

# Post-Invocation Questioning

[A] permanent immunity from further interrogation [after an invocation] would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.<sup>1</sup>

We all know that officers are not permitted to question suspects who have invoked their *Miranda* rights.<sup>2</sup> But we also know that it would be madness if this prohibition lasted forever. Thus, the Seventh Circuit pointed out that, unlike the “Energizer Bunny,” a *Miranda* invocation does not keep “going, and going, and going.”<sup>3</sup>

So, then, what’s the life span of an invocation? As we will explain in this article, it depends on whether the questioning was initiated by officers or the suspect. If it was the suspect, they may question him immediately if certain circumstances existed. But if the questioning was initiated by the officers, some time must pass, and the amount of time will depend on whether the suspect invoked the right to remain silent or the right to counsel.

It should be noted that post-invocation questioning is also permitted if the questions were reasonably necessary to reduce or eliminate a serious threat to life or property (i.e., the public safety exception), or if the person who asked the questions was an undercover officer or police agent (i.e., the undercover agent exception). We covered both of these subjects in the Fall 2012 *Point of View* in the article “*Miranda*: When Compliance Is Compulsory.”

Two other things. First, *Miranda* invocations are not offense-specific. This means that if a suspect

invoked, officers may not seek to question him about the crime for which he invoked or any other crime except under the circumstances discussed in this article.<sup>4</sup>

Second, the legality of post-invocation questioning was a hot topic a few years ago when the courts became aware that some law enforcement agencies and *Miranda* instructors were encouraging officers to deliberately ignore unambiguous invocations and continue questioning suspects to obtain leads or statements that could be used for impeachment. Known by the euphemism “outside *Miranda*,” this tactic was uniformly condemned by the courts and is apparently no longer being taught or practiced.<sup>5</sup>

## Invoked the Right to Remain Silent The “Scrupulously Honored” Test

If the suspect invoked only the right to remain silent, or if he just refused to waive his rights,<sup>6</sup> officers may seek to question him if they had “scrupulously honored” the invocation. This rule came from the Supreme Court’s decision in *Michigan v. Mosley*,<sup>7</sup> and it has been quite useful because suspects who have had some time to consider their predicament will often change their minds about talking to officers. The rule is also helpful because, if the suspect decides to speak with them, they may question him about the crime for which he invoked or any other crime.<sup>8</sup>

The question, then, is what must officers do to “scrupulously honor” an invocation? The cases indicate there are five requirements:

<sup>1</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 102.

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 474.

<sup>3</sup> *U.S. v. LaGrone* (7th Cir. 1994) 43 F.3d 332, 338.

<sup>4</sup> See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177; *Arizona v. Roberson* (1988) 486 U.S. 675.

<sup>5</sup> See *People v. Neal* (2003) 31 Cal.4th 63, 82; *People v. Jablonski* (2006) 37 Cal.4th 775, 816; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628 [“This is a very troubling case, presenting a deliberate violation of *Miranda*]; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602 [“When the police deliberately step over the line and disobey Supreme Court pronouncements, respect for the rule of law necessarily diminishes.”]; *California Attorneys for Criminal Justice v. Butts* (9th Cir. 1999) 195 F.3d 1039; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1237; *Garvin v. Farmon* (9th Cir. 2001) 258 F.3d 951, 954-55.

<sup>6</sup> See *People v. Lisper* (1992) 4 Cal.App.4th 1317, 1322.

<sup>7</sup> (1975) 423 U.S. 96.

<sup>8</sup> See *Michigan v. Mosley* (1975) 423 U.S. 96 [different crime]; *People v. Martinez* (2010) 47 Cal.4th 911, 950 [“different crime”]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 [“an identity of subject matter in the first and second interrogations is not sufficient to render the second interrogation unconstitutional”]; *People v. Lisper* (1992) 4 Cal.App.4th 1317, 1324 [different crime].

