No. _____

In the

Supreme Court of the United States

SUZANNE ELIZABETH WEXLER

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Berkemer v. McCarty*, this Court determined that generally the "roadside questioning of a motorist detained pursuant to a routine traffic stop" does not automatically amount to a "custodial interrogation" under *Miranda*, as "the usual traffic stop is more analogous to a so-called '*Terry* stop,' than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984). Since this Court's decision in *Berkemer*, the permissible scope of police authority has greatly expanded beyond the original contours envisioned by *Terry*, allowing law enforcement to utilize methods of force that are more traditionally associated with an arrest rather than an investigative detention. As a result, a circuit split has emerged between the U.S. Courts of Appeal regarding the interplay of *Terry* and *Miranda*, specifically whether Fourth Amendment reasonableness concerns have any bearing on a determination of custody under *Miranda*. The Texas Court of Criminal Appeals improperly answered this question in the affirmative.

The questions presented are:

1. Whether Fourth Amendment reasonableness concerns have any bearing on a determination of custody under *Miranda*, specifically in regards to whether an individual is subjected to a restraint on their freedom of movement to a degree associated with a formal arrest?

2. Whether the Texas Court of Criminal Appeals improperly considered Fourth Amendment reasonableness concerns and failed to consider all of the objective circumstances of Ms. Wexler's questioning when it determined that she was not in custody for purposes of *Miranda*?

3. Whether Ms. Wexler was in custody for purposes of *Miranda* when she was ordered out of a residence by law enforcement who informed her that they had a search warrant, removed from that residence by SWAT-like officers, and placed into the back of a patrol car?

PARTIES TO THE PROCEEDINGS

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RELATED PROCEEDINGS

1. 177TH JUDICIAL DISTRICT COURT, HARRIS COUNTY, TEXAS

   The State of Texas v. Suzanne Elizabeth Wexler
   Cause Number 1513928
   Judgment entered on June 28, 2017

2. TEXAS FOURTEENTH DISTRICT COURT OF APPEALS OF TEXAS

   Suzanne Elizabeth Wexler v. The State of Texas
   Cause Number 14-17-00606-CR
   Opinion issued on August 27, 2019
   Motion for Rehearing denied on November 19, 2019
   Motion for Rehearing *En Banc* denied on February 27, 2020

3. TEXAS COURT OF CRIMINAL APPEALS

   Suzanne Elizabeth Wexler v. The State of Texas
   Cause Number PD-0241-20
   Discretionary review granted on June 17, 2020
   Opinion issued on June 30, 2021

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STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1257(a). In addition, Jurisdiction is specifically authorized by Supreme Court Rule 10(b) in that the Texas Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals, and by Supreme Court Rule 10(c) in that the Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

The Texas Court of Criminal Appeals affirmed the judgment of the Texas Fourteenth District Court of Appeals on June 30, 2021. By this Court's orders of March 19, 2020, and July 19, 2021, the filing deadline for this petition extends to November 27, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Article 38.22, Section 2(a) of the Texas Code of Criminal Procedure provides in relevant part:

> the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:
>
> > (1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
> > (2) any statement he makes may be used as evidence against him in court;
> > (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
> > (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to him to advise him prior to and during any questioning; and
> > (5) he has the right to terminate the interview at any time[.]

Article 38.22, Section 3(a) of the Texas Code of Criminal Procedure provides in relevant part:

> No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:
>
> > (2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning[.]

STATEMENT OF THE CASE

Officers with the South Houston Police Department obtained a search warrant for a residence as a result of a surveillance operation that involved three traffic stops, all of which resulted in the discovery of methamphetamine. (3 R.R. (Trial) 34-38).[1] Petitioner, Suzanne Wexler, was identified as an individual who was suspected of dealing drugs out of the residence. (3 R.R. (Trial) at 51-52, 114-115, 129-130).

After obtaining the search warrant, officers conceived of an operation that utilized deputies from the Harris County Sheriff's Office High Risk Operations Unit ("HROU") and other officers to execute the warrant. (3 R.R. (Trial) at 43). The deputies from HROU were described as being like a SWAT team. (3 R.R. (Trial) at 33-34, 107). "While uniformed officers in marked police cars blocked both ends of the street, 20 to 25 HROU officers surrounded the house, announced via loudspeaker from an armored vehicle that they had a search warrant, and directed

[1] Citations to "R.R. (Trial)" are to the record in *Wexler v. State*, No. 14-17-00606-CR (Texas Fourteenth District Court of Appeals, filed on September 5, 2017, and September 22, 2017).

occupants to exit the house." *Wexler v. State*, 625 S.W.3d 162, 165 (Tex. Crim. App. 2021). (3 R.R. (Trial) at 33-34, 45-47, 49, 51).

