

# Miranda

## When warnings are required

*“In applying Miranda, one normally begins by asking whether custodial interrogation has taken place.”*<sup>1</sup>

Have you noticed that officers on television and in the movies are always *Mirandizing* somebody? They especially like to *Mirandize* suspects right after they arrest them, preferably while putting on the cuffs or while hauling them over to their patrol car. In the movie “Nighthawks” an officer (Sylvester Stallone) was shown *Mirandizing* a suspect while dragging him by the hair through a subway station.

All of this *Mirandizing* is, of course, just a theatrical device. It’s called melodrama. In real life, it’s called lousy police work.

The reason it’s bad practice is that officers are not required to *Mirandize* suspects whenever they arrest them or whenever they want to question them about a crime. Instead, the warnings are required only if, (1) the suspect is “in custody,” and (2) he is about to be “interrogated.” In the words of the California Supreme Court, “Absent ‘custodial interrogation,’ *Miranda* simply does not come into play.”<sup>2</sup> Or, as the Ninth Circuit put it, the *Miranda* warning “is not a judicially crafted civics lesson, to be recited whenever someone might find it useful to hear.”<sup>3</sup>

At first, it might seem that providing premature or gratuitous warnings is not a big deal. But sometimes it is. Consider this: A *Mirandized* suspect will naturally be more guarded and less forthcoming than a suspect who is simply conversing with officers. After all, that ominous warning—“*Anything you say may be used against you in court*”—was not designed to make suspects comfy and chatty.<sup>4</sup> Moreover, the suspect may invoke which may prevent investigators from questioning him later.

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<sup>1</sup> *People v. Mayfield* (1997) 14 Cal.4th 668, 732.

<sup>2</sup> *People v. Mickey* (1991) 54 Cal.3d 612, 648. ALSO 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.”]; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 [“It is settled that the *Miranda* advisements are required only when a person is subjected to ‘custodial interrogation.’”]; *Jackson v. Giurbino* (9th Cir. 2004) 364 F.3d 1002, 1008 [“*Miranda* rights vest in the context of custodial interrogations.”].

<sup>3</sup> *U.S. v. Kilgroe* (9th Cir. 1992) 959 F.2d 802, 805.

<sup>4</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436, 504 [dis. opn. of Harlan, J.] [“the thrust of the new rules is . . . ultimately to discourage any confession at all.”]; *New York v. Quarles* (1984) 467 U.S. 649, 657 [“A *Mirandized* suspect] might well be deterred from responding.”]; *People v. Manis* (1969) 268 Cal.App.2d 653, 668 [*Miranda* warnings tend to “formalize” the situation and “unnecessarily inhibit the police from carrying out their traditional function of investigating crime.”].

Why, then, do officers over-*Mirandize*? There are mainly two reasons. First, although the Court in *Miranda* ruled that waivers are not required when the suspect is out of custody, it indicated elsewhere in its opinion that *Miranda* applies whenever a suspect becomes the “focus” of an investigation.<sup>5</sup> In subsequent decisions, the Court expressly repudiated “focus” as a relevant circumstance but, for some reason, the “focus” factor demonstrated a vampiric persistence. In fact, it had become so entrenched that it was being cited as a relevant circumstance more than 18 years after the Court first instructed officers and judges to disregard it.<sup>6</sup>

Second, the terms “custody” and “interrogation” have been given confusing definitions by the courts. For example, an unarrested suspect who is questioned in the comfort of his own home might be “in custody” for *Miranda* purposes, while a suspect who is questioned in his prison cell or in a police interview room might not.

None of this should be interpreted to mean that *Miranda* is unknowable or even difficult. On the contrary, after almost 40 years of appellate court decisions interpreting it—and because of several U.S. Supreme Court decisions that have simplified or clarified many issues<sup>7</sup>—the law has reached a point of relative stability and clarity. As we hope to demonstrate in this article, it is now possible for officers to determine with confidence when *Miranda* warnings are required and, just as importantly, when they are not.

## **“IN CUSTODY”**

### **The functional equivalent of a formal arrest**

Unless a suspect is “in custody,” there is no need to *Mirandize* him. As the Court of Appeal observed, “Custody has become the critical element which triggers the necessity for warning.”<sup>8</sup> Or, in the words of the United States Supreme Court, “An officer’s obligation to administer *Miranda* warnings attaches only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’”<sup>9</sup>

There are two ways in which “custody” can occur. First, it happens automatically when a suspect is told he is under arrest.<sup>10</sup> (Note that an arrested suspect is “in custody” even if officers want to talk to him about a crime for which he has not been arrested. For example, if the suspect had been arrested for robbery, officers would need a waiver before questioning him about an unrelated murder.<sup>11</sup>)

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<sup>5</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 444, fn.4 [“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” [Footnote 4] “This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.”].

<sup>6</sup> See *California v. Stansbury* (1994) 511 U.S. 318.

<sup>7</sup> See *Dickerson v. United States* (2000) 530 U.S. 428, 443 [“If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement”].

<sup>8</sup> *People v. Manis* (1969) 268 Cal.App.2d 653, 667.

<sup>9</sup> *Stansbury v. California* (1994) 511 U.S. 318, 322.

<sup>10</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 434 [“There can be no question that respondent was ‘in custody’ at least as of the moment he was formally placed under arrest”]; *California v. Beheler* (1983) 463 U.S. 1121, 1125 [“formal arrest” results in “custody”]; *People v. Boyer* (1989) 48 Cal.3d 247, 271 [“formal arrest” results in “custody”]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 227 [“We ordinarily associate the concept of being ‘in custody’ with the notion that one has been formally arrested.”].

<sup>11</sup> See *Mathis v. United States* (1968) 391 U.S. 1, 4-5 [“We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.”]; *Arizona v. Roberson* (1988) 486 U.S. 675, 684

The second type of custody is not so easy to recognize and will, therefore, require some discussion. In a nutshell, it occurs whenever officers confront an unarrested suspect under circumstances that were so coercive or intimidating as to constitute the functional equivalent of a formal arrest; i.e., a de facto arrest.<sup>12</sup>

What is a “functional” arrest? It’s an encounter in which the surrounding circumstances would have indicated to the suspect that he had been arrested or that his freedom of movement had been restrained to the degree associated with a formal arrest.<sup>13</sup> To put it another way, it occurs if the suspect reasonably believed he could not simply terminate the interview and leave.<sup>14</sup>

To determine whether a functional arrest occurred, the courts apply the so-called “reasonable person” test.

#### The “reasonable person” test

Whether an unarrested suspect is in custody depends on how the surrounding circumstances would have appeared to a reasonable person—a reasonable “innocent” person<sup>15</sup>—in the suspect’s position.<sup>16</sup> It is therefore immaterial that the suspect thought he was under arrest or that the officers would have allowed him to leave.<sup>17</sup> As the Court of

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[“[T]here is no reason to assume that a suspect's state of mind is in any way investigation-specific”]; *People v. Underwood* (1986) 181 Cal.App.3d 1223, 1231 [“[I]t is immaterial that the questioning relates to a crime other than the one which triggered the custody”].

<sup>12</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 442; *People v. Taylor* (1986) 178 Cal.App.3d 217, 228 [“[T]he phrase ‘in custody,’ as used in the context of *Miranda*, is not synonymous with ‘custodial arrest’ but is rather 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.”].

<sup>13</sup> See *California v. Beheler* (1983) 463 U.S. 1121, 1125 [“[T]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”]; *Stansbury v. California* (1994) 511 U.S. 318, 322-3; *Berkemer v. McCarty* (1984) 468 U.S. 420, 440 [“It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest.”]; *Minnesota v. Murphy* (1984) 465 U.S. 420, 430; *People v. Boyer* (1989) 48 Cal.3d 247, 271 [“‘Custody’ means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”]; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 [“‘Custodial’ means any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.

<sup>14</sup> See *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [“. . . would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”]

<sup>15</sup> See *Florida v. Royer* (1983) 460 U.S. 491, 519, fn. 4 [“[T]he potential intrusiveness of the officers’ conduct must be judged from the viewpoint of an innocent person in Royer’s position.”]; *Florida v. Bostick* (1991) 501 U.S. 429, 437 [“[T]he ‘reasonable person’ test presupposes an innocent person.”].

<sup>16</sup> See *People v. Stansbury* (1995) 9 Cal.4th 824, 830 [the issue is “whether a reasonable person in the defendant’s position would have felt he or she was in custody.”]; *People v. Boyer* (1989) 48 Cal.3d 247, 272 [“Where no formal arrest takes place, the relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, \_\_\_ [“[C]ustody must be determined based on how a reasonable person in the suspect’s position would perceive his circumstances.”].

<sup>17</sup> See *People v. Herdan* (1974) 42 Cal.App.3d 300, 306 [“The subjective intent of the interrogator to arrest the suspect is not, in itself, a sufficient basis upon which to conclude that custody exists.”]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 605 [officers’ state of mind is irrelevant]; *People v. Brown* (1972) 26 Cal.App.3d 825, 847 [“Officer Hambley did regard him as a material

Appeal explained, “The test for custody does not depend on the subjective view of the interrogating officer or the person being questioned. The only relevant inquiry is how a reasonable man in the suspect’s shoes would have understood the situation.”<sup>18</sup>

**“FOCUS” OF THE INVESTIGATION:** As noted earlier, it is irrelevant that the suspect had become the “focus” of the officers’ investigation. This is because focus is an assessment that exists only in the minds of the investigating officers. And unless they somehow communicate this judgment to the suspect, it cannot possibly affect his belief that he is not free to go. In the words of the United States Supreme Court:

Our cases make clear, in no uncertain terms, that any 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*.<sup>19</sup>

For example, in *Beckwith v. United States*<sup>20</sup> the IRS had reason to believe that Beckwith filed false income tax returns. In the course of the investigation, two IRS agents went to Beckwith’s home to interview him. During the interview, he made some statements that were used against him at trial. On appeal to the U.S. Supreme Court, he argued that his statements were obtained in violation of *Miranda*, claiming that a person who is the “focus” of a criminal investigation should be deemed “in custody.” The Court disagreed, pointing out that the sole concern of *Miranda* was “the compulsive aspect of custodial interrogation, and not the strength or content of the government’s suspicions at the time the questioning was conducted.”

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witness and would have been unwilling to allow defendant to leave, but there is no evidence that defendant knew this.”]; *People v. Carpenter* (1997) 15 Cal.4<sup>th</sup> 312, 384 [officers’ undisclosed suspicions “do not establish custody.”]; *People v. Celaya* (1987) 191 Cal.App.3d 665, 671 [“Since custody is an objective condition, the subjective intent of the interrogator to arrest the suspect is not, in itself, a sufficient basis upon which to conclude that custody exists.”]; *U.S. v. Kilgroe* (9<sup>th</sup> Cir. 1992) 959 F.2d 802, 805 [“The *internal* knowledge of a government agent that a witness may have been involved in criminal activity generates no *external* coercion on the witness.”]; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) \_\_ F.3d \_\_.

<sup>18</sup> *People v. Mosley* (1999) 73 Cal.App.4<sup>th</sup> 1081, 1089. ALSO SEE *Stansbury v. California* (1994) 511 U.S. 318, 323 [“[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated.”]; *Thompson v. Keohane* (1995) 516 U.S. 99, 112 [“the court must apply an objective test”]; *People v. Breault* (1990) 223 Cal.App.3d 125, 134.

<sup>19</sup> *Stansbury v. California* (1994) 511 U.S. 318, 326. ALSO SEE *Minnesota v. Murphy* (1984) 465 U.S. 420, 431 [“The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings.”]; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [“Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect.”]; *California v. Beheler* (1983) 463 U.S. 1121, 1125; *People v. Stansbury* (1995) 9 Cal.4<sup>th</sup> 824, 830 [“[T]he uncommunicated subjective impressions of the police regarding defendant’s custodial status [are] irrelevant.”]; *People v. Vasquez* (1993) 14 Cal.App.4<sup>th</sup> 1158, 1163-4 [“[B]eing the focus of official investigation is irrelevant to custody unless it is somehow communicated to the defendant.”]; *In re Joseph R.* (1998) 65 Cal.App.4<sup>th</sup> 954, 959, fn. 8 [“[T]he United States Supreme Court has gone to great lengths in the last quarter century to make it clear that an officer’s focus of suspicion, like any other uncommunicated subjective concern entertained by a peace officer, has *nothing* to do with *Miranda* custody.”]; *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 952 [“To the extent the law enforcement officer’s information and beliefs remained unarticulated throughout the interview, they have no bearing on the question of whether the suspect was in custody.”].

<sup>20</sup> (1976) 425 U.S. 341.

**PROBABLE CAUSE TO ARREST:** What if officers have probable cause to arrest the suspect? Does this mean he is “in custody?” No. Like focus, the existence of probable cause is irrelevant so long as officers do not somehow notify the suspect that they think they have it. In fact, it doesn’t even matter that the officers had already decided to arrest the suspect at the conclusion of the interview.

For example, in *Berkemer v. McCarty*<sup>21</sup> a motorist who was stopped for DUI contended he was in custody from the moment he stumbled from his car because the arresting officer testified that, at that point, he knew the driver was drunk and that he’d be arrested. The Supreme Court ruled, however, that the officer’s state of mind was irrelevant because he “never communicated his intention to respondent.”

