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HERE IN MY CAR:

THE CROSSING OF *MIRANDA* AND *TERRY* AT THE INTERSECTION OF CUSTODY DURING STOPS

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INTRODUCTION

The late George Carlin famously joked about the seven words banned by the FCC[1], but seven words most Americans would rather not hear are, "You have the right to remain silent."[2] The constant barrage of television shows and movies about police officers has ensured that most people know those are usually the first words one hears when being arrested.[3]

The Fifth Amendment to the Constitution guarantees American citizens the right against self incrimination.[4] It was from the Fifth Amendment that the Court formulated the *Miranda* warning in the 1968 decision *Miranda v. Arizona*.[5] The *Miranda* warning must be given to a criminal suspect before a custodial interrogation.[6] A suspect is in custody when he has been

[1] *See* FCC v. Pacifica Found., 438 U.S. 726, 729–30 (1978) (discussing a radio broadcast of the George Carlin monologue entitled *Filthy Words*); *see also* Transcript of *Filthy Words*, http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/filthywords.html (last visited Mar. 10, 2010) (featuring a transcript of the original monologue performed by the late George Carlin).

[2] *See* Eric Longley, *The Miranda Warning*, ST. JAMES ENCYCLOPEDIA OF POP CULTURE, 2002, http://findarticles.com/p/articles/mi_g1epc/is_tov/ai_2419100811 (last visited Mar. 10, 2010) (pointing to Americans' association of the *Miranda* warning with arrest because of popular media representations).

[3] *Id.* (mentioning how "[m]ovies, television police dramas, and 'real' cop shows" have familiarized many with the *Miranda* warnings); *see also Premature Miranda Warnings: Mirandizing Too Soon Can be a Mistake*, http://www.policemag.com/Channel/Patrol/Articles/2009/12/Premature-Miranda-Warnings.aspx (last visited Mar. 10, 2010) (discussing that television shows and movies often distort the true meaning of *Miranda* warnings).

[4] U.S. CONST. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself").

[5] 384 U.S. 436, 468–69 (1966) (describing information the warning must provide).

[6] *Id.* at 444 (summarizing the Court's holding that "procedural safeguards" must be used to ensure that the rights of citizens are respected).

"deprived of his freedom of action in any significant way."[7]

Though it has been defined by the Court, the question as to when a person has entered into police custody is one that still comes up today.[8] In *New Mexico v. Snell*, the state of New Mexico appealed a ruling by the New Mexico Court of Appeals which held that a suspect was in custody when he was placed into the back seat of a police cruiser and asked about the car accident with which he had just been involved.[9] The point at which a person may enter into police custody during a routine traffic stop, or if a person can even enter into custody in that context, is a source of much confusion among the courts, and courts are split about whether the placing of a suspect into a police cruiser for questioning amounts to a custodial interrogation.[10]

It is important that the courts come to a consensus on what police conduct renders a suspect in custody; without a consensus, custody determinations will be confused, thus hindering the efficiency of the nation's courts and law enforcement officers.[11] Officers need to know when to recite the *Miranda* warning to suspects, or potential suspects, so that any evidence obtained through the questioning can be admitted in court as direct evidence.[12] It is particularly important that officers be aware of custody in the context of routine traffic stops because they are such a common exercise for this country's law enforcement officers.[13]

7 *Id.*

8 *See* Petition for Writ of Certiorari at 19, New Mexico v. Snell, 2008 WL 3833284 (2008) (No. 08-196) (calling the "relationship between *Terry* and *Miranda* in the context of traffic investigations . . . a recurring issue of nationwide importance"); *see* Katherine M. Swift, Comment, *Drawing a Line between Terry and Miranda: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1080 (2006) (describing the current use of different tests and the existing circuit split regarding when a suspect is in custody).

9 *See* Petition for Writ of Certiorari at 5, *Snell*, 2008 WL 3833284 (No. 08-196).

10 *Id.* at 12 ("Numerous courts have addressed the custody requirement of *Miranda* in the context of brief questioning in a patrol car, with greatly varying results").

11 *See* Swift, *supra* note 8, at 1080 (describing the current use of different tests and the splits among courts as to custody as "unpredictable and inconsistent"); Thomas P. Windom, Note, *The Writing on The Wall: Miranda's "Prior Criminal Experience" Exception*, 92 VA. L. REV. 327, 338 (stating that several factors are relevant to custody evaluation, and no one factor is necessarily dispositive).

12 *See Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (asserting that the warning is a prerequisite to the admissibility of statements made by a suspect during custodial interrogation); George C. Thomas III, Article, *The End of The Road For Miranda v. Arizona?: On The History and Future of Rules For Police Interrogation*, 37 AM. CRIM. L. REV. 1, 9 (2000) (stating that police must give suspects a *Miranda* warning before any evidence gained through police questioning can be admitted against the suspect).

13 *See* American Driver and Traffic Safety Education Association, *The Traffic Stop*, http://www.adtsea.iup.edu/adtsea/articles/Article.aspx?ArticleID=7b876663-3cfe-4254-a946-dbc38805d8c6 (last visited November 30, 2008) (stating that in 1999, fifty-two percent of all contacts made by the public with the police were traffic stops); Windom, *supra* note 11, at 338-39 (discussing that police conducting routine traffic stops "need not give *Miranda* warnings to a detained motorist

This note argues that, in the context of the routine traffic stop, once the situation becomes one in which there is a crime beyond that for which the officer stopped the motorist becomes apparent, such as vehicular homicide when the stop was the result of an accident, then the law enforcement officer must issue the *Miranda* warning. Failure to recite the warning would render questions related to that further crime inadmissible, thus preventing officers from utilizing a back door method to interrogate motorists.

The first part of this note discusses the background of the confusion regarding cases that seem to touch upon both the doctrine formulated in *Miranda,* and that devised in *Terry v. Ohio*. The second part of the note discusses the different approaches taken to delineating custody used by different courts throughout the country. The third part argues that in order to balance the need for effective law enforcement and the rights of American citizens when determining custody, the Court should utilize a tiered test that begins with the hallmark of a formal arrest test, and then moves to a totality of the circumstances test. In the case of a routine traffic stop, though, a third test should be applied before the other two that holds that once a greater crime is present and the officer wishes to ask questions related to it, *Miranda* must be recited; that approach is then applied to the facts of Snell.

I. BACKGROUND

Miranda v. Arizona is the case in which the Supreme Court formulated the warning that bears Miranda's name.[14] The warning must be given before a custodial interrogation.[15] In *Terry*, the Court established that the 'stop and frisk,' or *Terry* stop, is not a violation of the Fourth Amendment right against unreasonable search and seizure.[16] The Court did not mention *Miranda* in its *Terry* decision, as it did not see it as a case that touched upon custody.[17] The Court further held, in *Berkemer v. McCarty*, that a routine traffic stop is more like a *Terry* stop and thus does not require a *Miranda* warning.[18] However, in its decision, the Court held that a traffic

during questioning pursuant to the stop," however, police must be aware of custody laws, because the routine traffic stop conversation may lead to a custodial interrogation).

14 *See* Longley, *supra* note 2 (describing the origin of the *Miranda* warning).

15 *See Miranda*, 384 U.S. at 467-68 (stating that a suspect must be informed of his rights before custodial interrogation).

16 *See* Terry v. Ohio, 392 U.S. 1 (1968).

