1987) 191 Cal.App.3d 665, 672.

[55] *Miranda v. Arizona* (1966) 384 U.S. 436, 445.

[56] See *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428 ["a small, windowless interview room"]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 131 ["[t]he rooms are 7 by 12 feet, have no windows and require a key to enter or exit"]; *U.S. v. D'Antoni* (7th Cir. 1988) 856 F.2d 975, 981 ["[t]he room was unremarkable: about eight feet by twelve feet in size, with a half wall separating the interview area from a toilet area"]; *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 820 [a "claustrophobic" room].

[57] (1966) 384 U.S. 436, 457.

[58] **NOTE**: The courts often note when stationhouse interviews were conducted in less intimidating rooms; e.g., "[the officers] used a spacious conference room" (*U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 957); "[t]he interview was conducted in a large, open office rather than an interview room" (*People v. Fierro* (1991) 1 Cal.4th 173, 217); the interviews "took place in what [a detective] described as a 'soft' interview room that had carpet, wallpaper, and comfortable furniture"].

sion that defendant could not have left whenever he had wanted during the interview."[59]

It should also be noted that officers might be able to reduce the coercive nature of an interview room by, for example, explaining to the suspect that he was being questioned there because it is quiet or, as the officers did in *People v. Moore*, by placing an object next to the door "to keep it from closing and locking."[60]

THE TONE OF THE INTERVIEW: The officers' demeanor and the general atmosphere of the interview are especially important because an aggressive or confrontational interview may send the message that the officers have probable cause to arrest. On the other hand, the fact that officers appeared to be merely seeking information from the suspect is consistent with the notion that he was free to leave. For example, in ruling that suspects were not in custody, the courts have noted the following:

- "Instead of pressuring Alvarado with the threat of arrest and prosecution, [the officer] appealed to his interest in telling the truth and being helpful."[61]
- "These questions were nonaccusatory, and defendant was largely permitted to recount his observations and actions through narrative."[62]
- "[T]he questions focused on information defendant had indicated he possessed rather than on defendant's potential responsibility for the crimes."[63]
- "[T]he tone of the officers throughout the interview was courteous and polite" and they did not inform him that they "considered him to be guilty, or that they had the evidence to prove his guilt in court."[64]
- The officer "conducted his inquiry in a conversational tone, and there is no evidence he posed confrontational questions or pressured the defendant in any manner."[65]

This does not mean that stationhouse interviews will become custodial if officers informed the suspect that he had become the "focus" of their investigation, or because they told him about the incriminating evidence they had obtained to date. As the Supreme Court observed, "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go."[66]

As we will discuss later, informing a suspect of the evidence that tends to incriminate him does not ordinarily constitute "interrogation." And it is not likely to render him in custody if it was done in an informative—not accusatorial—manner. Thus, in *In re Kenneth S.*[67] the court said, "The fact that Detective Carranza told respondent that he had information that respondent was involved in the robbery was insufficient by itself to constitute custody and to countervail these other factors." Similarly, the courts have ruled that an interview was not

[59] (1985) 40 Cal.3d 126, 136.

[60] (2011) 51 Cal.4th 386, 398. ALSO SEE *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 65.

[61] *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664. ALSO SEE *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1091 ["the questioning was not accusatory or threatening"]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 609 [the questioning "was investigatory rather than accusatory"]; *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428 ["mostly informational questions in a non-threatening manner"]; *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 884 ["the interview "was conducted in an open, friendly, tone"]; *U.S. v. Sanchez* (8th Cir. 2012) 676 F.3d. 627, 631 [the officer "did not use strong-arm tactics or deceptive stratagems during the interview; his raised voice and his assertions that Sanchez was lying were not coercive interview methods"]; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437 ["the ambience was relaxed and non-confrontational"].

[62] *People v. Stansbury* (1995) 9 Cal.4th 824, 832.

[63] *People v. Moore* (2011) 51 Cal.4th 386, 396.

[64] *People v. Spears* (1991) 228 Cal.App.3d 1, 25.

[65] *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404.

[66] *Stansbury v. California* (1994) 511 U.S. 318, 325.

[67] (2005) 133 Cal.App.4th 54, 65. ALSO SEE *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-96 [after noting that an officer falsely told a burglary suspect that his fingerprints had been found at the scene, the Court said, "Whatever relevance this fact may have to other issues in this case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule"]; *People v. Moore* (2011) 51 Cal.4th 386, 402 ["police expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody"]; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d. 943, 958 [the tenor of the conversation was "businesslike," with one agent "presenting the evidence of Ambrose's involvement rather than questioning Ambrose"].

rendered custodial merely because officers told the suspect they had information that he was involved in the robbery under investigation,[68] that his fingerprints were found at the scene of a burglary,[69] or that his suspected accomplice had named him as the perpetrator.[70]

While merely informing the suspect of the evidence of his guilt is not apt to render an interview custodial, saying or implying that this evidence constitutes grounds for an immediate arrest will likely do so. For example, in *People v. Boyer*[71] the defendant accompanied officers to the Fullerton police station to talk about a double murder he was suspected of having committed. In the course of the interrogation, which the court described as "intense," the officers told Boyer that the victims' son had identified him as the killer, that the officers could prove he did it, and that he was "gonna fall." Boyer asked several times whether he was under arrest, but the officers "evaded the questions" in hopes of "prolonging the interview." He later confessed, but the court ruled his confession was obtained in violation of *Miranda* because, "in an intense interrogation spanning nearly two hours, they led the defendant to believe . . . they had the evidence to prove his guilt in court. [A] reasonable person in such circumstances would only have considered himself under practical arrest."

Similarly, in *People v. Aguilera*[72] San Jose police officers received a tip that Aguilera was involved in a gang-related shooting. So they went to his house and obtained his consent to accompany them to the station to talk about it. At the beginning, Aguilera claimed he was not involved in the shooting, at which point the officers called him a liar, said his story was "bullshit," accused him of "fabricating an alibi," and told him that his fingerprints had been found on one of the cars used by the shooters. After the interview progressed in this manner for a while, Aguilera abandoned his story and confessed. But the court ruled that his confession should have been suppressed because he was in custody. Among other things, the court noted that the interrogation "was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating." The court added, "Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee."

