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Is There a Seat for Miranda at Terry's Table?: an Analysis of the Federal Circuit Court Split over the Need for Miranda Warnings during Coercive Terry Detentions

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IS THERE A SEAT FOR MIRANDA AT TERRY'S TABLE?: AN ANALYSIS OF THE FEDERAL CIRCUIT COURT SPLIT OVER THE NEED FOR MIRANDA WARNINGS DURING COERCIVE TERRY DETENTIONS

Daniel R. Dinger†

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I. INTRODUCTION

In United States v. Artiles-Martin, decided June 30, 2008, the federal district court for the Middle District of Florida identified the existence of a federal circuit court split "over whether coercive Terry stops constitute Miranda custody." Put another way, the court noted a disagreement among the circuits over the need for Miranda warnings in coercive Terry detentions that involve questioning about the reasons for the stop. In detailing the nature of the circuit split, the court noted that the Eighth Circuit, as well as the First and Fourth circuits, "hold that so-called Terry reasonableness means Miranda warnings are not required, even if the stop was coercive." In other words, Miranda warnings are not necessary when a person is detained.

2. Id. at *11.
3. Id. at *11 n.38.
and questioned pursuant to the authority granted to law enforcement in *Terry v. Ohio*\(^4\) to conduct investigative detentions without violating the Fourth Amendment, even if the detention is coercive in nature. On the other side of the circuit split are the Second, Seventh, Ninth, and Tenth circuits, which "hold that a coercive *Terry* stop requires warnings but still is deemed a valid *Terry* stop."\(^5\) Put differently, these four circuits have held that *Miranda* warnings, though not necessary in all *Terry* stops, are required when a stop involves a certain level of force or coercion. And finally, the *Artiles-Martin* court observed that the Eleventh Circuit, to which it belongs, "has not expressly adopted either view."\(^6\)

This article will explore the aforementioned circuit split and the legal principles and issues at the heart of the controversy. Specifically, it will address the positions of the various circuits on the subject of whether a person detained in an obviously coercive but non-arrest *Terry* situation should be provided with *Miranda* warnings prior to being asked any questions about the circumstances leading to the detention. Further, an integral part of the discussion will be whether the fact that a reasonable person would not feel free to terminate a particular detention and leave is, as some courts have held, enough to necessitate *Miranda* warnings. Part II of the article will provide a brief but detailed overview of the basic legal principles involved in the issue that have led to the circuit split noted above. This will necessarily include a discussion of *Terry*, the concept of the investigative detention, and what law enforcement officers are permitted to do (and prohibited from doing) during such a stop, including those things that may make the stop coercive. There will also be discussion of *Miranda v. Arizona*\(^7\) and its requirement that certain warnings be given prior to custodial interrogation if any statements by a criminal defendant are to be admissible at trial. Part II will also include

\(^4\) 392 U.S. 1 (1968).
\(^6\) *Id.* at *11. *Artiles-Martin* is not the first court to recognize the existence of this circuit split. The split was noted earlier by the Second Circuit in *United States v. Newton*, 369 F.3d 659, 673 (2d Cir. 2004). See also *Griffin v. United States*, 878 A.2d 1195, 1199 (D.C. 2005) ("Recently, however, courts in various jurisdictions, including the 3rd, 7th[,] and 10th Circuits and the U.S. District Court for the District of Columbia, have examined the interplay between *Terry* and *Miranda* and have held that indeed, in some cases, where there is a valid *Terry* stop, 'the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with the concept of 'custody' [*Miranda*] than with "brief investigatory detention" [*Terry*], may also create a custodial situation under *Miranda*.'") (citations omitted).
\(^7\) 384 U.S. 436 (1966).
discussion of what constitutes "custody" and "custodial interrogation" in the context of the *Miranda* decision. Part III will address the circuit split itself, including the different views and standards that the circuit courts of appeals have taken in the context of the fact scenarios presented in the cases before them. Part IV will present a summary of the many different tests that are currently used by various courts throughout the United States to determine when a *Terry* detention becomes *Miranda* custody, either intentionally or unintentionally. Part V will then provide legal support and justification for the position that most coercive *Terry* investigative detentions do not and should not be found to require *Miranda* warnings, and will further present a proposed test for determining when a *Terry* stop becomes *Miranda* custody that is consistent with that position. And finally, Part VI will conclude the article with a brief summary of the legal justifications and arguments presented herein.

II. LEGAL PRINCIPLES INVOLVED IN THE CIRCUIT SPLIT OVER THE NEED FOR *MIRANDA* WARNINGS IN COERCIVE *TERRY* DETENTIONS

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It further guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment provides additional protections, stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The circuit split identified in the *Artiles-Martin* decision directly implicates these two important constitutional amendments and raises issues regarding the interplay between the two. To understand the nature of the circuit split and the questions that it presents, it is important to first have a general understanding of the Fourth and Fifth Amendments and their guaranteed protections, as well as two lines of important Supreme Court cases that center around the protections that they provide.

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8. U.S. CONST. amend. IV.
9. Id.
10. U.S. CONST. amend. V.
A. The Fourth Amendment, Terry v. Ohio, and the Investigative Detention

As noted above, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and requires that all warrants be supported by probable cause.11 This right to be free from unreasonable searches and seizures—once described as an "inestimable right of personal security"—is one that has long been held sacred. As the Supreme Court recognized over a century ago in Union Pacific Railroad Co. v. Botsford,12 "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."13 But the Supreme Court has also recognized that the Fourth Amendment protections are "not, of course, a guaranty against all searches and seizures, but only against unreasonable searches and seizures."14 In other words, there is no absolute immunity from governmental searches and seizures.

One situation in which a search and seizure based on less than probable cause is deemed to be reasonable—and therefore not a violation of the Fourth Amendment—is the investigative detention first recognized as constitutional in the Supreme Court's Terry decision. Prior to Terry, "the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed [solely] in terms of arrest, probable cause for arrest, and warrants based on such probable cause."15 After Terry, however, the Fourth Amendment landscape changed. In Terry the Supreme Court "for the first time recognized an exception to the requirement that Fourth Amendment seizures of

11. U.S. CONST. amend. IV.
14. Id. at 251.
15. United States v. Sharpe, 470 U.S. 675, 682 (1985); see also Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); Schmerber v. California, 384 U.S. 757, 768 (1966) ("We begin with the assumption that . . . the Fourth Amendment's proper function is to constrain, not against all intrusions . . . but against intrusions which are not justified in the circumstances, or which are made in an improper manner."); Elkins v. United States, 364 U.S. 206, 222 (1960) ("[W]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").
persons must be based on probable cause.” In so doing, “Terry departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment ‘seizures’ so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment ‘seizures’ reasonable could be replaced by a balancing test.” This balancing test weighs the “limited violation of individual privacy” that results from an investigative detention against the opposing interests of “crime prevention and detection” and law enforcement safety. “Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause . . . .”

Much has changed in the more than forty years since Terry was decided, as the general principles of Terry and investigative detentions have been further refined and defined by the Supreme Court and lower courts. Yet, as the existence and nature of the circuit split at issue demonstrates, there is still much to be resolved about what constitutes a lawful investigative detention under Terry and whether and how the basic principles of that landmark decision interact with another of the Supreme Court’s most important and game-changing decisions of the modern era—Miranda.

1. The Fourth Amendment and Terry v. Ohio

The Fourth Amendment protects “the people” against governmental intrusion into their private lives in the form of unreasonable searches and seizures. As noted by the Supreme Court in Chimel v. California, the Fourth Amendment “was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for indepen-

17. Id. at 208–09.
18. Id. at 209.
19. Id. at 209.
20. Id. at 209–10.
21. In United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990), the Supreme Court defined “the people” to include “a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United States] to be considered part of that community.” Accordingly, “[t]he community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country.” CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1287 (Johnny H. Killian et al. eds., 2004) [hereinafter CONSTITUTION: ANALYSIS AND INTERPRETATION].
In defining the application and scope of the Fourth Amendment, the Supreme Court has recognized that "the Fourth Amendment protects people, not places," and therefore "wherever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion." 25

23. Id. at 761.
24. Katz v. United States, 389 U.S. 347, 351 (1967). In holding that the Fourth Amendment protects people rather than places, the Supreme Court moved away from the notion that the Fourth Amendment is grounded in the protection of property and property interests. The Court addressed this concept directly in Warden v. Hayden, 387 U.S. 294 (1967), when it wrote:

The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

Id. at 304.

25. Terry v. Ohio, 392 U.S. 1, 9 (1968) (citation omitted). This concept was addressed in some detail in Katz, decided one year before Terry, which held that for the purposes of the Fourth Amendment, the inquiry to be made is whether the place searched is one in which the involved party had a reasonable expectation of privacy. In this regard, the Court wrote that the capacity to claim the protection of the Amendment depends not upon a property right in the invaded place, but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion. Katz, 389 U.S. at 350–51. As such, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351 (citations omitted).

To determine whether an expectation of privacy is "reasonable" for purposes of the Fourth Amendment, a court must look to whether "society" would find the expectation to be reasonable. In this regard the Supreme Court has found that there are some expectations of privacy that society is not prepared to accept and therefore are not reasonable. See CONSTITUTION: ANALYSIS AND INTERPRETATION, supra note 21, at 1290. For example, "protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others." Id. (citing Kyllo v. United States, 533 U.S. 27 (2001); Payton v. New York, 445 U.S. 573 (1980); Mincey v. Arizona, 437 U.S. 385 (1978); and Alderman v. United States, 394 U.S. 165 (1969)); see also United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

There is a lesser though still existing degree of protection for automobiles. See South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("[L]ess rigorous warrant requirements govern [the search of automobiles] because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.").
Furthermore, in addition to governing the search of a place in which a person has a reasonable expectation of privacy, "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person" as well. Although this obviously includes formal arrests, the Fourth Amendment also governs those detentions or seizures of persons that "do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology." As such, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

As a general rule, law enforcement must obtain a warrant prior to conducting a search or seizure. There are, however, "a few specially established and well-delineated exceptions" to this rule that allow for warrantless searches and seizures. In the criminal law arena these exceptions to the warrant requirement, though "jealously and carefully drawn," are of extraordinary importance because "the greater number of searches, as well as the vast number of arrests, take place without warrants." These exceptions to the warrant require-

And as noted above, there are some expectations of privacy that the Supreme Court has deemed to be unreasonable, including the alleged expectations of privacy in bank records, phone numbers dialed from a telephone, prison, or jail cells, and garbage placed outside for collection. See CONSTITUTION: ANALYSIS AND INTERPRETATION, supra note 21, at 1290 (citing California v. Greenwood, 486 U.S. 35 (1988) (trash left for collection); Hudson v. Palmer, 468 U.S. 517 (1984) (prison cells); Smith v. Maryland, 442 U.S. 735 (1979) (phone numbers dialed); United States v. Miller, 425 U.S. 435 (1976) (bank records)).

27. Id.; see also United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.") (citing Davis v. Mississippi, 394 U.S. 721 (1969)).
29. See id. at 20 ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure...") (citing Beck v. State of Ohio, 379 U.S. 89, 96 (1964); Chapman v. United States, 365 U.S. 610 (1961)); see also Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) ("Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'") (quoting Katz, 389 U. S. at 357); Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.").
32. CONSTITUTION: ANALYSIS AND INTERPRETATION, supra note 21, at 1313.
ment include searches incident to arrest, searches of a vehicle pursuant to the automobile exception, vessel searches, consent searches, border searches, searches of open fields, the seizure of items found in plain view, school searches, prison and probation searches, inventory searches, protective sweeps, and arrests for all felony offenses and for those misdemeanor offenses committed in the presence of law enforcement, as well as a handful of other exceptions. Also included in the list of recognized exceptions to the warrant requirement is the investigative detention—the exception that is at the heart of the circuit split referenced above.

The first case to recognize the investigative detention as an exception to the warrant requirement was *Terry v. Ohio*, which made its way to the U.S. Supreme Court by way of Ohio’s state courts. *Terry* involved a review of a police procedure known as the “stop and frisk” during which law enforcement briefly stops a person on less than probable cause and conducts a quick pat-down search of that person’s outer clothing for weapons. The Court began its analysis in *Terry* by noting that to determine whether the conduct at issue was reasonable, and therefore constitutional, it had to be “tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.” The test for reasonableness employed by the Court involved first a “focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,” followed by a “balancing [of] the need to search (or seize) against the invasion which the search (or seizure) entails.” In focusing on the “governmental intrusion” at issue, the

33. For additional information on the nature and scope of these exceptions to the warrant requirement, see generally CONSTITUTION: ANALYSIS AND INTERPRETATION, supra note 21, at 1313–36.

34. In framing the issue as one of first impression, the Court wrote: The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure. We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. *Terry*, 392 U.S. at 9–10.

35. Specifically, in *Terry*, a police detective had stopped three men who, based on his training and experience as a law enforcement officer, appeared to be “casing” a store in preparation for a robbery. *Id.* at 5–6. The stop was followed by a pat-down search of their outer clothing during which the detective found Terry and one of his companions to be in possession of two handguns. *See id.* at 7.

36. *Id.* at 20.

37. *Id.* at 20–21 (quoting Camara v. Mun. Court, 387 U.S. 523, 534–35 (1967)).
Terry Court required that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The specific facts were then to be "subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." This evaluation was to be made by employing an objective standard that took into account whether "the facts available to the officer at the moment of the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."

After setting forth these general principles, the Court applied those same principles to the facts of Terry to determine the constitutionality of the "stop and frisk" at issue in that case. In addressing the "governmental interest" put forth as justification for the "intrusion upon [Terry's] constitutionally protected interests," the Court noted:

One general interest is . . . that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even

38. Id. at 21. In a footnote, the Terry Court noted that this requirement of specificity was nothing new in terms of Fourth Amendment jurisprudence. The Court stated, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."


40. Id. at 21-22. In stressing the importance of employing an objective rather than a subjective standard in determining reasonableness, the Terry Court wrote:

Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple "good faith on the part of the arresting officer is not enough. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police."

41. Id. at 22 (quoting Beck, 379 U.S. at 97).
though there is no probable cause to make an arrest. 42

The Court further recognized that in situations such as that pre-
sented in *Terry*, "there is the more immediate interest of the police
officer in taking steps to assure himself that the person with whom he
is dealing is not armed with a weapon that could unexpectedly and
fatally be used against him." 43 Referencing the fact that "American
criminals have a long tradition of armed violence," 44 the Court thus
recognized "the need for law enforcement officers to protect
themselves and other prospective victims of violence in situations
where they may lack probable cause for an arrest." 45 Given these
circumstances, the Court concluded:

> When an officer is justified in believing that the individual
> whose suspicious behavior he is investigating at close range
> is armed and presently dangerous to the officer or to others,
> it would appear to be clearly unreasonable to deny the offic-
> er the power to take necessary measures to determine
> whether the person is in fact carrying a weapon and to neu-
> tralize the threat of physical harm. 46

Having recognized that the government has a legitimate interest
in crime prevention and in the safety of law enforcement officers, the
Court next considered "the nature and quality of the intrusion on
individual rights which must be accepted if police officers are to be
conceded the right to search for weapons in situations where
probable cause to arrest for crime is lacking." 47 Noting that a "stop
and frisk" is undoubtedly both a seizure and a search within the
context of the Fourth Amendment, the Court nevertheless held that
in certain situations a "stop and frisk" is reasonable and therefore not
a violation of the prohibition against unreasonable searches and
seizures. 48 In this regard, the Court concluded:

> Our evaluation of the proper balance that has to be struck
in this type of case leads us to conclude that there must be a
narrowly drawn authority to permit a reasonable search for
weapons for the protection of the police officer, where he
has reason to believe that he is dealing with an armed and
dangerous individual, regardless of whether he has probable

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42. *Id.* at 22.
43. *Id.* at 23.
44. *Id.*
45. *Id.* at 24.
46. *Id.*
47. *Id.*
48. *Id.* at 27.
cause to arrest the individual for a crime.\textsuperscript{49}

The Court outlined the proper standard for determining whether an officer has sufficient information or knowledge to make a lawful stop when it added:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unpaticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.\textsuperscript{50}

The Court next applied the newly-announced rule of law to the facts of \textit{Terry}, and in the end upheld the limited seizure and search that had taken place. In so doing, the Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous,"\textsuperscript{51} the officer is entitled to detain the person, and "for the protection of himself and others in the area [is further permitted] to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."\textsuperscript{52} And perhaps most important, the Court concluded that "[s]uch a search is a reasonable search under the Fourth Amendment."\textsuperscript{53}

\section{General Principles of \textit{Terry} and its Progeny}

The basic holding of \textit{Terry}, which is based on the premise that "police officers must often act before probable cause can be determined,"\textsuperscript{54} is that "[a]n investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion."\textsuperscript{55} An investigatory stop has been defined as a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status

\begin{thebibliography}{99}
\bibitem{49} Id.
\bibitem{50} Id. (citations omitted).
\bibitem{51} Id. at 30.
\bibitem{52} Id.
\bibitem{53} Id. at 31.
\bibitem{54} United States v. Perdue, 8 F.3d 1455, 1461 (10th Cir. 1993).
\bibitem{55} Ornelas v. United States, 517 U.S. 690, 693 (1996).
\end{thebibliography}
quo momentarily while obtaining more information about the facts and circumstances that created the reasonable suspicion and led to the stop. Reasonable suspicion has been defined as “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [a Fourth Amendment] intrusion.”

In other words, if a law enforcement officer has specific and articulable facts, which combined with rational inferences reasonably produce a belief that criminal activity is afoot and a particular individual is involved in that activity, the officer is permitted to briefly stop and question the person about the person’s identity and the


57. Terry, 392 U.S. at 21. The Supreme Court addressed the concept of reasonable suspicion in United States v. Sokolow, 490 U.S. 1 (1989). Quoting its own decision in Illinois v. Gates, 462 U.S. 213, 235–44 n.13 (1983), in which it addressed the concept of probable cause, the Sokolow Court held that “[i]n making a determination of probable cause, the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts. That principle applies equally well to the reasonable suspicion inquiry.” Sokolow, 490 U.S. at 10. The Court further noted that “there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity [is] afoot.” Id. at 9 (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980)). And that “innocent behavior will frequently provide the basis for a showing of [reasonable suspicion].” Id. at 10 (quoting Gates, 462 U.S. at 235–44 n.13).

In its discussion of reasonable suspicion, the Court also noted that the concept is not one that lends itself to an easy definition. To this end the Sokolow Court noted that “[t]he concept of reasonable suspicion, like probable cause, is not ‘readily, or even usefully, reduced to a neat set of legal rules.’” Id. at 7 (quoting Gates, 462 U.S. at 232). That said, the Court did provide some guidance on what level of proof is needed to meet the standard or burden of reasonable suspicion. It wrote:

In Terry v. Ohio, we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity “may be afoot,” even if the officer lacks probable cause. The officer, of course, must be able to articulate something more than an “inchoate and unperticularized suspicion or hunch.” The Fourth Amendment requires “some minimal level of objective justification” for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means “a fair probability that contraband or evidence of a crime will be found,” and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause. . . .. In evaluating the validity of a stop such as this, we must consider “the totality of the circumstances—the whole picture.” As we said in Cortez: “The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.”

Id. at 7–8 (citations omitted) (referencing and quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).
activities that have caused the officer concern. Additionally, if the officer has reason to believe that the detainee is armed and dangerous, a brief pat-down search of the person for weapons is permitted. However, both the stop and the search must be limited in scope, and any frisk or search for weapons must be such that the "intrusion [is] reasonably designed to discover [weapons] for the assault of the police officer" and not evidence of a crime.

Following an arrest and the charging of a person detained during a Terry stop, courts are often asked to review the circumstances of the stop to determine whether there was reasonable suspicion and whether the stop was otherwise lawful. The Supreme Court has imposed a two-part test for determining the lawfulness of a Terry investigative detention. The first part of the inquiry involves an examination of "whether the officer's action was justified at its inception," which turns on whether the officers had reasonable suspicion that the defendant had engaged, or was about to engage, in a crime. The second part of the inquiry involves a determination of "whether the stop went too far and matured into an arrest before there was probable cause." In making that determination, courts have been directed to consider "whether [the stop] was reasonably related in scope to the circumstances which justified the interference in the first place." If a court determines that either there was no reasonable suspicion or the stop "matured into an arrest" for which there was no probable cause, any evidence discovered during or as a result of the search is subject to suppression and is inadmissible at

58. See Cortez, 449 U.S. at 417–18 ("Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

59. See Perdue, 8 F.3d at 1462.

60. Terry, 392 U.S. at 29.

61. See Adams, 407 U.S. at 146 ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . "); see also Sibron v. New York, 392 U.S. 40, 64–66 (1980) (holding that a search that goes beyond what is necessary to discover whether a suspect possesses any weapons is not valid under Terry and any evidence discovered in such a search is subject to suppression under the exclusionary rule).

62. See United States v. Sharpe, 470 U.S. 675, 682 (1985) (noting that there is a "dual inquiry for evaluating the reasonableness of an investigative stop").


64. Id. at 1145.

65. Terry, 392 U.S. at 20; see also Sharpe, 470 U.S. at 683 (determining whether it was reasonable for two drug enforcement officers to detain the defendant and his suspicious vehicle for twenty minutes).
As law enforcement officers have put the *Terry* decision into action in their various jurisdictions, a number of related issues and questions have arisen, and the Supreme Court has therefore had to continue to define and refine the principles governing investigative detentions. For the purposes of this article, issues of what law enforcement can and cannot do during a *Terry* stop and how far officers can go in terms of coercion and force are key to understanding the circuit split and determining which position should be the prevailing view.

**a. Questioning during *Terry* detentions**

In addition to detaining an individual and conducting a brief search for weapons, a law enforcement officer conducting a *Terry* stop is also permitted to briefly question the detainee—a concept of obvious significance in the context of this article. In this regard, in *United States v. Brignoni-Ponce* the Supreme Court noted that when an officer has reasonable suspicion to believe that criminal activity is afoot, the officer is permitted to briefly detain a person suspected of being involved in that activity in order to "investigate the circumstances that provoke[d] suspicion." As noted in *Berkemer v. McCarty*, a decision that addressed both *Terry* and *Miranda*, "this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" regarding possible criminal activity. The Court reiterated law enforcement's ability to ask questions during a *Terry* stop in *Hayes v. Florida*, where it held that "if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped briefly while attempting to obtain additional information." During

68. *Id.* at 881.
70. *Id.* at 439.
71. *Id.* at 439-40.
73. *Id.* at 816; *see also* United States v. Hensley, 469 U.S. 221, 229 (1985) ("[T]he ability to briefly stop [a suspect], ask questions, or check identification in the absence
Terry detentions law enforcement officers are limited in what topics they can address in questioning and conversing with a detainee. Specifically, as noted above, officers are permitted to ask questions regarding a person's identity and may ask additional questions so long as those additional questions are "reasonably related in scope to the justification for their initiation."74 And as a general rule, "[t] he very nature of a Terry stop means that a detainee is not free to leave during the investigation, yet is not entitled to Miranda rights."75 The issue, of course, is whether there comes a point during a Terry stop that warnings are required despite the fact that the stop has not been converted to either a formal or de facto arrest supported by probable cause.

b. Time Limits for Terry Detentions

One issue that has arisen on more than one occasion in the context of a court's review of a Terry stop has to do with the length of a Terry stop, or how long officers can detain a person based solely on reasonable suspicion. While the Supreme Court has not adopted a specific time limit in terms of the number of minutes that a Terry stop can last, it has provided some guidance on the issue. For example, in Florida v. Royer,76 a plurality decision, the Court recognized that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."77 On this point, in United States v. Place78—another Terry-related decision decided the same year as Royer—the Court further held that "in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation."79 The Court provided...

74. Terry v. Ohio, 392 U.S. 1, 29 (1968); see also United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975) ("In this case . . . we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.").
75. United States v. Swanson, 341 F.3d 524, 528 (6th Cir. 2003).
77. Id. at 500.
79. Id. at 709.
similar guidance on the issue in *United States v. Sharpe*, where it held that "[i]n assessing whether a detention is too long in duration to be justified as an investigative stop," courts should "examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." In short, as the Court noted in *United States v. Hensley*, it is entirely possible that "a detention might well be so lengthy or intrusive as to exceed the permissible limits of a *Terry* stop."  

That said, *Terry* and its progeny do provide law enforcement with some flexibility with respect to length of detention in conducting *Terry* stops. For example, in *Sharpe*, the Court noted that:

> Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. But our cases impose no rigid time limitation on *Terry* stops. While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

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81. Id. at 686. The *Sharpe* Court provided additional guidance on this issue of using methods that will quickly confirm or dispel law enforcement's suspicions when it wrote:

> A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable." The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

82. 469 U.S. 221 (1985).
83. Id. at 235.
84. *Sharpe*, 470 U.S. at 685 (quoting United States v. Place, 462 U.S. 696, 709 (1983)) (citations omitted). In *Place*, the Court further explained its hesitance to
In choosing not to create a bright-line rule or set a time limit on *Terry* detentions, the *Sharpe* Court confirmed important precedent decided two years prior in *Michigan v. Summers,* in which it stated that “[i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* . . . .”

In the end, as the *Sharpe* Court noted, there is no bright-line rule with respect to time limits on a *Terry* stop. Instead, as noted above, “a court considering the reasonableness of a particular detention’s duration must ‘examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.’” Such a determination will necessarily be fact-specific and will be made on a case-by-case basis after consideration of the general principles set forth by the Supreme Court in its post-*Terry* decisions addressing the concept of investigatory detentions.

c. The Use of Force and Coercion During Investigative Detentions and the Concept of a De Facto Arrest

One of the more often-litigated issues to arise from *Terry* and its daily real-world application involves the question of how far law enforcement can go during a *Terry* stop in terms of the use of force and coercion. The Supreme Court has recognized that in certain circumstances a *Terry* stop can be converted into the equivalent of an

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create a bright line rule when it wrote:

> We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.

*Id.* at 709 n.10.


86. *Id.* at 700 n.12.

87. *See also* United States v. Acosta, 363 F.3d 1141, 1147 (11th Cir. 2004) (“There is no rigid time limitation or bright line rule regarding the permissible duration of a *Terry* stop.”).

88. United States v. Robinson, 30 F.3d 774, 784 (7th Cir. 1994) (quoting *Sharpe*, 470 U.S. at 686). In determining the reasonableness of a detention’s duration, the Supreme Court “has cautioned that a reviewing court should not ‘indulge in Unrealistic second guessing’ as to the methods law enforcement officials use to conduct their investigations.” *Id.* (quoting *Sharpe*, 470 U.S. at 686). And as the *Sharpe* Court noted, “[t]he question is not simply whether some . . . alternative [method] was available, but whether the police acted unreasonably in failing to recognize or pursue it.” *Sharpe*, 470 U.S. at 687.
arrest—referred to as a de facto arrest—even though the detaining officer has not formally arrested the suspect. This determination is significant because at the point that a Terry stop becomes an arrest or a de facto arrest, officers must have probable cause to justify that more serious form of detention rather than just reasonable suspicion that criminal activity is afoot. Determining when such a conversion has occurred, however, can oftentimes be difficult. The First Circuit Court of Appeals recently noted that “[t]he line between temporary detentions and de facto arrests is often blurred.” The Ninth Circuit Court of Appeals has said the same thing, holding that there is “no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest.” And the U.S. Supreme Court recognized the existence of this problem nearly twenty-five years ago in Sharpe when it noted that some of its prior precedent “may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest.” Not only can it be challenging to distinguish between the two in certain instances, but in some cases the line between temporary detentions and de facto arrests “can shift in the course of a single encounter so that what starts out as an investigatory stop may morph into a de facto arrest.” And while courts generally agree that in distinguishing between an investigative detention and a de facto arrest a court must look to the totality of the circumstances, there is much disagreement among both federal and

89. See Sharpe, 470 U.S. at 686 (“Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.”)

90. Morelli v. Webster, 552 F.3d 12, 19 (1st Cir. 2009).

91. Allen v. City of Los Angeles, 66 F.3d 1052, 1056 (9th Cir. 1995) (quoting United States v. Parr, 843 F.2d 1228, 1231 (9th Cir. 1988) (citation omitted)).

92. Sharpe, 470 U.S. at 685. See also Florida v. Royer, 460 U.S. 491, 506–07 (1983) (“We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigatory stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.”).

state courts about what test to apply in making the ultimate determination.

In terms of the circuit split referenced above, the question of how much force and coercion can be used without converting a Terry detention into a de facto arrest for which an officer needs probable cause, or if questioning is involved, without converting the stop into custodial interrogation for which Miranda warnings are required, is at the heart of the issue. The answer to the question of how far law enforcement can go depends on the court addressing the issue and the circumstances of the stop. For example, just over twenty years ago the Court of Appeals for the District of Columbia Circuit noted that, "[t]he amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent flight or drawing guns where law officers reasonably believe they are necessary for their protection."94 Other

94. United States v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989) (citing United States v. Merritt, 695 F.2d 1263, 1272–74 (10th Cir. 1982)); see also United States v. Thompson, No. 05-50801, 2007 WL 2044725, at *1 (9th Cir. July 16, 2007) ("However, the use of guns and handcuffs does not automatically convert a Terry stop into an arrest."); United States v. Merritt, 695 F.2d 1263, 1272–74 (10th Cir. 1982); United States v. Thompson, No. 05-50801, 2007 WL 2044725, at *1 (9th Cir. July 16, 2007) ("However, the use of guns and handcuffs does not automatically convert a Terry stop into an arrest."); United States v. Maguire, 359 F.3d 71, 78 (1st Cir. 2004) ("It is well established that the use or display of a weapon does not alone turn an investigatory stop into a de facto arrest."); United States v. Merkley, 988 F.2d 71, 78 (1st Cir. 2004) ("We are... unpersuaded that the use of handcuffs and leg irons converted an otherwise permissible detention into a detention in violation of the Fourth Amendment."); United States v. Alexander, 907 F.2d 269, 273 (2nd Cir. 1990) ("Under these circumstances, we do not find it unreasonable that the officers decided it was appropriate to protect themselves by unholstering their guns and frisking Alexander. Indeed, this Court has repeatedly acknowledged the dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose."); United States v. Alvarez, 899 F.2d 833, 838 (9th Cir. 1990) ("In this circuit it has been held that '[t]he use of force does not convert the [investigatory] stop into an arrest if it occurs under circumstances justifying fears of personal safety.'") (citations omitted); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989) ("Brief, even if complete, deprivations of a suspect's liberty do not convert a stop and frisk into an arrest so long as the methods of restraint used are reasonable to the circumstances."); United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988) ("Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that an investigative stop is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal, so there is a complex tradeoff involved in any
courts have allowed such things as removing detained persons from a car for the purpose of conducting a pat-down search of each person, blocking a suspect's exit from a vehicle or exit from an area in a vehicle, allowing a quick search of an occupied vehicle for weapons, placing a suspect in a police car, and moving a suspect from the location of the initial stop to a different location, holding that the stop in each case remained a lawful Terry stop and did not convert into an arrest or de facto arrest despite the officer's coercive actions or use of force. Courts have also held that the mere fact that there was physical contact between law enforcement and a detainee is not

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96. See, e.g., United States v. Jackson, 918 F.2d 236, 238 (1st Cir. 1990) ("The police may conduct an investigatory stop by blocking the egress of a vehicle in which a criminal suspect is riding and may approach the vehicle with weapons at the ready on a reasonable suspicion that its occupants are armed.") (citing United States v. Greene, 783 F.2d 1364 (9th Cir. 1986); United States v. Streifel, 781 F.2d 953, 961 n.15 (1st Cir. 1986); United States v. Jones, 759 F.2d 633, 637 (8th Cir. 1985); United States v. Jackson, 652 F.2d 244, 249–50 (2nd Cir. 1981); United States v. Vargas, 633 F.2d 891, 896 (1st Cir. 1980)).

97. See, e.g., Michigan v. Long, 463 U.S. 1032, 1049 (1983) ("Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.") (citations omitted).

98. See, e.g., United States v. Bradshaw, 102 F.3d 204, 212 (6th Cir. 1996) (holding that the officer "could lawfully detain [defendant in the back of the squad car] until he had finished performing radio checks and issuing the citation," because it was "well within the bounds of the initial stop."); United States v. Parr, 843 F.2d 1228, 1230 (9th Cir. 1988) ("Certainly, there is no per se rule that detention in a patrol car constitutes an arrest."); United States v. Manbeck, 744 F.2d 360, 377 (4th Cir. 1984) ("This court refuses to recognize a rule that all detentions in a patrol car are per se arrests.").

99. See United States v. Ricardo D., 912 F.2d 337, 340 (9th Cir. 1990) (holding that officers "may move a suspect from the location of the initial stop without converting the stop to an arrest when it is necessary for safety or security reasons"); see also Eberle v. City of Anaheim, 901 F.2d 814, 819 (9th Cir. 1990).
enough to convert a *Terry* stop into an arrest.100 In addressing these issues a number of courts have held that “[a] law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself and an obligation to ensure the safety of innocent bystanders, regardless of whether probable cause to arrest exists.”101 Others have noted that “[a]s a society, we routinely expect police officers to risk their lives in apprehending dangerous people . . . [and therefore we] should not bicker if in bringing potentially dangerous situations under control they issue commands and take precautions which reasonable men are warranted in taking.”102 Thus law enforcement has been granted some leeway by the courts to use reasonably necessary force in *Terry*-type investigative detentions. This has been particularly true as the nature of law enforcement and the level of violence that they may have to deal with has increased over the years, as noted by the Court of Appeals for the D.C. Circuit in *United States v. Clark*:

There has been a perceptible evolution in this area of the law. Courts today will find a permissible use of force by the police under circumstances that might have raised judicial eyebrows at the time the *Terry* decision was issued. While it was once considered necessary, in order to justify a *Terry* frisk, for a law enforcement officer to be “justified in believing that the individual whose suspicious behavior he is investigating . . . is armed and presently dangerous to the officer,”

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100. See *United States v. Maguire*, 359 F.3d 71, 78 (1st Cir. 2004) (“Working from the premise that arrests and investigatory touching necessarily carry with it some degree of coercion, we held that slight physical touching cannot, on its own, produce a de facto arrest. In the instant case, there was more than de minimis physical contact. However, merely because physical contact exceeds de minimis contact, it does not necessarily follow that the scope of the *Terry* stop was exceeded. Physical touching attendant to a *Terry* stop, particularly when officers are attempting to ensure their own personal safety in a reasonable manner, must be examined in the factual context of the case.”) (citation omitted).

101. *United States v. Carter*, 360 F.3d 1235, 1240 (10th Cir. 2004) (quoting *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993)); see also *United States v. Hamlin*, 319 F.3d 666, 671 (4th Cir. 2003) (“Moreover, the use of handcuffs did not convert the encounter into a custodial arrest because the use was reasonably necessary to protect the officer’s safety. During *Terry* stops, officers may take ‘steps reasonably necessary to maintain the status quo and to protect their safety.’”) (citations omitted); *United States v. Edwards*, 53 F.3d 616, 619 (3rd Cir. 1995); *United States v. Hensley*, 469 U.S. 221, 235 (1985) (noting that law enforcement officers are “authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a *Terry*] stop”).


103. 24 F.3d 299 (D.C. Cir. 1993).
it now suffices, in appropriate circumstances, for the officer to be justified in believing that the individual might be armed and dangerous. This development is a product of the times. Twenty-five years ago, when the Supreme Court issued its opinion in *Terry*, it might have been unreasonable to assume that a suspected drug dealer in a car would be armed; today, it could well be foolhardy for an officer to assume otherwise.104

Finally, some courts have also held that the mere fact that a detained person does not feel as if he or she is free to leave is not enough to convert a *Terry* stop to an arrest.105

On the other hand, other courts take a more limited view of what law enforcement can and cannot do in the context of a *Terry* stop if the stop is to remain purely an investigative detention and not convert into either a de facto or formal arrest.106 In other words, there is no unified answer to the question of when a *Terry* detention becomes an arrest.