17 *Id.*

18 *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

stop can, given the right circumstances, render a motorist in custody.[19] During the 1980's, the scope of the *Terry* doctrine was expanded by the lower federal courts. This expansion has led to a feeling of confusion among the courts about the applicability of *Terry* and *Miranda* in situations that seem to touch on both doctrines.[20] This confusion has led to a split among the circuits.[21]

A. Miranda and the Warning

a. The Case of Ernesto Miranda

Ernesto Miranda was arrested on March 13, 1963, and taken to a police station in Phoenix, Arizona.[22] The complaining witness identified him, and he was placed into one of the precinct's interrogation rooms.[23] Two police officers interrogated him for roughly two hours, and the interrogation produced a written confession signed by Miranda.[24] At no time was Miranda informed that he had the right to an attorney.[25] The confession, however, included a typed paragraph stating that Miranda was fully aware of all of his legal rights when he wrote it.[26] The Arizona Supreme Court, in allowing the confession to be admitted as evidence in Miranda's trial, emphasized the fact that Miranda had not specifically requested counsel.[27]

b. The Supreme Court's Decision

The Court held that the interrogation of Miranda violated his Fifth Amendment right against self incrimination.[28] It further held that in order to avoid violating citizens' Fifth Amendment rights, police must initiate procedural safeguards that effectively warn a suspect of his rights before conducting a custodial interrogation.[29] The Court stated that a suspect must

19 *Id.* (maintaining that the protections of *Miranda* apply to a motorist who has been taken into custody).

20 *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 716 (1994) (discussing how a series of cases decided by the lower federal courts caused the doctrines of *Terry* and *Miranda* to clash).

21 *Id.* (proposing a solution the author feels would harmonize the different approaches taken by the circuits).

22 *See* Miranda v. Arizona, 384 U.S. 436, 491 (1966).

23 *Id.*

24 *Id.* at 491–92.

25 *Id.* at 491.

26 *Id.* at 492.

27 *Id.*

28 *Id.*

29 *Id.* (holding that Miranda was not informed of his rights to the extent that he could knowingly waive them).

be informed of his right to remain silent, that anything he says can be used against him in a court of law, and that he has the right to an attorney, either retained or appointed.[30] The failure of law enforcement officers to issue the warning before a custodial interrogation causes any evidence produced from such an interrogation to be rendered inadmissible in court as direct evidence.[31]

c. Custodial Interrogation

The warning must be given before a custodial interrogation, and the Court has defined both custody[32] and interrogation.[33] In *Miranda*, the Court defined custody as a "deprivation of a person's freedom of action in any significant way."[34] The Court elaborated on the definition of custody in *California v. Beheler*, holding that in terms of 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."[35]

Interrogation was defined by the Court in *Rhode Island v. Innis* as "either express questioning or its functional equivalent."[36] The Court went on to say that interrogation is not limited to express questioning, but that it also includes words or actions of the police, which are not part of a normal arrest and custody, "that the police should know are reasonably likely to elicit an incriminating response from the suspect."[37]

B. Terry and the Stop and Frisk

a. The Case of John Terry

On Halloween, in 1963, at around 2:30 PM, a police detective in Cleveland witnessed some men behaving suspiciously.[38] Two of the men, Chilton and Terry, were standing on a corner; they took turns walking past

30 *Id.* (pointing to the fact that Miranda was neither informed of his right to counsel, nor to his right to remain silent).

31 *Id.* (asserting that the evidence obtained from the interrogation of Miranda was inadmissible).

32 *Id.* at 492, 444 (defining the meaning of custodial interrogation).

33 *See* Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (concluding that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent").

34 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

35 *See* California v. Beheler, 463 U.S. 1121, 1125 (1983).

36 *See Innis*, 446 U.S. at 301-02.

37 *Id.*

38 *See* Terry v. Ohio, 392 U.S. 1, 5 (1968) (noting the arresting officer's statements that although he was not sure why the men drew his attention at first, his thirty years of patrol experience led him to be suspicious of them).

a store down the street and returning to the corner. During the five or six trips each man made, he would look into the store, walk a little past it, turn around, walk past the store again, and then confer with the other when he returned to the corner.[39] At one point, a third man, Katz, walked up to them at the corner, spoke to them for a few minutes, and then continued on his way.[40] Soon after, Terry and Chilton began to walk in the same direction that Katz had gone.[41] The detective followed them and saw the three men meet up in front of another store; at this point he approached them and identified himself as a police officer.[42]

The behavior of the men led the detective to believe they were planning a daytime robbery of the store Chilton and Terry had walked past several times.[43] Since that type of crime usually involves weapons, the detective believed the men could be armed.[44] He grabbed one of the men, turned him around, and frisked him outside of his clothes.[45] He did the same to the other men, before reaching into the clothes of two of them to remove their guns.[46] Katz did not have a gun, so the detective did not go beyond patting down his outer clothing.[47]

b. The Supreme Court's Decision

The men argued that the officer's conduct had violated their Fourth Amendment right against unreasonable search and seizure.[48] The Court pointed out that the Fourth Amendment does not forbid all searches and seizures, but only unreasonable ones.[49] Further, the Court stated that "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[50] The

39 *Id.* at 6.
40 *Id.*
41 *Id.*
42 *Id.* at 6-7
43 *Id.*
44 *Id.*
45 *Id. at 7*
46 *Id.* After patting down Terry outside, the officer then directed the three men to enter a store, where he then patted down the remaining two men and removed one gun from Terry, and another gun from one of the other men. *Id.*
47 *Id.*
48 *Id.* at 8 (stating that certiorari was granted to decide whether the admission of the guns violated the defendants' Fourth Amendment rights).
49 *Id.* at 9.
50 *Id.* at 20-21.

Court noted that there is no test for reasonableness, and that determining reasonableness requires the balancing of the police officer's need to search or seize with the level of invasion upon the individual.[51]

In order to justify an intrusion upon a citizen, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[52] The Court noted that a police officer, whose job is already dangerous, should not have to make it even more so by taking unnecessary risks.[53] It would be an unnecessary risk to prohibit an officer, who 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," from determining whether that person is, in fact, a danger, and if so, to neutralize that danger.[54]

It is important to note that the Court did not mention *Miranda* at all in the *Terry* decision, and there was no question of custody.[55] *Terry* was only about the reasonableness of a search and seizure pursuant to the Fourth Amendment.[56] *Miranda*, on the other hand, was about a suspect who was in police custody and was not informed of his Fifth Amendment rights.[57] It may now seem to have been inevitable, but eventually the two cases intersected in *Berkemer v. McCarty*.[58]

C. Berkemer at the Intersection of Terry and Miranda

a. The Case of Rick McCarty (*Berkemer*)

An Ohio highway patrolman followed a car for approximately two miles after he noticed it swerving in and out of a lane, so he followed it for approximately two miles.[59] The patrolman then signaled to the driver of the swerving car to stop.[60] The driver, McCarty, was told to exit the car; when he complied, he was barely able to stand.[61] The patrolman concluded that

51 *Id.* at 21.
52 *Id.*
53 *Id.* at 24 (stating it would be unreasonable to prevent officers from taking action in potentially dangerous situations).
54 *Id.*
55 *See generally* Terry v. Ohio, 392 U.S. 1 (1968)
56 *Id.* at 4.
57 *See* Miranda v. Arizona, 384 U.S. 436 (1966).
58 *See* Berkemer v. McCarty, 468 U.S. 420 (1984).
59 *Id.* at 423.
60 *Id.*
61 *Id.*

McCarty was intoxicated.[62] He decided to charge McCarty with an offense and did not permit him to leave.[63]

He then asked McCarty if he had been drinking or using drugs, to which McCarty replied in the affirmative.[64] It was at this point that the patrolman placed McCarty under arrest.[65] He transported McCarty to the police station and there continued to question him.[66] He had not yet, however, recited the *Miranda* warning to McCarty.[67]

b. The Court's Decision

The Court held that McCarty should have been read the *Miranda* warning at the time he was placed under formal arrest.[68] The Court held, however, that the questioning that occurred before the arrest did not qualify as a custodial interrogation.[69] The Court reasoned that a routine traffic stop, such as the one that took place in *Berkemer*, was more akin to a *Terry* stop because detention of a motorist pursuant to a traffic stop is presumptively temporary and brief, and because circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.[70]

The Court went on to hold that a *Miranda* warning would be required, though, if the conduct of the police placed the driver in custody for practical purposes.[71]

II. THE CURRENT TESTS

In the wake of *Berkemer*, a split among the circuits developed.[72] Several of the circuits, namely the First, Fourth, and Eighth, took the holding in *Berkemer* to mean that a reasonable *Terry* stop, even a coercive one, did

62 *Id.*

63 *Id.*

64 *Id.* McCarty admitted that he had consumed two beers and had smoked several joints of marijuana shortly before the traffic stop.