LENGTH OF THE INTERVIEW: Although the courts often note the length of the interview, this is seldom a significant factor unless its duration or intensity were excessive. Thus, in *People v. Morris* the California Supreme Court noted that "[t]he interview was fairly long—one hour and 45 minutes—but not, as a whole, particularly intense or confrontational."[73] Similarly, in *U.S. v. Bassignani* the Ninth Circuit noted that, while a two and a half hour interrogation was "at the high end" of situations which had been deemed noncustodial, "this was not a marathon session designed to force a confession, and we therefore accord less weight to this factor."[74]

Questioning detainees

Another setting in which officers frequently question suspects is the street. And if, as is often the case, the suspect had been detained, the officers will need to know whether a *Miranda* waiver is required. Here, the rule is straightforward: Although detainees are aware that they are not free to leave or move about, they are not in custody for *Miranda* purposes if the restraint on their freedom was apparently temporary and "comparatively nonthreatening."[75] As the Court of Appeal put it, "Temporary detention

[68] *People v. Kenneth S*. (2005) 133 Cal.App.4th 54, 65.
[69] *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-96; *Illinois v. Perkins* (1990) 496 U.S. 292, 298.
[70] *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 973.
[71] (1989) 48 Cal.3d 247. ALSO SEE *Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3d 235, 244; *U.S. v. Revels* (10th Cir. 2007) 510 F.3d 1269, 1276 [officers "confronted her with a bag of cocaine that had been seized during the search"].
[72] (1996) 51 Cal.App.4th 1151.
[73] (2011) 51 Cal.4th 396, 402. ALSO SEE *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [two hour interview was "close" because of various circumstances; e.g., suspect not told he was not under arrest]; *People v. Spears* (1991) 228 Cal.App.3d 1, 26 [75 minutes, not unduly prolonged]; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 467 [interview 45-60 minutes and "compares favorably with other encounters we have deemed non-custodial"].
[74] (9th Cir. 2009) 575 F.3d 879, 886.
[75] *Berkemer v. McCarty* (1984) 468 U.S. 420, 440. ALSO SEE *People v. Manis* (1969) 268 Cal.App.2d 653, 668.

only slightly resembles *[Miranda]* custody, 'as the mist resembles rain.'"[76] A detention will, however, become custodial if the detainee was "subjected to treatment that rendered him 'in custody' for practical purposes."[77] This ordinarily occurs if the questioning had "ceased to be brief and casual" and had become "sustained and coercive,"[78] or if the detainee's freedom had been "curtailed to a degree associated with formal arrest."[79]

HANDCUFFS: When officers arrest a suspect, one of the first things they will usually do is handcuff him. And because handcuffing is a "distinguishing feature"[80] or "hallmark"[81] of an arrest, it has been argued that handcuffing a detainee necessarily renders him in custody for *Miranda* purposes.

The courts have, however, consistently rejected these arguments on grounds that, because custody depends on an examination of the totality of circumstances, there may be offsetting circumstances that would have communicated to the detainee that, despite the handcuffs, he was not under arrest. As the Court of Appeal explained, "Police officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no *Miranda* warnings are required."[82]

While there are no required circumstances, the cases seem to indicate that all of the following should exist:

(1) "YOU'RE NOT UNDER ARREST": At or near the time the detainee was handcuffed, the officers told him that he was not under arrest.

(2) EXPLAINING THE HANDCUFFS: The officers also explained why he was being handcuffed; e.g., it was merely a temporary measure while they conducted further investigation; e.g., searched a vehicle, ran a warrant check, interviewed witnesses or other suspects. As the Court of Appeal noted, "[B]rief handcuffing of a detainee would look less like a formal arrest if the interviewing officer informed the detainee that handcuffs were temporary and solely for safety purposes . . . "[83]

(3) DURATION OF HANDCUFFING: The detainee was not handcuffed for a lengthy period of time.

(4) NO OVERRIDING CIRCUMSTANCES: There were no other circumstances that would have reasonably indicated that, despite the officer's assurances to the contrary, the suspect was under arrest. For example, in *U.S. v. Henley* the court ruled that a detainee was in custody for *Miranda* purposes because he was both handcuffed and placed in the back seat of a patrol car.[84]

DRAWN FIREARM: A detainee who is questioned at gunpoint is plainly in custody.[85] A drawn weapon would, however, have no coercive effect if the detainee did not see it.[86] Furthermore, even if a weapon was displayed before the detainee was questioned, he may be deemed not in custody if (1) the officer was justified in drawing the firearm, (2) the weapon was reholstered before the officer questioned the detainee, and (3) there were no other circumstances that reasonably indicated that the detainee was under arrest.[87] Officers can further reduce the coercive effect of a drawn firearm if, before they questioned the detainee, they explained why the weapon had been displayed.

KEEP HANDS IN SIGHT: Commanding a detainee to keep his hands in sight is not something that is

[76] *People v. Manis* (1969) 268 Cal.App.2d 653, 667 [quoting from Longfellow's "The Day is Done"]. ALSO SEE *P v. Tully* (2012) __ C4 __ [2012 WL 3064338] [*Miranda* not applicable even though the detainee was not free to leave].
[77] *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.
[78] *People v. Manis* (1969) 268 Cal.App.2d 653, 669.
[79] *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.
[80] *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405. ALSO SEE *Dunaway v. New York* (1979) 442 U.S. 200, 215 [handcuffing is one of the "trappings" of an arrest]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 228 ["One well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain a citizen."].
[81] *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675, 676.
[82] *In re Joseph R.* (1998) 65 Cal.App.4th 954, 960-61.
[83] *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404. ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675, 676.
[84] (9th Cir. 1993) 984 F.2d 1040, 1042. ALSO SEE *People v. Bejasa* (2012) 205 Cal.App.4th 26, 39; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 ["Most important, defendant remained in handcuffs when the investigating officer interrogated him."].
[85] See *People v. Taylor* (1986) 178 Cal.App.3d 217, 229.
[86] See *People v. Stansbury* (1995) 9 Cal.4th 824, 832 ["there is no evidence that defendant could see the guns"].
[87] See *People v. Clair* (1992) 2 Cal.4th 629, 679; *People v. Holloway* (2004) 33 Cal.4th 96, 121; *People v. Taylor* (1986) 178 Cal.Ap.3d 217, 230; *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881; *Cruz v. Miller* (2nd Cir. 2001) 255 F.3d 77, 86.

associated with an arrest (because arrestees are usually handcuffed), and it is therefore not a significant circumstance.[88]

LENGTH OF THE DETENTION: Because most detentions are fairly brief, this circumstance is seldom noteworthy.[89]

AFTER PAT SEARCH: A detainee is not in custody merely because officers pat searched him, although it is a relevant circumstance.[90]

NUMBER OF OFFICERS: Questioning is considered more coercive—and is thus more indicative of custody—if the detainee was confronted by several officers, especially if several officers questioned him.[91] Conversely, the Court of Appeal recently observed, "Logically, the fewer the number of officers surrounding a suspect the less likely the suspect will be affected by custodial pressures."[92]

For example, in *People v. Lopez* the Court of Appeal noted the following in ruling that a detainee was not in custody: "While there were four officers present, they did not congregate around defendant but were dispersed among the three suspects. One officer alone approached and questioned the defendant."[93] Similarly, other courts that have addressed this issue have noted that "only two of [the officers] participated in the questioning; the others remained apart,"[94] and although the suspect "did encounter multiple agents," she "was not confronted by them simultaneously."[95]

TONE OF THE INTERVIEW: Officers who are questioning a detainee will usually adopt an amicable tone because they are seeking his voluntary cooperation. Accordingly, the tone of most such interviews is seldom coercive. If, however, their questions became accusatory, this would be highly relevant.[96] Also see "Questioning in police stations" (Tone of the interview), above.

QUESTIONING IN POLICE CARS: For various reasons, officers will sometimes question detainees in police cars; e.g., it was cold, dark, windy, or rainy outside.[97] While this will not render the interview custodial,[98] it is a relevant circumstance if the detainee was required to sit in the caged back seat, as opposed to the front passenger seat or a back seat that was not caged.[99] Furthermore, a detainee who is questioned behind a cage will almost always be deemed in custody if he was handcuffed.[100]

"YOU'RE FREE TO LEAVE": Officers will usually be able to eliminate any coerciveness resulting from a detention by informing the suspect in no uncertain terms that the detention has concluded and that he is now free to leave. After determining that he understands this, officers may seek his consent to answer additional questions; and if he agrees to do so, it is likely that the encounter will be deemed noncustodial. This subject is covered in the section "Questioning in police stations" ("You're free to leave"), above.

