No. 08-196

In The

Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

ROGER SNELL,

Respondent.

On Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER, ON THE FACTS OF THIS CASE, RESPONDENT'S FREEDOM OF ACTION WAS CURTAILED TO THE DEGREE WHICH RENDERED HIM IN CUSTODY FOR THE PURPOSE OF *MIRANDA* PROTECTIONS.

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COUNTER-STATEMENT OF THE CASE

Respondent was involved in a serious two-vehicle traffic accident on a rural New Mexico highway which resulted in the death of another driver. State Police Officers Eric Jones and Alan Apodaca, upon arriving at the scene, investigated the accident where Respondent was the only suspect of alleged vehicular homicide. (TR at 22-23).[1]

Officer Jones interviewed an eye-witness at her vehicle. (TR at 32). Respondent's vehicle was not driveable. (TR at 38). Respondent approached the eye-witness' vehicle while Officer Jones was conducting his interview. (TR at 34). Officer Jones instructed Respondent to leave the area. (TR at 34). When Respondent did not leave, Officer Apodaca told Respondent that if Respondent did not step away, Respondent would be placed under arrest for obstruction. (TR at 36-37 and 42). Officer Apodaca then removed Respondent and escorted him approximately 60-70 feet from the scene, locked Respondent in the back of Officer Jones' police car where Officer Jones later interrogated him. (TR at 42 and at 43).

After having investigated the accident scene and interviewing the eye-witness, Officer Jones returned to his police car where Respondent remained confined to the back seat. The officer did not advise Respondent of his *Miranda* rights. (TR at 45). Officer Jones

[1] Transcript of proceedings from March 27, 2006 hearing before the Colfax County, New Mexico District Court on the Motion to Suppress.

then interrogated Respondent while he remained in the back seat of the police car and was unable to leave. (TR at 42). The back doors of the patrol car remained locked during the interrogation. (TR at 38).

Respondent was then charged in the District Court of Colfax County, New Mexico on December 6, 2005, with Homicide by Vehicle NMSA 1978, §66-8-101(C) (2004). (RP at 1).[2] The Complaint alleges Snell operated a motor vehicle while under the influence of intoxicating liquors which resulted in the death of Heather Nielson. The complaint alleges, in the alternative, that Snell operated his vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner which endangered or was likely to endanger any person or property, contrary to NMSA 1978, §66-8-101(C). (RP at 1).

There is no evidence that Respondent was under the influence of intoxicating liquors. (*See* TR at 19-42). None of the suppressed evidence relates to intoxication, only to the approximate speed at which Snell may have been driving. (RP at 24).

The only evidence regarding Respondent's speed or manner of driving in support of the State's charge of vehicular homicide is Respondent's statement that he may have been traveling between 60-65 miles per hour. This statement was found to have been elicited

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[2] Record Proper from Colfax County, New Mexico District Court.

during a custodial interrogation, and was suppressed by the District Court. (RP at 90). Respondent did not state he was driving to fast for the conditions as urged by Petitioner.

The New Mexico Court of Appeals affirmed the District Court applying, in part, *Berkemer v. McCarty*, 468 U.S. 420 (1984) determining:

> The essential question is whether the detention "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self incrimination to require that he is warned of his constitutional rights." *Berkemer*, 468 U.S. at 437. The conduct of the police in this case in threatening Defendant with arrest, physically escorting him to the police car, placing him in the back seat, where he was locked in, leaving him there, and then returning to question him either from the front seat of the vehicle while he was locked in the back, or opening the back door and questioning him from a position that would have blocked his exit from the vehicle, exerted just the sort of pressure to which *Berkemer* refers.

App. 10-11.[3]

[3] Appendix to Petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

SUMMARY

This was not a routine traffic stop. The police did not pull the Respondent driver over from traffic and stop him on the roadside. Instead, the Respondent driver was involved in a fatal head-on-car accident which rendered both vehicles undriveable. The police came upon the scene and conducted an investigation which was focused solely on the Respondent. As such, the direct holding of *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), that persons temporarily detained pursuant to ordinary traffic stops are not "in custody" for the purposes of *Miranda* is not applicable. This case involved an investigation following an accident, not a traffic stop.

In the context of roadside traffic accident investigations, *Miranda* protections are applicable when a suspect's freedom of action is curtailed to a "degree associated with formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

On these facts there is no unsettled question of law under *Berkemer v. McCarty*, 468 U.S. 420 (1984). When the police restrain a suspect's freedom of action to a degree associated with formal arrest, he is entitled to *Miranda* warnings and protections. *Id.*

This analysis for deciding when a suspect has been taken into custody is necessarily fact intensive. *Berkemer* at 441. The Petitioner's dissatisfaction with the facts as determined by the District Court and the New Mexico Court of Appeals is not grounds supporting its Petition for Writ of Certiorari. Sup. Ct. R. 10.