- (1) **Interrogation terminated:** When the suspect invoked, the officers must have immediately terminated the interview.
- (2) **No pressure:** After they stopped the interview, the officers must not have pressured or otherwise coaxed the suspect into changing his mind about invoking.
- (3) **Time lapse:** The officers must have waited a “significant period of time” before recontacting the suspect.
- (4) **No pressure:** When they recontacted him, the officers must not have started by questioning him or encouraging him to talk. Instead, they must have simply asked if he had changed his mind about invoking. As the Ninth Circuit observed, there is a “critical distinction” between interrogation and merely asking whether the suspect “has changed his mind.”<sup>9</sup>
- (5) **Miranda waiver:** If the suspect said he was willing to speak with officers, they must obtain a *Miranda* waiver before questioning him.<sup>10</sup>

### Interrogation immediately terminated

The first requirement is that officers must have stopped interrogating the suspect when he invoked. In other words, they must have respected his decision to invoke. This does not mean, of course, that they may not thereafter communicate with him. Instead, they must not have said anything that was reasonably likely to elicit an incriminating response.<sup>11</sup> For example, in ruling that this requirement was satisfied, the courts have noted the following:

- [The officer] immediately ceased the interrogation.<sup>12</sup>
- [Q]uestioning ceased once Riva told [the officer] “I don’t want to say anything else right now.”<sup>13</sup>
- [The invocation] was respected by the original arresting officers, and all interrogation ceased.<sup>14</sup>
- [T]he agents here cut off the first round of questioning as soon as Hsu expressed a desire not to speak.<sup>15</sup>

In contrast, in *United States v. Rambo*<sup>16</sup> the defendant invoked his right to remain silent while he was being questioned about a series of robberies. At that point an officer said to him, “If you think back over the last two months since you’ve been out of prison, all the shit you’ve been involved in. Think about the towns that are going to want to talk to you, OK?” Rambo then waived his rights and confessed. The Tenth Circuit ruled, however, that the confession should have been suppressed because the officer had not scrupulously honored his invocation. Said the court:

When Rambo stated that he did not want to discuss the robberies, [the officer] made no move to end the encounter. Instead he acknowledged Rambo’s request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo’s present request to terminate discussion of the topic, he would be questioned further.

<sup>9</sup> *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 665. ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412 [“Agent Hill exerted no pressure upon Hsu whatsoever. He merely read Hsu his rights a second time”].

<sup>10</sup> See *Michigan v. Mosley* (1975) 423 U.S. 96, 102 [“He was given full and complete *Miranda* warnings at the outset of his second interrogation.”]; *People v. Mickey* (1991) 54 Cal.3d 612, 652; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 [“the provision of a fresh set of *Miranda* rights” is the “most important factor”]. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 950 [reminder was sufficient].

<sup>11</sup> See *People v. Dement* (2011) 53 Cal.4th 1, 26-27; *People v. Roldan* (2005) 35 Cal.4th 646, 735 [“statements volunteered when not in response to an interrogation are admissible against a defendant even after an initial assertion of the right to remain silent”]; *People v. Clark* (1993) 5 Cal.4th 950, 985 [“The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.”].

<sup>12</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 104.

<sup>13</sup> *People v. Riva* (2004) 112 Cal.App.4th 981, 994.

<sup>14</sup> *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324.

<sup>15</sup> *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412.

<sup>16</sup> (10th Cir. 2004) 365 F.3d 906. ALSO SEE *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664 [“Lopez-Diaz said that he did not want to talk about the drugs in the van but [after a short conversation] he was asked about the drugs in the van.”].

## No pressure

After terminating the interview, officers must not pressure the suspect to reconsider his decision to invoke or otherwise attempt “to undermine the suspect’s resolve” to invoke.<sup>17</sup> Such pressure can be blatant or subtle.