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[88] See *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167.
[89] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 437; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.
[90] See *U.S. v. Johnson* (7th Cir. 2012) __ F.3d __ [2012 WL 1871608].
[91] See *People v. Taylor* (1986) 178 Cal.App.3d 217, 229; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1085.
[92] *People v. Bejasa* (2012) 205 Cal.App.4th 26, 36. ALSO SEE *Berkemer v. McCarty* (1984) 468 U.S. 420, 438; *People v. Stansbury* (1995) 9 Cal.4th 824, 833 [four officers did not constitute a "show of force"].
[93] (1985) 163 Cal.App.3d 602, 609.
[94] *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 436.
[95] *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1242.
[96] See *People v. Lopez* (1985) 163 Cal.App.3d 602, 609; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 836; *People v. Haugland* (1981) 115 Cal.App.3d 248, 256.
[97] See *People v. Moore* (2011) 51 Cal.4th 386, 396 ["the alternative, defendant's residence, was cold and dark"].
[98] See *U.S. v. Guerrier* (1st Cir. 2011) 669 F.3d 1, 6 ["True, officers questioned Guerrier in an unmarked auto. But that fact does not by itself implicate *Miranda*"]; *U.S. v. Salvo* (6th Cir. 1998) 133 F.3d 943, 951 [although the interview took place in the officer's car, "this alone is not enough to convert the interview into a custodial interrogation"]; *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1242 ["Nor is the fact that most of the conversation took place inside Bridge's unmarked car dispositive of the custody issue"]; *U.S. v. Boucher* (8th Cir. 1990) 909 F.2d 1170, 1174.
[99] See *U.S. v. Plumman* (8th Cir. 2005) 409 F.3d 919, 924; *U.S. v. Lamy* (10th Cir. 2008) 521 F.3d 1257, 1264 ["his position in the passenger seat of the vehicle suggests a lack of arrest"]; *U.S. v. Guerrier* (1st Cir. 2011) __ F.3d __ [2011 WL 6415042].
[100] See *U.S. v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042; *People v. Thomas* (2011) 51 Cal.4th 449, 477.

Questioning in the suspect's home

The least coercive setting in which officers will question a suspect is the suspect's home.[101] As the Sixth Circuit observed in *United States v. Panak*, a person's home "is the one place where individuals will feel most unrestrained."[102] For this reason, a *Miranda* waiver is seldom necessary unless, as we will now discuss, the officers said or did something that dramatically changed the atmosphere.

HANDCUFFING, OVERBEARING CONDUCT: Questioning that occurs in the suspect's home will be deemed custodial if the officers handcuffed the suspect or otherwise conducted themselves, not as visitors seeking information, but as occupiers of the premises. As the Sixth Circuit explained:

> Even when an interrogation takes place in the familiar surroundings of a home, it still may become custodial without the officer having to place handcuffs on the individual. The number of officers, the show of authority, the conspicuous display of drawn weapons, the nature of the questioning all may transform one's castle into an interrogation cell—turning an inherently comfortable and familiar environment into one that a reasonable person would perceive as unduly hostile, coercive and freedom-restraining.[103]

That was exactly what happened in *Orozco v. Texas*[104] when four Dallas police officers went to Orozco's home at 4 A.M. to question him about a murder that had occurred a few hours earlier. They were admitted into the house by a woman who said that Orozco was sleeping in his bedroom, whereupon all four officers entered the bedroom, awakened Orozco, and questioned him in his bed about the murder. They eventually obtained an incriminating statement, but the U.S. Supreme Court ruled that the statement was obtained in violation of *Miranda* because, although Orozco was "interrogated on his own bed, in familiar surroundings," the total situation—especially the officers' overbearing conduct—demonstrated that he was in custody.

Similarly, in *People v. Benally*[105] two officers in Sunnyvale went to the Benally's hotel room to question him about a rape that had occurred earlier that evening. One of the officers drew his handgun, opened the door with a passkey and ordered Benally to raise his hands. After determining that Benally was not armed, the officer holstered his gun. Then, without obtaining a *Miranda* waiver, he questioned him and obtained some incriminating information. But the court summarily ruled the information was obtained in violation of *Miranda* because the officers' conduct rendered the encounter custodial.

EXECUTING SEARCH WARRANTS: A suspect's home is especially likely to be deemed custodial if officers had made a non-consensual entry to execute a search warrant or conduct a parole or probation search. This is mainly because the officers will usually have taken complete control of the home—and everyone in it—for purposes of officer safety. For example, in ruling that in-home questioning of an unarrested suspect was custodial after officers entered to execute search warrants, the courts have noted the following:

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[101] See *Michigan v. Summers* (1981) 452 U.S. 692, 702, fn.15 ["[T]he seizure in this case [in the suspect's home] is not likely to have coercive aspects likely to induce self-incrimination."]; *People v. Morris* (1991) 53 Cal.3d 152, 198 ["The inquiry did not take place in jail or on police premises, but in defendant's own motel room"]; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1083 ["courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature"]; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 465-66 [a person's home "is the one place where individuals will feel most unrestrained"].

[102] (6th Cir. 2009) 552 F.3d 462, 465-66.

[103] *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 466.

[104] (1969) 394 U.S. 324. COMPARE *People v. Morris* (1991) 53 Cal.3d 152, 198 ["defendant was not physically restrained or directed to say or do anything"]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 ["Breault was explicitly told that he was not under arrest. He was not handcuffed or physically restrained. The questioning took place in Breault's own home."]; *In re Danny E.* (1981) 121 Cal.App.3d 44, 50 ["[N]o objective indicia of arrest or detention were apparent, and the questioning was brief and nonaccusatorial."]; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437 ["The number of officers [on the premises] was impressive but not overwhelming," "no officer made physical contact with [the suspect]," and the officers "were polite and never hectored the defendant or raised their voices," but it was a "close" case mainly because the officers did not tell the suspect that he was free to leave]; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1166 ["It does not appear that Basher's movements were significantly curtailed."].

[105] (1989) 208 Cal.App.3d 900.

- "[N]ine officers drove up to the house, broke in with a battering ram, strode in with pistols and assault rifles at the ready, and when they found [the suspect] naked in his bed ordered him in an authoritative tone and guns pointed at him, to put his hands up."[106]
- "Craighead's home had become a police-dominated atmosphere. Escorted to a storage room in his own home, sitting on a box, and observing an armed guard by the door, Craighead reasonably believed that there was simply nowhere for him to go."[107]
- The suspect's house "was inundated" with over 23 FBI agents, and the suspect "was awakened at gun point and guarded at all times."[108]

In contrast, the courts have noted the following in ruling that questioning by officers during the execution of search warrants was not custodial:

- An FBI agent told the suspect that he "was not under arrest and was free to leave" and there were no contradictory circumstances.[109]
- "[T]he officers specifically informed Sutera that he was not under arrest, that he did not have to answer their questions, and that he was free to move around the apartment or leave anytime he wished."[110]
- "[T]here is nothing to suggest that the officers acted in a hostile or coercive manner."[111]

Questioning in prisons

Officers will sometimes want to question state prison inmates about crimes that occurred before they were incarcerated; and correctional officers will often want to question them about crimes that occurred inside the facility, such as battery on another inmate or possession of drugs or other contraband. At first glance, it might seem that anyone who is locked up in prison would automatically be in custody. But upon closer examination, it becomes apparent they are not.

