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MIRANDA RIGHTS IN A *TERRY* STOP: THE IMPLICATIONS OF *PEOPLE V. JOHNSON*

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INTRODUCTION

One of the most frequently litigated issues in criminal law, from traffic tickets to first degree murder cases, is whether to suppress incriminating statements made by a suspect during the course of the initial police contact. In making this determination, a court must balance the government's interest in effective law enforcement against the protections afforded an individual under the Fourth and Fifth Amendments of the United States Constitution.[1] In *Miranda v. Arizona*,[2] the Supreme Court held that police questioning of a suspect who was "in custody" must be preceded by the now familiar *Miranda* advisement, and by a knowing, voluntary and intelligent waiver by the suspect of his fifth amendment rights.[3] In *Terry v. Ohio*,[4] handed down two years after *Miranda*, the Court sanctioned the so-called "stop and frisk," which includes reasonable inquiries by a police officer regarding a suspect's

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1. The fourth amendment governs unreasonable seizures, the fifth amendment embodies the privilege against self-incrimination. The fourth amendment, in pertinent part, provides: "The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

The fifth amendment, in pertinent part, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

Although the amendments are distinct, they are nevertheless related. Justice Bradley, for the Court in *Boyd v. United States*, addressed the intimate relation between the two amendments:

> For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

Boyd v. United States, 116 U.S. 616, 633 (1885).

2. 384 U.S. 436 (1966).

3. *Id.* at 478. The fear voiced by Chief Justice Warren in *Miranda* was that the custodial setting had a tendency to elicit involuntary confessions by exerting psychological pressures on a defendant. *Id.* at 448-58, 460-61.

The *Miranda* advisement would be required whether someone was in custody, or had his freedom of movement "deprived in any significant way." *Id.* at 444, 477. Officers need not advise the suspect in any precise or ritualistic litany; substantial compliance will suffice. California v. Prysock, 453 U.S. 355 (1981). Comment, *Criminal Law: The Accused Rights to* Miranda *Warnings—Or Their Functional Equivalent*, 21 WASHBURN L.J. 427 (1982).

4. 392 U.S. 1 (1968).

activities.[5] The Court held that although based upon less than probable cause, such a seizure was permitted by the fourth amendment.[6]

There is a pronounced distinction between a "custodial interrogation" under *Miranda* and a "seizure" under *Terry*. *Miranda* was meant to relieve the hardship imposed upon a defendant when significant restraints of his liberty, comparable to an arrest, exert coercive pressures on him, yielding an "involuntary" confession in violation of the fifth amendment privilege against self-incrimination. *Terry*, on the other hand, defined the circumstances under which a police officer may detain and question an individual by applying the "reasonableness" requirement for a "seizure" under the fourth amendment. Despite the apparent lucidity of this distinction, the Colorado Supreme Court, in the recent case of *People v. Johnson*,[7] equated "seizure" with "custody," maintaining that the standards used to determine each are identical.[8]

This article will discuss the serious problems created by *People v. Johnson*. In equating the fourth amendment concept of seizure with the fifth amendment concept of custody, the Colorado Supreme Court has ignored the careful analytical distinctions between *Terry* and *Miranda*, distinctions which were intended to resolve problems arising from two different types of police-citizen contact. Moreover, if "seizure" is equivalent to "custody," then *Johnson* compels the conclusion that *Miranda* warnings are to be rendered as a predicate to any investigatory questioning conducted in the course of a *Terry* stop. Such a conclusion squarely conflicts with the teachings of the United States Supreme Court, as most recently articulated in *Berkemer v. McCarty*,[9] and threatens to emasculate the *Terry* stop as an effective tool of law enforcement.

I. *MIRANDA*, *TERRY* AND *BERKEMER*: THE SUPREME COURT GRAPPLES WITH INTERROGATION DURING DETENTION

Few decisions are of greater importance to the criminal practitioner than *Miranda* and *Terry*. Although each arose from a distinct factual situation, and were decided under different constitutional doctrines, it is nevertheless possible to misconstrue the two rulings and their applications. This is due, in part, to the fact that there is no clear line between a simple *Terry* stop and a custodial interrogation under *Miranda*; the possibility for overlap is as great as the fact patterns are diverse. A review of *Miranda*, *Terry*, and their progeny will clarify their application and pro-

5. *Id.* at 30. The issue of the admissibility of statements made by a suspect during the course of a *Terry* stop has not been frequently litigated. This is due in part to the fact that *Terry* stop cases generally deal with the suppression of physical evidence seized pursuant to the pat-down search or frisk. Similarly, most inculpatory statements are made following actual arrest of the suspect. *See* Weisgall, *Stop, Search, and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F.L. REV. 219 (1974).

6. 392 U.S. at 22.

7. 671 P.2d 958 (Colo. 1983), *aff'd*, 681 P.2d 524 (Colo. 1984) (affirming trial court's holding on remand).

8. 671 P.2d at 962.

9. 104 S. Ct. 3138 (1984).

vide the needed context within which the Colorado Supreme Court's decisions must be viewed.