**PRODDING:** Officers may neither urge the suspect to change his mind about invoking, nor say something that was reasonably likely to incite him to do so. Thus, in *Mosley* the Supreme Court ruled that Detroit police officers had scrupulously honored the defendant’s invocation because they “did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position”<sup>18</sup>

On the other hand, in ruling that officers failed to scrupulously honor a suspect’s invocation, the courts have noted the following:

- The officers “repeatedly spoke to [the suspect] for the purpose of changing his mind.”<sup>19</sup>
- The officer’s command to “tell the truth” after the invocation was “the antithesis of scrupulously honoring” his invocation.<sup>20</sup>
- The officer “confronted appellant with a description of federal prison.”<sup>21</sup>
- The officer confronted the defendant “with a discrepancy in his story.”<sup>22</sup>

Similarly, in *People v. Davis*<sup>23</sup> the defendant was arrested for murdering two people who had been shot 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 exchange occurred:

DETECTIVE: Remember that Uzi?

DAVIS: Yeah.

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

Although the issue in the case was not whether the detective had scrupulously honored Davis’s invocation, it was apparent that the court thought that the detective’s remark constituted prodding. As it pointed out, when the detective said, “Think about that little fingerprint on [the Uzi],” he implied that the defendant’s fingerprint had been found on the weapon and “thus indirectly accused defendant of personally shooting the victims.” This comment, said the court, “was likely to elicit an incriminating response and thus was the functional equivalent of interrogation.”

**WHY ARE YOU INVOKING?** Nor may officers ask the suspect to explain why he was invoking or why he was refusing to talk with them. As the Second Circuit observed, an officer “never needs to know why a suspect wants to remain silent.”<sup>24</sup>

For example, in *People v. Harris*<sup>25</sup> the court ruled that the defendant’s confession to a murder was obtained in violation of *Miranda* because, after he invoked the right to remain silent, the officer said “I thought you were going to come back and straighten it out.” This comment, said the court, was “a prodding invitation to further discussion about the incident.” Similarly, in *People v. Peracchi* the court suppressed a statement because the officer responded to an invocation by asking, “And you’re saying the reason is because [. . . ?]” Said the court, “[T]he officer here had no reason to question Peracchi about his motivation for remaining silent.”<sup>26</sup>

**DISCLOSING EVIDENCE:** Although there is not much law on the subject, there is some authority for the proposition that officers will not be deemed to have pressured the suspect if they briefly, factually, and dispassionately informed him about the evidence of his guilt. For example, in the Ninth Circuit’s case of *U.S. v. Davis*<sup>27</sup> the defendant invoked his right to remain silent after he was arrested for bank robbery.

<sup>17</sup> *U.S. v. Montgomery* (7th Cir. 2009) 555 F.3d 623, 634.

<sup>18</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 104.

<sup>19</sup> *U.S. v. Barone* (1st Cir. 1992) 968 F.2d 1378, 1384.

<sup>20</sup> *U.S. v. Tyler* (3rd Cir. 1998) 164 F.3d 150, 155.

<sup>21</sup> *U.S. v. Olof* (9th Cir. 1975) 527 F.2d 752, 753.

<sup>22</sup> *People v. Boyer* (1989) 48 Cal.3d 247, 274.

<sup>23</sup> (2005) 36 Cal.4th 510.

<sup>24</sup> *Anderson v. Smith* (2nd Cir. 1984) 751 F.2d 96, 105.

<sup>25</sup> (1989) 211 Cal.App.3d 640. BUT ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410 [“Our reading of *Mosley* is not so wooden. Far from laying down inflexible constraints on police questioning and individual choice, *Mosley* envisioned an inquiry into all the relevant facts to determine whether the suspect’s rights had been respected.”].

<sup>26</sup> (2001) 86 Cal.App.4th 353, 363.

<sup>27</sup> (9th Cir. 1976) 527 F.2d 1110.

An FBI agent then handed him a surveillance photo that plainly showed Davis robbing the bank. As Davis studied the photograph of himself, the agent asked, "Are you sure you don't want to reconsider?" He responded, "Well, I guess you've got me." He then waived his rights and confessed. Citing *Mosley*, the Ninth Circuit ruled that the agent's act of showing Davis the photograph did not constitute prodding or interrogation because "the agent merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture." In a subsequent case, the court pointed out that the "central" issue in *Davis* was the "key distinction between questioning the suspect and presenting the evidence available against him."<sup>28</sup> Apart from *Davis*, however, we are unaware of any case in which this issue has been addressed.