Similarly, in *People v. Blouin*<sup>22</sup> an officer who had probable cause to arrest the defendant for possession of a stolen car went to his house and asked him some questions about how he had obtained it. Blouin responded by making some incriminating statements that were used against him. On appeal, Blouin argued that he was in custody because the officer had probable cause to arrest him. It didn’t matter, said the court, because “[t]he officer’s intent to detain or arrest, if such did in fact exist, had not been communicated to defendant.”

#### Objective circumstances

Because the existence of “custody” depends solely on the objective circumstances surrounding the interview, the courts are interested only in what the suspect actually saw or heard. Most of the following circumstances are considered highly relevant and are commonly cited.

**HANDCUFFS:** A suspect who was handcuffed or who was otherwise physically restrained is almost always in custody because restraint is so closely associated with arrest. This subject is discussed more fully in the section “Questioning detainees” (“Handcuffs”), below.

**DRAWN GUN:** A suspect is plainly in custody if he was detained at gunpoint. See “Questioning detainees” (“Drawn weapons”), below.

**“FREE TO GO”:** Telling a suspect he is free to leave or that he is not under arrest is a strong indication he was not in custody. See “Questioning at police stations” (“Free to go”), below.

**MANNER OF QUESTIONING:** The manner in which officers questioned the suspect is often an important circumstance. See “Questioning at police stations” (“Accusatory interviews” and “Investigatory interviews”), below.

**NUMBER OF OFFICERS:** The number of officers who were present when the suspect was questioned may be important, especially the number of officers who actually questioned or confronted the suspect. See “Questioning detainees” (“Number of officers”), below.

**LENGTH OF QUESTIONING:** Sometimes noted but seldom a significant factor in the absence of other coercive circumstances. See “Questioning at police stations” (“Length of questioning”), below.

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<sup>21</sup> (1984) 468 U.S. 420, 436, fn. 22.

<sup>22</sup> (1978) 80 Cal.App.3d 269.

**MIRANDA WARNING:** Because *Miranda* warnings are closely associated with formal arrests, the fact that officers *Mirandized* the suspect is an indication he might have been in custody.<sup>23</sup>

**WHERE THE QUESTIONING OCCURRED:** As we will now discuss, the location in which the suspect was questioned is an important circumstance because some places are inherently coercive (police stations), some are neutral (public places), and some may actually reduce or eliminate any coerciveness (suspect's home or workplace).

#### Questioning at police stations

Most suspects who are questioned in the confines of a law enforcement building are under arrest and are therefore automatically in custody. But many unarrested suspects who are questioned in such places are also in custody. This is because police stations are naturally intimidating places to people who are there to discuss their possible involvement in a crime. This is especially true if the discussion occurs in the “inherently coercive environment” of a police interview room<sup>24</sup> in which the suspect is “cut off from the outside world.”<sup>25</sup>

There are, however, certain circumstances that can reduce the effect of these coercive circumstances to the point where a *Miranda* waiver will not be required. As the Court of Appeal explained, “While questioning at a police station by a police officer may be viewed as presumptively coercive, such interviews may not constitute custodial interrogation where the objective indicia of restraint or compulsion are lacking.”<sup>26</sup>

As a practical matter, there are three circumstances that must ordinarily exist for stationhouse questioning to be deemed noncustodial: (1) the suspect must have voluntarily agreed to come to the station; (2) he must have been told he was free to leave; and (3) a reasonable person in the suspect's position would have believed that, as the interview progressed, he continued to be free to leave.

**VOLUNTARY APPEARANCE:** The suspect's appearance at the police station must have been voluntary.<sup>27</sup> It doesn't matter whether he drove in with officers or came in on his

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<sup>23</sup> See *People v. Boyer* (1989) 48 Cal.3d 247, 272 [“[T]he police read defendant his *Miranda* rights at the station, a strong indication that they themselves considered the interrogation ‘custodial.’”]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1115 [“no *Miranda* warnings were given since defendant was not considered a suspect”]. **NOTE:** *Boyer* and *Holloway* were overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.

<sup>24</sup> See *People v. Celaya* (1987) 191 Cal.App.3d 665, 672.

<sup>25</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436, 445; *People v. Lopez* (1985) 163 Cal.App.3d 602,605 [“*Miranda* presented the clearest example of custody, namely the official isolation of a criminal suspect in a police station”].

<sup>26</sup> *People v. Mazza* (1985) 175 Cal.App.3d 836, 841. ALSO SEE *People v. Spears* (1991) 228 Cal.App.3d 1, 25 [“Although the taped interview did take place at the station house, that factor has repeatedly been held, in and of itself, to be insufficient to establish custodial interrogation.”].

<sup>27</sup> See *California v. Beheler* (1983) 463 U.S. 1121, 1122 [“Beheler voluntarily agreed to accompany police to the station house”]; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [“He came voluntarily to the police station”]; *People v. Dolly* (2005) \_\_ Cal.App.4th \_\_; *People v. Herdan* (1974) 42 Cal.App.3d 300, 307 [“Usually, interrogation at a police station is deemed inherently coercive, although this is not the case if the suspect comes to the police station on his own initiative or voluntarily.”]; *People v. Holloway* (2004) 33 Cal.4th 96, 120 [“[The officers] requested he come to the station for an interview but did not demand that he accompany them, and that at the interview's outset they confirmed with him that he was being interviewed voluntarily and told him he was not under arrest or the focus of their suspicion.”]; *Yarborough v. Alvarado* (2004) 541

own. What matters is that he did so freely. As the California Supreme Court explained, “A reasonable person who is asked if he or she would come to the police station to answer questions, and who is 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.”<sup>28</sup>

For example, in *California v. Beheler*<sup>29</sup> the defendant and some friends attempted to rob a woman in the parking lot of a liquor store in Kern County. In the course of the robbery, Beheler’s step-brother shot and killed the woman. A few hours later, Beheler phoned the sheriff’s department from his home and reported the crime. When deputies arrived, Beheler identified the shooter, told them where the gun was hidden, and voluntarily agreed to accompany them to the sheriff’s office for an interview.

At the station, Beheler was not *Mirandized*, but he was told he was not under arrest. He then freely answered the investigators’ questions and, in the process, made some incriminating statements. The California Court of Appeal ruled that Beheler’s statements were obtained in violation of *Miranda*, ruling essentially that any questioning of a person is custodial if the person was a suspect and the questioning occurred in a police station. But the U.S. Supreme Court disagreed, pointing out that “we have explicitly recognized that *Miranda* warnings are not required simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” The Court then examined the surrounding circumstances and concluded, “It is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed, Beheler’s freedom was not restricted in any way whatsoever.”

Similarly, in *Oregon v. Mathiason*<sup>30</sup> the defendant, a burglary suspect, agreed to meet with the investigating officer at the police station. When Mathiason arrived, the officer escorted him into an office and said he wanted to discuss a burglary, explaining that he was not under arrest. The officer spoke plainly, saying he believed that Mathiason had committed the crime, that his fingerprints had been found at the scene, and that he would probably be arrested at some point, adding that his truthfulness “would possibly be considered by the district attorney or judge.” Mathiason then confessed.

In ruling that Mathiason was not in custody for *Miranda* purposes, the U.S. Supreme Court said, “[T]here is no indication that the questioning took place in a context where respondent’s freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest.”

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U.S. 652, \_\_ [“The police did not transport Alvarado to the station or require him to appear at a particular time”]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 131 [“[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.’”]; *People v. Chutan* (1999) 72 Cal.App.4<sup>th</sup> 1276, 1280 [“He was invited to the police station and expressly told he was not under arrest.”]; *People v. Mazza* (1985) 175 Cal.App.3d 836, 839; *Bains v. Cambra* (9<sup>th</sup> Cir. 2000) 204 F.3d 964, 972-3 [suspect “was not coerced into going to the police station and instead voluntarily accompanied the police”]; *People v. Fierro* (1991) 1 Cal.4<sup>th</sup> 173, 217 [“Ms. Fierro accompanied the police to the station voluntarily, and voluntarily cooperated with their investigation.”]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 319 [defendant walked into a police station and said he wanted to turn himself in; officer asked a few, brief questions to determine the crime defendant committed]. COMPARE *People v. Esqueda* (1993) 17 Cal.App.4<sup>th</sup> 1450, 1482 [“[N]o evidence was presented to show he willingly agreed to go to [the Western substation] from the gas station.”].

<sup>28</sup> *People v. Stansbury* (1995) 9 Cal.4<sup>th</sup> 824, 831-2.

<sup>29</sup> (1983) 463 U.S. 1121.

<sup>30</sup> (1977) 429 U.S. 492.

**“FREE TO GO”**: While not technically an absolute requirement,<sup>31</sup> in most cases in which stationhouse questioning was deemed noncustodial the suspect was told in no uncertain terms that he was not under arrest or, better yet, that he was free to go.<sup>32</sup> This is commonly known as a “*Beheler* admonition.”<sup>33</sup>

It is especially important that officers stay aware throughout the interview that an additional “free to go” advisory may be necessary (maybe more than one) if the interview becomes accusatory or approaches “full-blown interrogation.”<sup>34</sup> As the court explained in *People v. Aguilera*, “We do not suggest that police must give such advice. However, where, as here, a suspect repeatedly denies criminal responsibility and the police reject the denials, confront the suspect with incriminating evidence, and continually press for the ‘truth,’ such advice would be a significant indication that the interrogation remained noncustodial.”<sup>35</sup>

Note, however, that a “free to go” advisory won’t mean much if it reasonably appeared the suspect was not, in fact, free to leave. This has occurred, for example, when an officer guarded the suspect at all times,<sup>36</sup> when officers told him he could leave only after he told them the truth,<sup>37</sup> when officers “evaded” the question when he asked whether he was under arrest,<sup>38</sup> and when the suspect was handcuffed.<sup>39</sup>

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<sup>31</sup> See *Yarborough v. Alvarado* (2004) 541 U.S. 652, \_\_ [suspect was not in custody even though he was not told he was free to leave]; *People v. Dolly* (2005) \_\_ Cal.App.4th \_\_ [“He was never told that he was not free to leave.”]; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162-4, fn.7; *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [although the suspect was not told he was free to leave, it was apparent that he was considered merely a witness, at least at the outset].

<sup>32</sup> See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162-4, fn.7 [such an advisory is “a significant indication that the interrogation remained noncustodial.”]; *California v. Beheler* (1983) 463 U.S. 1121, 1122; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [“[H]e was immediately informed that he was not under arrest.”]; *People v. Spears* (1991) 228 Cal.App.3d 1, 26 [“[A]ppellant was informed several times that he was free to leave.”]; *People v. Carpenter* (1997) 15 Cal.4th 312, 384 [“The officers expressly told defendant he was not in custody and was free to leave at any time.”]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 [“Breault was explicitly told that he was not under arrest.”]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608; *U.S. v. Crawford* (9<sup>th</sup> Cir. en banc 2004) 372 F.3d 1048, 1060 [“Perhaps most significant for resolving the question of custody, Defendant was expressly told that he was not under arrest”]; *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1279 [“[H]e was assured he was not being placed under arrest.”]; *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 951 [“[The FBI agent] told Salvo at both meetings that he was not under arrest, that he was free to leave at any time, and that he would not be arrested at the conclusion of the interview. Several cases indicate that such a statement by a police officer is an important factor in finding that the suspect was not in custody.” Citations omitted.]; *U.S. v. Czichray* (8<sup>th</sup> Cir. 2004) 378 F.3d 822, 826 [“That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. . . . [N]o governing [federal] precedent . . . holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.”]. COMPARE *People v. Boyer* (1989) 48 Cal.3d 247, 270 [court noted that officers did not respond when the suspect asked if he was still free to go].

<sup>33</sup> See *California v. Beheler* (1983) 463 U.S. 1121.

<sup>34</sup> See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1165 [“[W]e associate [the officers’ tactics] with the full-blown interrogation of an arrestee”].

<sup>35</sup> (1996) 51 Cal.App.4th 1151, 1162-4, fn.7.

<sup>36</sup> See *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1482.

<sup>37</sup> *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166.

<sup>38</sup> See *People v. Boyer* (1989) 48 Cal.3d 247, 271.

**LOCKED DOORS:** Although the courts sometimes note whether the suspect had to pass through locked doors, or that he was questioned in a locked interview room, these are not unusual circumstances in police stations and are, therefore, not a strong indication that the suspect was in custody. As the California Supreme Court noted when this issue was raised in *Green v. Superior Court*, “Notwithstanding the lock on the interview room door, the evidence does not compel the conclusion that defendant could not have left whenever he had wanted during the interview.”<sup>40</sup>

Still, officers might explain to the suspect that the reason they are using an interview room is that it is quiet and free of distractions, and that the reason the door locks automatically is that some of the people who are interviewed there are in custody.

**NUMBER OF OFFICERS:** The number of officers present in the interview room is a relevant circumstance, especially the number of officers who actually questioned or confronted the suspect. See “Questioning detainees” (“Number of officers”), below.