65 *Id.*

66 *Id.*

67 *See id.* at 424. Neither Williams nor anyone else told McCarty that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

68 *See id.* at 434-35 (stating that there is no question as to whether a suspect is in custody after a formal arrest).

69 *Id.* at 441.

70 *Id.* at 437-39 (concluding that those factors "mitigate the danger that a person questioned will be induced to speak where he would not otherwise do so freely").

71 *Id.* at 440 (clarifying that the "full panoply of protections prescribed by *Miranda*" will be available to motorists placed in custody).

72 *See* Swift, *supra* note 8, at 1084 (describing *Berkemer's* holding leading to a "simultaneous contraction of *Miranda* and expansion of *Terry*").

not require a *Miranda* warning.[73] These circuit courts essentially expanded the scope of the *Terry* stop to include police actions that would traditionally have been considered custody.[74] Other circuits, such as the Second, Seventh, Ninth, and Tenth, found that a reasonable *Terry* stop situation could escalate into a *Miranda* situation, but there is a further split regarding how that point is to be determined.[75]

Of the circuits that hold a *Terry* stop can escalate into a *Miranda* situation, there seem to be two types of tests applied to figure out when a stop becomes custody: one is the hallmark of a formal arrest test,[76] and the other is the totality of the circumstances test.[77] There is, for the most part, not a clear delineation between the two, and the two tests have even been used in tandem.[78] The result is confusion among the courts, and among law enforcement officers who must try to figure out when the *Miranda* warning is applicable so that evidence will not be deemed inadmissible at trial.[79]

A. Hallmark of a Formal Arrest

The hallmark of a formal arrest test holds that a suspect is in custody for purposes of *Miranda* when he is subject to police action that is the hallmark of a formal arrest.[80] The hallmarks of a formal arrest are those police actions most associated with formal arrest.[81] Handcuffs are most certainly a

73 *Id.* at 1084-85 (noting that "[s]ome lower courts have interpreted *Berkemer* to mean that *Miranda* warnings are never necessary for a lawful *Terry* stop").

74 *Id.* at 1086 (pointing out that those courts that find reasonable *Terry* stops as noncustodial "do not focus on the coercive nature of police behavior" during those stops).

75 *Id.* at 1087 (describing the approaches taken by the Second, Seventh, Ninth, and Tenth circuits, who have found reasonable *Terry* stops to be custodial).

76 *See* United States v. Newton, 369 F.3d 659, 676-77 (2d Cir. 2004) (holding that the use of handcuffs are a "hallmark of a formal arrest" and thus the suspect was in custody).

77 *See* Swift, *supra* note 8, at 1088 (claiming that courts have tried and failed to determine precisely when *Terry* stops become custodial and have "settled for vague totality of the circumstances" tests).

78 *See* United States v. Perdue, 8 F.3d 1455, 1463-67 (10th Cir. 1993) (taking into account factors the court deemed are associated with formal arrest in determining that the totality of the circumstances pointed to custody).

79 *See* Note, *Custodial Engineering: Cleaning Up the Scope of* Miranda *Custody During Coercive Terry Stops*, 108 HARV. L. REV. 665, 665 (1995) ("Incriminating statements made after the police issue a *Miranda* warning are presumptively admissible at trial; those made during a custodial interrogation before the warning are not."). David S. Romantz, *"You Have the Right To Remain Silent": A Case For the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt*, 38 IND. L. REV. 1, 10-15 (2005) (discussing the admissibility of incriminating statements made before and after *Miranda* warnings).

80 *See Newton*, 369 F.3d at 676 (maintaining that actions of police, like telling suspect he is not under arrest, must be measured against "the extent to which a reasonable person would understand any restraints on his freedom to be comparable to those associated with a formal arrest").

81 *See Perdue*, 8 F.3d at1464-65 (deeming "the use of guns to force a suspect off the road, out of

hallmark of the formal arrest.[82] Another hallmark would be the drawing of a gun on a suspect, along with being placed into a police vehicle, and being forced to lie on the ground.[83] Contrast those police actions with the hovering of helicopters overhead in *United States v. Perdue*, which is not associated with the typical, formal arrest.[84]

a. The Test Applied

The Second Circuit utilized a hallmark of a formal arrest test in *U.S. v. Newton*.[85] In that case, a parole officer received a call regarding a parolee who told his mother that he had a gun and threatened to kill her and her husband.[86] Three police officers and three parole officers went to the apartment and handcuffed the parolee, telling him that it was for his safety as well as that of the officers.[87] The officers sat him in a chair near the front door to the apartment, and one of them asked him if there was any contraband in the apartment.[88] The parolee nodded toward a shoebox; when asked about its contents, he answered that there was a gun inside the box.[89] The court decided that there was custody in that situation because of the use of the handcuffs, a hallmark of a formal arrest.[90]

B. The Totality of the Circumstances Test

The other test, used more often by the circuits, is the totality of the circumstances test.[91] A court applying this test will take into consideration a number of factors, which:

> may include any combination of the following: (1) the location of the encounter and whether it was familiar to the suspect, or at least neutral

his car, and onto the ground . . . a type of police conduct" akin to a formal arrest).

82 *See* U.S. v. Newton, 369 F.3d 659, 676 (2d Cir. 2004) (pointing out that handcuffs are generally considered a hallmark of a formal arrest).

83 *See Perdue*, 8 F.3d at 1464-65 (citing California v. Beheler, 463 U.S. 1121, 1125 (1983)) (asserting that being forced from one's car at gunpoint is conduct akin to a formal arrest).

84 *Id.* at 1464 (taking into account the hovering helicopters in utilizing the totality of the circumstances test).

85 *See Newton*, 369 F.3d at 676 (holding that the suspect was in custody for purposes of *Miranda* because he was handcuffed).

86 *Id.* at 663.

87 *Id.*

88 *Id.*

89 *Id.* at 663-64.

90 *Id.* at 677 ("[W]e must conclude that handcuffing Newton, though reasonable to the officers' investigatory purpose under the *Fourth Amendment*, nevertheless placed him in custody for purposes of *Miranda*.").

91 *See* Swift, *supra* note 8, at 1088 (citing the courts' inability to differentiate between a *Terry* stop and *Miranda* custody as the reason the courts utilize a totality of the circumstances test).

> or public; (2) the number of officers questioning the suspect; (3) the degree of physical restraint used to detain the suspect; (4) the duration and character of the interrogation; (5) the language used to summon the suspect; (6) the extent to which the suspect is confronted with evidence of guilt; and (7) whether the suspect initiated contact with the police.[92]

This list is not definitive, as courts may look at other factors, and none of the factors listed are dispositive.[93]

a. The Totality Test Applied

The Ninth Circuit utilized a totality of the circumstances test in *United States v. Kim*.[94] The court focused on five factors to determine whether there was custody; those factors were, "(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; (5) and the degree of pressure applied to detain the individual."[95]

In *Kim*, a Korean woman was worried about her son, who was working alone in their family business, after a detective came by her home asking about a former resident.[96] She went up to the business and found it surrounded by police.[97] She knocked on the door and an officer let her in; the officer quickly shut the door behind her and locked it before her husband could follow her.[98] Once inside, she was kept there for roughly three hours, questioned on and off, and situated so that there were police officers between her and the exit.[99] She was also instructed to shut up when she spoke Korean, and then instructed to only speak in English.[100] Relying on the totality of the circumstances test, the court found that she was in custody for purposes of *Miranda* and should have been informed of her rights.[101]

92 *Id.* at 1080.

93 *Id.* (adding that courts always point out that the factors viewed are neither dispositive nor exhaustive); United States v. Galceran, 301 F.3d 927, 929-930 (8th Cir. 2002) (noting that the factors listed are neither dispositive nor exhaustive).

94 292 F.3d 969, 973 (9th Cir. 2002) (deciding that in order to determine whether a person was in custody, a court must look at all of the circumstances surrounding the questioning).