The reason is that a prison inmate who is questioned by officers is not nearly as vulnerable to pressure as a person who had recently undergone the "sharp and ominous"[112] change of circumstances that results from an arrest. As the Supreme Court recently explained in *Howes v. Fields*, "[T]he ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same inherently compelling pressures" as those that result when "a person is arrested in his home or on the street and whisked to a police station for questioning."[113] Furthermore, the Court pointed out that, unlike arrestees, prison inmates know that, regardless of what they say to the officers who question them, they will not be walking out the prison gates when the interview is over and, thus, they are "unlikely to be lured into speaking by a longing for prompt release."

For these reasons, the Court ruled that prison inmates are in custody only if they were questioned under circumstances that presented "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."[114] In other words, inmates will be deemed in custody only if they were subjected to pressures and restrictions on their freedom above and beyond those which are inherent in the facility. Or, as the Ninth Circuit explained in a case that anticipated *Fields*:

> In the prison situation [*Miranda* "custody"] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.[115]

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[106] *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 820. ALSO SEE *U.S. v. Revels* (10th Cir. 2007) 510 F.3d 1269, 1276.
[107] *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1089.
[108] *U.S. v. Colonna* (4th Cir. 2007) 511 F.3d 431, 436.
[109] *U.S. v. Hargrove* (4th Cir. 2010) 625 F.3d 170, 182.
[110] *U.S. v. Sutera* (8th Cir. 1991) 933 F.2d 641, 647.
[111] *U.S. v. Hinojosa* (6th Cir. 2010) 606 F.3d 875, 883.
[112] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1191].
[113] (2012) __ U.S. __ [132 S.Ct. 1181, 1190].
[114] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1189-90]. ALSO SEE *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20; *Garcia v. Singletary* (11th Cir. 1994) 13 F.3d 1487, 1492.
[115] *Cervantes* v. *Walker* (9th Cir. 1978) 589 F.2d 424, 428.

Accordingly, interviews with prison inmates have been deemed noncustodial when all of the following circumstances existed:

- "YOU CAN RETURN TO YOUR CELL": The inmate was told that he could leave the room or return to his cell whenever he wanted. This is the "most important" circumstance.[116]
- NO HANDCUFFS: The inmate was placed in handcuffs.
- TONE OF THE INTERVIEW: The interview was neither lengthy nor highly accusatorial.
- LOCATION OF INTERVIEW: The interview took place in familiar or comfortable surroundings, such as a conference room or library.[117]

For example, in *United States v. Menzer* the court ruled that an inmate who was questioned by FBI agents about child molesting allegations was not in custody because:

> [T]he defendant voluntarily appeared at the interviews, he was not restrained in any manner, the room was well lit, there were two windows exposing the interview room to the prison administrative office area, the door to the interview room was unlocked and the defendant was told by [an FBI agent] that he was free to leave at any time.[118]

Questioning in jails

Unlike state prisoners, many jail inmates have not been incarcerated long enough for the "ordinary restrictions" to have become "expected and familiar."[119] Thus, to determine whether a jail inmate is in custody for *Miranda* purposes, officers must first consider whether he was a timeserver or pretrial detainee.

TIME-SERVERS: Because inmates who are serving a sentence in jail have ordinarily been incarcerated throughout the time that was necessary to adjudicate their cases (usually several months or even years), most of them are not automatically in custody, which means their status will depend on the circumstances pertaining to interviews in prisons; e.g., whether they were told they could return to their cells whenever they wanted.

UNSENTENCED INMATES: It is more difficult to determine the custody status of unsentenced detainees because the length of their incarceration may vary from a few hours to several years. Consequently, officers must consider the following circumstances:

> LENGTH OF INCARCERATION: The length of the inmate's incarceration is a significant circumstance because the longer the stay the more the jailhouse restrictions would have become expected and familiar. It follows that if the inmate had been recently booked or had otherwise not yet settled into a routine, he would likely be deemed in custody regardless of the surrounding circumstances. As for detainees who have been awaiting trial for months or years, it would seem that they are not automatically in custody, and that their custody status would therefore depend on an analysis of the circumstances discussed in the section on prison interviews.
>
> There is, in fact, a pre-*Fields* California case—*People v. Macklem*—in which the Court of Appeal ruled that an unsentenced detainee was not "in custody" for *Miranda* purposes when he was questioned about a jailhouse assault.[120] The court's analysis in *Macklem* was almost identical to that of the Court in *Fields*, including the *Macklem* court's observation that the defendant was not handcuffed and "was given the opportunity to leave the room if he requested to do so."

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[116] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1193].

[117] See *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1123 ["appellant was not compelled to speak with the police"]; *People v. Ray* (1996) 13 Cal.4th 313, 338 ["prison officials exerted no influence on him to discuss or admit the crimes"]; *People v. Macklem* (2007) 149 Cal.App.4th 674, 696 ["Macklem was given the opportunity to leave the room if he requested to do so"]; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20-21 [an officer stood outside the suspect's cell and questioned him]; *Georgison v. Donelli* (2nd Cir. 2009) 588 F.3d 145, 157 ["At no time was Georgison restrained during questioning, which took place in a visitors' room"]; *U.S. v. Conley* (4th Cir. 1985) 779 F.2d 970, 973-74 ["Although Conley wore handcuffs and, at some points, full restraints, evidence in the record indicates that this was standard procedure for transferring inmates to the infirmary"]; *U.S. v. Barner* (11th Cir. 2009) 572 F.3d 1239, 1245 ["[Barner] was not compelled to submit to the meeting with [the officer].

[118] (7th Cir. 1994) 29 F.3d 1223, 1232.

[119] See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1191].

[120] (2007) 149 Cal.App.4th 674, 696. ALSO SEE *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-28.

PRIOR INCARCERATIONS: It is arguable that an unsentenced inmate's status would also depend on whether he had been previously incarcerated in the facility and, if so, the amount of time he had spent there. That is because frequent-flyers may view their local jail as a home away from home.

SAME OR DIFFERENT CRIME: The fact that the inmate was questioned about a crime unrelated to the one for which he had been incarcerated is relevant because a reasonable person in his position would know that the officers who were questioning him did not have the power to release him; i.e., he "is unlikely to be lured into speaking by a longing for prompt release."[121]

Questioning in other places

Questioning that occurs in the following places is not inherently coercive and is therefore not apt to render an interview custodial: public places,[122] ambulances,[123] hospitals,[124] probation and parole offices,[125] the suspect's workplace.[126]

As for courtrooms, a defendant or witness who is questioned in open court is not in custody for *Miranda* purposes even if he was incarcerated at the time. As the Ninth Circuit observed, "Cross-examination by a prosecutor, conducted in public and in the presence of both judge and jury, is hardly tantamount to custodial questioning by the police."[127]

Finally, it should be noted that, regardless of where the suspect was located when he was questioned, he will not be in custody if the officer was talking to him over the telephone. This is because the suspect can terminate the conversation by simply hanging up. As the California Supreme Court observed in *People v. Mayfield*, "[A]n officer who is talking to a suspect under these conditions is not physically in the suspect's presence and thus lacks immediate control over the suspect, who retains a degree of freedom of action inconsistent with a formal arrest."[128]

"Interrogation"

Even if a suspect was in custody, a *Miranda* waiver is not required unless officers planned to immediately "interrogate" him. "It is clear," said the Supreme Court, "that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[129] What, then, is "interrogation"?

