

Miranda: Post-Invocation Questioning

"I want an attorney. I don't want to say anything."

Murder suspect.¹

From an officer's viewpoint, a suspect's *Miranda* invocation is usually bad news. This is not surprising because it usually means the person who has the most information about the crime has just become inaccessible. Moreover, if the case against him is weak, it may mean that officers will have to start their investigation from scratch, or even suspend it. But maybe not.

Although the United States Supreme Court has consistently ruled that the interview "must cease" when a suspect invokes,² it has also pointed out that an absolute and unconditional ban on post-invocation questioning would lead to "absurd and unintended results."³ As the Court explained:

[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity⁴

The question, then, is when can officers question a suspect who has invoked? As we discuss in this article, there are eight situations in which post-invocation questioning is permitted, specifically:

- (1) **Invocation "scrupulously honored"**: The suspect invoked only the right to remain silent, and the officers "scrupulously honored" the invocation before seeking to question him again.
- (2) **Suspect-initiated**: The suspect initiated the questioning.
- (3) **Release from custody**: The suspect was released from custody after he invoked.
- (4) **Not in "custody"**: The suspect was never "in custody."
- (5) **Not "interrogation"**: The officer's questions did not constitute "interrogation."
- (6) **Undercover officer exception**: The person asking the questions was an undercover officer or police agent.
- (7) **Public safety exception**: The officer's questions were reasonably necessary to reduce or eliminate a significant threat to life or property.
- (8) **Counsel was present**: The suspect's attorney consented to the interview and was present.

It should be noted that the legality of post-invocation questioning became a hot topic a few years ago. This occurred after the courts became aware that some law enforcement agencies and *Miranda* schools were encouraging officers to deliberately ignore invocations and continue questioning suspects to obtain leads or statements that could be used for impeachment. Although the courts have unfortunately sent out mixed signals on

¹ See *In re Frank C.* (1982) 138 Cal.App.3d 708, 711.

² See *Miranda v. Arizona* (1966) 384 U.S. 436, 473-4.

³ See *Michigan v. Mosley* (1975) 423 U.S. 96, 102.

⁴ *Michigan v. Mosley* (1975) 423 U.S. 96, 102. ALSO SEE *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664 ["The Supreme Court has rejected a literal interpretation of *Miranda*, however, holding that the exercise of the right to remain silent does not preclude all further questioning."].

this issue, it appears this tactic (known by the euphemism “outside *Miranda*”) is unlawful, especially in light of the U.S. Supreme Court’s decision in *Missouri v. Seibert*.⁵

In contrast, the types of post-invocation questioning we discuss in this article have been expressly approved by the courts.

THE INVOCATION WAS “SCRUPULOUSLY HONORED”

If the suspect invoked only the right to remain silent,⁶ and if officers “scrupulously honored” the invocation, they may contact him later to see if he has changed his mind about talking with them. If so, and if he waives his *Miranda* rights, officers may question him about the crime for which he invoked, or any other crime.⁷

The United States Supreme Court announced this rule in the case of *Michigan v. Mosley* in which it explained, “[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored.”⁸

To see how this rule works, it will be helpful to look at what happened in *Mosley*. After arresting Mosley for committing several robberies, Detroit police sought to question him. But he invoked his right to remain silent, saying he did not want to answer any questions about the robberies. The officers then “promptly ceased the interrogation” and booked him into jail.

It happened that Mosley was also a suspect in a robbery-murder that had occurred a few months earlier in a Detroit bar. So when homicide investigators learned he was in jail, they brought him to the Homicide Bureau for questioning. Mosley waived his *Miranda* rights and proceeded to implicate himself in the robbery-murder.

On appeal, Mosley argued that because he had previously invoked his right to remain silent, the homicide investigators had violated *Miranda* when they sought to question him. The Court classified this argument as “absurd,” pointing out it would mean that “a

⁵ (2004) 542 U.S. 600 [intentional use of two-step interrogation is treated as if he were a constitutional violation]. ALSO SEE *People v. Montano* (1991) 226 Cal.App.3d 914, 935-6; *People v. Neal* (2003) 31 Cal.4th 63; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628; *People v. Vasila* (1995) 38 Cal.App.4th 865, 869, fn.2; *Pollard v. Galaza* (9th Cir. 2002) 290 F.3d 1030; *McNally v. Butts* (9th Cir. 1999) 195 F.3d 1039; *U.S. v. Garvin* (9th Cir. 2001) 258 F.3d 951, 955-6; *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220.

⁶ **NOTE:** For a discussion of what constitutes such an invocation, see “*Miranda* Waivers and Invocations,” *Point of View*, Winter 2006.

⁷ See *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 [“[T]he issue does not revolve around the fact the second interview of defendant was not for another separate crime. . . .¶ The real issue is whether defendant’s *Miranda* right to cut off the questioning was respected”]; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410 [“[W]e have noted on several occasions that an identity of subject matter in the first and second interrogations is not sufficient, in and of itself, to render the second interrogation unconstitutional.”]; *U.S. v. Schwensow* (7th Cir. 1998) 151 F.3d 650, 659 [“[M]any of our sister circuits have addressed this very question and concluded that a second interview is not rendered unconstitutional simply because it involved the same crime as previously discussed.” Citations omitted.]; *U.S. v. Finch* (8th Cir. 1977) 557 F.2d 1234, 1236; *U.S. v. Udey* (8th Cir. 1984) 748 F.2d 1232, 1236. **NOTE:** If the suspect invoked the *Miranda* right to counsel, police-initiated questioning about any crime is prohibited unless one of the other exceptions discussed in this article applies. See *Arizona v. Roberson* (1988) 486 U.S. 675; *Fellers v. United States* (2004) 540 U.S. 519, 524.

⁸ (1975) 423 U.S. 96, 104.

person who has invoked his right to silence can never again be subjected to custodial interrogation by any police officer at any time or place on any subject.”

The Court then announced the rule that if the suspect invoked only the right to remain silent, and if the officers had “scrupulously honored” the invocation, they could contact him later to see if he had changed his mind about invoking. Although the Court did not provide a checklist for determining what officers must do to “scrupulously honor” an invocation,⁹ the courts have consistently ruled there are five requirements, all of which were satisfied in *Mosley*:

- (1) **Interrogation immediately ceased:** When the suspect invoked, the officers immediately stopped interrogating him.
- (2) **No coaxing:** The officers did not pressure or otherwise coax him into changing his mind about invoking.
- (3) **Time lapse:** The officers waited a “significant period of time” before recontacting him.
- (4) **No pressure:** When they recontacted him, they did not attempt to persuade him to talk.
- (5) **Waiver:** The officers did not begin questioning him until he waived his *Miranda* rights.

Interrogation immediately ceased

It is apparent that officers do not “scrupulously honor” an invocation if they ignore it.