B. The Fifth Amendment, *Miranda v. Arizona*, and the Concept of Miranda Warnings

The other constitutional amendment and landmark Supreme Court decision at the heart of the circuit split that is the subject of this article are the Fifth Amendment and the Supreme Court’s 1966 decision in *Miranda v. Arizona*.107 In order to understand the issues at the center of the debate one must first have a basic understanding of the Fifth Amendment prohibition against compelled self-incrimination and the general principles set forth in *Miranda* and its progeny.

1. The Fifth Amendment and *Miranda v. Arizona*

The Fifth Amendment provides, in part, that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.”108 Put another way, the Amendment protects against compelled self-incrimination, and as the Supreme Court has noted,

104. *Id.* at 304 (citations omitted).
105. *See* United States v. Sinclair, 983 F.2d 598, 603 (4th Cir. 1993) (“[T]he perception that one is not free to leave is insufficient to convert a *Terry* stop into an arrest.”).
106. *See*, e.g., United States v. Guzman-Padilla, 573 F.3d 865, 883–84 (9th Cir. 2009) (reiterating that *Terry* stops must be “brief” and “minimally intrusive”).
108. U.S. CONST. amend. V.
the Fifth Amendment not only permits a person to refuse to testify against himself in a criminal trial, "but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" One of the more prominent, and at times controversial, decisions on the Fifth Amendment prohibition against compelled self-incrimination is the Supreme Court's decision in *Miranda*—a decision "designed to give meaningful protection to Fifth Amendment rights" that is now considered a cornerstone of Fifth Amendment jurisprudence.

The *Miranda* decision stemmed from a group of four cases that went before the Supreme Court seeking a ruling on "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege [against compelled self-incrimination] under the Fifth Amendment." One of the four cases involved the prosecution of Ernesto Miranda for kidnapping and rape. In that case, Miranda was identified by the victim of his crime and was thereafter interrogated; during the interrogation Miranda admitted to the commission of the crimes and that confession was used against him at trial. However, Miranda was never informed that he had a right to remain silent and to have an attorney present during questioning. The Supreme Court reversed Miranda's conviction as a result of that omission, holding that his confession should not have been admitted at trial because law enforcement's failure to provide him with the aforementioned warning caused his confession to be obtained in violation of the Fifth Amendment. In

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112. See *id.* at 492.
113. See *id.* at 491–92.
114. See *id.* at 492.
115. See *id.* Prior to the *Miranda* decision, the general test for determining whether a confession was admissible was whether the admission or confession was voluntary. As noted in *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (quoting Haynes v. Washington, 373 U.S. 227 (1963) and citing Chambers v. Florida, 309 U.S. 227 (1940)).

Prior to Miranda, the admissibility of an accused's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause. If a suspect's statements had been obtained by "techniques and methods offensive to due process," or under circumstances in which the suspect clearly had no opportunity to exercise "a free and uncon-
holding as it did—that the now famous *Miranda* warnings must be given and the right against self-incrimination waived before custodial interrogation can take place—the Supreme Court declared that "our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings." In other words, the Court asserted that in holding as it did it was simply recognizing and upholding the Fifth Amendment prohibition against compelled self-incrimination and the right to the assistance of counsel in a criminal case that "were fixed in our Constitution only after centuries of persecution and struggle." In the *Miranda* opinion, the Court wrote that providing a suspect with a set of admonishments or warnings is necessary "to dispel the compulsion inherent in custodial surroundings." In so holding, the Court relied on and referenced the fact that, "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." In other words, subject to a few exceptions, confessions obtained during custodial interrogations that are not preceded by the proper warnings are inadmissible at trial.

The Supreme Court, addressing its decision in *Miranda*, has held that "[o]ne of the principal advantages of the [*Miranda*] doctrine that suspects must be given warnings before being interrogated while in

strained will," the statements would not be admitted. The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment.

The *Miranda* decision did not completely do away with the voluntariness test, however, because an involuntary confession obtained by "techniques and methods offensive to due process," though preceded by *Miranda* warnings, are still subject to suppression under the Fourteenth Amendment's guarantee of due process. See *Miller* v. *Fenton*, 474 U.S. 104, 110 (1985) ("[E]ven after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations...the Court has continued to measure confessions against the requirements of due process."); *Beecher v. Alabama*, 389 U.S. 35, 38 (1967) ("A realistic appraisal of the circumstances of this case compels the conclusion that this petitioner's confessions were the product of gross coercion. Under the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand."); see also *Mincey v. Arizona*, 437 U.S. 385, 386 (1978) ("[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law.").

117. *Id.*
118. *Id.* at 458.
119. *Id.* at 467.
custody is the clarity of that rule." In this regard, the Court has noted:

*Miranda*’s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.  

While it is reasonably clear as to what warnings must be given during custodial interrogation, the fact that the Supreme Court has revisited some aspect of the *Miranda* decision over fifty times since the case was originally decided (as well as the fact that *Miranda* has been the subject of thousands of lower court arguments and decisions) calls into question whether the rule provides as much “clarity” as the Court suggests.

2. **General Principles of *Miranda* and its Progeny**

The basic holding of *Miranda* is that in a criminal case “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” With respect to these “procedural safeguards,” the Court noted that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” The *Miranda* decision also established guidelines for law enforcement to follow in adhering to the Court’s decision. It wrote:

The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly[,] and intelligently. If, however, he indicates in any manner and at any

123. *Id.*
stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.\footnote{124. \textit{Id.} at 444–45. These principles regarding police conduct and the providing of \textit{Miranda} warnings to persons subjected to custodial interrogation have been further refined over the more than forty years since the Court’s decision in \textit{Miranda}. For example, a number of subsequent cases clarified the rules regarding invocation of one’s rights pursuant to \textit{Miranda}. One such case was \textit{Davis v. United States}, 512 U.S. 452, 459 (1994), where the Supreme Court held that any invocation of one’s \textit{Miranda} rights must be affirmative and unambiguous such that “if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.” Another invocation case was \textit{McNeil v. Wisconsin}, 501 U.S. 171, 182 n.3 (1991), where the Court rejected the concept of an anticipatory invocation of the right to counsel, holding that no invocation is valid until the person is actually provided with \textit{Miranda} warnings or subjected to actual custodial interrogation.

Another aspect of \textit{Miranda} that has been clarified over the years is that of the re-initiation of questioning. On that issue, the Court has held that once a person subjected to custodial interrogation invokes the right to counsel, law enforcement cannot thereafter reinitiate questioning on the issue for which the right was invoked and further cannot question the subject on any other matters until an attorney is provided or the person is released from custody. \textit{See Minnick v. Mississippi}, 498 U.S. 146, 153 (1990) (“Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”); \textit{Rhode Island v. Innis}, 446 U.S. 291, 297–98 (1980) (same). However, if the subject invoked only his right to remain silent, and in doing so did not unambiguously invoke his right to have an attorney present, law enforcement can reinitiate questioning on other matters so long as warnings are provided again. \textit{See Michigan v. Moseley}, 423 U.S. 96, 104–05 (1975). And, of course, the person subjected to custodial interrogation can always reinitiate questioning, after which law enforcement is free to continue the prior interrogation without providing the suspect with an attorney. \textit{See Oregon v. Bradshaw}, 462 U.S. 1039, 1045–46 (1983).

125. \textit{See Pennsylvania v. Muniz}, 496 U.S. 582, 589 (1990) (“Unless a suspect ‘voluntarily, knowingly[,] and intelligently’ waives these rights, any incriminating responses to [custodial] questioning may not be introduced into evidence in the prosecution’s case in chief in a subsequent criminal proceeding.”) (citations omitted).}
generally extend to physical evidence discovered as a result of the unwarned statements unless those unwarned statements are deemed to be involuntary as a result of coercion and compulsion that rises to the level of a due process violation.\textsuperscript{1}

\textsuperscript{1}omitted); Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer \textit{Miranda} warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under \textit{Miranda}. Thus, in the individual case, \textit{Miranda}'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.").

\textsuperscript{126.} See \textit{United States v. Patane}, 542 U.S. 630 (2004) (holding that physical evidence discovered as a result of an unwarned but voluntary statement is admissible at trial and should not be suppressed despite the existence of a \textit{Miranda} violation). In a plurality opinion written by Justice Thomas and joined by Chief Justice Rehnquist and Justice Scalia (Justices Kennedy and O'Connor joined in the result and filed a nearly identical concurring opinion), the issue before the Court, as well as the Court's answer to that issue, were presented as follows:

\textit{Id.} at 633–34. In addressing the reasoning behind its holding the Court wrote: [Police do not violate a suspect's constitutional rights (or the \textit{Miranda} rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by \textit{Miranda}. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived \textit{Miranda} violation. Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of \textit{Wong Sun}.\textsuperscript{1}

\textsuperscript{1}Id. at 641–42 (quoting Chavez v. Martinez, 538 U.S. 760, 790 (1994)). In the entirety of the opinion, the \textit{Patane} Court only notes one situation in which the physical fruits of an unwarned statement might be subject to suppression. Specifically, physical fruits of an unwarned confession will only be excluded when there is coercion that rises to the level of a due process violation. \textit{Id.} at 644. It is critical to note, however, that merely being in custody is not enough to rise to that level of unlawful coercion. On this point the Court wrote:

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And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient \textit{Miranda} warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination.

\textit{Id.} In other words, the fact that Patane had been arrested was not enough to make his statement involuntary for the purposes of the issue at hand.
a. Defining “Custodial Interrogation”

As noted above, the Court has held that *Miranda* warnings must be given prior to “custodial interrogation.” In the *Miranda* decision itself the Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” In other words, custody for *Miranda* purposes includes more than a formal arrest. And while it is clear that a person who has been formally arrested is in custody for *Miranda* purposes, the concept and meaning of being “otherwise deprived of [one’s] freedom of action in any significant way” is more difficult to decipher. On this issue the Supreme Court has noted that “[u]nfortunately, the task of defining ‘custody’ is a slippery one.”

Defining “custodial interrogation” has been problematic, in part, because the *Miranda* Court “did not articulate the indicia of custody, or otherwise help courts and police to determine the steps leading up to custody.” For the purposes of this article the concept and meaning of custodial interrogation are significant because a *Terry* detention, while not an arrest, necessarily involves to at least a small degree a deprivation of a detainee’s freedom of action and therefore raises questions about the applicability of *Miranda*, particularly when force or coercion is used during the stop.

The Supreme Court has addressed the phrase “deprived of his freedom of action in any significant way” in a handful of important cases since *Miranda* was decided in 1966. That said, not much guidance is provided as to the meaning of that phrase in the *Terry* context, and there is no authority from the Court indicating that a *Terry* detention is one in which a person is “deprived of his freedom of action in any significant way” such that *Miranda* warnings are required in all *Terry* stops. One of the first cases to address the meaning of “custodial interrogation” following the *Miranda* decision is *United States v. Beckwith.* In *Beckwith* the Court held that the mere fact that

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129. Id. at 309.
131. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) (“It must be acknowledged at the outset that a traffic stop significantly curtails the ‘freedom of action’ of the driver. It is a crime . . . to ignore a policeman’s signal to stop one’s car. . . .”).
a person is the focus of a criminal investigation, without more evidence, does not mean that a person is subject to custodial interrogation when questioned by police and therefore does not in and of itself implicate Miranda. Beckwith also held that the fact that an interview focuses on a subject's criminal culpability and the fact that there are some adversarial elements to a particular interview similarly does not automatically mean that a person was subjected to custodial interrogation. These holdings were reaffirmed in subsequent cases.

Following Beckwith the Court decided a series of additional cases through which the test for custodial interrogation changed and developed into the law as it exists today. One important post-Beckwith decision that played a role in this development of standards is Oregon v. Mathiason. In Mathiason the Court rejected a lower court holding that applied Miranda to a non-custodial interview because the interview took place in a “coercive environment.” Specifically, the Oregon Supreme Court based its finding that the interview took place in a coercive environment on the facts that the interview in question occurred in the Oregon State Police offices, the defendant was alone with law enforcement behind closed doors, the interrogating officer informed the defendant that he was a suspect in a crime and that the officers had evidence that incriminated him, and that the defendant was a parolee. In response, the U.S. Supreme Court noted that the defendant, while with officers for over two hours, was never arrested and was allowed to leave at the conclusion of the interview. In rejecting the application of Miranda to a coercive but non-custodial interview, the Court held:

[A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” Any interview of one suspected of a

133. See id. at 347–48 (“An interview with Government agents in a situation such as the one shown by this record simply does not present the elements which the Miranda Court found so inherently coercive as to require its holding. Although the ‘focus’ of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the [inherently coercive] custodial situation described by the Miranda Court as the basis for its holding.”).
134. See id. at 347. (“[T]he Court thus squarely grounded its holding on the custodial aspects of the situation, not the subject matter of the interview.”).
136. Id.
137. Id. at 494.
138. See id. at 494–95.
crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda*, by its terms, was made applicable, and to which it is limited. 399

Thus, the Court made clear that the mere fact that there is some coercion during an interview does not convert the situation into one in which a person is considered to be in custody for *Miranda* purposes.

Another important case is *California v. Beheler*, 140 which was decided six years after *Mathiason*. In *Beheler*, the Court addressed a factual situation somewhat similar to *Mathiason* in that the interview at issue occurred at the police station, was designed to produce incriminating responses, and took place very shortly after the commission of the crime that was being investigated and at a time when the defendant was considered a suspect in that crime. 141 In suppressing the statements at issue, the lower court had relied upon a "totality of the circumstances" test. 142 In *Beheler*, the Supreme Court rejected that test as applied by the lower court, noting that

> although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. 143

In so holding, the Court for the first time introduced the concept of *Miranda* applying not to a general deprivation of freedom of action "in any significant way," but to a deprivation of action that rises to such a level of restraint that it is determined to be of "the degree

139. Id. at 495.
141. See id. at 1123.
142. Id. at 1125.
143. Id. (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).
associated with formal arrest."\textsuperscript{144}

In other words, in holding as it did, the Court provided some guidance on the issue of when \textit{Miranda} applies in non-traditional custodial situations, requiring that suppression of a confession occur only when the restriction on movement is to a degree similar to that of a formal arrest. That said, the Court then noted that it is not controlling and not particularly relevant for \textit{Miranda} purposes that an interview took place in a police station, the person being interviewed is a suspect, the police have information about the person being interviewed, and very little time elapsed between the commission of the crime and the police interview.\textsuperscript{145} Unfortunately, however, the Court did not define the phrase "of the degree associated with a formal arrest," thus leaving the issue open to interpretation by the lower courts.

The Court further defined "custodial interrogation" in its 1984 decision in \textit{Minnesota v. Murphy},\textsuperscript{146} where it once again rejected a lower court decision requiring \textit{Miranda} warnings in a non-custodial setting. Specifically, in \textit{Murphy} the Court rejected the application of \textit{Miranda} to a probationer's non-custodial interview with a probation officer and did so despite the facts that the meeting was compelled, the probationer was under a court-ordered obligation to respond to the probation officer's questions, the probation officer suspected that the meeting would result in the probationer making incriminating statements and "consciously sought incriminating evidence,"\textsuperscript{147} and the probation officer had decided pre-interview to report any such incriminating answers to law enforcement.\textsuperscript{148} In rejecting the need for \textit{Miranda} in such circumstances, the Court provided additional guidance as to when an interrogation is considered to be noncustodial and therefore does not require \textit{Miranda} warnings. On this issue, the Court noted that a "[c]ustodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess," and that "custodial arrest thrusts an individual into 'an unfamiliar atmosphere' or 'an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.'"\textsuperscript{149} "It is unlikely," the Court said, "that a probation interview, arranged by appointment at a mutually conve-

\textsuperscript{144} Id.
\textsuperscript{145} See id.
\textsuperscript{147} Id. at 430.
\textsuperscript{148} See id. at 425.
\textsuperscript{149} Id. at 433 (citations omitted).
nient time, would give rise to a similar impression. In holding as it did, the Court also compared the situation in *Murphy* to that at issue in *Miranda*, noting that:

Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. *Murphy*'s regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. Since *Murphy* was not physically restrained, and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator.

From these portions of the opinion it is apparent that the Court contemplated that custodial interrogation necessarily involved such things as psychological ploys designed to take away a person's will and the conveyance of an impression by law enforcement action that a person has no choice but to confess.

Another case of significance in the continued development of the concept of custodial interrogation is *Berkemer v. McCarty*. In *Berkemer* the Court addressed for the first and only time the question of when *Miranda* warnings are necessary in a *Terry*-type situation. Specifically, *Berkemer* dealt with a situation in which an individual was stopped for weaving in and out of his lane and thereafter investigated for driving under the influence. During the course of the investigation at the scene of the traffic stop, McCarty, in response to a question about the ingestion of any intoxicants, admitted that prior to driving he had consumed alcohol and smoked marijuana. This admission was made after he had taken a field sobriety test but prior to his being arrested. Furthermore, no *Miranda* warnings were given prior to the questioning.

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150. Id. 151. Id. 152. 468 U.S. 420 (1984). 153. See id. at 423. 154. Id. 155. Id. 156. See id.
turned to the admissibility of the admissions, concluding in the end that McCarty was not subjected to custodial interrogation when the statements were made and therefore that they were admissible as evidence. In reaching its ultimate conclusion that the situation was non-custodial for *Miranda* purposes despite the driver's being stopped and thereafter detained by law enforcement, removed from his vehicle, and subjected to a field sobriety test and some related questioning, the Court first addressed “the scope of [its] decision in *Miranda*” in the sense of “whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered ‘custodial interrogation.’” Noting that “a traffic stop significantly curtails the ‘freedom of action’ of the driver . . . of the detained vehicle,” and that “few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so,” the Court nevertheless held that McCarty was not in custody for *Miranda* purposes because at no time between the initial stop and the formal arrest “was [he] subjected to restraints comparable to those associated with a formal arrest.” In so holding the Court in a sense rejected, or at least qualified, the original test for custody in *Miranda*, making it clear that the issue is not one of deciding whether the person's freedom of action was curtailed in “any significant way,” but whether the person was restrained to a degree comparable to a formal arrest—an arguably narrower standard.

The *Berkemer* decision provides a number of reasons for the Court’s conclusions. First, the Court noted that “[f]idelity to the doctrine announced in *Miranda* requires that it be enforced . . . only in those types of situations in which the concerns that powered the decision,” are implicated—namely “whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.” In the case of McCarty's traffic stop and the administration of a field sobriety test, the Court determined that *Miranda* was not applicable. This decision was based on the Court’s belief that traffic stops are generally temporary and brief, that the type of questioning used during a traffic stop is different from a

157. See id. at 442.
158. Id. at 435.
159. Id. at 436.
160. Id.
161. Id. at 441.
162. Id. at 437.
stationhouse interrogation "in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek," that the "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police," and that traffic stops are generally public at least to some degree. Given these things, the Court concluded that in an "ordinary traffic stop" there is much less of a "danger that a person questioned will be induced 'to speak where he would not otherwise do so freely'": simply because "the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself and in the subsequent cases in which we have applied *Miranda*.

The *Berkemer* Court next addressed the interaction between *Terry* and *Miranda*, and while the Court did not state that *Miranda* warnings are never required in *Terry* situations, it did provide some guidance on the issue. First, the Court noted that "the usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." The Court then recognized that it had not previously applied *Miranda* in the *Terry* context, noting that:

The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

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163. *See id.* The Court acknowledged that there would be some element of coercion or compulsion in most traffic stops. However, the Court also noted that: To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces.

164. *Id.* at 438 (quoting *Miranda* v. Arizona, 384 U.S. 436, 467 (1966)).

165. *Id.* at 438–39 (citations omitted).

166. *Id.* at 439.

167. *Id.* at 440. The Court further described its view of the non-threatening nature of "usual traffic stops" and the resulting lack of a need for *Miranda* warnings in a footnote when it wrote:

The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver, through subterfuge, will be made to incriminate himself. One of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery—such as "Mutt and Jeff" routines—to elicit confessions from suspects. A police
But while the Court indicated that it had not previously applied *Miranda* in the *Terry* context, it nevertheless explained that this did not mean that *Miranda* could never be implicated during a traffic stop. In this regard the Court opined that “the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest.” Thus, the Court held, “[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him ‘in custody’ for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.”

The Court additionally noted that it was disinclined to accept either a rule “that *Miranda* applies to all traffic stops” or one that requires “that a suspect need not be advised of his rights until he is formally placed under arrest.” Thus the Court seemingly concluded that first, a simple seizure of a person during a traffic stop generally will not be considered custodial interrogation; second, removing someone from his or her vehicle and subjecting the person to field sobriety tests and some questioning regarding driving under the influence in the manner done in *Berkemer* similarly will not render someone in custody for *Miranda* purposes; and third, it is possible that under certain circumstances a traffic stop can be converted into a situation in which a person is in *Miranda* custody, though the Court does not specify what those circumstances are other than those in which a person is subject to restraint to a degree associated with

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officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort.

*Id.* at 438 n.27.

168. *Id.* at 440 (citations omitted).

169. *Id.*

170. *Id.* at 441.

171. *Id.*

172. In holding that the facts of *Berkemer* did not rise to the level of custodial interrogation, the Court further described these facts as follows:

Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. . . . Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to “custodial interrogation” at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

*Id.* at 441–42.
formal arrest. 173

Finally, the Berkemer court noted a few additional concepts of importance for determining whether a person is in Miranda custody. First, the Court noted in a footnote that "[t]he threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." 174 In other words, consistent with prior opinions, the Court noted that the mere fact that a person is considered a suspect in a crime and that law enforcement has evidence of that person's involvement does not in and of itself create a custodial situation for Miranda purposes. 175 Second, the Court further held that "[a]
policeman’s unarticulated plan [to arrest a person] has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.’ Thus, the concept of whether a person is in custody for Miranda purposes is not dependent on the subjective intent of the investigating law enforcement officer unless and until that intent is communicated to the person being interrogated, but is instead based on the objective circumstances of the interrogation and how a reasonable person in the suspect’s position “would have understood [the] situation.” This objective test was later affirmed in the Court’s decision in Yarborough v. Alvarado and in other subsequent decisions, and has become perhaps the most often-cited test for determining whether a person who has not been formally arrested is nevertheless in custody for Miranda purposes.

Eleven years after deciding Berkemer, the Supreme Court once

176. Berkemer, 468 U.S. at 442.
177. See Stansbury, 511 U.S. at 325 (“In sum, an officer’s views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer’s views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.”).
178. Id. at 324. “Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” Id. at 323.
179. 541 U.S. 652 (2004). In Yarborough, the Court addressed the issue of whether an interviewee’s age should be taken into account when determining whether there was custodial interrogation. In that case, a seventeen-year-old met with law enforcement in a small room at a police station while his parents waited outside in a waiting room. Id. at 656. He was interviewed for approximately two hours and was then permitted to leave. Id. at 656–58. In federal habeas proceedings, the Ninth Circuit Court of Appeals “held that the state court erred in failing to account for Alvarado’s youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave.” Id. at 659–60. The Supreme Court reversed the Ninth Circuit’s decision, noting that “[o]ur opinions applying the Miranda custody test have not mentioned the suspect’s age, much less mandated its consideration. The only indications in the Court’s opinions relevant to a suspect’s experience with law enforcement have rejected reliance on such [subjective] factors.” Id. at 666–67. The Court also addressed once again the reason for the objective test rather than a subjective test, noting that “[t]he objective test furthers ‘the clarity of [Miranda’s] rule,’ ensuring that the police do not need ‘to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.’” Yarborough, 541 U.S. at 667 (quoting Berkemer, 468 U.S. at 430–31).
180. See Stansbury, 511 U.S. at 323.
again addressed the issue of *Miranda* custody in the case of *Thompson v. Keohane*, a habeas review of a consensual encounter at a police station, and in that decision once again modified the test for *Miranda* custody. Specifically, the Court applied the following test to determine whether a person is in custody for *Miranda* purposes:

Two discrete inquiries are essential to the determination [of whether a person is in custody for *Miranda* purposes]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.182

According to the *Thompson* opinion, this two-part test is used to determine whether there was a "restraint on freedom of movement of the degree associated with formal arrest"—the test set forth in *Beheler*. Additionally, the *Berkemer* test—which asks "how a reasonable man in the suspect's position would have understood his situation"—is a component of determining the answer to the second part of the question that asks whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.182

In holding as it did, the Court recognized a slightly altered element of the *Miranda* custody analysis. The year prior, in *Stansbury v. California*,185 the Court had noted that the *Berkemer* question of how a reasonable person would understand his or her situation entailed a determination of "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action."186 In *Thompson*, the Court seemingly amended the language of the test once again, making the question (or at least part of the question) not how a person "would gauge the breadth of his or her freedom of action," but whether that person would have felt that he or she had the ability to stop the questioning and leave the area of interrogation—an inquiry that had not been addressed in any *Miranda* decision prior to *Thompson*.

The precedential effect of *Thompson* has been the subject of some dispute. A number of jurisdictions and court decisions have unques-

182. *Id.* at 112. The *Thompson* Court further asked the question: "[I]f encountered by a 'reasonable person' would the identified circumstances add up to custody as defined in *Miranda*?" *Id.* at 113.
183. *Id.* at 112 (quoting California v. *Beheler*, 463 U.S. 1121, 1125 (1983)).
184. *Id.*
186. *Id.* at 925.
tioningly accepted the *Thompson* test as the proper test for determining whether a person is in custody for *Miranda* purposes. Other decisions, however, have questioned the applicability of *Thompson* in *Terry* situations. For example, in *United States v. Salvo,* the Sixth Circuit Court of Appeals made the following reference to *Thompson:*

A further indication that there may be a “free to leave” aspect to Fifth Amendment custody determinations can be found in the Supreme Court’s recent decision in *Thompson v. Keohane,* a jurisdictional habeas corpus case, in which the Court stated that the custody determination hinges upon whether, “given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” This language, although not a central holding of the case, indicates that the “free to leave” inquiry is at least a component of a Fifth Amendment custody determination (presumably with the exception of a *Terry* stop situation).

The bottom line is that a review of Supreme Court precedent leads one down a long and winding road that demonstrates that the formation of a bright-line rule that easily fits the facts of every case in which there is a question of custodial interrogation has become impossible. As noted below, different courts apply the above-referenced precedent in different ways, and as such there is a nearly endless list of fact-specific cases going in different directions on the issue.

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187. *See infra* Part IV.
188. 133 F.3d 943 (6th Cir. 1998).
189. *Id.* at 949–50.
190. The lack of a bright-line rule or an easily applied test is evident from the fact that one recent compilation from the American Law Reports, addressing strictly law enforcement and suspect interaction at either a suspect’s home or the home of a third party, lists literally hundreds of cases that have applied a number of different tests for determining custody and reached a number of different conclusions in the scenarios presented. *See George L. Blum, What Constitutes “Custodial Interrogation” by Police Officer Within Rule of Miranda v Arizona Requiring That Suspect be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation—At Suspect’s or Third Party’s Residence,* 28 A.L.R. 6th 505 (2007). Another similar compilation of cases on the issue of what constitutes custodial interrogation, also compiled as a part of the American Law Reports series, is over five hundred pages in length and similarly shows that lower courts are all over the board with respect to what tests are applied to determine *Miranda* custody, what facts or factors are considered and what degree of weight each factor carries, and what level of tolerance courts in *Terry* situations show for the use of force or coercion in the many scenarios presented by the cases. *See J.F. Ghent, What Constitutes “Custodial Interrogation” Within Rule of Miranda v Arizona Requiring That Suspect be Informed of His Federal Constitutional Rights Before Custodial Interrogation,* 31 A.L.R. 3d 565 (2009).
b. Exceptions to the Miranda Rule

There are some important exceptions to Miranda's general rule of exclusion. First, a defendant's statements elicited in violation of Miranda, while not available for use as substantive evidence, can be used for impeachment purposes in the event that the defendant chooses to testify at trial. The Supreme Court addressed this issue in Harris v. New York,\(^{191}\) where it held that while "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," the right to testify on one's own behalf "cannot be construed to include the right to commit perjury."\(^{192}\) Thus, the Court held,

Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . . The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.\(^{193}\)

There is also a public safety exception to the Miranda exclusionary rule. This exception was set out in New York v. Quarles,\(^{194}\) which involved a situation in which an officer asked a suspect about the location of a firearm after taking him into custody but before giving Miranda warnings. Specifically, the man taken into custody had allegedly raped a woman who reported that he was armed with a gun.\(^{195}\) After the rape, the suspect entered a supermarket where he was chased and stopped by law enforcement.\(^{196}\) Upon searching him, the officer found an empty holster and, without giving him Miranda warnings, asked the location of the gun.\(^{197}\) In recognizing a public safety exception, the Court held that "[w]hatever the motivation of individual officers . . . we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."\(^{198}\) In setting forth the justification

\(^{191}\) 401 U.S. 222 (1971).
\(^{192}\) Id. at 225 (citing United States v. Knox, 396 U.S. 77 (1969)).
\(^{193}\) Id. at 225–26; see also Oregon v. Hass, 420 U.S. 714 (1975).
\(^{195}\) Id. at 651–52.
\(^{196}\) Id. at 652.
\(^{197}\) Id.
\(^{198}\) Id. at 656.
for the public safety exception, the Court noted the dangers of strictly applying *Miranda* in situations such as that presented in *Quarles*. The Court wrote:

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. . . . Here, had *Miranda* warnings deterred Quarles from responding to [the] question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. [The officer] needed an answer to his question not simply to make his case against Quarles, but to insure that further danger to the public did not result from the concealment of the gun in a public area. 199

In concluding the majority opinion, the Court noted that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination," 200 and further stated that:

We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them. 201

Since *Quarles* was decided in 1984, a number of lower courts have invoked the public safety exception in various situations. 202

199. *Id.* at 657.
200. *Id.*
201. *Id.* at 657–58.
III. THE FEDERAL CIRCUIT COURT SPLIT AND THE EIGHTH CIRCUIT’S POSITION

As noted above, in United States v. Artiles-Martin the U.S. District Court for the Middle District of Florida identified the existence of a circuit split “over whether coercive Terry stops constitute Miranda custody.” In explaining the make-up of the split, the court noted that the First, Fourth, and Eighth circuits “hold that so-called Terry reasonableness means Miranda warnings are not required, even if the stop was coercive.” On the other side of the split are the Second, Seventh, Ninth, and Tenth circuits, which, according to the Artiles-Martin court, “hold that a coercive Terry stop requires warnings but still is deemed a valid Terry stop.” Finally, as referenced above, the court also acknowledged that its own Eleventh Circuit “has not expressly adopted either view.” Thus there exists a legitimate split in the circuits—a split that the Supreme Court has yet to address directly. Additionally, since none of the circuits involved have taken the position that all Terry stops require Miranda warnings, the issue of when a Terry detention becomes or changes into Miranda custody—and whether it ever does—is of significant concern. These same circuits also have differing views on this issue, and a handful of different tests for making that determination have been proposed and adopted in the cases that have addressed the need for Miranda warnings during Terry stops. To understand the issues and the split that has come about, and in particular the Eighth Circuit’s stance on the questions of whether Miranda warnings have a place in Terry detentions and, if so, when a Terry detention becomes Miranda custody, it is important to understand the cases and opinions in which the circuits and their lower courts have expressed their conflicting positions.

A. The Eighth Circuit’s Position in the Split over Miranda Warnings During Terry Stops

In defining the Eighth Circuit’s position as it did, the Artiles-
Martin court made reference to the case of United States v. Pelayo-Ruelas, an Eighth Circuit decision in which the court held that no Miranda warnings were required in the Terry detention at issue in the case. While the decision in Pelayo-Ruelas may not be as firm on the issue of Miranda warnings and coercive Terry stops as the Artilas-Martin opinion maintained that it is, Pelayo-Ruelas did note that the Eighth Circuit had previously held that Miranda warnings are not required during Terry stops and generally maintained that position. What the Artilas-Martin court missed, however, was another Eighth Circuit decision issued three years after Pelayo-Ruelas in which the Eighth Circuit seemingly, but without explanation, changed its position and held that Miranda warnings are in fact required in certain coercive Terry stop situations. In that decision, United States v. Martinez, the Eighth Circuit at best ignored and potentially even overruled Pelayo-Ruelas, while at the same time citing Pelayo-Ruelas as authority in support of its contradictory position. Given these two inconsistent cases and the way in which Martinez referenced Pelayo-Ruelas, as well as the rulings of lower courts within the Eighth Circuit since Pelayo-Ruelas and Martinez were decided, the Eighth Circuit's position on the role of Miranda warnings in Terry stops is, to say the least, unclear.

1. United States v. Pelayo-Ruelas

In United States v. Pelayo-Ruelas, the Eighth Circuit affirmed a district court decision denying a motion to suppress incriminating statements made by defendant-appellant Pelayo-Ruelas to a Drug Enforcement Administration (DEA) agent during a relatively non-coercive Terry detention. Specifically, the detention at issue involved the stop of Pelayo-Ruelas’s vehicle on a dead-end road by a plain-clothes DEA agent driving an unmarked police vehicle. A second unmarked police vehicle was involved in the stop as well, though neither vehicle blocked Pelayo-Ruelas’s car such that he could not leave the scene. The agent inquired about Pelayo-Ruelas’s citizenship status and the circumstances of his being where he was in the vehicle that he was driving. Pelayo-Ruelas was also asked to step...
out of his car where he was frisked and asked additional questions. Pelayo-Ruelas was arrested when a drug dog alerted on his vehicle. Miranda warnings were not proved until after the dog’s alert. A motion to suppress Pelayo-Ruelas’s statements, as the product of an unwarned custodial interrogation, was filed and denied.

In affirming the lower court’s denial of the motion to suppress, the Eighth Circuit first noted that it had previously held in at least two separate decisions that “[n]o Miranda warning is necessary for persons detained for a Terry stop.” Despite this rather forceful declaration, the Pelayo-Ruelas court nevertheless took a less rigid approach and seemingly qualified the Eighth Circuit’s prior position, holding instead that “most Terry stops do not trigger the detainee’s Miranda rights”—a potentially important change in the Eighth Circuit’s position depending on where one’s Terry detention falls on the spectrum of cases. And while it seemingly suggested that there are some limits to the number of Terry detentions in which Miranda warnings are necessary, the court unfortunately did not delineate what types of Terry stops might trigger the need for law enforcement to provide a Terry detainee with Miranda warnings prior to questioning. That said, the court was clear, however, that on the facts presented (and in “most” Terry stops) no Miranda warnings were required when Pelayo-Ruelas was questioned about his citizenship and circumstances. And for the purposes of the Artiles-Martin court, at least, the holding was enough to put the Eighth Circuit in the category of those courts not requiring Miranda warnings in coercive Terry detentions.