### Time lapse

The final requirement is that officers must wait a "significant" period of time before they recontact the suspect to see if he had changed his mind. What is "significant"? Obviously, a mere technical break will not suffice. As the Court noted in *Mosley*, "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda*."<sup>29</sup> The Court did rule, however, that a break lasting "more than two hours" was sufficiently "significant."<sup>30</sup> Meanwhile, in *U.S. v. Hue* the Ninth Circuit observed that a time lapse of only 30 minutes "might ordinarily incline us toward a conclusion that [the] right to cut off questioning was not respected."<sup>31</sup> So, to be on the safe side, officers should probably wait at least two hours.

## Invoked the Right to Counsel The 14-Day Waiting Requirement

The rules on recontacting a suspect who invoked the right to counsel are more restrictive than those that apply when he invoked the right to remain silent or if he simply refused to waive his rights. This is because the courts presume that a suspect who invoked the right to counsel feels incapable of dealing with the pressures of police questioning without consulting an attorney.<sup>32</sup> And such incapacity applies to the crime that was under discussion when he invoked and any other crimes.<sup>33</sup>

This does not mean that officers may never recontact a suspect to see if he has changed his mind and is now willing to talk with them without an attorney. Instead, it means that it's a little more involved than simply "scrupulously honoring" the invocation. Specifically, the Supreme Court in *Maryland v. Shatzer*<sup>34</sup> ruled that officers must ordinarily wait for 14 days before recontacting the suspect, and that the waiting period begins at different times depending on whether the suspect was released from custody or whether he remained in custody and was segregated from the general inmate population.

### Arrestee released from custody

**RELEASE ON BAIL, O.R.:** If the suspect posted bail or was released on his own recognizance after he invoked, officers may recontact him if they wait at least 14 days from the time he was released. Although it might seem odd that officers would need to wait to interview someone who was not in police custody, the Supreme Court in *Shatzer* made it clear that a

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<sup>28</sup> *U.S. v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 366. ALSO SEE *U.S. v. Montgomery* (7th Cir. 2009) 555 F.3d 623, 634 [outlining the evidence against the suspect was a "misstep . . . but was not by itself a violation of *Mosley*"]; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 ["[O]bjective, undistorted presentations by police of the evidence against the suspect are less constitutionally suspect than is continuous questioning."]. COMPARE *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1533 ["[T]he single statement in *Davis* is in sharp contrast with the repeated recitation of incriminating circumstances to which Smith was exposed"].

<sup>29</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 102.

<sup>30</sup> *Michigan v. Mosley* (1975) 423 U.S. 96, 104. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 950 ["overnight"]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 ["overnight"]; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324 ["a few days"]; *Sessoms v. Runnels* (9th Cir. 2011) 650 F.3d 1276, 1291 [five days].

<sup>31</sup> (9th Cir. 1988) 852 F.2d 407, 412.

<sup>32</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 681.

<sup>33</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 683; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177 ["Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."].

<sup>34</sup> (2010) \_\_ U.S. \_\_ [130 S.Ct. 1213].

release from custody will not, in and of itself, suffice; i.e., a certain amount of time must pass.<sup>35</sup>

**OUTRIGHT RELEASE:** If the suspect was released for lack of evidence pursuant to Penal Code section 849(b), it seems likely that officers need not wait an entire 14 days before recontacting him. But the Court in *Shatzer* did not address this issue.

### Time-servers

Officers will sometimes seek to question a jail or prison time-server about a crime that occurred before or during his incarceration. If the suspect invoked his right to counsel when officers initially attempted to interview him, they may recontact him as follows:

**RETURNED TO GENERAL POPULATION:** If the suspect returned to the general inmate population after he invoked, the 14-day waiting period begins on the date he invoked.<sup>36</sup> For example, in *Shatzer* officers received a report that the defendant had sexually abused his 3-year old son. They also learned that he was currently serving time in a Maryland state prison for sexually abusing another child. So an officer went to the prison to interview him about the new allegation but *Shatzer* invoked his right to counsel.