Thus, in ruling that officers failed to “scrupulously honor” a suspect’s invocation, the courts have pointed out:

- “When Rambo stated that he did not want to discuss the robberies, [the officer] made no move to end the encounter.”¹⁰
- “Lopez-Diaz said that he did not want to talk about the drugs in the van but [after a short conversation] he was asked about the drugs in the van.”¹¹
- “[The detective’s] continued questioning of appellant after he had refused to waive his rights was a deliberate violation of *Miranda*.”¹²

On the other hand, in cases where the courts ruled that officers had, in fact, “scrupulously honored” the defendant’s invocation, they pointed out:

- “[T]he police here immediately ceased the interrogation.”¹³

⁹ See *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410 [“Our post-*Mosley* decisions have adhered to this flexible approach that takes into account of all relevant circumstances.”]; *U.S. v. Schwensow* (7th Cir. 1998) 151 F.3d 650, 659 [“[*Mosley*] neither elevates any one factor as predominant or dispositive nor suggests that the enumerated factors are exhaustive, but instead directs courts to focus on whether the confession was obtained in a manner compatible with the requirements of the Constitution.”]. **NOTE: *Pettingill* abrogated:** In *People v. Pettingill* (1978) 21 Cal.3d 231, 246 the California Supreme Court announced that California courts would not follow *Mosley*; i.e., that officers could never initiate questioning of a suspect who invoked his right to remain silent. *Pettingill* was abrogated by Proposition 8. See *People v. Warner* (1988) 203 Cal.App.3d 1122, 1126-8; *People v. Harris* (1989) 211 Cal.App.3d 640, 647 [“*Mosley* now exclusively governs admissibility of a suspect’s statements following assertion of his or her right to remain silent.”]; *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1270.

¹⁰ *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 911.

¹¹ *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661.

¹² *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1601.

- “[Q]uestioning ceased once Riva told [the officer] ‘I don’t want to say anything else right now.’”¹⁴
- “[The invocation] was respected by the original arresting officers, and all interrogation ceased.”¹⁵
- “[T]he agents here cut off the first round of questioning as soon as Hsu expressed a desire not to speak.”¹⁶

Note that when the courts say that officers must stop questioning the suspect when he invokes, they mean that officers must not do or say anything that is reasonably likely to elicit an incriminating response.¹⁷

No pressure

Not only must officers stop questioning the suspect, they must not pressure or encourage him to reconsider his decision to invoke.¹⁸ As we discuss here, pressure can result from simple prodding or by confronting the suspect with incriminating evidence.

PRODDING: Prodding occurs when officers urge the suspect to change his mind about invoking or when they say or do something that is reasonably likely to incite him to do so. For example, in *U.S. v. Tyler*,¹⁹ the defendant invoked his right to remain silent after he was arrested for murdering a police informant. A few hours later, officers put him in a small room, the walls of which were plastered with crime scene photos of the victim’s body. At first, the officers talked to him about such things as hunting and his education. But when he started becoming “very emotional,” one of them urged him to “tell the truth.” Tyler then made some incriminating statements. Eleven days later, officers recontacted him in the jail and, after obtaining another waiver, elicited further admissions.

The trial court had ruled that all of Tyler’s statements were admissible, citing *Mosley*. But the Court of Appeals ruled that *Mosley* did not apply because the officers had not “scrupulously honored” his invocation. Said the court:

[The officer] had been carrying on a conversation with Tyler for nearly an hour when he broke down and was instructed to “tell the truth.” These circumstances would, in and of themselves, be inconsistent with scrupulously honoring Tyler’s assertion of silence. However, to make matters worse, the room in which the “conversation” occurred had pictures of the murder victim hung on the walls.

¹³ *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1272. ALSO SEE *Michigan v. Mosley* (1975) 423 U.S. 96, 104 [“[The officer] immediately ceased the interrogation”]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 [“[The officer] immediately ceased all interrogation.”].

¹⁴ *People v. Riva* (2004) 112 Cal.App.4th 981, 994.

¹⁵ *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324.

¹⁶ *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412.

¹⁷ See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *People v. Wader* (1993) 5 Cal.4th 610, 637.

¹⁸ See *Michigan v. Mosley* (1975) 423 U.S. 96, 104 [“[The officer] did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position.”]; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130 [“[The officer] tried neither to resume the discussion nor persuade defendant to reconsider his position.”]. COMPARE *U.S. v. Barone* (1st Cir. 1992) 968 F.2d 1378, 1384 [the officers “repeatedly spoke to Barone for the purpose of changing his mind.”].

¹⁹ (3d Cir. 1998) 164 F.3d 150. ALSO SEE *U.S. v. Barnes* (9th Cir. 1970) 432 F.2d 89 [prodding occurred when, after the suspects invoked, officers put them in a room with an accomplice and, at the officers’ request, the accomplice repeated her confession].

Another good example of prodding is found in *U.S. v. Rambo*.²⁰ After arresting Rambo for robbery, officers sought to question him about a series of other robberies they believed he had committed. When Rambo invoked his right to remain silent, an officer told him, “If you think back over the last two months since you’ve been out of prison, all the shit you’ve been involved in. Think about the towns that are going to want to talk to you, OK?” A little later, Rambo confessed.

The court ruled, however, the confessions should have been suppressed because the officer prodded Rambo into retracting his invocation. “These comments,” said the court, “reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo’s present request to terminate discussion of the topic, he would be questioned further.”

In a California case, *People v. Harris*,²¹ the court seemed to indicate that even minor prodding is inconsistent with scrupulously honoring an invocation. In *Harris*, the defendant left town after officers questioned him about a murder. Two days later, he spoke with an officer on the phone and agreed to come back and answer some more questions. But when he returned and was arrested, he invoked. Surprised by the invocation, the officer said, “I thought you were going to come back and straighten it out?” Harris responded by waiving his rights and confessing. But the court ruled the officer had not scrupulously honored the invocation because his question to Harris was “a prodding invitation to further discussion about the incident.” Said the court, “Had [the officer] scrupulously respected appellant’s right to remain silent, he would not have encouraged further conversation about the murder.”

FURNISHING INFORMATION: Furnishing information to a suspect about his case, such as the nature of the incriminating evidence obtained so far, may or may not constitute pressure depending largely on the manner in which the information was presented. Specifically, a presentation that was factual, brief, and dispassionate is much less likely to cause problems than one that was confrontational, provocative, or rambling.²²

²⁰ (10th Cir. 2004) 365 F.3d 906, 911. ALSO SEE *U.S. v. Olof* (9th Cir. 1975) 527 F.2d 752, 753 [after the suspect invoked, he was “confronted with the description of unpleasantness of prison for the obvious purpose of getting appellant to abandon his self-imposed silence”].

²¹ (1989) 211 Cal.App.3d 640. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.9 [“Defendant was not urged to ‘straighten it out’ in this case as was the defendant in *Harris*.”].

²² See *People v. Harris* (1989) 211 Cal.App.3d 640, 647-8 [“[The officer’s] booking remark was nothing more than a factual statement about the immediate next step in the criminal justice process and cannot be considered as [interrogation].”]; *People v. Thomas* (1990) 219 Cal.App.3d 134, 143 [“[The officer] told Thomas 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.’”]; *People v. Gray* (1982) 135 Cal.App.3d 859, 865 [“Detective Haas’ recitation of the facts was accurate, dispassionate and not remotely threatening.”]; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 [“‘[O]bjective, undistorted presentations’ by police of the evidence against the suspect are less constitutionally suspect than is continuous questioning.”]; *U.S. v. Allen* (8th Cir. 2001) 247 F.3d 741, 765 [“informing Allen of the results of the lineup did not amount to the functional equivalent of interrogation for purposes of the Fifth Amendment. It was a simple description of the status of the ongoing investigation”]. ALSO SEE *Arizona v. Roberson* (1988) 486 U.S. 675, 687 [Court said 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.].