I. The Decision of the New Mexico Court of Appeals Is Consistent with the Decisions of the United States Supreme Court.

The decision of the New Mexico Court of Appeals is consistent with the decisions of the United States Supreme Court on the issue. Accordingly, Petitioner cannot satisfy the criteria for a grant of certiorari set forth by Sup. Ct. R. 10(c) – the question has been settled by this Court.

The decision of the New Mexico Court of Appeals is consistent with *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) which requires a person to be warned of his rights, prior to "questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The New Mexico Court of Appeals relied upon the settled law of *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), which explains that *Miranda* protection become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." Where a motorist is subjected to treatment that renders him in custody for practical purposes, he will be entitled to a full panoply of protections prescribed by *Miranda*. *Id.* (Quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

"[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood the situation." *Berkemer*, 468 U.S. at 442. In *Stansbury v. California*, 511 U.S. 318, 323 (1994), this Court explained that the "determination of custody

depends on the objective circumstances of the interrogation, and not the subjective views harbored by either the interrogating officers or the person being questioned."

While this case was determined by the New Mexico Court of Appeals applying this *Berkemer* objective analysis the direct holding of *Berkemer* is not applicable on these facts. *Berkemer* deals specifically with "routine traffic stops." The Respondent was not stopped by the police in a traffic stop. Respondent was involved in a fatal automobile accident. His pickup truck was crashed and inoperable. The police came upon the scene and began their investigation of a felony crime in which Respondent was the only suspect. Respondent was threatened with arrest, locked in the back seat of a patrol car, told to wait there, and later interrogated in the patrol car where he was not free to leave. This is neither a *Terry* stop nor a routine traffic stop as the Petitioner urges.

Terry v. Ohio, 392 U.S. 1 (1968) involved a brief, on-the-spot stop on the street and a brief frisk for weapons. This Court established "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest that individual for a crime." *Id.* at 27.

The instant case does not involve a *Terry* stop despite Petitioner's strained arguments in that regard. Further, there are limits to investigations

which begin as a *Terry* stop. "For example, the seizure cannot continue for an extensive period of time or resemble a traditional arrest." *Hiddel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185-86 (2004). (Internal citation omitted).

Similarly, this case does not involve a brief detention as part of a routine traffic stop. *Berkemer v. McCarty*, 468 U.S. 420 (1984) does apply the *Terry* analysis to routine traffic stops because ordinary traffic stops are temporary and brief, are done in public to some degree, and "are not such that the motorist feels completely at the mercy of the police." *Id.* at 438. But, this Court warned "the safeguards of *Miranda* become applicable as soon as a suspects freedom of action is curtailed to a degree associated with formal arrest," or is subjected to "treatment that renders him in custody for practical purposes." *Id.* at 440. Although this case does not involve a "routine traffic stop" which was at issue in *Berkemer*, the Court of Appeals applied *Berkemer* to conclude:

> The conduct of the police in this case in threatening Defendant with arrest, physically escorting him to the police car, placing him in the back seat, where he was locked in, leaving him there, and then returning to question him either from the front seat of the vehicle while he was locked in the back, or opening the back door and questioning him from a position that would have blocked his exit from the vehicle, exerted just the sort of pressure to which *Berkemer* refers.

App. 10-11.

Petitioner's dissatisfaction with the facts supporting the Court of Appeals determination that Snell was in custody when he was interrogated is not grounds for review on certiorari. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .").

The determination of whether a suspect has been deprived of freedom of action to the extent to render him "in custody" is necessarily fact intensive. This Court acknowledged this fact intensive analysis "will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Berkemer* at 441. However, to adopt a rule that a suspect need not be advised of his right until formally arrested would do little to protect citizens' Fifth Amendment rights. *Id.*

The fact the objective analysis is fact intensive does not mean there is any unsettled question of law.

II. The Decision of the New Mexico Court of Appeals Is Consistent with that of the United States Courts of Appeals.

The Petitioner has not satisfied the criteria for a grant of certiorari set forth in Sup. Ct. R. 10(b). The decision of the New Mexico Court of Appeals is not in conflict with those of the United States Courts of Appeals.

The review of police conduct in this context is fact intensive and requires a case-by-case determination of whether "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer* at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

This analysis necessarily requires the examination of all facts and circumstances involved in police interrogations. In deciding cases on varying facts, United States Courts of Appeals, obviously, reach varying results. Results vary not because the law is unsettled, but because the facts are different in each case. The uniform application of settled law to widely varying factual circumstances, on a case-by-case basis, necessarily yields different results.