95 *Id.* at 974.

96 *Id.* at 971.

97 *Id.*

98 *Id.*

99 *Id.* at 972.

100 *Id.* at 971.

101 *Id.* at 978 (concluding that under a totality of the circumstances test, suspect was in custody).

C. Combining the Tests

The Tenth Circuit has found that a suspect was in custody by utilizing a combination of the two tests.[102] In *U.S. v. Perdue*, the Tenth Circuit held that a suspect who was forced out of his truck at gunpoint, separated from his pregnant fiancée, and forced to lie face down on the ground in the presence of several officers while helicopters hovered overhead was in custody for *Miranda* purposes.[103] The situation in *Perdue* featured both hallmarks of a formal arrest, such as drawn guns and a suspect being forced to lie on the ground, and circumstances that would be taken into account by a court utilizing the totality of the circumstances test, such as the hovering helicopters. Helicopters are rarely used in arrests, and thus their presence would not constitute a hallmark of a formal arrest. The court noted that being forced off the road and out of a vehicle onto the ground at gunpoint is more like a formal arrest, and took that into consideration when evaluating the totality of the circumstances faced by the suspect.[104]

D. Confusion Among the Courts

The utilization by the courts of different tests, or combinations of the tests, has created a situation in which there is no clear answer as to what constitutes custody.[105] In its holding in *Miranda*, the Court believed that its definition of custody would be an easy one to understand, both for the courts and for law enforcement.[106] That is no longer the case, and a new test must be established.[107] As Mark A. Godsey notes in *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, a test should be judged as to "how well it protects civil liberties and enforces the Constitution . . . how effectively it does so without substantially undermining law enforcement

[102] *See Perdue*, 8 F.3d at 1464-65 (10th Cir. 1993) (holding that some of the police actions taken against the suspect were akin to a formal arrest).

[103] *Id.* at 1464 (noting that the officers employed an amount of force that crossed the line between a *Terry* stop and an unconstitutional arrest).

[104] *Id.* at 1465 (finding that a person in the suspect's position "would have felt 'completely at the mercy of the police'").

[105] *See* Swift, *supra* note 8, at 1080 (stating that the ad hoc nature of custody tests has made custody determinations "unpredictable and inconsistent"); *See generally* Cruz v Miller, 255 F.3d 77, 84-86 (2d Cir. 2001) (discussing that the Supreme Court has acknowledged the difficulty of making custody determinations).

[106] *See* Berkemer v. McCarty, 468 U.S. 420, 432 (1984) (citing the simplicity and clarity of the Court's decision in *Miranda*); *See generally Miranda*, 384 U.S. at 465.

[107] *See* Swift, *supra* note 8, at 1080-81 (discussing the difficulty courts face in determining custody, and the inconsistencies that have resulted); *See* United States v. Smith, 3 F.3d 1088, 1095-96 (7th Cir. 1993) (noting that courts have identified different factors in determining whether police action constituted a stop or an arrest).

efforts . . . and whether it avoids extreme complexity so that police officers can realistically be expected to apply it accurately in real world situations."[108]

III. PROPOSED SOLUTION

This note proposes a test that does not drastically depart from the tests currently being applied, which are flawed only in that they lead to much confusion.[109] So this note's proposal will try to streamline them, and combine them into a coherent standard. First, courts should look to whether any of the hallmarks of a formal arrest were present during the period of questioning.[110] If the answer is yes, then courts should hold that the suspect was in custody. It is widely understood that the job of the law enforcement officer is a dangerous one, so there is an exception to ensure that it does not have to be any more dangerous than it already is.[111] The exception is that police can utilize the hallmarks of formal arrest - in this case drawn guns would presumably be the most common hallmark - in a situation they believe is dangerous; but, once the situation is under control, they must relinquish the hallmark in order to prevent rendering the individual in custody.[112] That said, questions asked while the hallmark is in place would be custodial.

A person can be in a custodial situation, however, despite a lack of any hallmarks of formal arrest.[113] Courts should then look, to the totality of the circumstances. This test, however, should be trimmed down from the hodgepodge of factors considered by the circuits into a leaner, easier to

108 *See* Godsey, *supra* note 20, at 733-34.

109 *See id.*, at 732 (stating that "no universal, disciplined method exists for measuring when such a stop is converted into an arrest"); *see also* Swift, *supra* note 8, at 1103 (concluding that proposed test is desirable because it will limit confusion surrounding custody).

110 *See, e.g.*, U.S. v. Newton, 369 F.3d 659, 676 (2d Cir. 2004) (calling handcuffs a hallmark of a formal arrest).

111 *See* Thomas Gerry Bufkin, Terry *and* Miranda*: The Conflict Between the Fourth and Fifth Amendments to the United States Constitution*, 18 MISS. C. L. REV. 199, 200–01 (noting that police officers' are frequently called on to investigate potentially dangerous, suspicious characters); Jenny Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizens Complaints Should be Open to Public Scrutiny*, 45 CRIM. L. BULL. 5 (stating that "[p]olice work is one of the most dangerous jobs in our society").

112 *See* U.S. v. Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993) (stating that drawn guns are akin to a formal arrest); Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (finding that *Miranda* protections apply when a traffic stop escalates and the motorist is deemed "in custody").

113 *See* U.S. v. Kim, 292 F.3d 969, 978 (9th Cir. 2002) (holding that "surround[ing] Kim to make her feel that she could not leave the store, the position of the officers, the fact that they locked Kim's husband out of their store, their restriction of her communication with her son, and their orders as to what language she should speak and when and where she could sit, combined with the length and nature of the questioning" created custody); United States v. Beraun-Panez, 812 F.2d 578, 580 (noting that psychological restraints may be just as binding as those that are physical).

apply test.[114]

Finally, this note's departure from typical solutions is in its proposed test to be applied to routine traffic stops.[115] The unique nature of the traffic stop requires a test that is particularly easy to apply. This note proposes that the nature of the questioning should be focused, so that if an officer's questioning goes beyond the scope of the stop then the *Miranda* rights must be given.

The Court defined custody in *Miranda* as the deprivation of a person's freedom of action in any significant way, which is a rather vague and easy-to-attain standard.[116] As the Court admitted in *Oregon v. Mathiason* in response to confusion about the Miranda standard, "[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."[117] The Court later clarified the standard for custody by stating that custody occurs when there is an arrest or a curtailment of one's freedom of movement to the degree that is associated with being arrested.[118] That proposition leads to the hallmark of the formal arrest test.

A. The Hallmark of the Formal Arrest Test

The analysis begins with the proposition that the utilization of a hallmark of a formal arrest will give rise to custody because it creates a restraint on freedom associated with that of a formal arrest.[119] It should be a rather simple analysis, then, but the expansion of the *Terry* stop has confused it by allowing police to utilize some of the hallmarks of a formal arrest when they reasonably fear for their safety.[120] Handcuffs are one of the hallmarks of a formal arrest.[121] Other hallmarks of a formal arrest are drawn guns,

114 *See, e.g.,* Swift, *supra* note 8, at 1080 (detailing several different factors that have been taken into account by courts in determining custody).

115 *See generally Berkemer*, 468 U.S.

116 *See* Swift, *supra* note 8, at 1078 (indicating that when it defined custody in *Miranda*, the Court "did not articulate the indicia of custody, or otherwise help courts (or police) to determine the steps leading up to custody"); Bufkin, *supra* note 110, at 199 (proffering that the uncertainty surrounding in-custody determinations is based on the "lack of clear direction" from the Supreme Court).

117 *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding that "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'").

118 *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (referring to the question of whether there has been a formal arrest or restraint as the ultimate inquiry).

119 *Id.* (holding that a formal arrest or restraint equal to it creates custody).

120 *See* Godsey, *supra* note 20, at 723 (stating that when it was decided, *Terry* called for "brief investigatory detention").