For example, in *U.S. v. Davis*,²³ the defendant invoked his right to remain silent after he was arrested for bank robbery. An FBI agent then handed him a bank surveillance photo of the robber. As Davis studied the photo of himself, the agent asked, “Are you sure you don’t want to reconsider?” Davis responded, “Well, I guess you’ve got me.” He then waived his rights and confessed. On appeal, the Ninth Circuit ruled the agent’s act of displaying the photo did not violate *Miranda* because “the agent merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture.”

The courts have also ruled that officers did not importune the suspect when they notified him that he had been identified by the victim,²⁴ or when they informed him they had discovered incriminating evidence.²⁵ On the other hand, a court is likely to conclude that officers importuned the suspect if they engaged in a “repeated recitation of incriminating evidence”²⁶ or if, as noted earlier, they presented it in a goading or confrontational manner.

Not surprisingly, however, it is sometimes difficult to determine the point at which an officer’s act of furnishing information crosses the line and becomes importuning. For example, in *U.S. v. Guerra*²⁷ the court ruled an officer did not scrupulously honor Guerra’s invocation when, about 30 minutes after he invoked, the officer approached him, re-read the *Miranda* warnings and told him that his accomplice, Koeppe, “was talking” and was “telling us everything that was going on.” Guerra said he didn’t believe it and asked to see a copy of Koeppe’s statement, which the officer provided. After reading the statement, Guerra asked the officer, “What do you want to know?” Said the court:

There can be little doubt that [the officer] intended to use Koeppe’s statement as a lever to pry an admission from the defendant. Although this certainly is an accepted and lawful interrogation technique under other circumstances, it can hardly be viewed as “scrupulously honoring” the defendant’s right to remain silent.

²³ (9th Cir. 1976) 527 F.2d 1110. ALSO SEE *U.S. v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 366 [“The key distinction between questioning the suspect and presenting the evidence available against him was also central to [*Davis*].”]. COMPARE *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1533 [“[T]he single statement in *Davis* is in sharp contrast with the repeated recitation of incriminating circumstances to which Smith was exposed.”].

²⁴ See *People v. Thomas* (1990) 219 Cal.App.3d 134, 143 [“Here it is clear there was no attempt by the officer to elicit information from Thomas before he volunteered and gratuitously interjected the statement.”]; *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].

²⁵ See *In re Curt W.* (1982) 131 Cal.App.3d 169, 180 [“[T]he officer’s remark could hardly be called anything but a tentative, and somewhat uncertain, statement not reasonably seen by him to invite a response.”]; *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203 [“[T]he rather innocuous statement [“We found a gun at your house”] did not constitute interrogation.”]; *People v. O’Sullivan* (1990) 217 Cal.App.3d 237; *People v. Patterson* (1979) 88 Cal.App.3d 742, 749 [“[T]he general conversation preceding the statement [“Your accomplice already made a statement”] did not amount of proscribed police questioning or interrogation.”] *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677 [an officer informed the suspect that “he had been arrested for possession of child pornography based on a number of tapes that had been seized from inside his home.”].

²⁶ *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1533, fn.9.

²⁷ (E.D. Mich. 2003) 237 F.Supp.2d 795.

Similarly, in *People v. Davis*,²⁸ the defendant was arrested for murdering two people who had been shot with an Uzi. At the police station, Davis invoked and was placed in a holding cell. Later that day, a detective entered the cell and said, “Remember that Uzi?” Davis responded, “Yeah.” The officer then said, “Think about that little fingerprint on it. We’ll see ya,” at which point the officer walked out. Although the issue in the case was not whether the detective scrupulously honored Davis’s invocation, the court left no doubt what it thought when it pointed out that the detective “implied that defendant’s fingerprint had been found on the Uzi, and thus indirectly accused defendant of personally shooting the victims. [T]his comment was likely to elicit an incriminating response and thus was the functional equivalent of interrogation.”

The same thing happened in *People v. Boyer*²⁹ when, after another murder suspect invoked, an officer said, “I just want to tell you a couple of things.” He then explained to Boyer that investigators had just located a witness, and the witness disputed significant parts of Boyer’s story. As the officer turned away, Boyer blurted, “I did it.” In ruling the officer’s comments constituted “improper resumption of contact” with a suspect who had invoked, the California Supreme Court said, “[B]y confronting defendant once again with a discrepancy in his story, [the officer] effectively invited defendant to make an incriminating response.”

Manner of recontacting the suspect

There are three additional requirements that must be met before officers will be deemed to have “scrupulously honored” an invocation. As we will now explain, these requirements pertain to the manner in which officers recontacted the suspect.

TIME LAPSE: After the suspect invokes, officers must wait a “significant period of time” before they go back to see if he has changed his mind.³⁰ This waiting period is important because it demonstrates to the suspect that the officers will honor his decision not to talk to them.³¹ What is a “significant” period of time?³²

It is apparent that a mere technical break does not qualify.³³ As the Court observed in *Mosley*, “To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda*.”³⁴ The Court also ruled, however, that a break lasting “more than two hours” qualified as “significant.”³⁵ And in

²⁸ (2005) 36 Cal.4th 510.

²⁹ (1989) 48 Cal.3d 247, 274.

³⁰ See *Michigan v. Mosley* (1975) 423 U.S. 96, 106; *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 911 [“Whatever else *Mosley* might require, it is clear that some break in the interrogation must occur.”].

³¹ See *People v. Riva* (2004) 112 Cal.App.4th 981, 994 [“A one-hour period between the end of the first interrogation and the start of the second was not so short as to constitute badgering or harassing the suspect”].

³² See *U.S. v. Hue* (9th Cir. 1988) 852 F.2d 407, 410 [“[W]e have never suggested that any specific length of time is necessary to a finding that the right to cut off questioning was scrupulously honored. This approach follows from *Mosley*, which noted ‘the passage of a significant period of time,’ but did not suggest any talismanic durational minimum.”].

³³ See *People v. Harris* (1989) 211 Cal.App.3d 640, 647 [“one minute” not sufficient]; *Anderson v. Smith* (2nd Cir. 1984) 751 F.2d 96, 102 [“Here there was not even a momentary cessation.”].

³⁴ (1975) 423 U.S. 96, 102.