Four cases were consolidated for appeal in *Miranda v. Arizona*,[10] all involving self-incriminating statements made by individuals while in custody and subject to police interrogation.[11] In each case, the defendant's statements were made before any advisement concerning the rights of an accused was given.[12] Two years earlier, the Court had addressed a similar situation in *Escobedo v. Illinois*,[13] ruling that certain incriminating statements made by a defendant during a custodial interrogation were constitutionally inadmissible on the grounds that the failure to apprise the defendant of his right to a lawyer and his right to remain silent was a denial of his sixth amendment right to counsel.[14] In *Miranda*, the Warren Court granted certiorari to further develop the rule regarding incriminating statements elicited during a custodial interrogation and to provide concrete guidelines for law enforcement agencies and courts to follow.[15]

The Supreme Court in *Miranda* held that before a suspect who was in custody could be subjected to interrogation, he must be advised of his right to remain silent and of his right to either retained or appointed counsel. Furthermore, if a defendant should choose to waive his rights, that waiver must be voluntary, knowing and intelligent.[16] The Court in *Miranda* perceived that the traditional safeguard of voluntariness under the due process clause simply was not sufficient to protect against the evils inherent in long term, incommunicado interrogation at a police station.[17] The Court quoted at length from various of "the most recent and representative"[18] of police manuals to illustrate the pervasive practice employed by police in custodial interrogations of obtaining a psychological advantage over a suspect so as to elicit a self-incriminating response. The Court nevertheless recognized that volunteered confessions are still a viable aspect of law enforcement, and such statements are admissible in evidence when freely given without coercive pressures.[19] However, when a suspect is both in custody and subject to in-

10. Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Miranda v. Arizona, 98 Ariz. 18, 401 P.2d 721 (1965); California v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); Vignera v. New York, 15 N.Y.2d 970, 259 N.Y.S.2d 857, 207 N.E.2d 527 (1965).

11. *Miranda*, 384 U.S. 491-98.

12. *Id.*

13. 378 U.S. 478 (1964).

14. *Id.* at 490 (holding that when a police investigation has gone beyond a general inquiry, and has subsequently become focused on a particular suspect who has been denied a request for counsel, and also has not been advised of his rights, self-incriminating statements made during the course of a custodial investigation are inadmissible).

15. *Miranda*, 384 U.S. at 443. Unlike *Escobedo*, the inquiry in *Miranda* was directed at the privilege against self-incrimination.

16. *Id.* at 478.

17. *Id.* at 444, 477.

18. *Id.* at 448. *See also* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956).

19. 384 U.S. at 457-58. Prior to *Miranda*, the test for admission of confessions was

terrogation, the Court concluded that *Miranda* safeguards apply.[20]

The *Miranda* decision held that warnings are required whenever a suspect is "deprived of his freedom in any significant way."[21] The trend immediately thereafter was to interpret *Miranda* as applying only to station house questioning because the primary concern was with long-term, incommunicado interrogation. The Supreme Court clarified that *Miranda* was not confined to the station house in *Orozco v. Texas*,[22] in which it held that *Miranda* warnings should have been given to a suspect who was awakened at four a.m. in his bedroom and immediately questioned by four armed and uniformed police officers.[23]

By contrast, in *Oregon v. Mathiason*,[24] the Court clarified that even questioning conducted at the station house is not necessarily "custodial." In *Mathiason*, the Court dealt with the admissibility of inculpatory statements made by the defendant to police.[25] A burglary victim gave police the name of the only suspect of whom she could think—Mathiason.[26] Three weeks after the crime, an officer attempted to contact this suspect but was unsuccessful and left his card and a note at the defendant's residence requesting that the defendant call police.[27] Mathiason did call and was asked to meet with the officer at a police station that same day.[28] The defendant complied.[29] In a room with the door closed, the officer told the defendant that he was not under arrest.[30] The officer then asked the defendant about the burglary and falsely told the defendant that his fingerprints had been found at the

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whether they were "voluntary." Kamisar, *Involuntary Confessions*, 17 RUTGERS L. REV. 728 (1968).

20. 384 U.S. at 467. The question of what constitutes interrogation was resolved in Rhode Island v. Innis, 446 U.S. 291 (1980). The Supreme Court found that interrogation means any statement by a police officer which is designed to elicit an incriminating response. *Id.* at 301. *See also* People v. Lee, 630 P.2d 583, 589 (Colo. 1981); Grano, *Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979); Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation?" When Does It Matter?*, 67 GEO. L.J. 1, 7 (1978); White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1979); White, *Interrogation Without Questions* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1211 (1980); Note, Rhode Island v. Innis: *A Heavy Blow to the Rights of a Suspect in Custody; and No "Christian Burial" to Ease the Passage*, 41 LA. L. REV. 928, 929 (1981); Note, *The Meaning of "Interrogation" Under* Miranda v. Arizona: Rhode Island v. Innis, 12 TEX. TECH. L. REV. 725, 734 (1981); Comment, Rhode Island v. Innis—*Criminal Procedure—Fifth Amendment—Interrogation in Violation of* Miranda *Includes Not Only Direct Questioning But also Conduct Police Officers Knew or Should Have Known Would Elicit an Incriminating Response*, 9 HOFSTRA L. REV. 691 (1981); Comment, *Criminal Procedure Defining Interrogation Under* Miranda, 20 WASHBURN L.J. 434, 441 (1981).

21. 384 U.S. at 478.

22. 394 U.S. 324 (1969).

23. 394 U.S. at 326. For a discussion of *Orozco*, see Comment, *Custodial Interrogation and Res Gestae Under* Miranda, 22 BAYLOR L. REV. 88 (1970).

24. 429 U.S. 492 (1977).

25. *Id.* at 493.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

scene of the crime.[31] The defendant then confessed.[32]

The Supreme Court, in a *per curiam* opinion, upheld the use of the defendant's confession against him at trial, relying heavily on the fact that the defendant's freedom of movement was not inhibited by the police and that after having confessed he was permitted to leave the police station.[33] As a result, the Court concluded that "Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way.' "[34] The Court went on to note that

> such 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 crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is a 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.[35]

Finally, the Court held that a *Miranda* advisement is not required merely because the questioning transpires at a police station or "because the questioned person is one whom the police suspect."[36] The facts of *Mathiason* present circumstances more coercive and more custodial than the situation that confronted the Colorado Supreme Court in *Johnson*, yet the *Mathiason* Court recognized that specific factual circumstances that fall short of custody do not call for an advisement of rights. The seminal case of *Terry v. Ohio* illustrates this proposition.