**LENGTH OF QUESTIONING:** This is seldom a significant factor in the absence of other coercive circumstances.<sup>41</sup> With lengthy questioning, however, officers might remind the suspect now and then that he is free to go.

**ACCUSATORY INTERVIEWS:** An accusatory or confrontational interview is much more likely to be deemed custodial than an investigative interview (covered next). For example, the courts often take note of the following:

- Did the nature and form of the officers’ questions demonstrate they firmly believed the suspect was guilty?
- Was the interview marked by confrontational questioning and the disclosure of incriminating evidence in an accusatorial (not an informational) manner?
- Did the officers employ psychological interrogation tactics?
- Did the officers dominate the interview?

For example, in *People v. Aguilera*<sup>42</sup> officers learned that Aguilera “was involved” in a gang-related drive-by shooting. So they went to his house and asked if he would

<sup>39</sup> See *U.S. v. Newton* (2<sup>nd</sup> Cir. 2004) 369 F.3d 659, 675, 676 [“But telling a suspect that he is not under arrest does not carry the same weight in determining custody when he is in handcuffs”].

<sup>40</sup> (1985) 40 Cal.3d 126, 136. ALSO SEE *People v. Stansbury* (1995) 9 Cal.4<sup>th</sup> 824, 834 [suspect “had to pass through a locked parking structure and a locked entrance to the jail to get to the interview room”].

<sup>41</sup> See *Yarborough v. Alvarado* (2004) 541 U.S. 652, \_\_\_ [two-hour interview but there were offsetting circumstances]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [two hour interview, “close” case]; *Pennsylvania v. Bruder* (1988) 488 U.S. 9, 11 [“modest number of questions”]; *California v. Beheler* (1983) 463 U.S. 1121, 1122 [“less than 30 minutes”]; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-6 [half hour interview]; *People v. Morris* (1991) 53 Cal.3d 152, 197 [“[T]he questioning was brief and nonaccusatorial”]; *People v. Farnam* (2002) 28 Cal.4<sup>th</sup> 107, 180 [“[T]he term ‘custody’ generally does not include a temporary detention for investigation where an officer detains a person to ask a moderate number of questions”]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 228; *People v. Blouin* (1978) 80 Cal.App.3d 269, 283 [“The questioning was short in duration”]; *People v. Aguilera* (1996) 51 Cal.App.4<sup>th</sup> 1151, 1164-5 [“The ‘tag-team’ interrogation lasted two hours”]; *In re Joseph R.* (1998) 65 Cal.App.4<sup>th</sup> 954, 961 [“The entire encounter lasted only about 15 or 20 minutes.”]; *People v. Spears* (1991) 228 Cal.App.3d 1, 26 [75 minutes interrogation not unduly prolonged].

<sup>42</sup> (1996) 51 Cal.App.4<sup>th</sup> 1151. ALSO SEE *U.S. v. Rambo* (10<sup>th</sup> Cir. 2004) 365 F.3d 906, 909 [“Not one hundred percent of it is falling down on your shoulders. But a lot of it’s gonna be.”]. COMPARE *People v. Forster* (1994) 29 Cal.App.4<sup>th</sup> 1746, 1753 [“[W]e do not discern any overbearing demeanor from [the officers].”]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 132

accompany them to the station to talk about it. He agreed. At the start of the interview, they told him he was not in custody, but the court noted they “did not tell [him] he was free to terminate the interview and leave if he wished.” When Aguilera said he was not involved in the shooting, the officers called him a liar, said his story was “bullshit,” accused him of “fabricating an alibi,” and claimed his fingerprints had been found on one of the cars used by the shooters. After the interview progressed in this manner for some time, Aguilera abandoned his story and confessed.

The court ruled, however, that Aguilera’s confession was obtained in violation of *Miranda* because he was “in custody” when he confessed and had not waived his rights. Said the court, “The ‘tag team’ interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers’ tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee.”

Similarly, in *People v. Boyer*<sup>43</sup> the defendant, a suspect in a double murder in Fullerton, agreed to accompany officers to the station to talk. During the subsequent “intense interrogation,” the officers told him that the victims’ son had identified him as the killer, that they could prove he did it, and that he was “gonna fall on this one.” Boyer asked several times whether he was under arrest, but the officers “evaded the questions” in hopes of “prolonging the interview.” He later confessed. In ruling that Boyer was in custody, the California Supreme Court said:

[I]n an intense interrogation spanning nearly two hours, they led defendant to believe that . . . they had the evidence to prove his guilt in court. [A] reasonable person in such circumstances would only have considered himself under practical arrest.

While the accusatory nature of an interview is an important circumstance, an interview does not become custodial simply because officers said they had reason to believe the suspect was guilty. For example, the U.S. Supreme Court ruled that a suspect was not in custody merely because officers told him his fingerprints had been found at the scene,<sup>44</sup> that “his truthfulness would possibly be considered by the district attorney or judge,”<sup>45</sup> or because he was considered their “prime suspect.” As the Court pointed out in *Stansbury v. California*, telling a person he is a “prime suspect” does not necessarily mean he is under arrest because “some suspects are free to come and go until the police decide to make an arrest.”<sup>46</sup>

Nor does questioning become custodial merely because it was unpleasant or because the officers were unfriendly. As the U.S. Supreme Court has noted:

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part

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[“The questions were detailed but not accusatory”]; *People v. Spears* (1991) 228 Cal.App.3d 1, 25 [“The tone of the officers throughout the interview was courteous and polite.”].

<sup>43</sup> (1989) 48 Cal.3d 247.

<sup>44</sup> See *Oregon v. Mathiason* (1977) 429 U.S. 492, 493; *Illinois v. Perkins* (1990) 496 U.S. 292, 298. ALSO SEE *Bains v. Cambra* (9<sup>th</sup> Cir. 2000) 204 F.3d 964, 973 [“targeted questioning” did not render the interview custodial].

<sup>45</sup> See *Oregon v. Mathiason* (1977) 429 U.S. 492, 493.

<sup>46</sup> (1994) 511 U.S. 318, 325. ALSO SEE *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 952 [“But, even if Salvo had been told everything the agents knew, without some additional conduct by the officers indicating a custodial situation, the state of the officers’ knowledge, although possibly a factor in determining custody, does not itself determine custody.”].

of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question.<sup>47</sup>

**INVESTIGATIVE INTERVIEWS:** Unlike accusatory interviews whose apparent purpose is to obtain incriminating evidence, “investigative” interviews are relatively noncoercive because, by all outward appearances, the officers’ purpose is simply to obtain information or, at most, explore the possibility that the suspect was the perpetrator. In such interviews, the officers are usually restrained and courteous, and they permit the suspect to give narrative answers to their questions, as opposed to firing pointed questions that require “yes” or “no” responses.<sup>48</sup>

For example, in *People v. Stansbury*<sup>49</sup> LASD homicide detectives who were investigating the abduction and murder of a 10-year old girl learned that Stansbury had talked with the girl shortly before she disappeared. So they asked Baldwin Park police to go to Stansbury’s home “to see if he would come in for questioning.” Stansbury agreed and accepted a ride from the officers. At the sheriff’s station, investigators began by telling him he was merely “a possible witness.” They then asked several questions about “his whereabouts and activities” on the day the girl disappeared. His responses were used against him at his murder trial.

Stansbury argued that his statements should have been suppressed because he had not waived his rights. But the court ruled he was not in custody, citing the following circumstances: he came to the station voluntarily, he was told he was merely “a possible witness,” the officers’ questions “were nonaccusatory,” and they permitted him to tell his story “through narrative.”

Similarly, in *People v. Holloway*<sup>50</sup> Sacramento police learned the Holloway was acquainted with two women who had been murdered in their townhouse. At the request of homicide investigators, Holloway accompanied them to the police station for questioning. At the outset, they told him they were “collecting as much information as they could about the victims and their associates,” adding that he was “not under arrest.”

<sup>47</sup> *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.

<sup>48</sup> See *Yarborough v. Alvarado* (2004) 541 U.S. 652 [officer “appealed to his interest in telling the truth and being helpful”]; *People v. Spears* (1991) 228 Cal.App.3d 1, 25 [officers were “courteous and polite”]; *People v. Dolly* (2005) \_\_ Cal.App.4th \_\_ [“The police officers did not attempt to dominate the conversation and allowed appellant to speak freely”]; *People v. Mazza* (1985) 175 Cal.App.3d 836, 842 [suspect was treated with “deference”]; *In re Danny E.* (1981) 121 Cal.App.3d 44, 50 [officers merely gave the suspect “the opportunity to explain”]; *People v. Morris* (1991) 53 Cal.3d 152, 197-8 [officers asked “two yes-or-no questions designed to elicit only defendant’s identity and his relationship to the van.”]; *People v. Blouin* (1978) 80 Cal.App.3d 269, 283 [questioning was “short,” “not accusatory”]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 [“The officer merely asked [the suspect] who resided at the house and questioned him about ownership of the marijuana plants.”]; *People v. Bellomo* (1992) 10 Cal.App.4th 195, 199 [the officer asked the suspect if he was the driver “in order to reconstruct what happened.”]; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164 [“Are you selling dope?”]; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 836 [“Do you have any drugs in your possession?”]; *People v. Gravatt* (1971) 22 Cal.App.3d 133, 138 [“Have you done time?”]; *People v. Haugland* (1981) 115 Cal.App.3d 248, 256 [“Are you carrying a weapon?”]; *In re Joseph R.* (1998) 65 Cal.App.4th 954 [“Did you throw rocks at a bus?”]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 609 [“Who do those tools belong to?”].

<sup>49</sup> (1995) 9 Cal.4th 824.

<sup>50</sup> (2004) 33 Cal.4th 96.

One of the investigators then told him that he was not “per se the person we feel is responsible for the murder,” that he hoped to “eliminate [him] as a possible suspect,” but that if he became a suspect “they would then advise him of his rights.” During the course of the interview, Holloway gave the investigators an alibi which they later proved was false.

Holloway argued his phony alibi story should have been suppressed because the interview became custodial when the investigators told him he was not a suspect “per se.” But the California Supreme Court disagreed, saying, “[A] reasonable person would understand the advisement as indicating an opportunity to be cleared, at the early stages of an investigation.”

#### Questioning in the suspect’s home

Probably the least coercive environments in which questioning occurs is the suspect’s home, the home of a friend or relative, and the suspect’s workplace. This is because it’s the suspect who is on his own “turf,” while the officers are the ones who are in unfamiliar territory.<sup>51</sup> Consequently, in the absence of some overriding coercive circumstance, *Miranda* waivers are not required when the questioning occurs in such places.<sup>52</sup>

For example, in *People v. Valdivia*<sup>53</sup> Santa Ana police developed probable cause to arrest Valdivia for killing a man outside a bar. While trying to track him down, they went to his brother’s house where, as they were explaining the situation to his brother, Valdivia walked in. The officers then questioned him about the shooting and, in the process, obtained several incriminating statements. In ruling a *Miranda* waiver was unnecessary, the court noted, “[T]he contact came in the home of his brother, who was also present. The officers did not draw their weapons or place him under arrest. Thus, the encounter was not coercive.”

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<sup>51</sup> See *U.S. v. Braxton* (4<sup>th</sup> Cir. 1997) 112 F.3d 777, 783 [“The interview took place on his turf, at his mother’s home.”]; *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 950 [“[S]everal Courts of Appeals have found that when police question a suspect in a residence, these circumstances often do not rise to the kind of custodial situation that necessitates *Miranda* warnings, whether they are free to leave or not.” Citations omitted.]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 247 [discussing consent searches, the Court noted that because consent searches “normally occur on a person’s own familiar territory,” there is less reason to presume coercion]; *U.S. v. Czichray* (8<sup>th</sup> Cir. 2004) 378 F.3d 822, 826 [“When a person is questioned ‘on his own turf,’ we have observed repeatedly that the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation.”]; *U.S. v. Sutura* (8<sup>th</sup> Cir. 1991) 933 F.2d 641, 647 [“While a person may be deemed to be in custody even in his own home, it is not the type of coercive setting normally associated with custodial interrogation.”].

<sup>52</sup> See *People v. Herdan* (1974) 42 Cal.App.3d 300, 307, fn.9 [“An interrogation at a suspect’s home is usually, but not always, deemed noncoercive.”]; *People v. Blouin* (1978) 80 Cal.App.3d 269, 283 [“The interrogation was conducted on the street in front of defendant’s home”]; *People v. Merchant* (1968) 260 Cal.App.2d 875, 878; *In re James D.* (1981) 116 Cal.App.3d 810, 815; *People v. Breault* (1990) 223 Cal.App.3d 125, 135; *In re Danny E.* (1981) 121 Cal.App.3d 44, 50; *U.S. v. Braxton* (4<sup>th</sup> Cir. 1997) 112 F.3d 777, 781 [“Indeed, it would be hard to imagine a more routine, benign, and noncoercive investigatory scenario: Braxton was not under arrest, the pre-arranged interview took place in his mother’s home with others present, the interview lasted only an hour. . . .”]. ALSO 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.”].

<sup>53</sup> (1986) 180 Cal.App.3d 657.