³⁵ *Michigan v. Mosley* (1975) 423 U.S. 96, 104 [“After an interval of more than two hours, *Mosley* was questioned by another police officer . . . ”]. ALSO SEE *People v. Warner* (1988) 203

another case, a one hour break was deemed “significant” when, after invoking, the suspect indicated he might be willing to speak with the officers later; i.e., “I don’t want to say anything else *right now*.”³⁶ On the other hand, the Ninth Circuit has noted that a time lapse of only 30 minutes “might ordinarily incline us toward a conclusion that [the] right to cut off questioning was not respected.”³⁷

NO PRESSURE: When recontacting the suspect, officers must not pressure or even encourage him to talk. They must simply seek to determine if he has changed his mind about invoking.³⁸ As the Ninth Circuit observed, there is a “critical distinction” between interrogation and merely asking whether the suspect “has changed his mind” about invoking.³⁹

MIRANDA WAIVER: Finally, if the suspect is still in custody when he agrees to talk with officers, they must not begin questioning him until he has waived his *Miranda* rights.⁴⁰

Practice Note

Because *Mosley* does not apply if the suspect invoked the *Miranda* right to counsel, follow-up investigators who want to determine if he has changed his mind will need to know which right he invoked. This will depend on what the suspect said when he invoked—his exact words. It is, therefore, essential that officers who take an invocation write in their report what the suspect said; e.g., “I want to talk to a lawyer” (an invocation), “Maybe I should talk to a lawyer” (not an invocation).

SUSPECT-INITIATED QUESTIONING

Post-invocation questioning is also permitted if the suspect notified officers that he had changed his mind and was now willing to talk with them about his case.⁴¹ As the

Cal.App.3d 1122, 1130 [“overnight interval”]; *People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1272 [five days]; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324 [“a few days”].

³⁶ *People v. Riva* (2004) 112 Cal.App.4th 981, 994. Emphasis added.

³⁷ *U.S. v. Hue* (9th Cir. 1988) 852 F.2d 407, 412.

³⁸ See *Michigan v. Mosley* (1975) 423 U.S. 96, 105-6 [there was no “persisting in repeated efforts to wear down his resistance and make him change his mind.”]; *People v. Riva* (2004) 112 Cal.App.4th 981, 994 [“The evidence does not suggest [the officer] attempted to intimidate Riva at any time.”]; *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 412 [“Agent Hill exerted no pressure upon Hsu whatsoever. He merely read Hsu his rights a second time, and Hsu responded with a valid waiver.”].

³⁹ *U.S. v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 665.

⁴⁰ See *Michigan v. Mosley* (1975) 423 U.S. 96, 97-8; *Jackson v. Giurbino* (9th Cir. 2004) 364 F.3d 1002, 1009 [“*Mosley* does not control this case, but is distinguishable because it concerned the admissibility of statements made by a suspect who received *Miranda* warnings and waived them”].

⁴¹ See *Minnick v. Mississippi* (1990) 498 U.S. 146, 156 [“*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities”]; *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 736-7 [“A suspect who has asserted his rights and prevented further lawful interrogation nonetheless retains the option, thereafter, voluntarily to initiate a confession.”]. **NOTE:** Such post-invocation questioning is permitted even if the suspect is represented by an attorney who had instructed him to say nothing. See *People v. Rich* (1988) 45 Cal.3d 1036, 1081 [“After accepting Swartz as his attorney, and having been specifically and repeatedly instructed not to talk to the police, defendant initiated several conversations with [the officers].”]; *People v. Stephens* (1990) 218 Cal.App.3d 575, 580-2 [court agrees with trial judge’s ruling that “the contact is not absolutely prohibited by the attorney-client relationship in view of

court noted in *In re Frank C.*, “Notwithstanding an initial assertion of the right to remain silent, a statement subsequently made by a suspect in custody is admissible if it was volunteered upon his own initiative and was not made in response to interrogation by police.”⁴² Note that unlike the “scrupulously honored” rule, suspect-initiated questioning is permitted regardless of whether the suspect invoked the right to remain silent or the right to counsel.

As we will now discuss, there are three requirements that must be met before such questioning is permitted:

- (1) **Suspect initiated:** The questioning must have been initiated by the suspect, not officers or anyone else.
- (2) **“Freely” initiated:** The suspect’s decision to initiate questioning must have been made freely, not as the result of prodding or coercion.
- (3) **General discussion:** When the suspect initiated questioning, he must have indicated he wanted to open up a general discussion about his case.

One other thing: If the suspect is still in custody when he initiated questioning, there is a fourth requirement: officers must not start asking questions until they have obtained a *Miranda* waiver.⁴³

Who initiated the questioning?

The questioning must, of course, have been initiated by the suspect, not officers or anyone else.⁴⁴ This is seldom a contested issue because most suspects will notify the

the facts of this case, that the defendant himself voluntarily requested the contact”]. ALSO SEE *People v. Sultana* (1988) 204 Cal.App.3d 511, 521; *People v. Mattson* (1990) 50 Cal.3d 826, 869 [“No violation of a defendant’s Sixth Amendment right to counsel occurs as a result of a failure to notify counsel who represents a defendant in a prosecution for a separate offense of the intent to interview the defendant as a suspect in an unrelated criminal investigation when the defendant has waived his right to have counsel present during the interview.”]; *People v. Morris* (1991) 53 Cal.3d 152, 201-2.

⁴² (1982) 138 Cal.App.3d 708, 713.

⁴³ See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [“‘initiation’ of a conversation by a defendant” does not also constitute “a waiver of a previously invoked right to counsel.”]; *Edwards v. Arizona* (1981) 451 U.S. 477, 486, fn.9 [after a suspect reinitiates, “the question would be whether a valid waiver of the right to counsel and the right to silence had occurred”]; *People v. Waidla* (2000) 22 Cal.4th 690, 728 [“[T]he police may commence interrogation [of a suspect who had reinitiated] if he validly waives his *Miranda* rights.”]; *U.S. v. Montgomery* (1st Cir. 1983) 714 F.2d 201, 203 [“[T]he mere fact that a suspect, after requesting counsel, reopened the dialogue does not end the inquiry as to waiver.”]; *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1412-3 [“[W]hether the suspect voluntarily, knowingly, and intelligently waived his right to counsel is a separate inquiry from the question of whether the suspect reinitiated interrogation.”]. **NOTE:** Although this requirement may be satisfied if the suspect had waived his rights before he invoked, and the waiver was “reasonably contemporaneous” with the start of the interview he initiated (see *Wyrick v. Fields* (1982) 459 U.S. 42, 47), it is almost always better to seek an express waiver because it tends to demonstrate that the suspect had, in fact, changed his mind about talking with officers. See *People v. Bradford* (1997) 14 Cal.4th 1005, 1036 [“While it is not clear that *Miranda* warnings are always required to find a knowing and intelligent waiver of the right to counsel, their absence under the circumstances of this case [questioning after an invocation] weakens the claim that the defendant made such a waiver.”].

⁴⁴ See *Edwards v. Arizona* (1981) 451 U.S. 477, 485 [the suspect must have initiated “further communication, exchanges, or conversations with the police.”]; *People v. Randall* (1970) 1 Cal.3d 948, 956, fn.7 [after a defendant invokes, questioning is permitted if it was the result of “a change

officers by phone that they want to talk to them, or they will send word through a jailer, fellow inmate, or other acquaintance. In any event, if the officers confirm with the suspect that he does, in fact, want to talk with them, this requirement will be satisfied.⁴⁵

On the other hand, a *Miranda* violation will result if the meeting was initiated by officers. This is true even if they did not actively try to get the suspect to change his mind.