Ms. Wexler exited the residence in response to the announcement, was immediately detained by HROU officers, and placed into the backseat of a patrol car. (3 R.R. (Trial) at 46-47, 49). Detective Jerome Hill then questioned Ms. Wexler while HROU officers were sweeping the residence, telling her "We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." (3 R.R. (Trial) at 52, 58). In response, Ms. Wexler told Detective Hill that narcotics would be in her bedroom in a dresser drawer. (3 R.R. (Trial) at 58). Ultimately, officers discovered methamphetamine where Ms. Wexler said it would be. (3 R.R. (Trial) at 82-83).

In the trial court, Ms. Wexler objected to the admission of her statement, claiming that the statement was hearsay and was an attempt to extract a confession without the safeguards provided for a confession. (3 R.R. (Trial) at 53, 56). The State contended that the situation was substantially no different than pulling somebody over for a traffic violation and Ms. Wexler was merely detained, not in custody. (3 R.R. (Trial) at 53-54). After allowing trial counsel to conduct a brief voir dire of Detective Hill, the trial court overruled Ms. Wexler's objection and admitted the statement. (3 R.R. (Trial) at 56).

In the Texas Fourteenth District Court of Appeals, Ms. Wexler contended that her statement that the drugs were in a dresser drawer in her bedroom was improperly admitted as it was the result of a custodial interrogation without the

benefit of any warnings pursuant to *Miranda* and Article 38.22 of the Texas Code of Criminal Procedure. A majority of The Texas Fourteenth District Court of Appeals rejected Ms. Wexler's claim stating:

> The fact that appellant's freedom of movement was restricted does not establish that she was under custodial arrest because a person temporarily detained for purposes of investigation also has her freedom of movement restricted. If the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests the detention is an arrest. While there were numerous police officers on the scene, there is no evidence appellant was aware of that number. There is also no evidence appellant was aware that the police had blocked access to the street, or that there was an armored vehicle on the scene. Even if she was, this evidence goes to only one of the factors listed in *Sheppard*, the amount of force used.
>
> There is no evidence in the record that the police used physical force to remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone. There is however, evidence in the record that an investigation was under way when appellant was detained. Further, there was evidence that appellant was detained so the HROU could perform a protective sweep of the house. There was also evidence that appellant's detention was relatively brief and that the police did not remove appellant from the scene prior to Hill's question. Hill was the only officer to talk with appellant and he did not inform her that she was under arrest or even a suspect. Finally, it was undisputed that illegal drugs had not been found in the house at the time Hill asked appellant where the drugs were located and thus Hill did not have probable cause to arrest appellant at that moment. We conclude that the record supports the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her where the drugs were located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure.

Wexler v. State, 593 S.W.3d 772, 779-780 (Tex. App.—Houston [14th Dist.] 2019) (internal citations and quotations omitted)

Ms. Wexler subsequently filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals. In that petition, Ms. Wexler renewed her contention that her statement to Detective Hill was improperly admitted as it was the result of a custodial interrogation without the benefit of any warnings. The Texas Court of Criminal Appeals granted Ms. Wexler's petition and submitted the case. In rejecting Ms. Wexler's contentions, and affirming the judgment of the Texas Fourteenth Court of Appeals, a majority of the Court determined Ms. Wexler failed to demonstrate that her statement was the product of a custodial interrogation. *Wexler v. State*, 625 S.W.3d 162, 168 (Tex. Crim. App. 2021). Initially, the Texas Court of Criminal Appeals determined that Ms. Wexler "offered no evidence of her awareness of the police presence, and the trial court was not required to infer it." *Id*. at 168-169. Specifically, the Court wrote:

> Although Hill testified about the various law enforcement entities that helped execute the warrant, no one testified about whether Appellant would have been able to see them. For example, Hill testified that the HROU had an armored vehicle and over 20 officers who "surrounded" the house, but he did not testify where the vehicle was or where the officers were positioned. Hill testified about the presence of narcotics officers on the scene, but he did not testify about their number or their location. Hill testified that patrol cars blocked the ends of the street, but he did not testify about their distance from the house or whether they were visible to Appellant at any point.