Actually, there are two types: direct and indirect. Direct interrogation is simply any request for information about the crime that the officers are investigating; e.g., "What did you do with all the money, Mr. Madoff?"[130] In contrast, indirect interrogation, also known as the "functional equivalent" of interrogation, is broadly defined as any "practice that the police should know is reasonably likely to elicit an incriminating response."[131] Not surprisingly, almost all of the litigation in this area pertains to indirect interrogation.

General principles

In determining whether officers engaged in indirect interrogation the courts apply the following principles:

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[121] *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1184]. ALSO SEE *People v. Macklem* (2007) 149 Cal.App.4th 674, 691; *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-28; *Garcia v. Singletary* (11th Cir. 1994) 13 F.3d 1487, 1489.

[122] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 438; *People v. Sanchez* (1987) 195 Cal.App.3d 42, 47 [on a public street]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [hallway of the suspect's apartment building]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["busy, public area of the airport"]; *U.S. v. Lockett* (3rd Cir. 2005) 406 F.3d 207, 211 [Amtrak station].

[123] See *People v. Mosley* (1999) 73 Cal.App.4th 1081; *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 86-87.

[124] See *U.S. v. Jamison* (4th Cir. 2007) 509 F.3d 623.

[125] See *Minnesota v. Murphy* (1984) 465 U.S. 420, 433; *People v. Carpenter* (1997) 15 Cal.4th 312, 384; *In re Richard T.* (1978) 79 Cal.App.3d 382; *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1310-11.

[126] See *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 885 ["Here, Bassignani was interviewed at a conference room within his workplace—plainly a familiar environment."]. ALSO SEE *INS v. Delgado* (1984) 466 U.S. 210, 218.

[127] *U.S. v. Kilgroe* (9th Cir. 1992) 959 F.2d 802, 804, 805. ALSO SEE *People v. Tarter* (1972) 27 Cal.App.3d 935, 942.

[128] *People v. Mayfield* (1997) 14 Cal.4th 668, 733. ALSO SEE *People v. Webb* (1993) 6 Cal.4th 494, 526

[129] *Rhode Island v. Innis* (1980) 446 U.S. 291, 300. ALSO SEE *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 909 ["For the protections of *Miranda* to apply, custodial interrogation must be imminent or presently occurring."].

[130] *Rhode Island v. Innis* (1980) 446 U.S. 291, 298-99.

[131] *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

REASONABLY LIKELY: Indirect interrogation does not result merely because there was a "possibility" that the officer's words would have prompted the suspect to make an incriminating statement, or because the officer hoped they would. Instead, it results only if the officer knew or should have known that an incriminating response was reasonably likely. As the California Supreme Court put it:

> Not every question directed by an officer to a person in custody amounts to an "interrogation" requiring *Miranda* warnings. The standard is whether under all the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect.[132]

LINK BETWEEN QUESTION AND CRIME: A question is not apt to constitute interrogation unless there was some factual link between it and the crime under investigation.[133]

THE OFFICERS' INTENT: If officers intended to elicit an incriminating statement, their words would probably be deemed interrogation because they would have known that an incriminating response was reasonably likely.[134] On the other hand, the fact that officers had no such intent is irrelevant if an incriminating response was reasonably likely.[135]

UTILIZING INTERROGATION TACTICS: Utilizing interrogation tactics such as "good cop-bad cop" would likely constitute interrogation because the objective is to elicit an incriminating information and, therefore, an incriminating response would have been reasonably foreseeable.[136]

EXPLOITING VULNERABILITIES: Exploiting a suspect's weaknesses, fears, or other vulnerabilities to obtain a statement—especially extreme vulnerabilities—is likely to render an interview custodial because an incriminating response is reasonably likely. In the words of the Supreme Court, "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response."[137]

In the discussion that follows, we will show how the courts apply these principles in determining whether an officer's words or conduct constituted interrogation.

Accusations

Accusing a suspect of having committed the crime under investigation will almost always constitute interrogation because of the likelihood he will respond by saying something incriminating. That's what happened in *In re Albert R.* when an officer, having just arrested Albert for car theft, said "[t]hat was sure a cold thing you did to [your friend], selling him that hot car." Albert responded, "Yes, but I made the money last." Not surprisingly, the court suppressed the admission on grounds that the officer's words constituted interrogation.[138]

Interrogation will also result if officers arranged for someone else to make the accusation in their presence. For example, in *People v. Stewart*[139] an

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[132] *People v. Wader* (1993) 5 Cal.4th 610, 637. ALSO SEE *People v. Morris* (1987) 192 Cal.App.3d 380, 389.

[133] See *People v. Wader* (1993) 5 Cal.4th 610, 637 ["The relationship of the question asked to the crime suspected is highly relevant." Quoting from *U.S. v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1237].

[134] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7 ["where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."]; *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["the fact that the police intended to elicit incriminating information . . . suggests that they should have known a particular ploy was reasonably likely to succeed"].

[135] See *In re Albert R.* (1980) 112 Cal.App.,3d 783, 793 [an intent to obtain incriminating information "is not required for the concept of custodial interrogation. It is the reasonable likelihood of the police words or conduct eliciting an incriminating response that is of significant import."].

[136] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7; *Miranda v. Arizona* (1966) 384 U.S. 436, 452.

[137] *Rhode Island v. Innis* (1980) 446 U.S. 291, 302, fn.8. ALSO SEE *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *Brewer v. Williams* (1977) 430 U.S. 398, 392 ["[the officer] knew that Williams was a former mental patient, and knew also that he was deeply religious."].

[138] (1980) 112 Cal.App.3d 783, 792]. COMPARE*: In re Curt W.* (1982) 131 Cal.App.3d 169, 180 ["[T]he officer's remark ["The car's not yours"] could hardly be called anything but a tentative, and somewhat uncertain, statement not reasonably seen by him to invite a response."].

[139] (1965) 236 Cal.App.2d 27. ALSO SEE *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["Confronting a suspect with his alleged partner and informing him that his alleged partner has confessed is very likely to spark an incriminating response"].

officer brought two robbery suspects, Clements and Stewart, into an interview room and instructed Clements to read aloud his written confession in which he also implicated Stewart. At Stewart's trial, prosecutors were permitted to present evidence that Stewart did not deny Clements' allegation, but the court ruled this violated *Miranda* because Clements made the accusation while acting as a surrogate interrogator.