The investigation then stalled but, about two years later, officers obtained additional incriminating information and returned to the prison to see if *Shatzer* might now be willing to speak with them without an attorney. He said yes, waived his rights, and made admissions which were used against him at trial. He was convicted. In applying its new 14-day waiting requirement, the Supreme Court ruled that, because *Shatzer*'s return to the general prison population had lasted more than 14 days, the officers did not violate *Miranda* when they sought to question him.

**SUSPECT SEGREGATED:** For various reasons, some inmates must be segregated from the general inmate

population. The question arises: May officers recontact them 14 days after they invoked the right to counsel? Or are they absolutely immune from police-initiated interrogation? Although we are unaware of any case that has addressed this issue, the logic behind *Shatzer* would indicate that recontact would not be prohibited if (1) the inmate had been in administrative segregation for a sufficient amount of time that segregation had become his "normal" or "familiar" environment; and (2) despite being segregated, he could make phone calls to his attorney or others. This issue was not, however, addressed in *Shatzer*.

### Unsentenced detainees

In most cases, the suspect will be an unsentenced detainee, meaning that he is temporarily incarcerated in a city or county jail where he is awaiting trial, sentencing, or a charging decision by prosecutors. Unfortunately, *Shatzer* contained conflicting language as to whether detainees may be recontacted.

On the one hand, it distinguished sentenced prisoners (who are supposedly living "normal" lives) from unsentenced detainees (who presumably are not). In addition, it said that unsentenced detainees are more susceptible to police coercion because they are being "held in uninterrupted pretrial custody" while the crime for which they were incarcerated is "being actively investigated."

Still, there is reason to believe that officers may recontact unsentenced detainees after 14 days if they had been incarcerated for so long that they had become accustomed to the jail environment. After all, many inmates who are awaiting trial or sentencing have been living in jail for years or at least many months and, thus, may view their environment as "normal" in the sense that it is not "unfamiliar."

<sup>35</sup> (2010) \_\_ U.S. \_\_ [130 S.Ct. 1213] ["[When] a suspect has been released from his pretrial custody *and* has returned to his normal life *for some time* before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced." At p. 1221 [Emphasis added]; "The only logical endpoint of *Edwards* disability is termination of *Miranda* custody *and* any of its lingering effects." At p. 1222 [Emphasis added]; "[W]hen a suspect who initially requested counsel is reinterrogated after a break in custody *that is of sufficient duration* to dissipate its coercive effects . . ." At p. 1222 [Emphasis added]; the 14-day wait "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." At p. 1223. **ALSO SEE** *U.S. v. Guzman* (1st Cir. 2010) 603 F.3d 99, 106 ["In this case, Guzman was released on bail for about four months between the time that he originally invoked his right to counsel and the ATF agents' subsequent attempt to question him. This far exceeds the time period required by *Shatzer* and thus its break-in-custody exception to *Edwards* applies."].

<sup>36</sup> *Maryland v. Shatzer* (2010) \_\_ U.S. \_\_ [130 S.Ct. 1213, 1224].

It should also be noted that, unlike police interview rooms, jail facilities are hardly designed to (in *Shatzer* terminology) undermine the detainee's "will to resist and to compel him to speak." In addition, like state prison inmates, most jail inmates "live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone."

Moreover, unsentenced detainees are not "isolated with their accusers," and most of them are aware that, because their cases are in the hands of the courts, the investigators who are seeking to interview them have no authority to release them as a reward for making a statement.<sup>37</sup> As we said, however, this issue is currently unresolved.