Id. at 169

In addition, although the Texas Court of Criminal Appeals agreed that the Texas Fourteenth District Court of Appeals "did not clearly articulate the 'ultimate inquiry' pertinent to the custody question for *Miranda* purposes," it determined that the Fourteenth Court "correctly recited the reasonable person standard and the

need to examine 'all the objective circumstances surrounding the questioning.'" *Wexler*, 625 S.W.3d at 169. Furthermore, the Texas Court of Criminal Appeals noted that the Texas Fourteenth District Court of Appeals "looked not only at the actions of the police, but also at whether Appellant was aware of those actions" and concluded that the holding was in line with this Court's decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984):

> Similarly, Appellant's detention was of short duration, it was in a public setting, and she was not told that her detention would not be temporary. There was no evidence that Appellant was aware of an overwhelming police presence. Accordingly, the court of appeals correctly held that Appellant failed in her burden of proving that she experienced the functional equivalent of a formal arrest.

Wexler, 625 S.W.3d at 170

REASONS FOR GRANTING THE PETITION

While the Texas Court of Criminal Appeals purportedly considered whether a reasonable person would believe they were in custody, their decision in actuality improperly considered Fourth Amendment reasonableness concerns in a determination of custody under *Miranda*. In addition, the Texas Court of Criminal Appeals effectively decided that so long as an encounter between a citizen and a law enforcement officer remains a lawful investigative detention, then an individual cannot be in custody for *Miranda* purposes. In doing so, the Texas Court of Criminal Appeals undermined Fifth Amendment law by implicitly allowing the expansion of *Terry* to impermissibly encroach upon the protections of *Miranda*, and ignored the objective circumstances surrounding Ms. Wexler's interrogation. Furthermore, the Texas Court of Criminal Appeals' decision highlights the need for this Court to

resolve an issue that has divided the U.S. Courts of Appeal: whether Fourth Amendment reasonableness concerns should be considered when determining whether an individual is in custody for purposes of *Miranda* and the Fifth Amendment?

I. THE QUESTIONS PRESENTED INVOLVE THE DETERMINATION OF WHETHER A VALID INVESTIGATIVE DETENTION UNDER THE FOURTH AMENDMENT CAN, AT THE SAME TIME, PLACE AN INDIVIDUAL IN CUSTODY FOR PURPOSES OF MIRANDA AND THE FIFTH AMENDMENT.

A. A SPLIT AMONGST THE U.S. COURTS OF APPEAL HAS FORMED AFTER THIS COURT'S DECISION IN *BERKEMER V. MCCARTY* REGARDING THE INTERPLAY BETWEEN FOURTH AMENDMENT REASONABLENESS CONCERNS UNDER *TERRY* AND A DETERMINATION OF CUSTODY UNDER *MIRANDA* AND THE FIFTH AMENDMENT.

In *California v. Beheler*, this Court restated the definition of "custody" under *Miranda*:

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

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

"[T]he 'danger of coercion [that] results from the *interaction* of custody and official interrogation" is the "coercive pressure that *Miranda* was designed to guard against." *Maryland v. Shatzner*, 559 U.S. 98, 112 (2010). Pursuant to this Court's decision in *Terry*¸ law enforcement officers may, under certain circumstances, temporarily detain a person for investigative purposes regarding potential criminal behavior even though there is insufficient probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). "To justify a *Terry* type detention, a law enforcement

officer must have 'a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'…" *United States v. Hooper*, 935 F.2d 484, 494 (2nd Cir. 1991), quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Although reasonable suspicion is not explicitly defined, "an inchoate and unparticularized suspicion or hunch' on the part of a law enforcement officers will not suffice to establish reasonable suspicion." *Id*. "The reasonableness of a temporary detention must be examined in terms of the totality of the circumstances and will be justified when the detaining officer has specific articulable facts, which, taken together with rational inferences from those facts, lead him to concluded that the person detained actually is, has been, or soon will be engaged in criminal activity." *Balentine v. State*, 71 S.W.3d 763, 768 (Tex. Crim. App. 2002).

This Court has provided only limited guidance as to how a *Terry* investigative detention and a person being in "custody" for purposes of *Miranda* interact with each other. In *Berkemer*, this Court determined that as a basic principle "roadside questioning of a motorist detained pursuant to a routine traffic stop" does not automatically amount to a "custodial interrogation" under *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984). As this Court explained:

> "[T]he usual traffic stop [being] more analogous to a so-called '*Terry* stop,' than to a formal arrest. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

Id. at 439-440

This Court further noted that "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections provided by *Miranda*." *Id*. at 440. As one commentator has noted, "the unanimous opinion [in *Berkemer*] was…predicated, in part, on the Justices' assumption that *Terry* stops, in all forms, would not rise to the level worthy of *Miranda* warnings." Michael J. Roth, *Berkemer Revisited: Uncovering the Middle Ground Between Miranda and the New Terry*, 77 FORDHAM L. REV. 2779, 2805 (2009).