For example, in *Edwards v. Arizona*⁴⁶ the defendant invoked his *Miranda* right to counsel after he was arrested for robbery and murder. The next day, the investigating officers went to the jail, re-*Mirandized* him, and said they “wanted to talk.” It turned out that Edwards was now willing to talk, so he waived his rights and confessed. But the United States Supreme Court ruled the confession was inadmissible because the interview was initiated by the officers, not Edwards.

“**IF YOU WANT TO TALK LATER . . .**”: After a suspect invokes, officers may inform him that because of the invocation they can no longer talk to him about his case unless he initiates the interview.⁴⁷ To put it another way, officers do not “initiate” questioning by furnishing the suspect with such information.

INITIATING CONTACT VS. INITIATING QUESTIONING: Suspects will sometimes initiate questioning after they were brought into a room in which the investigating officers were present. If this happens, the officers do not violate *Miranda* by accepting his offer and questioning him.

For example, in *People v. Waidla*⁴⁸ the defendant invoked his *Miranda* right to counsel when he was arrested at the U.S.-Canada border on a Los Angeles murder warrant. He was then transported to a police facility and placed in a holding cell. Two LAPD detectives who had been in the area looking for him arrived at the facility and entered the room in which the holding cell was located. Waidla recognized one of the detectives and asked, “What can I do for you?” The detective then escorted Waidla to an interview room and, after obtaining a *Miranda* waiver, questioned him about the murder.

On appeal, Waidla argued that his answers to the detective’s questions should have been suppressed because, although he had arguably initiated the questioning, the detective initiated the encounter when he walked into the room where Waidla was being held. The California Supreme Court summarily rejected the argument, noting there is simply no requirement that the suspect initiate both the questioning *and* the encounter.

SUSPECT INVITES LATER INTERVIEW: If the suspect invokes but says he will talk later, officers may recontact him later to see if he is now willing to talk. Although the officers are technically initiating the questioning, it does not violate *Miranda* because the suspect authorized them to do so.

of mind on the part of the defendant prompted by . . . his own psychological makeup, or similar facts”]; *People v. Marshall* (1990) 50 Cal.3d 907, 925-6.

⁴⁵ See *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737-8 [court ruled that Michaud initiated questioning when, (1) she and a fellow inmate approached a jailer, and the fellow inmate said that Michaud wanted to talk about a murder; and (2), when the officers arrived, Michaud confirmed that this was true].

⁴⁶ (1981) 451 U.S. 477.

⁴⁷ See *People v. Sapp* (2003) 31 Cal.4th 240, 268-9 [officer “properly advised defendant that none of the homicide investigators could question him unless defendant initiated contact with them.”].

⁴⁸ (2000) 22 Cal.4th 690. ALSO SEE *People v. Mickey* (1991) 54 Cal.3d 612, 652 [“[Mickey] argues that the rule [permitting suspect-initiated questioning] requires that the suspect to initiate the meeting with the police and not merely the discussion. We find no such requirement.”].

For example, in *People v. Mickey*⁴⁹ the defendant arguably invoked his *Miranda* right to counsel when he was arrested in Japan for a murder in Placer County. However, he also told a sheriff's detective, "Curt, I would like to continue our conversation at a later time." About two days later, the detective went to the jail and asked Mickey if he was now willing to talk about the crime. He said yes, waived his rights, and made some incriminating statements.

Mickey argued that his statements should have been suppressed because the detective, by going to the jail and asking if he was now willing to talk, had initiated the subsequent interview. The California Supreme Court disagreed, ruling that Mickey initiated the questioning when he told the detective that he would be willing to "continue our conversation at a later time."

Suspect "freely" initiated

The second requirement is that the suspect's decision to initiate questioning must have been made freely. Like the "no pressure" requirement discussed earlier, this essentially means the officers must have honored the invocation, and must not have pressed him to change his mind. As the California Supreme Court explained, "[A] change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the officers cannot be considered a voluntary, self-initiated conversation."⁵⁰

For example, in *People v. Superior Court (Zolnay)*⁵¹ a sheriff's deputy was questioning two burglary suspects when one of them invoked his right to counsel. The deputy then left the room for a while, saying he believed they were guilty, that the investigation would continue, that they could make his job "easy or tough," and suggesting they "talk the matter over." When he returned about ten minutes later, the suspects announced they had decided not to invoke after all. In fact, they confessed. But the California Supreme Court ruled the confessions were inadmissible because, even if the suspects could be said to have initiated the questioning, it was not done freely in view of the deputy's assertion that the defendants could make his job "easy or tough," and his asking whether they had reached a decision.

BLATANT GOADING: Here are two examples of blatant goading. In *People v. Neal*⁵² an officer told the invoking suspect, "But believe me, if you don't try and cooperate, the system is going to stick it to you as hard as they can . . . [that is] charge you with a

⁴⁹ (1991) 54 Cal.3d 612.

⁵⁰ *People v. McClary* (1977) 20 Cal.3d 218, 226-7. ALSO SEE *People v. Hayes* (1985) 169 Cal.App.3d 898, 909 ["*Miranda* does not proscribe a suspect from changing his mind concerning speaking to the police, when his change of heart is a voluntary one, based on factors that do not involve coercion by the police."]; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 573 ["[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."].

⁵¹ (1975) 15 Cal.3d 729. ALSO SEE *People v. San Nicolas* (2005) 34 Cal.4th 614, 642-3; *People v. Morris* (1991) 53 Cal.3d 152, 200-1 [permitting a suspect to speak with his girlfriend for five minutes did not render his subsequent decision to talk to officers "not freely initiated"]; *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737 ["At no point did the law enforcement officials unconstitutionally attempt to coerce Michaud into speaking with them."].

⁵² (2003) 31 Cal.4th 63. ALSO SEE *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1601 ["[The detective's] continued questioning of appellant after he had refused to waive his rights was a deliberate violation of *Miranda*. Disrespect of the right to remain silent is indicative of coercion."].

heavier charge as they can, you know first degree murder or whatever.” And in *People v. McClary*⁵³ officers ignored the defendant’s invocation and continued to aggressively question her. At one point, they made it clear that unless she confessed she would be charged as a “principal” and would be “subject to the death penalty.” The interview ended without a confession but about three hours later she informed the officers that she “wished to tell the truth.” She then confessed. But the California Supreme Court ruled that McClary had not freely initiated the interview, pointing out that “a change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the officers cannot be considered a voluntary, self-initiated conversation.”

NO “INTERROGATION”: The next two cases are a little different because they were decided on the basis that the defendant not only freely initiated questioning, but that the officers did not “interrogate” them. In *People v. Stephens*⁵⁴ the defendant invoked his *Miranda* right to counsel after he was arrested for a home invasion robbery. He later sent word from the jail that he wanted to talk with the investigating officer. The meeting began with Stephens asking why the DA was offering him 16 years in prison. The officer said it was probably because of Stephens’ lengthy rap sheet and the seriousness of the crime. The officer then told him that because he had invoked, he did not want him to say anything more without having an attorney present. Stephens explained that he was in the process of firing his attorney, at which point he admitted being present during the robbery. On appeal, the court ruled that Stephens’ statement was obtained lawfully because he had requested the meeting and the officer’s comments did not constitute “interrogation.”