## Suspect-Initiated Questioning

Regardless of whether the suspect invoked the right to remain silent or the right to counsel, officers may question him if he subsequently notified them that he had changed his mind and was now willing to talk to them without an attorney.<sup>38</sup> Furthermore, if the suspect initiated questioning about one crime, officers may question him about that crime and any other crime he is suspected of having committed unless he said otherwise.<sup>39</sup>

As we will now discuss there are three requirements that must be met before such questioning will be permitted: (1) the questioning must, in fact, have been initiated by the suspect; (2) the suspect's decision to initiate questioning must have been made freely; and (3) when the suspect initiated questioning, it must have reasonably appeared that he was willing to open up a general discussion about the crime. (There is, of course, a fourth requirement: officers must obtain a *Miranda* waiver before they question him.<sup>40</sup>)

### "Suspect-initiated"

Post-invocation contact typically occurs when the suspect phones officers from the jail and tells them he wants to talk to them, or when he passes the word along through a corrections officer, another inmate, or a relative. In any event, if officers confirmed with him that he does, in fact, want to talk with them, this requirement will be satisfied.

**OFFICER INVITES POST-INVOCATION TALK:** After a suspect invokes, officers do not violate *Miranda* by leaving a business card and explaining that, if he changes his mind, he should notify them.<sup>41</sup>

**SUSPECT INVITES POST-INVOCATION TALK:** If the suspect invoked but also said he might be willing to answer questions "later," officers may check with him later to see if he now wants to talk. For example, in *People v. Mickey*<sup>42</sup> a murder suspect who had just invoked the right to counsel told a Placer County sheriff's detective, "Curt, I would like to continue our conversation at a later time." About two days later, the detective went to the jail and asked Mickey if he was now willing to talk about the crime. He said yes, waived his rights, and made some incriminating statements which were used against him. On appeal, the court ruled that Mickey had effectively initiated further discussion when he told the detective that he would like to talk with him "at a later time."

### Suspect "freely" initiated

The second requirement is that the suspect's decision to initiate questioning must have been made freely, which simply means it must not have been the result of continued interrogation or badgering. As the California Supreme Court explained, the decision to talk with officers "cannot be a product of police interrogation, badgering, or overreaching, whether explicit or subtle, deliberate or unintentional."<sup>43</sup>

<sup>37</sup> QUOTES FROM *Maryland v. Shatzer* (2010) \_\_ U.S. \_\_ [130 S.Ct. 1213, 1219-25].

<sup>38</sup> See *Minnick v. Mississippi* (1990) 498 U.S. 146, 156; *People v. Davis* (2009) 46 Cal.4th 539, 596; *In re Frank C* (1982) 138 Cal.App.3d 708, 713.

<sup>39</sup> See *People v. Thomas* (2012) 54 Cal.4th 908, 927.

<sup>40</sup> See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044; *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1418; *People v. Waidla* (2000) 22 Cal.4th 690, 728.

<sup>41</sup> *People v. Sapp* (2003) 31 Cal.4th 240, 268.

<sup>42</sup> (1991) 54 Cal.3d 612, 652. ALSO SEE *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1235; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1010; *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737-38.

<sup>43</sup> *People v. Davis* (2009) 46 Cal.4th 539, 596. ALSO SEE *People v. Hayes* (1985) 169 Cal.App.3d 898, 909; *People v. McClary* (1977) 20 Cal.3d 218, 226.

For example, in *People v. Superior Court (Zolnay)*<sup>44</sup> a sheriff's deputy was questioning two burglary suspects when one of them invoked the right to counsel. The deputy then left the room for a while after telling them he believed they were guilty, that the investigation would continue, that they could make his job "easy or tough," and suggested that they "talk the matter over." When he returned about ten minutes later, the suspects said they had decided not to invoke after all, and then confessed. But the California Supreme Court ruled the confessions were inadmissible because, even if the suspects could be said to have initiated the questioning, it was not done freely in view of the deputy's assertion that the defendants could make his job "easy or tough" and asking whether they had reached a decision.