In *Terry*, a veteran police officer observed Terry and two others engaged in suspicious activity focused upon a particular store window.[37] After confronting the suspects, asking for their names, and receiving no response, the officer abruptly patted Terry down, thereby discovering a pistol in a pocket of Terry's overcoat.[38] A subsequent search disclosed that Terry was carrying a .38 caliber revolver and that one of Terry's cohorts also possessed a concealed weapon.[39] The Supreme Court granted certiorari to determine whether the search violated the defendants' fourth amendment rights.[40] The broader issue before the Court was when, if ever, might a police officer detain a suspect to investigate or

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31. *Id.*
32. *Id.*
33. *Id.* at 493-94.
34. *Id.* at 495.
35. *Id.*
36. *Id. See also* Note, *Custodial Interrogation After* Oregon v. Mathiason, 1978 DUKE L.J. 1497, 1499, 1505 (1978); Comment, *"In Custody?": A Relaxation of* Miranda, 23 LOY. L. REV. 1057, 1059-60 (1977); Comment, *Criminal Procedure—Defining "Custodial Interrogation" For Purposes of* Miranda: Oregon v. Mathiason, 57 OR. L. REV. 184 (1977).
37. 392 U.S. at 6.
38. *Id.* at 7.
39. *Id.*
40. *Id.* at 8.

prevent a crime without probable cause for arrest.[41]

The Court first laid an analytical foundation, holding that every stop and frisk is governed by the fourth amendment:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search."[42]

Applying a fourth amendment analysis, the Court held that any involuntary detention by a police officer must meet the fourth amendment requirement of "reasonableness,"[43] which involves "balancing the need for the search [or seizure] against the invasion which the search [or seizure] entails."[44] Addressing the facts of *Terry*, Chief Justice Warren stated that the officer must advance "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[45] The Court applied a two-part analysis: whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstance which first justified the intrusion.

The Court did not hold, as Justice Douglas argued in his dissent, that only an arrest based on probable cause could be a reasonable detention under the fourth amendment.[46] Rather, it deferred to the government's interest in "effective crime prevention and detection" and the need to authorize "necessarily swift [police] action predicated upon on-the-spot observation of the officers on the beat."[47] The Court implicitly acknowledged that a police officer must be able to forcibly detain a citizen, even without probable cause to arrest, for effective crime prevention. However, because *Terry* not only permits a pat-down search and a brief seizure of a person, but also "reasonable inquiries" of that person,[48] how does *Terry* relate to the privilege against self-incrimination

41. *Id.* at 10. *Terry* has received substantial attention in the academic community. *See, e.g.*, LaFave, *"Street Encounters" and the Constitution*: Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40 (1968). LaFave addressed the course of a *Terry* stop and determined that generally, such situations were not custodial because the suspect was not "swept away" to "unfamiliar surroundings," and then held and questioned incommunicado. *Id.* at 95-106. *See also* Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1974) (trend toward admittance of statements made during on-the-scene questioning). *See generally* Platt, *The Limits of Stop and Frisk—Questions Unanswered by* Terry, 10 ARIZ. L. REV. 419, 433-35 (1968) (reviewing trends immediately after *Terry*); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 532 (1967) (advocating that stops with questioning significantly deterred criminal activity during the pre-*Terry* era).

42. 392 U.S. at 16. *See also* Delaware v. Prouse, 440 U.S. 648 (1979) (stopping of a vehicle on the highway is a "seizure"); Comment, Delaware v. Prouse: *Dilution of Fourth Amendment Rights in Constitutional Balancing*, 57 DEN. L.J. 345 (1980).

43. 392 U.S. at 19-22.

44. *Id.* at 21 (citing Camara v. Municipal Ct., 387 U.S. 523, 534-35, 536-37 (1967)).

45. *Id.*

46. *Id.* at 35-39 (Douglas, J., dissenting).

47. *Id.* at 20.

48. *Id.* at 30.

addressed in *Miranda*?

The extent of the inquiries permitted under *Terry* remained unclear for a number of years. The United States Supreme Court touched on this issue in *Florida v. Royer*:[49] "Although not expressly authorized in *Terry*, *United States v. Brignoni-Ponce*, . . . was unequivocal in saying that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop."[50] Yet, *Royer* did not resolve the question: if a predicate for *Miranda* is that the suspect be in custody or have his freedom deprived in any significant way, and *Terry* permits a forcible detention of a suspect for investigation and reasonable inquiries, when does the forcible detention in *Terry* become a "significant deprivation of freedom" for the purposes of *Miranda*, thus making advisement of rights mandatory?

In *Berkemer v. McCarty*,[51] the Supreme Court, in a unanimous opinion by Justice Marshall, addressed this issue in the context of a routine traffic stop of an automobile.[52] In *Berkemer*, the defendant was stopped for investigation of driving under the influence of either alcohol or drugs.[53] Prior to arrest, but while forcibly detained, the defendant was asked several questions and he made incriminating replies.[54] He was then arrested and taken to the police station where he was questioned again and made further damaging statements.[55] At no time was he advised of his *Miranda* rights.[56]

The Court suppressed all statements in response to interrogation made after the arrest because there was no *Miranda* advisement.[57] It did not, however, suppress the statements made during the course of the stop.[58] Analogizing the traffic stop with a *Terry* stop, the Court held that a traffic stop itself was a seizure under the fourth amendment. Justice Marshall noted:

> It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the

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49. 460 U.S. 491 (1983).

50. *Id.* at 498 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975)). Although *Brignoni-Ponce* involved a border search to asertain the status of a vehicle's passengers, it has consistently been cited as a *Terry* case without reference to its particular fact pattern. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979).

51. 104 S. Ct. 3138 (1984).

