POINT of VIEW

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Point of View

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Notice of Change in Publication Frequency

To help ensure that we can continue to publish Point of View for the law enforcement and legal communities, it has become necessary to reduce the frequency of publication from four times a year to three. Distribution will now occur in January, May, and September.

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Miranda:
When Compliance Is Compulsory

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

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

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

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

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

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

Actual Custody

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

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

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

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

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

De Facto Custody

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

Rules and principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questioning in police stations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questioning detainees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questioning in the suspect's home

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questioning in prisons

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

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

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

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

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

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

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

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

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

Questioning in jails

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

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

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

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

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

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

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

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

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

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

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

Questioning in other places

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

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

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

"Interrogation"

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

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

General principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Accusations

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

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

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

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

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

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

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

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

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

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

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

Confronting with evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

Officer: Remember that Uzi?

Davis: Yeah.

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

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

Other statements of fact

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

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

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

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

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

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

Neutral questions

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

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous

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

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

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

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

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

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

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

Miranda Exceptions

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

Routine booking questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The public safety exception

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The undercover agent exception

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

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

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

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

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

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

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

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

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

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

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

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

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

Recent Cases

People v. Superior Court (Chapman)

(2012) 204 Cal.App.4th 1004

Issue

Having secured a house in which a man had been shot and killed, were officers required to obtain a search warrant before reentering the house to seize evidence that other officers had seen in plain view?

Facts

At about 5 P.M., LAPD officers were dispatched to a report that someone had fired shots inside a home in West Los Angeles. When they arrived, several neighbors were outside the house "yelling that there was somebody shooting inside the house." The officers ordered everyone in the house to exit, at which point Carl Chapman and Raquel Perry stepped outside. Perry was hysterical, screaming "Help us, he shot him, he shot him" (pointing at Chapman). Chapman told the officers "Just help him. Help him."

After pat searching Chapman and finding a gun, officers entered the house and conducted a sweep, looking for victims and other suspects. The only person on the premises was Chapman's son Brian whose body was on the floor near the kitchen. He had been shot and was pronounced dead by paramedics at 5:22 P.M. During the sweep, officers also saw the following in plain view: shell casings near the body, bullet holes in the walls, and blood. The following then occurred:

- 5:30 P.M.: Chapman was arrested and driven to police headquarters for questioning.
- 5:45 P.M.: Two homicide detectives arrived and were briefed on what had happened. They entered the house and saw a handgun about two feet from the body and strike marks on the wall.
- 6:50 P.M.: A photographer arrived and took photos of the crime scene.
- 7:20 P.M. – 10:00 P.M.: The crime scene was processed by criminalists.
- 7:30 P.M.: A third detective (who had interrogated Chapman at the police station and had obtained a confession) arrived on the scene, entered the house and observed bullet holes and blood in plain view. He then left.
- 12:30 A.M.: The third detective returned to the house and found a bullet fragment inside the refrigerator.
- 12:35 A.M.: A coroner's investigator arrived. As he moved the body, he found a shell casing and noticed a depression in the floor from a possible bullet strike.

Chapman was charged with murder. Before trial, he filed a motion to suppress all the evidence and observations of evidence in the house after his son was pronounced dead and the scene secured; i.e., after 5:30 P.M. The trial judge granted the motion, ordering the suppression of the observations by the detectives, the photographer and criminalists, but not the coroner. Prosecutors appealed.

Discussion

Officers may, of course, enter a residence without a warrant if they reasonably believed there was someone on the premises who needed immediate aid.[1] It was therefore apparent that the officers' initial entry into the house was lawful and that their observations of the body and various other things in plain view were admissible. Instead, the issue was whether the observations by the detectives who entered after the scene had been secured were admissible. Chapman argued they were not, claiming the detectives could not reenter the premises or seize evidence unless they had obtained a search warrant. And, as the Court of Appeal explained, the trial judge agreed with this argument:

> The trial court found the emergency ended before the "second wave" entered the house. Chapman was arrested and the premises were secured, said the court. The second wave of officers was designed to follow up and not deal with the exigent circumstances. Rather, their purpose was to investigate and determine if there was a crime and who was involved.

[1] See *Mincey v. Arizona* (1978) 437 U.S. 385, 392; *Arizona v. Hicks* (1987) 480 U.S. 321, 325.

The trial court's ruling was, however, erroneous because it was contrary to another well-settled rule: Officers who have lawfully entered a residence on the basis of exigent circumstances do not need a warrant to reenter the premises after the emergency had been defused if:

(1) **Process evidence in plain view**: Their objective was to process or seize evidence that was in plain view during the initial entry.
(2) **Immediate seizure impractical**: Due to exigent circumstances, it was impossible or impractical for the officers to immediately seize or process the evidence.
(3) **Premises under police control**: The reentry was made before officers had relinquished control of the premises.[2]

And that was exactly what had happened here. "[W]e are presented," said the Court of Appeal, "with an uninterrupted police presence in the residence and a close-in-time successive search of areas already validly searched in order to begin processing and collecting evidence observed in plain view."

The court also noted that "[r]equiring the first wave responders to seize evidence found in plain view during their search would have hampered their primary duty and could have made what appeared to be a dangerous situation even more dangerous."