However, since *Berkemer,* the scope of police authority has greatly expanded beyond the original contours envisioned by *Terry*, allowing law enforcement to use methods of force that are more traditionally associated with an arrest rather than an investigative detention. This expansion includes the approval of the use of handcuffs, the drawing of weapons, relocation of suspects to police vehicles, and other displays of force such as completely surrounding a suspect with police vehicles or requiring him to lie face down on the ground. See *United States v. Vargas*, 369 F.2d 98, 102 (2nd Cir. 2004) (use of handcuffs did not transform *Terry* stop into an arrest as such force was "reasonable under the circumstances"); *State v. Sheppard*, 271 S.W.3d 281, 289 n. 28 (Tex. Crim. App. 2008) ("a Fourth Amendment *Terry* detention is not a custodial arrest, and the use of handcuffs does not automatically convert a temporary detention into a Fourth Amendment arrest."); *United States v. Navarrete-Barron*, 192 F.3d 786, 789-791 (8th Cir. 1999) (officers drawing weapons and handcuffing suspect whom they believed was armed did not exceed limits of a

Terry stop); and *United States v. Tilmon*, 19 F.3d 1221, 1227-1228 (7th Cir. 1994) (surrounding of suspect by police vehicles and requiring suspect to lie face down on the ground due to concerns regarding officer safety). Although this Court's ruling in *Berkemer* may have been limited to routine traffic stops, with the expansion of the permissible degrees of force allowed to be utilized by law enforcement in *Terry* situations, "appellate courts have seized upon *Berkemer's* language to justify denial of *Miranda* rights during far more intrusive stop and frisk scenarios." *Berkemer Revisited,* 77 FORDHAM L. REV. at 2783. As a result of this expansion of permissible *Terry* stops, a circuit split has emerged between the U.S. Courts of Appeal regarding the interplay of *Terry* and *Miranda*.

Several U.S. Courts of Appeal have interpreted this Court's decision in *Berkemer* as stating that if an investigative stop is reasonable under *Terry*, then the seized suspect is not in custody for *Miranda* purposes. Implicit in this conclusion is that *Terry* and *Miranda* do not overlap and are on the same continuum. See *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995) ("In *Berkemer*, the Supreme Court held that *Miranda* warnings are not required when a person is questioned during a routine traffic stop or stop pursuant to *Terry v. Ohio*."); *United States v. Trueber*, 238 F.3d 79 (1st Cir. 2001), quoting United *States v. Streifel*, 781 F.2d 953 (1st Cir. 1986) ("As a general rule, *Terry* stops do not implicate the requirements of *Miranda*, because '*Terry* stops, through inherently somewhat coercive, do not usually involve the types of police dominated or compelling atmosphere which necessitates *Miranda* warnings.'"); *United States v. Swanson*, 341 F.3d 524 (6th Cir. 2003) ("The very

nature of a *Terry* stop means that a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights.").

Other U.S. Courts of Appeals have determined that applying Fourth Amendment reasonableness is not the appropriate standard for determining whether an individual is in "custody" for purposes of *Miranda*. Under this view, a person can be lawfully subjected to an investigative detention under the Fourth Amendment, but still be in custody for purposes of *Miranda*. Implicit in this viewpoint is the belief that a seizure under the Fourth Amendment and custody under *Miranda* are separate concepts that for the most part overlap with each other on different continuums. See *United States v. Newton*, 369 F.3d 659, 675 (2nd Cir. 2004) ("Miranda's concern is not with the facts known to the law enforcement officers or the objective reasonableness of their actions in light of those facts. Miranda's focus is on the facts known to the seized suspect and whether a reasonable person would have understood that his situation was comparable to a formal arrest."); *United States v. Revels*, 510 F.3d 1269, 1274 (10th Cir. 2007) ("whether the police subjected [a person] to a lawful investigative detention is not dispositive of whether the officers should [advise a defendant] of her *Miranda* rights."); *United States v. Martinez*, 462 F.3d 903, 908-909 (8th Cir. 2006) (relying on *Berkemer* to reject the government's argument that so long as the encounter remained a *Terry* stop, no *Miranda* warning were required.); [2] *United States v.*

[2] Ms. Wexler notes that the U.S. Eighth Court of Appeals has not been entirely consistent regarding this issue. See *United States v. Pelayo-Ruelas*, 345 F.3d 589, 592 (8th Cir. 2003) ("Citing *Berkemer*, we have declared that, "No Miranda warning is necessary for persons detained for a *Terry* stop.").