52. Strictly speaking, the *Berkemer* opinion was not unanimous. Justice Stevens concurred in the judgment but felt the issue was not properly before the Court. 104 S. Ct. 3153-54 (Stevens, J., concurring). Justice Stevens believed the sole issue on certiorari was whether *Miranda* was applicable to misdemeanor arrests. He was distressed by the fact that *Berkemer's* holding went considerably further. While *Berkemer* held that *Miranda* did apply to misdemeanor arrests, the issue of whether the full panoply of criminal procedure rights accompany traffic stops or arrests is an interesting one. For discussions of some of these issues, see Comment, *Search Incident to Custodial Arrest for Traffic Violation*, 11 AM. CRIM. L. REV. 801 (1973); Comment, *A Lawful Custodial Arrest for a Traffic Violation Justifies a Full Search of the Arrestee*, 11 HOUS. L. REV. 1283 (1973); Annot., 25 A.L.R. 3d 1076 (1969).

53. 104 S. Ct. at 3142.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 3148.

58. *Id.* at 3152.

> passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission . . . . Certainly 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.[59]

The defendant argued that *Miranda* warnings should have been given prior to the questions asked during the traffic stop because the defendant had been "deprived of his freedom in a significant way."[60] The Court emphatically rejected this contention. It held:

> we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent.
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> . . . .
>
> [W]e have held [that] a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." . . . "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " Typically, 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. . . . *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.[61]

Berkemer clarified what was implicit in the *Terry* and *Miranda* doctrines as they developed: that when determining the applicability of *Miranda* to an initial contact short of arrest, practicing lawyers and trial judges must do more than ask whether the defendant was free to leave, or seized under the fourth amendment. The issue that must be addressed is whether the person detained has also been "subjected to treatment that renders him 'in custody' for practical purposes."[62] Colorado decisions addressing this issue have sent practitioners mixed messages.

II. *PEOPLE V. JOHNSON*: COLORADO EQUATES CUSTODY WITH SEIZURE

With its decision in *People v. Johnson*,[63] the Colorado Supreme Court appeared poised to require *Miranda* warnings prior to any questioning made in the course of an investigatory stop. In order to understand how the Colorado court arrived at a position seemingly in conflict with that of the *Berkemer* Court, it is necessary to briefly examine the Colorado

59. *Id.* at 3149.
60. *Id.* at 3148.
61. *Id.* at 3149-51 (emphasis added) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).
62. 104 S. Ct. at 3151.
63. 671 P.2d 958 (Colo. 1983), *aff'd*, 681 P.2d 524 (Colo. 1984).

doctrinal history of both the fourth amendment concept of the investigatory stop and the fifth amendment concept of custody.

A. *The Colorado Supreme Court Adopts and Interprets* Terry.

The investigatory stop in Colorado was sanctioned three years after *Terry* in the seminal case of *Stone v. People*.[64] Impliedly following *Terry*, the Colorado Supreme Court held that although an investigatory stop was a "seizure" under the fourth amendment, such a stop could be made for limited purposes upon less than probable cause.[65] While *Stone* specifically authorized police questioning only to ascertain a suspect's name and address, the court was quick to recognize, as had the commentators, that "the right to interrogate during a 'stop' is the essence of *Terry* and its progeny."[66] Only four months after *Stone*, the court further noted that "there is an area of proper police practice in which less than probable cause may still justify temporary detention *for questioning*."[67]

The Colorado court's enthusiasm for the *Stone* stop as a tool for police questioning soon was carried to unreasonable lengths. In *People v. Stevens*,[68] a woman suspected of smuggling marijuana into the state penitentiary was taken from the prison lobby to a conference room, where she was questioned for one half-hour by several prison officials and subsequently made a confession.[69] Over a vigorous dissent by Justice Erickson (in which he emphasized his apparent pique with a forty-one case string cite), the court held that the confession did not result from an illegal arrest made without probable cause, but rather was derived through proper questioning during a "temporary detention for field investigation."[70] In a subsequent habeas corpus action, the Tenth Circuit Court of Appeals needed only a short paragraph to "dispel any notion that this was a *Terry*-type detention."[71]

As the composition of the court changed after *Stevens*, the limits of the so-called *Stone* stop were more sharply, and narrowly, delineated. In cases such as *People v. Tooker*,[72] *People v. Schreyer*,[73] and *People v.*

64. 174 Colo. 504, 485 P.2d 495 (1971).

65. *Id.* at 508. The language in *Stone* does not precisely mirror that of *Terry*. Under *Stone*, to lawfully detain an individual for questioning, the court created the "Stone area," announcing the following standard: "(1) the officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention must be reasonable; and (3) the character of the detention must be reasonable when considered in light of the purpose." 174 Colo. at 509, 485 P.2d at 497.

66. J. HALL, SEARCH AND SEIZURE, § 10:15 (1982) (quoting United States v. Oates, 560 F.2d 45, 63 (2d Cir. 1977)).

67. People v. Gurule, 175 Colo. 512, 515, 488 P.2d 889, 890 (1971) (emphasis added).

68. 183 Colo. 399, 517 P.2d 1336 (1973), *rev'd sub nom.*, Stevens v. Wilson, 534 F.2d 867 (10th Cir. 1976).

69. 183 Colo. at 402, 517 P.2d at 1337-38.

70. 183 Colo. at 405, 517 P.2d at 1339.

71. 534 F.2d at 870 (state court erred in determining voluntariness of confession, not the illegality of arrest).

72. 198 Colo. 496, 601 P.2d 1388 (1979).

73. 640 P.2d 1147 (Colo. 1982).

Hazelhurst,[74] the court repeatedly emphasized that only a brief line of questioning is permitted in a *Stone* stop.[75] In none of these cases did the court even hint that such questioning in a *Stone* stop amounted to custodial interrogation requiring *Miranda* warnings.[76] Indeed, a sentence in *Schreyer* seemed to indicate just the opposite. "*Terry*," the court said through Justice Erickson, "upheld the lawfulness of certain brief police stops based upon a standard of less than probable cause for the traditional *arrest or custodial interrogation*."[77] Thus, as late as 1982, the court seemed to be distinguishing between an investigatory stop and custodial interrogation. Within a year that distinction would be considerably blurred.