In another case, *People v. Morris*,<sup>54</sup> the defendant killed a man near Lake Tahoe and stole his van. A few days later, he picked up a hitchhiker in Nebraska and told him about the killing. The hitchhiker notified police who found the van in a motel parking lot. Looking inside, officers saw blood stains. They then contacted Morris in his room and asked if he owned the vehicle. When he said yes, they arrested him. In ruling the question did not violate *Miranda*, the California Supreme Court noted, among other things, “The inquiry did not take place in jail or on police premises, but in defendant’s own motel room with his two female friends present.”

Questioning in the suspect’s home may, however, be deemed custodial if the suspect was handcuffed or if officers conducted themselves in an overbearing manner, not as visitors seeking information. For example, in *Orozco v. Texas*<sup>55</sup> four Dallas police officers went to Orozco’s home at about 4 A.M. to question him about a murder which had occurred a few hours earlier. They were admitted into the house by a woman who said Orozco was asleep in his bedroom, whereupon all four officers entered the bedroom and, without obtaining a waiver, questioned him about the shooting. The U.S. Supreme Court suppressed Orozco’s statements because, although he was “interrogated on his own bed, in familiar surroundings,” the officers’ conduct demonstrated that he was “in custody” for *Miranda* purposes.

Similarly, in *People v. Benally*<sup>56</sup> officers in Sunnyvale developed probable cause to believe that Benally had, earlier that evening, beaten and raped a woman in his hotel room. Two officers went to Benally’s room which they opened with a passkey. As they entered and identified themselves, one of the officers drew his gun. Seeing Benally lying on his bed, the officers ordered him to get up and raise his hands. He complied. After determining Benally was not armed, the officer holstered his gun. During questioning about the rape, Benally made some incriminating statements but the court ruled they were inadmissible because the officers’ manner of entering and confronting Benally would have caused a reasonable person in his position to believe he was under arrest.

#### Questioning on the street, public places

Questioning that occurs during police contacts in public places—such as streets, airports, parking lots, public areas in government buildings, stores, and the common areas in hotels and motels—are not custodial in the absence of coercive circumstances.<sup>57</sup> This is because the atmosphere is “substantially less police dominated” than that which was the concern of the *Miranda* court.<sup>58</sup> In addition, the exposure to public view “reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-

<sup>54</sup> (1991) 53 Cal.3d 152.

<sup>55</sup> (1969) 394 U.S. 324. ALSO SEE *People v. Whitfield* (1996) 46 Cal.App.4<sup>th</sup> 947; *People v. Brown* (1972) 26 Cal.App.3d 825, 848 [questions were “of an exploratory nature”].

<sup>56</sup> (1989) 208 Cal.App.3d 900.

<sup>57</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [street]; *People v. Robertson* (1982) 33 Cal.3d 21, 38 [parking lot]; *People v. Forster* (1994) 29 Cal.App.4<sup>th</sup> 1746, 1753 [public area of government office]; *People v. Wolf* (1978) 78 Cal.App.3d 735 [vehicle repair shop]; *People v. Epperson* (1986) 187 Cal.App.3d 115, 119 [hotel hallway]; *U.S. v. Yussuff* (7<sup>th</sup> Cir. 1996) 96 F.3d 982 [airport]; *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 950-1 [Burger King parking lot]. ALSO SEE *Minnesota v. Murphy* (1984) 465 U.S. 420, 430 [“We have consistently held that [*Miranda*] does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.”].

<sup>58</sup> *Berkemer v. McCarty* (1984) 468 U.S. 420, 439.

incriminating statements and diminishes the [suspect's] fear that, if he does not cooperate, he will be subjected to abuse.”<sup>59</sup>

For these reasons, the courts have also rejected arguments that unarrested suspects were in custody when they were questioned in places that, although not public, were certainly not police-dominated; e.g., in an ambulance, in the office of a probation or parole officer, and in a college computer room.<sup>60</sup> Likewise, a defendant or other witness who is testifying in court is not in a *Miranda* setting even though he might feel a lot of nervous tension and stress.<sup>61</sup>

#### Questioning detainees

Suspects who are being detained are not free to leave which means their freedom of movement is virtually nonexistent. Nevertheless, they are not automatically “in custody” because, (1) detentions usually occur in public places;<sup>62</sup> (2) detentions are, by definition, temporary and relatively brief; and (3) the atmosphere surrounding most detentions does not generate the degree of compulsion to speak which the *Miranda* procedure was designed to alleviate. Or, to put it somewhat more poetically, “Temporary detention only slightly resembles custody, ‘as the mist resembles the rain.’”<sup>63</sup>

For example, in ruling that officers who have detained DUI suspects need not obtain waivers before asking questions about their sobriety, the U.S. Supreme Court noted, “The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*.”<sup>64</sup>

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<sup>59</sup> *Berkemer v. McCarty* (1984) 468 U.S. 420, 438.

<sup>60</sup> See *People v. Mosley* (1999) 73 Cal.App.4<sup>th</sup> 1081 [gunshot victim was not in custody when he was questioned in an ambulance as to what had happened]; *Minnesota v. Murphy* (1984) 465 U.S. 420, 433 [probation interview]; *In re Richard T.* (1978) 79 Cal.App.3d 382 [parole interview]; ALSO SEE *U.S. v. Salvo* (6<sup>th</sup> Cir. 1998) 133 F.3d 943, 950-1 [dormitory computer room].

<sup>61</sup> See *U.S. v. Kilgroe* (9<sup>th</sup> Cir. 1992) 949 F.2d 802, 804, 805 [“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.”]; *U.S. v. Melendez* (1<sup>st</sup> Cir. 2000) 228 F.3d 19, 22 [“The dangers of coerced self-incrimination present in police interrogation—a unique potential for the exertion of pressure, physical intimidation, psychological trickery, and prolonged grilling with no outside contact—are largely absent in a public courtroom.”]; *U.S. v. Byram* (1<sup>st</sup> Cir. 1998) 145 F.3d 405, 409 [“[T]he testimony was given in open court and involved none of the dangers of jail-cell interrogation that prompted *Miranda*.”]; *U.S. v. Valdez* (2<sup>nd</sup> Cir. 16 F.3d 1324, 1330-2; *Minnesota v. Murphy* (1984) 465 U.S. 420, 427 [“[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.”]; *People v. Tarter* (1972) 27 Cal.App.3d 935, 942 [open courtroom is not a “police dominated atmosphere”].

<sup>62</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 438 [“[T]he typical traffic stop is public, at least to some degree.”]; *U.S. v. Galindo-Gallegos* (9<sup>th</sup> Cir. 2001) 244 F.3d 728, 732 [“[T]he public setting gives rise to a likelihood of witnesses to any misconduct.”].

<sup>63</sup> See *People v. Manis* (1969) 268 Cal.App.2d 653, 667 [quoting from “The Day is Done” by Longfellow]. ALSO SEE *People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 679 [“Generally, however, [custody] does not include a temporary detention for investigation.”]; *U.S. v. Booth* (9<sup>th</sup> Cir. 1981) 669 F.2d 1231, 1237 [“We have consistently held that even though one’s freedom of action may be inhibited to some degree during an investigatory detention, *Miranda* warnings need not be given prior to questioning since the restraint is not custodial.”].

<sup>64</sup> *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

This does not mean that detentions are *never* custodial.<sup>65</sup> As we will explain, there are several circumstances that can trigger *Miranda*.

**HANDCUFFS:** A detainee who is questioned while handcuffed is almost always “in custody” because physical restraint is commonly associated with formal arrest.<sup>66</sup> As the Court of Appeal observed, “One well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain a citizen.”<sup>67</sup>

Nevertheless, a detainee who has been handcuffed may be deemed “not in custody” if, (1) the handcuffing was reasonably necessary, and (2) the handcuffs were removed before the detainee was questioned.<sup>68</sup>

**DRAWN WEAPONS:** A detainee who is questioned at gunpoint is obviously in custody. “It goes without saying.” said the Court of Appeal, “that the display of a weapon by police officers plainly conveys to a reasonable citizen the message that he is not free to leave.”<sup>69</sup> On the other hand, a drawn weapon would have no coercive effect if the detainee did not see it.<sup>70</sup>

Even if a weapon was displayed at some point, the detainee may be deemed “not in custody” if, (1) the initial danger level justified the drawing of a weapon, and (2) the weapon was reholstered before the questioning began. As noted in *People v. Taylor*:

[A] police officer may well act reasonably in drawing his gun while he approaches a citizen in an uncertain situation. However, having ascertained that no immediate danger justifies his display of his weapon, the officer may also reholster it. Assuming the citizen is subject to no other restraints, the

<sup>65</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440 [“If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him ‘in custody’ for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.”]; *U.S. v. Booth* (9<sup>th</sup> Cir. 1981) 669 F.2d 1231, 1235b [“Pertinent areas of inquiry include the language used by the officer to summon the individual, the extent to which he or she is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention and the degree of pressure applied to detain the individual.”].

<sup>66</sup> See *New York v. Quarles* (1984) 467 U.S. 649, 655; *People v. Whitfield* (1996) 46 Cal.App.4<sup>th</sup> 947, 952-3; *People v. Turner* (1984) 37 Cal.3d 302, 319 [“With drawn guns, they apprehended the two suspects, handcuffed, and otherwise immobilized them. There appears to be no question that they were ‘in custody.’”]; *People v. Herdan* (1974) 42 Cal.App.3d 300, 307, fn.11 [“If the police officer uses physical restraint on the suspect it is more likely to be deemed custodial than if the questioning occurs without physical restraint.”]; *People v. Morris* (1991) 53 Cal.3d 152, 198; *U.S. v. Newton* (2<sup>nd</sup> Cir. 2004) 369 F.3d 659, 675, 676 [“Handcuffs are generally recognized as a hallmark of a formal arrest.”]; *U.S. v. Booth* (9<sup>th</sup> Cir. 1981) 669 F.2d 1231. COMPARE *People v. Breault* (1990) 223 Cal.App.3d 125, 135 [“He was not handcuffed or physically restrained.”]; *People v. Forster* (1994) 29 Cal.App.4<sup>th</sup> 1746, 1753 [“he was neither restrained nor handcuffed”].

<sup>67</sup> *People v. Taylor* (1986) 178 Cal.App.3d 217, 228.

<sup>68</sup> See *People v. Holloway* (2004) 33 Cal.4<sup>th</sup> 96, 120 [court disagrees with the idea that “once [the defendant] had been uncuffed and the detectives had made their request for a station house interview, he was not free to go his own way.”]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 230; *In re Joseph R.* (1998) 65 Cal.App.4<sup>th</sup> 954, 957 [“[T]he restraints were applied only briefly—for five minutes—before questioning began.”].

<sup>69</sup> *People v. Taylor* (1986) 178 Cal.App.3d 217, 229. ALSO SEE *People v. Turner* (1984) 37 Cal.3d 302, 319.

<sup>70</sup> See *People v. Stansbury* (1995) 9 Cal.4<sup>th</sup> 824, 832 [“[T]here is no evidence that defendant could see the guns, which were out of their holsters but not pointed at anyone. . . . The officer who actually came to defendant’s doorstep testified that he held the gun so that defendant could not see it.”].

officer's initial display of his reholstered weapon does not require him to give *Miranda* warnings before asking the citizen questions.<sup>71</sup>

**NUMBER OF OFFICERS:** Questioning is considered more coercive if the suspect was confronted by several officers, especially if several officers were questioning him.<sup>72</sup> For example, in *People v. Lopez* the court, in ruling the defendant was not in custody, noted among other things that although there were three detainees and four officers, the officers “did not congregate around defendant but were dispersed among the three suspects. One officer alone approached and questioned the defendant.”<sup>73</sup>

**LENGTH OF DETENTION:** The courts often note whether the detention was relatively brief or unusually lengthy.<sup>74</sup> This is relevant because a lengthy detention, like lengthy questioning, may be viewed as coercive. Still, this factor is seldom pivotal if a lengthy detention was reasonably necessary.<sup>75</sup>

**MANNER OF QUESTIONING:** A detention may become custodial if the questioning “ceased to be brief and casual” and had become “sustained and coercive.”<sup>76</sup> The circumstances that are relevant in making this determination were covered in the section “Questioning at police stations (“Accusatory interviews”) (“Investigative interviews”).

#### Questioning barricaded suspects

Although barricaded suspects know they will be arrested when they surrenders, and although their freedom of movement is highly restricted, they is not in custody for *Miranda* purposes when speaking with officers over the phone. This is because, as the California Supreme Court observed:

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<sup>71</sup> (1986) 178 Cal.App.3d 217, 230. ALSO SEE *People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 679 [“That [the officer] approached defendant . . . with gun drawn, and ordered him not to move, was altogether reasonable under the circumstances. Certainly, this fact alone does not transform the situation into one of ‘custody.’”]; *U.S. v. Cruz* (2<sup>nd</sup> Cir. 2001) 255 F.3d 77, 86.

<sup>72</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 438 [“The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability.”]; *Pennsylvania v. Bruder* (1988) 488 U.S. 9, 11 [a “single police officer”]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 [Only two officers came to the house”]; *People v. Aguilera* (1996) 51 Cal.App.4<sup>th</sup> 1151, 1162]; *U.S. v. Galindo-Gallegos* (9<sup>th</sup> Cir. 2001) 244 F.3d 728, 732 [“[T]here were two border patrol officers and 15 or 20 suspects”]; **COMPARE** *New York v. Quarles* (1984) 467 U.S. 649, 655 [“Quarles was surrounded by at least four police officers”]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 229 [detainee was surrounded by four officers].