Smith, 3 F.3d 1088, 1096-1099 (7th Cir. 1993) ("our inquiry into the circumstances of temporary detention for a Fifth and Sixth Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop."); and *United States v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002) ("whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is 'in custody' for *Miranda* purposes are two different issues").

The decision in *Newton* is illustrative of the belief that a seizure under the Fourth Amendment and custody under *Miranda* are separate concepts that for the most part overlap with each other. In *Newton*, the defendant "was seized when he opened his apartment door to six law enforcement officers, one of whom promptly proceeded to handcuff him." *Newton*, 369 F.3d at 675. Initially, the Court in *Newton* determined that "Newton's seizure did not equate to a de facto arrest under the Fourth Amendment." *Id*. at 675. Specifically, the Court determined:

> The record indicates that his seizure was certainly brief, lasting only the few minutes it took the officers to locate the sought-for firearm, after which Newton was formally arrested. Further, because the stop occurred at Newton's residence, he was subjected to neither the inconvenience nor the indignity associated with a compelled visit to the police station. To the extent Newton argues that it was unreasonable for six officers to be involved in his seizure, we disagree. The officers' purpose in going to Ms. Wright's apartment was to investigate a report that Newton illegally possessed a firearm and had recently threatened to kill his mother and her husband. Given the obvious dangers inherent in such a volatile situation, not only was it reasonable for six officers to go to the apartment; it was reasonable for them to handcuff Newton while they searched for the firearm. Indeed, under the circumstances, handcuffing was a less intimidating - and less dangerous - means of ensuring the safety of everyone on the premises than holding Newton at gunpoint during the search.

Id. (internal citation and quotation omitted)

Regarding the defendant's claim that he was in custody, the Court determined that "Miranda's concern is not with the facts known to the law enforcement officers or the objective reasonableness of their actions in light of those facts. Miranda's focus is on the facts known to the seized suspect and whether a reasonable person would have understood that his situation was comparable to a formal arrest." *Id*. In addition, the Court noted that "[t]he number of officers on the scene would not, by itself, have led a reasonable person in Newton's shoes to conclude that he was in custody." *Id*. The handcuffs were the problematic factor for the Court and ultimately were what led the Court to determine that "a reasonable person would have understood that his interrogation was being conducted pursuant to arrest-like restraints." *Id.* at 675-677. This conclusion was made even with officers specifically advising the defendant that he was not under arrest and the restraints were being placed on him for officer safety. *Id*. at 676.

B. Similar to the U.S. First, Fourth, and Sixth Courts of Appeal, the Texas Court of Criminal Appeals has allowed Fourth Amendment reasonableness concerns to improperly invade into a determination of custody under *Miranda* and the Fifth Amendment.

Although the Texas Court of Criminal Appeals agreed that the Texas Fourteenth District Court of Appeals "did not clearly articulate the 'ultimate inquiry' pertinent to the custody question for *Miranda* purposes," it determined that they "correctly recited the reasonable person standard and the need to examine 'all the objective circumstances surrounding the questioning.'" *Wexler v. State*, 625

S.W.3d 162, 169 (Tex. Crim. App. 2021). In addition, the Texas Court of Criminal Appeals noted that the Texas Fourteenth District Court of Appeals "looked not only at the actions of the police, but also at whether Appellant was aware of those actions" and concluded that the holding was in line with this Court's decision in *Berkemer*. *Id*. at 170, citing *Wexler v. State*, 593 S.W.3d 780 (Tex. App.—Houston [14th Dist.] 2019) and *Berkemer v. McCarty*, 468 U.S. 420 (1984).

By endorsing and adopting the analysis of the Texas Fourteenth District Court of Appeals, the Texas Court of Criminal Appeals determined that in a consideration of whether an individual is in custody for purposes of *Miranda*, it is permissible to look at the reasonableness of the facts known to the officers and the reasonableness of their actions in light of those facts. Like the First, Fourth, and Sixth U.S. Courts of Appeal, the Texas Court of Criminal Appeals approved the notion that if an investigative stop is reasonable under *Terry*, then the seized suspect is not in custody for *Miranda* purposes. A review of the Texas Court of Criminal Appeals' standard for the determination of custody for purposes of *Miranda* also supports this conclusion. The Texas Court of Criminal Appeals has established four general situations that may constitute custody:

> (1) The suspect is physically deprived of his freedom of action in any significant way; (2) A law-enforcement officer tells the suspect he is not free to leave; (3) Law-enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or (4) There is probable cause to arrest and law-enforcement officers did not tell the suspect he is free to leave.