B. *Custodial Interrogation in Colorado*

The Colorado history of "custodial interrogation" has been similarly tortuous. Although *Miranda* had replaced the "focus of investigation" test of *Escobedo v. Illinois*[78] with a standard requiring police officers to advise suspects of their rights after being "taken into custody or otherwise deprived of [their] freedom in any significant way,"[79] early Colorado *Miranda*-type cases combined the two tests. In *People v. Orf*,[80] for example, the court cited both *Miranda* and *Escobedo* in suppressing statements made by the defendant because "the investigation at this time 'focused' on the defendant and only the defendant."[81] In *People v. Algien*,[82] however, the court strictly construed the *Miranda* analysis and stated that, in determining whether someone was in custody, "the objective test should be applied, that is, whether under the circumstances a

74. 662 P.2d 1081 (Colo. 1983).

75. As stated in *Shreyer*: "Any temporary police detention made for the purpose of questioning a suspect who might otherwise escape is limited to determining an individual's identity or obtaining an explanation of his behavior." 640 P.2d at 1150 (citations omitted).

76. Arguably, such a hint did occur in People v. Pancoast, 659 P.2d 1348 (Colo. 1982), where Justice Quinn (now Chief Justice) remanded the case to the district court to determine if a proper seizure had occurred. He clarified the appropriate standard by stating:

> [T]he issue whether a person has been seized for purposes of the Fourth Amendment must be resolved by an objective standard—that is whether "in view of all the circumstance surrounding the incident, a reasonable person would have believed that he was not free to leave." This objective standard is consistent with Colorado case law on the meaning of "custody" for purposes of the *Miranda* warning.

659 P.2d at 1350 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) and citing People v. Algien, 180 Colo. 1, 501 P.2d 468 (1972) and People v. Marioneaux, 618 P.2d 678 (Colo. App. 1980)).

The distinction between the objective standard to determine custody and the objective standard to determine seizure is recognized, although not explicitly, in 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.6(c) (1984) (noting the similarity between the two standards but not equating the two).

77. 640 P.2d at 1149 (emphasis added).

78. 378 U.S. 478 (1964). For a discussion of *Escobedo*, see *supra* notes 13-14 and accompanying text.

79. *Miranda*, 384 U.S. at 444.

80. 172 Colo. 253, 472 P.2d 123 (1970).

81. *Id.* at 260, 472 P.2d at 127.

82. 180 Colo. 1, 501 P.2d 468 (1972).

reasonable man would believe himself to be deprived of his freedom in any significant way."[83]

Three years later, then Chief Justice Pringle authored an opinion in *People v. Parada*[84] which should have ended the confusion once and for all:

> [W]hether *Miranda* warnings are required in a particular situation depends on a threshold determination that the interrogation is "custodial." While "custodial" does not necessarily refer to a police station investigation . . . it does require that the interrogation be conducted under circumstances where a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Thus, the thrust of *Miranda* substituted the "custodial interrogation" requirement for the "focus of the investigation" test which had earlier been enunciated. . . .[85]

Yet, less than one year after *Parada*, the Colorado Supreme Court seemed to drift back to an *Escobedo*-type analysis. In *People v. Thornton*,[86] the only Colorado case dealing directly with the issue of whether *Miranda* warnings are required in a *Stone* stop, police stopped a car for a traffic infraction, a vehicle which matched the description of the "getaway car" in a recent burglary of a construction site.[87] Noticing some wet, mud-covered welding equipment in the back seat, the officer questioned the driver, who claimed that the equipment was his and had been in the car all day.[88] The driver was then arrested.[89] Justice Erickson's opinion for the court, while acknowledging that the officer did not have probable cause at the time of the stop, nevertheless concluded that

> [t]he police did . . . possess sufficient information to raise a reasonable suspicion that the occupants of this vehicle may have been involved in the reported burglary. When the police saw the acetylene tanks and other welding equipment in the back seat of the car, further inquiry was in order. The responses of the defendant were made *during the investigatory, not the accusatory stage of this criminal proceeding*, and the *Miranda* warnings were,

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83. *Id.* at 7, 501 P.2d at 471.

84. 188 Colo. 230, 533 P.2d 1121 (1975).

85. *Id.* at 233-34, 533 P.2d at 1122-23 (citations omitted) (quoting *Miranda*, 384 U.S. at 444). The Colorado Supreme Court went on to note that

> [s]ince neither party asserts that Parada was "taken into custody" at the time of questioning, the question before this Court is whether she was "deprived of (her) freedom of action in any significant way." Resolution of this question turns on whether she reasonably believed that she was not free to leave. . . . In *Hall*, Judge Friendly, writing for the court, explained this test. He stated: "[I]n the absence of actual arrest, something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so."

Id. at 1122-23 (citations omitted) (quoting United States v. Hall, 421 F.2d 540, 545 (2d Cir. 1969)).

86. 190 Colo. 397, 547 P.2d 1278 (1976).

87. *Id.* at 399, 547 P.2d at 1280.

88. *Id.*

89. *Id.*

therefore, not necessary.[90]

In subsequent cases, however, the court resumed reliance on the objective test for establishing custody set forth in *Algien*[91] and *Parada*,[92] and such was the state of the law when the Colorado Supreme Court decided *People v. Johnson*[93] late in 1983.