<sup>73</sup> (1985) 163 Cal.App.3d 602, 609.

<sup>74</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 437; *People v. Lopez* (1985) 163 Cal.App.3d 602, 609 [“The detention had been relatively brief—it appears less than 15 minutes”]; *People v. Vasquez* (1993) 14 Cal.App.4<sup>th</sup> 1158, 1163 [“The length of the stop prior to defendant’s arrest was very short.”].

<sup>75</sup> See *People v. Forster* (1994) 29 Cal.App.4<sup>th</sup> 1746, 1753 [“[T]he detention was a relatively long one, a little more than an hour. However, there is a reasonable explanation for that delay”].

<sup>76</sup> See *People v. Manis* (1969) 268 Cal.App.2d 653, 669; *People v. Aguilera* (1996) 51 Cal.App.4<sup>th</sup> 1151, 1164-5 [the questioning “was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating.”]; *People v. Forster* (1994) 29 Cal.App.4<sup>th</sup> 1746, 1753 [“[W]e do not discern any overbearing demeanor from [the officers].”; .”]; *People v. Morris* (1991) 53 Cal.3d 152, 197 [“[T]he questioning was brief and nonaccusatorial”]; *People v. Blouin* (1978) 80 Cal.App.3d 269, 283 [“The questioning was . . . not accusatory in nature”]; *People v. Brown* (1972) 26 Cal.App.3d 825, 848 [questions were “of an exploratory nature”].

[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; indeed, the suspect can readily terminate communications at any time by hanging up the phone.<sup>77</sup>

#### Questioning time-servers in jails and prisons

In the course of a criminal investigation, officers sometimes learn that the suspected perpetrator is currently serving time in a jail or prison. The question arises: If they want to interview him, must they obtain a *Miranda* waiver?

At first glance, the answer would seem to be yes because, after all, time-servers live in buildings that were built for the sole purpose of restraining them. Nevertheless, they possess much more freedom than the people for whom the *Miranda* procedure was devised; namely, arrestees who have been thrust into a “police-dominated” and “unfamiliar” setting in which police officers who “appear to control [the suspect’s] fate” exploit the “inherently compelling pressures” of the situation to coerce a confession from the suspect.<sup>78</sup>

On the contrary, it’s the officers who find themselves in an unfamiliar setting; the inmate is on his own turf.<sup>79</sup> Plus, the officers do not control his fate. Although they might eventually cause him to be charged with a new crime, he knows the officers are powerless to change his immediate circumstances.<sup>80</sup> Moreover, while an inmate is not free to leave the facility, he is free to go back to his cell.

For these reasons, as the Ninth Circuit pointed out, the “free to leave” test is not a “useful tool” when the suspect is serving time. As the court noted, if all time-servers were “in custody,” no one in authority could ask them a potentially incriminating question without first obtaining a waiver. Such a state of affairs would “not only be inconsistent

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<sup>77</sup> *People v. Mayfield* (1997) 14 Cal.4<sup>th</sup> 668, 733. ALSO SEE *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1122; *U.S. v. Turner* (9<sup>th</sup> Cir. 1994) 28 F.3d 981, 984 [“Nor was he detained, since he could have hung up the phone at any time”]; *U.S. v. Willoughby* (2<sup>nd</sup> Cir. 1988) 860 F.2d 15, 24 [“Though he was not free to leave MCC, he was free to cut off a conversation with a visitor”].

<sup>78</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436, 445, 457, 467; *Minnesota v. Murphy* (1984) 465 U.S. 420, 433; *Illinois v. Perkins* (1990) 496 U.S. 292, 296-7.

<sup>79</sup> See *Clark v. Maryland* (2001) 781 A.2d 913, 946 [“Release into the general prison population places an inmate in a very different atmosphere than the one he endured after arrest as a pre-trial detainee, worried and uncertain about his fate with regard to the pending charges. A sentenced prisoner, settled into the routine of his new life in the general prison population, is incarcerated but may well be out of *Miranda* custody.”]; *Minnesota v. Murphy* (1984) 465 U.S. 420, 433 [“[C]ustodial arrest thrusts an individual into an unfamiliar atmosphere or an interrogation environment created for no purpose other than to subjugate the individual to the will of his examiner.”].

<sup>80</sup> See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [“When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.”]; *U.S. v. Teemer* (1<sup>st</sup> Cir. 2005) 394 F.3d 59, 65-6 [“The label ‘custodial interrogation,’ like many such labels, is suggestive rather than precise; and the purpose as well as the words inform our understanding. The *Miranda* doctrine functionally aims to protect defendants in situations where, in common experience, isolation and the potential for coercive pressure have been found to exist.”].

with *Miranda* but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart.”<sup>81</sup>

Consequently, time-servers are not automatically “in custody” for *Miranda* purposes.<sup>82</sup> Instead, they are in custody only if there was some *additional* imposition on their freedom of movement or, to put it another way, there was a measure of compulsion “over and above that associated with [their] prisoner status.”<sup>83</sup> As explained in *Cervantes v. Walker*:

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

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<sup>81</sup> *Cervantes v. Walker* (9<sup>th</sup> Cir. 1978) 589 F.2d 424, 427-8. ALSO SEE *People v. Mayfield* (1997) 14 Cal.4<sup>th</sup> 668, 733 [a barricaded suspect in a residence “retains a degree of freedom of action inconsistent with a formal arrest”].

<sup>82</sup> See *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1121 [“We also decline to read [*Mathis v. United States* (1968) 391 U.S. 1] to compel that *Miranda* warnings be given to a prisoner or jail inmate under all circumstances. A prisoner or one incarcerated in jail is not automatically in ‘custody’ within the meaning of *Miranda*.”]; *U.S. v. Menzer* (7<sup>th</sup> Cir. 1994) 29 F.3d 1223, 1231 [“The Second, Fourth, Eighth and Ninth Circuits have held that, when challenging a statement given by a defendant, merely because the defendant is in prison on an unrelated charge does not mean the defendant is ‘in custody’ for purpose of *Miranda*.” Citations omitted]; *U.S. v. Willoughby* (2<sup>nd</sup> Cir. 1988) 860 F.2d 15, 23 [“[W]e believe that the mere fact of imprisonment does not mean that all of a prisoner’s conversations are official interrogations that must be preceded by *Miranda* warnings.”]; *Leviston v. Black* (8<sup>th</sup> Cir. 1988) 843 F.2d 302, 303 [“[I]ncarceration does not *ipso facto* render an interrogation custodial.”]; *U.S. v. Conley* (4<sup>th</sup> Cir. 1985) 779 F.2d 970, 972-3 [“We also decline to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations”].

<sup>83</sup> See *People v. Fradiue* (2000) 80 Cal.App.4<sup>th</sup> 15, 20 [“The question must therefore shift to whether some extra degree of restraint was imposed upon the inmate to force him to participate in the interrogation.”]; *U.S. v. Willoughby* (2<sup>nd</sup> Cir. 1988) 860 F.2d 15, 24 [“[T]here was nothing in the circumstances that suggested any measure of compulsion above and beyond that confinement.”]; *U.S. v. Conley* (4<sup>th</sup> Cir. 1985) 779 F.2d 970, 973 [the test is “whether the inmate was subjected to more than the usual restraint on a prisoner’s liberty to depart.”]; *Garcia v. Singletary* (11<sup>th</sup> Cir. 1994) 13 F.3d 1487, 1492 [“In the context of questioning conducted in a prison setting, restricted freedom implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.”]; *New Hampshire v. Ford* (New Hampshire Supreme Court 1999) 736 A.2d 937, 943 [“[W]hen an individual is incarcerated for an offense unrelated to the subject of his interrogation, custody for *Miranda* purposes occurs when there is some act or circumstances that places additional limitations on the prisoner. There must be some further restriction on the prisoner’s freedom of movement in anticipation of or associated with the interrogation itself.”]. **NOTE:** This standard is consistent with decisions of the United States Supreme Court that the test for Fourth Amendment “custody” is whether the circumstances were sufficiently coercive, not whether the questioning occurred in an environment that has coercive aspects to it. See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *California v. Beheler* (1983) 463 U.S. 1121. It is also consistent with the Court’s ruling in *Florida v. Bostick* (1991) 501 U.S. 429 that a passenger on a bus is not automatically “seized” whenever he is questioned by a police officer. Said the Court, “[T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick’s movements were ‘confined’ in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.” At p. 436.

determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.<sup>84</sup>

What “acts” fall into this category? The following are commonly cited:

- Whether the prisoner was handcuffed or subjected to restraint other than that which is inherent in the facility.
- Whether the prisoner was led to believe he was *required* to meet with the officers or answer their questions.
- Whether the questioning took place in familiar or intimidating surroundings; e.g., prison library or cafeteria vs. watch commander’s office.
- Whether the prisoner was told he could stop the questioning at any time.<sup>85</sup>

For example, in *U.S. v. Menzer*<sup>86</sup> the defendant was serving time in Wisconsin for sexual exploitation of children. Meanwhile, FBI agents learned he might have started the fire that was set in his home one month before his arrest. Two of his children were killed in the fire. Hoping to obtain an incriminating statement, agents went to the prison and interviewed him. He was later convicted based, at least partly, on some of his statements.

Because the officers had not obtained a *Miranda* waiver before interviewing him, Menzer contended his statements should have been suppressed. The court disagreed, noting that in determining whether a sentenced prisoner was in custody for *Miranda* purposes, the courts examine the “totality of the circumstances” to determine if there was “a change in the surroundings of the prisoner which results in an added imposition of his freedom of movement, and whether circumstances suggest any measure of compulsion above and beyond the confinement.” The court then examined the surrounding circumstances and noted, among other things:

[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.

Consequently, there was no *Miranda* violation.

#### Questioning after release from custody

A suspect who is “in custody” is automatically “out of custody” when he is freed. Accordingly, officers need not *Mirandize* him if they question him later at, for instance, his home. As the Court of Appeal observed, “Once released, 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 . . . .”<sup>87</sup>

The question has arisen whether officers may seek to interview a suspect who was released if he had previously invoked his *Miranda* right to counsel. Ordinarily, police-

<sup>84</sup> (9<sup>th</sup> Cir. 1978) 589 F.2d 424, 428.

<sup>85</sup> See *Cervantes v. Walker* (9<sup>th</sup> Cir. 1979) 589 F.2d 424, 428; *People v. Fradiue* (2000) 80 Cal.App.4<sup>th</sup> 15, 20-1; *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1122; *State v. Ford* (New Hampshire Supreme Court 1999) 738 A.2d 937, 943 [interview occurred “in a relatively uncoercive area of the prison, the correctional officers’ lunch room, not a prison cell or interrogation room.”].

<sup>86</sup> (7<sup>th</sup> Cir. 1994) 29 F.3d 1223.

<sup>87</sup> *In re Bonnie H.* (1997) 56 Cal.App.4<sup>th</sup> 563, 583.

initiated questioning of a suspect who has invoked the right to counsel is prohibited.<sup>88</sup> But the California Supreme Court has ruled it is permitted if the suspect was released for a sufficient amount of time so that he could have consulted with counsel. The case was *People v. Storm*,<sup>89</sup> and the facts were as follows.

Officers suspected that Storm had murdered his wife but they lacked probable cause. So they asked him if he would voluntarily come to the station for a polygraph test. He agreed. During the test, the examiner told him there was a “greater than 99% probability” that he was lying about his role in his wife’s death. Storm responded by saying he wanted a lawyer. Because there was insufficient evidence to hold him, he was allowed to leave. Two days later, detectives went to his apartment and questioned him again about the murder. During the interview, he made several incriminating statements. Based largely on these statements, he was convicted of first degree murder.

Storm argued that his statements should have been suppressed, claiming his earlier invocation was still in effect despite his release. The California Supreme Court disagreed, noting that even if Storm was in custody for *Miranda* purposes when he was told that he was flunking the test, he was certainly no longer in custody after he was released. Said the court, “So long as there was a true break in custody, affording defendant a reasonable time and opportunity to consult counsel while free of custodial influences, the police thereafter had the right to recontact him without undue delay.”

The court emphasized that a mere technical break in custody won’t do. “We do not suggest,” said the court, “the police can avoid [a *Miranda* invocation] simply by allowing the suspect to step outside the station house at midnight on a Saturday, then promptly rearresting him without affording any realistic opportunity to seek counsel’s assistance free of the coercive atmosphere of custody.”

## **INTERROGATION**

Even if a suspect is in custody, a *Miranda* warning is unnecessary unless officers are seeking to “interrogate” him. “It is clear,” said the U.S. 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*.”<sup>90</sup> For example, an unwarned suspect’s statement will not be suppressed on *Miranda* grounds if it was made spontaneously.<sup>91</sup>

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<sup>88</sup> See *United States v. Edwards* (1974) 415 U.S. 800; *Arizona v. Roberson* (1988) 486 U.S. 675.