121 *Id.* at 719. (claiming that handcuffs are generally considered to be a hallmark of a formal

the forcing of a suspect out of his car, and the forcing of a suspect onto the ground.[122]

A reasonable *Terry* stop will not immediately give rise to custody.[123] However, the *Terry* stop was devised as a brief intrusion so that an officer could dispel his suspicions that a person might be armed.[124] The *Terry* stop, then, is an exception to the hallmark of a formal arrest rule when an officer is "warranted in the belief that his safety or that of others was in danger."[125] The officer may utilize a hallmark of formal arrest briefly so that he may establish control of the situation. [126] Upon establishing control of the situation, the officer must then either cease to utilize the hallmark, or recite the *Miranda* warning to the individual if he plans to question her.

a. Application of the Hallmark of the Formal Arrest Test

An example would be if an officer spotted a man who matched the description of an armed bank robber, and drew his gun on the man while telling him to stop. This is a reasonable *Terry* stop, as it is reasonable for the officer to believe that the man may be armed and dangerous.[127] Upon frisking the man, if the officer were to find no weapon, he would have then established that the man was not a danger to him and could thus cease utilizing the hallmark of a formal arrest, the drawn gun, because the *Terry* stop exception had ended.[128] If the officer ceases to use his gun, the individual has not been placed into custody.

If he continues to point the gun at the suspect, and then questions him, those questions would be custodial. The suspect would be subject to a curtailment of his freedom associated with arrest, and there would no

arrest).

122 *See* United States v. Perdue, 8 F.3d 1455,1464-65 (10th Cir. 1993) (calling "the use of guns to force a suspect off the road, out of his car, and onto the ground" police action that is more associated with formal arrest than with the typical *Terry* stop).

123 *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (comparing the routine traffic stop to a *Terry* stop, and concluding that the traffic stop does not automatically warrant a Miranda warning); s*ee also* United States v. Sullivan, 138 F.3d 126, 130-31 (4th Cir. 1998).

124 *See Berkemer*, 468 U.S. at 438-39 (finding that the routine traffic stop is similar to *Terry* because it is temporary, brief, and does not leave the individual at the mercy of the police); *see* United States v. Newton, 369 F.3d 659, 673 (2d Cir. 2004).

125 *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

126 *See Perdue*, 8 F.3d at 1464; Bufkin, *supra* note 110, at 201 (describing situations in which police must sometimes utilize hallmarks of arrest to ensure their own safety and that of any bystanders)

127 *See Terry*, 392 U.S. at 28 (holding that the detective in *Terry* was justified in his search because the crime he suspected Terry of was one that normally included a weapon).

128 *Id.*, at 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

longer be a reason to support the officer's pointing of the gun.[129]

b. The Godsey Analysis of a Custody Test

This portion of the test meets the three standards espoused by Godsey for a good test of custody.[130] First, it protects civil liberties and enforces the Constitution because it prevents the questioning of citizens who are in custody who have not been Mirandized.[131] Custody is established by the hallmark of a formal arrest, and the Fifth Amendment right against self incrimination is protected by requiring *Miranda* in such a situation, lest the evidence obtained by such questioning be dismissed.[132]

The hallmark of the formal arrest test also does this without undermining law enforcement because it allows officers the chance to utilize the most effective means to stabilize a situation.[133] Once a situation is stable, it then reinforces the rights of citizens by removing the shadow of arrest.[134] This test is also easy to apply in real world situations; an officer can use the means necessary to establish that he can safely speak to a citizen in an uncoercive environment, or he can decide that the situation requires continued use of a hallmark of arrest and thus any interrogation must be preceded by *Miranda*.[135]

129 *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (declaring that restraint equal formal arrest creates custody); *Terry*, 392 U.S. at 29 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

130 *See Godsey*, supra note 20, at 734 (giving the first of three factors that can be used to determine if a custody test is practicable).

131 *Id.* (explaining the first factor). *Cf.* United States v. Perdue, No. 91-40052-01, 1992 U.S. Dist. LEXIS 8508, at *5-7 (D. Kan. May 1, 1992) (unpublished), *rev'd in part,* 8 F.3d 1455, 1461 (10th Cir. 1993) (holding that *Miranda* rights are never implicated in *Terry* stops, a ruling that was then reversed by the Tenth circuit).

132 *See Godsey*, supra note 20, at 717 (stating that *Miranda* warnings "were designed to counteract the inherently compelling and intimidating pressures of police custodial interrogation"); *See* Catherine L. Guzelian, Note, *Following the Flag: The Application of The Fifth Amendment Self-Incrimination Clause and the Miranda Warnings to Overseas Confessions*, 3 GEO. J. L. & PUB. POL'Y 341, 343 (2005) (declaring the Fifth Amendment right against self incrimination is protected by barring any statements given prior to a *Miranda* warning at trial).

133 *See* U.S. v. Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993) (holding police conduct that would ensure an officer's safety most effectively, such as drawn guns and forcing a suspect onto the ground, is akin to a formal arrest); *see* Godsey, *supra* note 20, at 715 (stating "these types of force are often considered to place a suspect in police 'custody' and thereby necessitate *Miranda* warnings").

134 *See* Godsey, *supra* note 20, at 733-34 (listing a second factor in the three factor custody test); *see also*, United States v. Brady, 819 F.2d 884, 887 (9th Cir. 1987) (holding that a formal arrest has a degree of restraint which can include being stopped at gunpoint and or handcuffed).

135 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (asserting that the *Miranda* warning must be given before custodial interrogations); *see also*, Dickerson v. U.S., 530 U.S. 428, 431-32, 443 (2000) (reaffirming *Miranda*'s ruling that certain warnings must be given before one is put into custody to have any statements made by them admissible).

B. The Totality of the Circumstances Test

The Fifth Amendment right against self incrimination was designed to protect citizens from being coerced into giving up information that could incriminate them.[136] Even in the absence of a hallmark of formal arrest, a person may be subject to interrogation in a coercive environment.[137] Right now some courts use a totality of the circumstances test to determine if an environment in which a person was interrogated was coercive, but there are a multitude of factors and courts do not seem to agree on how much weight to give each one, or even which ones to use.[138]

The totality of the circumstances test is a reasonable test that seeks to protect the rights of citizens, but at the moment, with all of the differences between courts, it does not seem to lend itself to easy application.[139] The test must be streamlined and given some structure.

a. Current Factors

Currently, the factors courts look at include, the location of the questioning, the number of officers, the degree of physical restraint used to detain the suspect, the duration and character of the interrogation, the language used to summon the suspect, the extent to which the suspect is confronted with evidence of guilt; and whether the suspect initiated contact with the police.[140]

b. Weighing the Factors in an Effort to Streamline

Several of the factors would seem to lend themselves to a heavier weighting when trying to determine if a person was in custody. Those would be the factors that are directly related to the restraint imposed on the

136 *See Miranda*, 384 U.S. at 444 (stating that the Fifth Amendment protects the privilege of an individual not to incriminate himself).

137 *See* U.S. v. Kim, 292 F.3d 969, 973 (9th Cir. 2002) (finding custody in a situation that lacked any of the hallmarks of a formal arrest as they have been defined in this note).

138 *See* Swift, *supra* note 8, at 1080 (declaring"[c]ourts do not agree on which factors to consider; courts do not even agree on the weight to give individual factors."); *see also Kim*, 292 F.3d at 973 (listing five factors which may be relevant to deciding whether a person was in custody, none of which are dispositive).

139 *See* United States v. Hernandez-Hernandez, 327 F.3d 703, 706 (8th Cir. 2003) (stating that a court must examine all the circumstances surrounding an interrogation); Swift, *supra* note 8, at 1080-81 (claiming that the Supreme Court itself has acknowledged the difficulty that lies in determining custody).

140 *See* United States v. Trueber, 238 F.3d 79, 93 (1st Cir. 2001) (noting relevant circumstances courts take into account to determine custody); Swift, *supra* note 8, at 1080 (listing factors taken into account by different courts when determining custody).

citizen.[141] Other factors do not seem nearly as important in determining whether a person was subject to questioning in a coercive environment.[142] As such, those factors should not be held to be as important, if held at all, in determining whether there was custody.