Properly commenting on the factual analysis to be applied the Court in *United States v. Martinez*, 462 F.3d 903, 909 (8th Cir. 2006) explained:

> The government argues that so long as the encounter remained a *Terry* stop, no *Miranda* warnings were required. But the Supreme Court has indicated that the analysis is not that simple. In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Court looked to the *circumstances* involved in a traffic stop to conclude that the suspect's freedom of action was not "curtailed to a 'degree associated with formal arrest'" as to require *Miranda* warnings. *Id.* at 440, 86 S.Ct. 1602 (quoting *California v. Beheler*, 463 U.S. 1121, 1125,

103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam)). In holding that the traffic stop at issue in *Beheler* was akin to a *Terry* stop, the Court held that, "by itself," the stop did not render him "'in custody.'" *Id.* at 441, 86 S.Ct. 1602. Analyzing the factual circumstances, the Court noted that the "respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." *Id.* . . . The Court noted that some traffic/*Terry* stops might involve such restraint, necessitating *Miranda* warnings. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. *Id.* at 440, 86 S.Ct. 1602.

The Court in *Martinez* concluded:

> In this case, Martinez was detained by two officers, patted down for weapons (with none being found), and closely questioned about his possession of weapons. Then, he was handcuffed and told he was being further detained. This occurred before being questioned by the two officers. A reasonable person would not, considering the totality of the circumstances, feel he was at liberty to stop the questioning and leave. Martinez's freedom was restricted to a degree often associated with formal arrest, and we find he was in custody at the time he was handcuffed. He

> was interrogated about the wad of cash while in custody, being asked at least twice to explain the presence of the cash. Thus, we find that Martinez was subjected to custodial interrogation and the facts presented in each case vary.

Martinez at 909.

In *U.S. v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), the Court applied a *Berkemer* inquiry and found a suspect to be in custody where he was forced out of his car and to the ground at gun point, and the police kept their guns drawn. The Court found as a matter of law that the suspect was in custody during the initial questioning.

Because the test applied to determine whether a suspect is in custody is fact intensive and necessarily applied on a case-by-case basis, the United States Courts of Appeals have reached different results while consistently applying the settled objective test and analysis of *Berkemer*. *U.S. v. Newton*, 369 F.3d 659, 676 (2nd Cir. 2004) ("[A] reasonable person finding himself placed in handcuffs by the police would ordinarily conclude that his detention would not necessarily be temporary or brief and that his movements were now totally under the control of the police – in other words, that he was restrained to a degree normally associated with arrest and therefore, in custody."); *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993) (Defendant is in custody when out numbered by police when he had been frisked, placed in handcuffs and told to sit in a specific place

on the grass by the side of the road); *United States v. Elias*, 832 F.2d 24 (3rd Cir. 1987) (Remanded for District Court for further factual findings to allow determination of whether defendant was in custody under *Berkemer*); *United States v. Trueber*, 238 F.3d 79 (1st Cir. 2001) (Defendant not in custody when officer had gun drawn but at his side when asking suspect to step from his vehicle, where officers exerted no more physical restraint on suspect beyond a limited pat down and the encounter lasted no more than fifteen minutes); *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) (Defendant not in custody where officers did not draw weapons, the defendant was held briefly by the arm, the questioning was brief and there was no further display of force).

Because the conduct of both police and suspects varies widely in the context of roadside accident investigations, there can be no litmus test for determining whether a suspect has been rendered in custody for the purposes of *Miranda*. The fact that the interrogation occurred in a patrol car may not, by itself be determinative when many other divergent facts present themselves from one case to another.

For example, in *U.S. v. Jones*, 523 F.3d 1235 (10th Cir. 2008), the Court applied a *Berkemer* analysis to hold that a suspect who voluntarily entered an unmarked police car to be interviewed was not in custody. The Court's decision was based on the fact that the suspect was told she was not under arrest, she was told she did not have to talk with the officer, she was told she could terminate the interview at any

time, and the officer made certain the car door was unlocked. Obviously, the determination of whether the suspect is in custody for the purpose of *Miranda* is fact intensive.

Suspects who voluntarily consent to give statements in patrol cars or police stations will not be rendered in custody. *See California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *U.S. v. Jones*, 523 F.3d 1235 (10th Cir. 2008). Or to the contrary, as in the instant case, the police may force the suspect into a locked police car to be left there until he can be interrogated without any chance to leave the interrogation which does render the suspect to be in custody.

Respondent did not voluntarily consent to enter the police car for any purpose. App. 3. He was placed there by the officers, locked in and left there. App. 4 and 10.

A suspect can also be bound by psychological restraints which are just as binding as physical restraints for the purpose of rendering a suspect to be in custody. *U.S. v. Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987). The extent to which the patrol car is used in the interrogation is but a single factor of the overall circumstances.