Accordingly, the court ruled that the observations of the detectives, photographer, and criminalists were admissible with one exception: the observation by the third detective of a bullet fragment in the closed refrigerator was unlawful because the fragment was not in plain view.[3]

People v. Torres

(2012) 205 Cal.App.4th 989

Issue

Did officers have sufficient grounds to make a warrantless entry into a hotel room to prevent the destruction of burning marijuana?

Facts

A guest at a hotel in Los Angeles notified security officers that her room had been burglarized and that several items had been stolen, including credit cards, a laptop, and a cell phone. It was quickly determined that a hotel engineer had unwittingly admitted two women into the victim's room, and that a security officer had admitted the same women into another room. The hotel management called LAPD.

Having determined that the perpetrators were apparently staying in a certain room in the hotel, LAPD officers went there to speak with them. As they arrived outside the room, they noticed a "strong smell" of marijuana in the vicinity; and when a woman opened the door in response to their knocking, they noticed that the odor became stronger. The officers ordered the woman and the other occupant of the room—another woman—to step into the hallway. After they complied, one of the officers entered the room and conducted what he testified was a "protective sweep." While doing so, he saw the burglary victim's cell phone and credit card in plain view. He then looked under the mattress and found the laptop.

The women filed a motion to suppress the evidence on grounds that the officer's warrantless entry was illegal. The judge denied the motion and the women pled no contest to burglary. They then appealed the denial of their suppression motion.

Discussion

As noted, the officer who entered the room testified that his objective was to conduct a protective sweep. The term "protective sweep" has a very specific definition in the law: it's an emergency procedure in which officers make a quick tour of a home or other structure, looking to see if there is someone on the premises who poses a threat to them or others. Such an intrusion is lawful—but only if officers had a reasonable belief "based on specific and articulable facts" that the area to be swept

[2] See *People v. McDowell* (1988) 46 Cal.3d 551; *People v. Justin* (1983) 140 Cal.App.3d 729, 736.

[3] **NOTE**: The court made two other rulings: (1) Chapman had effectively consented to the initial entry into the premises, and (2) the bullet casing and depression under the victim's body was also admissible under the inevitable discovery rule. Said the court, "Because there was a dead body in Chapman's residence, it is reasonable to expect the coroner would have been notified of the death, proceeded to the residence, removed the body, found the casing and depression, and then notified police according to law." Citing Gov. Code §§ 27491.1, 27491.2.

harbors a person who poses a danger to them or others.[4] It was therefore apparent—as the trial court and the Attorney General concluded—that the entry and search of the room could not qualify as a protective sweep because the officer had no information that there was anyone else in the room, much less anyone who posed a threat to them.

As a backup argument, prosecutors argued that the entry was lawful because there were exigent circumstances. Specifically, they contended that (1) the officers reasonably believed that the odor of burning marijuana was coming from the suspects' room, and (2) an immediate entry was required to prevent the destruction (the continued burning) of the evidence.

An exigent circumstance based on destruction of evidence will warrant an immediate entry into a home if all of the following circumstances existed:

(1) **Evidence on premises**: Officers must have had probable cause to believe there was destructible evidence on the premises.[5]

(2) **Impending destruction**: Officers must have reasonably believed that the suspect or someone else was about to destroy the evidence.[6]

(3) **Jailable crime**: While the evidence need not pertain to a felony or even a crime that was "serious,"[7] it must at least carry a potential penalty of jail time.[8]

Although the first and second requirements were met, the third was problematic because (1) the crime under investigation was possession of marijuana, and (2) there was no reason to believe that the amount of marijuana on the premises weighed 28.5 grams or more. Consequently, because possession of less than 28.5 grams of marijuana does not constitute a jailable offense in California,[9] the court ruled that the officer's entry was unlawful. Said the court, "Where, as here, police articulated no basis to believe a jailable offense was occurring, there were no exigent circumstances justifying a warrantless entry to prevent destruction of evidence that would prove the offense."

People v. Rangel

(2012) 206 Cal.Ap.4th 1310

Issue

If a search warrant authorizes a search for indicia of gang activity, does it impliedly authorize a search of smartphones on the premises?

Facts

In the course of an investigation into a felony assault in a local park, San Mateo police investigators developed probable cause to believe that the perpetrator was Eric Rangel, and that the crime was gang-related. Accordingly, they obtained a warrant to search Rangel's home for, among other things, "gang indicia"; i.e., items that would help prove that Rangel belonged to a certain gang. The warrant identified such items as including "graffiti, notebooks, photographs, sketches, poetry, and red clothing"; and it said that such items might be found in "newspapers, artwork, compact disks, audio and videocassette, cameras, undeveloped film, address books, telephone lists . . . ."

While searching Rangel's bedroom, officers seized a "smartphone," which the court described as "a cellular phone that has the ability to store data, photographs, and videos." Later at the police station, an investigator searched the phone and found text messages that linked Rangel to the assault. When Rangel's motion to suppress the text messages was denied, he pled no contest.

Discussion

On appeal, Rangel argued that the search of his smartphone was unlawful because the warrant did not expressly authorize a search of such devices. He also contended that, even if the warrant could be interpreted as authorizing a seizure of his smartphone, the officers could not search it unless they had obtained a second warrant that expressly authorized the search. The court rejected both arguments.

[4] See *Maryland v. Buie* (1990) 494 U.S. 325, 337.

[5] See *People v. Thompson* (2006) 38 Cal.4th 811, 820-22; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193.

[6] See *Illinois v. McArthur* (2001) 531 U.S. 326, 332; *Richards v. Wisconsin* (1997) 520 U.S. 385, 391; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209.