C. *The Fifth is the Fourth and the Fourth is the Fifth*: People v. Johnson

In *People v. Johnson*, a plain clothes sheriff's investigator went to the place of employment of one Evan Dean Johnson, who had been named by a burglary victim as a possible suspect.[94] The investigator, who had no visible weapon and was dressed in plain clothes, asked Johnson to step outside, and he complied.[95] The female investigator identified herself as a law enforcement officer and told him she desired to talk to him about the burglary.[96] After the defendant, in response to a question, denied any knowledge of the burglary, the officer asked the defendant if he would submit to a polygraph test.[97] "The defendant looked down at his feet for ten to twenty seconds, appeared as if he was going to cry, and said 'I guess I might as well tell you, I did it.' "[98] The defendant was immediately advised pursuant to *Miranda*, signed a waiver form regarding those rights, and gave the investigator a written statement admitting his involvement in the crime.[99] After making that statement, he was taken from his place of employment to jail.[100]

In ruling to suppress this statement and a written confession made subsequent to *Miranda* warnings, the trial court made no finding as to whether the defendant was in custody, basing its decision simply on the notion that an advisement must be given "before someone asks that ultimate question."[101] The Colorado Supreme Court reversed and remanded the case to the trial court for determination of whether the defendant was in custody at the time he incriminated himself.[102] The court reviewed several United States and Colorado Supreme Court

90. *Id.* at 400, 547 P.2d at 1280 (emphasis added) (citations omitted). *Thornton* has not been explicitly overruled. *But see* People v. Lee, 630 P.2d 583, 590 n.12 (Colo. 1981) (court declines to consider whether police considered the defendant a suspect; *Thornton* distinguished on its facts), *cert. denied*, 454 U.S. 1182 (1982). *Lee* has recently been cited with approval on its facts. *See* People v. Clements, 665 P.2d 624, 625 (Colo. 1983) (anticipating *Berkemer* in holding *Miranda* warnings not required in routine traffic stops). The court has soundly rejected as misplaced its reliance on the investigatory-accusatory distinction. *See Lee*, 630 P.2d at 588-90.

91. 172 Colo. 253, 260, 472 P.2d 123, 127 (1970).

92. 190 Colo. 397, 400, 547 P.2d 1278, 1280 (1976). *See, e.g.*, People v. Gutierrez, 198 Colo. 118, 119, 596 P.2d 759, 760 (1979).

93. 671 P.2d 958 (Colo. 1983), *aff'd*, 681 P.2d 524 (Colo. 1984).

94. 671 P.2d at 959.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 959-60.

99. *Id.* at 960.

100. *Id.*

101. *Id.*

102. *Id.* at 965.

cases defining custody, reiterrating that the objective test of *Algien* and *Parada* applied when making a custody determination.[103] Then, prefacing the court's forthcoming equation of "seizure" with "custody," it asserted:

> This objective standard is consistent with the decisions of this court and the United States Supreme Court which construe the word "seizure" for the purposes of the Fourth Amendment. [The] test is whether under the circumstances surrounding the incident a reasonable man would have believed that he was not free to leave.[104]

By this statement, the court had imported fourth amendment doctrine to the analysis of the fifth amendment custody issue. It did so without apparent consideration of the very different policies which underly the two amendments. Rather, the court seemed to "accord talismanic power"[105] to the phrase "whether a reasonable man would have believed that he was not free to leave," the test which the court had adopted in the fifth amendment context in *People v. Parada*,[106] and in the fourth amendment context in *People v. Pancoast*.[107] Nor did the *Johnson* court leave any room to believe that it was merely analogizing; its equation of the two concepts was emphatic: "the standards to be employed in determining the meaning of 'custody' under the Fifth Amendment for purposes of *Miranda* and 'seizure' for purposes of the Fourth Amendment *are identical*. . . ."[108] Although the objective standard had previously been applied by the Colorado court to determine both custody and seizure questions, the court's equation of the two concepts obscures and conflicts with the teachings of the United States Supreme Court as exemplified by *Berkemer*.

If, after *Johnson*, "seizure" and "custody" are synonymous, then the central question remains: are *Miranda* warnings required prior to any questioning in a *Stone* stop? A *Stone* stop is, of course, a seizure under the fourth amendment,[109] and the test for determining whether a

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103. *Id.* at 960-61.

104. *Id.* at 961 (citing United States v. Mendenhall, 446 U.S. 544 (1980)); People v. Pancoast, 659 P.2d 1348 (Colo. 1982); People v. Bookman, 646 P.2d 924 (Colo. 1982)).

105. Berkemer v. McCarthy, 104 S. Ct. at 3149.

106. 188 Colo. at 234, 533 P.2d at 1123.

107. 659 P.2d 1348, 1350 (Colo. 1982) (objective test applied to determine timing of defendant's arrest). *See also* People v. Lewis, 659 P.2d 676, 681 n.3 (Colo. 1983).

108. 671 P.2d at 962 (emphasis added). On remand, "[t]he trial court found the conduct of the investigator was not such as to indicate to a reasonable person that he was in custody, with the exception, however, of the question regarding the polygraph exam." *Id.* Additionally, the trial court stated that "[a]ll but the specific question [concerning the polygraph request] that we are dealing with was not that coercive . . . ." People v. Johnson, 681 P.2d 524, 525 n.3 (Colo. 1984) *aff'g* 671 P.2d 958 (Colo. 1983). The court's brief *per curiam* decision affirmed the trial court's ruling suppressing the admission because its finding that he was in custody was "supported by the record." *Id.* at 525. Thus, the court had endorsed a ruling that a mere question, absent any indicia of coercion, could render a situation as "custodial." One month later, however, the court held that it was error to focus "essentially on one circumstance only" in determining whether a suspect is in custody. *See* People v. Thiret, 685 P.2d 193, 202-03 (Colo. 1984).

109. *See* Stone v. People, 174 Colo. at 508, 485 P.2d at 497; *see also supra* text accompanying notes 64-77.

seizure has occurred applies to *Stone* stops as well as arrests. As the court said in *Lewis v. People*,[110] "*Pancoast* and *Bookman* make clear that we adopted *Mendenhall's* objective or reasonable person standard to all forms of police intrusions constituting a 'seizure' of the person, including temporary detentions."[111] Now, after Johnson, the question that must be answered by the Colorado Supreme Court is when will *Miranda* warnings be required?