In deciding the appeal the Eighth Circuit made another state-

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214. Id.
215. Id.
216. Id.
217. See id. Curiously, the trial court initially granted Pelayo-Ruelas' motion to suppress. However, after hearing the DEA agent's testimony at trial, the court reversed itself and allowed the statements to be admitted into evidence. See id.
218. Id. at 592 (quoting United States v. McGauley, 786 F.2d 888, 890 (8th Cir. 1986)).
219. Id. (emphasis added). This position is generally consistent with another Eighth Circuit case that is cited in the Pelayo-Ruelas opinion—United States v. Johnson, 64 F.3d 1120 (8th Cir. 1995). In Johnson, the Eighth Circuit held that “Miranda warnings are not necessary during ordinary Terry stops because they generally do not amount to custodial interrogation.” Id. at 1126. Unfortunately, the Johnson decision does not specify what constitutes an “ordinary” Terry stop that does not require Miranda warnings, and further provides little guidance as to what might constitute a non-ordinary Terry stop that would require warnings.
220. See Pelayo-Ruelas, 345 F.3d at 592.
ment of significance on the role of Miranda warnings in the context of Terry detentions. On appeal, Pelayo-Ruelas had argued that "a person is in custody for Miranda purposes whenever a reasonable person would not feel free to leave"—the test for determining Miranda custody set forth in Thompson and followed by a number of courts throughout the United States. The Pelayo-Ruelas court unequivocally rejected application of that test, and in doing so made it clear that this "broad contention" is "contrary to . . . controlling authority." The court further stated that the mere fact that a reasonable person would not feel free to leave during particular circumstances does not automatically create a situation in which a person is in Miranda custody. Specifically, the court rejected Pelayo-Ruelas's argument on the ground that a person "is not free to leave a Terry stop until the completion of a reasonably brief investigation, which may include limited questioning." In other words, the Eighth Circuit held that the fact that a detained person does not feel as if he or she is free to leave does not automatically trigger a need for a recitation of the Miranda warnings because the person is, in fact, lawfully detained and therefore is truly not free to leave regardless of whether a reasonable person would feel free to leave. Further, the court noted that since such a detainee is not in Miranda custody, Supreme Court precedent dictates that he or she can still be questioned on issues relating to the reason for the Terry detention without being first provided Miranda warnings. By rejecting the test suggested by Pelayo-Ruelas, the Eighth Circuit set itself apart from a number of other jurisdictions who have accepted that very test or versions very close to it.

2. United States v. Martinez

Three years after the Eighth Circuit decided Pelayo-Ruelas, the court again addressed the issue of Miranda warnings in the context of a Terry detention in the case of United States v. Martinez. The Martinez opinion has two parts—a majority opinion that appears to run contrary to Pelayo-Ruelas, and a dissenting opinion that pushes for a continuation of the Pelayo-Ruelas view of the need (or absence of need) for Miranda warnings in coercive Terry detentions.

221. Id.
222. Id.
223. Id.
224. Id. at 593.
225. See infra Part IV.
226. 462 F.3d 903 (8th Cir. 2006).
a. Martinez: The Majority Opinion

While the Artiles-Martin court referenced Pelayo-Ruelas as the Eighth Circuit's position on the need for Miranda warnings in coercive Terry situations, it failed to note that three years after Pelayo-Ruelas the Eighth Circuit issued a seemingly contradictory opinion in United States v. Martinez. The Martinez opinion presents an interesting contrast to Pelayo-Ruelas because it relied on Pelayo-Ruelas as support for its position, yet at the same time went directly against both many of the statements of law contained in the Pelayo-Ruelas opinion as well as the general tenor of that prior decision—a fact pointed out by a forceful dissent.

In Martinez, the Eighth Circuit addressed the detention and questioning of defendant Martinez, who was indicted for and convicted of committing a bank robbery in St. Cloud, Minnesota. Following the robbery, law enforcement stopped Martinez in an area approximately one-half mile from where the crime occurred. Martinez was stopped because he matched the description of the robbery suspect and was thereafter detained and searched for weapons. During that detention officers discovered that Martinez had a large sum of cash on his person, and when he gave inconsistent explanations for having the cash, he was handcuffed, placed in the back of a patrol car, and taken to the bank for a show-up identification. Once he was identified as the person who committed the crime, Martinez was arrested and was thereafter tried for and convicted of the robbery. The involved officers did not provide Martinez with Miranda warnings until he was placed in the patrol car, which was after he made statements to the officers about having a large sum of cash and gave the inconsistent stories as to how he had obtained it. On appeal, Martinez argued that any statements that he made to the arresting officers should have been suppressed because he was subjected to custodial interrogation when he was asked about the money found in his possession, and was not provided with Miranda warnings before that questioning took place. The Eighth Circuit agreed with Martinez, holding that he was subjected to custodial interrogation prior to being placed in the

227. Id. at 906-07. Martinez was convicted of violating 18 U.S.C. § 2113(a) & (d), and was sentenced to 150 months imprisonment. See id.
228. Id. at 906.
229. See id. at 906-07.
230. See id. at 906.
231. See id. at 908.
patrol car and therefore should have been given *Miranda* warnings.\(^{232}\)

The first area in which the *Martinez* opinion went contrary to *Pelayo-Ruelas* without any recognition of that prior opinion was in its discussion of what test to apply to determine whether a person is in custody for *Miranda* purposes. In addressing what it chose as the appropriate test, the court cited to the Supreme Court's decision in *Thompson* and its test that involves a review of "the circumstances surrounding the interrogation" and a decision as to whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."\(^{233}\) In applying that test to the facts of the case, the Eighth Circuit held that "[a] reasonable person would not, considering the totality of the circumstances, feel he was at liberty to stop the questioning [to which Martinez was subjected] and leave,"\(^{234}\) and therefore determined that Martinez was entitled to *Miranda* warnings despite the fact that the initial detention during which incriminating statements were made was a *Terry* stop rather than a formal arrest.\(^{235}\) As noted, this decision went directly contrary to the same circuit's opinion from three years earlier in which the *Pelayo-Ruelas* court held that "[t]hus, we reject as contrary to... controlling authority [the] broad contention that a person is in custody for *Miranda* purposes whenever a reasonable person would not feel free to leave."\(^{236}\)

The *Martinez* court's next departure from the reasoning and holding of *Pelayo-Ruelas* came when the court used *Pelayo-Ruelas* as support for a position arguably contrary to the ultimate holding of that case. As noted above, in *Pelayo-Ruelas* the Eighth Circuit held that the appellant was not questioned in violation of *Miranda* even though some persons might have found the circumstances of the questioning to be somewhat coercive.\(^{237}\) In doing so, the *Pelayo-Ruelas* court cited prior Eighth Circuit case law that unequivocally held that "[n]o *Miranda* warning is necessary for persons detained for a *Terry* stop," and then it noted that "most *Terry* stops do not trigger the detainee's *Miranda* rights."\(^{238}\) Instead of looking at *Pelayo-Ruelas* as placing limits

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\(^{232}\) See *id.* at 909. In the end, however, the court also determined that the non-suppression of the statements was harmless error that "did not sufficiently influence the jury to merit our reversal." *Id.* at 910.


\(^{234}\) *Martinez*, 462 F.3d at 909.

\(^{235}\) *See id.*

\(^{236}\) United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003).

\(^{237}\) *Id.* at 593.

\(^{238}\) *Id.*
on the cases in which *Miranda* might be required in a *Terry* stop, the *Martinez* court cited it as authority and interpreted *Pelayo-Ruelas* as standing for the proposition that "this court has previously implied the possible need for *Miranda* warnings during a *Terry* stop." Thus, the court ultimately determined that Martinez "was entitled to *Miranda* warnings at the time he was handcuffed." And though the language of *Pelayo-Ruelas* did leave open the possibility of some *Terry* stop situations in which *Miranda* warnings are required, the tenor of the *Pelayo-Ruelas* decision, its reference to and reliance on prior cases rejecting *Miranda*’s application to appropriately-limited questions asked during *Terry* stops, and the court’s holding and outcome seem more akin to one in which requiring *Miranda* is seen as a rare exception and not one in which carte blanche is granted to require *Miranda* in subsequent cases. *Martinez* read *Pelayo-Ruelas* as providing for the latter rather than the former, and in so doing went against that prior Eighth Circuit precedent as to both the need for *Miranda* warnings in *Terry* detentions and the method for determining when a person is in *Miranda* custody.

b. *Martinez: The Dissenting Opinion*

The *Martinez* opinion’s inconsistencies with the holding of *Pelayo-Ruelas* and the cases cited in that opinion are highlighted in a brief but pointed dissent in which the dissenting judge “dissent[s] from the conclusion . . . that [the law enforcement officers] violated Edwin Martinez’s Fifth Amendment rights by failing to give *Miranda* warnings before asking [him] to explain the ‘wad of cash’ found in his pocket shortly after an armed bank robbery.” The dissent began by making reference to the general holding or requirements of the *Miranda* decision and the implications that a *Terry* stop has on a detainee’s constitutional rights. It then addressed the lack of any interplay between *Miranda* and *Terry*, noting that

[the apparent overlap of the broad definition of custody in *Miranda* and the detention inherent in a *Terry* stop inevitably raised the question whether a *Terry* stop is a significant deprivation of the suspect’s freedom of action so that *Miranda* warnings are required before any questioning. An affirmative answer to this question would have undermined both the practical and the constitutional underpinnings of the

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239. *Martinez*, 462 F.3d at 909.
240. *Id.* at 910.
241. *Id.* at 911 (Loken, J., dissenting).
Court’s 8-1 decision in *Terry*: “if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.”

In other words, the *Martinez* dissent took the position that applying *Miranda* to *Terry* detentions would undermine the widely accepted practice of investigative detentions to the degree that they would become essentially useless.

The dissent further pointed out that historically, *Miranda* (which was decided just two years before *Terry*) has not had any place in *Terry* detentions and that “[n]ot surprisingly, the court declined to make *Miranda* warnings mandatory during *Terry* stops.” Referencing *Pelayo-Ruelas*, the dissent then argued that the Eighth Circuit’s position on *Miranda* and the Supreme Court cases applying and expanding the *Miranda* decision has generally been that “most *Terry* stops do not trigger the detainee’s *Miranda* rights.” In so doing, the dissent seemed to indicate that its reading of *Pelayo-Ruelas*, unlike that of the *Martinez* majority, is that the need for *Miranda* warnings in a *Terry* stop situation should be seen as the exception rather than the rule.

Finally, the dissent questioned the majority’s reliance on certain authority cited in the majority opinion and its subsequent acceptance of the *Thompson* reasonable-person test for determining whether *Miranda* warnings should be required during a *Terry* detention. Specifically, the dissent cited *Pelayo-Ruelas* for the proposition that in a *Terry* stop a detained person “is not free to leave . . . until the completion of a reasonably brief investigation, which may include limited questioning,” and therefore “it is contrary to *Berkemer* . . . to frame the *Miranda* custody question as being whether a reasonable person would ‘feel he was at liberty to stop the questioning and leave’ because that framing compels the conclusion that all questioning during lawful *Terry* stops must be preceded by *Miranda* warnings.” Put another way, the dissent suggested, as the *Pelayo-Ruelas* court did, that the use of a test that looks at whether a reasonable person feels free to leave is inappropriate given the fact that a person detained pursuant to *Terry* truly is not free to leave and will likely understand

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242. *Id.* at 911–12 (Loken, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 35 (1968) (White, J., concurring)).
243. *Id.* at 912.
244. *Id.* at 911 (quoting *United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003)).
245. *Id.* at 912.
that fact given the circumstances of the detention. Based on this reading of the law and its application to the facts of Martinez, the dissent concluded that “Martinez was not in custody for Miranda purposes when he gave inconsistent and therefore incriminating answers to questions that were consistent with a lawful Terry stop.”

3. Making Sense of the Eighth Circuit’s Position

Given the contradictory positions of Pelayo-Ruelas and Martinez, it can be difficult to discern where exactly the Eighth Circuit stands on the interaction of Miranda and Terry in the context of coercive Terry detentions. This difficulty is evidenced by the fact that a review of lower court decisions within the Eighth Circuit shows that the circuit’s district courts are not always in agreement as to which case represents the correct standard within the circuit. Specifically, since Martinez was decided in 2006, three years after Pelayo-Ruelas, a number of district court decisions have been issued that have followed the reasoning in Martinez with respect to the need for Miranda during coercive Terry stops, and the use of the Thompson reasonable person test to determine whether a person is in custody for Miranda purposes. At the same time, however, an equal number of district courts have done the same with Pelayo-Ruelas, following its reasoning and both rejecting the need for Miranda warnings in Terry stops and rejecting the Thompson reasonable person test in the Terry context, indicating that not only is there a split of authority among the federal circuits, but apparently within the Eighth Circuit as well.

As noted above, a number of lower courts within the Eighth Circuit have followed Martinez and applied the principles and reasoning of the majority opinion. For example, in the case of United States v.

246. Id. at 913. Additionally, the Martinez dissent noted that the majority’s conclusion that Martinez “was entitled to Miranda warnings at the time he was handcuffed” because at that point a reasonable person would not feel that he or she was free to terminate questioning and leave, is contrary to “cases holding that a Terry stop that includes handcuffing followed by brief questioning related to the purpose of the stop does not violate the suspect’s Fourth or Fifth Amendment rights.” Id. (citing United States v. Cervantes-Flores, 421 F.3d 825, 829–30 (9th Cir. 2005); United States v. Fornia-Castillo, 408 F.3d 52, 63–65 (1st Cir. 2005); United States v. Miller, 974 F.2d 953, 956–57 (8th Cir. 1992); United States v. Bautista, 684 F.2d 1286, 1292 (9th Cir. 1982)).

247. See, e.g., United States v. Torres-Monje, 433 F.Supp.2d 1028, 1035 (D.N.D. 2006) (“The eighth Circuit has rejected the `broad contention that a person is in custody for Miranda purposes whenever a reasonable person would not feel free to leave.’” (quoting U.S. v. Pelavo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003)).
the District Court for the District of Minnesota noted that in *Martinez* "the Eighth Circuit set out a . . . nuanced approach" to determine whether *Miranda* warnings need to be given to a person detained pursuant to *Terry*. Specifically, the *Pentaleri* court adopted the reasoning and holding of *Martinez* and read the current state of the law within the Eighth Circuit to be that "[i]f a suspect is sufficiently restrained during an investigatory stop, the suspect may be in custody for the purposes of the privilege against self-incrimination, even though the suspect is not formally arrested." The court further cited *Martinez* in formulating the test to be applied in determining whether a detainee has been "sufficiently restrained" such that the detainee is determined to be in custody for *Miranda* purposes. Specifically, the court noted that the proper test for determining "whether restraint is comparable to formal arrest" is "whether a reasonable person, under similar circumstances, would understand the situation to be an arrest." Curiously, although the *Pentaleri* court indicated that this test came from *Martinez*, the test set forth in *Martinez* is actually slightly different, as the *Martinez* court asked whether "a reasonable person would not, considering the totality of the circumstances, feel he was at liberty to stop the questioning and leave" and not whether the person "would understand the situation to be an arrest." Another decision from a district court within the Eighth Circuit that followed *Martinez* and rejected the holdings and reasoning of *Pelayo-Ruelas* is *United States v. Gelb* which cited *Martinez* for the proposition that "the ultimate question is whether ‘a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’" The *Gelb* court also acknowledged and accepted the *Martinez* court's holding that "while most traffic stops do not constitute ‘custody’ for *Miranda* purposes, ‘[s]ome traffic *Terry* stops might involve such restraint, necessitating *Miranda* warnings.’"

Additionally, a number of courts within the boundaries of the

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249. Id. at *6.
250. Id. (citing *United States v. Martinez*, 462 F.3d 903, 909–10 (8th Cir. 2006)).
251. Id. (citing *Martinez*, 462 F.3d at 908–09).
255. Id. at *3* (citing *Martinez*, 462 F.3d at 909).
256. Id.
Eighth Circuit have continued to follow the reasoning of Pelayo-Ruelas, despite the court’s more recent decision in Martinez. For example in United States v. Diaz-Quintana, decided three years after Martinez, the District Court for the District of North Dakota published an interesting opinion that followed the reasoning of Pelayo-Ruelas instead of Martinez. In Diaz-Quintana, the court addressed a defendant’s motion to suppress statements made to law enforcement officials during an investigation of his immigration status. In denying the defendant’s motion, the court referenced and followed the reasoning of Pelayo-Ruelas, rejecting the reasonable-person test from Martinez and noting that Miranda warnings are not required in most Terry situations. Specifically, the Diaz-Quintana court cited and followed Pelayo-Ruelas (and disregarded Martinez) when it held:

> It is well-established that Miranda warnings are not needed for persons detained for a Terry stop. The Eighth Circuit has rejected the “broad contention that a person is in custody for Miranda purposes whenever a reasonable person would not feel free to leave.” Instead, “[o]ne is not free to leave a Terry stop until the completion of a reasonably brief investigation, which may include limited questioning. But most Terry stops do not trigger the detainee’s Miranda rights.” By way of extension, “the full panoply of protections prescribed by Miranda does not apply during the course of a traffic stop where the motorist is not subjected to the functional equivalent of formal arrest.”

Other district court decisions from within the Eighth Circuit have

258. See id. at 1281.
259. Id. at 1275–77.
260. Id. at 1281.
261. Id. at 1281 (citing United States v. Martin, 411 F.3d 998, 1003 (8th Cir. 2005); United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003)) (citations omitted). Perhaps the most interesting portion of the Diaz-Quintana opinion is the test that the court states should be used to determine whether there has been a “restraint on [a detainee’s] freedom of movement of the degree associated with a formal arrest” such that the detention has become the “functional equivalent of an arrest” and Miranda warnings are required. Id. Specifically, the court writes that the appropriate test is to “determine whether a reasonable person in Diaz-Quintana’s position would have considered his freedom of movement restricted to the degree associated with a formal arrest.” Id. In other words, the test stated by the Diaz-Quintana court is whether a reasonable person in a detainee’s position would consider that his or her freedom was restricted to such a degree and in such a way that what was initially a Terry detention later became the functional equivalent of an arrest. See id.
followed the reasoning of *Pelayo-Ruelas* as well.\(^{262}\) And, in a very recent case, the Eighth Circuit itself cited *Pelayo-Ruelas* for the proposition that the *Thompson* reasonable-person test is not applicable in traffic stop situations, but said nothing about *Martinez* and whether that case no longer constituted good law.\(^{263}\)

In short, the Eighth Circuit’s position on the issue of the intersection of *Miranda* warnings and *Terry* stops is unclear at best, and the circuit appears to be divided on the issue much like many of the rest of the federal and state courts throughout the United States.\(^{264}\)

B. The First and Fourth Circuits: No Warnings Required During Coercive *Terry* Stops

Once again, in defining the circuit split “over whether coercive *Terry* stops constitute *Miranda* custody,” the *Artiles-Martin* court notes that the First and Fourth Circuits have taken the same position as the Eighth Circuit that “so-called *Terry* reasonableness means *Miranda* warnings are not required, even if the stop was coercive.”\(^{265}\) The cases

\(^{262}\) Another decision from a district court within the Eighth Circuit that followed *Pelayo-Ruelas* in spite of the Eighth Circuit’s subsequent holding in *Martinez* is *United States v. Treacle*, No. 4:08CR3105, 2008 WL 5423743, at *7–8 (D. Neb. Dec. 10, 2008) (citing *Pelayo-Ruelas* for the proposition that “[a] person is not necessarily in custody for *Miranda* purposes even if a reasonable person in his or her position would not feel free to leave” because a *Terry* detainee is not free to leave until a reasonably brief investigation—which may include limited questioning—has been completed). Also, the court in *Treacle* referenced *Pelayo-Ruelas* and *United States v. Klein*, 13 F.3d 1182, 1183 (8th Cir. 1994), as factual support for the proposition that *Miranda* warnings are not required simply because there is some degree of coercion during a *Terry* detention. *Treacle*, 2008 WL 5423743, at *8.

\(^{263}\) *See United States v. Morse*, 569 F.3d 882, 884 (8th Cir. 2009) (stating “[i]n *Berkemer*, the Supreme Court held that even though a motorist is seized during a traffic stop, *Miranda* warnings are not required where the motorist is not subjected to the functional equivalent of a formal arrest. Therefore, that [defendant-appellant] reasonably believed that he was not free to terminate the encounter with [the officer] does not resolve whether *Miranda* warnings were required in order to elicit admissible statements from [defendant-appellant]”) (citing *Pelayo-Ruelas*, 345 F.3d at 592 for the proposition that the Eighth Circuit has rejected the “broad contention that a person is in custody for *Miranda* purposes whenever a reasonable person would not feel free to leave”) (alteration in original) (citations omitted).

\(^{264}\) In fact, courts within the same federal district have reached different conclusions within the same year. Specifically, the *Gelb* and *Treacle* decisions, one of which followed *Pelayo-Ruelas* and one of which followed *Martinez*, were both decided in 2008 by courts within the District of Nebraska, making it even more apparent that a split exists within the Eighth Circuit on the issue of *Miranda* warnings and coercive *Terry* detentions similar to the split that exists among the federal judiciary as a whole. *See Treacle*, 2008 WL 5423743; *United States v. Gelb*, No. 8:08CR110, 2008 WL 4866338 (D. Neb. Nov. 7, 2008).

\(^{265}\) *United States v. Artiles-Martin*, No. 5:08CR140c10GRJ, 2008 WL 2600787, at
cited for this proposition are the First Circuit’s decision in United States v. Trueber and the Fourth Circuit case of United States v. Leshuk. Although neither case states directly that Miranda warnings are never warranted in Terry detentions, the decisions in each of the cases support the categorization given to them in Artiles-Martin.

1. The First Circuit

In Trueber, the First Circuit addressed a government appeal of a lower court decision to suppress statements made by defendant Trueber, an Austrian national who travelled to the United States via the Dominican Republic, during a traffic stop and subsequent search of a hotel room. Briefly stated, Trueber came to law enforcement’s attention when his name was found in the possession of an individual named Lemmerer, who was arrested when he was found to be in possession of five kilograms of cocaine upon entering the United States. Further investigation of Trueber provided additional information that caused law enforcement to suspect that he was an associate of Lemmerer and was further engaged in illegal activity, including the fact that Trueber had a relationship with two companies that were under investigation for illegal activities that included drug trafficking and money laundering. After a period of surveillance, three customs agents and at least two local law enforcement officers conducted a traffic stop of a vehicle in which Trueber was a passenger. During the stop, officers did the following: removed Trueber and the driver from the vehicle; ordered the driver to get down on the ground and later stand up and put his hands on the vehicle; conducted a pat-down frisk of Trueber; asked Trueber a number of questions about his reason for being in the United States and his relationship with the driver; and obtained consent to search a suitcase that Trueber had placed in the vehicle. The suitcase was later determined to contain items that officers later testified were used by drug traffickers to attempt to mask the odor of certain controlled substances. At some point during the encounter, which lasted

266. United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001).
267. 65 F.3d 1105, 1110 (4th Cir. 1995).
268. See Trueber, 238 F.3d at 82–83.
269. Id. at 82.
270. See id.
271. Id. at 83.
272. Id.
273. See id. at 83.
about fifteen minutes, one of the customs agents drew his gun and pointed it at the ground, though there was some question as to whether Trueber saw the gun. Trueber further raised the officers' suspicions by giving conflicting information about where he had been staying while in the United States and his relationship with the driver of the vehicle. Finally, the customs agents obtained Trueber's consent to search his hotel room, so all of the parties travelled to Trueber's hotel where he was further questioned and a search conducted. During the questioning, Trueber continued to make statements that were either inconsistent with statements that he had made previously or were inconsistent with what was being found during the search of the hotel room; Trueber also admitted to agents that he knew the person arrested the day before and that they had made plans to meet upon that person's arrival in the United States. The interview in the hotel room lasted approximately one hour and twenty minutes, and although Trueber was never told that he was not free to leave, when he asked about that issue he was told that he was not under arrest but that "[w]e are just questioning you." He was also allowed to use the bathroom but was told to keep the door ajar and when he asked to look in one of his bags he was told that one of the agents would locate the item for him. Trueber was ultimately arrested and charged in connection with the cocaine found on Lemmerer the previous day. During suppression proceedings, the district court found that "for purposes of Miranda, Trueber was in custody when questioned [by customs agents] and, therefore, all statements violated Miranda and should be suppressed." The First Circuit ultimately reversed and vacated the district court's suppression order. In doing so, the court began by referencing prior First and Ninth Circuit case law for the proposition that Miranda generally does not have a place in Terry detentions. The court noted that "[a]s a general rule, Terry stops do not implicate the requirements of Miranda because 'Terry stops, though inherently somewhat coercive, do not usually involve the type of police dominat-

274. *Id.* at 84.
275. See *id.* at 83–84.
276. *Id.* at 84.
277. *Id.* at 85.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 91 (alteration in original).
282. *Id.* at 96.
283. *Id.* at 92.
ed or compelling atmosphere which necessitates Miranda warnings." Noting that the stop of Trueber's vehicle was justified under Terry and that therefore "without administering Miranda warnings, the agents were entitled to stop the truck, detain its occupants, and pursue a means of investigation that was likely to confirm or dispel their suspicions quickly," and further noting that "[t]he central issue in this case is whether an otherwise valid Terry stop escalated into a de facto arrest necessitating the administration of Miranda warnings," the Trueber court, referencing Berkemer, held that "the target of a Terry stop must be advised of his Miranda rights if and when he is 'subject to restraints comparable to those associated with a formal arrest.'" These statements by the Trueber court are significant for the reason that, unlike other circuit courts that have addressed the issue, the Trueber court did not recognize the existence of a hybrid Terry-Miranda situation in which a person is detained pursuant to Terry and therefore not under de facto or actual arrest, yet at the same time is entitled to Miranda warnings before questioning. Additionally, the court nowhere recognized that there should be separate Fourth and Fifth Amendment analyses. Based on the nature and wording of the opinion, the Trueber court made it clear that, in its view, either a person is detained pursuant to Terry and is not entitled to Miranda warnings, or that initial investigative detention has escalated or transformed into a de facto arrest for which warnings are required. In answering whether, under the facts presented, there was a valid Terry stop or a de facto arrest, the First Circuit first acknowledged that "[t]here is no scientifically precise formula that enables courts to distinguish between investigatory stops... and... 'de facto arrests.'" That said, Trueber nevertheless held that the appropriate analysis for determining whether a situation has become a de facto arrest for which Miranda warnings are required "is [to determine] 'how a reasonable man in the suspect's shoes would have understood his situation.'" Later the court added additional detail to the nature of the inquiry, noting that a court must consider whether and when a reasonable person in [a defendant's]

284. Id. (quoting United States v. Streifel, 781 F.2d 953, 958 (1st Cir. 1986) (quoting United States v. Bautista, 684 F.2d 1286, 1291 (9th Cir. 1982))).
285. Id.
286. Id. at 92–93.
287. Id. at 93 (quoting Berkemer v. McCarty, 468 U.S. 420, 441 (1984)).
288. See id. at 79.
289. Id. at 93 (quoting United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994)).
290. Id. (quoting Stansbury v. California, 511 U.S. 318, 324 (1994)).
position would have believed that he was actually in police custody and being constrained to a degree associated with formal arrest (rather than simply undergoing a brief period of detention at the scene while the police sought by means of a moderate number of questions to determine his identity and to obtain information confirming or dispelling their suspicions). \(^{291}\)

This determination, the court explained, "turns on an assessment" of certain factors, which "include[s], among other inquiries, 'whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation.' \(^{292}\) Curiously, Trueber cited Thompson as authority for the proposition that "[t]he 'ultimate inquiry' . . . is whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest;' \(^{293}\) however, nowhere did it mention Thompson's reasonable person test and did not establish a determination of whether a reasonable person would feel free to terminate an investigation and leave as being a relevant standard for the analysis. \(^{294}\) In fact, while it further cited Thompson for the proposition that a custody determination involves "two discrete inquiries," it substituted its own standard for Thompson's second inquiry, thus leaving out the determination of whether a reasonable person would feel free to terminate an investigation and leave as a factor in the analysis. \(^{295}\)

The Trueber court next addressed the facts of the case before it, and in the context of that discussion, referenced a number of prior court decisions in which a detention of a person was determined to be a Terry detention rather than a de facto arrest requiring Miranda warnings despite the use of coercive action by law enforcement. \(^{296}\) The first case referenced by the Trueber court was that of United States v. Taylor. \(^{297}\) In Taylor, as described by the Trueber court, the First Circuit held that "a valid Terry stop did not mature into a de facto arrest when police cruisers stopped a car, blocked it, and two officers

\(^{291}\) Id. (quoting United States v. Streifel, 781 F.2d 953, 962 (1st Cir. 1986)) (alterations in original).

\(^{292}\) Id. (quoting United States v. Ventura, 85 F.3d 708, 711 (1st Cir. 1996)).

\(^{293}\) Id. (citations omitted).

\(^{294}\) See id. at 79.

\(^{295}\) See id. at 93.

\(^{296}\) See id. at 94.

\(^{297}\) 162 F.3d 12 (1st Cir. 1998).
drew their weapons when approaching the car." According to the decision in *Taylor* itself, the detained persons were also removed from their vehicle and "secured on the ground and searched for weapons," "ten to twelve officers [were] on the scene," and "the detention lasted approximately thirty minutes." Yet despite these arguably coercive actions on the part of law enforcement, the *Taylor* court still held that "the actions of . . . [the] officers, when viewed in the totality of circumstances then confronting them, fit within the contours of a permissible *Terry* stop." This conclusion, the court noted, was based on the fact that "[u]nder these circumstances, we cannot say that the district court erred in concluding that a reasonable person, standing in Taylor's shoes, would have understood, at the time, that he was being briefly detained for inquiry and investigation, not arrested."

Next, the *Trueber* court made a brief reference to its decision in *United States v. Trullo*, another First Circuit decision in which the court held that a police officer's use of a drawn weapon did not convert an investigative detention into an arrest for *Miranda* purposes. *Trueber* also referenced *United States v. Zapata* for the proposition that "[m]ere numbers [of law enforcement officers] do not automatically convert a lawful *Terry* stop into something more forbidding." Further, the court referenced *United States v. Sharpe* and *United States v. Owens* for precedent supporting the view that a detention does not become a de facto arrest simply because it lasts for more than a couple of minutes.

In the end, the First Circuit made two determinations as to Trueber's claim that he was in *Miranda* custody. First, it held unequivo-
cally that the initial detention of Trueber at the time that he was pulled over and removed from his vehicle was a Terry stop and nothing more; and therefore, Miranda warnings were not required and Trueber’s statements were inappropriately suppressed. \(^{311}\) Second, with respect to the statements made in Trueber’s hotel room as it was being searched by Customs agents, the court opted to remand that issue—as well as the issue of whether Trueber’s consent to the search of his room was truly voluntary—“for application of the correct legal test for determining custody while in the hotel room.”\(^{312}\)

2. The Fourth Circuit

The Fourth Circuit case cited for the proposition that Miranda warnings are not required during investigative detentions even when there are some coercive elements involved is United States v. Leshuk,\(^{313}\) a marijuana manufacturing prosecution in which the defendant-appellant appealed the district court’s denial of his motion to suppress both statements made to law enforcement and evidence discovered as a result of a search. Curiously, in Leshuk the district court found that the conduct of the law enforcement officers present “during the questioning was neither coercive nor intimidating,” a contention with which the Fourth Circuit does not appear to disagree.\(^{314}\) However, given the posture taken by the court in its discussion of the general legal principles governing Terry detentions and Miranda custody, the Artiles-Martin court appears to be on the right track when it placed the Fourth Circuit in the category of those circuits that have held that the existence of coercive elements in a Terry interrogation does not automatically place the detainee in Miranda custody for the purposes of limited questioning.\(^{315}\)

The prosecution of Leshuk arose when Leshuk and a co-defendant were arrested and charged with violations of the federal drug laws. In April of 1994, a turkey hunter discovered a marijuana grow operation in a rural area of West Virginia.\(^{316}\) The hunter reported the site to law enforcement, and when he was directing them to the area in question the hunter and two sheriff deputies came

\(^{311}\) See id. at 95.
\(^{312}\) Id. at 95–96.
\(^{313}\) 65 F.3d 1105 (4th Cir. 1995).
\(^{314}\) Id. at 1110.
\(^{316}\) See id. at 1106.
across Leshuk and his friend. The turkey hunter was the first to
discover Leshuk and when he did so he announced that “this is the
sheriff’s office,” ordered Leshuk and his companion to raise their
hands, and indicated that he or the officers would shoot Leshuk’s dog
if he did not call it off. The hunter also at one point briefly held
Leshuk by the arm. During this encounter Leshuk and his friend
were questioned about why they were in the area of the marijuana
grow and were confronted about whether or not they owned two
backpacks and a large plastic garbage bag later determined to contain
marijuana plants, all three of which were found in the immediate
vicinity of the detainees. In response to the questioning Leshuk
identified himself, told the officers how he had come to be in the
area, and denied ownership of the backpacks and the garbage bag.
1
Leshuk was thereafter arrested and charged. Following a condi-
tional guilty plea to aiding and abetting the manufacture of marijua-
na, Leshuk appealed his conviction and sentence, claiming that his
constitutional rights were violated when he was detained and
questioned by law enforcement after he was discovered in the vicinity
of a marijuana cultivation site. Specifically, “Leshuk contend [ed]
that the scope of the detention exceeded a Terry stop and was a
custodial interrogation for Miranda purposes because a reasonable
person in his position would have believed that he was in custody and
not free [to leave] from the very beginning of the encounter until the
time [of his] arrest.” As noted elsewhere in this article, a number of
courts have accepted some version of this reasonable person test as
the appropriate test for determining whether a Terry detention has

317. Id. at 1106–07.
318. Id. at 1107.
319. Id. at 1110.
320. Id. at 1107.
321. Id.
322. Id. To avoid any issues arising from the turkey hunter’s actions, the Fourth
Circuit approached the case with the assumption “that a reasonable person might
have believed that the hunter was a law enforcement official.” Id. at 1110 n.3.
324. Id. at 1108.
325. Id. at 1109. While the district court ultimately denied Leshuk’s motion to
suppress, it did so despite a magistrate judge’s recommendation that his statements
to law enforcement be suppressed. Id. at 1108. The magistrate judge made this
recommendation “based on his finding that a reasonable person in the defendants’
position would have understood that he was in custody and not free to leave from the
beginning of the encounter”—the very same argument later made by Leshuk to the
Fourth Circuit. Id.
transformed into *Miranda* custody. 6 In *Leshuk*, however, the Fourth Circuit, like the *Martinez* dissent discussed above, unequivocally rejected this version of the reasonable person test as being inconsistent with the general nature of and principles supporting the *Terry* detention. 327 In so doing, the Fourth Circuit noted that the reasonable person test put forth by *Leshuk* is "important to the assessment of whether a stop is considered custodial given that 'the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.'" 328 But while the *Leshuk* court noted the "importance" of the reasonable person test set forth by *Leshuk*, it concluded that a "reasonable person['s] ... belie[f] that he was in custody and not free [to leave]" was not enough to convert a *Terry* stop to *Miranda* custody. 329 The court wrote:

Such an objective belief, however, does not necessarily transform a lawful *Terry* stop into a custodial interrogation requiring *Miranda* warnings. As this Court has reasoned, "[t]he perception . . . that one is not free to leave is insufficient to convert a *Terry* stop into an arrest. A brief but complete restriction of liberty is valid under *Terry*." 330 In fact, *Terry* stops customarily involve "detentions where the person detained is not technically free to leave while the officer pursues the investigation." 331

In other words, as the *Pelayo-Ruelas* court noted, the objective beliefs of a reasonable person regarding whether or not that person is free to terminate an investigative detention and walk away do not ultimately determine whether that person's detention has changed from a *Terry* stop to *Miranda* custody because in a *Terry* stop a detainee truly is not free to leave until law enforcement has completed the investigation that led to or resulted from the stop. 332

326. *See supra* Part III.A; *infra* Part V.A.2.
327. *Id.* at 1110.
328. *Id.* at 1109 (quoting Stansbury v. California, 511 U.S. 318, 323 (1994)).
329. *Id.*
330. *Id.* (quoting United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1978)).
331. *Id.* (quoting United States v. Manbeck, 744 F.2d 360, 376–77 (4th Cir. 1984)).
332. *See Moore*, 817 F.2d at 1108.