[7] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.

[8] See *People v. Hua* (2008) 158 Cal.App.4th 1027, 1035-36; *People v. Thompson* (2006) 38 Cal.4th 811, 820-25 [DUI is sufficiently serious].

[9] See Health & Saf. Code § 11357(b).

SEARCH OF THE SMARTPHONE: Officers who are executing a search warrant may, of course, search for the listed evidence in any place or thing on the premises in which such evidence might reasonably be found.[10] It was therefore apparent—and the court so ruled—that the search of Rangel's smartphone was lawful because gang indicia could logically have been stored inside it. As the court pointed out:

> A smartphone such as appellant's is akin to a personal computer because it has the capacity to store people's names, telephone numbers and other contact information, as well as music, photographs, artwork, and communications in the form of emails and messages—all of which may amount to gang indicia, depending on their content.

WAS A SECOND WARRANT REQUIRED? As noted, the court also rejected Rangel's argument that, even if the investigator could have lawfully seized the smartphone, he could not search it for text messages unless he obtained a second warrant that expressly authorized such a search. As the court explained, officers need not obtain a second warrant to search something that was searchable under the terms of the first warrant. And because the first warrant impliedly authorized a search of the smartphone, a second warrant was unnecessary. "Federal cases have recognized," said the court, "that a second warrant to search a properly seized computer is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant."[11]

Accordingly, the court ruled that Rangel's motion to suppress the information in his smartphone was properly denied.

U.S. v. Flores-Lopez

(7th Cir. 2012) 670 F.3d 803

Issue

Must officers obtain a warrant to search an arrestee's cell phone for its phone number?

Facts

Officers in Indiana arrested Flores-Lopez after he transported a pound of methamphetamine to a garage where a sale to an undercover agent had been arranged. While searching him, officers found a cell phone which they searched for its phone number. Using that information, they issued a subpoena to Flores-Lopez's cell phone provider for recent call history records. Those records revealed that the phone had been used frequently to communicate with other co-conspirators. This information was used against Flores-Lopez at his trial and he was found guilty.

Discussion

Flores-Lopez argued that the search of his cell phone was unlawful because the officers did not have a warrant. The court disagreed.

It is settled that officers who have made a lawful arrest may, as an incident to the arrest, search the arrestee for weapons in his possession and evidence pertaining to the crime.[12] Thus, the search of Flores-Lopez was plainly lawful. The issue, however, was whether the officer needed a warrant to search the cell phone's memory for its assigned phone number.

At first glance, the answer would appear to be no. After all, the Supreme Court has ruled that officers who are conducting a search of a person incident to arrest may search any containers that the arrestee

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[10] See *Warden v. Hayden* (1967) 387 U.S. 294, 299-300 [search for gun: OK to search inside a washing machine]; *People v. Kraft* (2000) 23 Cal.4th 978, 1043-45 [search for shell casings, bullets, fiber: OK to search the vehicle's trunk, under the seat covers, a binder]; *People v. Gallegos* (2002) 96 Cal.App.4th 612, 626 ["It is not unusual for documents to be stored in drawers or closets, on shelves, in containers, including the Tupperware and wooden boxes searched here, or even in duffle bags."]; *People v. Superior Court (Meyers)* (1979) 25 Cal.3d 67, 77 ["The warrant itself authorized a search which would explore into every corner and cranny which might conceal items as small as a jewelry pin."]; *People v. Smith* (1994) 21 Cal.App.4th 942, 950 ["Officer Giese testified that cocaine 'can be hidden anywhere.'"]; *People v. Kibblewhite* (1986) 178 Cal.App.3d 783, 785 ["A search of the residence authorizes the search of all areas of the residence, including containers therein, which could hold the contraband described in the warrant."]; *U.S. v. Gomez-Soto* (9th Cir. 1983) 723 F.2d 649, 655.

[11] Citing *U.S. v. Evers* (6th Cir. 2012) 669 F.3d 645, 652; *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 532, 535; *U.S. v. Gregoire* (8th Cir. 2011) 638 F.3d 962, 967-68.

[12] See *United States v. Robinson* (1973) 414 U.S. 218.

was carrying. And a cell phone is just a container of information, isn't it? Technically yes, said the court, but it added that there is still some question as to whether cell phones should be subject to more restrictive rules because the "potential invasion of privacy in a search of a cell phone is greater than in a search of a [conventional] container." In fact, the court observed that "[j]udges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book" because "[e]ven the dumbest of modern cell phones gives the user access to large stores of information."

While these are legitimate concerns, the court ruled they were not implicated here because the search was limited to obtaining only a single (and not very private) piece of information: a phone number. As it pointed out, the invasion was "slight" and, in fact, was more akin to a patdown of the phone than a full-blown search. It then concluded that "[i]f police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number."[13] Accordingly, the court ruled the search was lawful.

Comment

We decided to report on this opinion because it deals with an evolving subject that is of special interest to law enforcement; and it was written by one of the country's most respected and widely-read judges, Richard Posner of Chicago's Seventh Circuit. And, as usual, the judge's analysis and discussion were excellent.