The question, whether *Miranda* warnings are required in a *Stone* stop, was neatly framed, though not answered, in *People v. Wells*.[112] There a police officer on an early morning routine patrol of a warehouse complex observed that the defendant "had backed up his vehicle, with the trunk open, against a tractor-trailer and appeared to be pulling on the gate handle of the trailer."[113] Moments later, as the defendant was leaving, "[t]he officer drove to the side of the defendant's vehicle, rolled down his window, and told the defendant to 'hold on a second.' "[114] The officer then asked what the defendant was doing there and the defendant replied that he was looking for a job.[115] An identification check disclosed an outstanding warrant for the defendant, who was arrested and searched.[116] Further investigation disclosed that the tractor-trailer had been entered unlawfully.[117]

The defendant questioned only the validity of the initial stop, a challenge which the court rejected.[118] In a footnote, however, the court pointedly stated that, as the issue had not been raised before the district court, it could not consider "whether the defendant's statement to [the officer] at the scene was the result of custodial interrogation which should have been preceded by a proper advisement of the defendant's *Miranda* rights."[119] The court then cited *Miranda* and *Johnson*.[120] In

110. 659 P.2d 676 (Colo. 1983).

111. *Id.* at 681. United States v. Mendenhall, 446 U.S. 544 (1980), involved a confrontation between federal agents and the defendant in the public concourse of an airport. The Court applied the objective standard in determining that the circumstance surrounding the contact did not amount to a seizure. *Id.* at 553-56.

112. 676 P.2d 698 (Colo. 1984).

113. *Id.* at 700.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. The court stated:

> The total circumstances observed by the officer immediately prior to the stop—the defendant's physical action in attempting to forcibly open the trailer door and his obvious effort to leave the scene as the officer entered the parking lot—constitute a sufficiently particularized basis in fact for stopping the defendant in order to briefly investigate the circumstances of his conduct.

Id. at 702. *But see* People v. Thomas, 660 P.2d 1272 (1983) ("Even when the act of running [from police] is motivated by an effort to avoid contact with the police, it still does not constitute the type of specific and articulable fact that is constitutionally sufficient to justify a stop."); People v. Quintero, 657 P.2d 948 (Colo.) (stop to determine whether burglary has been committed when no criminal acts have been reported to police is constitutionally impermissible), *cert. granted*, Colorado v. Quintero, 103 S. Ct. 3535, *cert. dismissed*, 104 S. Ct. 543 (1983) (due to death of defendant).

119. 676 P.2d at 702 n.3.

120. *Id.* at 702.

light of *Johnson*, the trial court could have only answered the question posed by the footnote in the affirmative. Thus, after *Johnson*, but before *Berkemer*, the Colorado Supreme Court appeared poised to require that police officers, before *any* inquiry into reasonably suspicious activity, must advise suspects of the right to remain silent.[121] The *Johnson* holding, if interpreted literally, presents a threat to traditional law enforcement procedures in Colorado by effectively eliminating the distinction between seizure and custody, potentially creating fifth amendment protections in situations not contemplated by the Supreme Court in *Miranda* and its progeny.

III. *JOHNSON*'S PRECEDENTIAL VALUE AFTER *BERKEMER*

The confusion engendered in the lower courts by the uncertain validity of the *Johnson* analysis has been evident in recent decisions of the Colorado Court of Appeals. In *People v. Harris*,[122] fragments of a parking light scattered about the scene of a fatal accident led a police officer to suspect that the defendant's car was involved in the fatal accident on the previous day.[123] The officer followed the defendant's car to a parking lot. The officer requested the defendant's identification and asked him whether he had been involved in any accidents in the last twenty-four hours.[124] The defendant's response led to several more questions.[125] The court of appeals held that the trial court had erred "as a matter of law" in finding that the defendant was not in custody during this conversation.[126] As support, the court cited *Pancoast* for its view that "[a] person is in custody for Miranda purposes if, in view of all the circumstances, a reasonable person would have believed he was not free to leave."[127]

Oddly, the court ignored *Johnson* entirely, citing *Pancoast*, a fourth amendment seizure case as support for the fifth amendment custody standard. The court's ruling in *Harris* is also at odds with precedent in that it seemingly relies on the officer's state of mind in determining the custody issue.[128] Thus, while the result in *Harris* is not necessarily erroneous, since the defendant was possibly in custody, the analysis applied by the court clearly was not in accord with precedent.

Even more striking was the Colorado Court of Appeals' attempt to

121. Even before *Berkemer*, such a ruling would have been at odds with the overwhelming weight of precedent on this issue. *See, e.g.*, United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211, (1983). *See generally* 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 & n.66 (Supp. 1984) ("The courts have generally concluded that police questioning outside the station house is not 'custodial' . . ."); 2 W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 27.3(a)(3) & n.55 (1984) ("Courts are also virtually unanimous in finding that questioning of a suspect during an investigative stop authorized under *Terry v. Ohio* . . . does not meet the requirement of custodial interrogation.").

122. 703 P.2d 667 (Colo. App. 1985).

123. *Id.* at 669-70.

124. *Id.*

125. *Id.*

126. *Id.* at 669.