Similarly, in *People v. Dominick*⁵⁵ the defendant was brought into an interrogation room after he was arrested for rape and murder. He then invoked his right to counsel, at which point the officers “began picking up their notebooks and other materials in preparation to leave the interview room.” Before leaving, however, one of the officers told him that the rape victim had identified him in a photo lineup and that his accomplice had also been arrested. About five minutes later, Dominick told that officers that he “had to” talk to them about the case and that he “did not need an attorney present.” In ruling that the officer’s remark did not constitute prodding, the court said “the officers did not attempt to engage defendant in a conversation but merely offered him justification for retaining him in custody.”

PUSHING THE ENVELOPE: If officers continued to question the suspect after he invoked, or if they prodded him to change his mind, a court *might* find that his subsequent decision to initiate questioning was made freely if it occurred after the suspect had had sufficient time to contemplate his decision. For example, in *People v. Bradford*⁵⁶ the defendant invoked his right to counsel after he was arrested for rape and murder. Nevertheless, the investigators suggested he should unburden his guilty conscience, pointing out that there might be mitigating circumstances and that their conversation was “off the record.” Bradford then made some incriminating statements which were properly suppressed. The next morning he sent word to the officers that he wanted to talk with

⁵³ (1977) 20 Cal.3d 218, 229.

⁵⁴ (1990) 218 Cal.App.3d 575, 582. ALSO SEE *People v. Powell* (1986) 178 Cal.App.3d 36, 41 [defendant voluntarily initiated questioning even though, after he invoked, officers asked him legitimate questions about his identity].

⁵⁵ (1986) 182 Cal.App.3d 1174, 1191-2.

⁵⁶ (1997) 14 Cal.4th 1005, 1043-6.

them. When they arrived he said, “I had some questions and I’ll probably talk, I don’t know.” He then asked if he could get some psychiatric treatment in prison. After the officers explained that he could, Bradford talked to them about his role in the crimes.

Bradford contended that because the officers had encouraged him to talk after he invoked, his decision to initiate questioning was not made freely. Nevertheless, the California Supreme Court ruled it was apparent that Bradford truly wanted to talk about the crimes, in fact he was eager to do so.

Suspect opened a “general discussion”

We now confront the most troublesome of the three legal requirements: A suspect does not initiate questioning about his case unless he says something that demonstrates a desire to engage in a “generalized discussion relating directly or indirectly to the investigation.”⁵⁷ The purpose of this requirement is to make sure that officers are not able to construe anything a suspect says after he invoked as a desire to submit to general questioning. As Justice Rehnquist observed in *Oregon v. Bradshaw*, “There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.”⁵⁸

The problem for officers is that suspects rarely make their intentions clear. Although it may be theoretically possible that a suspect would say something like, “I have decided to open up a broad and unrestricted discussion of all facets of the crimes for which I was arrested,” he is much more likely to say something like, “I wanna talk to the cops,” “What’d you do with my car?” or “What happens next?” In these situations the officers might respond by telling the suspect that his question or remark could be interpreted as an indication that he had changed his mind about invoking; then asking whether that was, in fact, his intent. But, for various reasons, this seldom resolves the issue.⁵⁹

⁵⁷ See *People v. Mickey* (1991) 54 Cal.3d 612, 648; *People v. Thompson* (1990) 50 Cal.3d 134, 164 [“[W]hile defendant’s initiation of the conversation may be said to have been ambiguous in that it did not make clear his willingness to engage in a generalized discussion of the crime. it could reasonably be interpreted by the officer as opening a generalized discussion, and that the officer understood the request in that light.”]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034-7; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1190; *People v. McClary* (1977) 20 Cal.3d 218, 226; *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 737; *People v. Dingle* (1985) 174 Cal.App.3d 21, 28; *U.S. v. Michaud* (9th Cir. 2001) 268 F.3d 728, 737 [a murder suspect opened up a general discussion about her case when, through a fellow inmate, she said she “needed to talk to somebody about a murder that had happened in Alpine County.”]. **NOTE:** The test is whether officers *reasonably believed* the suspect wanted to discuss his case in general, not whether he actually wanted to do so. See *People v. Thompson* (1990) 50 Cal.3d 134, 164 [although the defendant’s question was ambiguous “in that it did not make clear his willingness to engage in a generalized discussion of the crime, it could reasonably be interpreted by the officer as opening a generalized discussion, and that the officer understood the request in that light.”].

⁵⁸ (1983) 462 U.S. 1039, 1045 [plur. opn.].

⁵⁹ **NOTE:** For one thing, the suspect may not know how to respond to the officers’ question unless they “educate” him as to the legal issues involved; e.g., the legal consequences of a *Miranda* invocation, the circumstances in which post-invocation questioning is permitted, and what constitutes a “general” discussion. In our criminal justice system, however, the courts do not want officers to provide legal advice to the people they arrest. In addition, it is often difficult for suspects and officers (and even judges) to determine the point at which a remark that somehow

In any event, the courts seem to have resolved the problem by ruling that a suspect who tells officers he wants to talk about some material facet of his case will be deemed to have opened up a general discussion about it unless he expressly restricted the discussion to peripheral matters. The following are examples.

QUESTIONS ABOUT EVIDENCE: A suspect may demonstrate an intent to open a general discussion about his case if he said he wanted to talk about one or more items of incriminating evidence. For example, in *People v. Mattson*⁶⁰ the California Supreme Court ruled that a multiple-murder suspect initiated questioning when he asked what the police had done with the car he had used in several of his crimes. After telling the suspect that his car had been impounded, the officer asked him about some clothing found inside it. The suspect responded by making an incriminating statement.

On appeal, the court ruled the officer could reasonably have believed that the suspect had opened a general discussion because the car “held highly incriminating evidence.” Furthermore, there was “no indication in defendant’s request to speak to [the officer] that defendant wished to discuss only routine matters related to his incarceration.”

SUSPECT WANTS HIS ACCOMPLICE RELEASED: A suspect who wants to discuss getting his accomplice released or having the charges against his accomplice reduced will ordinarily be deemed to have opened up a general discussion about his case. This is because the accomplice’s liability will depend largely on how his role contrasted with that of the suspect’s. For example, in *People v. Thompson*,⁶¹ the court ruled the defendant opened up a general discussion when he asked to speak with an officer about releasing his girlfriend who had been arrested as an accessory. Said the court:

Defendant’s request to talk about [his girlfriend Lisa who was arrested as an accessory] was not an innocuous request, comparable to asking for a drink of water. Lisa was under arrest as an accessory after the fact, and police willingness to release her depended on her noncomplicity in the crime. Defendant’s request for Lisa’s release might reasonably be met with a suggestion that defendant discuss the crime to show Lisa’s noninvolvement.

SUSPECT WANTS TO ASSIST OFFICERS: A suspect may be deemed to have opened up a general discussion about his case if he offered to help officers in their investigation. For example, in *People v. Waidla*⁶² (discussed earlier on a different issue) INS agents arrested the defendant on a Los Angeles murder warrant as he entered the United States from Canada. When an agent *Mirandized* him, he invoked his right to counsel. The next day, two LAPD detectives arrived to take him back to Los Angeles. Waidla recognized one of the detectives and asked, “What can I do for you?” The officer told him that he “would get a room where they could sit down and he would explain his reason for being there.” When they sat down, the detective *Mirandized* Waidla, who waived his rights and eventually confessed. On appeal, the court ruled that the officer reasonably believed that Waidla’s question (“What can I do for you?”) demonstrated a desire to talk about his crimes.

touches upon a case crosses the line and demonstrates an intent to open up a general discussion about it.