Appellant nonetheless contends that the stop and frisk were so intrusive that they amounted to an arrest without probable cause. He argues that, because he did not feel free to leave during the stop, he was in a custodial situation. The perception, however, that one is not free to leave is insufficient to convert a *Terry* stop into an arrest. A brief but complete restriction of liberty is valid under *Terry*.
In its opinion in *Leshuk* the Fourth Circuit also acknowledged precedent from multiple federal circuit court decisions throughout the United States supporting the idea that the employment of such arguably coercive acts as "drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes."\(^3\) This precedent, the court wrote, is supported by the fact that "[i]nstead of being distinguished by the absence of any restriction of liberty, *Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer’s suspicions."\(^3\) In other words, the *Leshuk* court took the position that it is not the presence or absence of a restriction on a detainee’s liberty that determines whether one is detained pursuant to *Terry* or, alternatively, is in *Miranda* custody, because restrictions on liberty are a part of *Terry* detentions. Rather, the primary issue is the length of time that a person is detained. Additionally, the court also rejected Leshuk’s contention that when coercive tactics are employed, a *Terry* detention becomes *Miranda* custody when "officers do not take [any] affirmative steps" to "reduce the intensity of the initial contact" or "inform[] the defendants that they could leave or could remain silent."\(^3\) And in much the same vein, the *Leshuk* court placed some emphasis on a law enforcement officer’s ability, when conducting a *Terry* stop, "to ‘take such steps as [are] reasonably necessary to protect [his or her] personal safety and to maintain the status quo during the course of the stop.’"\(^3\) In *Leshuk* those steps included such potentially coercive actions as announcing the presence of law enforcement officers, holding Leshuk by the arm, instructing him to put his hands in the air and call off his dog, and conducting a pat-down search or frisk of Leshuk and his companion, all of which were found to be an appropriate and lawful part of the *Terry* detention.\(^3\)

Finally, the *Leshuk* decision also addressed the admissibility of Leshuk’s unwarned statements. On that issue, the Fourth Circuit

\(^{333}\) *Leshuk*, 65 F.3d at 1109–10 (citing *Manbeck*, 744 F.2d at 377–80; *Moore*, 817 F.2d at 1108).

\(^{334}\) *Id.* at 1109.

\(^{335}\) *Id.* at 1110.

\(^{336}\) *Id.* at 1109 (quoting United States v. Hensley, 469 U.S. 221, 235 (1984) ("When the . . . officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.").)

\(^{337}\) See *id.* at 1107, 1110.
concluded that the questioning was reasonably related to the purpose of the detention and was therefore proper because "[o]fficers may temporarily detain an individual under Terry for purposes of questioning the individual..." As was the case in Trueber, the Fourth Circuit in Leshuk did not distinguish between the concept of Miranda custody and formal or de facto arrest, but treated them as being the same thing. Furthermore, while it did not contend that such a situation cannot theoretically arise, the Leshuk court similarly did not acknowledge or support the possibility that there can be a situation in which a person is detained during a lawful Terry stop and yet must still be provided with Miranda warnings. The court's conclusion, to the contrary, was that Miranda warnings were not required when Leshuk was questioned by the officers because the Terry stop was lawful and officers are permitted to ask reasonable and pertinent questions of a person detained pursuant to Terry. 

With regard to the decisions in Trueber and Leshuk, nowhere in the decisions do the First and Fourth Circuits come out and directly or unequivocally say that Miranda warnings are never required during coercive Terry detentions. Given the tenor of the opinions, however, and the fact that they do not distinguish between an arrest and Miranda custody and do not treat them as separate and distinct concepts, the Artiles-Martin court did not appear to be off base in placing these two federal circuits on that side of the circuit split that is the topic of this article.

C. The Second, Seventh, Ninth, and Tenth Circuits: Warnings are Required During Coercive Investigative Detentions

Once again, in defining the circuit split "over whether coercive Terry stops constitute Miranda custody," the Artiles-Martin court noted that the Second, Seventh, Ninth, and Tenth Circuits "hold that a coercive Terry stop requires warnings but still is deemed a valid Terry stop." The cases that are cited for this proposition are the Second Circuit's decision in United States v. Ali, the Seventh Circuit's decision in United States v. Smith, the Ninth Circuit's decision in United States v. Smith, and the Tenth Circuit's decision in United States v. Smith.

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338. Id. at 1110.
339. Id.
341. 68 F.3d 1468 (2nd Cir. 1995).
342. 3 F.3d 1088 (7th Cir. 1993).
United States v. Kim,\textsuperscript{343} and finally, the Tenth Circuit's decision in United States v. Perdue.\textsuperscript{344}

1. The Second Circuit

In a change of pace from its description of the position of the First and Fourth Circuits, the Artiles-Martin court referenced the Second Circuit as one that "hold[s] that a coercive Terry stop requires warnings but still is deemed a valid Terry stop."\textsuperscript{345} The case cited in Artiles-Martin in support of that claim is United States v. Ali.\textsuperscript{346} Ali was an appeal of defendant-appellant Ali's conviction for various federal offenses stemming from his being caught attempting to transport a number of shotguns in checked luggage on an international flight leaving JFK Airport in New York City.\textsuperscript{347} The firearms were discovered by an X-ray examiner who reported the finding to Customs officials.\textsuperscript{348} Prior to boarding his airplane, Ali was pulled from the boarding area into an "adjacent corridor" and questioned without Miranda warnings by a group of seven Customs officials, a number of whom were in uniform and had visible firearms.\textsuperscript{349} During the questioning Ali initially lied about the circumstances of his having the firearms, but later admitted to transporting them illegally.\textsuperscript{350} Ali was arrested, charged criminally, and filed a motion to suppress his statements to Customs officials on the ground that he was not provided with Miranda warnings prior to questioning.\textsuperscript{351} When asked about Ali's status at the time that he was confronted by the Customs officials, one of the involved agents testified at a suppression hearing that Ali, though not formally arrested, was not free to leave the place where he was being questioned.\textsuperscript{352} Despite that testimony, the district court denied Ali's motion to suppress, which Ali thereafter appealed to the Second Circuit.\textsuperscript{353}

On appeal, the Second Circuit reversed the district court's ruling on the motion to suppress.\textsuperscript{354} In a relatively short opinion, the court

\begin{itemize}
\item 343. 292 F.3d 969 (9th Cir. 2002).
\item 344. 8 F.3d 1455 (10th Cir. 1993).
\item 345. Artiles-Martin, 2008 WL 2600787, at *11 n.38.
\item 346. 68 F.3d 1468.
\item 347. Id. at 1470.
\item 348. Id.
\item 349. Id.
\item 350. Id. at 1471.
\item 351. Id. at 1470.
\item 352. Id. at 1471.
\item 353. Id. at 1470-71.
\item 354. Id. at 1475.
\end{itemize}
first noted that the standard set by the *Miranda* decision was that custodial interrogation means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Based on that language and the Supreme Court’s decision in *Berkemer*, the Second Circuit held that for *Miranda* purposes, “[a]n accused is in ‘custody’ when, in the absence of an actual arrest, law enforcement officials act or speak in a manner that conveys the message that they would not permit the accused to leave.” The Court further stated that “[t]he proper inquiry is thus whether a reasonable person in [the appellant’s] shoes would have felt free to leave under the circumstances.” Upon making that inquiry in Ali’s case, the Second Circuit determined that, given the circumstances, a reasonable person would not have felt free to leave and therefore Ali should have been provided with *Miranda* warnings.

In addition to holding that Ali should have been given *Miranda* warnings prior to being questioned, the Second Circuit went a step further and held that in such a context, whether a detention is lawful under *Terry* is irrelevant to the *Miranda* analysis. Specifically, the court held:

[W]hether the “stop” was permissible under *Terry v. Ohio* . . . is irrelevant to the *Miranda* analysis. *Terry* is an “exception” to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination. The fact that the seizure and search of a suspect comports with the Fourth Amendment under *Terry* simply does not determine whether the suspect’s contemporaneous oral admissions may be used against him or her at trial.

Thus the *Ali* court set the standard within the Second Circuit that *Terry* and *Miranda*, in essence, have nothing to do with one another in the sense that one can be appropriately detained pursuant to *Terry* and still be entitled to *Miranda* warnings—a holding much different from that of its First and Fourth Circuit counterparts. The court

355. Id. at 1472 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).
356. Id. (quoting *Campaneriv. Reid*, 891 F.2d 1014, 1021 n.1 (2nd Cir. 1989)).
357. Id. at 1473.
358. Id. at 1472–73.
359. Id.
360. Id.
361. A handful of courts have accepted the *Ali* court’s holding that *Miranda* and *Terry* are completely unrelated and irrelevant to one another. See, e.g., United States v. Bailey, 468 F.Supp.2d 373, 386 (E.D.N.Y. 2006) (“[T]he Second Circuit has made
further held that even if Ali was properly detained under Terry—and the court never stated whether he was or was not—Miranda warnings can and will still be required when the standard set forth above is met.\(^{362}\)

Much like the Eighth Circuit, however, the Second Circuit has shown some inconsistency in formulating a test for Miranda custody. Ali is regularly cited by those courts and commentators addressing the circuit split at issue in this article, but a comprehensive review of Second Circuit jurisprudence on the issue cannot be complete without addressing the Second Circuit’s later decision in Cruz v. Miller,\(^{363}\) where it noted that “[t]he cases in our Circuit seem not entirely consistent”\(^{364}\) on the issue of Miranda and Terry detentions. Unlike Ali, Cruz was not a criminal case being prosecuted in the federal courts, but was a federal habeas case addressing a crime prosecuted in the New York state courts. One of the primary issues before the Cruz court was “whether the state courts made an ‘unreasonable application’ of clearly established Supreme Court law in determining that the circumstances under which a suspect was stopped and questioned on a public street did not result in ‘custody’ requiring Miranda warnings.”\(^{365}\)

Briefly stated, the underlying criminal case involved a shooting in an area of the Bronx that was known for regular drug activity.\(^{366}\) Two witnesses to the shooting provided a description of the shooter and the direction that he went after the crime was committed.\(^{367}\) Based on that information, law enforcement eventually stopped Cruz because clear that the issue about whether an investigatory stop is reasonable under the Fourth Amendment is separate from whether the seized suspect is ‘in custody’ for purposes of Miranda. . . . Thus, in the instant case, the lawfulness of [the defendant’s] initial stop and detention during the search does not end the inquiry.” See also United States v. Newton, 369 F.3d 659, 673 (2nd Cir. 2004) (“This court has had few occasions to consider when an investigative stop . . . rises to the level of Miranda custody. . . . Some courts have concluded that where an investigatory stop is reasonable under the Fourth Amendment, the seized suspect is not ‘in custody’ for purposes of Miranda. This court, however, has specifically rejected Fourth Amendment reasonableness as the standard for resolving Miranda custody challenges. . . . A number of our sister circuits are in agreement. Thus, instead of asking whether the degree of restraint was reasonable, we have focused on ‘whether a reasonable person in defendant’s position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest.’”) (citations omitted))

\(^{362}\) Id. at 1472–73.
\(^{363}\) 255 F.3d 77 (2nd Cir. 2001).
\(^{364}\) Id. at 85.
\(^{365}\) Id. at 77.
\(^{366}\) Id. at 78.
\(^{367}\) Id.

http://open.mitchellhamline.edu/wmlr/vol36/iss4/10
he matched the description that they had been provided. The officers approached Cruz with their guns drawn and one of them ordered him to stop moving and put his hands in the air. After calling for the eye witnesses to be transported to the location of the stop, one of the officers began to question Cruz about his recent whereabouts and Cruz's subsequent claim that he was in a certain area buying drugs. Cruz was apparently crying at some point during the questioning—an officer asked him about it and he responded that he was crying because he was scared of having a gun pointed in his face. He was also described as "shaking and [acting] very upset throughout the conversation." Cruz was not physically restrained during the questioning, but there were at least six or seven officers on scene and the officers asking the questions "acknowledged that had Cruz tried to walk away, they would not have allowed him to leave . . . ." That fact, however, was never communicated to Cruz.

After a witness positively identified him as the shooter, Cruz was arrested. He was not provided with Miranda warnings until after his arrest.

Cruz was charged with second-degree murder in connection with the shooting and a suppression hearing was held in which the state trial court addressed the circumstances of his questioning. Specifically, Cruz argued that when he was questioned he was subjected to custodial interrogation without the benefit of Miranda warnings. As noted in the Second Circuit's opinion, the trial court rejected Cruz's assertion that he had been subjected to custodial interrogation, ruling instead that "the questioning was not an 'interrogation' but rather 'investigatory in nature,' since the 'police officers did not know whether they actually had the right person,' and the inquiry was 'prior to the time that the show up was conducted for the purpose of the identification.'" The trial court did not explicitly address or determine whether the circumstances of the questioning

368. See id.
369. Id.
370. See id.
371. Id.
372. Id.
373. Id.
374. Id. at 78-79.
375. Id. at 79.
376. Id.
377. See id.
378. Id.
379. Id.
were such that Cruz was in "custody" for *Miranda* purposes. Following a denial of his motion to suppress, the case went to trial where Cruz was convicted of first-degree manslaughter.

In the context of the federal habeas case, the Second Circuit upheld the conviction. In doing so, the court engaged in a lengthy discussion of the law of custodial interrogation and the Supreme Court jurisprudence that had developed that law. In the course of that discussion the Second Circuit referenced a handful of important points and issues that have arisen since the original *Miranda* decision was handed down. First, in its discussion of the original *Miranda* decision, the Second Circuit noted that the *Miranda* decision explicitly stated that it "was not intended to apply to 'general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process.'" This fact, the court wrote, "created a potential conflict that subsequent decisions have not entirely eliminated." This conflict arises from the fact that *Miranda* warnings are required whenever any person is "deprived [of] his freedom of action in any significant way" since "most people stopped by police on a street and asked questions would not feel free to leave," and "general on-the-scene questioning as to facts surrounding a crime" are exempted from the requirement of *Miranda* warnings. This conflict became "more troublesome," the Second Circuit noted, once the Supreme Court decided *Terry*, in which it permitted investigative detentions on less than probable cause but also "explicitly declined to decide the 'propriety of an investigative seizure...for purposes of...interrogation...'." In reviewing this issue, the *Cruz* court also acknowledged Justice White's concurring opinion in *Terry* in which he argued that "if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process."

The *Cruz* court next cited a few subsequent cases that it posited addressed the relationship between *Miranda* and *Terry*. The first

380. Id.
381. See id.
382. Id. at 78.
383. See id. at 80–87.
384. See id.
385. Id. at 81 (quoting *Miranda* v. Arizona, 384 U.S. 436, 477 (1966)).
386. Id.
387. Id.
388. Id. (quoting *Terry* v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
389. Id. at 81 n.3 (quoting *Terry*, 392 U.S. at 35 (White, J., concurring)).
390. See id. at 81–82.
case cited was *United States v. Brignoni-Ponce*, where the court found to contain the “implication” that *Miranda* warnings were not required when an immigration officer “question[ed] [a] driver and passengers about their citizenship and immigration status, and ... ask[ed] them to explain [the] suspicious circumstances” that led to their being stopped, even when those questions sought incriminating information that went directly to the crime being investigated. The court next referenced *Oregon v. Mathiason*, noting that in that case the Supreme Court “made it clear that *Miranda* warnings are not required simply because ‘the questioning took place in [either] a ‘coercive environment’” or in a non-public setting, and that a “noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a ‘coercive environment.’” According to the Second Circuit, the *Mathiason* decision found subsequent support in *California v. Beheler*, which held that “whether a suspect is ‘in custody’ for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” The *Cruz* court also addressed *United States v. Mendenhall*, noting that while the Supreme Court was developing a “freedom of movement” standard for the application of *Miranda* warnings, “it was [simultaneously] developing what appeared to be a similar ‘free to leave’ standard for determining when a seizure occurred for purposes of the Fourth Amendment.” *Mendenhall*, the Second Circuit noted, played a part in the development of that standard as it held that “a Fourth Amendment ‘seizure’ occurs ‘only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’

395. *Id.* at 82 (quoting *Mathiason*, 429 U.S. at 495).
399. *Cruz*, 255 F.3d at 82.
400. *Id.* (quoting *Mendenhall*, 446 U.S. at 554). The *Mendenhall* Court listed several factors that played a part in determining whether there had been a seizure, including “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be
After discussing the Terry-seizure and Miranda-custody standards, the Second Circuit next turned to Berkemer v. McCarty,\(^{401}\) in which the Supreme Court addressed the two situations in a single case.\(^{402}\) As noted above and by the Second Circuit in the Cruz decision, Berkemer held that “in a typical traffic stop, Miranda warnings are not required.”\(^{403}\) The Cruz court further noted the Berkemer Court’s holding that the “comparatively nonthreatening character of [Terry] detentions . . . explains the absence of any suggestion . . . that Terry stops are subject to the dictates of Miranda,”\(^{404}\) while at the same time recognizing that the Supreme Court simultaneously acknowledged that traffic stops that go beyond a certain duration “could present circumstances amounting to ‘custody.’”\(^{405}\) The analysis of Berkemer continued with the Cruz court once again turning to the Supreme Court’s holding in Brignoni-Ponce that “once [a] stop has been made, ‘the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.’”\(^{406}\) The Cruz court also recognized that there are some problems with the Berkemer test.\(^{407}\) Specifically, after noting that the Berkemer test asks “how a reasonable man in the suspect’s position would have understood his situation,”\(^{408}\) the Cruz court commented that:

[T]his cryptic reference to the suspect’s “situation” left it unclear whether the Court was applying the “freedom of movement” standard from custodial interrogation cases such as Mathiason and Beheler or the “free to leave” standard from Fourth Amendment seizure cases such as Mendenhall . . . or whether the two formulations are not meaningfully distinct.\(^{409}\)

In addressing the “cryptic reference” to the suspect’s situation, the Cruz court further stated that:

The opinion in Berkemer somewhat clarified what was meant by the “situation” by referring to “those types of situations in which the concerns that powered [Miranda] are

\(^{402}\) See Cruz, 255 F.3d at 82.
\(^{403}\) Id. (citing Berkemer, 468 U.S. at 439).
\(^{404}\) Id. (citing Berkemer, 468 U.S. at 440).
\(^{405}\) Id. at 83 (citing Berkemer, 468 U.S. at 441 n.34).
\(^{406}\) Id. (quoting Berkemer, 468 U.S. at 439) (emphasis in Cruz decision).
\(^{407}\) See id. at 83.
\(^{408}\) Id. (quoting Berkemer, 468 U.S. at 442).
\(^{409}\) Id.
implicated.” “Thus we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.”

According to the Second Circuit’s reading of Berkemer, relevant circumstances include the length of a detention, the public nature of the detention, and the number of law enforcement officers on scene during the seizure.

Noting the Supreme Court’s acknowledgement in Oregon v. Elstad that “the task of defining ‘custody’ is a slippery one,” the Cruz court then chose to “make some examination of how the federal courts of appeals have analyzed the issue of custody for Miranda purposes” to ascertain “the considerations that these courts have considered relevant.” This examination included references to United States v. Leshuk, the Sixth Circuit’s decision in United States v. Salvo, and the Ninth Circuit’s decision in United States v. Booth, in which the Ninth Circuit held that the relevant inquiry is “whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.” The Cruz court next addressed its own decision in United States v. Ali, recognizing that Ali incorrectly “placed considerable weight on whether the suspect feels ‘free to leave’ without acknowledging that in all Terry stops (and traffic stops), the suspect does not feel free to leave, at least not while the permitted (brief) questioning is occurring.” The Cruz court further cited another of its own decisions—United States v. Morales—recognizing the holding in that case to be that “custody itself does not necessarily require Miranda warnings: ‘Only questioning that reflects a measure of compulsion above and beyond that inherent in custody itself constitutes interrogation the fruits of which may be received in evidence only after Miranda

410. Id. (citations omitted).
411. See id. at 83–84.
413. Id. at 309.
414. Cruz, 255 F.3d at 85.
415. Id. at 85.
416. 65 F.3d 1105 (4th Cir. 1995).
417. 133 F.3d 943 (6th Cir. 1998).
418. 669 F.2d 1231 (9th Cir. 1981).
419. Id. at 1235 (emphasis in Cruz decision).
420. 68 F.3d 1468 (2d Cir. 1996).
422. 834 F.2d 35 (2d Cir. 1987).
warnings have been given.\footnote{Cruz, 255 F.3d at 85 (quoting Morales, 834 F.2d at 38).}

In concluding its discussion of the issue, the Cruz court determined that given the "the Supreme Court's lack of clear guidance on the issue [of the interplay of Miranda and Terry] in the context of sidewalk questioning,"\footnote{Id. at 85–86.} the state court was not unreasonable in its application of the law to Cruz's situation. While the court noted that "some of the circumstances admittedly point toward custody,"\footnote{Id. at 86.} including the drawing of weapons, ordering Cruz not to move and to raise his hands, frisking him, and radioing for other officers to bring witnesses to the scene for identification, it concluded that the situation was such that the officers were reasonable in taking measures to protect themselves from unknown but reasonably suspected dangers.\footnote{Id.} The court further noted that the statements that Cruz tried to suppress "were made after very brief questioning of the sort that could reasonably be thought not to make the suspect feel that he was about to be held for a prolonged period of time"\footnote{Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).} and were of the type that would assist in "confirming or dispelling the officer's suspicions" about Cruz's activities.\footnote{Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984))).}

In summary, while not explicitly rejecting the reasoning and decision in Ali, the Cruz court at the very least noted that there was room for disagreement with that decision and that there are some circumstances in which Miranda warnings are not required—notwithstanding the existence of what was arguably substantial coercion in the effectuation of the Terry stop. It further noted, at least impliedly, that there is a split on the issue of what test to apply for determining Miranda custody within the Second Circuit as well.

2. The Seventh Circuit

The Artiles-Martin court referenced the Seventh Circuit's decision in United States v. Smith as standing for the proposition that coercive Terry stops require Miranda warnings.\footnote{See United States v. Artiles-Martin, No. 5:08-CR-14-Oc-10GRJ, 2008 WL 2600787, at *11 n.38 (M.D. Fla. June 30, 2008).} Smith, like many of the other Terry-Miranda cases addressed by the courts, was a narcotics prosecution of a group of multiple defendants.\footnote{See United States v. Smith, 3 F.3d 1088, 1090 (7th Cir. 1993).} Law enforcement first
became aware of Smith and his co-defendants when a motel clerk reported that they appeared to be involved in drug-related activity. During a subsequent investigation, law enforcement discovered evidence which led them to believe that drug-related offenses were being committed, including: information regarding significant foot traffic going to and from the defendants' rooms, the defendants' rooms being paid for in a suspicious manner, one defendant being seen with a large sum of cash and cocaine residue, and a possible drug ledger being found in trash discarded from the room. After a period of time, law enforcement received word that the defendants had checked out of the motel, had called for a taxi, and were on their way to the bus station, apparently to leave town. In order to prevent them from leaving the area, officers stopped the taxicab. During the course of that stop officers ordered the defendants out of the vehicle, conducted a pat-search of each defendant, and handcuffed at least two of the three before ordering them to sit on the ground. It was also reported that at least one of the officers may have had a gun drawn and held at his side. The officers also outnumbered the suspects. Finally, during the encounter the officers asked each of the defendants questions about who owned various bags within the taxi and asked one of the defendants if he recognized one of the officers from the motel. At least two of the three admitted owning some property within the taxi. Following a search of the luggage, a significant amount of cocaine was found to be in the defendants' possession.

In Smith, the Seventh Circuit addressed what it termed to be the "complex problem" of deciding whether the Terry stop at issue "required safeguards protecting the familiar Fifth and Sixth Amendment rights articulated in Miranda v. Arizona." Prior to addressing the issue in full, the court noted the difficulty associated with the issue of Miranda and Terry and that "the line between a lawful Terry stop and

431. Id. at 1091.
432. See id. at 1091–92.
433. See id. at 1092.
434. Id.
435. See id. at 1092–93.
436. Id. at 1092.
437. Id.
438. See id. at 1093.
439. See id.
440. See id.
441. Id. at 1090.
an unlawful arrest is not bright." 442

After discussing the general legal standards governing Terry stops, the court determined that the officers had reasonable suspicion to justify the stop and that the degree and duration of the restraints employed, including the use of handcuffs, were also reasonable. 443

That conclusion, however, did not end the inquiry. At the trial level, the district court had held that the defendants' rights under Miranda were not violated because they were not in custody when they made these statements. 444 The Seventh Circuit, however, disagreed, noting that any "inquiry into the circumstances of temporary detention for a Fifth and Sixth Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop." 445 That focus, the court wrote, "is much narrower" 446 since "[t]he number of relevant factors is severely limited" 447 and "[p]olice officers have much less discretion than in Fourth Amendment cases." 448 The reason for the different treatment of the Fourth and Fifth Amendment analyses, the court held, was the difference in the rights protected by each. 449 It wrote:

The purpose of permitting a temporary detention without probable cause or a warrant is to protect police officers and the general public.

The purpose of the Miranda rule, however, is not to protect the police or the public. "[T]he basis for [the] decision was the need to protect the fairness of the trial . . . ." and "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." 450

Thus the court proceeded to analyze the case to determine whether the defendants, though lawfully detained under Terry, were in custody for Miranda purposes. 451

In conducting that analysis, the Seventh Circuit set forth its test for determining whether a person is in custody for Miranda purposes.

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442. Id. at 1095 (quoting United States v. Glenna, 878 F.2d 967, 971 (7th Cir. 1989)).
443. See id. at 1095–96.
444. Id. at 1096 (citation omitted).
445. Id.
446. Id. at 1097.
447. Id.
448. Id.
449. See id.
450. Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 240–41 (1973)).
451. See id.
Referencing Berkemer and Beheler, the court determined that the appropriate question to ask is whether a suspect was deprived of his action in any significant way while at the same time taking into account whether the suspect’s freedom of action was curtailed to a degree associated with formal arrest. In terms of the Smith case, after applying that standard the court determined that the defendant “was not free to go anywhere” and that “[h]is movement was curtailed as if he were handcuffed to a chair in a detective’s office or placed in a holding pen in a station house or put behind bars.” As such, the court continued, “[w]e have no difficulty in concluding that [the defendant-appellant’s] freedom of action was curtailed in a very significant way.” In support of its factual conclusion, the court referenced other cases that had reached similar results.

Finally, any review of Smith must necessarily include a look at one particular statement in the opinion. In the middle of the court’s decision it writes that “Berkemer . . . underscores that Fifth and Sixth Amendment rights are implicated before a defendant has been arrested.” While one could read this statement to mean that the court is referring to the fact that Miranda can come into play before a formal arrest has taken place if the context of the detention has transformed into a de facto arrest, the more logical interpretation of this statement, based on the remainder of the opinion, is that the Seventh Circuit reads Berkemer to mean that Miranda custody is a separate and distinct inquiry from any analysis of Fourth Amendment custody.

3. The Ninth Circuit

The Ninth Circuit decision that has been associated with the view “that a coercive Terry stop requires warnings but still is deemed a valid Terry stop” is United States v. Kim. Kim was a government appeal of

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452. See id.
453. Id.
454. Id.
455. Specifically, the court referenced United States v. Henley, 984 F.2d 1040 (9th Cir. 1993), in which the Ninth Circuit “held that when a suspect, who had not yet been formally arrested, was handcuffed and placed in the back of a police car, he was in custody for Miranda purposes.” Smith, 3 F.3d at 1098 (citing Henley, 984 F.2d at 1042). The Seventh Circuit also noted that a similar conclusion was reached in United States v. Sangineto-Miranda, 859 F.2d 1501, 1515 (6th Cir. 1988)). Id.
456. Id. at 1097.
458. 292 F.3d 969 (9th Cir. 2002).
a district court's order suppressing incriminating statements made by defendant Kim during the execution of a search warrant at a store that she owned. After hearing the evidence, the district court granted the motion to suppress on the ground that Kim was in custody for Miranda purposes and therefore entitled to Miranda warnings before questioning.

The case began with the execution of a search warrant at a deli owned by Kim. Law enforcement had received information that she was selling large amounts of pseudoephedrine, a precursor chemical in the production of methamphetamine, despite having been warned against such sales. Kim was not present at the store when officers first began the search, but arrived as it was being executed. At the time of her arrival, her son was inside the store and was being detained by DEA agents. Kim was allowed to enter the store but her husband was kept out and the door was locked from the inside behind her. Agents later told Kim that she was not to speak in Korean (her son was still in the store but had been told not to speak with his mother) and there was testimony that one of the agents even told her to "shut up" at some point. After a period of time, a detective began to question Kim though she was not provided with Miranda warnings before the questioning began. Kim was not handcuffed during questioning, but she did have multiple officers standing around her at the time. Kim was questioned for approximately thirty minutes before an interpreter arrived, and for between fifteen and twenty minutes afterwards. The facts were in dispute as to whether Kim was told that she was not under arrest and was free to leave and whether she was positioned in such a way that she could have left the area if she chose to do so. During the interview Kim admitted to being involved in the large-scale sale of pseudoephedrine. Kim was not arrested at the scene, but was later indicted and, as noted above, filed

459. Id. at 971.
460. See id.
461. See id.
462. Id.
463. Id.
464. See id.
465. Id.
466. See id.
467. See id. at 971–72.
468. Id. at 972.
469. Id.
470. See id.
471. See id.
and successfully argued a motion to suppress her statements.\textsuperscript{472}

On appeal, the Ninth Circuit affirmed the lower court’s ruling finding Kim was in custody for \textit{Miranda} purposes when she made the incriminating statements at issue.\textsuperscript{473} The test set forth in the \textit{Kim} opinion included a number of elements. First, the court noted that it needed to first examine “all of the circumstances surrounding the interrogation”\textsuperscript{474} to determine “whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”\textsuperscript{475} The inquiry, the court noted, is an objective one, and involves a determination of “whether ‘the officers established a setting from which a reasonable person would believe that he or she was not free to leave.’”\textsuperscript{476} The court also provided what it stated was a non-exhaustive list of factors that were potentially relevant to the required determination.\textsuperscript{477} Based on its application of the referenced test and factors for consideration, the Ninth Circuit affirmed the district court’s order of suppression.\textsuperscript{478}

An obvious issue in the case was the fact that Kim went to the store on her own and voluntarily entered the store knowing that law enforcement officers were present inside. In its discussion of that issue, the court noted that there is precedent in support of the view that voluntarily entering a location where law enforcement is present is a factor that goes against a finding of custody.\textsuperscript{479} In this regard the Ninth Circuit noted that both \textit{Beheler} and \textit{Mathiason}—cases in which defendants voluntarily went to a police location and after answering questions were allowed to leave—found that the interviewees were not in \textit{Miranda} custody despite being questioned in a police station.\textsuperscript{480} Despite this precedent, however, the court distinguished Kim’s situation because, it found, her entry into her store was not with the intent to voluntarily speak with law enforcement, but instead was to

\begin{itemize}
\item \textsuperscript{472} \textit{Id.}
\item \textsuperscript{473} \textit{Id.} at 971.
\item \textsuperscript{474} \textit{Id.} at 973.
\item \textsuperscript{475} \textit{Id.} (quoting \textit{Stansbury v. California}, 511 U.S. 318, 322 (1994)).
\item \textsuperscript{476} \textit{Id.} at 973–74 (quoting \textit{United States v. Beraun-Panez}, 812 F.2d 578, 580 (9th Cir. 1987) modified, 830 F.2d 127 (9th Cir. 1987)).
\item \textsuperscript{477} See \textit{id.} at 974. The list of factors, which came from \textit{United States v. Hayden}, 260 F.3d 1062, 1066 (9th Cir. 2001), included the language used to summon the detainee, the extent to which the person was confronted with evidence of guilt, the physical location, surroundings, length of the interview, and the amount of pressure applied to the detained individual. \textit{Id.}
\item \textsuperscript{478} \textit{Id.}
\item \textsuperscript{479} See \textit{id.}
\item \textsuperscript{480} \textit{Id.}
\end{itemize}
check on her son’s welfare.\textsuperscript{481} The court wrote:

If the police ask—not order—someone to speak to them and that person comes to the police station, voluntarily, precisely to do so, the individual is likely to expect that he can end the encounter. By contrast, someone who comes to her own store with no intention of submitting to questioning is not likely to harbor the same understanding once police interrogation nonetheless begins—especially if, as here, she is ordered to shut up, seated in isolation away from two other family members, and then questioned.\textsuperscript{482}

Finally, the court addressed two cases from other courts—one of which was cited by the government in support of its assertion that Kim was not in custody and therefore was not entitled to 

\textit{Miranda} warnings—that arguably provided contrary authority.\textsuperscript{483} In doing so, the court distinguished both cases and held that they did not warrant a different result in \textit{Kim}.\textsuperscript{484} The first case, \textit{United States v. Crawford},\textsuperscript{485} which is addressed in more detail below, was distinguished both on the facts of that case—the \textit{Kim} court found that the situation in \textit{Crawford} was not nearly as coercive as Kim’s detention—and on the fact that in that case the Fifth Circuit applied a more deferential standard of review than that applied in \textit{Kim}.\textsuperscript{486} The second case, the Supreme Court’s decision in \textit{Michigan v. Summers},\textsuperscript{487} was distinguished based on the fact that in that case law enforcement did not interrogate the suspect.\textsuperscript{488} And in doing so, the \textit{Kim} court noted once again that “whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is ‘in custody’ for \textit{Miranda} purposes are two different issues.”\textsuperscript{489}

The Ninth Circuit’s decision in \textit{Kim} was not unanimous. Specifically, there is a dissenting opinion in \textit{Kim} that plainly sides with those courts that have taken the position that \textit{Miranda} warnings need not be given during a non-arrest \textit{Terry} detention, even if that detention has some coercive aspects to it.\textsuperscript{490} The dissent disagreed with the majori-

\begin{thebibliography}{99}
\bibitem{481} See id.
\bibitem{482} Id. at 974–75.
\bibitem{483} See id. at 975–76.
\bibitem{484} See id. at 975–77.
\bibitem{485} 52 F.3d 1303 (5th Cir. 1995).
\bibitem{486} See \textit{Kim}, 292 F.3d at 975–76.
\bibitem{487} 452 U.S. 692 (1981).
\bibitem{488} See \textit{Kim}, 292 F.3d at 976.
\bibitem{489} Id.
\bibitem{490} See id. at 978–82 (O’Scannlain, J., dissenting).
\end{thebibliography}
ty's determination that defendant Kim was in *Miranda* custody when questioned by law enforcement.\textsuperscript{491} The dissent began by noting that "an officer's obligation to give the traditional *Miranda* warning to a suspect applies only to custodial interrogation,"\textsuperscript{492} which, it wrote, means that a court must determine "whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."\textsuperscript{493} Noting that this determination should be made by applying an objective standard to avoid "imposing upon police officers the often impossible burden of predicting whether the person they question, because of characteristics peculiar to him, believes himself to be restrained,"\textsuperscript{494} the dissent characterized the appropriate test for determining whether a *Terry* detention has become *Miranda* custody as "whether, based upon a review of all the pertinent facts, 'a reasonable innocent person in such circumstances would conclude that after brief questioning [she] would not be free to leave.'"\textsuperscript{495} In support of its position, and in support of the view that *Miranda* warnings are not required simply because a detention has a coercive aspect to it, the dissent referenced a handful of what it found to be helpful cases. One such case was *Crawford*, the decision from the Fifth Circuit distinguished by the *Kim* majority.\textsuperscript{496} In describing the rather coercive circumstances involved in that case and the Fifth Circuit's ultimate holding that the coercive interrogation did not rise to the level of *Miranda* custody, the *Kim* dissent noted first that *Crawford* involved the detention of two suspects during the execution of a search warrant in the suspects' electronics store.\textsuperscript{497} In *Crawford* the officers executing the search warrant "did not tell defendants that they were or were not free to leave, the defendants... could not

\begin{enumerate}
\item \textsuperscript{491} *Id.* at 978.
\item \textsuperscript{492} *Id.*
\item \textsuperscript{493} *Id.* (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)).
\item \textsuperscript{494} *Id.* (quoting United States v. Beraun-Panez, 812 F.2d 578, 581 (9th Cir. 1987)).
\item \textsuperscript{495} *Id.* (quoting United States v. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981)).
\item The dissent also referenced United States v. Mendenhall, 446 U.S. 544 (1980), and listed certain factors that can be taken into account to determine whether a person is in *Miranda* custody. See *Kim*, 292 F.3d at 978. It stated:
Factors that... should [be] consider[ed] in determining whether a person was in custody include: (1) the language used to summon the individual, (2) the extent to which the defendant is confronted with evidence of guilt, (3) the physical surroundings of the interrogation, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual. *Id.* (citing United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001)).
\item \textsuperscript{496} *Id.* at 979 n.1.
\item \textsuperscript{497} *Id.*
\end{enumerate}
move around the store without being accompanied by an agent and could not be in each other's presence, and one defendant . . . was . . . 'sandwiched between two men at all times.' Given these facts, the Kim dissent argued that "Crawford's 'factual differences' from [Kim] actually make the situation there more coercive," and yet "[d]espite Crawford's coercive aspects . . . the Fifth Circuit held that they did not constitute a custodial situation for Miranda purposes." The dissent also referenced Oregon v. Mathiason, which once again held that "a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that . . . the questioning took place in a 'coercive environment' because all police interviews, simply by their very nature, have some coercive aspects to them.