127. *Id.*

128. *Id.* at 670.

wrestle with *Johnson* in *People v. Koolbeck*.[129] In *Koolbeck*, the defendant was asked to get into the police officer's car while the officer investigated a burglary.[130] The defendant was not free to leave. In response to general inquiries, the defendant made some arguably incriminating statements.[131] The court cited both *Johnson* and *Pancoast* as the basis for its employment of an objective standard: "whether a person has been 'seized' under the fourth amendment and thus is in custody for the purposes of the fifth amendment is an objective standard."[132] Yet, the court then held that the brief detention involved was a *Terry/Stone* stop,[133] which meant that although the defendant was not free to leave, and therefore had been seized, his seizure was temporary and did not amount to an arrest. Following through on its misplaced analysis, the court concluded that the police officer's detention was a lawful *Stone* stop, and therefore, "a *Miranda* warning was not necessary for the questions asked."[134] While this is an arguably correct interpretation of *Berkemer*, it is totally inconsistent with *Johnson*. If seizure equals custody, then *Miranda* warnings would have logically been required in *Koolbeck*. Perhaps Judge Babcock, author of the *Koolbeck* opinion, was making a good faith effort to reach the correct result, but failed to force the aberrant holding of *Johnson* into the orthodox mold.

People v. Black,[135] indicates that the Colorado Supreme Court is unaware of the effect of *Berkemer* on its holding in *Johnson*. In *Black*, the court suppressed statements made by a suspect at the scene of a vehicular crime, correcting a trial court that had resurrected the "focus of the investigation" test from *Escobedo*.[136] Correctly, the court stated that *Miranda* had substituted a custodial analysis for *Escobedo's* "focus" test.[137] Citing *Johnson* twice, the court held that the subjective mindset of the police officer is simply not relevant to the issue of custody.[138] In a footnote, the court cited *Berkemer* in support of this proposition.[139] There is no recognition in the opinion that *Berkemer* had effectively rejected *Johnson*'s holding that seizure and custody are identical.

CONCLUSION

The validity of *Johnson* is at best uncertain in light of the United States Supreme Court's ruling in *Berkemer*. Although the Colorado court is free to interpret the Colorado Constitution more strictly than the United States Constitution, and has not hesitated to do so in the past,[140]

129. 703 P.2d 673 (Colo. App. 1985).
130. *Id.* at 667.
131. *Id.*
132. *Id.* at 668.
133. *Id.* (citing People v. Shreyer, 640 P.2d 1147 (Colo. 1982)).
134. *Id.*
135. 698 P.2d 766 (Colo. 1985).
136. *Id.* at 767.
137. *Id.* at 768.
138. *Id.*
139. *Id.* at 768 n.6.
140. *See, e.g.*, People v. Oates, 698 P.2d 811 (Colo. 1985) (extending fourth amendment

People v. Johnson was decided under the federal Constitution and therefore appears to be an inadvertent mixing of doctrinal analysis rather than a bold departure from federal precedent. To remedy this flawed interpretation, the Colorado Supreme Court must either recognize its error in *Johnson* and adopt an analysis consistent with orthodox *Terry/Miranda* doctrine as illustrated by *Berkemer*, or embrace *Johnson* and anchor its equation of seizure with custody as the law under the Colorado Constitution. The latter would effectively emasculate the "stop and frisk" as a law enforcement tool.

While the *Johnson* holding affects only one issue of criminal procedure, those unfamiliar with criminal litigation may not appreciate the practical significance of the problem created by the case. Every criminal trial lawyer knows that statements made during the first few moments of contact with a police officer are crucial. A person's off-hand remark, or response to a police officer's general questioning, made when the fear of being caught is most intense and before time has given an opportunity to craft a careful explanation, can be essential in proving a criminal charge. *Koolbeck*, *Wells*, *Harris*, and *Berkemer* all provide vivid illustrations of this fact. The admissibility of such statements is almost always conditioned on applying the distinct teachings of *Terry* and *Miranda*.

The Colorado Supreme Court should recognize *Johnson* as a deviation from traditional *Terry/Miranda* analysis which significantly changes police conduct in "stop and frisk" situations. Acknowledging *Johnson's* conflict with entrenched practice, the Colorado Supreme Court should give lower courts and practicing lawyers some additional guidance. As it stands now, *Johnson* theoretically requires police officers to "Mirandize" virtually anyone they contact under even remotely suspicious circumstances.[141] This result could hardly have been contemplated by the Supreme Court in *Miranda*. Indeed, Chief Justice Warren in *Terry* recognized that the "stop and frisk" is a legitimate investigative tool that carefully balances society's need for law enforcement against the individual's right to be left alone.[142]

Acknowledging the *Stone* stop as an effective tool of law enforcement, the Colorado Supreme Court should qualify *Johnson* and correct its erroneous ruling. Such a course would return Colorado to a more sensible interpretation of fourth and fifth amendment precedent, permitting law enforcement personnel to continue to work with familiar

protection under the Colorado Constitution not found to exist in the United States Supreme Court ruling in United States v. Karot, 104 S. Ct. 3296 (1984), which held a defendant did not have a reasonable expectation of privacy with regard to a beeper placed in a steel drum); People v. Sporleder, 666 P.2d 135 (Colo. 1983) (extending protection under the Colorado Constitution for pen registers in opposition to the Supreme Court's ruling in Smith v. Maryland, 442 U.S. 735 (1979)); Charnes v. DiGiacomo, 200 Colo. 94, 612 P.2d 1117 (1980) (extending protection under the Colorado Constitution to bank records not found to exist in United States v. Miller, 425 U.S. 435 (1976)).

141. The authors have been informed in at least one jurisdiction in Colorado the District Attorney has instructed law enforcement personnel to "Mirandize" every person they have contact with in a criminal investigation.

142. 392 U.S. at 20-21.

standards that in no way compromise defendants' fifth amendment rights. Admittedly, the orthodox *Terry/Miranda* analysis is not always easy and there are no bright lines. Such an analysis ultimately requires careful, fact-specific determinations made not by "according talismanic power" to a simple precedential phrase, but rather, as in *Berkemer*, by appreciating and applying the underlying tenets of the fourth and fifth amendments. Only through this type of analysis can the court give due deference to both the legitimate needs of law enforcement as recognized in *Terry*, and the fifth amendment principles embodied in *Miranda*.