Similarly, the courts have ruled that a suspect did not "freely" initiate questioning when an officer told him that, if he refused to confess, the system was "going to stick it do you,"<sup>45</sup> or that he would be charged as a "principal" and would be "subject to the death penalty."<sup>46</sup>

### Intent to open "generalized" discussion

The final requirement—and the most troublesome—is that it must have been reasonably apparent that, when the suspect initiated questioning, he wanted to open up a general discussion about the crime, as opposed to merely discussing incidental or unrelated matters or "routine incidents of the custodial relationship."<sup>47</sup> As Justice Rehnquist observed in *Oregon v. Bradshaw*:

There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.<sup>48</sup>

The problem for officers is that suspects rarely make their intentions crystal clear. Although it is conceivable that a suspect would say something like "I have decided to open up a broad and unrestricted discussion of all facets of the crimes for which I was arrested," he is much more likely to say "Dude, I wanna talk to you," or "What's gonna happen now?" Fortunately, the courts have ruled that an intent to open up a general discussion may be based on either direct or circumstantial evidence.<sup>49</sup>

**DIRECT EVIDENCE OF INTENT:** The following are examples of inquiries that constituted direct evidence that the suspect wanted to open up a general discussion of the crime for which he was arrested:

**TALK ABOUT SUSPECT'S CASE:** The suspect said he wanted to talk about his case, or that he wanted to ask questions about his case, or that he decided to waive his rights.<sup>50</sup>

**SUSPECT WANTS ACCOMPLICE RELEASED:** The suspect told officers that he wanted to discuss getting his accomplice released or that he wanted to talk about getting his accomplice's charges reduced. The reason this demonstrates an intent to discuss the case in general is that the accomplice's liability will usually depend on both his and the suspect's roles in the crime.<sup>51</sup>

<sup>44</sup> (1975) 15 Cal.3d 729.

<sup>45</sup> *People v. Neal* (2003) 31 Cal.4th 63, 81, 84-85.

<sup>46</sup> *People v. McClary* (1977) 20 Cal.3d 218, 227.

<sup>47</sup> *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.

<sup>48</sup> (1983) 462 U.S. 1039, 1045.

<sup>49</sup> See *People v. Waidla* (2000) 22 Cal.4th 690, 727 [the suspect's comment may relate "directly or indirectly to the investigation"].

<sup>50</sup> See *People v. San Nicolas* (2004) 34 Cal.4th 614, 641; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1190; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573; *U.S. v. Palega* (8th Cir. 2009) 556 F.3d 709, 715; *Hennessey v. Bagley* (6th Cir. 2011) 644 F.3d 308.

<sup>51</sup> *People v. Thompson* (1990) 50 Cal.3d 134, 164 ["Defendant's request to talk about Lisa was not an innocuous request, comparable to asking for a drink of water. Lisa was under arrest as an accessory after the fact, and police willingness to release her depended on her noncomplicity in the crime. Defendant's request for Lisa's release might reasonably be met with a suggestion that defendant discuss the crime to show Lisa's noninvolvement."]; *People v. Gamache* (2010) 48 Cal.4th 347, 386 [Defendant, "without prompting, raised the subject of his wife's involvement in the case, assuring [the detective] that she did not know anyone was going to be killed. This statement can be fairly said to represent a desire on his part to open up a more generalized discussion"]; *People v. Morris* (1991) 53 Cal.3d 152, 200-201 [suspect said he would talk if officers would agree not to prosecute his friends, and the officers explained they could not make such a promise]. **NOTE:** In *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1418 the court ruled that the defendant's statement "Well I want to know if [my accomplice] is going to stay here how much time" pertained only to "routine incidents of the custodial relationship." But because the court neglected to analyze the issue, its opinion is questionable.

WHAT'S NEXT? A suspect may demonstrate an intent to discuss the crime if he subsequently asked what is going to happen next and did not indicate that he was only asking about certain technical matters. For example, in *Oregon v. Bradshaw* the U.S. Supreme Court ruled that a suspect had opened up a general discussion when, after being transferred to the county jail, he asked, "Well, what is going to happen to me now?"<sup>52</sup> In contrast, in *People v. Sims*<sup>53</sup> the California Supreme Court ruled that a suspect did not open up a general discussion when, immediately after invoking, he asked what was going to happen with regard to extradition. Said the court, "By his offhand question as to what was going to happen from this point on (coupled with a reference to extradition) . . . defendant did not open the door to interrogation after previously having invoked his *Miranda* rights."