⁶⁰ (1990) 50 Cal.3d 826, 859-62. ALSO SEE *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413 [suspect reinitiated when he said, “Let me tell you about the car [that was used in the commission of the crime].”].

⁶¹ (1990) 50 Cal.4d 134.

⁶² (2000) 22 Cal.4th 690.

REQUEST TO TALK LATER: If the suspect invokes but tells officers he might want to talk later, the officers may recontact him later to see if he has changed his mind about invoking. If so, the subsequent interview will be deemed “suspect initiated” because it would be reasonable for the officers to infer that the suspect was prepared to talk generally about his case.

For example, in *People v. Mickey*⁶³ (discussed earlier in a related context) the defendant arguably invoked his *Miranda* right to counsel before he was extradited to Placer County from Japan via Honolulu. During the flight, Mickey became emotional and started making spontaneous statements to an officer about how and why the murder occurred. When the plane landed in Honolulu at about 6:30 A.M., Mickey told the officer, “I would like to continue our conversation at a later time.” He was then taken to the Honolulu jail. At about 12:30 P.M., the officer went to the jail and met with Mickey, who acknowledged that he had requested the interview. He then waived his *Miranda* rights and, during the subsequent interview, made several incriminating statements.

As noted earlier, the California Supreme Court ruled these statements were admissible because Mickey had initiated the questioning when told the officer he would like to “continue our conversation.” Of interest here is that the court also ruled his statement “can be fairly said to represent a desire on his part to open up a more generalized discussion relating directly or indirectly to the investigation.”

“ROUTINE” MATTERS: As noted, a suspect does not initiate questioning about his case if it reasonably appears he wanted to discuss only “routine” matters. Although there is not much law on what falls into the category of “routine matters,” in one case the court ruled that run-of-the-mill questions concerning sentencing would qualify. Specifically, in *People v. Dingle*⁶⁴ the court ruled that the defendant had not opened up a general discussion of his case when he asked how much time he would get if he pled guilty.

Officers are frequently asked, “What’s going to happen next?” Whether or not this constitutes a “routine” question seems to depend on the context in which it was asked. This is because some of the things that will happen “next” have nothing to do with his guilt or innocence, while others do. Consequently, if it appears he merely wants information about a procedural matter, a court might rule he has not opened a general discussion.

For example, in *People v. Sims*⁶⁵ the defendant was arrested in Las Vegas for murdering a Domino’s Pizza employee in Glendale. When Glendale officers sought to question him, he invoked. As the officers were preparing to leave the interview room, Sims asked what was going to happen “from this point on.” After explaining the extradition procedure, one of the officers told Sims about some of the evidence linking him to the murder. Sims responded by saying, “I had to kill that boy.” The officer then described the murder scene, noting that the victim had been left “gagged and submerged” in a bathtub. Sims explained that he had to kill the victim because he “would have identified me.”

On appeal, the court rejected the argument that Sims had initiated questioning when he asked about extradition. Said the court, “By his offhand remark as to ‘what was going to happen from this point on’ (coupled with a reference to extradition), which he posed

⁶³ (1991) 54 Cal.3d 612, 641-53.

⁶⁴ (1985) 174 Cal.App.3d 21.

⁶⁵ (1993) 5 Cal.4th 405. ALSO SEE *People v. Hayes* (1985) 169 Cal.App.3d 898, 909 [not post-invocation interrogation to explain to the suspect what was going to happen next].

to the police officers as they prepared to leave, defendant did not open the door to interrogation after previously having invoked his *Miranda* rights.”

In contrast to *Sims* is the case of *Oregon v. Bradshaw*⁶⁶ in which the United States Supreme Court ruled that Bradshaw’s question—“What’s going to happen to me now?”—*did* demonstrate his willingness to generally discuss his case. Although it is difficult to reconcile *Sims* with *Bradshaw*,⁶⁷ it might be that *Sims* demonstrated a willingness to discuss only the extradition procedure which has nothing to do with the facts of the case.

In any event, after Bradshaw asked the question, the officer responded by telling him, “You do not have to talk to me. You have requested an attorney and I don’t want you talking to me unless you do so desire because—since you have requested an attorney—you know, it has to be at your own free will.” After telling Bradshaw where he would be taken, the officer suggested that he “might help himself by taking a polygraph examination.” Bradshaw agreed and, following the test, he confessed.

The Court acknowledged that Bradshaw’s remark was “ambiguous.” Nevertheless, it “evinced a willingness and a desire for a generalized discussion about the investigation,” especially because the officer immediately reminded Bradshaw that he did not have to talk to him, adding, “and only after [Bradshaw] told him that he ‘understood’ did they have a generalized conversation.”

SUSPECT RELEASED

Officers may seek to question a suspect who has invoked his right to remain silent or his right to counsel if, (1) he was released from custody after he invoked,⁶⁸ and (2) the break in custody was long enough so that he could have talked with an attorney.⁶⁹

⁶⁶ (1983) 462 U.S. 1039.

⁶⁷ **NOTE:** The court in *Sims* attempted to distinguish *Bradshaw* on grounds that, immediately after Bradshaw asked his question, the officer told him, “You do not have to talk to me,” and had obtained a *Miranda* waiver before questioning him. At p. 441. This distinction is troublesome, however, because the suspect’s intent is ordinarily based on the suspect’s words, not those of the officer.

⁶⁸ See *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 584 [“[A] suspect’s request for counsel during police custodial interrogation followed by a termination of questioning and a good faith release of custody, one that is not contrived or pretextual on the part of the police, does not prohibit police-initiated interrogation at a later time . . .”]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171 [“The three days between the two statements during which time defendant was out of police custody sufficiently attenuated the May 3 statements from the prior illegal detention.”]; *U.S. v. Coleman* (9th Cir. 2000) 208 F.3d 786, 790 [“[The] Defendant had been released from custody for a significant period of time [two days] before investigators questioned him again”]; *U.S. v. Skinner* (9th Cir. 1982) 667 F.2d 1306, 1309; *U.S. v. Hines* (9th Cir. 1992) 963 F.2d 255, 256-7; *Dunkins v. Thigpen* (11th Cir. 1988) 854 F.2d 394, 396-8; *McFadden v. Garrahty* (4th Cir. 1987) 820 F.2d , 654, 661.