With these cases serving as a guide, the Kim dissent contended that while there may have been some coercive elements to Kim's detention, in the end it was a Terry detention only and not an arrest or a restraint on freedom to the degree associated with an arrest and Miranda warnings were therefore not necessary. Specifically, the dissent concluded that "[w]hile the interview lasted about 90 minutes, the police did not summon Kim, she was not confronted with evidence of her guilt, she was in familiar surroundings, and the degree of pressure applied to detain her was minimal"—a factual conclusion that was obviously far different from that of the majority.

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498. United States v. Crawford, 52 F.3d 1303, 1307-09 (5th Cir. 1995); see also Kim, 292 F.3d at 979 n.1 (O'Scannlain, J., dissenting) (citations omitted).
499. Crawford, 52 F.3d at 1308; see also Kim, 292 F.3d at 979 n.1.
500. Kim, 292 F.3d at 979 n.1.
502. Id. at 495. In a portion of the Mathiason opinion not quoted by the Kim dissent but associated with the above declaration, the Supreme Court continued: But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.
503. See Kim, 292 F.3d at 981 (O'Scannlain, J., dissenting).
504. Id.
4. The Tenth Circuit

The Tenth Circuit case referenced by the Artiles-Martin court as standing for the proposition that coercive Terry stops require Miranda warnings is United States v. Perdue. Factually, Perdue presents a fairly coercive scenario. Perdue was contacted while law enforcement officers in Jefferson County, Kansas were executing a search warrant on a piece of property in a very rural part of the county. During the search of a building located on the property, law enforcement found approximately five hundred marijuana plants, scales, packaging materials, firearms, and ammunition. While the search warrant was being executed, Perdue and his pregnant girlfriend were seen driving their vehicle onto the property toward the building and then quickly turning around upon seeing law enforcement. Two police officers stopped Perdue's escape, approached the vehicle with weapons drawn, and ordered Perdue and his girlfriend to get out of the car and lie face down on the ground. The record was unclear, but the Tenth Circuit noted that handcuffs may have been used as well. While Perdue was lying on the ground and while the officers' weapons were still drawn, he was asked about his reason for being there. In response, Perdue told the officers that he was there to check on his "stuff" and that his "stuff" was the marijuana that those executing the search warrant had found. Based in part on his admissions, Perdue was charged, tried, and convicted of possession of marijuana with intent to distribute and use of a firearm in relation to a drug trafficking offense. During the prosecution Perdue filed a motion to suppress the referenced statements, but that motion was denied.

On appeal, the Tenth Circuit reversed Perdue's conviction on the ground that his statements were improperly admitted and remanded the case for a new trial. In doing so the court addressed the interplay between Miranda and Terry and the need for Miranda warnings during lawful Terry stops. The Perdue court began its analysis

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505. 8 F.3d 1455 (10th Cir. 1993).
506. Id. at 1458.
507. Id.
508. Id.
509. Id.
510. See id.
511. Id. at 1459.
512. See id.
514. See id. at 1460.
515. See id. at 1470.
by noting that, in its view, “a suspect can be placed in police ‘custody’ for purposes of Miranda before he has been ‘arrested’ in the Fourth Amendment sense.” The test cited by the court is a combination of those set forth in Miranda, Beheler, and Berkemer. Specifically, the Perdue court wrote:

The Supreme Court has instructed that a person has been taken into police custody whenever he “has been deprived of his freedom of action in any significant way.” The Court has also stated that the safeguards prescribed by Miranda become applicable as soon as a suspect’s freedom of action is curtailed to a “degree associated with formal arrest.” The only relevant inquiry is “how a reasonable man in the suspect’s position would have understood his situation.”

In addressing the specific interplay between Terry and Miranda, the Perdue court first noted that “[t]he traditional view . . . is that Miranda warnings are simply not implicated in the context of a valid Terry stop.” The reason for this traditional view, the court stated, is that in terms of Terry-type stops,

the typical police-citizen encounter . . . usually involves . . . a very brief detention without the aid of weapons or handcuffs, a few questions relating to identity and the suspicious circumstances, and an atmosphere that is “substantially less ‘police dominated’ than that surrounding the . . . interrogation at issue in Miranda.”

Thus, the court continued, “historically, the maximum level of force permissible in a standard Terry stop fell short of placing the suspect in ‘custody’ for purposes of triggering Miranda.” The Perdue court next noted that since the Supreme Court’s decision in Terry, however, the landscape had changed and increasing degrees of coercion had become acceptable in the realm of a Terry stop. It wrote:

The last decade, however, has witnessed a multifaceted expansion of Terry. Important for our purposes is the trend granting officers greater latitude in using force in order to “neutralize” potentially dangerous suspects during an investigatory detention. As discussed in our Fourth Amendment

516. Id. at 1463–64.
517. Id. at 1463 (citations omitted).
518. Id. at 1464 (citing United States v. Streifel, 781 F.2d 953, 958 (1st Cir. 1986); United States v. McGauley, 786 F.2d 888, 891 (8th Cir. 1986); United States v. Jones, 543 F.2d 1171 (5th Cir. 1976); United States v. Hickman, 523 F.2d 323 (9th Cir. 1975)).
519. Id. (quoting United States v. Berkemer, 468 U.S. 420, 439 (1984)).
520. Id.
analysis, when circumstances reasonably indicate that the suspects are armed and dangerous, courts have been willing to rely on the “officer safety” rationale of Terry and authorize the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons, and other measures of force more traditionally associated with the concepts of “custody” and “arrest” than with “brief investigatory detention.” Thus, today, consonant with this trend, we held that police officers acted reasonably under the Fourth Amendment when they, without probable cause and with guns drawn, stopped Mr. Perdue’s car, forced him to get out of his car, and demanded that he lie face down on the ground.\(^{521}\)

Despite its holding that the Terry stop in Perdue was reasonable and therefore lawful, the Tenth Circuit nevertheless held that for Miranda purposes a custodial situation had been created. In this regard the court noted that “[o]ne cannot ignore the conclusion, however, that by employing an amount of force that reached the boundary line between a permissible Terry stop and an unconstitutional arrest, the officers created the ‘custodial’ situation envisioned by Miranda and its progeny.”\(^{522}\) Given this holding the court next addressed the Berkemer reasonable-person test in the context of the facts of Perdue’s detention. Noting that the appropriate test was to determine “how a reasonable man in the suspect’s position would have understood his situation,”\(^{523}\) the court concluded that “[a] reasonable man in Mr. Perdue’s position could not have misunderstood the fact that if he did not immediately cooperate, his life would be in danger” and “would have felt ‘completely at the mercy of the police,’”\(^{524}\) and therefore “as a matter of law that Mr. Perdue was in police custody during the initial questioning by Officer Carreno.”

Thus the court seemingly applied the aforementioned test by looking at how a reasonable person in the detainee’s position would view his or her safety and whether or not refusing to cooperate with law enforcement was an option.

In its opinion the Perdue court relied heavily on Berkemer and spent a good portion of the opinion addressing the holdings of that decision. Using Berkemer as a basis for its own holding, the Tenth Circuit noted that while Berkemer “held that Miranda warnings are not

\(^{521}\) Id.

\(^{522}\) Id.

\(^{523}\) Id. at 1465 (quoting Berkemer, 468 U.S. at 442).

\(^{524}\) Id. (quoting Berkemer, 468 U.S. at 438).
required during a routine traffic stop,\(^5\) it also "explicitly refused to adopt a bright-line rule proffered by the government which would have made \textit{Miranda} inapplicable in all police-citizen encounters that do not rise to the level of a Fourth Amendment arrest."\(^6\) It further noted that \textit{Berkemer} had specifically singled out two facts of importance in determining whether a routine stop had become \textit{Miranda} custody—the length of a stop and whether the stop was conducted in a public area.\(^7\) Based on these two factors, the Tenth Circuit again held that Perdue was in \textit{Miranda} custody for the reason that his detention "present[ed] the precise scenario envisioned by the \textit{Berkemer} Court when it indicated that \textit{Miranda} warnings might be implicated in certain highly intrusive, 'non-arrest' encounters."\(^8\)

Finally, the court noted that a "growing number of courts . . . have recognized that \textit{Miranda} rights can be implicated during a valid \textit{Terry} stop,"\(^9\) and given that fact, law enforcement officers would need to be ready to make a determination of whether a given situation required \textit{Miranda} warnings. Specifically, the court held that "[p]olice officers must make a choice—if they are going to take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising them of their constitutional rights."\(^10\)

\textit{D. The Eleventh Circuit's Purported Abstention}

\textit{Artiles-Martin}\(^11\) was decided by the U.S. District Court for the Middle District of Florida, which is part of the Eleventh Circuit. After recognizing the existence of the circuit split that is the subject of this article and the differing points of view that make up the split, the \textit{Artiles-Martin} court noted that "the Eleventh Circuit has not expressly adopted either view."\(^12\) According to the \textit{Artiles-Martin} decision, the closest that the Eleventh Circuit had come to taking sides was its 2004

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at} 1466.
\item \textit{Id.}
\item \textit{Id. at} 1465 (citing United States v. Smith, 3 F.3d 1088 (7th Cir. 1993); United States v. Elias, 832 F.2d 24 (3rd Cir. 1987); United States v. Bautista, 684 F.2d 1286, 1291 (9th Cir. 1982) ("Miranda warnings are necessary even during a Terry stop if the suspect has been taken into custody or if the questioning otherwise takes place in a police dominated or compelling atmosphere.").
\item \textit{Id. at} 1466.
\item \textit{Id. at} *11.
\end{enumerate}
decision in United States v. Acosta. As the Artiles-Martin court read the Acosta decision, that opinion “distinguished Perdue and focused on the nature and level of restraint that the defendant was subjected to during the Terry stop.”

Acosta involved the stop of a person known to be involved in money laundering. Specifically, agents from the United States Customs Service High Intensity Drug Trafficking Area Group (HIDTA) received word from an undercover officer that Acosta was going to be involved in the delivery of a large amount of cash as part of a money laundering operation. After conducting surveillance for a period of time, agents stopped Acosta’s vehicle and detained him. This detention was accomplished by a group of “five or six officers . . . [a]t least one [of which] had his gun drawn, [though] all of the officer’s [sic] guns were re-holstered within ten-seconds [sic].” Acosta was also told that he was not under arrest but that agents wanted to speak with him. He was also frisked for weapons. During the ensuing conversation, Acosta eventually gave consent to search his vehicle, admitted that he had a large amount of cash inside, and admitted ownership of a duffle bag that was later found to contain additional cash and heroin. It was not until after the heroin was discovered that Acosta was given Miranda warnings and arrested.

On the issues of Terry and Miranda, the Acosta decision was divided into two sections. The first section addressed solely Terry and concluded that the stop at issue was a lawful investigative detention. In its discussion of that point, the court noted that when determining whether a particular stop is a lawful Terry stop or is a detention that has transformed into a de facto arrest that must be supported by probable cause, a court should look at “four non-exclusive factors.” The list of factors put forth by the court included “the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the

533. See id. (citing United States v. Acosta, 363 F.3d 1141 (11th Cir. 2004)).
534. Id.
535. Id., 363 F.3d at 1142.
536. Id. at 1143.
537. Id.
538. Id.
539. Id.
540. Id.
541. See id.
542. See id. at 1145–48.
543. Id. at 1146.
detention, and the duration of the detention. 544 In its Terry discussion, the Eleventh Circuit noted a few other important concepts. First, the court addressed the fact that questioning that is non-custodial for Miranda purposes is an important part of a Terry investigation. Citing another opinion, the court wrote:

A Terry stop is justified to give the police an opportunity to engage in brief and nonintrusive investigation techniques, such as noncustodial questioning of the detained person. . . . [However,] the police [may not] use an investigative stop to subject a suspect to custodial interrogation that would ordinarily require formal arrest and Miranda warnings. 545

In other words, the Acosta court recognized that a lawful Terry stop can include the questioning of a suspect who is detained and not free to leave without the need for Miranda warnings, so long as the situation does not rise to the level of "custodial interrogation." 546 The court also noted its position that "[w]hile restriction on freedom of movement is a factor to be taken into account in determining whether a person is under arrest, it alone is not sufficient to transform a Terry stop into a de facto arrest." 547 And, finally, the court also recognized the uniqueness of the Terry investigative detention in that "the very nature of a Terry stop includes stopping a suspect from leaving," 548 and that "an investigatory stop is not an arrest despite the fact that a reasonable person would not believe he was free to leave." 549

The second portion of the opinion that is relevant to the interplay between Terry and Miranda addressed the concept of Miranda custody. With respect to the court's opinion, it should first be noted that the Acosta court very clearly recognized that whether a person is in custody for Miranda purposes is a separate and distinct inquiry from whether a person has been subjected to a Terry detention or a de facto arrest. 550 In doing so (and despite distinguishing Perdue, 551 as was noted by Artiles-Martín) the Acosta court seemingly left open the possibility that there might be some cases in which Miranda warnings would be required in a pre-arrest, investigative detention situation. Specifically, Acosta wrote that the stop and questioning at issue in the

544. Id. (quoting United States v. Gil, 204 F.3d 1347, 1351 (11th Cir. 2000)).
545. Id. (quoting United States v. Hardy, 855 F.2d 753, 759 (11th Cir. 1988)).
546. See id.
547. Id. at 1147.
548. Id.
549. Id. (quoting United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995)).
550. Id. at 1148.
551. Id. at 1150.
case before it "did not involve the type of 'highly intrusive' coercive atmosphere that may require Miranda warnings even before a formal arrest is made." Miranda warnings would be required, Acosta concluded, when "a reasonable person in [the detainee's] position would . . . have believed that he was utterly at the mercy of the police, away from the protection of any public scrutiny, and had better confess, or else." In short, the Eleventh Circuit's position on the issue of the ability of officers to use at least some coercion in Terry stops without converting the stops into Miranda custody contemplated the possibility that Miranda warnings may be required if the atmosphere surrounding the stop is a "'highly intrusive' coercive" one, but simultaneously recognized that coercion not reaching the level of "highly intrusive" that does not leave the detainee believing that he or she is "utterly at the mercy of police . . . and had better confess or else" will not necessitate the furnishing of Miranda warnings to a suspect during a Terry stop.

In its discussion of Miranda, the Acosta opinion made additional statements of importance. First and foremost—and contrary to a number of other cases that have addressed the issue—the Acosta court recognized the incompatibility of the Teny investigative detention and the Thompson reasonable-person test. It wrote:

Normally courts apply a two-part test to determine whether a suspect is in custody for Miranda purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." As we have already discussed, a suspect who is detained during a Terry stop is not free to leave from the beginning of the stop until it ends. If we applied the general Miranda custodial test literally to Terry stops, the result would be that Miranda warnings are required before any questioning could occur during any Terry stop.

The Acosta court found support for this position in Berkemer, which again held that McCarty was not in custody despite it being very clear that he was not going to be permitted to leave until law enforcement had completed its investigation for possible driving under

552. Id.
553. Id.
554. See id.
555. Id. at 1148.
556. Id. (citation omitted).
the influence. The Acosta court noted:

The guidance the Berkemer decision provides stems from the fact that traffic stops, like Terry stops generally, are indeed stops. A reasonable person knows that he is not free to drive away from a traffic stop until it is completed, just as a reasonable person knows that he is not free to walk away from a Terry stop until it is over. If the lack of freedom to leave were decisive, which is to say if every phrase in the Miranda opinion is to be applied literally, then all traffic stops as well as all Terry stops generally would be subject to the requirements of that decision. Berkemer establishes that they are not.

Despite referencing and reverencing Berkemer, however, Acosta nevertheless did not follow Berkemer in the sense that it did not adopt the traditional Berkemer test for determining Miranda custody, but rather adopted its own test, which asks whether "a reasonable person in [the detainee's] position would . . . have believed that he was utterly at the mercy of the police, away from the protection of any public scrutiny, and had better confess, or else." In reviewing Acosta it should be noted that, at least to some degree, courts within the Eleventh Circuit have not quite known how to interpret it, and in fact have read that decision in different ways. For example, at least one district court in the Eleventh Circuit has read Acosta, in conjunction with the Eighth Circuit's decision in Pelayo-Ruelas, to mean that "[n]o Miranda warnings are required to legitimize a Terry stop, even though the suspect is not free to leave during the brief detention." Artiles-Martin did not quite go that far, but instead noted that the Eleventh Circuit apparently had not yet taken a position on the circuit split at issue in this article. Regardless of how one reads Acosta and the court's intentions, the Artiles-Martin court appears to be correct when it noted that in terms of the circuit split at issue "the Eleventh Circuit has not expressly adopted either view." One thing that does appear to be clear from the decision, however, is

557. Id. at 1148–49 (citing Berkemer v. McCarty, 468 U.S. 420 (1984)).
558. Id. at 1149.
559. Id. at 1150.
560. United States v. Middleton, No. CRIM.A. CR205-025, 2006 WL 156872, at *3 (S.D. Ga. Jan. 19, 2006) (focusing not on whether there was any coercion in the course of the stop at issue, but on the fact that the investigating officer's questions to the defendant were limited in time and scope).
562. Id. at *11.
that the Eleventh Circuit presents yet another test for determining when *Miranda* warnings are required in situations not involving a formal arrest—a test that appears far more restrictive than simply determining whether or not a reasonable person would have felt free to terminate a *Terry* stop and leave.

### E. The Remaining Federal Circuits: The Third, Fifth, Sixth, and D.C. Circuits

The remaining federal circuits have each weighed in to one degree or another on the interplay between *Terry* and *Miranda*, though not as strongly as the aforementioned circuits. That said, their views are an important part of a complete discussion of the issue.

#### 1. The Third Circuit

Although not listed on either side of the circuit split, the Third Circuit has addressed what constitutes *Miranda* custody in at least one case. Even though that case does not involve a *Terry* stop, a review of the case is nevertheless useful. *United States v. Jacobs* involved an interview of a former paid FBI informant at a local FBI office. Specifically, law enforcement received information that Jacobs, who had been working as an informant for a number of years, was involved in the transportation of cocaine from Los Angeles, California, to Wilmington, Delaware. When asked about the allegations, Jacobs initially denied any involvement. Later, she was asked to go to the Wilmington FBI office where she was confronted about her involvement by her handler. She was questioned by him in private, and during the conversation she was shown some suitcases that had been used by her co-conspirators during a recent drug run. She was also confronted about inconsistencies or untruths in her version of events. At no time was she given *Miranda* warnings. She was allowed to leave after her interview and later gave officers some evidence of the conspiracy that had been in her home.

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563. 431 F.3d 99 (3rd Cir. 2005).
564. *Id.* at 103.
565. *Id.*
566. *Id.*
567. *Id.* at 103–04.
568. *Id.*
569. *Id.*
570. *Id.* at 104.
571. *Id.* at 104 n.6.
In addressing whether Jacobs was in custody for *Miranda* purposes during her interview, the Third Circuit noted that there is not one universally accepted test for determining *Miranda* custody, which itself denotes the existence of a federal circuit and state court split of authority. It wrote:

In this context, there are at least three differently worded tests for when a person is in custody: (1) when the person has been deprived of her or his freedom in some significant way; (2) when a reasonable person would perceive that she or he was not at liberty to terminate the interrogation and leave; and (3) when there is a restraint on the person’s freedom of movement of the degree associated with a formal arrest. More clear is that the determination of custody is an objective inquiry (that is, what a reasonable person would believe) based on the circumstances of the interrogation.

The court also noted a number of factors that it held should be addressed in making a *Miranda* custody determination, including the location of the interrogation, how much the interviewing officers knew in terms of a suspect’s culpability, and whether the officer indicated to the suspect a belief of the suspect’s guilt. Another factor addressed by the court was whether the suspect was permitted to leave at the end of the interview. It was in the context of this discussion that the Third Circuit ultimately acknowledged its test for determining *Miranda* custody, at least in the case before it, when it wrote: “[T]he test for custody is not whether the police in fact let a suspect leave at the end of the questioning without hindrance. Rather, it is whether, under the circumstances, a reasonable person would have believed that during the questioning he or she could leave without hindrance.” Because the case did not involve a *Terry* stop, the court did not address how that test would play out in the context of a *Terry* investigative detention. Regardless, the court ultimately determined based on the referenced test and the three listed factors that Jacobs was in custody and, therefore, her admissions should be suppressed.

The Third Circuit’s decision in *United States v. Elias* is also instructive in that it recognized the possibility that investigative

572. Id. at 105.
573. Id.
574. Id.
575. Id. at 106–07.
576. Id.
577. Id. at 107–08.
578. 832 F.2d 24 (3rd Cir. 1987).
detentions can rise to the level of *Miranda* custody. Specifically, the court referenced *Berkemer* and its “refus[al] to rule out the possibility that a *Terry*-like traffic stop could mature into a more serious detention which would have to be considered custodial.” However, because of inconsistencies in the factual record, the court went no further than making that basic observation.

2. *The Fifth Circuit*

The Fifth Circuit addressed the issue of *Miranda* custody and its interplay with the concept of a Fourth Amendment seizure in *United States v. Bengivenga*, an en banc decision that addressed the need for *Miranda* warnings during routine border inspections and a *Terry*-like detention during such an inspection. And even though the situation in *Bengivenga* was not particularly coercive in the sense that no force or coercion were used, it still provides a good discussion on the issue of determining *Miranda* custody and the interplay of the Fourth and Fifth Amendments.

As noted above, *Bengivenga* involved the detention of a subject at a fixed border checkpoint. During a routine check of a bus carrying multiple passengers, border patrol agents discovered three suitcases that had a strong odor of marijuana. Tags on the suitcases indicated that they were headed for Alice, Texas, and agents had previously determined that *Bengivenga* and a female companion of hers were the only passengers headed for that location. Based on that information, the two women were asked to accompany the agents to the checkpoint trailer. The women, who had nervously watched the agents as they first inspected the luggage, denied ownership of the suitcases. Later, however, agents found baggage claim slips in *Bengivenga*’s possession that matched the luggage. At that point, *Bengivenga* was arrested and provided with *Miranda* warnings. Prior to the arrest, she had answered questions regarding her destination.

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579. *Id.* at 26.
580. *Id.* at 27.
581. 845 F.2d 593 (5th Cir. 1988) (en banc).
582. *Id.* at 594.
583. *Id.*
584. *Id.*
585. *Id.*
586. *Id.*
587. *Id.*
588. *Id.*
589. *Id.*
and the ownership of the luggage. \textsuperscript{590} Prior to trial, Bengivenga moved to suppress the statements that she had made and the physical evidence of her bus ticket, her baggage claim stubs, and the marijuana from her suitcases, and did so on the alleged grounds that she had been in custody and was entitled to \textit{Miranda} warnings but did not get them. \textsuperscript{591} Her motion was denied, the case went to trial, the evidence was admitted, and Bengivenga was convicted. \textsuperscript{592}

On appeal, the Fifth Circuit addressed the proper test for determining whether a person is in \textit{Miranda} custody, and although the facts of \textit{Bengivenga} are not particularly coercive (though the dissent strongly disagreed with that assessment of the facts) \textsuperscript{593} the decision still provides a guide for understanding the way that the Fifth Circuit would analyze the issue. In essence, the \textit{Bengivenga} court applied the \textit{Berkemer} test, though with one clarification. It wrote:

\begin{quote}
A suspect is therefore "in custody" for \textit{Miranda} purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances. \textsuperscript{594}
\end{quote}

By expounding on the status of the reasonable person as it did, the court defined the reasonable person in a way not specified in \textit{Berkemer}, though not inconsistent with \textit{Berkemer} either. As noted below, a number of courts have adopted a similar definition of the reasonable person. \textsuperscript{595}

The court also addressed the issue of whether \textit{Miranda} warnings are required in \textit{Terry} stops—an issue of obvious importance for the purposes of this article. In so doing, the court determined that \textit{Miranda} warnings generally do not have a place in \textit{Terry} investigative detentions. \textsuperscript{596} In this regard, the \textit{Bengivenga} court wrote that "[o]fficers possessing reasonable articulable suspicion of a person's

\begin{flushright}
590. \textit{Id.} \\
591. \textit{Id.} at 595. \\
592. \textit{Id.} \\
593. \textit{Id.} at 601–06 (Goldberg, J., dissenting). \\
594. \textit{Id.} at 596 (majority opinion). \\
595. \textit{See infra} Part V.A.2. \\
596. \textit{Id.} at 599. 
\end{flushright}
participation in criminal activity may seize the suspect in accord with the Fourth Amendment to conduct an investigative stop—a narrow intrusion involving limited detention accompanied by brief questioning and, if justified, a frisk for weapons. The court added that “[s]uch investigative stops do not render a person in custody for purposes of Miranda.” This holding appears to be based on the majority’s view of the relationship between the Fourth Amendment and Miranda custody under the Fifth Amendment. Specifically, the court held that:

[A] Fourth Amendment seizure does not necessarily render a person in custody for purposes of Miranda. . . . “[T]he core meaning both of ‘seizure’ in the Fourth Amendment sense, and of ‘custody’ in the Miranda sense, appears to be the same: the restraint of a person’s ‘freedom to walk away’ from the police.” The critical difference between the two concepts, however, is that custody arises only if the restraint on freedom is a certain degree—the degree associated with formal arrest.

Thus, the court appeared to hold that the Fourth and Fifth Amendment analyses are for all intents and purposes the same, much like the holdings in United States v. Leshuk and United States v. Trueber. The court also held that Terry detentions do not require Miranda warnings because Terry detentions are not the equivalent of an arrest and Miranda warnings are only required when a person is restrained to a “degree associated with formal arrest” in the sense that the person is not free “to walk away from the police.” Based on all of these standards, the court determined that Bengivenga and her companion were not in custody for Miranda purposes, but were instead reasonably detained pursuant to Terry with weight being given to the fact that the questioning did not “exhaust the permissible scope of investigative questioning.”

597. Id.
598. Id.
599. Id. at 598 (quoting United States v. Brunson, 549 F.2d 348, 357 n.12 (5th Cir. 1977)).
600. 65 F.3d 1105, 1110 (4th Cir. 1995).
601. 238 F.3d 79, 95 (1st Cir. 2001).
602. Bengivenga, 845 F.2d at 598.
603. See id. at 601. As noted above, there was a dissenting opinion in Bengivenga. The court’s decision was an en banc decision with one concurring opinion and four dissenters. Id. The basic position of the dissenting judges was that under the stated test Bengivenga was in custody for Miranda purposes and therefore should have been entitled to a suppression of evidence. Id. at 607 (Goldberg, J., dissenting).
604. Id. at 599 (majority opinion).
3. The Sixth Circuit

The Sixth Circuit's position on the issue of the interplay between Miranda and Terry is addressed, in part, in United States v. Salvo, a case involving a consensual interview between FBI agents and a person who had been caught sending e-mail messages seeking advice on seducing young boys.\footnote{605} The first interview took place in a computer room in the suspect's college dorm, and involved the suspect and three FBI agents.\footnote{606} Following the interview, there was a consensual search of the suspect's dorm room, and the suspect handed the FBI his computer which, despite the suspect's attempt to erase the hard drive, was determined to contain images of child pornography.\footnote{607} After some discussion, the Salvo court's position appears to be that in most circumstances "because of the very cursory and limited nature of a Terry stop, a suspect is not free to leave, yet is not entitled to full custody Miranda rights."\footnote{608} However, the court also noted that there are some exceptions to that rule when it wrote:

[T]his does not equate to a broader application of this rule to detentions of a more lengthy, substantive nature. In non-transitory, more protracted interrogation situations, the question of whether a reasonable person would feel free to leave obviously becomes more pertinent to a determination of whether the suspect is in custody for purposes of Fifth Amendment protection.\footnote{609}

Thus, the court recognized that the Fourth and Fifth Amendment inquiries are separate from one another. The court provided additional details on what it determined to be the appropriate test for Miranda custody later in its opinion. Specifically, it held:

[F]or the purposes of a Fifth Amendment custody inquiry, we believe that courts may consider, as one component or aspect of the totality of the circumstances under which the suspect is questioned, whether a reasonable person in the suspect's position would have felt free to leave. We stress that this is not necessarily an ultimate or even dispositive inquiry; only that courts, in considering whether a suspect is

\footnotesize{605. United States v. Salvo, 133 F.3d 943, 945–47 (6th Cir. 1998).
606. Id. at 945–46.
607. Id. at 946.
608. Id. at 949; see also United States v. Hopewell, No. 1:08-cr-065, 2009 WL 414604, at *10 (S.D. Ohio Feb. 17, 2009) ("To the contrary, the Sixth Circuit has recognized that a suspect generally is not entitled to full custody Miranda rights during a limited Terry stop.").
609. Salvo, 133 F.3d at 949.}
“in custody” for the purposes of triggering the Fifth Amendment protections, may inquire as to whether a reasonable person in that suspect’s particular circumstances would have felt free to leave. In other words, this is one permissible inquiry, among others, which courts may consider in making Fifth Amendment custody determinations.  

In other words, the court recognized the usefulness of the Thompson reasonable person test but did not recognize it to be dispositive of the issue of Miranda custody. In Salvo, the district court had suppressed statements based on its finding that a reasonable person in defendant’s position would not have felt free to leave during his interviews with law enforcement. In reversing the suppression, the Fifth Circuit noted in accordance with the above-referenced statement that “[a]lthough the District Court’s inquiry into whether a reasonable person in Salvo’s position would have felt free to leave was permissible, it was not sufficient because it did not go far enough and its conclusion was not supported by the record.”  

Referencing Mathiason, the court concluded that although any police questioning “by its very nature, is always going to have coercive aspects to it,” it “does not mean, however, that a suspect is ‘in custody’ each time he or she is questioned by a law enforcement officer.” Instead, the court held that Miranda warnings are only required when “the restraint exercised by [law enforcement] . . . approach[es] the level associated with either formal arrest or a coercive context tantamount to custody.”  

The Sixth Circuit’s position on the issue of Miranda and Terry stops is further defined in United States v. Swanson, which was decided five years after Salvo. In Swanson, the court addressed a situation in which the appellant was convicted of being a felon in possession of a firearm. Specifically, Swanson was in a tattoo parlor

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610. Id. at 950. The Salvo court further noted that the following factors should be taken into account in making such a custody determination: the purpose of the questioning, whether the location in which the questioning took place was hostile or coercive, the length of the questioning, and any other indicia of custody, such as who initiated contact or questioning or whether the suspect had the ability to or was told that he or she could leave at any time. See id.

611. See id. at 949–50.

612. Id. at 947.

613. Id. at 953.

614. Id.

615. Id.

616. Id.

617. 341 F.3d 524 (6th Cir. 2003).

618. Id. at 526.
when an acquaintance of his was arrested by federal agents on an arrest warrant. During the arrest, Swanson and others were detained by a group of federal agents who had guns drawn and held at their sides. Swanson was further told by the agents that he would not be released until he was identified and officers were able to determine that he had no outstanding warrants for his arrest. When he attempted to leave the area, Swanson was detained and interviewed by one of the federal agents, though he was told that he was not under arrest and did not have to speak with the agent. During an ensuing conversation Swanson, made incriminating statements about the ownership of an automobile and how talking to law enforcement regarding guns that might be in his possession would not be in his best interest, which were later used to convict him.

On appeal, Swanson argued that his statements should have been suppressed because he was in custody at the time of the interrogation and was not provided with *Miranda* warnings. The Sixth Circuit ultimately rejected Swanson’s claim that he was in custody and ruled that the statements in question were properly admitted at the trial. In doing so, the court first referenced the Supreme Court’s holding in *Mathiason* that “the obligation to administer a *Miranda* warning to a suspect only arises ‘where there has been such a restriction on a person’s freedom as to render him in custody.’” Citing *Berkemer*, the court next noted that “[t]he very nature of a *Terry* stop means that a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights.” Given those two principles, the court noted, “the pertinent question is whether Swanson was ‘in custody’ during the investigatory detention for the purposes of determining whether his Fifth Amendment rights were violated.”

In setting forth the appropriate test for determining whether a temporary detention has become a *Miranda* custody, the Sixth Circuit wrote:

In determining whether a defendant was subject to cus-

619. *Id.*
620. *Id.*
621. *Id.* at 527.
622. *Id.*
623. *Id.*
624. *Id.* at 527–28.
625. *Id.* at 531.
626. *Id.* at 528 (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam)).
627. *Id.* (citing Berkemer v. McCarty, 468 U.S. 420, 439–41 (1984)).
628. *Id.*
todial interrogation we look to the totality of the circumstances “to determine ‘how a reasonable man in the suspect’s position would have understood the situation.’” The “ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”

Similar to the Salvo decision, the court then noted that the totality of the circumstances test should include “whether a reasonable person in the defendant’s position would feel free to leave” with the understanding that in a Terry stop a person is not free to leave, as well as the following factors:

1. the purpose of the questioning;
2. whether the place of the questioning was hostile or coercive;
3. the length of the questioning;
4. other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police . . . [or] acquiesced to their requests to answer some questions.

In holding as it did, the court gave particular deference to whether the law enforcement officer had informed the suspect that he or she was not under arrest, noting that “a statement by a law enforcement officer to a suspect that he is not under arrest is an important part of the analysis of whether the suspect was ‘in custody.’” Interestingly, while not stating that Miranda warnings are required in all Terry stops, the Swanson court nevertheless noted that because “in the context of a Terry-style investigatory detention, a person is not free to leave, at least temporarily,” that first factor in the determination of whether a reasonable person in the defendant’s position is in custody “weighs in favor of defining [a detainee’s] detention and questioning as a custodial interrogation.”

Finally, the Swanson court noted that the test for determining Miranda custody has changed since the Supreme Court decided Miranda. Specifically referencing a prior Sixth Circuit decision in

629. Id. at 528–29 (quoting United States v. Salvo, 133 F.3d 943, 948 (6th Cir. 1998); United States v. Knox, 839 F.2d 285, 291 (6th Cir. 1988)) (internal quotations omitted).
630. Id. at 529.
631. Id. (quoting Salvo, 133 F.3d at 950).
632. Id. at 530.
633. Id. at 529.
634. Id.
which the court had held that a defendant "was in custody when questioned . . . because the police had deprived [him] of his 'freedom of action' in a 'significant way," the Swanson court made it clear that, based on its reading of Berkemer's holding—that "a motorist temporarily detained in a traffic stop does not have the right to a Miranda warning even though a 'traffic stop significantly curtails the freedom of action of the driver . . . ."—the mere fact that a person was deprived of his or her freedom of action is insufficient by itself to convert a detention to Miranda custody, and, once again, that "[t]he very nature of a Terry stop means that a detainee is not free to leave during the investigation, yet is not entitled to Miranda rights." 