1. Factors to be Accorded More Weight

The factors that should be given heavier weight are the location of the questioning, the degree of physical restraint used to detain the suspect, the duration of the interrogation, and the character of the interrogation.[143] The number of police is superfluous and could be considered a part of the degree of the restraint.[144] Those that do not seem as weighty are the language used to summon the suspect, the extent to which the suspect is confronted with evidence of guilt, and whether the suspect initiated contact with the police.[145]

Once again, the definition for custody used by the Court in *Miranda* was the deprivation of a person's freedom in any significant way.[146] When attempting to determine if someone's freedom has been curtailed in a significant way, the actual physical restraint and the amount of time the person is held should be the most important factors.[147] The character of the interrogation is also important because it factors into the analysis of whether the interrogation was coercive.[148] These factors are the heaviest

141 *See* United States v. Martin 95 Fed. Appx. 169, 177 (6th Cir. 2004) (describing restraints involved during an arrest); Swift, *supra* note 8, at 1091-92 (determining that there is a difference in the degree of physical restraint in cases in which custody is found and those in which it is not found).

142 *See* United States v. Martin 95 Fed. Appx. at 177 (stating neither the length nor the place of question weigh in favor of detention as custodial interrogation); Swift, *supra* note 8, at 1091-92. (asserting that the only relevant factors when determining if there is custody are duration and restraint).

143 *See* Berkemer v. McCarty, 468 U.S. 420, 437-38 (1984) (differentiating a routine traffic stop from a custodial interrogation by stating that a routine traffic stop is temporary, brief, and does not leave the motorist at the mercy of the police).

144 *See* United States v. Acosta, 363 F.3d 1141, 1150 (11th Cir. 2004) (noting motorists are usually detained by at most two police officers); Swift, *supra* note 8, at 1093-94 (arguing that the number of officers should be incorporated into the restraint evaluation because the presence of multiple officers lends itself to the belief that if needed, the suspect could be physically restrained).

145 *See* United States v. Kim, 292 F.3d 969, 974 (9th Cir. 2002) (listing the factors among those to be relevant to determine if a person would believe he or she was not free to leave); Swift, *supra* note 8 at 1092-93 (stating those factors are ambiguous, subjective, and serve to confuse the analysis of custody more than aid it).

146 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."); *see also* Oregon v. Mathiason, 429 U.S. 492, 494 (1977) (applying the *Miranda* standard of custody to questioning that takes place in a prison setting).

147 *See* Swift, *supra* note 8, at 1089 (asserting that the only factors relevant to the question of custody are the degree of restraint and the duration).

148 *See Miranda*, 384 U.S. at 448 (acknowledging that coercion can be mental as well as physical, and in modern interrogations it often is); *see also* Blackburn v. Alabama, 361 U.S. 199, 206 (1960)

and thus should represent the initial analysis of the totality of the circumstances test. Courts should look at these factors first.

In determining if a person's freedom was curtailed, it is important to determine to what extent the person is physically restrained from leaving.[149] It should be noted that it is not necessary to discuss any of the hallmarks of a formal arrest because in the context of this note, if a hallmark is present, then the custody analysis does not reach the totality of the circumstances test. That means that handcuffs are not a part of this analysis.[150] So then the other ways a person's freedom may be curtailed would apply.[151] Essentially, if a person is not free to leave, then her freedom is curtailed, no matter how that effect is achieved.[152] A locked room is a curtailment of a person's freedom because they cannot leave.[153] An open door that is blocked by an officer is again a significant curtailment because the placement of the officer implies that the person would not be able to leave without permission of the officer. More officers multiplies that effect; that is why the number of officers present should be looked at as a part of the physical restraint on the person, because the greater the number of officers, the less likely a person will feel they are free to leave.[154]

The location of the questioning should be considered as part of the degree of restraint.[155] A person will not feel as free to leave a police station

(explaining that coercion can be both mental as well as physical).

149 *See Kim*, 292 F.3d at 977–78 (taking into account the position of the officers and the fact that the officers surrounded the suspect in a way that created the impression the suspect was not free to leave); *see also* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (explaining that when determining whether a person was free to leave, the court should look at the circumstances surrounding the incident, including the threatening presence of several officers).

150 *See* U.S. v. Newton, 369 F.3d 659, 676 (2d Cir. 2004) (holding handcuffs to be a hallmark of a formal arrest); *see also* U.S. v. Polanco, 2011 U.S. Dist. LEXIS 6341 (S.D.N.Y. 2011) (stating that handcuffing has generally been described as the hallmark of a formal arrest).

151 *See Miranda*, 384 U.S. at 444 (defining custody as a deprivation of freedom in a significant way); *see also* U.S. v. Flores, 193 Fed. Appx. 597, 601 (6th Cir. 2006) (holding that the defendant was not in custody because there was no deprivation of his freedom in any substantial way during questioning).

152 *See Kim*, 292 F.3d at 977-78 (stating that it did not matter whether the officers intended to create the impression that the suspect was not free to leave); *see also* U.S. v. Taylor, 956 F.2d 572, 576 n. 2 (1992) (explaining that the officer's subjective intent is only relevant to the extent it was conveyed to the person confronted).

153 Burkholder v. Newton, 115 Fed. Appx. 358, 361 (3d Cir. 2004) (explaining that taking someone into a locked room to be questioned is a curtailment of a person's freedom); *see* Swift, *supra* note 8, at 1095 (declaring, while conceding it is debatable, that being locked in a room is more restraining than being in handcuffs because you cannot run out of a locked room, whereas you can run while wearing handcuffs).

154 *Kim*, 292 F.3d at 977-78 (taking into account both the number of officers and their placement in the room in which the questioning took place); Swift, *supra* note 8, at 1093-94 ("Multiple officers imply physical force in a way that a single agent would not.").

155 *Kim*, 292 F.3d at 974 (listing "the physical surroundings of the interrogation" as a relevant

as he would a street corner.[156] When questioning takes place indoors it immediately adds to the idea that there is custody because a person will not feel as free to leave when they are indoors.[157]

The duration is also an important aspect of the determination.[158] The longer a person is kept somewhere, the greater the curtailment on his freedom. A person's time is his own, and when it is spent doing something that the person would not have been doing, it has effectively been taken from him.[159] The longer a person is kept, the greater the chance that the questioning took place while the person was in a degree of physical restraint that imposed custody.[160] In order to keep somebody for a long time, there must be some sort of restraint to keep them.

The nature of the interrogation is also important in determining if the person was interrogated in a coercive environment.[161] The very nature of the Fifth Amendment is to protect citizens from being coerced into incriminating themselves, and certain police tactics could be coercive if the citizen is not informed of his rights.[162] The extent to which the suspect is confronted with evidence of guilt is a part of the analysis of the nature of

factor to be considered); *see* Swift, *supra* note 8, at 1092 (arguing that it is not the location itself that is important, but the way in which the location restrains the suspect that is).

156 *See Miranda*, 384 U.S. at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . 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 trickery."); *see also* Swift, *supra* note 8, at 1096 (explaining that if a person is involuntarily taken to a police station the Court will not require an extended duration of detention in order for the situation to be deemed custodial).

157 *See* U.S. v. Griffin, 7 F.3d 1512, 1519 (10th Cir. 1993) (stating that in circumstances where the suspect is placed in an isolated, nonpublic room, she will not feel as free to leave); *see also* Swift, *supra* note 8, at 1096 (explaining that if a person is involuntarily taken into a private, locked room the Court will not require an extended duration of detention in order for the situation to be deemed custodial).

158 *Kim*, 292 F.3d at 981 (considering the duration of the detention); *see* Swift, *supra* note 8, at 1091 (noting that most, if not all, custody cases will look at the time of the restraint when determining custody).

159 *See Kim*, 292 F.3d at 981 (finding a detention of about 90 minutes too high); *see also* Swift, *supra* note 8, at 1090 (stating that the duration of detention must be brief).