<sup>89</sup> (2002) 28 Cal.4<sup>th</sup> 1007. ALSO SEE *People v. Mack* (1980) 27 Cal.3d 145, 154; *People v. Scaffidi* (1992) 11 Cal.App.4<sup>th</sup> 145, 152 [“[D]efendant’s assertion would only have had merit, under these facts, had defendant remained in continuous custody.”]; *People v. Inman* (1986) 186 Cal.App.3d 1137, 1142-3; *U.S. v. Skinner* (9<sup>th</sup> Cir. 1982) 667 F.2d 1306, 1309; *U.S. v. Hines* (9<sup>th</sup> Cir. 1992) 963 F.2d 255, 257; *U.S. v. Coleman* (9<sup>th</sup> Cir. 2000) 208 F.3d 786, 790 [“The statements that Defendant sought to have suppressed were made *after* he was released from custody. Because Defendant had been released from custody for a significant period of time before investigators questioned him again, the district court’s refusal to suppress those statements did not violate *Edwards*.”]; *Clark v. Maryland* (2001) 781 A.2d 913, 941-2 [“Federal and state courts have unanimously accepted the view that the *Edwards* prohibition against reinterrogation is inapplicable if, after a suspect asks for counsel, there is a break in custody before reinterrogation commences.” Citations omitted.]

<sup>90</sup> *Rhode Island v. Innis* (1980) 446 U.S. 291, 300.

<sup>91</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436, 478; *People v. Maxey* (1985) 172 Cal.App.3d 661, 666; *People v. Grant* (1988) 45 Cal.3d 829, 842-3; *In re Frank C.* (1982) 138 Cal.App.3d 708, 713; *People v. Edwards* (1991) 54 Cal.3d 787, 815-6 [officers are not required to prevent a suspect from

There are two types of interrogation for *Miranda* purposes, somewhat similar to the two types of “custody.” First, there are questions that plainly call for an incriminating response; e.g., “What kind of gun did you use?” “Why did you kill him?”

Second, there are questions that, although not calling for an incriminating response, were reasonably likely to elicit one.<sup>92</sup> These types of questions constitute de facto interrogation; i.e., the “functional equivalent of direct questioning.” As the Court noted in *Rhode Island v. Innis*, “A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation.”<sup>93</sup>

Note that this subject (what is “interrogation?”) is also important for a reason other than determining when a waiver is required. As a general rule, if a suspect invokes his *Miranda* rights, officers may not interrogate him. But if the suspect invokes and later makes a statement in response to questions that do not constitute “interrogation,” the statement will not be suppressed.<sup>94</sup>

### Basic principles

To determine whether an officer’s words or conduct constituted de facto “interrogation,” the courts apply the following principles.

**“REASONABLY LIKELY”:** Interrogation does not result merely because there was a “possibility” the suspect would incriminate himself, or because officers “hoped” he would,

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making a spontaneous statement “off the record”]; *People v. Amos* (1977) 70 Cal.App.3d 562, 568-9; *People v. Claxton* (1982) 129 Cal.App.3d 638, 653; *People v. Bradford* (1997) 14 Cal.4th 1005, 1035; *People v. Matthews* (1968) 264 Cal.App.2d 557, 567; *People v. West* (1980) 107 Cal.App.3d 987, 994 [suspect spontaneously told an officer, “I should have blown you away when I had the chance.”]; *People v. Mercer* (1967) 257 Cal.App.2d 244, 249 [“The police need not gag a suspect who wishes to confess his commission of an unsolved crime.”]; *People v. Brewer* (2000) 81 Cal.App.4th 442, 458.

<sup>92</sup> See *Arizona v. Mauro* (1986) 481 U.S. 520, 526; *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-601; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573 [“A functional equivalent of questioning is any statement or conduct which the police should know is reasonably likely to elicit an incriminating response from the suspect.”]; *People v. Wader* (1993) 5 Cal.4th 610, 637; *People v. Clark* (1993) 5 Cal.4th 950, 985; *People v. Mickey* (1991) 54 Cal.3d 612, 651. **NOTE:** The purpose of this broad definition of “interrogation” is to prevent officers from circumventing *Miranda* by devising “methods of indirect questioning.” See *Rhode Island v. Innis* (1980) 446 U.S. 291, 299, fn.3 [“To limit the ambit of *Miranda* to express questioning would place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.”]; *People v. Wojtkowski* (1985) 167 Cal.App.3d 1077, 1081 [“This broad definition prevents police ingenuity in creating methods of indirect questioning.”].

**NOTE:** The term “incriminating response” covers “any statement or non-verbal act which might be used against the suspect in court. It can be in the form of a denial, an admission, an alibi, or any other inculpatory or exculpatory conduct.” See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.5; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573.

<sup>93</sup> (1980) 446 U.S. 291, 301.

<sup>94</sup> See *People v. Roldan* (2005) \_\_ Cal.4th \_\_, \_\_ [“[S]tatements volunteered when not in response to an interrogation are admissible against a defendant even after an initial assertion of the right to remain silent.”]; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573 [“Since the police spoke with Shedelbower five minutes after he requested an attorney, we must determine if those remarks constituted interrogation.”]; *In re Frank C.* (1982) 138 Cal.App.3d 708, 713 [“Notwithstanding an initial assertion of the right to remain silent, a statement subsequently made by a suspect in custody is admissible if it was . . . not made in response to interrogation by police.”].

or because the suspect interpreted the officer's words as calling for an incriminating response. Interrogation occurs only if a reasonable officer would have known an incriminating response was likely.<sup>95</sup>

**OFFICERS' INTENT:** Interrogation usually results if the officers intended that their words would elicit an incriminating response. This is because it indicates they knew an incriminating response was reasonably likely. "[W]here 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."<sup>96</sup>

**EXPLOITING FEARS, WEAKNESSES:** Interrogation usually results if officers knowingly exploited a suspect's "unusual susceptibility" or fears.<sup>97</sup>

**LINK BETWEEN QUESTION AND CRIME:** A question is more apt to be deemed interrogation if there was a direct link between it and the crime under investigation.<sup>98</sup>

### Accusations

Accusing a suspect of committing a crime almost always constitutes interrogation because an incriminating response is commonly the result. As the Court of Appeal explained:

When police officers confront an accused with an accusatory statement which on its face requires an explanation, they can be seeking no other result but an oral

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<sup>95</sup> See *Arizona v. Mauro* (1986) 481 U.S. 520, 529 ["Officers do not interrogate a suspect simply by hoping that he will incriminate himself."]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301-2 ["[T]he police surely cannot be held accountable for the unforeseeable results of their words or actions"]; *Pennsylvania v. Muniz* (1990) 496 U.S. 582; *People v. Morris* (1987) 192 Cal.App.3d 380, 389 ["The standard here is not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect."]; *People v. Wader* (1993) 5 Cal.4th 610, 637; *In re Albert R.* (1980) 112 Cal.App.3d 783, 793; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 242.

<sup>96</sup> *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7. ALSO SEE *In re Albert R.* (1980) 112 Cal.App.3d 783, 788, 792-3. **BUT ALSO SEE** *People v. Claxton* (1982) 129 Cal.App.3d 638, 655 ["Certainly the intent of [the officer] is highly probative; he did not intend to elicit incriminatory statements from the appellant to be used against him."]. **NOTE:** It would not be particularly relevant that the officer did *not* intend to elicit an incriminating response because a officer's lack of intent does not tend to prove that a reasonable officer would not have known an incriminating response was reasonably likely. See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Boyer* (1989) 48 Cal.3d 247, 275. Also, it is not particularly significant that the suspect believed the officer's words or conduct called for an incriminating response. Again, this is because the existence of "interrogation" depends on what the officer should have known—not how the suspect may have interpreted the officer's words or conduct. See *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 242.

<sup>97</sup> See *Rhode Island v. Innis* (1980) 446 U.S. 291, 302, fn.8 ["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."]. **ALSO SEE** *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *Brewer v. Williams* (1977) 430 U.S. 387.

<sup>98</sup> See *People v. Wader* (1993) 5 Cal.4th 610, 637 [there was no indication "that the inquiry was at all relevant to any charge for which defendant was then in custody or any crime of which he was then suspected."]; *U.S. v. Booth* (9th Cir. 1981) 660 F.2d 1231, 1238 ["[I]t is relevant, but not determinative, that a question posed was not related to the crime or the suspect's participation in it."].

acknowledgment of the truth of the statement by the accused or the eventual court use of his silence as an implied admission.<sup>99</sup>

For example, in *In re Albert R.*<sup>100</sup> the defendant was arrested for car theft after he sold a stolen car to a friend named Jim Hackett. A CHP officer who was driving Albert to jail told him, “That was sure a cold thing you did to Jim Hackett, selling him that hot car.” Albert responded, “Yes, but I made the money last.” The court ruled the officer’s comment constituted “interrogation,” saying, “There was nothing subtle about the officer’s statements to defendant. They were blatantly and flagrantly accusatorial. As such, [the officer] should have known that his accusations were reasonably likely to obtain inculpatory statements.”

Interrogation may also result if officers arrange for someone else to make an accusation in their presence. This occurred in *People v. Stewart*<sup>101</sup> where an officer brought two robbery suspects, Clements and Stewart, into an interview room and had Clements read aloud his written confession in which he incriminated Stewart. At Stewart’s trial, the prosecution was permitted to present evidence that Stewart did not deny Clements’ allegation. This violated *Miranda*, said the Court of Appeal, because Clements was functioning as a surrogate interrogator when he made the accusation.

#### Evidence of guilt

Informing a suspect in custody of the evidence of his guilt may, of course, result in an incriminating response, especially if it was done in provocative or goading manner. On the other hand, an incriminating response is considered much less likely if officers conveyed the information in a manner that was brief, factual, and dispassionate. Consequently, the courts usually rule that officers do not “interrogate” a suspect by laying their cards on the table.<sup>102</sup> For example, the following were deemed not interrogation:

- **YOU WERE ID’D:** After a suspect invoked his right to counsel, the officers were “gathering their materials in preparation to leave” when one of them told him that the victim had identified him as the person who had raped her and murdered her boyfriend. Court: “[The officer’s statements] did not call for nor elicit an incriminating response. They were not the type of comments that would encourage [the suspect] to make some spontaneous incriminating remark.”<sup>103</sup>
- **THERE’S CONTRADICTORY EVIDENCE:** A minor who had been arrested for attempted car theft claimed the car belonged to his mother. When the arresting officer ran the license number and determined he was lying, he said to him, “The car’s not yours.” The minor then admitted the car was stolen. Court: “[T]he officer’s remark could

<sup>99</sup> *People v. Stewart* (1965) 236 Cal.App.2d 27, 32. ALSO SEE *Tankleff v. Senkowski* (2<sup>nd</sup> Cir. 1998) 135 F.3d 235, 244 [“[T]he detectives had accused him of showing insufficient grief, had said that his story was ‘ridiculous’ and ‘absurd,’ and had added that they simply ‘could not accept’ his explanations.”].

<sup>100</sup> (1980) 112 Cal.App.3d 783.

<sup>101</sup> (1965) 236 Cal.App.2d 27. ALSO SEE *Nelson v. Fulcomer* (3<sup>rd</sup> Cir. 1990) 911 F.2d 928, 937-8.

<sup>102</sup> See *Arizona v. Roberson* (1988) 486 U.S. 675, 687 [Court states that if a suspect invokes his *Miranda* rights as to one crime, officers may inform him of the facts of their investigation into a second crime for which he was a suspect, “as long as such communication does not constitute interrogation.” Thus, a statement of facts does not necessarily constitute interrogation.].

<sup>103</sup> See *Shedelbower v. Estelle* (9<sup>th</sup> Cir. 1989) 885 F.2d 570, 573. ALSO SEE *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192 [officers were merely explaining why the defendant would remain in custody when they told him, after he invoked, that he had been ID’d].

hardly be called anything but a tentative, and somewhat uncertain, statement not reasonably seen by him to invite a response.”<sup>104</sup>

- **WE FOUND EVIDENCE:** While driving a suspect to jail, an FBI agent was notified by cell phone that officers found a gun in the suspect's house. The agent told the suspect, “They found a gun at your house.” Court: “[T]he rather innocuous statement at issue here did not constitute interrogation.”<sup>105</sup>
- **WE HAVE EVIDENCE:** Before *Mirandizing* the defendant, an officer “explained the charges against him” and informed him that “he had been arrested for possession of child pornography based on a number of tapes that had been seized from inside his home.”<sup>106</sup>
- **WE HAVE A STRONG CASE:** Before *Mirandizing* a robbery suspect, an officer told him that his accomplice “had already made a statement” and as the result the case against the suspect was “pretty good.” Court: “[T]he general conversation preceding the statement under challenge did not amount to proscribed police questioning or interrogation.”<sup>107</sup>

#### Brief, factual statements

Furnishing a suspect with general information is seldom deemed interrogation if officers were brief and to the point. In other words, furnishing the suspect with information he would probably like to have is less apt to be deemed interrogation than information that serves mainly to prod or incite. The following are examples.