Lower courts within the Sixth Circuit have taken Swanson to stand for the proposition that the Fourth Amendment inquiry under Terry plays an important role in the Fifth Amendment inquiry under Miranda and that Terry stops do not generally implicate Miranda warnings. For example, in United States v. Moore, one court, quoting Swanson, wrote:

Obviously [the] defendant was not free to leave; indeed, a temporary investigative detention under Terry v. Ohio presupposes that a suspect is not free to leave. But, so long as the detention remains within the parameters of a Terry detention and has not evolved into a custodial arrest, Miranda warnings are not required. "The very nature of a Terry stop means that a detainee is not free to leave during the investigation, yet is not entitled to Miranda rights."

In another lower court decision, United States v. Mathis, the district court also referenced Swanson and held that "[c]ourts have recognized that Miranda does not apply to an investigative detention, otherwise known as a Terry stop." Courts in other federal circuits have also cited Swanson as authority for this same proposition.

635. Id. at 530-31 (referencing and commenting on United States v. Jones, 846 F.2d 358 (6th Cir. 1988)). Interestingly, while the Swanson court appears to pay some deference to its holding in Jones, the underlying tone of the court's discussion of that prior decision arguably shows that the Swanson court would have reached a different result.
636. Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 441 (1984)).
637. Id. at 528 (citing Berkemer, 468 U.S. at 439–41).
639. Id. at *4 (quoting Swanson, 341 F.3d at 529).
641. Id. at 817–18.

It is clear that police officers are permitted to obtain information con-
4. **The D.C. Circuit**

Like the Third, Fifth, and Sixth circuits, the D.C. Circuit is not mentioned in the *Artiles-Martin* opinion. That said, there is case law from the D.C. Circuit that provides some precedent for future decisions within the circuit on the dual issues of whether coercion can be used during a *Terry* detention and, if so, what level or degree of coercion is necessary to transform an investigative detention into *Miranda* custody.

On the issue of coercion during a *Terry* stop, the case law from the D.C. Circuit appears to give law enforcement wide latitude in their use of force. For example, in *United States v. Mhite*, 643 the D.C. Circuit upheld a *Terry* stop of a vehicle that involved law enforcement parking in such a way that it was "difficult but not impossible for the [appellant's vehicle] to pull away" and the drawing of firearms as the officers approached the appellant's vehicle. 644 The appellant was then removed from the vehicle at gunpoint and was grabbed by officers. 646 Noting that "[w]hen a 'stop' ends and an arrest begins has been the subject of numerous judicial decisions," the court held that "[t]he use or display of [fire]arms may, but does not necessarily, convert a stop into an arrest. 648 Courts have generally upheld stops made at gunpoint when the threat of force has been viewed as reasonably necessary for the protection of the officer." 649 Noting that "[o]n occasion... the courts have ruled that the use of excessive force

firming or dispelling their suspicions during a *Terry* stop. The fact that an individual is briefly detained while asked a moderate number of questions does not, by itself, give rise to a custodial investigation. In *Swanson*, the United States Court of Appeals for the Sixth Circuit recognized that "[t]he very nature of a *Terry* stop means that a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights. Therefore, the pertinent question is whether [the suspect] was 'in custody' during the investigatory detention for the purposes of determining whether his Fifth Amendment rights were violated." 649

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644. *Id.* at 31.
645. *Id.*
646. *See id.* at 31–32.
647. *Id.* at 33.
648. *Id.* at 34.
649. *Id.* at 34–35. In support of this proposition, the *White* court cited a number of cases in which stops or detentions of persons during which law enforcement drew or otherwise used weapons were determined to be investigatory stops rather than arrests, including *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977); *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975); *United States v. Maslanka*, 501 F.2d 208 (5th Cir. 1974); and *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974). *Id.*
transformed a stop into an arrest,"\textsuperscript{650} the White court nevertheless determined that rather than just holding the situation to be an arrest because law enforcement used some force while approaching and detaining the appellant, the court should instead look to the reasons that the officers acted the way that they did during the stop.\textsuperscript{651} The White majority next held that the decision to order "the occupants to get out of the car for questioning [was] compatible with an investigatory stop,"\textsuperscript{652} noting that "[c]ourts have routinely allowed officers to insist on reasonable changes of location when carrying out a Terry stop."\textsuperscript{653} Finally, the majority also reiterated that "[l]evels of force and intrusion in an 'investigatory stop' may be legitimately escalated to meet supervening events,"\textsuperscript{654} and that "suspicious behavior may lead an experienced officer to fear for his safety, thus justifying an escalation in the level of force used."\textsuperscript{655} In short, a look at the White decision makes it clear that the D.C. Circuit will not invalidate a Terry detention or deem it an arrest simply because law enforcement introduces some "admittedly coercive elements"\textsuperscript{656} into the stop.

As for the issue of coercive Terry stops and Miranda custody, the D.C. Circuit does not appear to have any cases directly addressing the issue. However, in United States v. Gaston,\textsuperscript{657} the court did address the issue of how to determine whether a person is in Miranda custody when that person is detained during the execution of a search warrant—a situation many courts have held to be a Terry-type detention.\textsuperscript{658} In Gaston the D.C. Circuit addressed a situation in which

\begin{footnotesize}
\begin{itemize}
    \item 650. Id. at 35.
    \item 651. Id.
    \item 652. Id. at 36–37.
    \item 653. Id. at 37. In support of this proposition, the White court cited United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977) and United States v. Oates, 560 F.2d 45, 57 (2d Cir. 1977).
    \item 654. Id. at 40.
    \item 655. Id.
    \item 656. Id.
    \item 657. See also, e.g., United States v. Clark, 24 F.3d 299, 302 (D.C. Cir. 1994) ("[C]ourts have generally upheld stops made at gunpoint when the threat of force has been viewed as reasonably necessary for the protection of the officer.") (citations omitted); United States v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989) ("The amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent flight, or drawing guns where law officers reasonably believe they are necessary for their protection.") (citations omitted).
    \item 658. 357 F.3d 77 (D.C. Cir. 2004).
    \item 659. See, e.g., United States v. Davis, 530 F.3d 1069, 1080 (9th Cir. 2008) ("The traditional rule is that 'an official seizure of [a] person must be supported by probable cause, even if no formal arrest is made.' However, some seizures which
\end{itemize}
\end{footnotesize}
at least ten police officers entered a home and handcuffed Gaston and another individual, both of whom were found in the doorway of a second-floor bedroom. One of the officers interviewed Gaston, who was handcuffed at the time he was questioned, and Gaston admitted that he co-owned the home with his sisters. Gaston was not provided with *Miranda* warnings prior to being questioned by the officer, and the statements that he gave regarding ownership were later admitted as inculpatory evidence at trial.

In addressing Gaston’s claim on appeal that he should have been given *Miranda* warnings, the D.C. Circuit more or less skirted the issue of whether Gaston was in custody for *Miranda* purposes. The court did recognize that the test for determining *Miranda* custody “is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” The court further noted that the test is an objective one that asks: “would a reasonable person have understood his situation to be comparable to a formal arrest?” After recognizing this test, however, the court declined to would fall under this general rule ‘constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity.’ A seizure effected by law enforcement while executing a valid search warrant falls within this limited exception.” (quoting Michigan v. Summers, 452 U.S. 692, 696, 699 (1981)); Terry v. Ohio, 392 U.S. 1, 21–22 (1968)) (citations omitted); United States v. Johnson, 528 F.3d 575, 579–80 (8th Cir. 2008) (“Michigan v. Summers recognizes that, consistent with Terry v. Ohio, a limited intrusion on a person’s security is sometimes justified by substantial law enforcement interests such that it may be made on less than probable cause. For example, the resident of a home subject to a search warrant may be detained so as to prevent flight, minimize the risk of harm to the officers, and allow the officers to conduct an orderly search. Because a neutral magistrate has already found probable cause to search the home, there is naturally an articulable and individualized suspicion of criminal activity that justifies the detention of the home’s occupants. In contrast, an articulable and individualized suspicion does not exist to search the patron of a public business during the execution of a search warrant.”) (citations omitted); United States v. Calloway, 298 F. Supp. 2d 39, 48 (D. D.C. 2003) (“The Supreme Court has already held that the detention of occupants of premises being searched by the police is not a seizure for Fourth Amendment purposes, as it is commensurate with the detention of suspects in a Terry v. Ohio stop. Under Summers and Terry, therefore, police officers executing a search warrant can detain occupants of a residence in order to minimize the risk of harm to the officers, to prevent flight, and to facilitate the completion of the search.”) (citation and footnote omitted).

660. Gaston, 357 F.3d at 81.
661. See id.
662. See id. at 81–82.
663. See id.
664. Id. at 82 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).
665. Id. (citing Berkemer v. McCarty, 468 U.S. 420, 441–42 (1984)).
address the issue in the context of a situation in which handcuffs are used to restrain a subject during a search warrant. It wrote:

Gaston was handcuffed when Officer Hurley questioned him although the officers had not yet formally arrested him. The government argues that handcuffing does not automatically constitute custody, but is merely one factor to be considered. There is authority to this effect, but we do not have to decide whether to follow it because the questioning fell within an exception to Miranda.

The "authority" that the court cited as supporting the government's argument is Leshuk, the Fourth Circuit decision that held that "drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into custodial arrest for Miranda purposes." Curiously, the court nowhere mentioned the cases on the other side of the circuit split such as Ali, Smith, and Perdue. What that means in terms of how the circuit would come down if it squarely addressed the issue of Miranda and coercive Terry stops, however, is unclear.

IV. A SUMMARY OF THE PROPOSED TESTS FOR DETERMINING WHEN A TERRY DETENTION BECOMES MIRANDA CUSTODY

As a close review of all of the decisions noted above demonstrates, there is a great deal of disagreement over whether a valid Terry stop can and ever will rise to the level of Miranda custody. Furthermore, those circuits that do recognize this possibility often disagree over what test to apply to the Miranda custody determination—an issue of importance as it directly determines when Miranda warnings must be given to a person detained under the authority recognized in Terry. A look at some of the proposed tests for determining Miranda custody, including cases not referenced above, shows that there are a number of different tests in use throughout the United States.

666. See id.
667. Id. (citation omitted). The exception to Miranda that the court relied on in upholding the admission of the statements about ownership of the home is the same exception that allows officers to ask "routine booking questions 'reasonably related to the police's administrative concerns.'" Id. (quoting Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990)). The ownership of the house, the court wrote, related to those administrative concerns. Id.
670. United States v. Smith, 3 F.3d 1088 (7th Cir. 1993).
671. United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).
One such test—the most recent test suggested by the Supreme Court—comes from the aforementioned Thompson v. Keohane. "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."\(^{672}\) A good number of lower courts—including the Eighth Circuit in Martinez\(^{673}\)—have accepted this test or a similar iteration as the appropriate one for determining whether a person detained for an investigative detention is also in Miranda custody.\(^{674}\) In Martinez, for example, the court held the appropriate inquiry to be whether "[a] reasonable person would not, considering the totality of the circumstances, feel he was at liberty to stop the questioning and leave."\(^{675}\)

A similar test was suggested by the dissenting opinion in the Ninth Circuit's decision in Kim, though that proposal allowed for brief questioning, an apparent recognition of the nature of a Terry stop, and further does not reference the detainee's ability to terminate questioning.\(^{676}\) The proposed test is whether "a reasonable innocent person in such circumstances would conclude that after brief...
questioning [he or she] would not be free to leave.”

Yet another version of the Thompson test is set forth in United States v. Conrad, 678 though it addresses simply feeling free to leave and does not address the termination of any questioning. The court wrote, “The inquiry into whether a suspect is in custody is objective, and the Court looks to the totality of the circumstances and considers whether a reasonable person would have believed that he or she was free to leave.” 679 A similar version of the test was used in United States v. Jones, 680 though the focus was not solely on leaving but on freedom of movement. It asked “whether a reasonable man in the Defendant’s position would feel he is deprived of his ‘freedom of movement.’” 681 And yet another related inquiry was discussed by the Georgia Court of Appeals in Thomas v. State, 682 which said that “the test to determine whether a detainee is ‘in custody’ for Miranda purposes is ‘whether a reasonable person in the detainee’s position would have thought the detention would not be temporary.’” 683

A different type of test for determining Miranda custody that has gained widespread acceptance—though in a handful of similar yet varying forms—comes from the Supreme Court’s decision in Berkemer v. McCarty, 684 also referenced above. 685 Berkemer applied the following test: “The only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” 686 A number of lower courts have applied the Berkemer test exactly as stated. 687 However, a handful of other courts have applied the test in slightly modified versions. For example, in United States v. Pentaleri, 688 the U.S.

677. Id.
679. Id. at 1041.
681. Id. at 611 (citing Stansbury v. California, 511 U.S. 318, 322 (1994)); see also Commonwealth v. Jones, 928 A.2d 1054, 1057 (Pa. Super. Ct. 2007) (“A custodial interrogation occurs when a person is physically deprived of their freedom in any significant way or is placed in a situation in which they reasonably believe their freedom of action or movement is restricted by the interrogation.”), rev’d, 988 A.2d 649 (2010).
683. Id. at 542 (quoting Johnson v. State, 506 S.E.2d 234, 236 (1998)).
685. See supra, note 141 and accompanying text.
District Court for the District of Minnesota asked not how a reasonable person would understand his or her situation, but whether that person would understand the situation to be an arrest. It described the test as "whether a reasonable person, under similar circumstances, would understand the situation to be an arrest."

Other courts have applied this same version of the test. Still others have applied the same test but have asked not whether the situation was understood to be an arrest, but whether it was understood to be a restraint on freedom that the law associates with formal arrest. The Fifth Circuit Court of Appeals asked this question in United States v. Bengivenga as whether "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest."

Still others have asked not whether the reasonable person would understand the situation to be an arrest, but whether a reasonable person would understand the situation to be something less than an arrest, such as an investigative detention. For example, in United States v. Taylor, the First Circuit put forth this inquiry: whether "[u]nder the [] circumstances . . . a reasonable person, standing in [the defendant's] shoes, would have understood, at the time, that he was being briefly detained for inquiry and investigation, not arrested."

In United States v. Trueber, the First Circuit used a similar though slightly different inquiry that addressed both the concept of an arrest and an investigative detention, asking whether the reasonable person understood the situation to be an arrest and not just an investigative detention, describing the inquiry as

whether . . . a reasonable person in [the detainee's] position

689.  Id. at *6 (citation omitted).
690.  See, e.g., Harris v. Commonwealth, 500 S.E.2d 257, 262 (Va. Ct. App. 1998) ("If a reasonable person in the suspect's position would have understood that he or she was under arrest, then the police are required to provide Miranda warnings before questioning."); see also United States v. Hephner, 260 F. Supp. 2d 763, 778 (N.D. Iowa 2003).
691.  845 F.2d 593 (5th Cir. 1988) (en banc).
693.  162 F.3d 12 (1st Cir. 1998).
694.  Id. at 22.
695.  238 F.3d 79 (1st Cir. 2001).
would have believed that he was actually in police custody and being constrained to a degree associated with formal arrest (rather than simply undergoing a brief period of detention at the scene while the police sought by means of a moderate number of questions to determine his identity and to obtain information confirming or dispelling their suspicions). 696

This or a similar test has been applied in the lower courts within the First Circuit and elsewhere. 697 Another version of this test that was accepted by the Wyoming Supreme Court in Gunn v. State 698 focuses not on an arrest or investigative detention, but on Miranda custody: "The proper inquiry is to ask 'whether a reasonable man in Appellant's position would have considered himself to be in police custody.'" 699 And in Barrett v. State, 700 the Indiana Court of Appeals provided yet another test when it held, "Generally, we ask whether a reasonable person under the same circumstances would believe that

696. Id. at 93 (quoting United States v. Streifel, 781 F.2d 953, 962 (1st Cir. 1986)).
697. Other cases accepting this as the appropriate test for determining Miranda custody include United States v. Daubmann, 474 F. Supp. 2d 228, 233 (D. Mass. 2007) ("In short, if a 'reasonable person in [the detainee's] position would have believed that he [or she] was actually in police custody and [was] being constrained to a degree associated with formal arrest,' then custody has been established for Miranda purposes.") (quoting Trueber, 238 F.3d at 93); and United States v. Mittel-Carey, 456 F. Supp. 2d 296, 305 (D. Mass. 2006) (same). See also State v. Silva, 11 P.3d 44, 50 (Idaho Ct. App. 2000) ("[W]hether a reasonable person would believe he or she was in police custody to a degree associated with formal arrest, not whether the person would believe he or she was not free to leave.") (citing Berkemer v. McCarty, 468 U.S. 420, 442 (1984)); State v. Smith, 864 A.2d 1177, 1181 (N.J. Super. Ct. App. Div. 2005) ("Because Terry and traffic stops necessarily involve some restraint on freedom of action, the question is not whether a reasonable person would feel free to leave at the inception of the questioning. The question is whether a reasonable person, considering the objective circumstances, would understand the situation as a de facto arrest or would recognize that after brief questioning he or she would be free to leave.") (citation omitted).
698. 64 P.3d 716 (Wyo. 2003).
699. Id. at 720 (quoting Glass v. State, 853 P.2d 972, 976 (Wyo. 1993)); see also United States v. Jefferson, 562 F. Supp. 2d 707, 713 (E.D. Va. 2008) ("The custody inquiry is objective: the question is not whether the suspect or the interrogating officer believed that the suspect was in custody, but whether a reasonable person in the suspect's position would have understood that he or she was in custody."); State v. Navy, 635 S.E.2d 549, 553 (S.C. Ct. App. 2006) ("The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody.") (quoting Bradley v. State, 449 S.E.2d 492, 498–94 (1994)), rev'd, 688 S.E.2d 838 (S.C. 2010); State v. Mosher, 584 N.W.2d 553, 557 (Wis. Ct. App. 1998) ("The test is 'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'") (quoting State v. Swanson, 475 N.W.2d 148, 152 (Wis. 1991)).
she was under arrest or not free to resist the entreaties of the police.”

Some courts, such as the Utah Supreme Court in *State v. Levin*, appear to combine a number of the above-referenced tests into one. In *Levin*, the Utah court wrote:

A person is in custody when “[the person’s] freedom of action is curtailed to a degree associated with formal arrest.” The inquiry is objective and considers “how a reasonable man in the suspect’s position would have understood his situation.” A suspect may understand himself or herself to be in custody based either on physical evidence or on the nature of the officer’s instructions and questions. Therefore, we focus on both the evidence of restraint and on objective evidence of the officers’ intentions. As stated by the U.S. Supreme Court, “[A]n officer’s views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer’s views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.”

In referencing such terms as “how a reasonable person in that position would perceive his or her freedom to leave,” “how a reasonable man in the suspect’s position would have understood his situation,” “freedom of action . . . curtailed to a degree associated with formal arrest,” and “[a] suspect may understand himself or herself to be in custody,” the Utah court seemingly combines many of the above-referenced tests, including *Thompson, Berkemer*, and other versions of those tests. Other courts have applied a combination of the above tests as well. In *United States v. Molina*, for example, the court offered the following test:

The determination of whether a suspect was “in custody” for the purposes of *Miranda* requires a two-step inquiry. The first step in the inquiry is to ask “whether a reasonable person would have thought he was free to leave.” If a reasonable person would not have thought himself free to leave, the

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701. *Id.* at 1028.
702. 144 P.3d 1096 (Utah 2006).
703. *Id.* at 1105–06 (footnotes omitted).
704. *Id.*
next question to ask is "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."\(^{706}\)

In explaining the logic for such a two-part test, the New York court made reference to the \textit{Berkemer} decision, noting while persons stopped for traffic citations likely would not feel free to leave without officer permission, those same persons would not expect the traffic stop to be the equivalent of a formal arrest.\(^{707}\) And in \textit{United States v. Touzel},\(^{708}\) the court held that the proper test involves the following inquiries:

\[\text{T}he\ \text{test\ for\ determining\ whether\ a\ person\ is\ in\ custody}\\]

for \textit{Miranda} purposes is "whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest." Two important factors in making that determination are whether "a reasonable person in the suspect's shoes would have understood that his detention was not likely to be temporary and brief," and whether he "would feel that he was completely at the mercy of the police."\(^{709}\)

Other courts have applied a version of the \textit{Berkemer} test, but have done so with the express statement that the "reasonable person" from whose position the situation is viewed is an innocent person. For example, in \textit{People v. Colon},\(^{710}\) the New York Supreme Court for New York County used this test: "A person is deemed to be in custody . . . when a reasonable person in the defendant's position who is innocent of any crime would have believed himself or herself to be in custody."\(^{711}\) And in \textit{Aningayou v. State},\(^{712}\) the Alaska Court of Appeals stated that in reviewing a situation to determine whether a person is in custody for \textit{Miranda} purposes, "[t]he examination of the circumstances of the questioning is objective, that is, from the point of view of a reasonable, innocent person."\(^{713}\) Other courts, and in particular

\(^{706.}\) \textit{Id.} at 311 (citations omitted).
\(^{707.}\) \textit{See id.}
\(^{709.}\) \textit{Id.} at 522 (quoting \textit{United States v. Newton}, 369 F.3d 659, 675 (2d Cir. 2004)).
\(^{710.}\) 784 N.Y.S.2d 316 (N.Y. Sup. Ct. 2004).
\(^{711.}\) \textit{Id.} at 317.
\(^{713.}\) \textit{Id.} at 967 (citing \textit{Long v. State}, 837 P.2d 737, 743 n. 1 (Alaska Ct. App. 1992)).
courts from New York and Texas, have similarly held that the reasonable person for the purposes of determining *Miranda* custody is an innocent person.\(^{714}\)

Another type of test for determining whether a person is in *Miranda* custody looks to the actions of the police officers involved and what those actions tell about the situation, and sometimes also draws additional elements from the above-referenced tests. One such test was applied in *Acosta*, and was described as whether a "reasonable person in [the detainee's] position would . . . have believed that he was utterly at the mercy of the police, away from the protection of any public scrutiny, and had better confess or else."\(^{715}\) The Tenth Circuit in *Perdue* asked a similar question, making part of the focus for determining "how a reasonable man in the suspect's position would have understood his situation" whether the person felt "completely at the mercy of the police."\(^{716}\)

Another version that looked at police activity—and in particular pressures placed on the defendant—came from the Maryland Court of Appeals in *Minehan v. State*,\(^{717}\) which held that *Miranda* custody "is an objective state that is entered when a suspect is 'led to believe, as a reasonable person, that he is being deprived or restricted of his freedom of action or movement under pressures of official authority.'"\(^{718}\) A similar focus on police pressures came out of the Oregon Court of Appeals in *State v. Coen*,\(^{719}\) which held that

*Miranda* warnings . . . are required when a person is either in full custody or under compelling circumstances. . . . Compelling circumstances exist when, taking into account the totality of the circumstances, a reasonable person in de-

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\(^{715}\) United States v. *Acosta*, 363 F.3d 1141, 1150 (11th Cir. 2004).

\(^{716}\) United States v. *Perdue*, 8 F.3d 1455, 1465 (10th Cir. 1993) (citation omitted).


\(^{718}\) *Id*. at 70 (citations omitted).

\(^{719}\) 125 P.3d 761 (Or. Ct. App. 2005).
fendant's position would feel compelled to answer a police officer's questions . . . [or] would have felt required to stay and answer all of the officer's questions.\textsuperscript{720} In a subsequent decision by the Oregon Supreme Court in \textit{State v. Shaff},\textsuperscript{721} which applied the same standard as that used in \textit{Coen}, the court noted that "[t]he question whether the circumstances were compelling . . . turns on how a reasonable person in the suspect's position would have understood his or her situation."\textsuperscript{722} It further noted that "the ‘overarching inquiry is whether the officers created the sort of police-dominated atmosphere that \textit{Miranda} warnings were intended to counteract."\textsuperscript{723}

Many of the above inquiries are somewhat similar. However, many of the inquiries are also very different from each other, and even those that are similar have some subtle yet important differences. In short, there appears to be a lack of a consistent standard for determining when a \textit{Terry} detention becomes \textit{Miranda} custody, and the lack of a consistent standard only adds to the difficulty of determining whether or when a coercive \textit{Terry} stop remains a \textit{Terry} stop that does not require \textit{Miranda} warnings during the lawful and Supreme Court-sanctioned questioning of a detainee.

Adding to the confusion is the fact that different courts give weight to different factors or circumstances surrounding an interrogation in applying the above-listed tests. Factors that courts have considered in making a custody determination include, but are not limited to, the location and physical surroundings of the encounter, the suspect's familiarity with the location of questioning, the time of day or night during which questioning takes place, the number of law enforcement personnel present during any detention and questioning, the degree of physical restraint and coercion used during the detention (including whether law enforcement frisked the detainee, displayed weapons, and used handcuffs), the length and circumstances of any interrogation, the purpose of the interrogation, whether and to what extent the detainee was confronted with evidence of his or her guilt, whether the detainee was arrested at the termination of the interview, whether the suspect is informed that the detention will or will not be temporary, whether the investigation has focused on the person being interviewed, the amount of time between questioning

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\textsuperscript{720} \textit{Id.} at 766-67 (citations omitted).
\textsuperscript{721} 175 P.3d 454 (Or. 2007).
\textsuperscript{722} \textit{Id.} at 457.
\textsuperscript{723} \textit{Id.} (quoting \textit{State v. Roble-Baker}, 136 P.3d 22, 22 (Or. 2006)).
\end{flushleft}
and subsequent arrest, by whom and how the contact was initiated, how the suspect got to the location of the questioning, what words were spoken by the officer, the language used to summon the detainee, the officer's tone and general demeanor, who else was present in addition to law enforcement, the officer's response to any questions, whether the defendant was directed to do anything, the detainee's response to any directives, whether law enforcement used any deception or deceptive interview techniques, and whether there are other objective indicia of arrest. As the Supreme Court has noted, "the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving Miranda protection."724 What portions of these circumstances should be looked at and the weight that each factor should be given, however, differs from jurisdiction to jurisdiction and from court to court,726 and as one commentator noted, "[t]his grab bag of relevant factors [often] makes custody determinations unpredictable and inconsistent.727

V. ANALYSIS AND RECOMMENDATIONS

As a review of the pertinent case law indicates, there is significant disagreement over whether coercive Terry stops constitute Miranda custody and therefore whether Miranda warnings are required in coercive Terry situations. Courts addressing these issues should find that in the majority of cases, coercive Terry detentions do not require Miranda warnings and should recognize that the mere fact that an investigative detention involves force or coercion does not mean, without more, that a Terry detention becomes Miranda custody. This is true for a number of reasons. First, the original Terry decision contemplated the fact that law enforcement officers would ask a detainee questions during a potentially coercive encounter, and that this could be done without the need for Miranda warnings.728 Addi-


726. See Gunn, 64 P.3d at 720 ("No one factor alone will necessarily establish custody for Miranda purposes, and not all factors will be relevant to a given case.").

727. Swift, supra note 130, at 1080.

728. Terry v. Ohio, 392 U.S. 1, 28 (1968).
itionally, post-Terry Supreme Court case authority similarly recognizes that some coercion is appropriate in Terry detentions without implicating Miranda. The view that coercion by itself does not convert a Terry stop into Miranda custody also finds support in the fact that the original Miranda decision did not contemplate that warnings would be required in all coercive circumstances and in the concept and definition of the term arrest. Additionally, the fact that the Supreme Court has recently narrowed the definition of the term “custody” provides additional support for the argument. And finally, practical considerations weigh in favor of recognizing that Miranda’s applicability in Terry detentions should be the rare exception and not the rule.

Additionally, it is clear from the widespread disagreement noted above that guidance is needed when it comes to defining an appropriate test for determining whether a situation is one of Miranda custody. In this regard, the appropriate test would be one that distinguishes between true Terry investigative detentions and other encounters such as consensual encounters. Additionally, any accepted test must account for the fact that a person detained pursuant to Terry is not free to leave until the officer’s suspicions have been dispelled and therefore has had his or her freedom of movement lawfully restricted and truly is not at liberty to terminate questioning and leave the area of detention. Any proposed test further needs to recognize the origins of Terry and respect the fact that law enforcement is permitted, pursuant to that decision, to use a reasonable amount of force to protect either the officer or the public, and is further permitted to question detainees without implicating Miranda. In short, the Thompson reasonable person test simply does not work in the Terry context and those courts that give it strict adherence need to replace it.

A. Analysis: Issues to Consider when Addressing the Circuit Split

When addressing the circuit split and the interplay of Terry and Miranda in coercive situations, a handful of important issues must be considered—issues that weigh in favor of a finding that the use of at least some force or coercion is permissible in Terry detentions without converting those detentions into de facto arrests or, more important, into Miranda custody.
1. The Mere Fact that an Investigative Detention Involves Force or Coercion Should not Per Se Transform that Detention into One in Which Miranda Warnings Are Required

Any court looking at the issues underlying the circuit split described in the Artiles-Martin decision must begin its analysis with the recognition that Terry stops, though not arrests, will often involve some form of coercion. And more important, those courts must accept the view that the mere existence of coercion in a Terry stop does not transform the stop into Miranda custody and does not per se require that Miranda warnings be provided to a detainee. Although there may be some question as to where the line between Terry stops, Miranda custody, and formal arrest actually is, the mere fact that there is some coercion does not automatically take a situation out of the realm of a traditional Terry stop and convert it into one in which Miranda warnings are required. The view that some coercion is permissible during a Terry stop without creating a situation in which Miranda warnings become necessary is supported by authority from the Supreme Court and other federal and state appellate courts, as well as by the original Terry and Miranda decisions themselves.

a. The Original Terry Decision Contemplates that Some Questions Will Be Asked During Terry Detentions—Including Coercive Terry Detentions—Without Implicating Miranda

The original Terry decision contemplated a number of things, two of which are of importance with respect to addressing and dealing with the present issue. The first is that law enforcement officers effecting an investigative detention are permitted to ask a detainee a limited number of questions to confirm or dispel their reasonable suspicion that criminal activity is afoot. And it cannot be overlooked that in so holding the Terry Court, significantly, did not make any mention of its recently issued Miranda decision and in no way implicated or involved Miranda in its Terry decision—something that it obviously had the ability to do if it so chose. The second principle of importance is the fact that law enforcement officers are permitted to

729. See, e.g., State v. Dawson, 983 P.2d 916, 922 (Mont. 1999) ("This Court has previously held that law enforcement officers need not administer Miranda warnings to suspects during brief investigative encounters even if those encounters are somewhat coercive. Moreover, we have stated that an interrogation is not custodial unless there is a significant restriction of personal liberty similar to an arrest, and even temporary confinement as a safety precaution does not render the detention 'custodial' for Miranda purposes.") (citations omitted).
use some coercion to effect these investigative detentions in which they can subsequently ask a detainee questions. As noted by the United States Supreme Court in \textit{Graham v. Connor},\textsuperscript{730} "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."\textsuperscript{731} And as the \textit{Terry} decision itself instructed,

we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.\textsuperscript{732}

Thus, the very Court that permitted law enforcement to detain an individual based on reasonable suspicion and ask that detainee a limited number of questions about the very criminal acts being investigated without implicating or even making reference to \textit{Miranda} also permitted those same officers in the same detentions to use necessary force to protect themselves and the public and to effect the purposes of the stop. And, once again, in holding as it did, the Court nowhere referenced its decision in \textit{Miranda} from just two year earlier—a significant fact in the context of a decision approving some questioning in situations that were understood might involve some degree of force or coercion.

The position that the \textit{Terry} decision contemplated the use of necessary force and the questioning of a detainee, and that it did so without putting any \textit{Miranda}-based stipulations or restraints on that questioning, is supported by Justice White's concurrence in \textit{Terry}. In joining the 8–1 decision in \textit{Terry}, he wrote:

[A]lthough the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop.

\textsuperscript{730} 490 U.S. 386 (1989).
\textsuperscript{731} \textit{Id.} at 396.
\textsuperscript{732} \textit{Terry v. Ohio}, 392 U.S. 1, 24 (1968); \textit{see also} \textit{Adams v. Williams}, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.").
There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked, but may refuse to cooperate and go on his way. However, given the proper circumstances . . . the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. . . . But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.733

Justice White’s comment is significant because it supports the idea that a person can be stopped and frisked if the circumstances warrant a frisk and otherwise “restrained briefly” in a Terry-type detention, and further can be asked specific questions about the reasons for the stop, without the implication of Miranda.734 Additionally, the existence of the comment itself and Justice White’s additional comment that the Court “puts the matter [of Miranda] aside” indicates that the Terry Court was well aware of its Miranda decision from two years prior and chose not to make it a part of the Terry context.735 Furthermore, the fact that Justice White raised the issue and stated a belief that questioning in a Terry context does not implicate a detainee’s Fifth Amendment rights, and no contrary response or challenge was raised by any other member of the Court, indicates at the very least a non-rejection, and perhaps even an acceptance, of his views on the issue.

This view is even consistent with statements contained in the Miranda opinion itself, which held:

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an

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733. Terry, 392 U.S. at 34–35 (White, J., concurring).
734. Id.
735. Id.
undue interference with a proper system of law enforce-
ment. As we have noted, our decision does not in any way
preclude police from carrying out their traditional investiga-

Arguably, the entire concept of the \textit{Terry} investigative detention,
including investigating criminal activity that is happening in the
officer’s presence and talking with persons potentially involved to
determine what exactly is happening, is a “traditional investigatory
function”\footnote{737. \textit{Id.}} and is not meant to be affected by \textit{Miranda}. This view is
further supported by the \textit{Miranda} Court’s statement that “[g]eneral
on-the-scene questioning as to facts surrounding a crime or other
general questioning of citizens in the factfinding process is not
affected by our holding.”\footnote{738. \textit{Id. at 477.}}

A good example of these basic principles in the context of an
actual case is presented by the very straightforward case of \textit{United States
v. Cervantes-Flores},\footnote{739. 421 F.3d 825 (9th Cir. 2005).} which involved the prosecution of an illegal alien
for reentering the United States. The basic facts of the reentry were
described in the Ninth Circuit’s opinion in the case. Specifically, in
May of 1998, the defendant was found inside the United States
without proper documentation.\footnote{740. \textit{Id. at 828.}} He was thereafter convicted of
improper entry by an alien and was removed from the country in
January of 2003.\footnote{741. \textit{Id.}} One week after his removal, Cervantes was
reapprehended in California when he was observed walking along the
side of a highway.\footnote{742. \textit{Id.}} Specifically, a border patrol agent’s suspicions
were aroused when Cervantes, upon noticing the agent’s marked
vehicle, began to run away from the vehicle.\footnote{743. \textit{Id.}} The agent was able to
catch Cervantes after about three-quarters of a mile, at which time
Cervantes was subdued and handcuffed.\footnote{744. \textit{Id.}} As noted by the Ninth
Circuit, “[w]ithout giving any \textit{Miranda} warning, [the border patrol
agent] then asked Cervantes his citizenship, whether he had immigra-
tion documents allowing him to be in the United States, and how he
crossed the border.”\footnote{745. \textit{Id.}} In response to the questioning, Cervantes
admitted that he was a Mexican citizen and that he had entered the

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\footnote{736. Miranda v. Arizona, 384 U.S. 436, 481 (1966).}
\footnote{737. \textit{Id.}}
\footnote{738. \textit{Id. at 477.}}
\footnote{739. 421 F.3d 825 (9th Cir. 2005).}
\footnote{740. \textit{Id. at 828.}}
\footnote{741. \textit{Id.}}
\footnote{742. \textit{Id.}}
\footnote{743. \textit{Id.}}
\footnote{744. \textit{Id.}}
\footnote{745. \textit{Id.}}
United States illegally.\textsuperscript{746} Cervantes was thereafter convicted of a reentry offense and appealed his conviction, including the trial court's refusal to suppress the statements that he made to the border patrol agent who arrested him.\textsuperscript{747}

On appeal, the Ninth Circuit Court of Appeals, in a post-\textit{Kim} decision, upheld the conviction.\textsuperscript{748} On the \textit{Terry} and \textit{Miranda} issues, the Ninth Circuit noted that agents had reasonable suspicion to detain Cervantes and that given that fact the agent "could ask Cervantes questions 'reasonably related in scope to the justification for their initiation.'\textsuperscript{749} Specifically, the court held that questions about Cervantes's place of birth, citizenship, lack of permission to be in the United States, and manner of crossing the border—though questions that went to the heart of the illegal conduct that he was later charged with—"were reasonably limited in scope to determining whether Cervantes had crossed the border illegally\textsuperscript{750} and were therefore appropriate and his answers admissible despite the fact that \textit{Miranda} warnings were not provided. The Court further noted that under the circumstances the use of handcuffs to detain Cervantes was not inappropriate and did not convert the \textit{Terry} detention into \textit{Miranda} custody.\textsuperscript{751} The court concluded:

In sum, [the agent] had reasonable suspicion to make an initial \textit{Terry} stop. He limited the scope of his questions to investigating that suspicion alone. His use of handcuffs was justified by Cervantes' flight and [the agent's] safety concern and thus did not convert the stop into a custodial arrest. Accordingly, we hold that the district court did not err in admitting the statements Cervantes made in response to [the agent's] questions.\textsuperscript{752}

\textit{Cervantes-Flores} serves as a useful example for a number of reasons. First, it provides a classic example of a \textit{Terry} stop, involves some use of coercion and force that is reasonable given the circumstances surrounding the stop, involves questioning that pursuant to \textit{Terry} is properly limited in scope, and recognizes that all of these things are consistent with, and appropriate under, the original \textit{Terry} decision

\begin{itemize}
  \item\textsuperscript{746} \textit{Id.}
  \item\textsuperscript{747} See \textit{id.} at 829.
  \item\textsuperscript{748} \textit{Id.} at 835.
  \item\textsuperscript{749} \textit{Id.} at 830 (quoting U.S. v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975); \textit{Terry} v. Ohio, 392 U.S. 1, 29 (1968)).
  \item\textsuperscript{750} \textit{Id.}
  \item\textsuperscript{751} \textit{Id.}
  \item\textsuperscript{752} \textit{Id.}
\end{itemize}
and, most important, are appropriate without the need for *Miranda* warnings.