We must, however, question one of his comments. Although he ultimately ruled that the search of the cell phone was lawful, he implied that the result might have been different if the officers had conducted a more intensive search, such as looking through its call history. While the U.S. Supreme Court has not directly addressed this issue, it ruled in *United States v. Robinson* that officers who are conducting a search incident to arrest may open and search any containers that the arrestee was carrying.[14] In fact, it seems that the Court in *Robinson* rejected the idea that was suggested in *Flores-Lopez* that it might be necessary to restrict the invasiveness of certain searches incident to arrest depending on the nature of the item searched.[15] Thus, it is questionable whether the search of Flores-Lopez's phone would have been illegal if the officers had searched its call history or maybe even text messages.

It would be especially questionable in California where our Supreme Court ruled in 2011 that a cell phone is an item that is "immediately associated" with the person of an arrestee,[16] and is therefore searchable under the U.S. Supreme Court's decision in *United States v. Chadwick*.[17]

Two other things should be noted. First, the court pointed out that its analysis of cell phone searches in this case applied equally to searches of laptop computers and other digital storage devices. Said the court, "Lurking behind this issue is the question whether and when a laptop or desktop computer, tablet, or other type of computer (whether called a 'computer' or not) can be searched without a warrant—for a modern cell phone *is* a computer."

Second, the U.S. Supreme Court has ruled that when officers have arrested an occupant of a vehicle for a crime in which there are usually fruits or instrumentalities (e.g., drug trafficking), they may, as an incident to the arrest, search the passenger compartment for such evidence if they have reasonable suspicion that it is inside; i.e., neither probable cause nor immediate access is required.[18] It is, therefore, arguable that when officers arrest an occupant of a vehicle who is carrying a cell phone, and when they have reasonable suspicion to believe that incriminating information pertaining to the crime for which he was arrested is stored in the phone's memory, a warrant is not required to search for such information. To our knowledge, however, no court has yet addressed this issue.

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[13] **NOTE**: The court also provided an interesting discussion of the ways in which digital data may be sabotaged.

[14] (1973) 414 U.S. 218, 236 ["Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them . . . ."

[15] *Id.* at p. 228 [referring to the Supreme Court's seminal detention case, *Terry v. Ohio* (1968) 392 U.S. 1, 23: "*Terry* therefore, affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause."].

[16] *People v. Diaz* (2011) 51 Cal.4th 84. [certiorari denied by *Diaz v. California*, 132 S.Ct. 94].

[17] (1977) 433 U.S. 1, 15.

[18] *Arizona v. Gant* (2009) 556 U.S. 332, 335. ALSO SEE *People v. Nottoli* (2011) 199 Cal.App.4th 532, 554.

U.S. v. Perea-Rey

(9th Cir. 2012) 680 F.3d. 1179

Issues

(1) Did a federal agent's entry into an enclosed carport constitute a "search"? (2) If so, was the search lawful?

Facts

Border Patrol agents saw a man illegally enter the United States from Mexico by climbing over a border fence. They followed the man, Pedro Garcia, to a home in Calexico where he opened a gate, walked to the front porch and knocked on the door. The resident of the home, Heriberto Perea-Rey, answered the door and gestured for Garcia to go to an attached carport at the side of the house.

One of the agents followed Garcia into the carport and detained him. He also detained Perea-Rey who had apparently entered the carport from a side door leading to the house. The agent then knocked on the side door and commanded everyone in the house to step outside. Six men did so. After determining that the men were illegal aliens, the agents arrested Perea-Rey for harboring them.

Perea-Rey filed a motion to suppress the agent's observation of the illegal aliens leaving his house. The district court denied the motion, and Perea-Rey pled guilty. He then appealed the suppression ruling to the Ninth Circuit.

Discussion

Perea-Rey contended that the agent's warrantless entry into the carport constituted a "search," and that it was an illegal search because it was not covered by any of the exceptions to the warrant requirement. The court agreed.

A "SEARCH"? The first issue was whether the agent's act of walking into Perea-Rey's carport constituted a "search" under the Fourth Amendment. For the past 45 years, the term "search" has been defined as an intrusion into a place or thing that infringed on a person's reasonable expectation of privacy.[19] But, as we discussed in the Spring 2012 *Point of View*, the United States Supreme Court ruled in *U.S. v. Jones* that a search will also occur if (1) officers "physically occupied private property" (i.e., trespassed on the property), and (2) their objective was to obtain information.[20] In applying this new definition of "search," the Ninth Circuit in *Perea-Rey* ruled that an entry onto private property occurs if officers, without having permission, physically entered the home or its "curtilage." Said the court, "Warrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches."

Although the term "curtilage" is vague and has little significance nowadays, as a practical matter it ordinarily means the front, back and side yards, plus the driveway.[21] Thus, it was apparent that the agent's act of entering Perea-Rey's front yard, walking over to the carport and entering it was a trespass into the curtilage, which therefore constituted a "search." (Note that the agent's act of entering the carport would also have constituted a search under the traditional definition of the term.)

WAS THE SEARCH ILLEGAL? Like any warrantless search, the agent's search of Perea-Rey's carport would be illegal unless one of the exceptions to the warrant requirement applied, such as consent or exigent circumstances. But none did, and therefore the entry was illegal. Consequently, the court ruled that the agent's observation of the illegal aliens in Perea-Rey's home was the fruit of an illegal search, and that it should have been suppressed.