Confronting with evidence

In contrast to accusations, merely informing the suspect of the evidence of his guilt will not constitute interrogation if it was done in a brief, factual, and dispassionate manner.[140] As the Ninth Circuit observed in *United States v. Hsu:*

> [O]bjective, undistorted presentations by the police of the evidence against a suspect are less constitutionally suspect than is continuous questioning because the risk of coercion is lessened when information is not directly elicited.[141]

For example, in *People v. Gray* an officer who had just arrested Gray for murder, told him of "considerable evidence pointing to his involvement in the death." In ruling that this did not constitute interrogation, the court pointed out that "the transcript reflects that [the officer's] recitation of the facts was accurate, dispassionate and not remotely threatening."[142]

Similarly, in *Shedelbower v. Estelle* officers were about to leave an interview room after the defendant, a suspect in a rape and murder, had invoked his *Miranda* right to counsel. As they were gathering up their papers, one of them informed Shedelbower that his accomplice had also been arrested, and that one of his victims had identified his photo as one of the men who had raped her and murdered her friend. In ruling the officer's words did not constitute interrogation, the Ninth Circuit pointed out that they "did not call for nor elicit an incriminating response. They were not the type of comments that would encourage Shedelbower to make some spontaneous incriminating remark."[143]

Finally, in *United States v. Davis*[144] FBI agents arrested the defendant for robbing a bank. During questioning, Davis invoked his right to remain silent, at which point an agent showed him a surveillance photo of the robbery. As Davis studied the photo and noticed the remarkable similarity between his face and that of the robber, the agent inquired, "Are you sure you don't want to reconsider?" Davis responded, "Well, I guess you've got me." He then waived his rights and confessed. On appeal, the Ninth Circuit ruled that the agent's act of showing Davis the photo did not constitute continued interrogation because he "merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture; the questioning did not resume until Davis had voluntarily agreed that it should." In a subsequent case in which the court discussed its decision in *Davis*, it noted that the "key distinction between questioning the suspect and presenting the evidence available against him" was "central" to the decision.[145]

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[140] See *People v. Gray* (1982) 135 Cal.App.3d 859, 865 [the "recitation of the facts was accurate, dispassionate and not remotely threatening."]; *People v. Patterson* (1979) 88 Cal.App.3d 742, 749 ["Your accomplice already made a statement"]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192 [the victim identified you]; *U.S. v. Thierman* (9th Cir. 1982) 678 F.2d 1331, 1334, fn.3 ["*Miranda* does not preclude officers, after a defendant has invoked his *Miranda* rights, from informing the defendant of evidence against him or of other circumstances which might contribute to an intelligent exercise of his judgment."]; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1134 ["even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case"]; *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169 [officer did not interrogate a suspect when he "told him that the agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble"]; *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203 ["statements by law enforcement officials to a suspect regarding the nature of the evidence against the suspect [do not] constitute interrogation as a matter of law"]; *Easley v. Frey* (7th Cir. 2006) 433 F.3d 969, 974 [not interrogation to inform a suspect that witnesses had ID'd him]; *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285 ["Merely apprising Vallar of the evidence against him by playing tapes implicating him in the conspiracy did not constitute interrogation."].

[141] (9th Cir. 1988) 852 F.2d 407, 411.

[142] (1982) 135 Cal.App.3d 859, 865.

[143] (9th Cir. 1989) 885 F.2d 570, 573.

[144] (9th Cir. 1976) 527 F.2d 1110.

[145] *U.S. v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 366.

Interrogation may, however, result if the officer presented the evidence to the suspect in a goading, provocative, or accusatorial manner. For example, in *People v. Sims* an officer who was questioning a murder suspect described the crime scene "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found.'" The California Supreme Court ruled that the officer's statement constituted interrogation.[146]

Even a brief comment might constitute interrogation if it was goading. For example, in *People v. Davis*[147] the defendant was arrested for murdering two people with an Uzi. At the police station, Davis invoked his right to remain silent and was placed in a holding cell. Later that day, a detective entered the cell and the following ensued:

Officer: Remember that Uzi?

Davis: Yeah.

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

In ruling that the detective's comment constituted interrogation, the court explained that his parting words—"Think about that little fingerprint on [the Uzi]—implied that "defendant's fingerprint had been found on the Uzi, and thus indirectly accused defendant of personally shooting the victims."

Other statements of fact

Providing the suspect with other types of information will seldom constitute interrogation if the information was factual and was presented in a businesslike fashion. For example, the following have been deemed not interrogation:

"YOU'RE UNDER ARREST FOR . . . ": Informing a suspect that he is under arrest for a certain crime or that he would be booked for a certain crime.[148]

EXPLAINING SUBJECT OF INTERVIEW: Informing a suspect of the nature of the questions that the officers wanted to ask.[149]

EXPLAINING THE POST-ARREST PROCEDURE: Informing a suspect of the post-arrest procedure; i.e., what's going to happen next.[150]

READING SEARCH WARRANT: Reading to the suspect the contents of a warrant to search his home.[151]

Also note that the Sixth Circuit recently ruled that an officer did not interrogate a suspect by informing him and the other passengers in a vehicle that, because they all denied that the contraband in the vehicle belonged to them, they would all be taken into custody and charged.[152]

Neutral questions

A "neutral" question is an inquiry that plainly did not call for information about the crime under investigation. Thus, a neutral question will not constitute interrogation even if it produced a confession or admission. Here are some examples:

BOOKING QUESTIONS: Questions that are asked as a matter of routine in conjunction with the booking process are not interrogation. This subject is covered below in the section on *Miranda* exceptions.

SEEKING CONSENT TO SEARCH: Seeking consent to search for evidence pertaining to the crime under investigation does not constitute interrogation because it essentially calls for a yes or no response.[153]

QUESTIONING A WITNESS: When officers question a person in custody about a crime for which he is believed to be only a witness, their questions will not constitute interrogation because there is little likelihood that they will elicit an incriminating response.[154]

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[146] (1993) 5 Cal.4th 405, 444. ALSO SEE *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 910.

[147] (2005) 36 Cal.4th 510.

[148] See *People v. Celestine* (1992) 9 Cal.App.4th 1370, 1374; *People v. Harris* (1989) 211 Cal.App.3d 640, 647-48; *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698, 702.

[149] See *People v. Huggins* (2006) 38 Cal.4th 175, 198; *U.S. v. Head* (8th Cir. 2005) 407 F.3d 925, 929.

[150] See *People v. Guerra* (2006) 37 Cal.4th 1067, 1096; *People v. Harris* (1989) 211 Cal.App.3d 640, 647-48; *People v. Hayes* (1985) 169 Cal.App.3d 898, 908.

[151] See *U.S. v. Johnson* (7th Cir. 2012) __ F3 __ [2012 WL 1871608].

[152] *U.S. v. Collins* (6th Cir. 2012) __ F.3d __ [2012 WL 2094415].

[153] See *People v. Ruster* (1976) 16 Cal.3d 690, 700; *People v. Shegog* (1986) 184 Cal.App.3d 899, 905.

[154] See *People v. Moore* (2011) 51 Cal.4th 386, 395; *People v. Wader* (1993) 5 Cal.4th 610; *People v. Ochoa* (2001) 26 Cal.4th 398, 436-37; *People* v. *Mosley* (1999) 73 Cal.App.4th 1081, 1089. COMPARE: *People v. Roquemore* (2005) 131 Cal.App.4th 11, 26 [questions relating to gang activity in general were sufficiently connected to the charged crime as to constitute interrogation].