*b. Later Supreme Court Precedent Supports the View that Some Coercion is Permissible in Terry Detentions Without Implicating *Miranda*

The concept of some coercive elements existing during a *Terry* detention is not a new one. As the Supreme Court stated in *Mathiason*, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." The Supreme Court has been clear, however, that the mere fact that some coercion exists is not enough to convert a *Terry* stop into a situation in which *Miranda* warnings are necessary, and therefore any court addressing the interplay between these two important decisions must remember that fact.

In addition to the Court’s statement in *Mathiason*, a number of Supreme Court decisions support the theory that coercion can be used in a *Terry* stop without converting that stop into either an arrest or a situation in which *Miranda* warnings are required. First and foremost, the *Miranda* decision itself supports that belief. As will be discussed below, while *Miranda* ultimately concluded that warnings should have been given in the case before it, the facts and background of the *Miranda* decision, as well as the language used indicates that not all situations involving coercion require *Miranda* warnings. Other decisions support these arguments as well. In *United States v. Hensley*, for example, the Supreme Court addressed the stop of a person in one jurisdiction who was suspected of criminal activity in another jurisdiction. The stop at issue involved law enforcement pulling a vehicle over, approaching the vehicle with a weapon drawn pointed in the air, and ordering the occupants to get out of the vehicle. In holding that the police officer’s actions were all warranted and appropriate under a *Terry* investigative detention scenario, the Court noted that “[w]hen the ... officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status

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755. *Id.* at 221.
756. *See id.* at 224.
quo during the course of the stop," and therefore their "conduct was well within the permissible range in the context of suspects who are reported to be armed and dangerous." And while Hensley did not involve any interrogation of significance enough to address in the opinion, the Court, once again without reference to Miranda, further held that the underlying reasonable suspicion was such that it "justif[ied] a brief stop to check Hensley's identification, pose questions, and inform the suspect that [law enforcement from another jurisdiction] wished to question him." In short, the Court upheld the stop as a standard investigative detention despite the coercive acts of pulling the suspects over, approaching their vehicle at gunpoint, and ordering them out of the car. In so doing, the Court recognized that law enforcement can ask questions during a Terry stop without implicating or even referencing Miranda.

Another case in which the Supreme Court approved of a coercive Terry situation is Michigan v. Summers, which also had an added element of some questioning that did not cause the Court to invoke Miranda. In Summers, the Court addressed the seizure and subsequent search of a person discovered just outside of a home for which law enforcement had obtained a search warrant. With respect to the facts of the case, the Supreme Court noted that as a group of police officers were preparing to execute a search warrant on a home believed to contain narcotics, they encountered Summers descending the front steps of the home. Officers thereafter "requested his assistance in gaining entry, and detained him while they searched the premises." Drugs were found in the home, officers were able to determine that Summers owned the house, he was arrested, and a search of his person revealed 8.5 grams of heroin in an envelope in Summers's pocket.

The lower courts provided additional details of the detention, search, and questioning that took place. The first appellate court to address the case was the Michigan Court of Appeals in People v. Summers. In that opinion the Michigan court noted that Summers was detained by law enforcement outside of the home and asked

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757. Id. at 235 (emphasis added).
758. Id. at 234 (emphasis added).
760. Id. at 693.
761. Id.
762. Id.
763. See id.
about his relationship to the premises. It also noted that he was eventually ordered to re-enter the house—a matter about which “he had little choice”—where he was subsequently detained in a single room with other occupants and further questioned. Summers thereafter “indicated upon questioning that he was the owner of the house and lived there.” Those answers were inculpatory because drugs were found in the home. The Michigan Supreme Court also heard and ruled on the case in its own version of People v. Summers.

The Court’s description of the facts included a statement that “the testimony of [the detaining officer] at the preliminary examination indicates that the defendant was not free to leave the front porch as the premises search warrant was being executed, but was instead escorted into his house and deprived of his liberty.”

Procedurally, both the Michigan Court of Appeals and the Michigan Supreme Court affirmed the trial court’s dismissal of the case after a suppression hearing and prior to trial, so none of the statements that Summers made were actually introduced into evidence or had their admissibility challenged. As such, the United States Supreme Court’s decision is not a Miranda-based decision. However, with the above-referenced facts as background, the Summers Court did make some statements relevant to the issue of whether Miranda warnings are required in coercive Terry detentions such as that at issue in Summers. First and foremost, the Court wrote that:

If the purpose underlying a Terry stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than [a] brief time period . . . . As one commentator observed: “It is clear that there are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained . . . . There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable.”

765. Id. at 690–91.
766. Id. at 691 n.2.
767. Id. at 691.
769. Id. at 228.
770. Id. at 227, 231.
771. Summers, 452 U.S. at 700 (quoting 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 at 36–37 (1978)).
Once again, Summers is not a Miranda-based case; however, in writing the above footnote the Court nowhere indicates that Miranda warnings might be required in such a circumstance.

The Court also makes a comparison of the facts of Summers to those of Dunaway v. New York,772 a case in which a Terry stop was deemed to be a de facto arrest.773 In making that comparison, the Summers Court noted that “[i]n sharp contrast to the custodial interrogation in Dunaway, the detention of this respondent was ‘substantially less intrusive’ than an arrest.”774 This is a significant statement in the context of a discussion of Miranda and its role in Terry detentions. First, the Court made it very clear that the situation in Summers—which included detaining a person against his will inside a single room while multiple law enforcement officers search the remainder of the home for drugs and doing so in such a way that it was clear that he was not free to leave—did not rise to the level of a “custodial interrogation” like the situation in Dunaway.775 Further, and perhaps more important, the Court found the same situation to be “substantially less intrusive’ than an arrest.”776 This is significant because Beheler and Berkemer held that a seizure only rises to the level of custodial interrogation requiring Miranda warnings when “a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’”777 Thus, it is clear from the opinion that a situation such as that described above, which again has been referred to as a Terry detention, is far from rising to the level of custodial interrogation and is “substantially less intrusive’ than an arrest,” and any questioning that takes place within the parameters set for Terry detentions does not need to be preceded by Miranda warnings. In the same discussion, the Court further noted in another footnote that “unlike the seizure in Dunaway, which was designed to provide an opportunity for interrogation and did lead to Dunaway’s confession, the seizure in this case is not likely to have coercive aspects likely to induce self-incrimination.”778 In other words, the Court once again found the situation in Summers to be very much different from the cases that led to the Miranda decision and therefore found it to be a

773. Summers, 452 U.S. at 702.
774. Id.
775. Id.
776. Id.
778. Summers, 452 U.S. at 702 n.15.
case in which *Miranda* warnings would not be required—an analysis and result that should be given significant consideration by courts addressing a claim that *Miranda* warnings should have been required during a particular *Terry* detention.

Of course, the Supreme Court decision of most importance to the argument that *Miranda* warnings generally have no place in *Terry* detentions, even if those detentions involve some degree of force or coercion, is *Berkemer*. As noted above, the investigative detention at issue in *Berkemer* involved a motorist being stopped by law enforcement, removed from his vehicle, and subjected to testing to determine if he was under the influence of some substance. 779 McCarty, the motorist, was undoubtedly seized and his freedom of action curtailed to a degree that he was not free to leave, and yet he was not deemed to be in custody because he was not “subjected to restraints comparable to those associated with a formal arrest.”780 As noted above, the Supreme Court distinguished traffic stops in the sense that motorists do not feel completely at the mercy of police, traffic stops are generally more public, there is less danger that a person will be forced to make self-incriminating statements when he or she otherwise would not do so, and “the atmosphere surrounding an ordinary traffic stop is substantially less ‘police dominated’ than that surrounding the kinds of interrogation at issue in *Miranda* itself and in the subsequent cases in which” *Miranda* has been applied.781 This comparison of traffic stops to the significantly overbearing interrogation at issue in *Miranda* is important. As will be discussed below, the types of interrogation that led to the *Miranda* decision are significantly overbearing and coercive, and much more so than even a *Terry* stop like those at issue in *Pelayo-Ruelas*, *Martinez*, *Treuber*, *Leshuk*, *Ali*, *Cruz*, *Smith*, *Perdue*, and many of the other cases referenced above. Regardless, in making a comparison to the facts of *Miranda* a part of the consideration, the *Berkemer* court set a standard that other courts would be right to follow. More specifically, in addressing the circuit split at issue here, the courts should compare the facts of each *Terry*-type case to the facts of *Miranda* when determining whether warnings are required in a particular situation—a procedure suggested by *Beckwith* and other Supreme Court decisions.782

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780. *Id.* at 441.
781. *Id.* at 438–39.
782. See, e.g., *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (“An interview with Government agents in a situation such as the one shown by this record simply does not present the elements which the *Miranda* court found so inherently coercive.
Given the extremely coercive nature of the interrogations that led up to the *Miranda* decision, except in rare circumstances the suggested comparison should weigh in favor of warnings not being required for *Terry* stops. The most often-cited portion of the *Miranda* opinion for support for the position that warnings are not required in *Terry* detentions reads:

The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

Again, this statement from *Berkemer* notes that there should be a comparison between the facts and circumstances of those cases that led the Court to decide *Miranda*, and those *Terry* stops that courts are being asked to address. This is significant because, once again, even coercive *Terry* stops that involve handcuffs and other coercive acts necessitated by a suspect's danger to officers and the community in general are far less coercive than the situations complained of in *Miranda*.

Finally, one additional part of the *Berkemer* decision that supports the non-applicability of *Miranda* in most *Terry* stops is its statement, found in a footnote in the opinion, that

[o]ne of the investigative techniques that *Miranda* was designed to guard against was the use by police of various kinds of trickery—such as "Mutt and Jeff" routines—to elicit confessions from suspects. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort.

The same is certainly true of most *Terry* stops—including those in which the circumstances of the stop require a use of force and coercion—because by their very nature as incidents that generally arise without much warning, they do not provide law enforcement with any chance to develop or implement an interrogation plan.
c. The Original Miranda Decision Does Not Require Warnings in all Coercive Interrogations

The aforementioned cases are important in the context of a discussion of whether and when Miranda becomes applicable in a Terry-like investigative detention. Specifically, the fact that Terry itself contemplates that some force and coercion may be necessary in certain circumstances, yet at the same time allows law enforcement officers to ask some questions regarding the circumstances of the stop, is significant. This is particularly true because the Court had decided Miranda just two years prior to Terry, and in no way referenced the need for Miranda warnings in discussing the questioning that was permitted to take place during a Terry stop. Certainly a person who had been detained by law enforcement and potentially even searched during the investigation of criminal activity had been "deprived of his freedom of action in any significant way," which was the standard under Miranda that was applicable at the time. And yet, again, nowhere in the Terry opinion is it suggested that Miranda was even remotely applicable. This lack of discussion of the need for Miranda warnings in the Terry decision or a number of other Terry-related decisions up until the Court ruled in Berkemer suggests that the Court did not intend Miranda to apply in those types of situations. This suggestion, in turn, is supported by the Miranda opinion itself, which precedes its ruling with a discussion of "graphic examples" of overbearing and unlawful coercion. 785 Thus when Miranda referenced the applicability of the warnings to those situations in which a person has been arrested or is "otherwise deprived of his freedom of action in any significant way," the Court was undoubtedly referring to those coercive circumstances described in the opinion or their functional equivalent, and not necessarily less coercive circumstances such as those that the Mathiason Court indicated do not require Miranda warnings.

There are a number of places in the Miranda opinion in which the Court described the types of situations that gave rise to its landmark decision. Near the beginning of the opinion, for example, the Court noted that the right against self-incrimination "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons," 786 which included "the temptation to press the witness unduly, to browbeat him if he be timid

786. Id. at 442 (quoting Brown v. Walker, 161 U.S. 591, 596–97 (1896)).
or reluctant, to push him into a corner, and to entrap him into fatal contradictions.\textsuperscript{787}

The \textit{Miranda} Court also described the situations of the actual cases themselves that the \textit{Miranda} Court was asked to resolve, which shared a number of "salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."\textsuperscript{788} The Court further described other factors that led up to and played into its decision in \textit{Miranda}, including a disturbing history of interrogation in the United States.\textsuperscript{789} The \textit{Miranda} Court also referenced a number of specific police practices and interview techniques that it believed required a holding such as that set forth in the \textit{Miranda} opinion.\textsuperscript{790} For example, the opinion referenced direction given by law enforcement interrogation manuals that suggests such things as (1) conducting an interview in a private location of the interrogator's choice and in an "atmosphere [that] suggests the invincibility of the forces of the law"\textsuperscript{791} so as to "deprive[] [the subject] of every psychological advantage";\textsuperscript{792} (2) displaying "an

\textsuperscript{787}. \textit{Id.} at 443 (quoting \textit{Brown}, 161 U.S. at 596–97).
\textsuperscript{788}. \textit{Id.} at 445.
\textsuperscript{789}. In describing the referenced history of interrogation within the United States, the \textit{Miranda} Court wrote:

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that, in this country, they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's... it is clear that police violence and the "third degree" flourished at that time.

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions." The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. \textit{Id.} at 445–46 (citing \textit{People v. Portelli}, 205 N.E.2d 857 (1965)). The \textit{Miranda} Court did later note that "[t]he examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern." \textit{Id.} at 447. It was the Court's hope that "a proper limitation upon custodial interrogation... such as these decisions will advance" would provide an "assurance that practices of this nature will be eradicated in the foreseeable future." \textit{Id.}

\textsuperscript{790}. \textit{Id.} at 449–55.
\textsuperscript{791}. \textit{Id.} at 450 (citations omitted).
\textsuperscript{792}. \textit{Id.} at 449 (citations omitted).
air of confidence in the suspect's guilt, 793 by focusing only on confirming certain details of the offense and finding out the reasons the subject committed the act "rather than . . . asking the subject whether he did it," 794 minimizing the moral seriousness of the offense and blaming the victim or society rather than the suspect, providing the suspect with legal excuses for the alleged conduct, and otherwise using "tactics . . . designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty," 795 and (3) presenting an overbearing and "oppressive atmosphere of dogged persistence," 796 by interrogating "steadily and without relent, leaving the subject no prospect of surcease" 797 for hours and even days if need be "with no respite from the atmosphere of domination," 798 and otherwise "dominat[ing] his subject and overwhelm[ing] him with his inexorable will to obtain the truth" 799 with just enough respite to "avoid a charge of duress that can be technically substantiated." 800

The Court also addressed concerns regarding other law enforcement tactics such as: pre-planned "Mutt and Jeff" or "good cop/bad cop" routines, inducing confessions "out of trickery" 801 such as the use of fictitious or bogus line-ups, convincing the subject that silence and a refusal to answer questions is only an admission of guilt, convincing a subject that it is better not to involve other persons when an attorney or family member is requested, 802 and otherwise using methods that will "persuade, trick, or cajole him out of exercising his constitutional rights." 803 These specific practices and the need to avoid them were the primary reason behind the Court's opinion in *Miranda*.

In support of its holding, the Court also referenced some of the factual scenarios of then-recent cases that played into its decision. And, perhaps most important, the Court noted that "[i]n the cases before us today, given this background [of recent confession cases], we concern ourselves primarily with this interrogation atmosphere

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793.  *Id.* at 450.
794.  *Id.*
795.  *Id.*
796.  *Id.* at 451.
797.  *Id.*
798.  *Id.*
799.  *Id.*
800.  *Id.*
801.  *Id.* at 452–53.
802.  *See id.* at 453–54.
803.  *Id.* at 455.
and the evils it can bring."\textsuperscript{804} In other words, the Court's reference to the recently-decided cases, which immediately followed its discussion on excessive police interrogation techniques, is the "background" that provides details on the "interrogation atmosphere" that is at the heart of the \textit{Miranda} opinion. The then-recent cases that played into the Court's decision to rule as it did in \textit{Miranda} included \textit{Townsend v. Sain},\textsuperscript{805} \textit{Lynamn v. Illinois},\textsuperscript{806} \textit{Haynes v. Washington},\textsuperscript{807} and \textit{Fay v. Noia},\textsuperscript{808} all of which, the Court found, involved an "incommunicado police-dominated atmosphere."\textsuperscript{809} The facts of these cases are significant to an analysis of the reasons behind the \textit{Miranda} decision as they show the coercive and intimidating nature of the situations being considered by the Court at the time—situations far more coercive and intimidating than the comparatively tame scenarios presented in the \textit{Terry} cases that make up the circuit split referenced in \textit{Artiles-Martin}.

\textit{Townsend}, for example, involved the extended detention and questioning of a nineteen-year-old heroin addict.\textsuperscript{810} The detention involved multiple periods of questioning at various law enforcement locations and took place over a period of over twenty hours.\textsuperscript{811} Townsend, the suspect in a murder and separate robbery investigations, was under the influence of heroin at the time he was first detained and later began to suffer symptoms of withdrawal.\textsuperscript{812} During his time of detention, Townsend was placed into a line-up and later alleged that when one of the robbery victims identified someone other than Townsend as his attacker, Townsend was physically hit in the stomach by one of the police officers, causing him to vomit, and the officer then told Townsend that he knew that Townsend committed the crime.\textsuperscript{813} During his detention, Townsend was given certain pills and injected with medication to address his withdrawal symptoms, and later alleged that prior to receiving the medication, he was told that medical help would be contingent on his cooperation in the murder investigation.\textsuperscript{814} After being detained for approximately twenty-one hours, Townsend finally confessed to the murder for

\begin{footnotes}
\item[804] \textit{Id.} at 456.
\item[805] 372 U.S. 293 (1963).
\item[806] 372 U.S. 528 (1963).
\item[807] 373 U.S. 503 (1963).
\item[809] \textit{Miranda}, 384 U.S. at 456.
\item[810] \textit{Townsend}, 372 U.S. at 297.
\item[811] \textit{Id.} at 297–98.
\item[812] \textit{Id.}
\item[813] \textit{Id.} at 300.
\item[814] \textit{Id.}
\end{footnotes}
which he was being investigated.\textsuperscript{815} He was further detained for approximately three days when he was taken in front of a coroner's inquest and called as a state witness where he again confessed.\textsuperscript{816} Townsend was informed that he had a right not to testify at the inquest, but was also not appointed an attorney until he was arraigned on the murder charge another nine days later.\textsuperscript{817} Certainly it goes without saying that any comparable interrogation would be so far outside the bounds of a lawful \textit{Terry} detention that no true \textit{Terry} stop could involve such horrific and blatantly unconstitutional interrogation tactics.

\textit{Lynumn} involved a similarly coercive situation.\textsuperscript{818} Specifically, \textit{Lynumn} involved a confession made in response to a threat by police that if the petitioner—a mother who "had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats"—did not "cooperate" with the officers' investigation, her financial aid would be cut off and her children taken away.\textsuperscript{819} As noted by the Court, "these threats were made while she was encircled in her apartment by three police officers and a twice-convicted felon who had purportedly 'set her up.'"\textsuperscript{820}

In \textit{Haynes}, the suspect's version of events included allegations that he was detained for approximately sixteen hours before making and signing a confession, during which time his repeated requests to call his attorney and his wife were denied.\textsuperscript{821} He further alleged that officers told him that he would only be allowed to make the requested calls after he "cooperated" in the sense that he provided law enforcement with a written and signed confession admitting participation in a robbery.\textsuperscript{822} And, "according to the petitioner, he was, in fact, held incommunicado by the police until some five or seven days after his arrest."\textsuperscript{823} Haynes' version of what happened was, in some respects, contested by the State, though the involved detectives did testify that Haynes may have asked to call his wife and that they may have told him that he could only do so if he cooperated with their investiga-
Again, as noted above, the Berkemer Court suggested a comparison of pending cases to these types of scenarios to determine the applicability of Miranda, and there is no doubt that no valid Terry stop can compare to these cases in degree of force or coercion.

The Miranda opinion and its underlying reasoning were based in great part on the facts of the individual cases on which the Court was asked to rule—the Miranda decision itself serving as a ruling in multiple underlying cases. In addressing the coercive circumstances of the separate prosecutions and appeals making up the Miranda decision, the Court wrote briefly on each of the underlying cases, noting that they involved such “menacing police interrogation procedures” as securing a confession in a special interrogation room, lengthy overnight detention and interrogation by both state and federal officers, and, in one truly egregious case, a series of nine separate custodial interrogations over a period of detention lasting five days. These circumstances, the Court wrote, which each “carri[ed] its own badge of intimidation,” were designed “for no purpose other than to subjugate the individual to the will of his examiner.” The Court also took note of the special circumstances of each defendant, writing, for example, that the defendant in Miranda “was a seriously disturbed individual with pronounced sexual fantasies” and that the defendant in California v. Stewart “was an indigent Los Angeles Negro who had dropped out of school in the sixth grade.”

In summing up all of the cases and interrogation techniques referenced above and placing them in the context of the need for what became Miranda warnings, the Court wrote:

We are satisfied that all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trick-

824. See id. at 509–10.
826. Id. at 457.
827. Id.
The Miranda Court further noted that it was seeking to provide protection against those “interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.”\textsuperscript{829} The Court expressed concern regarding those “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”\textsuperscript{830} The Court further explained that the required warnings are necessary to overcome those “inherent pressures of the interrogation atmosphere” and “an interrogator’s imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury.”\textsuperscript{831} And the Court repeatedly made reference to “the secret interrogation process,”\textsuperscript{832} the “isolated circumstances under which . . . interrogation takes place,”\textsuperscript{833} and the concept of “incommunicado interrogation.”\textsuperscript{834}

This discussion of the cases, interrogation techniques, and police practices is significant, because immediately after this lengthy discussion, the Court sets forth its holding that “[t]he principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.”\textsuperscript{835} Specifically, the cases and practices discussed immediately prior to this statement are important because they provide the context for the Court's reference to the concept of “otherwise deprived of his freedom of action in any significant way.”\textsuperscript{836} In the context of the discussion of when the newly-announced Miranda warnings should be given, it is those overbearing and shocking circumstances to which the Court has referred that are the subject of discussion. Nowhere in the discussion of police practices and case decisions does the Court discuss a mere investigative detention that later came to be known as a

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828. \textit{Id.} at 461.
830. \textit{Id.} at 467.
831. \textit{Id.} at 468.
832. \textit{Id.} at 470.
833. \textit{Id.} at 475.
834. \textit{Id.}
835. \textit{Id.} at 477.
836. \textit{Id.} at 444.
\end{flushleft}
Terry stop. It is the more significant deprivations of liberty and dignity used for the express purpose of extracting a confession to which the Court has referred, and not those uses of force or coercion that are necessary in a Terry stop to maintain the status quo and otherwise safely effectuate the purposes of and allow law enforcement to safely gain control of the investigative detention.

This view of Miranda is bolstered by the Court’s next area of discussion. In addressing when Miranda warnings are and are not required, the Court noted the following about situations in which the warnings are not necessary:

General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.837

Certainly true Terry stops, such as those at issue in the Eighth Circuit’s decisions in Martinez and Pelayo-Ruelas, involved “on-the-scene questioning as to the facts surrounding a crime”—the very questioning contemplated by the original Terry decision.838 At the end of the statement the Court added a footnote of significance. In that footnote the Court wrote:

The distinction and its significance has been aptly described in the opinion of a Scottish court: “In former times, such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavorable to the suspect.”839

Taken together, these two statements seemingly place a limit on how often and in what situations Miranda warnings were intended to be required. This position finds support in the Supreme Court’s later statement in Rhode Island v. Innis840 that “[i]nterrogation,” as conceptualized in the Miranda opinion, must reflect a measure of compul-

837. Id. at 477–78.
838. Terry v. Ohio, 392 U.S. 1, 4–6 (1968); id. at 477; Martinez, 462 F.3d 903, 907–08 (8th Cir. 2006); Pelayo-Ruelas, 345 F.3d 589, 590, 592 (8th Cir. 2003).
839. Miranda, 384 U.S. at 478 n.46 (citations omitted).
sion above and beyond that inherent in custody itself."\textsuperscript{841}

The view that \textit{Miranda} was intended to apply to only those overbear- ing circumstances where a person essentially loses the ability to resist is supported by Justices White and Stewart's reading of \textit{Miranda} as expressed in their dissenting opinion in \textit{Orozco v. Texas}.\textsuperscript{842} Decided three years after \textit{Miranda}, \textit{Orozco} reversed a murder conviction on the grounds that the defendant's statements, which were made after he was arrested and then questioned without \textit{Miranda} warnings in his own home, should not have been used against him at trial.\textsuperscript{843} In dissent, Justices White and Stewart complained about the Court's application of \textit{Miranda} to what they believed was a very non-coercive interrogation, the defendant's arrest notwithstanding.\textsuperscript{844} In addressing what they believed to be the original intent of the \textit{Miranda} decision, Justices White and Stewart first addressed the extreme nature of the interrogation techniques used in the \textit{Miranda} cases. In so doing they noted that the \textit{Miranda} cases involved "subtle forms of psychological pressure,"\textsuperscript{845} the "incommunicado interrogation of individuals in a police-dominated atmosphere,"\textsuperscript{846} "extended period[s] of isolation, repeated interrogation, cajolery, and trickery,"\textsuperscript{847} and, overall, techniques causing a risk that "the confidence of the prisoner could be eroded."\textsuperscript{848} Justice White then expressed his concern that the \textit{Miranda} decision was being applied in situations in which such contemptible techniques were not used. He wrote:

The Court now extends the same rules to all instances of in-custody questioning outside the station house. Once arrest occurs, the application of \textit{Miranda} is automatic. The rule is simple but it ignores the purpose of \textit{Miranda} to guard against what was thought to be the corrosive influence of practices which station house interrogation makes feasible.\textsuperscript{849}

And as Justice White noted, the \textit{Miranda} decision as applied in \textit{Orozco} does not even take into account whether or not an interrogation actually involves coercive interrogation tactics. He wrote:

The Court wholly ignores the question whether similar hazards exist or even are possible when police arrest and inter-

\begin{itemize}
\item \textsuperscript{841} \textit{Id.} at 300.
\item \textsuperscript{842} 394 U.S. 324 (1969).
\item \textsuperscript{843} \textit{Id.} at 327.
\item \textsuperscript{844} \textit{Id.} at 330 (White, J., dissenting, joined by Stewart, J.).
\item \textsuperscript{845} \textit{Id.} at 328.
\item \textsuperscript{846} \textit{Id.} (quoting \textit{Miranda}, 384 U.S. at 445).
\item \textsuperscript{847} \textit{Id.} at 329.
\item \textsuperscript{848} \textit{Id.} at 328.
\item \textsuperscript{849} \textit{Id.} at 329.
\end{itemize}
rogate on the spot, whether it be on the street corner or in the home, as in this case. No predicate is laid for believing that practices outside the station house are normally prolonged, carried out in isolation, or often productive of the physical or psychological coercion made so much of in Miranda. It is difficult to imagine the police duplicating in a person’s home or on the street those conditions and practices which the Court found prevalent in the station house and which were thought so threatening to the right to silence. Without such a demonstration, Miranda hardly reaches this case or any cases similar to it.850

Finally, Justices White and Stewart also expressed concern over the fact that Miranda as applied required warnings even when a person clearly knew his or her rights prior to an interrogation, writing that “[w]here the defendant . . . as a lawyer, policeman, professional criminal, or otherwise has become aware of what his right to silence is, it is sheer fancy to assert that his answer to every question . . . is compelled unless he is advised of those rights with which he is already intimately familiar.”851 Justice White concluded that the defendant’s conviction should not have been overturned on Miranda grounds for the reason that “there was no prolonged interrogation, no unfamiliar surroundings, no opportunity for the police to invoke those procedures which moved the majority in Miranda,”852 and therefore no reason to exclude the confession. This discussion of the original intent of the Miranda decision is significant because Terry stops, and even coercive Terry stops, are not carried out like the deliberate, prolonged, isolated, and psychologically overpowering interrogation situations at issue in Miranda. Officers conducting true Terry stops that are limited in scope and in time simply do not have the opportunity to employ the “Mutt and Jeff” routines and use other planned, deliberate, and prolonged interrogations that caused so much concern for the Miranda Court.

The view that Miranda was intended to apply to circumstances far more coercive than a Terry-type investigative detention is further supported by the Supreme Court’s decision in Minnesota v. Murphy,853 a case involving a probationer’s confession to committing a prior rape and murder to his probation officer during a court-mandated probation interview. First, the Murphy Court noted that the purpose

850. Id. at 329–30.
851. Id. at 329.
852. Id. at 330.
of the Court’s decision in \textit{Miranda} was “[t]o dissipate ‘the overbearing compulsion . . . caused by isolation of a suspect in police custody,’”\textsuperscript{854} an obvious reference to the \textit{Miranda} Court’s frequent mention of the “incommunicado interrogation” noted in that Court’s discussion of the cases and police practices that preceded announcement of the rule—practices and incommunicado isolation that simply do not take place in true \textit{Terry} stops. The \textit{Murphy} Court further pointed out that \textit{Miranda} custody is a more narrowly-defined condition than other forms of custody. In this regard the Court, in reference to the appellant in \textit{Murphy}, wrote:

He was, to be sure, subject to a number of restrictive conditions governing various aspects of his life, and he would be regarded as “in custody” for purposes of federal habeas corpus. But custody in that context has been defined broadly to effectuate the purposes of the writ, and custody for \textit{Miranda} purposes has been more narrowly circumscribed.\textsuperscript{855}

The \textit{Murphy} Court referenced a handful of prior decisions in its discussion of what constitutes \textit{Miranda} custody.\textsuperscript{856} One of the cases cited as helpful precedent in \textit{Murphy} is \textit{Roberts v. United States},\textsuperscript{857} which provides additional support for the view that \textit{Miranda} involves a “narrower standard”\textsuperscript{858} of determining custody. Specifically, the \textit{Roberts} Court noted that:

Although Miranda’s requirement of specific warnings creates a limited exception to the rule that the privilege [against self-incrimination] must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed. The warnings protect persons who, exposed to such interrogation without the assistance of counsel, otherwise might be unable to make a free and informed choice to remain silent.\textsuperscript{859}

In other words, the \textit{Roberts} Court considered \textit{Miranda} to be involved when the coercive nature of custodial interrogation is such and to the degree that it affects a person’s ability to make a free and voluntary choice to remain silent. Another case cited in \textit{Murphy} is

\begin{itemize}
  \item \textsuperscript{854} \textit{Id.} at 430 (quoting \textit{United States v. Washington}, 431 U. S. 181, 187 n.5 (1977)).
  \item \textsuperscript{855} \textit{Id.} (citations omitted).
  \item \textsuperscript{856} \textit{Id.} at 430–31.
  \item \textsuperscript{857} 445 U.S. 552 (1980).
  \item \textsuperscript{858} \textit{Murphy}, 465 U.S. at 430.
  \item \textsuperscript{859} \textit{Roberts}, 445 U.S. at 560–61 (citations omitted).
\end{itemize}
which provides some insight into the Court's view of when Miranda warnings are required. First and foremost, citing United States v. Beckwith, the Washington Court noted that in that decision it had "reaffirmed the need for showing overbearing compulsion as a prerequisite to a Fifth Amendment violation." The use of the word "overbearing" is consistent with the previously-referenced holding of Roberts that in order to create a Miranda violation the coercion must be such that it voids the person's ability to make a free and voluntary choice not to speak to law enforcement. The Washington Court further noted:

Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. In addition to guaranteeing the right to remain silent unless immunity is granted, the Fifth Amendment proscribes only self-incrimination obtained by a "genuine compulsion of testimony." Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions.

Again, the Court's reference to such terms as "genuine compulsion of testimony" and its reference to the fact that the Fifth Amendment "does not prohibit every element which influences a criminal suspect to make incriminating admissions" supports the view that in order for coercive circumstances to reach the level of a Miranda violation, they must be coercive to the degree that the detained party loses his or her ability to make a voluntary choice not to speak. This, in turn, means more than just a little bit of coercion. It also moves the realm of Miranda custody away from the true Terry investigative detention where the intent of questioning is to confirm or deny an officer's reasonable suspicions and not necessarily to compel self-incriminating statements that a person would not otherwise make.

And finally, the oft-cited Berkemer decision provides further support for the view that Miranda was intended to apply to only those overbearing circumstances where a person essentially loses the ability to resist. As noted by the Eleventh Circuit Court of Appeals in Acosta:

Instead of asking whether a suspect reasonably would feel free to leave, the Berkemer Court instead said the question

861. Id. at 190.
862. Id. at 187 (quoting Michigan v. Tucker, 417 U. S. 433, 440 (1974)).
should be "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights."  

_Berkemer_ also noted that "[f]idelity to the doctrine announced in _Miranda_ requires that it be enforced . . . only in those types of situations in which the concerns that powered the decision are implicated." 864 In other words, at least in the context of a _Terry_-like traffic stop, _Miranda_ warnings are only required when the pressures exerted impair a person's ability to freely exercise the right against self-incrimination, and not in less coercive situations that would often arise in _Terry_-type investigative detentions. And finally, _Berkemer_ also rejected the defendant's argument that _Miranda_ requires warnings to be given even in simple roadside traffic stops. In so doing the Court significantly limited the scope of the _Miranda_ Court's declaration that warnings are required when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," 865 noting that "we decline to accord talismanic power to the phrase in the _Miranda_ opinion emphasized by respondent." 866 In other words, a deprivation of liberty rising to the level of _Miranda_ custody involves far more than a situation in which a person simply is not free to leave until allowed to do so by law enforcement, even when some force or coercion is employed out of necessity.