160 Swift, *supra* note 8, at 1091 ("[T]he fact that most cases do emphasize the length of the detention suggests that it is an important factor"); Berkemer v. McCarty, 468 U.S. 420, 441-42 ("Only a short period of time elapsed between the stop and arrest. At no point during that interval was respondent informed that his detention would not be temporary...Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest").

161 *See Miranda*, 384 U.S. at 448 (1966) (stating that not all coercion is physical); Chambers v. Florida, 309 U.S. 227, 239 (1940) (noting that non-physical methods that produce coerced confessions violate due process).

162 *Miranda*, 384 U.S. at 467 ("We have concluded 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"); Rhode Island v. Innis, 446 U.S. 291, 299 (1980) ("This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation).

the interrogation.[163] Also considered in this part should be the presence of other people around, because the presence of other people lessens the chance for coercion, and will also keep a person at ease.[164]

2. Factors to be Disregarded

The other two factors should not be given much weight in determining whether there was custody. If a suspect voluntarily approaches the police, there is not custody.[165] On the other hand, whether a suspect was interrogated involuntarily would factor into either the degree of the restraint imposed, the nature of the interrogation, or both. The language used to summon the suspect is not a factor that should be considered on its own, but rather as a part of the nature of the interrogation, specifically as the way the interrogation was initiated.[166]

c. Application of the Streamlined Totality Test

An example of a case in which the totality of the circumstances case would lead to custody would be a person stopped by two police officers in a store in the mall and brought to a back office for questioning. The degree of restraint would be high because there are two officers, alone with the person in a room with one exit. The person would not feel free to leave.[167] Time would not be as important, but the longer the police kept the person there, the greater the presumption of custody. Thus any interrogation by the officers should be preceded by the *Miranda* warning.[168]

Applying this test, custody would not be found in a case where a person was stopped in the middle of a crowded mall. In this situation, there would

163 *Miranda*, 384 U.S. at 450 (describing one manual for interrogation techniques as instructing officers that "[t]he guilt of the subject is to be posited as a fact"); *see also* State v. Pitts, 936 So.2d 1111, 1124 (2006) (noting that one of the four factors employed as a guide for determining whether a suspect is in custody for purposes of *Miranda* is the extent to which the suspect is confronted with evidence of his or her guilt).

164 *Miranda*, 384 U.S. at 450 (according to one manual, allowing others to be around the suspect during questioning could embolden him as the others may lend moral support); Missouri v. Werner, 9 S.W.3d 590, 595 (2000) (stating that one indicia of custody includes whether the atmosphere was police dominated).

165 *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (finding that there was no custody where a suspect came to the police station voluntarily); *see also Werner*, 9 S.W.3d at 595 (2000) (stating that one indicia of custody includes whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to answer questions).

166 *See* U.S. v. Kim, 292 F.3d 969, 973 (9th Cir. 2002) (taking into account the language used to summon the suspect); U.S. v. Beraun-Panez, 812 F. 2d 578, 580 (9th Cir. 1987) (stating that the language used to summon the individual is relevant to whether an accused is in custody).

167 *See Miranda*, 384 U.S. at 444 (1966) (defining custody as a deprivation of freedom in a significant way).

168 *Id.* (stating that custodial interrogations must be preceded by procedural safeguards).

not be as much of a feeling that the person cannot leave because they are out in the open area of the mall, and there are people around.[169] If the police kept the person for a long time then there would be custody, but again that would require some restraint.

d. The Godsey Analysis of a Custody Test

The totality of the circumstances portion of the test meets the three factors of a good test of custody stated in the Godsey piece.[170] The test had always protected the rights of citizens and enforced the constitution by looking at all of the circumstances in an interrogation situation and determining if there was custody.[171] The problem with the test was that, in doing so, it undermined law enforcement because it required them to essentially guess as to what factors would be considered important in a situation, and then whether those factors were enough to be considered custody.[172] It made law enforcement gamble, because by Mirandizing suspects, they would get less information, but if they did not, the information they did obtain could be inadmissible in court.[173] The reason it undermined law enforcement was mainly because it was difficult to apply in real world situations.[174] This version of the test had made that easier for law enforcement. It has cut down on the number of factors to consider, and weighted them so that officers know which factors are more important than others.[175]

C. A Unique Situation: The Routine Traffic Stop

a. The Traffic Stop

The traffic stop is the most common interaction between citizens and law enforcement officers.[176] It is unique in that it is an interaction with law

169 *See* Berkemer v. McCarty, 468 U.S. 420, 438 (1984) (distinguishing the routine traffic stop from a custodial interrogation based on the fact the traffic stop is public and can be viewed by people passing by).

170 *See* Godsey, *supra* note 20, at 734 (1994).

171 *See Kim*, 292 F.3d at 973 (taking into account the totality of the circumstances to find custody).

172 *See* Swift, *supra* note 8, at 1080 (calling the multifactor nature of the totality of the circumstances test a "grab bag" that made custody cases "unpredictable and inconsistent").

173 *See Miranda*, 384 U.S. at 444 (1966) ("[T]he 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.").

174 *See* Godsey, *supra* note 20, at 741 (arguing that a test that is too difficult for officers to apply in real world situations will result in confusion and overturned convictions).

175 *See id.* at 734.

176 *See* American Driver and Traffic Safety Education Association, *The Traffic Stop*, *available at:*

enforcement, but it rarely ends in arrest.[177] They are usually brief, and there is an expectation on the citizen's part that if he cooperates, he will, at worst, be fined and be on his way.[178]

The Court ruled, in *Berkemer*, that the routine traffic stop was more akin to a *Terry* stop than to custody for purposes of *Miranda*.[179] It did, however, preserve the possibility of custody in the routine traffic stop.[180] It is not clear, however, what constitutes custody in the context of the routine traffic stop.[181]

1. The Possibility of Custody

The Court acknowledged that the physical circumstances of a traffic stop are similar to custody in that the freedom of action of the driver and passengers are significantly curtailed.[182] In *Berkemer*, the Court declined to extend *Miranda* to all traffic stops, but left the question of custody in the context of the traffic stop open, and stated that "a motorist who has been detained pursuant to a traffic stop thereafter [who has been] subjected to treatment that renders him 'in custody' for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*."[183]

2. Similarity to the *Terry* Stop

The Court likens traffic stops to *Terry* stops and states 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."[184] Such information in the context of a traffic stop would rarely include information about a specific and serious crime. The

http://www.adtsea.iup.edu/adtsea/articles/Article.aspx?ArticleID=7b876663-3cfe-4254-a946-dbc38805d8c6 (last visited November 30, 2008).

177 *See* Berkemer v. McCarty, 468 U.S. 420, 438 n. 26 (1984) (explaining that a motorist subject to a routine traffic stop will not be arrested unless she "is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate").

178 *Id.* at 437-38 (acknowledging that a motorist who is stopped expects to be stopped briefly and then be on his way).

179 *Id.* at 438-39 (reasoning that the atmosphere of a traffic stop is less "police dominated" than the type of interrogation at issue in *Miranda*).

180 *Id.* at 440 (stating that a motorist will be entitled to the protections of *Miranda* if she is rendered in custody after being stopped).

181 *See* Petition for Writ of Certiorari, *supra* note 8 at 7 (citing the struggle of both courts and commentators to establish a reasonable rule on custody in the context of cases that touch on both the Fourth and Fifth Amendments).

182 *See Berkemer*, 468 U.S. at 436 ("It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle.").

183 *Id.* at 440.

184 *Id.* at 439.

Court also noted that "[t]he brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself."[185] That is precisely why *Miranda* should apply to questions asked about specific and serious crimes in the context of the routine traffic stop; because of the motorist's expectations, it is a form of subterfuge to ask him questions about a specific and serious crime.