Comment

There are two things about this decision that should be noted. First, even though a search now occurs when officers walk up to the front door of a home, it would be a *legal* search because officers, like anyone else, may walk along pathways and other areas on private property to which visitors had been given implied permission to enter. Thus, the

[19] See *Maryland v. Macon* (1985) 472 U.S. 463, 469 ["A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]; *Katz v. United States* (1967) 389 U.S. 347, 353 [a "search" occurs if the Government's activities "violated the privacy upon which [the defendant] justifiably relied"]; *Illinois v. Andreas* (1983) 463 U.S. 765, 771 ["If the inspection by the police does not intrude upon a legitimate expectation of privacy, there is no 'search'"].

[20] (2012) __ U.S. __ [132 S.Ct. 945, 949].

[21] See *United States v. Dunn* (1987) 480 U.S. 294, 300.

court in *Perea-Rey* pointed out that "the knock and talk exception authorizes officers to enter the curtilage to initiate a consensual conversation with the residents of a home."[22] Consequently, if the Border Patrol agent had seen the illegal aliens leaving the house while he was on the pathway leading from the gate to the front porch, the doctrine of implied consent would have rendered his presence there lawful. But because there is no implied permission to enter semi-enclosed carports, the search was unlawful.

Second, regardless of which definition of "search" a court applies, a defendant will still be unable to challenge its legality unless he had a reasonable expectation of privacy in the place or thing that was searched.[23]

U.S. v. Bolivar

(9th Cir. 2012) 670 F.3d 1091

Issue

While conducting a probation search of a home, did officers have sufficient reason to believe that a backpack was searchable?

Facts

Police officers in Idaho were conducting a probation search of Philine Black's one-bedroom apartment when they spotted a backpack in the bedroom closet. They opened it and found a sawed-off shotgun. Before they opened the backpack, the officers had noticed that the closet contained women's and men's clothing, with men's clothing on the right side and women's clothing on the left. The backpack was hanging in the center.

Ms. Black said the gun belonged to Bolivar and, as the result, he was charged with being a felon in possession of a firearm. When his motion to suppress the shotgun was denied, he pled guilty but later appealed the denial of his suppression motion.

Discussion

Bolivar argued that officers who conduct probation searches of homes are prohibited from searching personal property unless they have probable cause to believe the item belongs to the probationer. He also contended that the officers lacked probable cause to believe the backpack belonged to Black.

It is settled that officers may search a home pursuant to the terms of a resident's probation or parole only if they have probable cause to believe he lives there. As the Ninth Circuit explained, "Law enforcement officers are allowed to search a parolee's residence, but they must have probable cause to believe that they are *at* the parolee's residence."[24]

This does not mean, as Bolivar argued, that officers who are conducting a search are prohibited from opening a container unless they have probable cause to believe that it belongs to the probationer or parolee. Instead, only reasonable suspicion is required. As the court in *Bolivar* explained, "Once police officers properly enter a residence pursuant to a probation search, they need only a reasonable suspicion to conclude that the probationer owns, controls, or possesses a particular item within the probationer's residence in order to search that item."

Thus, the court ruled that, because the officers who were searching Black's apartment had reasonable suspicion to believe the backpack belonged to her, it was searchable.

Comment

In determining whether there is reasonable suspicion to believe that a closed container belongs to a probationer or parolee, the courts often note whether such a container is normally possessed by men or women. And if the parolee was a man, and the item was something that only women commonly possess, the officers would ordinarily not have reasonable suspicion.[25] This was not an issue in *Bolivar* because the backpack was gender-neutral.[26]

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[22] ALSO SEE *People v. Thompson* (1990) 221 Cal.App.3d 923, 943 ["An officer is permitted the same license to intrude as a reasonably respectful citizen."]; *People v. Zichwic* (2001) 94 Cal.App4th 944, 953 ["Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off."].

[23] See *Rakas v. Illinois* (1978) 439 U.S. 128, 132; *United States v. Payner* (1980) 447 U.S. 727, 731 ["[A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights."].

[24] See *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1080.

[25] See *People v. Baker* (2008) 164 Cal.App.4th 1152, 1160.

[26] See *People v. Boyd* (1990) 224 Cal.App.3d 736, 745.

U.S. v. Glover

(4th Cir. 2011) 662 F.3d 694

Issue

Did officers reasonably believe that a detainee was preparing to rob a gas station?

Facts

At about 4:40 A.M., two officers on patrol in Charlotte, North Carolina were passing by an all-night gas station. Both officers knew that the station was in an area that was "plagued by violent crime," that it had previously been robbed, that only one attendant worked at night and that he usually stayed in the locked office. As they pulled into the station, they noticed that the attendant was outside checking the fuel tanks. They also spotted a man—later identified as Glover—behind the station who appeared to be watching the attendant. Glover would glance at the attendant then pull his head back "as if he were trying to hide."

Suspecting an impending robbery, the officers pretended to drive off, all the while keeping an eye on Glover and noticing that he kept watching them. They then circled around to the back of the station to confront him, but he wasn't there—he was now standing directly over the attendant, having apparently rushed toward him. The officers then jumped from their car and detained him. They also pat searched him and found a gun in his pants pocket.

When Glover's motion to suppress was denied, he pled guilty to possession of a firearm by a felon.

Discussion

Glover contended that the gun should have been suppressed because the officers lacked grounds to detain and pat search him. As he pointed out, he had not yet attempted to rob the attendant and none of his actions were illegal. The court responded by explaining that, while one purpose of detentions is to apprehend people who have already committed crimes, an equally important purpose is to prevent crimes from occurring. This means, said the court, that officers who have reasonable suspicion "can detain suspects for conduct that is ambiguous and susceptible of an innocent explanation" in order to "resolve the ambiguity."