- **YOU'RE UNDER ARREST FOR . . . :** Informing a suspect he is under arrest for a certain crime is not interrogation. Court: “Far more is required to constitute the functional equivalent of questioning than merely advising a person he is under arrest for a specific offense.”<sup>108</sup>
- **YOU CAN CALL ME LATER:** A suspect who had been arrested for possession of drugs, invoked his right to counsel. The next day, a narcotics officer spoke with him in jail and said “he was not interested in obtaining a statement,” that he was a “little fish,” and that officers wanted his supplier. The officer then gave the suspect his pager number and told him to call if he was interested in cooperating after his release. Noting that the only reason the officer spoke with the suspect was “to solicit his help in an ongoing drug investigation after he was freed from jail,” the court ruled the officer's statement “should not be considered an interrogation.”<sup>109</sup>
- **WHAT'S GOING TO HAPPEN NOW:** After a suspect invoked his right to counsel, a detective said, “That's fine. That is your right. I'm going to have you booked for first degree murder and robbery. I'm going to send you down to the Juvenile Hall and I'm going to call the intercept officer in Probation and get you detained and send you downtown.” As the detective got up to leave, the suspect offered to show him

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<sup>104</sup> *In re Curt W.* (1982) 131 Cal.App.3d 169, 180.

<sup>105</sup> *U.S. v. Payne* (4<sup>th</sup> Cir. 1992) 954 F.2d 199, 203. ALSO SEE *People v. O'Sullivan* (1990) 217 Cal.App.3d 237. **NOTE re conduct as “interrogation”:** In one case, *People v. Taylor* (1986) 178 Cal.App.3d 217, the court ruled an officer “interrogated” Taylor when, after a high-speed chase, the officer showed him a piece of jewelry he had attempted to hide. Because the court failed to present any logical analysis of its novel conclusion, *Taylor* appears to be an aberration.

<sup>106</sup> *U.S. v. Wipf* (8<sup>th</sup> Cir. 2005) 397 F.3d 677, 685.

<sup>107</sup> *People v. Patterson* (1979) 88 Cal.App.3d 742, 749.

<sup>108</sup> *People v. Celestine* (1992) 9 Cal.App.4<sup>th</sup> 1370, 1374.

<sup>109</sup> *U.S. v. Jackson* (7<sup>th</sup> Cir. 1999) 189 F.3d 502, 509-11.

where the gun was hidden. Court: “We are satisfied that [the suspect’s] desire to talk to [the detective] was motivated by his desire to exculpate himself from the murder charge, and that [the detective’s] factual responses to appellant’s statement were not an attempt to elicit any statements from appellant.”<sup>110</sup>

- **BASIS OF ARREST:** Before the defendant was *Mirandized*, an officer told him that “he has been arrested for possession of child pornography based on a number of tapes that had been seized from inside his home.”<sup>111</sup>

Note, however, that factual statements are more likely to be deemed interrogation as they become less informative and more provocative; e.g., “This is your last chance to cooperate,” and (after the suspect invoked), “I thought you were going to come back and straighten it out.”<sup>112</sup>

#### Conversations between officers, monologues

A conversation between two officers in the suspect’s presence may be deemed interrogation if a court concludes it was merely a ploy to obtain an incriminating statement. The same is true of an officer’s monologue in the suspect’s presence. As the Court of Appeal observed, “[P]olice statements may amount to custodial interrogation without being phrased in questioning form.”<sup>113</sup>

A blatant example of an interrogation masquerading as a monologue is found in the case of *Brewer v. Williams*.<sup>114</sup> Williams was arrested in Davenport, Iowa on charges he had abducted a 10-year old girl in Des Moines. The girl had not been located, and officers suspected she had been murdered. As two detectives were driving Williams back to Des Moines, one of them delivered to Williams an address which has become known as the “Christian Burial Speech.”

“I want to give you something to think about while we’re traveling down the road,” said the detective. Knowing that Williams was deeply religious, he pointed out that unless the girl’s body was found soon it would be covered with snow, which meant she would not receive a “Christian burial.” Said the officer, “I feel that you yourself are the only person that knows where this little girl’s body is, and if you get a snow on top of it you yourself may be unable to find it.” Williams responded by leading officers to the girl’s body.

In ruling the officer’s “speech” constituted interrogation, the U.S. Supreme Court said, “There can be no serious doubt [that the officer] deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him.”

In contrast to *Williams* is another U.S. Supreme Court case, *Rhode Island v. Innis*.<sup>115</sup> Although *Innis* was factually similar to *Williams*, the Court reached a different result. Here’s what happened.

Two officers were driving Innis to jail after arresting him for an armed robbery and murder that had occurred a few hours earlier. The officers knew that the perpetrator’s sawed-off shotgun had not been recovered and, as they testified, they briefly discussed it:

<sup>110</sup> *People v. Hayes* (1985) 169 Cal.App.3d 898, 908.

<sup>111</sup> *U.S. v. Wipf* (8<sup>th</sup> Cir. 2005) 397 F.3d 677.

<sup>112</sup> *U.S. v. Padilla* (9<sup>th</sup> Cir. 2004) 387 F.3d 1087, 1093); *People v. Harris* (1989) 211 Cal.App.3d 640, 648-9.

<sup>113</sup> *In re Albert R.* (1980) 112 Cal.App.3d 783, 790.

<sup>114</sup> (1977) 430 U.S. 387.

<sup>115</sup> (1980) 446 U.S. 291.

OFFICER GLECKMAN: I was talking back and forth with Patrolman McKenna stating that I frequent this area [where Innis was arrested] while on patrol and that because a school for handicapped children is located nearby, there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

OFFICER MCKENNA: I more or less concurred.

Innis then interrupted the officers and led them to the gun, saying he "wanted to get the gun out of the way because of the kids in the area in the school."

Although the facts were quite similar to those in *Brewer v. Williams*, the United States Supreme Court ruled the officers' conversation was not "interrogation" because of two things. First, unlike the speech in *Williams*, the conversation "consisted of no more than a few offhand remarks." Second, the officers in *Innis*, unlike the officers in *Williams*, did not exploit their suspect's known psychological weakness. As the Court noted, the officers were not aware that Innis was "peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."

#### "Neutral" questions and remarks

Questions and remark that are not reasonably likely to elicit an incriminating response are known as "neutral" expressions and are, by definition, not interrogation. As the court noted in *People v. Mercer*, "A neutral inquiry of an officer such as 'what happened?' upon arriving at the scene of a crime is proper and the response of a suspect is admissible."<sup>116</sup> As we will now discuss, there are several types of neutral inquiries and remarks.

**ROUTINE BOOKING QUESTIONS:** When a person is arrested, there are certain questions that are asked as a matter of routine, usually in conjunction with the booking process. These so-called "routine booking questions" do not constitute interrogation because, (1) they are not reasonably likely to elicit an incriminating response, and (2) they are "normally attendant to arrest and custody" and are, therefore, exempt from *Miranda*.<sup>117</sup>

As a general rule, an inquiry constitutes a "routine booking question" if it merely seeks basic identifying data or biographical information that is necessary to complete the booking or pretrial services process.<sup>118</sup> Information falling into this category include the

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<sup>116</sup> (1967) 257 Cal.App.2d 244, 248. Citations omitted. ALSO SEE *People v. Wader* (1993) 5 Cal.4th 610, 637 ["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."]; *U.S. v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1237 ["Many sorts of questions do not, by their very nature, involve the psychological intimidation that *Miranda* is designed to prevent."].

<sup>117</sup> See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *People v. Hall* (1988) 199 Cal.App.3d 914, 919-20; *People v. Morris* (1987) 192 Cal.App.3d 380, 387; *People v. Herbst* (1986) 186 Cal.App.3d 793, 800.

<sup>118</sup> See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Hall* (1988) 199 Cal.App.3d 914, 921; *People v. Herbst* (1986) 186 Cal.App.3d 793. **NOTE:** Questions concerning a suspect's identity do not constitute interrogation even though they were not asked in conjunction with the booking process. See *People v. Valdivia* (1986) 180 Cal.App.3d 658, 662; *People v. Powell* (1986) 178 Cal.App.3d 36, 39. **NOTE:** Prior to *Innis*, the California Supreme Court ruled in *People v. Rucker* (1980) 26 Cal.3d 368 that routine booking questions would be admissible in court only if officers obtained a valid *Miranda* waiver. As the result of Proposition 8, however, *Rucker* has been

suspect's name, address, date of birth, physical description, telephone number, occupation, social security number, employment history, arrest record, spouse's name, and parents' name.<sup>119</sup>

**SITUATIONAL QUESTIONS AND REMARKS:** While routine booking questions are asked as a matter of regular police procedure, some types of questions and remarks are deemed neutral because they were merely a natural response to a matter at hand. Here are some examples:

**SEEKING CONSENT TO SEARCH:** Asking a suspect for consent to search calls for a non-incriminating "yes" or "no" response.<sup>120</sup>

**THAT'S THE GUY:** When an officer saw that another officer had just arrested the person he had seen throw evidence from a window, he said to the arresting officer, "Yeah, that's the guy."<sup>121</sup>

**YOU'RE NOT GOING TO BE RELEASED AS SOON AS YOU THINK:** When the defendant told the arresting officer that she "would be released in the morning" (and therefore he should not impound her car), the officer told her that "she had been arrested for a serious charge and that she might not be getting out as quickly as she thinks."<sup>122</sup>

**THIS IS INTERESTING:** A jailer, upon finding methamphetamine in the bottom of the defendant's deodorant container, said to her partner, "I believe I have something here." Court: "There is no basis for finding that the deputy should have known her quick, informative remark, made contemporaneously with her discovery, was reasonably likely to elicit an incriminating response."<sup>123</sup>

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abrogated, and *Innis* is the law in California. See *People v. Hall* (1988) 199 Cal.App.3d 914, 919-21; *People v. Morris* (1987) 192 Cal.App.3d 380, 387; *People v. Herbst* (1986) 186 Cal.App.3d 793, 800.

<sup>119</sup> See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601-2; *People v. Powell* (1986) 178 Cal.App.3d 36, 40 ["[T]he rights enumerated in *Miranda* . . . are not implicated by questions relating only to booking information. Identification of the arrestee is a necessary and legitimate part of the booking process."]; *People v. Palmer* (1978) 80 Cal.App.3d 239, 256 ["[T]he *Miranda* rules do not apply to routine questions relating to personal identification and background information"]; *People v. Powell* (1986) 178 Cal.App.3d 36, 40; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 662 ["Questioning for the purpose of establishing an individual's identity need not be preceded by *Miranda* warnings."]; *U.S. v. Ward* (9<sup>th</sup> Cir. 1973) 488 F.2d 162, 164 ["The name a person is using, like his voice or his fingerprints, is a publicly displayed characteristic."]; *People v. Rincon* (2005) \_\_ Cal.App.4th \_\_.

<sup>120</sup> See *People v. Ruster* (1976) 16 Cal.3d 690, 700; *People v. Shegog* (1986) 184 Cal.App.3d 899, 905; *People v. Brewer* (2000) 81 Cal.App.4<sup>th</sup> 442, 458; *People v. James* (1977) 19 Cal.3d 99, 114-5; *People v. Fierro* (1991) 1 Cal.4<sup>th</sup> 173, 217. **ALSO SEE** *Doe v. United States* (1988) 487 U.S. 201 [a court order requiring the target of a grand jury investigation to sign a "consent directive" authorizing banks to disclose records pertaining to his bank accounts does not violate the Fifth Amendment's prohibition against compelled testimony].

<sup>121</sup> *U.S. v. Younger* (9<sup>th</sup> Cir. March 1, 2005) \_\_ F.3d \_\_.

<sup>122</sup> *U.S. v. Morton* (D.C. Cir. 2004) 391 F.3d 274, 276.

<sup>123</sup> *People v. O'Sullivan* (1990) 217 Cal.App.3d 237. **ALSO SEE** *U.S. v. Lopez* (1st Cir. 2004) 380 F.3d 538, 545-6 ["[We found] the stuff . . . the deal [is] off."] Not interrogation.]. **NOTE:** In *People v. Morris* (1987) 192 Cal.App.3d 380 an officer who was booking a murder suspect asked, "Who are you accused of killing?" Morris responded, "I killed my sister-in-law." The officer testified he asked the question because he wanted to make sure Morris was kept away from any of the victim's friends or relatives who might be in the facility. Although the court ruled the question constituted interrogation, it did so based solely on its conclusion that it was not a "routine" booking question,

YOU WERE ID'D: Officers were conducting a parole search of an apartment when they found a gun that had been used in an attempted murder. When an officer notified the parolee that he was under arrest, he replied, "I wasn't even out of my apartment that night." The officer told him that "he was identified as being there by me seeing him on a video tape at a bar a few blocks away from the shooting." Court: "Here it is clear there was no attempt by the officer to elicit information from [the parolee] before he volunteered and gratuitously interjected the statement."<sup>124</sup>

CLARIFICATION: When an officer told Andersen he was under arrest for disorderly conduct he responded, "I stabbed her." The officer asked, "Who?" Anderson then named the woman he had murdered five days earlier. Court: "The police officer's question was a neutral response, intended to clarify Anderson's puzzling declaration; it was not coercive interrogation that *Miranda* seeks to prevent."<sup>125</sup>

CLARIFICATION: A man entered a police station and said he wanted to turn himself in. When asked why, he said for murder. When asked when it occurred, he said it happened one week earlier.<sup>126</sup>

CLARIFICATION: When an officer arrested him in a bank for passing a forged money order, Maxey spontaneously said he received the money order from two men who had accompanied him to the bank. The officer asked Maxey to describe the two men. His response was used against him at trial. Court: The officer "was in the awkward situation of either not asking what the two men looked like and risking the disappearance of the real culprits, or of believing Maxey and attempting to check out his story. We cannot say that the few questions asked in response to Maxey's volunteered story about the two men constituted custodial interrogation."<sup>127</sup>

IDENTIFY COMPANIONS: While executing a search warrant, officers asked a handcuffed occupant to identify the others in the room.<sup>128</sup>

BREATHALYZER INSTRUCTIONS: After transporting a DUI suspect to jail, an officer gave him instructions on how to complete the various sobriety tests. He also asked if he understood the instructions. The suspect responded by making incriminating statements. Court: "These instructions were not likely to be perceived as calling for any verbal response and therefore were not [interrogation]. The dialogue also

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ignoring the acknowledged propriety of the question and the lack of any coercion. An unsound decision.