⁶⁹ See *People v. Storm* (2002) 28 Cal.4th 1007, 1026 [“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.”]; *People v. Inman* (1986) 186 Cal.App.3d 1137, 1143; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 584 [“[A] suspect’s request for counsel during police custodial interrogation followed by a termination of questioning and a good faith release of custody, one that is not contrived or pretextual on the part of the police, does not prohibit police-initiated interrogation at a later time . . .”]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171 [“The three days between the two statements during which time defendant was out of police custody sufficiently attenuated the May 3 statements from the prior illegal detention.”]; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 155 [“The break in custody

For example, in *People v. Storm*⁷⁰ the defendant was suspected of killing his wife. At the request of San Diego County sheriff's investigators, Storm agreed to come to the station for a polygraph test. In the course of the test, the examiner told him there was a 99% chance he was lying when he said he did not kill his wife. Storm responded by saying he wanted an attorney. Because officers lacked probable cause to arrest him, they released him. Two days later, investigators went to Storm's home, questioned him again and obtained some incriminating statements. Storm was arrested the next day and was later convicted, based largely on his statements to the officers.⁷¹

On appeal, Storm contended that his invocation was still in effect when the officers recontacted him at home and, therefore, his statements should have been suppressed. The California Supreme Court disagreed, saying:

So long as there was a true break in custody, affording defendant reasonable time and opportunity to consult counsel while free of custodial influences, the police thereafter had the right to recontact him without undue delay.

Similarly, in *People v. Scaffidi*⁷² the defendant invoked his right to counsel after he was arrested for prowling. Later that day he made bail and was released. The next day he was arrested again, this time for burglary and possession of stolen property. At the station, he waived his *Miranda* rights and, while being questioned, said some things that led to his conviction for murdering his girlfriend. Scaffidi contended his statements were obtained unlawfully because he had previously invoked his right to counsel. The court disagreed, noting, "The break in custody removed any possible [invocation] bar on police initiated interrogation without counsel on the 18th."

[on the 17th] removed any possible *Edwards* bar [failure to honor invocation] on police initiated questioning without counsel on the 18th."]; *U.S. v. Coleman* (9th Cir. 2000) 208 F.3d 786, 790 ["[The] Defendant had been released from custody for a significant period of time [two days] before investigators questioned him again"]; *U.S. v. Skinner* (9th Cir. 1982) 667 F.2d 1306, 1309; *U.S. v. Hines* (9th Cir. 1992) 963 F.2d 255, 256-7; *Dunkins v. Thigpen* (11th Cir. 1988) 854 F.2d 394, 396-8; *McFadden v. Garraghty* (4th Cir. 1987) 820 F.2d , 654, 661. **NOTE: If suspect "let the cat out of the bag":** If, before releasing the suspect, officers obtained an incriminating statement from him as the result of a noncoercive and unintentional *Miranda* violation, the post-release statements will not be suppressed on grounds that, as the result of the suppressed statement, he had incriminated himself and had therefore already "let the cat out of the bag." See *Oregon v. Elstad* (1985) 470 U.S. 298, 312 ["This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."]; *People v. Storm* (2002) 28 Cal.4th 1007, 1030 ["[A] later statement obtained in compliance with *Miranda*, and without coercive methods of interrogation, is not to be presumed involuntary simply because the suspect has already incriminated himself."].

⁷⁰ (2002) 28 Cal.4th 1007.

⁷¹ **NOTE: If suspect "let the cat out of the bag":** If, before releasing the suspect, officers obtained an incriminating statement from him as the result of a noncoercive and unintentional *Miranda* violation, the post-release statements will not be suppressed on grounds that, as the result of the suppressed statement, he had incriminated himself and had therefore already "let the cat out of the bag." See *Oregon v. Elstad* (1985) 470 U.S. 298, 312 ["This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."]; *People v. Storm* (2002) 28 Cal.4th 1007, 1030 ["[A] later statement obtained in compliance with *Miranda*, and without coercive methods of interrogation, is not to be presumed involuntary simply because the suspect has already incriminated himself."].

⁷² (1992) 11 Cal.App.4th 145.

Note that this rule applies even if the suspect was back in custody when officers sought to question him. In such cases, officers must of course obtain a *Miranda* waiver before proceeding.⁷³

OTHER POST-INVOCATION QUESTIONING

Officers may also seek to question a suspect who has invoked under the following circumstances:

NEVER “IN CUSTODY”: Although the suspect attempted to invoke, he was never “in custody”; i.e., at no time would a reasonable person in his position have believed he was under arrest or that his freedom had been restricted to the degree associated with an actual arrest.⁷⁴

NO “INTERROGATION”: The officers’ questions did not constitute “interrogation,” meaning the questions were not reasonably likely to elicit an incriminating response.⁷⁵ For example, if officers reasonably believe the suspect is merely a *witness* to a crime, they may seek to question him despite a previous invocation. This is because questions directed to a person who is believed to be merely a witness are not reasonably likely to elicit an incriminating response and, therefore, do not constitute “interrogation.”⁷⁶

QUESTIONING BY UNDERCOVER AGENT: It is not a violation of *Miranda* for an undercover officer or police agent to question the suspect about the crime for which he previously invoked the right to remain silent or the right to counsel.⁷⁷ Such questioning will, however, violate the Sixth Amendment right to counsel if the suspect was charged with the crime that was the subject of discussion.

PUBLIC SAFETY EXCEPTION: Officers may initiate questioning of a suspect who has invoked if they reasonably believe, (1) the suspect has information that would help them

⁷³ See *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 584; *People v. Mack* (1980) 27 Cal.3d 145, 152-4; *People v. Scaffidi* (1992) 11 Cal.App.4th 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* (9th Cir. 1982) 667 F.2d 1306, 1309; *U.S. v. Hines* (9th Cir. 1992) 963 F.2d 255, 257; *U.S. v. Coleman* (9th 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*.”].

⁷⁴ See *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn.3 [“Most rights must be asserted when the government seeks to take the action they protect against.”]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, __; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 [“[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.

⁷⁵ **NOTE:** For a discussion of what constitutes “interrogation,” see the article “Miranda: When warnings are required,” in the Summer 2005 *Point of View*.

⁷⁶ See *People v. Wader* (1993) 5 Cal.4th 610; *People v. Underwood* (1986) 181 Cal.App.3d 1223, 1231.

⁷⁷ See *Illinois v. Perkins* (1990) 496 U.S. 292, 296 [“Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate.”]; *Arizona v. Mauro* (1987) 481 U.S. 520; *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541; *People v. Plyler* (1993) 18 Cal.App.4th 535; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194-5. **NOTE:** For a detailed discussion of this issue, see the article “Miranda Exceptions” in the Summer 2005 *Point of View*.

save a life, prevent serious injury, or neutralize a substantial threat to property; and (2) the officers' questions were reasonably necessary to eliminate the danger.⁷⁸

COUNSEL PRESENT: The suspect's attorney notified officers that the suspect would now answer their questions, and the attorney was present throughout the interview.⁷⁹ POV

⁷⁸ See *People v. Wills* (1980) 104 Cal.App.3d 433, 448; *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541. ALSO SEE *New York v. Quarles* (1984) 467 U.S. 649, 655-6; *People v. Panah* (2005) 35 Cal.4th 395, 471. **NOTE:** For a detailed discussion of this issue, see the article "Miranda Exceptions" in the Summer 2005 *Point of View*.

⁷⁹ See *Minnick v. Mississippi* (1990) 498 U.S. 146, 152; *Edwards v. Arizona* (1981) 451 U.S. 477, 484; *Davis v. United States* (1994) 512 U.S. 452, 458.