The court then examined the various circumstances and concluded that the officers had sufficient reason to believe that Glover was about to rob the attendant. Of particular importance, the court noted the following:

EARLY MORNING: Robbers are especially likely to commit their crimes late at night or very early in the morning when it is unlikely they would be seen by passersby. Said the court, "The fact these events took place at this late hour only compounds the suspiciousness of Glover's behavior."

FURTIVE GESTURES: The officers noticed that Glover was "glancing around the corner" and then "would pull his head back as if he were trying to hide." Such "nervous, evasive behavior," said the court, "supports the reasonableness of the officers' belief that Glover was preparing to commit a crime."

SUDDEN MOVEMENT: When Glover thought the officers had left, "he suddenly left his location and planted himself next to the attendant."

ATTRACTIVE TARGET: Finally, the court noted the "vulnerability of the gas station attendant" and that "24 hour gas stations like this are frequently targets of robbery" because the attendants are usually alone. Said the court, "The Fourth Amendment does not preclude officers from taking modest steps to protect twenty-four hour gas stations, convenience stores, or fast-food outlets from armed robberies. The clerks and attendants who keep these facilities open to the public late at night often do so at considerable risk to their own safety. They often work solitary shifts in isolated circumstances where their presumed proximity to cash makes them uniquely vulnerable."

For these reasons, the court ruled that the officers' detention of Glover was lawful and, because they had reason to believe he was preparing to rob the attendant, they also had sufficient grounds to pat search him.

Note re People v. Tom

On June 20, 2012, the California Supreme Court granted a Petition to Review the case of *People v. Tom*. As we reported in the Spring 2012 edition, the court in *Tom* ruled that a motorist who had caused a fatal traffic accident was "in custody" for *Miranda* purposes even though he had not been arrested and was generally free to walk around the scene. As the result of the Supreme Court's action, *Tom* is no longer citable authority. POV

The Changing Times

Alameda County District Attorney's Office

Inspector II **Chris Lux** retired after 40 years in law enforcement. Chris joined the DA's Office in 2002 after a stellar 29-year career with San Leandro PD. Chris worked in nearly every assignment in the office, and his investigative abilities were impartred to newer investigators and prosecutors. Congratulations to Chris on his well-deserved retirement. Deputy DA **Ken Ryken** was appointed Director of the Finance Division.

Alameda County Narcotics Task Force

Transferring out: **Eric Gatty** (CHP), **Gary Castaneda** (CHP), and **Nick Calonge** (OPD). Transferring in: **Bruce Calero** (CHP), **Ian Ryland** (CHP), and **Chris Crabtree** (OPD).

Alameda County SAFE Task Force

Transferring out: **Michele Keller** (Probation Dept.). Transferring in: **De Andre Lewis** (Probation Dept.).

Alameda County Sheriff's Office

Lt. **Garrett Holmes** was promoted to acting captain. Sgts. **Michael Denobriga**, **H. Pace Stokes**, and **Mario Felix** were promoted to acting lieutenant. The following deputies were promoted to acting sergeant: **Keith Gilkerson**, **Gena Livensparger**, **Patrick Kennedy**, **David Bonnell**, and **Anthony De Sousa**. The following deputies retired: Lt. **William Gordillo** (29 years), Lt. **Mark Gordillo** (24 years), Sgt. **Steve Suchon** (25 years), Sgt. **Dino Belluomini** (27 years), **William Ambrose** (23 years), **Debra LaRosa** (14 years), **Sandra Sheesley** (22 years), **John McCoy** (24 years), **Carol Williams** (31 years), **Deborah Ingols** (16 years), **Shari Paladino** (23 years), **Kevin Kilgore** (26 years), **John Huey** (27 years), and **Carols Ferrerya** (4 years). Finance Manager **Susan Bunting** died on June 3, 2012. Susan had been with ACSO for 17 years.

Alameda Police Department

The following officers retired: Lt. **Bill Scott** (30 years), **Paul Hischier** (11 years), and **Rhoda Germany** (10 years). Acting Sgt. **David Pascoe** was promoted to sergeant. New dispatcher: **William Schweitzer**. The Alameda City Jail closed, taking with it several longtime employees: **Juanita Rabai**, **Tina Rodriguez**, **Ernest White**, **Edward Bell**, **Stephen Morgan**, and **Danelle Pola**. Retired motor officer **Dave Ellis** died unexpectedly on May 7, 2012. Dave served for over 30 years with the Alameda and Oakland Police Departments, and retired just this last year. He was 52.

Albany Police Department

John Costenbader transferred from Patrol to Investigations. **Aaron Potter** resigned to accept a position with Napa County SO. Parking enforcement officer **Danno Ho** was appointed as a police officer trainee. Communications clerk **Darla Majors** retired after 25 years of service. Administrative Services Supervisor **Martha King** retired after 29 years of service. New communications clerk: **Gina Easlon**.