3. Traffic Stops Do Not Normally End in Arrest

Traffic stops do not normally end in arrest. The only reasons a traffic stop will end in arrest are "the driver is accused of a specific, serious crime, the driver refuses to appear in court, or the driver demands to be taken before a magistrate."[186] In the context of the routine stop, an officer does not need to ask questions that go beyond the scope of the infraction for which the driver was stopped. Drivers do not expect to be accused of specific, serious crimes.[187] If, however, a driver is accused of a specific, serious crime, then the driver should be given the *Miranda* warning.[188]

4. There are Certain Expectations Associated With a Stop

This rule would apply only to routine traffic stops, because of the expectations of the driver. Drivers do not expect to be arrested as a result of a routine stop, and thus their guard is down when they are questioned during the stop.[189] It would be unfair to allow officers to question drivers about greater offenses without Mirandizing them because the questioning happened to take place during a routine stop. Allowing this would violate the Fifth Amendment right against self incrimination.[190] This rule would be applied before the standard custody tests espoused above, for this rule is in addition to those tests, not in lieu of them.

It is for these reasons that the routine traffic stop is unique, and the question of when there is custody during a routine traffic stop must be addressed.[191]

185 *Id.* at 438 n.27.

186 *Id.* at 438 n.26.

187 *Id.* at 437-38 (describing drivers' expectations as being able to leave soon after being stopped).

188 *Id.* at 438 n.26 (stating that an accusation of a specific, serious crime is one of three reasons a motorist might get arrested).

189 *Id.* at 437-438 (asserting that drivers expect nothing more than a citation in the context of a routine traffic stop).

190 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that officers must ensure that procedural safeguards are in place before subjecting a suspect to custodial interrogation).

191 *Berkemer*, 468 U.S. at 437-38 (explaining why the *Miranda* rights are so important).

b. The Case of Richard Snell

In holding that the traffic stop is more like a *Terry* stop, the Court acknowledged that there is the possibility that officers could ask questions during the stop that could lead to an arrest for something unrelated to the stop before reading the *Miranda* rights.[192] This is exactly what happened in *New Mexico v. Snell*.

In *Snell*, a man driving along the highway crashed into a car head-on on a cold night.[193] It was so cold that there was ice and snow on the ground.[194] One of the people involved in the accident died as a result of her injuries.[195] When the police came to the accident scene, the man attempted to interject while an officer questioned the third party involved in the accident.[196] The officer told the man to stop interfering or he would be arrested, and then another officer brought him to the patrol car and placed him in the back.[197] While the man was in the back of the patrol car, he was questioned about the accident.[198] His answers to those questions eventually led to a charge of vehicular homicide.[199]

At trial, the man, Snell, argued that his Fifth Amendment rights were violated because he was not read his *Miranda* rights before the questioning in the back of the patrol car.[200] The trial court agreed that he was in custody for purposes of *Miranda*, based upon the cautionary language of *Berkemer*.[201] The court of appeals agreed as well.[202] The state argued that routine traffic stops are more like *Terry* stops, and the questioning was a part of the brief, investigatory questioning allowed under the *Terry* stop.[203] The courts disagreed, and utilized a totality of the circumstances test to determine that as a result of the officer telling Snell if he did not stop interfering he would be arrested, the placing of Snell in the car, and the questioning while either the doors were locked or Snell's exit was blocked, there was custody.[204]

192 *Id.* at 441 (showing that there is a possibility for officer discretion).

193 *See* Petition for Writ of Certiorari, *supra* note 8 at 3 (explaining the facts of the case).

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at 3-4.

198 *Id.*

199 *Id.*

200 *Id.* (stating that Snell moved to suppress the statements made in the back of the patrol car and any fruits of that interrogation).

201 *Id.* at 4 (citing the district court's decision to grant Snell's motion to suppress).

202 *Id.* at 5.

203 *Id.* at 25 (stating that the *Miranda* warning is not required during a brief investigatory stop).

204 *Id.* at 26 (holding that the New Mexico state courts wrongly decided the case because they

The New Mexico courts reached the correct conclusion, but this note proposes that a different approach should have been used to reach that result. As stated earlier, traffic stops are unique. In the context of the routine traffic stop, motorists expect to be pulled over, asked to hand over license and registration, maybe get briefly questioned about the infraction, receive a ticket, and be finished.[205] This expectation causes motorists to lower their guard, opening them up to subterfuge.[206] That is why traffic stops should have their own rules to apply to custody.

c. Application of Proposed Traffic Stop Test to Snell

In the case of Snell, application of this principle would have rendered the questions asked of Snell in the patrol car inadmissible because of the presence of the specific, more serious offense.[207] To hold otherwise would allow the state of New Mexico to essentially take advantage of the understanding of a citizen that traffic stops do not normally result in arrests, and that if one is going to, motorists deserve the procedural protections provided by the *Miranda* warning.[208]

d. The Godsey Analysis of a Custody Test

This rule also meets the three standards for an effective rule in the Godsey piece.[209] This rule protects civil liberties and enforces the Constitution because it requires the state to provide motorists with extra protection against self incrimination that would otherwise not be present in the context of a stop.[210] Nor does this rule undermine law enforcement efforts.[211] When an officer stops a motorist, the expectation is most likely the same as that of the motorist, a brief stop ending in a ticket.[212] This rule does not affect that outcome in any way; it only requires that when there is a greater, more serious crime present, if the officer is going to ask questions

instigated an overly broad 5th Amendment analysis).

205 *See* Berkemer v. McCarty, 468 U.S. 420, 437-38 (1984) (describing the expectation of the motorist caught in a routine stop as a brief detention ending with a traffic citation).

206 *Id.* at 438 n.27 ("The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself.").

207 *See* Petition for Writ of Certiorari, *supra* note 8 at 4.

208 *Berkemer*, 468 U.S. at 440 (reassuring observers that if a motorist is treated in such a way that creates custody, the protections of *Miranda* will apply).

209 Godsey, *supra* note 20, at 234 (setting out three standards by which to judge custody tests).

210 *Id.* (listing the first step of the analysis as how well "it protects civil liberties and enforces the Constitution").

211 *Id.* (noting the second step as "how effectively it [protects civil liberties and enforces the Constitution] without substantially undermining law enforcement efforts").

212 *Berkemer*, 468 U.S. at 438 (finding that the detention of a "motorist pursuant to a traffic stop is presumptively temporary and brief").

that could lead to incriminatory answers, the *Miranda* warning must be given. Just because a person is in their car does not mean they should be denied the protections of *Miranda*.[213] This rule is also not difficult for officers to apply in the field. An officer knows why he has pulled a person over, and there are only so many reasons that an officer can pull a person over while driving.[214] Those reasons must be visible to the officer from his automobile. Even if an officer hears over his radio that a certain make and model of car has been stolen, he must see that the car he is pulling over matches the description given over the radio. So questions that go beyond the scope of the normal reasons for a traffic stop can only be asked after the giving of the *Miranda* warning.[215]

CONCLUSION

It is very important that courts come to a conclusion about when a person is placed in custody for the purposes of the *Miranda* warning. The warning is an integral part of our justice system in that it provides notice to citizens of the protections of the Constitution. That said, it is also important that law enforcement officers understand the situations in which they must utilize the warning. Both because it allows them to investigate more efficiently by knowing when the warning is not required, and because it protects citizens from police coercion.

The hallmark of a formal arrest test fits that bill by providing citizens protection when necessary, and giving officers an easy to apply standard for when to give the warning. It is important to remember that custody can still be attained in the absence of a hallmark of a formal arrest, and that is where the totality of the circumstances test enters the picture. It also provides protection to citizens, and with the leaner, less confusing version proposed in this note, provides officers with an easy to understand and apply rule for custody. Finally, routine traffic stops are unique, and do not normally require the protections of *Miranda*, but there are certainly situations in which *Miranda* may become necessary. The rules proposed in this note, that *Miranda* becomes necessary once the questioning turns to a crime that is outside the scope of the stop that is more serious and specific, provides *Miranda* to motorists when it is necessary while not putting a

213 *Id.* at 440 (holding that the conduct of police can render motorists in custody).

214 *See* American Driver and Traffic Safety Education Association, *supra* note 13 (stating there are a variety of reasons a motorist may be stopped).

215 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (proposing that officers must warn individuals of their rights before beginning a custodial interrogation).

burden on police.