Gardner v. State, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009)

"The first three situations require that the restriction on freedom of movement must reach 'the degree associated with an arrest' as opposed to an investigative detention." *State v. Saenz*, 411 S.W.3d 488, 496 (Tex. Crim. App. 2013). "The fourth situation requires that an officer's knowledge of probable cause be manifested to the suspect." *Id*. "In making the custody determination, the primary question is whether a reasonable person would perceive the detention to be a restraint on his movement 'comparable to…formal arrest,' given all the objective circumstances." *State v. Ortiz*. 382 S.W.3d 367, 372 (Tex. Crim. App. 2012). From these general situations, under Texas law, if an individual is subjected to a valid investigative detention, then they cannot be in custody for purposes of *Miranda* as the restraint would never rise to the degree of a formal arrest.[3]

The Texas Court of Criminal Appeals cited the temporal brevity of the detention, the so-called public setting, and Ms. Wexler not being told that her detention would not be temporary to find that Ms. Wexler was not subjected to the functional equivalent of a formal arrest. *Wexler*, 625 S.W.3d at 170. In addition, the Texas Court of Criminal Appeals cited approvingly to the Texas Fourteenth District Court of Appeals considering the reasonableness of the actions of law enforcement in determining whether Ms. Wexler was in custody for purposes of *Miranda*. Some of those considerations included, evidence supporting a determination that an investigation was underway when she was detained, she was being detained so a

[3] In the Texas Court of Criminal Appeals, Ms. Wexler contended that this Court's use of the term "investigative detention" in that case "did not have the same meaning as a *Terry* investigative stop." (Appellant's Brief on the Merits at 17). However, the Texas Court of Criminal Appeals opinion demonstrates that they implicitly rejected Ms. Wexler's contention.

protective sweep could be performed, and she was only asked a brief question. *Wexler*, 593 S.W.3d at 780, citing *Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Whether a person is under arrest or subject to a temporary investigative detention is a matter of degree and depends upon the length of the detention, the amount of force employed, and whether the officer actually conducts an investigation.") and *Sheppard*, 271 S.W.3d at 290.[4] In neither of these determinations did the Texas Fourteenth District Court of Appeals focus on whether a reasonable person in the same circumstances as Ms. Wexler would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. Instead, the Texas Fourteenth District Court of Appeals used these findings to justify the actions of the officers in light of the facts known to them at the time of their search of the residence and detention of Ms. Wexler.

Once the Texas Court of Criminal Appeals concluded that the officers' actions did not constitute the functional equivalent of a formal arrest, it acted along the lines of the First, Fourth, and Sixth U.S. Court of Appeals, and concluded that this Court's holding in *Berkemer* limited *Miranda* warnings to only those situations where a detentions involved an actual formal arrest, or the functional equivalent of one.

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[4] In *Mount*, the defendant contended, among other things, that the trial court erred by denying his motion to suppress because his initial detention was unlawful as it was an illegal arrest. *Mount*, 217 S.W.3d at 724. Notably, no issue was raised regarding whether the defendant had been subjected to a custodial interrogation. In addition, as the Texas Court of Criminal Appeals noted, *Sheppard* concerned a Fourth Amendment issue and not whether there was a custodial interrogation. See *Wexler*, 625 S.W.3d at 169.

II. FOURTH AMENDMENT REASONABLENESS CONCERNS HAVE NO BEARING ON A DETERMINATION OF CUSTODY UNDER *MIRANDA*, SPECIFICALLY IN REGARDS TO WHETHER AN INDIVIDUAL IS SUBJECTED TO A RESTRAINT ON THEIR FREEDOM OF MOVEMENT TO A DEGREE ASSOCIATED WITH A FORMAL ARREST. THE ONLY RELEVANT INQUIRY IS HOW A REASONABLE PERSON IN THE SUSPECT'S POSITION WOULD HAVE UNDERSTOOD THE SITUATION.

Why is the difference of opinion amongst the various U.S. Courts of Appeals important? One might say that this Court in *Berkemer* determined exactly what the First, Fourth, and Sixth U.S. Courts of Appeal have held; an individual cannot be under an investigative detention under *Terry* and in custody for purposes of *Miranda* simultaneously. See *Howes v. Fields*, 565 U.S. 499 (2012) ("We have 'decline[d] to accord talismanic power' to the freedom of movement inquiry…and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.") and *Maryland v. Shatzer*, 559 U.S. 98, 112-113 (2010) (Relying upon *Berkemer*, this Court stated that "the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop…does not constitute *Miranda* custody."). If this is true, then the Texas Court of Criminal Appeals' decision would appear to be sound. However, this Court's opinion in *Berkemer* "indicate[d] that a suspect can be placed in police 'custody' for purposes of Miranda before has been 'arrested' in the Fourth Amendment sense." *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993), citing *Berkemer*, 468 U.S. at 441 ("Turning to the case before us, we find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the Trooper Williams placed him under arrest.").