BART Police Department

The following officers have retired: Sgt. **John Austin** (27 years), **Lester Scanlan** (23 years), **Leonard Olsen** (11 years), **Spencer Thorpe** (24 years), and **Daniel Hoover** (9 years). The following officers were promoted to sergeant: **David Salas**, **Tanzanika Carter**, **Anisa McNack**, **Carolyn Perea**, **Tania Salas**, **Brando Cruz**, **Jaswant Sekhon**, and **J. Enriguez**. Transfers: Lt. **Kevin Franklin** to Security Programs Manager, Lt. **Michael Hayes** to Patrol, Sgt. **Paul Garcia** to Revenue Protection, Sgt. **Tim Pashoian** to Range Master, **John Vuong** to FBI Joint Terrorism Task Force, **Steve Christ** to Protection/Explosive Detection Canine Handler, **Cliff Valdehueza** to TSA canine handler, and **Michael Busse** to Administrative Traffic Officer. New officers: **Ninja Allen**, **Antwinette Turner**, and **Bryan Trabanino**.

California Highway Patrol

Castro Valley Office: Lt. **Linda Franklin** was promoted to captain. **Mindy Laponte** and **Michael Vigil** were promoted to sergeant.

East Bay Regional Parks Police Department

Lt. **Dave Dubowy** retired after 28 years of service. Dispatch Supervisor **Roseanne Farmer** retired with 32 years of service. Sgt. Gretchen Rose was promoted to patrol lieutenant. Sgt. **Lance Brede** was promoted to administrative services lieutenant. **Ryan Lehew** was promoted to sergeant. Lateral appointments: **Jeff Green** and **John Gallegos**. Dispatcher **Brian Bonilla** was promoted to Dispatch Supervisor. Dispatcher **Carissa Rios** was hired. Sgt. **Dave Phulps** was selected for the CALEA specialty assignment.

FREMONT POLICE DEPARTMENT

Sgt. **Christopher Alberti** retired after 27 years of service. **Barry Fowlie** was promoted to sergeant. Lateral appointments: **Fabian Torrico** and **Jared Madsen**. New officers: **Vincent Barbero**, **Gabrielle Wright**, **Stephen Hill**, and **Elise Dooley**. Officer **Tom Fazio** passed away on May 1, 2012 after a lengthy illness. **Ken Bingaman**, who retired in 2005, died in June.

HAYWARD POLICE DEPARTMENT

Sgts. **Jeff Lutzinger** and **Linda Slaughter** were promoted to lieutenant. Inspectors **Guy Jakub** and **Greg Velasquez** were promoted to sergeant. **Dan Olsen** was promoted to sergeant. The following officers retired: Lt. **Reid Lindblom** (30 years), Sgt. **Steve Brown** (31 years), Insp. **Kendell Won** (23 years), and **Jeff Porto** (26 years). **Vincent Portillo** and **David Springer** have taken disability retirements. Officer **Rodney Pierce** died as a result of an off-duty motorcycle accident on May 11, 2012. Rod leaves a legacy of excellence and he will be sorely missed.

K-9 **Nicky** and Officer **Loring Cox** competed against 25 other teams from across the state in the Stockton PD Narcotics K-9 trial, and took first place in vehicle search and first place in overall narcotics. **Michael DeOrian** was selected as Dispatcher of the Year.

NEWARK POLICE DEPARTMENT

Sgt. **Mike Carroll** was promoted to commander and will oversee the administrative division. Commander **Bob Douglas** retired after 28 years of service (and 30 years in law enforcement). **Sean Farley** retired after seven years of service. Transfers: Sgt. **Manny DeSerpa** from Patrol to Detectives, and **Tony Heckman** from Patrol to the Special Enforcement Team. Lateral appointments: **Ethan Katz** and **Sean Eriksen** (both from Contra Costa SO), and **Jennifer Bloom** (Sacramento County SO).

Randy Ramos received the Distinguished Service Medal. Sgt. **John Kovach** and **Karl Geser** received Gold Awards for their actions in the aftermath of the shooting of an off-duty U.S. Customs and Border Protection Agent in February. Due to their life-saving measures, the agent not only survived, but returned to work exactly three months later. Det. **Dan Anderson** was named Officer of the Year (four-time recipient).

SAN LEANDRO POLICE DEPARTMENT

Dan Ruff retired after over 10 years of service. Lateral appointments: Capt. **Ed Tracey** (Oakland PD), **Calvin Watson** (San Jose PD), and **Steven Cesaretti** (Union City PD). Transfers: Lt. **Randy Brandt** from Patrol to Criminal Investigations, and Lt. **Jeff Tudor** from Criminal Investigations to Patrol. Lt. **Greg Lemmon** graduated from the Senior Management Institute for Police in Boston. Sgt. **Mike Sobek** graduated from the LAPD Leadership Academy. **Ryan Gill** graduated from Inner Perspective Leadership Development.

UNION CITY POLICE DEPARTMENT

The department is sad to report that retired sergeant **Chris Guckert** passed away on March 2, 2012 after battling cancer. Before joining Union City PD, Chris was an 18 year veteran of Fremont PD. He retired in 2009 after 10 years of service. Det. **Yousuf Shansab** was promoted to corporal and transferred from Patrol to Investigations. Transfers: Corp. **Bob Kensic** from Community Policing to Investigations, Corp. **Paul Kanazeh** from Patrol to Community Policing, and **Krista Fraga** from Patrol to Investigations.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

New officers: **Jonathan Caires**, **Thomas Hulburt**, **Robert Ibanez**, and **Karla Rush**. Corp. **Timothy Zuniga** passed away on May 28, 2012. Tim joined the department in 2003. POV

War Stories

The flying reefer blues

Having just participated in a MADD recognition luncheon, four CHP officers in a patrol car were driving northbound on I-880 near Oak Street in Oakland. As they were passing a red Dodge Magnum, they noticed that the driver was smoking a joint. So they lit him up, at which point he tossed the joint out the window. Unfortunately for him, the evidence landed on the windshield of the patrol car. Also unfortunately for him, he was stoned.