Miscellaneous

LECTURES: An officer's lecture to a suspect or other monologue in his presence may constitute interrogation, especially if it was lengthy, provocative, or goading.[155]

CASUAL CONVERSATION: Casual conversation or small talk is not apt to be deemed interrogation, especially if it was not a pretext to obtain incriminating information.[156]

ANSWERING SUSPECT'S QUESTIONS: Answering a suspect's questions about sentencing or other matters is not likely to constitute interrogation if the officer's answer was brief and to the point.[157]

REQUESTING CLARIFICATION: If a suspect makes a spontaneous statement or asks a question, it is not interrogation to simply request that he clarify something, or to ask the types of open-ended questions that merely tend to display interest; e.g., Would you repeat that?[158]

CONVERSATION FILLERS: Using a conversation filler when a suspect is making a statement does not constitute interrogation; e.g., "Yeah," "I can understand that," I hear you," "Would you repeat that?[159]

QUESTIONS ABOUT HEALTH OR INJURY: Asking a suspect about an injury or some other physical ailment is not apt to be deemed interrogation unless it was a pretext to obtain incriminating information.[160]

RECORDING CONVERSATION BETWEEN SUSPECTS: Placing suspects together and secretly recording their conversation does not constitute interrogation. Thus, *U.S. v. Hernandez-Mendoza* the Eighth Circuit ruled that an officer's "act of leaving the appellants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning."[161]

Miranda Exceptions

There are three exceptions to the rule that officers must obtain a *Miranda* waiver before engaging in custodial interrogation: (1) the routine booking question exception, (2) the public safety exception, and (3) the undercover agent exception.

Routine booking questions

When a person is arrested, there are certain questions that officers or jail personnel will ask as a matter of routine, usually in conjunction with the booking process. Such questions will seldom constitute interrogation because an incriminating response is seldom foreseeable. But even if it was foreseeable (e.g., the suspect's address would be incriminating if drugs had been found there), the response will not be suppressed if the question was "normally attendant to arrest and custody."[162] As we will now explain, there are two types of routine booking questions: (1) questioning seeking basic

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[155] See *Brewer v. Williams* (1977) 430 U.S. 387; *In re Johnny V.* (1978) 85 Cal.App.3d 120, 134.

[156] See *People v. Mickey* (1991) 54 Cal.3d 612, 651; *People v. Roldan* (2005) 35 Cal.4th 646, 735-36; *People v. Claxton* (1982) 129 Cal.App.3d 638, 654; *People v. Ashford* (1968) 265 Cal.App.2d 673, 685; *People v. Lewis* (1990) 50 Cal.3d 262, 274; *People v. Gamache* (2010) 48 Cal.4th 347, 388; *People v. Gurule* (2002) 28 Cal.4th 557, 602. ALSO SEE *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1073 ["There is nothing inherently wrong with efforts to create a favorable climate for confession."].

[157] See *People v. Clark* (1993) 5 Cal.4th 950, 985; *People* v. *Dement* (2011) 53 Cal.4th 1, 27; *People v. Roldan* (2005) 35 Cal.4th 646, 735-36.

[158] See *People v. Ray* (1996) 13 Cal.4th 313, 338 ["To the extent [the investigator] interrupted and asked questions, they were merely neutral inquiries made for the purpose of clarifying statements or points that he did not understand."]; *In re Frank C.* (1982) 138 Cal.App.3d 708, 714 ["What did you want to talk to me about?"]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 319 [suspect entered a police station and said he wanted to turn himself in; when asked why, he said it was for murder; when asked when the murder happened, he said it was one week earlier]; *U.S. v. Gonzales* (5th Cir. 1997) 121 F.3d 928, 940 ["[W]hen a suspect spontaneously makes a statement, officers may request clarification of ambiguous statements without running afoul of the Fifth Amendment."]; *U.S. v. Mendoza-Gonzalez* (8th Cir. 2004) 363 F.3d 788, 795 [when the suspect asked if he could make a phone call, the officer asked why he wanted to make a call].

[159] See *People v. Ray* (1996) 13 Cal.4th 318, 338; *People v. Matthews* (1968) 264 Cal.App.2d 557, 567.

[160] See *People v. Jones* (1979) 96 Cal.App.3d 820, 827; *U.S. v. Howard* (8th Cir. 2008) 532 F.3d 755.

[161] (8th Cir. 2010) 600 F.3d 971, 977. ALSO SEE *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["we cannot say that merely placing a suspect in the same room with his partner in crime, without *any* additional stimulus, is reasonably likely to evoke an incriminating response"].

[162] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.

identifying information, and (2) questions seeking administrative information.

BASIC IDENTIFYING INFORMATION: A *Miranda* waiver is not required before seeking basic identifying data or biographical information that is needed to complete the booking or pretrial services process; e.g., suspect's name, gang moniker, address, date of birth, place of birth, phone number, occupation, social security number, employment history, arrest record, parents' names, spouse's name.[163]

BASIC ADMINISTRATIVE INFORMATION: A question may also be covered under the routine booking exception if the following circumstances existed:

(1) LEGITIMATE ADMINISTRATIVE PURPOSE: The question sought information that was needed for a legitimate jail administrative purpose.

(2) NOT A PRETEXT: The question was not a pretext to obtain incriminating information.[164]

For example, jail officials may ask an inmate about his gang affiliation in order to keep him separated from members of rival gangs.[165] But such questions would not be covered if their objective was to obtain intelligence about gang activities in his neighborhood.[167] Nor would the exception apply to questions as to why the arrestee possessed credit cards in various names,[168] or how the arrestee had arrived at the house in which he was arrested.[167]

Two other things should be noted. First, a booking-related question may be deemed pretextual if it was not asked in conjunction with the booking process.[169] Second, although some courts have ruled that the routine booking question exception does not apply if the question was reasonably likely to elicit an incriminating response,[170] this is illogical. After all, if the exception applied only to questions that were not reasonably likely to elicit an incriminating response, the exception would be superfluous because the question would not constitute interrogation and, therefore, *Miranda* would not even apply.

The public safety exception

Under *Miranda's* public safety exception, officers may question a suspect who is in custody without obtaining a waiver (or after he invoked his right to remain silent or right to counsel) if they reasonably believed that he possessed information that would help save a life, prevent serious injury, or diffuse a serious threat to property.[171] The justification for this exception is fairly straightforward: When a substantial threat to people or property could be reduced or eliminated by obtaining information from a suspect who was in custody, it is not in the public interest to require that officers begin the

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[163] See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Farnam* (2002) 28 Cal.4th 107, 180; *People v. Clair* (1992) 2 Cal.4th 629, 679-80; *People v. Powell* (1986) 178 Cal.App.3d 36, 40; *People v. Palmer* (1978) 80 Cal.App.3d 239, 256; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 662; *U.S. v. Arellano-Ochoa* (9th Cir. 2006) 461 F.3d 1142, 1146; *U.S. v. Pacheco-Lopez* (6th Cir. 2008) 531 F.3d 420, 423; *Rosa v. McCray* (2nd Cir. 2005) 396 F.3d 210, 211; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1133 ["[T]he question about Washington's gang moniker was routine gathering of background information"].