In determining custody under *Miranda* "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." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (emphasis added). This ultimate inquiry details "two different types of custody under *Miranda*, 'formal arrest custody' and 'restraint on freedom of movement custody,' or restraint custody,' for short." *Bates v. State*, 494 S.W.3d 256, 278 (Tex. App.—Texarkana 2015, pet. ref'd) (Burgess, J., concurring). "No controversy exists regarding the interplay between formal arrest custody under *Miranda* and 'investigative detentions' under *Terry*; a person is clearly in custody under *Miranda* when has been formally arrested under the Fourth Amendment." *Id.* at 278. "Because a person under formal arrest is in custody, and because an investigative detention is not a formal arrest, then formal arrest custody and investigative detention are mutually exclusive." *Id.* at 279. The same cannot be said of restraint custody under *Miranda* and the Fifth Amendment. As Justice Burgess noted in his concurring opinion, "it does not appear that restraint custody under *Miranda* was ever considered" in *Berkemer* "because the roadside detention in *Berkemer* was not very intrusive[.]" *Id.* 281. This is an important consideration.

"[T]he requirements of *Miranda* arise from Fifth Amendment protections." *State v. Ortiz*, 346 S.W.3d 127, 133 (Tex. App.—Amarillo 2011), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012), citing *Dickerson v. United States*, 530 U.S. 428, 440 fn. 4 (2000). "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination *Miranda* safeguards 'a

fundamental *trial* right.'" *Withrow v. Williams*, 507 U.S. 680, 691 (1993). "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed by the Fourth Amendment[.]" *Schenckloth v. Bustamonte*, 412 U.S. 218, 240-241 (1973). Potential violations of the Fourth Amendment require the balancing of the government's interest in crime prevention against a person's right to be free from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 19-27 (1968). "Even though the privacy interest protected by the Fourth and Fifth Amendments overlap, the exceptions to their protections are significantly different and inapplicable to each other." *Bates,* 494 S.W.3d at 282, citing *Fisher v. United States*, 425 U.S. 391, 400 (1976). Whereas the Fourth Amendment may be complied with through the securing of a warrant, a showing of sufficient probable cause, or potentially even the reasonableness of the actions of law enforcement; the requirements of the Fifth Amendment cannot be overcome through such methods. As this Court noted in *Fisher*, the Framers:

> struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and warrant to search and seize will issue. They did not seek in still another Amendment – the Fifth – to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

Fisher, 425 U.S. at 400

The Second, Eighth, Ninth, and Tenth U.S. Courts of Appeals have determined, the inquiry into the circumstances of temporary detention for a Fifth Amendment *Miranda* analysis requires a different focus than that for a Fourth Amendment *Terry* stop. The reasonableness of the actions of law enforcement under

the Fourth Amendment does not factor into a custody analysis under *Miranda*, as "the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood the situation." *Berkemer*, 468 U.S. at 441-442. Ms. Wexler contends that this is the approach a reviewing court should utilize in determining custody for purposes of *Miranda*. To allow a reviewing court to consider Fourth Amendment reasonableness concerns would "allow Fourth Amendment reasonableness to invade into the Fifth Amendment's restraint custody analysis," especially when one considers how the *Terry* doctrine has been expended to allow officers to utilize methods of force that are more traditionally associated with an arrest rather than an investigative detention, primarily based upon the reasonableness of the actions of law enforcement. This is especially important as this Court has held that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Howes*, 565 U.S. at 14, quoting *Berkener*, 468 U.S. at 437.

III. MS. WEXLER WAS SUBJECTED TO A RESTRAINT ON HER FREEDOM OF MOVEMENT TO THE DEGREE ASSOCIATED WITH A FORMAL ARREST AND WAS IN CUSTODY FOR PURPOSES OF *MIRANDA*.

The Texas Court of Criminal Appeals improperly considered factors concerning the reasonableness of the facts known to law enforcement and the reasonableness of their actions when determining whether she was in custody for purposes of *Miranda*. What is missing from their analysis was how those law enforcement's actions would have been perceived by a reasonable person in the Ms.