**SUSPECT STARTS TALKING:** The suspect spontaneously started talking about his case.<sup>54</sup>

**TALK ABOUT A DEAL:** The suspect asked about obtaining a reduced sentence.<sup>55</sup>

**TALK ABOUT OTHER CASE:** The suspect told officers that she wanted to talk to them about a crime for which she had not yet been arrested.<sup>56</sup>

**QUESTION ABOUT EVIDENCE:** The suspect wanted to know about an item of evidence in the case.<sup>57</sup>

**SUSPECT OFFERS TO HELP:** After being extradited, a murder suspect, upon seeing an officer he recognized, asked "What can I do for you?" or "What do you want from me?"<sup>58</sup>

**CIRCUMSTANTIAL EVIDENCE OF INTENT:** A suspect's intent to open up a general discussion of the crime

will also be found if (1) he asked to speak with officers, and (2) he did not indicate he was only willing to speak about incidental or unrelated matters. Thus, in *People v. Mattson*,<sup>59</sup> the court ruled that a murder suspect who had invoked the right to counsel had opened up a general discussion because, just before a lineup, he told one of the investigators, "I'd like to talk to you." Said the court, "There was no indication in defendant's request to speak to [the officer] that defendant wished to discuss only routine matters related to his incarceration."

Similarly, in the high-profile case of *People v. Davis*<sup>60</sup> the defendant, Richard Allen Davis, had been arrested in 1993 for kidnapping and murdering 12-year old Polly Klass in Petaluma. While being questioned at the Mendocino County Jail, Davis invoked his right to counsel. A few days later, he told a corrections officer that he wanted to talk to a certain Petaluma investigator. The investigator phoned Davis who began by saying "I fucked up big time" and asked to be placed in protective custody. When the investigator asked if Polly was still alive, Davis said no. Later that day, the officer and an FBI agent obtained a *Miranda* waiver from Davis who gave them a videotaped statement and led them to Polly's body.

The officer's question as to whether Polly was still alive was, of course, admissible under *Miranda*'s "rescue" exception. As for recontacting Davis at the jail, the court ruled that he had effectively initiated the interview because his "comments during that telephone conversation with [the investigator] indicated a willingness to waive his previously asserted right to counsel and to make a statement." POV

<sup>52</sup> (1983) 462 U.S. 1039, 1045-46.

<sup>53</sup> (1993) 5 Cal.4th 405.

<sup>54</sup> *In re Frank C.* (1982) 138 Cal.App.3d 708, 713.

<sup>55</sup> *People v. Tully* (2012) 54 Cal.4th 952, 985 [after invoking, defendant "reinitiated the conversation when he told [the officer] he did not want to go to jail that night, after which [the officer] suggested defendant might 'work off' his offense by becoming an informant"].

<sup>56</sup> *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737-38 [suspect said she "needed to talk to somebody about a murder"].

<sup>57</sup> *People v. Mattson* (1990) 50 Cal.3d 826, 859-62 [suspect asked an officer what the police had done with the car he had used in several of his crimes]. ALSO SEE *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413 [suspect reinitiated when he said he wanted to tell officers about the car that was used in the commission of the crime under investigation].

<sup>58</sup> *People v. Waidla* (2000) 22 Cal.4th 690, 731 [Waidla's words "can fairly be said" to represent a desire to talk about his crimes].

<sup>59</sup> (1990) 50 Cal.3d 826, 861. ALSO SEE *People v. Thomas* (2012) 54 Cal.4th 908, 927 ["Even if the record in this case is read as establishing that defendant said only that he wanted to talk about the Flenbaugh crimes with the Hayward detective, it does not establish that he wanted to talk only about the Flenbaugh crimes"]; *People v. Ray* (1996) 13 Cal.4th 313, 334, 337 [suspect said he wanted to "clear up matters that were bothering him"]; *U.S. v. Oehne* (2nd Cir. 2012) 698 F.3d 119, 124 [after invoking, the suspect spontaneously discussed his case by telling an officer that he "was not a bad guy"].

<sup>60</sup> *People v. Davis* (2009) 46 Cal.4th 539, 597.