There are a myriad of factual circumstances to be weighed and considered. "Examples of circumstances that might indicate a seizure [custody], even where the person did not attempt to leave would be the threatening presence of several officers, the display of

a weapons by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980).

The New Mexico Court of Appeals decision is not in conflict with those of the United States Courts of Appeals. Results simply vary when the settled law is applied to different facts.

III. The Decision of the New Mexico Court of Appeals Does Not Conflict with the Decisions of Other States.

Because the New Mexico Court of Appeals decision is expressly based on the application of the United States Constitution and not state law, App. 6, Petitioner cannot satisfy the criteria for a grant of certiorari that the decision of the New Mexico Court of Appeals conflicts with decisions of another state court of last resort. Sup. Ct. R. 10(b).

Although the instant case was not decided under state law, a brief examination of the state court authority cited by Petitioner is instructive on situations where suspects are interrogated in patrol cars.

The Supreme Court of North Carolina in *State v. Washington*, 410 S.E.2d 55 (N.C. 1991) (adopting Judge Greene's dissenting opinion of the North Carolina Court of Appeals, 402 S.E.2d 851, 854-55

(1991)), held a defendant was in custody for the purposes of *Miranda* in the context of a traffic stop where defendant was stopped, placed in the back seat of the officer's patrol car where the door handles on the inside of the back seat doors did not work. Applying the test articulated in *Berkemer* the Court concluded that a reasonable person in the defendant's position would have believed he was deprived of his freedom in a significant way.

The Supreme Court of Utah considered and applied the *Berkemer* objective test in *State v. Mirquet*, 914 P.2d 1144, 1148 (Utah 1996) to find a driver who was stopped for speeding to be in custody for the purposes of *Miranda* when the officer interrogated the driver inside the patrol car, where the investigation focused solely on the driver and where the "objective indicia of arrest were present."

The Alaska Court of Appeals in *Rockwell v. State*, 176 P.3d 14, 20 (Alaska Ct. App. 2008), mindful of *Berkemer*'s holding that *Miranda* warnings are ordinarily not required when a motorist is subjected to roadside questioning during a routine traffic stop, held that the suspect driver was in custody when the officer asked him to get in the back seat of the patrol car (even though the officer made the request because it was cold outside and he wanted to get the suspect away from traffic), the police officer told him he was not under arrest, and the officer told the suspect he was going to drive him to a police sub-station.

The Supreme Court of Pennsylvania, in a case decided prior to *Berkemer*, held that a driver's freedom of action had been restrained as to require *Miranda* warnings before police interrogation where the driver was expressly told to wait at the scene of an accident and he was placed in a patrol car. *Commonwealth v. Meyer*, 412 A.2d 517 (Pa. 1980).

IV. No Issue of Important Policy Is Involved.

Petitioner shows no compelling policy reason in support of certiorari review. The decision of the New Mexico Court of Appeals does not unduly interfere with legitimate police roadside investigations of traffic accidents or police safety.

First, the New Mexico Court of Appeals decision neither adopts nor applies a bright-line test that suspects are "in custody" for the purpose of *Miranda* any time statements are taken in a patrol car. The New Mexico Court of Appeals based its decision on the totality of factual circumstances, only one of which was the fact the interrogation was in the patrol car. Other factors included the fact that Respondent was threatened with arrest, physically escorted to the police car, left alone in the locked police car, and was unable to leave the police car when being questioned by the police. App. 10.

Second, police clearly may interview suspects in police cars if 1) they ask the suspect to voluntarily enter the police car and insure that the suspect can terminate the interview at any time, *see U.S. v.*

Jones, 523 F.3d 1235 (10th Cir. 2008); or 2) they may advise the citizen of his *Miranda* rights prior to any involuntary interview in a police car. Neither of these simple procedures put police officers' safety at risk or compromise investigations as urged by the Petitioner.

This Court in *Berkemer v. McCarty*, 468 U.S. 420, 433-34 (1984) considered the minor burdens on law enforcement in comparison to the significant protections of all citizen's rights when requiring *Miranda* warnings when citizens were rendered "in custody" for practical purposes:

> The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individuals will to resist, and as much as possible, free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. . . . The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principal that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate.

Id. (Internal quotation marks omitted).

Finally, if police officers are confronted with a situation which requires them to lock citizens in police cars for the officers' own safety, they simply

must advise the citizen of his rights before interviewing that individual. "Police officers must make a choice – if they are going to take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising them of their constitutional rights." *U.S. v. Perdue*, 8 F.3d 1455, 1465 (10th Cir. 1993). By so doing, both the police and the suspect are protected.

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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