Wexler's situation. For example, if Ms. Wexler had been informed by an officer that she was not under arrest and was being detained for investigative or safety purposes when she was placed into the back of the patrol car, that would be evidence related to a custody determination because it might have an effect upon whether a reasonable person in the same circumstances as the Ms. Wexler would have perceived their physical freedom to be restricted to the degree associated with a formal arrest. However, no such evidence, or similar evidence, exists in this case. Although Detective Hill testified regarding some safety concerns as to why Ms. Wexler was ordered out of the residence, the record is devoid of any evidence that any officer communicated to Ms. Wexler that she was being detained due to their safety concerns or for general questioning. See *Turner v. State*, 252 S.W.3d 571, 579-580 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (determination that defendant was not in custody for purposes of *Miranda* partly because officers informed the defendant he was not under arrest and that he was handcuffed merely for safety reasons).

In addition, the Texas Court of Criminal Appeals failed to consider all of the objective circumstances of the encounter between Ms. Wexler and law enforcement. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restrain on freedom of movement' of the degree associated with a formal arrest.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994), quoting *Beheler*, 463 U.S. at 1125. "[T]he initial determination of custody

depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id*. at 323. "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Id*. at 325. "Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Id*. The Texas Court of Criminal Appeals determined that Ms. Wexler failed to demonstrate that she was aware of an overwhelming police presence. *Wexler*, 625 S.W.3d at 169 (Ms. Wexler "offered no evidence of her awareness of the police presence, and the trial court was not required to infer it."). However, this finding defies common sense as the record is clear that Ms. Wexler did not walk out of the residence on her own accord and put herself into the back of a patrol car. The evidence clearly indicates she was ordered to do so by law enforcement via loudspeaker and that officers immediately detained her and placed her into the back of a patrol car. (3 R.R. (Trial) at 46-47, 49, 50-51). In his dissenting opinion, Judge Walker noted the objective evidence within the record to demonstrate that Ms. Wexler was aware of the significant police presence:

> Appellant was aware that police were, over a loudspeaker, commanding her to leave the residence. When she did so, she was aware that multiple officers were present, because more than one officer detained her, and, as she was exiting the house, other officers were entering the house or had already entered it. Furthermore, these officers were SWAT-like. She was immediately detained and placed in the back of a police car, and obviously she must have been aware that she was detained and placed in the back of a police car. Even if Appellant was not aware that one of the vehicles present was an armored one and she was not aware of exactly how many officers there

> were, the reasonable person would appreciate that a significant police force was there. This show of force, that Appellant was aware of, weighs in favor of finding that a reasonable person would not have felt free to leave.

Wexler, 625 S.W.3d at 172-173 (Walker, J., dissenting)

Another objective circumstance not considered by the Texas Court of Criminal Appeals was Detective Hill's sole question to Ms. Wexler. Instead of addressing what Detective Hill said, the Court merely dismissed Detective Hill's questioning "as a single question before any search took place." *Wexler*, 625 S.W.3d at 170. However, the question was much more than that. Detective Hill told Ms. Wexler some variation of "We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what" after she was removed from the residence and placed into the back of the patrol car. (3 R.R. (Trial) at 52, 58). This question did not concern general matters such as routine questions incident to booking or attempting to ascertain Ms. Wexler's identification, but was a specific question regarding the location of illegal narcotics and directly communicated to Ms. Wexler that Detective Hill suspected her of possessing or selling narcotics out of the residence that he was looking for within the residence. (3 R.R. (Trial) at 36-38, 114-115, 129-130). The question was specifically designed to elicit an incriminating response, as her knowledge of the location of the crystal methamphetamine was certainly evidence that connected her to the controlled substance. As Judge Walker wrote in his dissent:

> The majority downplays this as the "[posing] of a single question before any search took place," but even as a single question, *the officer's statement clearly conveyed to Appellant that police were looking for*

> *drugs and that they believed she knew where the drugs were located.* A reasonable person, after being placed in a police car, being told by a police officer that they have a warrant and are searching the residence for drugs, being told that they will find the drugs, and then being asked one question by that officer—"Where are the drugs?"—would feel like a suspect. While being a focus of the investigation is not itself determinative of being in custody, it is a relevant factor to a custody determination.

Wexler, 625 S.W.3d at 173 (Walker, J., dissenting) (emphasis added)

Law enforcement took advantage of their search of the residence to extract self-incriminating statements from Ms. Wexler. Ms. Wexler was subjected to a restraint on her freedom of movement to the degree associated with a formal arrest and was in custody for purposes of *Miranda*. The Texas Court of Criminal Appeals contrary holding due to Ms. Wexler being detained due to an investigative detention is contrary to *Miranda* and its progeny.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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