<sup>124</sup> *People v. Thomas* (1990) 219 Cal.App.3d 134, 143. **NOTE:** In *People v. Boyer* (1989) 48 Cal.3d 247, 273-4 the court ruled that officers "interrogated" a suspect when they told the defendant they had just discovered a witness who disputed material parts of his story. This ruling was, however, based largely on circumstances that had occurred beforehand; e.g., "over an hour of intensive interrogation, during which the police repeatedly accused him of lying and professed their firm belief in his guilt, and the officers had apparently attempted to subvert *Miranda* by failing to honor Boyer's previous *Miranda* invocation. See *U.S. v. Payne* (4<sup>th</sup> Cir. 1992) 954 F.2d 199, 203 ["[W]hether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue."].

<sup>125</sup> *Andersen v. Thieret* <sup>125</sup> (7<sup>th</sup> Cir. 1990) 903 F.2d 526, 532. ALSO SEE *People v. Mercer* (1967) 257 Cal.App.2d 244, 248 [a suspect who had just been arrested said, "I did it. No one else was involved." The officer responded, "Did what?"]; *U.S. v. Gonzales* (5<sup>th</sup> 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."].

<sup>126</sup> *People v. Conrad* (1973) 31 Cal.App.3d 308, 319.

<sup>127</sup> *People v. Maxey* (1985) 172 Cal.App.3d 661, 667.

<sup>128</sup> *U.S. v. Guiterrez* (7<sup>th</sup> Cir. 1996) 92 F.3d 468, 471.

contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily attendant to the police procedure.”<sup>129</sup>

**ANSWERING QUESTIONS:** Suspects in custody frequently pose questions to officers. And if the questions pertain to a crime, their response may elicit an incriminating response. Nevertheless, the courts have consistently ruled that officers do not “interrogate” a suspect when they merely answer a suspect’s question, provided, (1) the question was volunteered, (2) the officer’s answer was brief and to the point, and (3) there were no indications of coercion. Some examples:

**WHY’S THE DA BEING HARDNOSED?** Stephens, who was in custody on robbery charges, asked a detective why the DA was offering him 16 years. The detective said it was probably because of the seriousness of the crime and Stephens’ criminal record. Stephens responded by explaining that it was his accomplice who had actually carried the gun during the robbery. Court: “[Stephens] evidently thought an offer of a 16-year term was excessive because he was ‘not the one with the gun.’ Defendant obviously did not perceive that he was being interrogated but, rather, wanted to voluntarily assert a reason for leniency.”<sup>130</sup>

**HOW MUCH TIME AM I LOOKING AT?** Upon being arrested for murder, Clark invoked his *Miranda* rights. Officers then transported him to a local hospital to obtain a blood sample. During the trip, Clark asked, “What can someone get for something like this, thirty years?” An officer responded, “Probably not unless you were a mass murderer,” adding that he had never seen anybody serve more than seven and a half years. Clark responded, “I want this on the record. I’m guilty. I killed her. What do you want to know?” Court: “[T]here was no reason for [the officer] to have known that his casual estimate of possible penalties would produce an incriminating response from this defendant. Defendant phrased his question in abstract terms and the officer responded in the same terms.”<sup>131</sup>

**STATUS OF MURDER VICTIMS:** A Placer County sheriff’s detective was returning a murder suspect to the U.S. from Japan. During the flight, the suspect asked if the two murder victims were buried together. The detective said the victims’ bodies were cremated and their ashes scattered in the High Sierra. At that point, the suspect “suffered an emotional lapse” and made several incriminating statements. Court: “Plainly, there was no express questioning. . . . Nor, in our view, were there any words or actions [by the detective that he] should have known were reasonably likely to elicit an incriminating response.”<sup>132</sup>

**CONVERSATION FILLERS:** If an unwarned suspect is making a statement, officers do not violate *Miranda* by making use of ordinarily conversation fillers that help the flow of conversation; e.g., “Yeah,” “OK,” “I hear you,” “I can understand that.” They may also ask

<sup>129</sup> *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 603 [questions in which the suspect was asked to count aloud did, however, constitute “interrogation.”]. ALSO SEE *U.S. v. Edmo* (9<sup>th</sup> Cir. 1998) 140 F.3d 1289, 1293; <sup>129</sup> *People v. Jones* (1979) 96 Cal.App.3d 820, 827 [“Do you want your stomach pumped?”].

<sup>130</sup> *People v. Stephens* (1990) 218 Cal.App.3d 575. ALSO SEE *People v. Roldan* (2005) \_\_ Cal.4th \_\_ [county jail inmate asked why he was being moved to a high security area].

<sup>131</sup> *People v. Clark* (1993) 5 Cal.4<sup>th</sup> 950. ALSO SEE *People v. Tarter* (1972) 27 Cal.App.3d 935, 943 [the questions were not interrogation because they were asked “for the sole purpose of better enabling the marshal to express a more accurate opinion concerning the likely disposition of the defendant’s case.”].

<sup>132</sup> *People v. Mikey* (1991) 54 Cal.3d 612, 651.

the types of open-ended questions that tend to display interest; e.g., “Would you repeat that?” “What are you talking about?” “What do you want to say?”<sup>133</sup>

For example, in *People v. Ray* the defendant was in prison on a murder charge. One day he asked to meet with a Department of Corrections investigator. During the meeting, Ray began confessing to a series of robberies. As he was doing so, the investigator would occasionally interject “yeah” or “okay,” ask Ray to repeat something, or ask for details, such as when and where the crimes were committed and whether the victims were tied up or hurt. In ruling the investigator’s remarks did not constitute interrogation, the California Supreme Court said:

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. Nothing in the substance or tone of such inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide.<sup>134</sup>

Similarly, in *People v. Gonzales*<sup>135</sup> the defendant asked an officer, “Can I be up front with you?” The officer responded, “Sure.” The suspect then made an incriminating statement. In ruling the officer’s response, “Sure,” did not constitute interrogation, the Colorado Supreme Court said, “[W]e cannot conclude that [the officer’s] response compelled the defendant to make a statement, much less that, based on the totality of the circumstances, [the officer] reasonably should have anticipated that his response would be perceived by the defendant as an interrogation and overcome his desire not to speak about his case.”

**CASUAL CONVERSATION:** It is not uncommon for officers and prisoners to engage in casual conversation or “small talk.” Although it is possible that the prisoner may respond by making an incriminating statement, in most cases such a response is not reasonably foreseeable. Consequently, when such a conversation was truly “casual”—not subterfuge—it will not be deemed interrogation.

For example, in *People v. Claxton* a supervisor at juvenile hall asked Claxton, a 17-year old murder suspect, “What did you get yourself into?” Claxton responded by making an incriminating statement. The court ruled the question was not interrogation because, “In the patois of the streets or jailhouse, the inquiry is tantamount to ‘What’s up?’ or ‘What are you in for?’ The question did not require an inculpatory reply, nor does anything in the record suggest that [the supervisor] expected one.”<sup>136</sup>

Similarly, in *People v. Lewis*, the defendant was stopped when officers saw him driving a stolen car whose owner had been murdered. While sitting in the back seat of a patrol car, Lewis asked a sergeant whom he knew, “What are they going to do with my car?” The sergeant said it was being impounded because it had been used in a crime. In response, Lewis claimed he bought it from “an elderly gentleman.” The sergeant commented that it was a nice car, adding, “Man, you must have a good job.” Lewis responded by making an incriminating statement. In ruling the sergeant’s comment did not constitute interrogation, the court said, “The record indicates that this was a casual

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<sup>133</sup> *People v. Matthews* (1968) 264 Cal.App.2d 557, 567.

<sup>134</sup> (1996) 13 Cal.4<sup>th</sup> 313, 338.

<sup>135</sup> (Colorado Supreme Court 1999) 987 P.2d 239, 242.

<sup>136</sup> (1982) 129 Cal.App.3d 638, 654. ALSO SEE *Rhode Island v. Innis* (1980) 446 U.S. 291, 303 [“a few off hand remarks”]; *People v. Bradford* (1997) 14 Cal.4<sup>th</sup> 1005, 1034-5; *People v. Ashford* (1968) 265 Cal.App.2d 673, 685 [“How’s it going, Ashford?”].

conversation between two acquaintances. Defendant initiated the conversation and was very concerned about what would happen to his car.”<sup>137</sup>

Casual conversation may, however, be deemed interrogation if the suspect was apparently not interested in conversing. For example, in *In re Johnny V.*<sup>138</sup> an officer learned that Johnny, a juvenile whom he knew, had been arrested for murder and was sitting in an interview room. When the officer entered the room, Johnny immediately invoked his right to remain silent. At that point, the officer said, “Well, they got you for this thing, too, huh? Well, I could understand if they had gotten [your older brother] and not you.” Johnny then made an incriminating statement. In ruling the officer’s attempt to engage Johnny in casual conversation constituted interrogation, the court noted it was essentially “an invitation to him to explain his involvement in the crime.”

**QUESTIONING A WITNESS:** When a person in custody for Crime A is believed to be a witness in Crime B, officers are not ordinarily required to seek a waiver before questioning him about Crime B. This is because an incriminating response is not reasonably likely when officers are questioning a person who was reasonably believed to be merely a witness.

For example, in *People v. Wader*<sup>139</sup> a San Bernardino County sheriff’s sergeant asked Wader, an inmate in the county jail, if he knew the whereabouts of his friend Frank Hillhouse who was wanted for murder. Wader responded by making a statement that linked him to the murder. In ruling the sergeant’s statement was not interrogation, the California Supreme Court noted, “[The sergeant’s] inquiry regarding the whereabouts of Hillhouse was designed to elicit information about Hillhouse, not defendant. There is no indication in the record before us that the inquiry was at all relevant to any charge for which defendant was then in custody or any crime of which he was then suspected.”

**CLARIFYING MIRANDA RIGHTS:** If a suspect says he does not understand his rights, an officer’s attempt to explain them is not reasonably likely to elicit and incriminating response and is, therefore, not interrogation. As the court explained in *People v. Turnage*, “[T]he case law draws a sensible distinction between clarification and interrogation. On the one hand, it permits clarifying questions with regard to the individual’s comprehension of his constitutional rights or the waiver of them; on the other hand, it prohibits substantive questions which portend to develop the facts under investigation.”<sup>140</sup> POV

<sup>137</sup> (1990) 50 Cal.3d 262, 274. ALSO SEE *People v. Roldan* (2005) \_\_ Cal.4th \_\_, \_\_ [a county jail inmate saw a deputy he recognized. “What’s happening, Deputy Munson?” he asked. She replied by asking “if he was going to stay out of trouble.” In response, Roldan admitted that he was guilty of murder. Not “interrogation.”].

<sup>138</sup> (1978) 85 Cal.App.3d 120, 134.

<sup>139</sup> (1993) 5 Cal.4th 610. ALSO SEE *People v. Underwood* (1986) 181 Cal.App.3d 1223, 1231; *People v. Ochoa* (2001) 26 Cal.4th 398, 436; *People v. Mazza* (1985) 175 Cal.App.3d 836, 842 [“Mazza was treated with the deference due a grieving boyfriend who might have turned out to be an important witness.”]; *U.S. v. Bogle* (D.C. Cir. 1997) 114 F.3d 1271, 1275 [“Detective Parker was careful to inform Bogle that he was not there to ask about the murder of Cordell Johnson [Bogle was under arrest for murdering Johnson] and that he wanted to talk only about the murder of Bogle’s brother,” a crime for which Bogle was not a suspect].

<sup>140</sup> (1975) 45 Cal.App.3d 201, 211. ALSO SEE *People v. Wash* (1993) 6 Cal.4th 215, 239 [“[W]here a defendant expresses ambiguous remarks falling short of an invocation of his *Miranda* rights, the officers may continue talking for the purpose of obtaining clarification of his intentions.”]; *Duckworth v. Eagan* (1989) 492 U.S. 195, 203; *People v. Farnam* (2002) 28 Cal.4th 107, 181; *People v. Hinds* (1984) 154 Cal.App.3d 222, 235.