Nice catch!

It turns out that marijuana isn't the only airborne controlled substance on East Bay freeways. CHP motor officer Tim Moore was patrolling I-580 in Pleasanton when he noticed that the driver of the car in front of him had just tossed something out the window. Said Tim, "It was flying high in the air and headed straight toward me. I was hesitant to brake or swerve out of the way on my motorcycle and I caught the thing. When I looked at it, I noticed it was a glass bottle of Hennessy cognac. I stashed it in my leather jacket and stopped the driver. I asked him what he threw out the window and he said, 'Oh, a bottle of Hennessy.' I asked, 'This one?' and showed him the bottle." "Yeah, it looks familiar," he said.

Cruel and unusual

Vallejo police officers devised a cheap and effective way to get rid of loiterers and drug dealers who were hanging out on a downtown street corner. They installed loud speakers on the roof of a nearby bus depot and started playing an assortment of classical music, mainly symphonies and piano concertos. Most of the loiterers fled the scene within a hour or so, but a several of the more callous hooligans stood their ground. That's when the officers brought out their heavy artillery: a CD of Barry Manilow's Greatest Hits. Problem solved. Meanwhile, a teenager in Michigan, who was cited by blasting rap music from his car, was ordered to spend three hours listening to a Wayne Newton CD. The ACLU is investigating.

Some wise motherly advice

A man who was being booked into jail in Oakland used his phone call to seek advice from his mother:

Son: I'm in jail, Ma. They got me for robbery.

Mom: What you robbin' people for?

Son: I need money.

Mom: How much you get?

Son: About 15 bucks I think.

Mom: You stupid fuckin' crackhead, hophead! You out there robbin' people for chump change! When you go to the trouble to rob some motherfucker, you better make sure you get some real money!

A twofer in Fremont

A Fremont officer had just turned on his red lights to make a car stop on an apparent DUI. As the car was rolling to a stop, the officer noticed that the driver and his female passenger were switching places. It turned out they were both drunk—so both were arrested for DUI.

Don't know much about books

Oakland police officers were dispatched to a bank on Lakeshore Avenue where a woman was reportedly using a phony ID to withdraw money. Meanwhile, the bank manager was talking to the woman, trying to stall her. "Where do you work?" he asked. "At a bookstore," she replied. "Which one?" The woman thought for a few seconds and finally said "It's . . . it's . . . it's Facebook."

Having fun with 911

A 911 operator in San Francisco received a frantic call from a woman who said she was in the booking office at the Hall of Justice and that she was having a heart attack. When paramedics arrived, they found the woman—in perfect health. It turned out she had used her one phone call to dial 911 and report a fictitious emergency. What's weird is that the woman was being booked into the jail on a charge of falsely reporting another emergency to 911.

The revenge of a CHP K-9

An irate motorist phoned the CHP in Dublin, saying he wanted to file a complaint against a certain CHP K-9. The man said the dog had been assisting an officer in searching his car for drugs, and that the dog scratched his upholstery. (The man consented to the search, no drugs were found.) A report was duly taken. About three weeks later, the same man led CHP officers on a pursuit through Pleasanton. He eventually bailed out but was apprehended by a K-9. Yes, it was the same dog. And everyone agreed that he seemed especially pleased.

A clueless soccer dad

A Petaluma police officer was monitoring traffic on Route 116 when he heard a fast-approaching car. As the car came into view, he saw that it was a Nissan Altima, and that the driver was not only speeding, he had crossed the solid double yellow lines into oncoming traffic in order to pass another car. It took the officer three minutes to catch up to the car—which he clocked at 104 m.p.h. Why was the driver in such a hurry? He explained that he was taking his two 9-year old passengers to a soccer game and he didn't want to be late. He was arrested for reckless driving and child endangerment.

The two stooges

Two men walked into a Taco Bell in Livermore. We'll call them Moe and Curley. Moe saw someone he didn't like, so naturally he hit him over the head with a chair. He was about to hit him again, but when he hoisted the chair into the air it hit Curley on the head, knocking him down and causing a nasty cut. Moe and Curley fled, but Livermore police were able to follow the trail of blood to a nearby apartment. Inside, they found Moe and Curley . . . plus their marijuana grow and stash of methamphetamine.

Finicky motorists

A CHP dispatcher notified an officer in Pleasanton that someone had left a TV set on the freeway:

Dispatcher: It's in the number 3 lane. The caller said it was a big screen TV and it wasn't broken.

Officer: I'm surprised nobody took it yet.

Dispatcher: The caller said it was an older model. That's probably why.

Something is amiss

Police in Wichita, Kansas arrested a young man at the airport after he tried to pass two counterfeit $15 bills.

What's happening in court

In Oakland, a judge was questioning a defendant who had missed his last court date:

Judge: I have a letter in the file purportedly signed by you stating why you missed your court date. Is this your letter, and is this your signature?

Defendant: Yes, sir.

Judge: The letter says your missed your court date because your aunt was in the hospital dying of prostate cancer.

Defendant: That's right, judge, and she's still there, too.

Judge: Sir, your aunt does not have a prostate.

Defendant: Are you sure?

Judge: I'm positive.

Defendant: Well . . . I'm sure she'll be real happy to hear that.

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