[164] See *People v. Gomez* (2011) 192 Cal.App.4th 609, 630; *U.S. v. Booth* (9th Cir. 1982) 669 F.2d 1231, 1238; *U.S. v. Salgado* (9th Cir. 2002) 292 F.3d 1169, 1172.

[165] See *People v. Gomez* (2011) 192 Cal.App.4th 609, 634 ["It is reasonable to take steps to ensure that members of rival gangs are not placed together in jail cells."].

[166] See *People* v. *Roquemore* (2005) 131 Cal.App.4th 11, 26.

[167] See *U.S. v. Minkowitz* (E.D.N.Y. 1995) 889 F.Supp. 624, 628 ["questions concerning a defendant's possession of credit cards in a different name can hardly be characterized as 'routine' or 'basic'"].

[168] See *U.S. v. Pacheco-Lopez* (6th Cir. 2008) 531 F.3d 420, 424 ["But asking Lopez where he was from, how he had arrived at the house, and when he had arrived are [not routine booking questions]."].

[169] See *People v. Gomez* (2011) 192 Cal.App.4th 609, 635. COMPARE: *U.S. v. Mata-Abundiz* (9th Cir. 1983) 717 F.2d 1277, 1280 ["[T]he questioning conducted by [the officer] [ten days after arrest] had little, if any, resemblance to routine booking"].

[170] See *People v. Morris* (1987) 192 Cal.App.3d 380, 389; *U.S. v. Mata-Abundiz* (9th Cir. 1983) 717 F.2d 1277, 1280.

[171] See *New York v. Quarles* (1984) 467 U.S. 649, 656; *People v. Mayfield* (1997) 14 Cal.4th 668, 732; *People v. Wills* (1980) 104 Cal.App.3d 433, 446-47; *People v. Panah* (2005) 35 Cal.4th 395, 471; *People v. Dean* (1974) 39 Cal.App.3d 875, 882; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1050. **NOTE**: Although we have found no cases in which application of the public safety exception was based exclusively on the threatened destruction of property, it seems apparent that such a threat falls well within the public safety exception. After all, if a substantial threat to property constitutes an exigent circumstance so as to excuse compliance with provisions of the Fourth Amendment, it should be sufficiently important to excuse compliance with procedural requirements that are not mandated by the Constitution. See *People v. Riddle* (1978) 83 Cal.App.3d 563, 572 ["Application of the principle of exigent circumstances is not restricted to situations where human life is at stake."].

interview by warning him (essentially) that he would be better off if he refused to assist them. As we will now explain, the public safety exception will be applied only if both of the following circumstances existed:

(1) THREAT EXISTED: The officers must have reasonably believed that a threat to public safety existed.

(2) QUESTIONS REASONABLY NECESSARY: The officers' questions must have been directed toward obtaining information that was reasonably necessary to eliminate the threat.

THREAT EXISTED: Officers must have reasonably believed that there existed an imminent and serious threat to a person (whether a civilian, an officer, or the suspect) or to property. The following are examples of questions that have satisfied this requirement:

"CARRYING A WEAPON?" Before pat searching an arrested suspect, an officer asked if he was carrying any weapons or sharp objects.[172]

"WEAPONS NEARBY?" After arresting or detaining a suspect who was reasonably believed to be armed, an officer asked if he had any other weapons nearby.[173]

DEADLY WEAPON IN A PUBLIC PLACE: Officers reasonably believed that the suspect had recently discarded a deadly weapon in a public place.[174]

LOCATE MISSING VICTIM: Officers questioned a kidnapping suspect concerning the whereabouts of his victim.[175]

SUSPECT INGESTED DRUGS: Having probable cause to believe that the suspect had just swallowed one or more rocks of cocaine, a deputy asked if he had, in fact, ingested drugs.[176]

HOSTAGE NEGOTIATIONS: A police negotiator spoke with a barricaded suspect who was holding a hostage.[177]

QUESTIONS REASONABLY NECESSARY: As noted, the public safety exception covers only those questions that were reasonably necessary to eliminate the threat.[178] As the Court of Appeal observed, the officer's inquiry "must be narrowly tailored to prevent potential harm."[179] For example, while officers could ask an arrestee if he was carrying a weapon or if he had any sharp objects in his possession, they could not ask "What's in your pocket?" or "Why are you carrying a gun?"[180]

The undercover agent exception

The third *Miranda* exception, the "undercover agent" exception, covers situations in which the suspect doesn't know that the person who is asking questions is an undercover officer or a police agent.[181] In these situations, *Miranda* does not apply because a suspect who is unaware he is speaking with an undercover officer or agent would not feel the type of coercion that *Miranda* was designed to alleviate.[182] Note, however, that questioning by an undercover agent may violate the Sixth Amendment right to counsel if the suspect had been arraigned on the crime under discussion.[183] POV

[172] See *People v. Cressy* (1996) 47 Cal.App.4th 981, 987; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1166.

[173] See *People v. Simpson* (1998) 65 Cal.App.4th 854, 862; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1051; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167; *U.S. v. Are* (7th Cir. 2009) 590 F.3d 499, 506.

[174] See *New York v. Quarles* (1984) 467 U.S. 649; *People v. Gilliard* (1987) 189 Cal.App.3d 285; *People v. Cole* (1985) 165 Cal.App.3d 41, 51-52; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1050-51; *U.S. v. Watters* (8th Cir. 2009) 572 F.3d 479, 482.

[175] See *People v. Davis* (2009) 46 Cal.4th 539, 592; *People v. Dean* (1974) 39 Cal.App.3d 875, 883; *People v. Coffman* (2004) 34 Cal.4th 1, 57; *People v. Riddle* (1978) 83 Cal.App.3d 563, 577; *People v. Panah* (2005)) 35 Cal.4th 395, 471.

[176] See *People v. Stevenson* (1996) 51 Cal.App.4th 1234; *People v. Jones* (1979) 96 Cal.App.3d 820, 827-28.

[177] See *People v. Mayfield* (1997) 14 Cal.4th 668, 734.

[178] See *New York v. Quarles* (1984) 467 U.S. 649, 658-59 ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 678.

[179] *People v. Cressy* (1996) 47 Cal.App.4th 981, 989.

[180] See *U.S. v. Johnson* (7th Cir. 2012) __ F.3d __ [2012 WL 1871608].

[181] See *Illinois v. Perkins* (1990) 496 U.S. 292, 296; *Arizona v. Mauro* (1987) 481 U.S. 520, 526; *People v. Gonzales* (2011) 52 Cal.4th 254, 284; *People v. Tate* (2010) 49 Cal.4th 635, 686; *People v. Miranda* (1987) 44 Cal.3d 57, 86; *People v. Davis* (2005) 36 Cal.4th 510, 555; *People v. Thornton* (2007) 41 Cal.4th 391, 433; *People v. Guilmette* (1991) 1 Cal.App.4th 1534; *People v. Plyler* (1993) 18 Cal.App.4th 535, 544-45; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194-95; *People v. Leonard* (2007) 40 Cal.4th 1370, 1402; *U.S. v. Hernandez-Mendoza* (8th Cir. 2010) 600 F.3d 981, 977 [recorded conversation between two arrestees in patrol car]; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 87 [statement to EMT].

[182] See *Illinois v. Perkins* (1990) 496 U.S. 292, 296.

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