As the facts of _Miranda_ and the statements in the following cases demonstrate, _Miranda_ has some limits in its application. Certainly _Miranda_ warns against unreasonable and unfair interrogation techniques that are not appropriate in our civilized society. It also provides for the protection of warnings for those being subjected to custodial interrogation. What it does not provide for, however, is warnings in all situations in which there is some coercion or coercive circumstances involved in a law enforcement encounter with a suspected criminal. Thus the Supreme Court's Statement in _Mathiasen_ that:

[A] noncustodial situation is not converted to one in which _Miranda_ applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a

864. _Berkemer_, 468 U.S. at 437.
866. _Berkemer_, 468 U.S. at 437.
“coercive environment.” Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.” It was that sort of coercive environment to which Miranda, by its terms, was made applicable, and to which it is limited.

This is significant in the context of a Terry stop for the reason that in the vast majority of Terry stops, all of the evils warned about in the Miranda opinion are simply non-existent. For example, Miranda discusses and then bases its holding upon legitimate concerns regarding the use of “sustained and protracted questioning incommunicado in order to extort confessions.” By their very nature, the majority of true Terry stops will not and cannot involve “sustained and protracted questioning” because a Terry stop is not only brief, but can only last long enough to confirm or dispel the detaining officer’s suspicions. Thus, officers simply will not have time to hide a person away and subject the person to lengthy interrogation while maintaining a true Terry detention. Additionally, true Terry encounters are unexpected in the sense that law enforcement will not have time to plan a method of carrying out an encounter and questioning during that encounter that will play on a suspect’s fears and take advantage of the pre-planned “Mutt and Jeff” routines that the Miranda court wrote about. Terry stops arise when law enforcement becomes suspicious about criminal activity and, by their nature, are carried out without the benefit of scenario-specific planning and training, are carried out outside of the controlled environment of the police station where law enforcement obviously has the upper hand, and are carried out without the opportunity to prepare a course of interrogation designed to cause a suspect to talk and confess when he or she would not otherwise do so. This is true particularly in those situations that require some force or coercion because of the nature of the suspected crime or the actions or identity or the proclivity for violence of the

868. Miranda, 384 U.S. at 446.
suspected criminal being questioned and investigated. In short, when making the comparison of a present case to the underlying situations in the cases that make up the Miranda decision, as the Berkemer Court suggests, Terry detentions—including those similar to the detentions in Perdue, Ali, Smith, and Martinez that involve some force and coercion—simply (and fortunately) do not measure up.

d. The Concept and Definition of “Arrest” Supports the Argument that Miranda Warnings Have no Place in Terry Detentions

In Beheler, the Court noted that for the purposes of determining Miranda custody, “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” Given these statements, it is clear that in making a determination of whether or not a person is in custody for Miranda purposes, it is appropriate for courts to look to the definition and concept of an “arrest” to determine whether the circumstances presented in an individual case rise to the level of Miranda custody, much like the Supreme Court did in Summers when it found that the detention of a homeowner during the execution of a search warrant did not rise to the level of an arrest or Miranda custody. After such a comparison, those situations that do not rise to the level of an arrest, then, should not and do not require Miranda warnings.

This view is supported by the Supreme Court’s decision in Dunaway v. New York. In Dunaway the Supreme Court rejected the detention of a suspect on less than probable cause for the purpose of conducting a custodial interrogation. More specifically, in Dunaway the Court found a Fourth Amendment violation when officers who did not have probable cause nevertheless took a suspect into custody for the purposes of interrogating him about a crime that was under investigation and did so in such a way that the suspect had no choice but to accompany the officers to the police station and remain there for questioning. In addressing the issue, the Supreme Court held that Dunaway was, for all intents and purposes, under arrest, though not formally arrested. In reaching that conclusion, the Court spent a significant portion of the opinion addressing Terry detentions and

872. Id.
their relationship to and differences with arrests—a discussion that is significant in light of the Beheler Court's holding that Miranda custody involves a "restraint on freedom of movement" of the degree associated with a formal arrest. 873

In terms of the spectrum of seizures, the Court noted first that "since the intrusion involved in a 'stop and frisk' [is] so much less severe than that involved in traditional 'arrests,'"874 the general rule requiring probable cause is inapplicable in those Terry-type situations. The Court reiterated this concept later in the opinion, noting that Terry "departed from traditional Fourth Amendment analysis" in that "it defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test."875 Finally, after referencing Terry, Adams, Mimms, and Brignoni-Ponce, the Court noted that the "intrusions" in those cases "fell far short of the kind of intrusion associated with an arrest."876 Given these statements, it appears that as long as a detention of a suspect falls within the guidelines set for lawful and appropriate Terry detentions, the detention is considered to be "substantially less intrusive than [an] arrest[.]"877 and therefore, pursuant to the Beheler "'restraint on freedom of movement' of the degree associated with a formal arrest"878 test, does not amount to Miranda custody.

Finally, in considering these issues, it is important once again to review the basic concept of the de facto arrest, because it is at the point that a detention becomes a de facto arrest that it leaves the realm of a Terry stop and under Dunaway becomes more than the investigative detention that is considered to be "substantially less intrusive than [an] arrest[.]"879 In its most basic terms, an investigative detention remains a lawful Terry detention and does not rise to the level of a de facto arrest so long as it falls within the following guidelines set forth in Florida v. Royer.880

The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a

873. Beheler, 463 U.S. at 1124 (citations omitted).
874. Dunaway, 442 U.S. at 209.
875. Id. at 209–10.
876. Id. at 212.
877. Id. at 210.
878. Beheler, 463 U.S. at 1125 (citations omitted).
limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.881

Furthermore, while there is no time limit for Terry investigative detentions, courts should “examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”882 This description of the parameters of an appropriate Terry stop is helpful because it presupposes the existence of some force or coercion, noting that if force and coercion are used they must be used in the “least intrusive” way possible given the circumstances. And finally, with respect to the Royer Court’s statement that “[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case,”883 no court can forget that in conducting Terry investigative detentions, law enforcement officers are “authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of a Terry stop,”884 even when those “steps” involve the use of force or coercion.

The bottom line is that a Terry detention is not an arrest. Similarly, a Terry detention that does not exceed the bounds set forth in Royer and the other aforementioned cases is not a de facto arrest. Thus, if a Terry stop is valid in the sense that it is limited in scope, limited in time, and questions posed are within the bounds set for Terry stops, then according to the Supreme Court in Dunaway, it is presumably less intrusive than an arrest, and therefore it would not rise to the level of Miranda custody as defined in Beheler. In short, when there is a valid Terry stop, the rebuttable presumption should be that it is not an arrest, is not a de facto arrest, does not create a restraint on freedom of movement to the degree associated with formal arrest, and therefore is not Miranda custody. As such, under Beheler, no Miranda warnings are required in those situations.

881. Id. at 500.
883. Royer, 460 U.S. at 500.
e. Questioning During Custodial Interrogation Has a Different Purpose from that Done During a Terry Detention

As originally contemplated, the questions that were permissible in a Terry stop were different from those at issue during custodial interrogation. Put differently, the purpose of interrogation is different from that of Terry questioning. In interrogation, particularly as outlined in the Miranda decision and the descriptions of the cases at issue there, the purpose is to elicit incriminating responses from the person being questioned. As noted in Rhode Island v. Innis, “the term ‘interrogation’ under Miranda refers . . . to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” In Terry, however, the purpose of questioning is different. Law enforcement, while trying to stop what they reasonably suspect might be criminal activity, are not intentionally trying to elicit incriminating responses from a subject whom they suspect might be involved in a crime, but instead are attempting to “obtain information confirming or dispelling the officer’s suspicions” regarding possible criminal activity. The difference may be a subtle one, but it is a difference still the same, and because there is a difference, the required Miranda warnings should be held to apply to questions asked during custodial interrogation but not to appropriately limited questions asked during Terry detentions.

f. The Supreme Court’s Narrowing of the Definition of “Custody” Supports the View that Miranda Has Little to No Place in Terry Investigative Detentions

In determining which situations require Miranda warnings and which do not, it is also important to note that the Supreme Court has arguably narrowed the definition of custody since the original Miranda decision. This has been done by way of changing the test for custody in such a way that the Court has more narrowly focused the number of situations in which the definition can be applied. Setting aside the nature of the coercive circumstances that led to the Miranda decision, the plain language used in the opinion arguably

887. See Swift, supra note 130 at 1078–79 (addressing the ways in which the definition of “custody” for Miranda purposes has been narrowed since the original Miranda decision).
casts a wide net with respect to the number and types of circumstances to which the decision applies, as it requires *Miranda* warnings whenever a person has been “deprived of his freedom of action in any significant way.” Without looking to the types of custodial interrogations that led the Court to decide as it did, the *Miranda* Court’s statement that warnings are required in those cases where a person is “deprived of his freedom of action in any significant way” could apply to any number of circumstances, including *Terry* stops. For as the *Berkemer* Court wrote, “a traffic stop significantly curtails the ‘freedom of action’ of the driver . . . of the detained vehicle.” Once again, in *Berkemer* the defendant was ordered out of his vehicle and asked to take a number of field sobriety tests. He was certainly not free to leave until the tests were satisfactorily completed such that the detaining officer would have been satisfied that he was not under the influence of alcohol. Arguably, then, he was deprived of his freedom of action in a significant way, but the Court nevertheless held that he was not in custody under a revised test that applied *Miranda* warnings only in those situations where the detention was comparable to an actual arrest, or as the *Berkemer* Court put it where the “suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” In a sense, then, the test has narrowed so that detentions such as *Terry* stops can lawfully take place without the need for *Miranda* warnings.

**g. Practical Considerations**

Finally, courts addressing the issue of whether *Miranda* warnings are required in coercive *Terry* stop situations need to consider a few practical considerations. For example, under the current view taken by some courts, the more violent and dangerous a criminal is, the less law enforcement will be able to do in the sense of confirming or dispelling the reasonable suspicion that is the basis for the *Terry* stop. In a situation in which a suspected criminal is violent enough and dangerous enough to law enforcement that coercion and force in the nature of drawn weapons and handcuffs must necessarily be used, some courts would immediately require that *Miranda* warnings be given because the detained criminal will not feel free to terminate the

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889. See id.
891. *Id.* at 423.
892. *Id.* at 440.
stop and leave. This was the position taken by the Perdue court when it held that "[p]olice officers must make a choice—if they are going to take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising them of their constitutional rights." This position is unsatisfactory because it provides a benefit to violent criminals that does not apply to non-violent criminals whose Terry stops are effected with little or no coercion. Additionally, holdings like that of the Perdue court will limit law enforcement's ability to quickly take control of a situation and investigate the suspected criminal activity that is the basis for the stop because the officers will not be able to ask questions without first stopping to provide Miranda warnings. As noted in Quarles, "[w]e decline to place officers . . . in the untenable position of having to . . . give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." It is likewise unsatisfactory to say that in such a situation law enforcement can still ask the necessary questions to confirm or dispel their reasonable suspicions and take control of the situation with the trade-off being that the statements will just be suppressed and unusable in the state's case-in-chief at trial. Such a position, however, is unacceptable because, once again, a dangerous criminal ends up benefiting from his or her violent tendencies.

One might also claim that the public safety exception can step in to prevent suppression of any statements made. However, while it is quite useful, the public safety exception may not always come into play in such a situation because that exception is limited in its applicability. A good example is the case that led to the creation of the exception itself. As noted above, Quarles involved a suspect hiding a gun in a supermarket where any other patron could have come across it had law enforcement not intervened. Had the suspect in Quarles been pulled over in a car, however, the situation would have been different. Law enforcement would still have known him to be dangerous based on the fact that he had allegedly raped another person and had a firearm in his possession, but the situation and danger to the public (though not to the officers) would be much less poignant. Thus an officer who decided to approach the car at gunpoint and ordered the suspect to get down on the ground would

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893. United States v. Perdue, 8 F.3d 1455, 1465 (10th Cir. 1993).
895. Id. at 652.
not have been able to invoke the public safety exception, but would still have faced a dangerous situation. To require an officer in that situation to stop and provide the suspect with Miranda warnings prior to inquiring about the gun and the circumstances of the stop would seriously inhibit the officer’s ability to take control of the situation and quickly confirm or dispel the reasonable suspicions that were the basis for the stop. Thus the suspected criminal’s penchant for violence would actually hinder law enforcement’s ability to take control of the situation and would, in the end, provide a benefit for the suspect that a less dangerous suspect would not receive—a benefit that cannot be removed because of the inapplicability of the public safety exception.

Another practical concern has to do with the logic of the situation in which a person is validly detained under Terry but is also in custody for Miranda purposes. To say that a seizure is a valid Terry detention means that law enforcement only needs reasonable suspicion to make the stop—no evidence rising to the level of probable cause is required. But to say at the same time that the situation is one of Miranda custody means, under Beheler, that the restriction on the detainee’s liberty is of a degree associated with formal arrest. A formal arrest, of course, requires probable cause, and so to hold that a person is in Miranda custody but is validly detained under Terry is to say that even though law enforcement has exercised enough control over the person that probable cause is otherwise required, in the particular situation at issue reasonable suspicion is enough to justify the detention. This problem has been recognized by at least one legal commentator who wrote:

By allowing a Terry stop to rise to the level of Miranda custody while remaining a valid Terry stop these courts implicitly endorse the expansion of Terry to cover custodial situations. That endorsement allows police to take suspects into custody without probable cause, so long as they read them their rights. This violates the Fourth Amendment’s protection against unreasonable seizures.

Obviously such a situation simply does not make much legal sense.

In short, courts addressing these issues need to look to the practical consequences of their decisions and perhaps reconsider a ruling that may provide an added benefit or protection to the most violent of www.open.mitchellhamline.edu/wmlr/vol36/iss4/10

897. Swift, supra note 130 at 1088.
criminals, particularly when all of the above-referenced authority permits questioning in coercive Terry circumstances without the need for Miranda warnings.

2. Many of the Proposed Tests for Determining Miranda Custody Are Flawed

As noted above, there are a number of different tests and variations of tests used in courts throughout the United States to determine whether a situation rises to the level of custodial interrogation. Many of these proposed tests are flawed in the sense that they leave no room for questioning during Terry stops without requiring Miranda warnings or otherwise lead to confusing and inconsistent results.

a. The "Reasonable Person Would Not Feel Free to Leave" Test from the Supreme Court's Decision in Thompson and the Eighth Circuit's Decision in Martinez is Not Workable

One of the most frequently cited tests is whether a reasonable person in the suspect's position would have felt free to terminate the interrogation and leave—a test originally set forth in the Supreme Court's decision in Thompson and later adopted by the Eighth Circuit in Martinez. This test has been referred to above as the Thompson reasonable person test. As a number of courts have noted, however, there are some significant flaws or weaknesses with that test.

First and foremost, when a person has been detained for a traditional, non-coercive investigative detention pursuant to Terry, that person is not free to leave until the Terry stop is completed and therefore should reasonably feel that he or she is not free to leave. Therefore if it is read literally, the test set forth in Thompson at least when applied in the Terry context, is whether a reasonable person would feel free to terminate an interrogation and detention and leave in a situation where that person realistically cannot leave and would not be allowed to do so. The concerns regarding the application of such a test in Terry investigative detentions are laid out well by the

898. See supra Part V.
900. See supra notes 184–187 and accompanying text.
901. See, e.g., United States v. Salvo, 133 F.3d 943, 949 (6th Cir. 1998) ("[T]he transitory nature of a Terry stop itself indicates that a suspect is not free to leave during that brief period of detention."); People v. Martinez, 200 P.3d 1053, 1057 (Colo. 2009) ("A stop allows an officer temporarily to detain an individual for limited investigatory purposes such that he is not free to leave.").
Eleventh Circuit's decision in *Acosta*. It wrote:

Normally courts apply a two-part test to determine whether a suspect is in custody for *Miranda* purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." As we have already discussed, a suspect who is detained during a *Terry* stop is not free to leave from the beginning of the stop until it ends. If we applied the general *Miranda* custodial test literally to *Terry* stops, the result would be that *Miranda* warnings are required before any questioning could occur during any *Terry* stop.903

A number of courts and court opinions have recognized this very problem, including the Eighth Circuit's decision in *Pelayo-Ruelas*,904 the Ninth Circuit's *Kim* dissent,905 and others.906

In this regard, it is not much of a stretch to argue that had the Supreme Court applied this very test in *Berkemer*, the result of that decision would have been different. Once again, *Berkemer* involved a DUI investigation where a person was removed from his vehicle and asked to perform field sobriety tests.907 Given that situation, one would be hard-pressed to say that a reasonable person in the detainee's position would have felt free to terminate the investigation (including terminating the field sobriety tests) and drive away. The Supreme Court itself even recognized that "a traffic stop significantly curtails the 'freedom of action' of the driver... of the detained

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903. Id. at 1148 (citations omitted).
904. United States v. Pelayo-Ruelas, 345 F.3d 589, 59293 (8th Cir. 2003).
905. United States v. Kim, 292 F.3d 969, 978 (9th Cir. 2002).
906. See, e.g., State v. Marcum, 205 P.3d 969, 977–78 (Wash. Ct. App. 2009) ("Contrary to the trial court’s ruling, the fact that numerous police vehicles surrounded Marcum in the grocery store parking lot did not convert the investigatory detention of Marcum into a custodial arrest. By definition, someone subject to a *Terry* investigative detention is not ‘free to leave.’... Provided the stop is justified by reasonable suspicion and does not exceed its allowable purpose, the presence of numerous officers does not convert it into a custodial arrest.... During such a seizure, suspects need not ‘feel that they were free to leave.’... Marcum was not free to leave. But that does not convert his investigatory detention into a custodial arrest for purposes of the Fifth Amendment. Rather, a ‘detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to *confirm or dispel the officer’s suspicions* without rendering the suspect ‘in custody’ for the purposes of *Miranda.* Such questioning is precisely what occurred here.”) (citations omitted).
and that “few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.”\textsuperscript{909} Despite that fact, however, the Court held that the defendant in \textit{Berkemer} was not in custody for \textit{Miranda} purposes and that his unwarned statements were admissible against him at trial.\textsuperscript{910} Thus, there is clearly some discrepancy between the holdings and results under \textit{Berkemer} and \textit{Thompson} in a \textit{Terry} context, which has led some courts to reject \textit{Thompson} in the sense of determining that the \textit{Thompson} holding does not apply to \textit{Terry} stops. For example, as referenced above, the Sixth Circuit made a parenthetical comment in \textit{Salvo} that “the [\textit{Thompson}] ‘free to leave’ inquiry is at least a component of a Fifth Amendment custody determination (presumably with the exception of a \textit{Terry} stop situation).”\textsuperscript{911}

The bottom line is that a literal application of the test set forth in \textit{Thompson}, which many courts have applied in \textit{Terry} situations, would require \textit{Miranda} warnings in almost all non-arrest and non-consensual police encounters. This is because even a person stopped for a routine speeding violation can arguably be said to feel that he or she is not free to leave until the stopping law enforcement officer releases the person. This very fact was referenced by the Eleventh Circuit in \textit{Acosta}, where it noted:

> The guidance the \textit{Berkemer} decision provides stems from the fact that traffic stops, like \textit{Terry} stops generally, are indeed stops. A reasonable person knows that he is not free to drive away from a traffic stop until it is completed, just as a reasonable person knows that he is not free to walk away from a \textit{Terry} stop until it is over. If the lack of freedom to leave were decisive, which is to say if every phrase in the \textit{Miranda} opinion is to be applied literally, then all traffic stops as well as all \textit{Terry} stops generally would be subject to the requirements of that decision. \textit{Berkemer} establishes that they are not.\textsuperscript{912}

Such a result does not make sense and, as noted above, would involve a much wider application of \textit{Miranda} that was originally contemplated by the Court in that it would encompass detentions and interrogations far different and far less restrictive than those at issue in \textit{Miranda}. Thus, the Sixth Circuit view that \textit{Thompson} does not

\begin{itemize}
  \item \textsuperscript{908} \textit{Id.} at 436.
  \item \textsuperscript{909} \textit{Id.}
  \item \textsuperscript{910} \textit{Id.} at 441–43.
  \item \textsuperscript{911} United States v. \textit{Salvo}, 133 F.3d 943, 950 (6th Cir. 1998).
  \item \textsuperscript{912} United States v. \textit{Acosta}, 363 F.3d 1141, 1149 (11th Cir. 2004).
\end{itemize}
provide the proper framework for an inquiry involving a *Terry* stop makes some sense.\textsuperscript{913} This is particularly true in light of the facts of *Thompson*, which involved a person who was not detained by the police for a brief investigation of possible on-going criminal activity, but instead involved a person who was asked to meet with detectives at a police station, who appeared under his own power, and was repeatedly told that he was free to terminate questioning and leave at any time.\textsuperscript{914}

\textit{b. The Lack of Specificity in the Berkemer Test Has Led to Some Confusion Among Lower Courts that Limits its Effectiveness as a Possible Test for Determining Miranda Custody}

Perhaps the most oft-cited authority for determining whether a situation has developed to the point that a detainee is in *Miranda* custody is *Berkemer*, where the Supreme Court held that “the only relevant inquiry [in determining whether a person is in custody for *Miranda* purposes] is how a reasonable man in the suspect's position would have understood his situation.”\textsuperscript{915} One of the obvious challenges with applying this standard is first determining exactly what the Court is referring to when using the phrase “would have understood his situation.” For example, it is unclear whether the Court was referring to a person’s circumstances at the time of a detention in general terms, or whether the person is deemed to have an understanding of the difference between a *Terry* stop and an arrest and therefore understood the “situation” to be either an arrest or an investigative detention. Thus, as referenced above, some courts focus on an understanding of whether a person is under arrest, some courts focus on an understanding of whether the situation is just a temporary detention, some courts focus on an understanding of whether a person is in custody, some courts focus on an understanding of whether a person is at the mercy of police, and other courts focus on an understanding of additional factors.\textsuperscript{916} In short, it can be unclear what exactly the reasonable person is deemed to or should understand. In a slightly different sense, the Second Circuit recognized a problem with the *Berkemer* test in *Cruz v. Miller* when it wrote:

*Berkemer* emphasizes that “the only relevant inquiry [in determining when a person is in ‘custody’ for purposes of

\begin{itemize}
\item \textsuperscript{913} Salvo, 133 F.3d at 950.
\item \textsuperscript{915} Berkemer, 468 U.S. at 442.
\item \textsuperscript{916} See supra Part IV.
\end{itemize}
Miranda is how a reasonable man in the suspect's position would have understood his situation.” However, this cryptic reference to the suspect’s “situation” left it unclear whether the Court was applying the “freedom of movement” standard from custodial interrogation cases such as Mathiason and Beheler or the “free to leave” standard from Fourth Amendment seizure cases such as Mendenhall and Delgado, or whether the two formulations are not meaningfully distinct.

Furthermore, the mere fact that there are many different versions of the Berkemer test, as referenced above, demonstrates a lack of specificity in the test. Given these concerns, it is apparent that the Berkemer test, while widely-accepted and applied, needs some clarification.

B. Recommendations: The Best Method for Determining When a Terry Detention Becomes Miranda Custody is a Method that Recognizes that Some Limited Use of Force or Coercion is Necessary Because of the Circumstances of a Stop is Permissible Without Implicating Miranda

As noted above, the original Terry decision contemplated that law enforcement would be permitted to ask some questions during all Terry investigative detentions, including coercive Terry investigations—a position solidified and supported by subsequent Supreme Court authority. Furthermore, the Miranda decision was not intended to apply to all coercive situations—an idea supported by other cases such as Beheler and Berkemer. Based on these concepts, it is apparent that the best method for determining when a Terry detention becomes Miranda custody is a method that recognizes that some limited use of force or coercion is necessary because of the circumstances of an investigative detention is permissible without automatically implicating Miranda.

One fact that is significant, but is not mentioned by the Artiles-Martin court when delineating the circuit split, is that the cases that make up the split are really of three distinct types. The first type involves a true Terry stop in which law enforcement has reasonable suspicion that criminal activity is afoot and makes a temporary detention pursuant to the terms and principles of Terry to confirm or dispel the reasonable suspicions. Situations like this include Berkemer, Trueber, Leshuk, Ali, Cruz, Smith, Perdue, Swenson, and Salvo, as well as

917. Cruz v. Miller, 255 F.3d 77, 83 (2d Cir. 2001).
918. See supra Part II.A.2.
countless other cases. The second type of situation is one in which law enforcement does not have just reasonable suspicion to believe that there is criminal activity, but necessarily has probable cause by virtue of the fact that they were able to obtain a warrant for the search of a particular premises. This type can be seen in the Supreme Court’s decision in *Summers* 919 and the Ninth Circuit’s decision in *Kim*, 920 which both involved the detention of a person during the execution of a search warrant, which clearly presents a different situation.921 And a third situation, addressed in such cases as *Mathiason*, *Thompson*, and *Beheler*, involves not a Terry stop but a consensual encounter that, unlike a Terry detention or a detention during the execution of a search warrant, can presumably be terminated at any time.

The differences between these three situations are significant and should be taken into account when determining whether the presence of coercive actions necessitates the use of Miranda warnings in each circumstance. Part of the problem that reviewing courts have faced is trying to find a test that applies equally to Terry stops and consensual encounters—or, put another way, trying to apply one specific test for Miranda custody into each of the situations outlined above. This has proven difficult at best, and consequently the better approach is to treat each of the situations differently and not attempt to apply the same test to each. More specifically stated, cases such as *Beheler* and *Mathiason* involve consensual encounters and not true Terry stops, so some consideration of that fact has to be given when applying the principles in those cases and any test for Miranda custody to true Terry stops. Otherwise the confusion that currently exists in this area of the law is certain to continue.

Given these considerations, the best test for determining Miranda custody in a true Terry situation is one that combines elements from a number of different Supreme Court decisions and in doing so stays true to the principles of those decisions but does so in a way that has not yet been fully employed by any federal circuit or state court to date. Specifically, the best approach for true Terry-type situations involves a two-part test that combines a modified version of the

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921. *Id.* at 971–72. At the same time, however, Kim also potentially involves not a detention during the execution of a search warrant in the manner addressed in *Summers*, but a consensual encounter in the sense that Kim was not originally detained by law enforcement, but voluntarily submitted herself to their presence when she decided to enter her store during the search. See *id.* at 971.
Berkemer reasonable person test with the requirement from Beheler that custodial interrogation is a “restraint on freedom of movement’ of the degree associated with a formal arrest.”

First, any court addressing the issue should look to whether the degree of force and coercion used in a particular case does rise to the level such that it is “to the degree associated with formal arrest,” with due deference being given to the Berkemer Court’s directive that a comparison be made with the types of cases and interrogations that originally led to the Court’s Miranda decision. Given the general holdings of Summers and other cases, if a particular encounter, though coercive, (1) falls squarely within the parameters of a lawful Terry stop in the sense that any use of force or coercion is necessary for the protection of law enforcement and the public and is a reasonable response to the situation, (2) any questions asked are limited to the suspected criminal activity under investigation, and (3) the duration of the stop is limited to what is necessary to carry out the investigation, then this part of the test should weigh in favor of the situation being deemed non-custodial. This view is consistent with such cases as Berkemer and Brignoni-Ponce, and was adopted in the Ninth Circuit’s decision in United States v. Davis when it wrote: “Where an individual has been detained . . . and officers’ questioning stays within the bounds of questioning permitted during a Terry stop, Miranda rights are not required. If, however, the individual is asked questions going ‘beyond a brief Terry-type inquiry,’ the individual is entitled to Miranda warnings.”

To say that no lawful Terry stop can rise to the level of Miranda custody would go directly against the Supreme Court’s holding in Berkemer, in which it rejected a proposed rule that a suspect “need not be advised of his rights until he is formally placed under arrest.” However, as the aforementioned authority demonstrates, the application of Miranda warnings to a completely lawful stop

923. United States v. Davis, 530 F.3d 1069 (9th Cir. 2008).
924. Id. at 1081.
925. Berkemer v. McCarty, 468 U.S. 420, 441 (1984) (“Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation’s traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens’ Fifth Amendment rights. The second would enable the police to circumvent the constraints on custodial interrogations established by Miranda.”).
Terry stop should be the exception and not the rule.

Second, in conjunction with the answer to the first question, a court addressing a situation involving a true Terry stop should consider how a reasonable innocent person who is "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances," 926 and who understands the difference between Terry detentions and de facto or actual arrests, would understand his or her situation. Specifically, courts should consider whether the person would consider it to be an arrest or a temporary investigative detention for the purpose of quickly confirming or dispelling suspicions of criminal activity. In addition to the above inquiries, it is important that the Thompson reasonable person test not be a part of the inquiry when dealing with a true Terry detention because, as stated by a number of courts, a person simply is not free to terminate a Terry investigation and leave because they truly are detained. It simply does not make sense to ask whether a person would feel as if he or she was free to terminate questioning and leave when the person would not be able to do so. The better inquiry is to focus on whether the reasonable person, who understands the difference between Terry stops and custodial interrogation, de facto arrests, and actual arrests, and the reasons for each, would understand the situation at hand. This same approach would apply to situations such as that in Summers where a person is detained subject to the execution of a search warrant. 927 In such cases the person is not generally free to leave, and therefore the Thompson reasonable person test should not be a part of the inquiry.

In the context of consensual encounters, however, such as those present in Beheler, Mathiason, and Kim to a certain degree, a different approach is appropriate. The test for consensual encounters is necessarily different because in a true consensual encounter the person really is free to leave at any time—unlike the situation in Terry and the other Terry-stop cases. In those circumstances, the test should include the factors addressed above—namely whether the person has been subjected to a "restraint on freedom of movement" of the degree associated with a formal arrest" 928 and how a reasonable person in the suspect's position would understand the situation—though with some modifications. Specifically, instead of employing the standard of a reasonable person who knows the difference between Terry

detentions and de facto or actual arrest, the better inquiry is to use a reasonable person who understands the difference between a consensual encounter and a de facto or actual arrest. Additionally, in such an inquiry, the Thompson reasonable person test becomes useful in the sense that the question is whether the reasonable person who consented to contact with law enforcement would feel free to terminate the investigation and leave—something that a person theoretically should be able to do in a true consensual encounter. That inquiry is a necessary part of the larger question of how the reasonable person understands the situation and whether that person would believe it to still be a consensual encounter.

An application of the above test for determining custody in a true Terry-stop situation to the facts and context of one of the cases that held that Miranda warnings can be required during coercive Terry stops is instructive. One of the courts to hold that Miranda warnings are required in coercive Terry stops was the Eighth Circuit’s decision in Martinez.929 Martinez involved a true Terry stop that was based on information reported following a robbery.930 As noted by the Eighth Circuit, Martinez involved the investigation of a bank robbery.931 In that case law enforcement stopped Martinez and told him that they needed to talk with him.932 As noted by the court, Martinez was cooperative, but given the circumstances of the crime being investigated, the officer “walked up to Martinez, took the cell phone from his hand and laid it on the ground, grabbed his hands, and told him that he was being detained because he matched the description of a bank robber.”933 The officer, cognizant of the fact that a gun had been used during the robbery, performed a pat-down search of Martinez to check for weapons.934 As one officer was performing the pat-down search, another officer asked Martinez if he had any weapons.935 Martinez denied having any weapons, but did indicate that he had a large sum of money on his person.936 The initial officer “felt what he knew to be a wad of cash in Martinez’s pocket” and thereafter placed Martinez in handcuffs and informed him that he

929. United States v. Martinez, 462 F.3d 903 (8th Cir. 2006).
930. Id. at 906.
931. Id.
932. Id.
933. Id.
934. Id.
935. Id.
936. Id.
would be “further detained.” Officers then asked Martinez where he had obtained the cash. He first indicated that he had just recently been paid for some work that he had done, but later "changed his story to say he saw a man running in the park, and that he found the money." As noted by the court, the officer “then placed Martinez in the back of the police car, read him his Miranda rights, and took him to the bank for a show-up identification.

With respect to the proposed test for true Terry stops such as that at issue in Martinez, the first part involves determining whether the stop fell within the parameters of a lawful and constitutionally sustainable Terry stop. In the Martinez opinion there was no assertion by the court that the stop was not a lawful Terry stop. To the contrary, the court held that “neither placing Martinez in the police car nor transporting him to the bank converted this Terry stop into an arrest for which probable cause was required.” Additionally, a comparison of the facts of Martinez to those at issue in Miranda, as directed by the Berkemer court, demonstrates that the facts of Martinez were far less coercive than the Miranda cases in the sense that, among other things, there was no incommunicado interrogation, Martinez was not held in isolation, and officers did not have time to implement planned interrogation routines designed to overcome a Martinez’s possible resolve to remain silent.

Because the facts of Martinez place it squarely within the parameters of a lawful Terry stop in the sense that the use of force was necessary for the protection of law enforcement and the public and was a reasonable response to the situation, the questions that were asked were limited to the suspected criminal activity under investigation, and the duration of the stop was limited to what was necessary to carry out the investigation, and because the facts do not rise to the level of an arrest or a restraint of the degree associated with an arrest as set forth in Dunaway and do not compare to those underlying Miranda, this first part of the test should weigh in favor of a finding that the restraints used were not "to the degree associated with formal arrest." Therefore the situation was non-custodial. The second part

937. Id.
938. Id.
939. Id.
940. Id.
941. See id. at 907.
942. Id. at 908.
943. Id. at 906.
of the proposed test, once again, is to consider what a reasonable person who understands the difference between *Terry* investigative detentions and an arrest would understand the detention to be, pursuant to the precedent set forth in *Berkemer*.

Briefly stated, based on the facts of *Martinez* and the officer's actions being wholly consistent with an investigative detention as opposed to an arrest, a court addressing the issue could clearly conclude that a reasonable person, who understood the difference between an arrest and an investigative detention, would find the situation at issue to be an investigative detention as opposed to an arrest. Based on these findings, an application of the suggested test could reach a reasonable conclusion of a non-*Miranda* custody situation in *Martinez*.

### VI. CONCLUSION

Criminal courts and appellate courts deal with issues of *Miranda* and *Terry* stops on a daily basis, as do police officers, prosecutors, and criminal defense attorneys. Given the fact that in today's world, criminals appear to be more violent than in the past, and also that law enforcement officers are at times required to use greater degrees of force and coercion to safely effect an investigative detention, the two cases and their holdings now occasionally conflict with one another. Additionally, because of a lack of direct Supreme Court authority as to how to handle these conflicts, courts in different jurisdictions have reached different conclusions and applied different legal standards in addressing this significant conflict, thus leading to a split in the federal circuits over whether coercive *Terry* detentions constitute *Miranda* custody.

In addressing these situations, courts should look to the original *Miranda* and *Terry* decisions and subsequent Supreme Court authority to determine how to resolve the conflicts in individual cases. When that authority is consulted, it becomes apparent that the mere fact that there is some coercion and force used in a particular situation should not, and does not, automatically require *Miranda* warnings to be given during the course of a *Terry* stop. Additionally, the very nature of a *Terry* stop requires that in determining whether a person is in *Miranda* custody, the fact that the person does not feel free to leave is not and should not be dispositive of the issue. Instead courts should look at the entire circumstances of a stop as required by the Supreme Court and apply the test proposed in this article to make
that determination.\textsuperscript{945}

Until the Court addresses the issue more directly there will likely be continued confusion and disagreement among the federal and state courts. However, applying the suggested test will ensure that the original intent of the \textit{Miranda} and \textit{Terry} decisions are given proper respect, the concept of arrest and custodial interrogation are not modified or changed to the detriment of those accused of committing criminal acts, and the rights of criminal defendants will continue to be protected in a way that does not inappropriately restrict law enforcement's ability to investigate crime and protect the public.

\textsuperscript{945} See Stansbury v. California, 511 U.S. 318, 322 (1994) ("[A] court must examine all of the circumstances surrounding the interrogation.").