A ROSE BY ANY OTHER NAME: ANALYZING THE TEXAS APPELLATE COURT SPLIT ON DEFINING CUSTODY FOR *MIRANDA* PURPOSES

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** This Comment is dedicated to Nathan Kaufman, for his kindness and friendship; his selflessness will always be remembered. The Author would like to thank Professor Charles Bubany for his help and invaluable insight on this Comment.

"[A]ll our words from loose using have lost their edge . . . ."[1]
-Ernest Hemingway

I. PLANTING THE IDEA OF *MIRANDA* AND CUSTODY

Like a rose by any other name, custody by any other name would be as coercive. From the big screen to real life, the following proverbial phrase is frequently associated with a person being placed under arrest:

> You are under arrest, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you. Do you understand these rights as they have been read to you?[2]

This phrase seeks to protect suspects from being compelled to speak against their will.[3] However, it is ironic that a process designed to ensure that suspects are not compelled to speak against their will is incorrectly applied in both federal circuit courts and in Texas appellate courts by incorporating *Terry v. Ohio* into a custody analysis under *Miranda v. Arizona*.[4] When Texas appellate courts misapply this doctrine, they admit potentially incriminating evidence in violation of a suspect's constitutional protections.[5]

Knowing when to read suspects their *Miranda* rights seems to be an easily applicable rule: a suspect who is in custody and subjected to interrogation must be read his *Miranda* rights.[6] This begs the question, however, of what it means to be in "custody" for the purposes of *Miranda v. Arizona*.[7] *Black's Law Dictionary* defines "physical custody" as "[c]ustody of a person . . . whose freedom is directly controlled and limited."[8] The United States Supreme Court defines it as "a 'formal arrest or restraint on [the suspect's] freedom of movement' of the degree associated with a formal

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1. ERNEST HEMINGWAY, DEATH IN THE AFTERNOON 71 (1932).

2. 21 JUMP STREET (Original Film 2012) (referencing what is commonly known as "*Miranda* rights" as laid out in *Miranda v. Arizona*).

3. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

4. *Compare* Koch v. State, 484 S.W.3d 482, 487–91 (Tex. App.—Houston [1st Dist.] 2016, no pet.), *with* Bates v. State, 494 S.W.3d 256, 263 (Tex. App.—Texarkana 2015, pet. ref'd) (showing an appellate court split on what constitutes custody). *See generally* Michael J. Roth, Note, Berkemer *Revisited: Uncovering the Middle Ground Between* Miranda *and the New* Terry, 77 FORDHAM L. REV. 2779, 2779 (1994).

5. *See Miranda*, 384 U.S. at 458–60 (noting a person's right against self-incrimination is fulfilled only when that person is guaranteed the right to remain silent).

6. *See id.* at 467–68.

7. *See, e.g.*, *Bates*, 494 S.W.3d at 277–79 (Burgess, J., concurring).

8. *Physical Custody*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

arrest."[9] However, this phrase takes on many different meanings in Texas when it is defined for the purposes of *Miranda*.[10]

In Texas, for example, whether a suspect was in custody may depend on the Texas appellate court deciding the case.[11] Consider a suspect accused of driving while intoxicated when he crashed.[12] Assume the officer handcuffed the suspect and placed him in the back of her patrol car when she arrived at the scene of the accident.[13] Also assume that the suspect did not receive his *Miranda* warnings until after he rambled that he consumed "2, 5, 7, 15" drinks that day starting around noon in response to the officer's questions.[14] The suspect then moves to suppress the statements he made between the officer handcuffing him and giving him his *Miranda* warnings.[15] Whether there was "'a formal arrest or restraint on [the suspect's] freedom of movement' of the degree associated with a formal arrest" then becomes the key question in determining whether the suspect's statements may be used against him at trial.[16] Previously, the Texarkana Court of Appeals held that a suspect's statements were inadmissible because the suspect was in *Miranda* custody when he was interrogated.[17] Under similar circumstances, though, the Houston First District Court of Appeals held that a suspect's statements were admissible because he was not in *Miranda* custody.[18]

The issue in this hypothetical, and the issue discussed in this Comment, illustrate how Texas courts differ in ruling on the determination of custody. Part II lays out the background underlying the United States Supreme Court's decision in *Miranda* and *Terry* and the Texas Court of Criminal Appeals' incorporation of *Miranda*.[19] Part III discusses how Texas appellate courts interpret *Miranda*, and the Court of Criminal Appeals' decisions, and brings to light the appellate courts' split in the interpretation.[20] Finally, Part IV argues that the Amarillo and Texarkana appellate courts use the appropriate standard in defining *Miranda* custody and lays out reasons for other Texas appellate courts to join in their approach.[21]

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9. Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

10. *See infra* Part III (explaining the differing interpretations of "physical custody").

11. *Compare* Koch v. State, 484 S.W.3d 482, 487–89 (Tex. App.—Houston [1st Dist.] 2016, no pet.), *with* Bates v. State, 494 S.W.3d 256, 267–68 (Tex. App.—Texarkana 2015, pet. ref'd).

12. *See Koch*, 484 S.W.3d at 485.

13. *See id.*

14. *See id.* at 486.

15. *See id.*

16. Stansbury v. California, 511 U.S. 318, 322 (1994) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)); *see also* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

17. Bates v. State, 494 S.W.3d 256, 271 (Tex. App.—Texarkana 2015, pet. ref'd).

18. *See Koch*, 484 S.W.3d at 485.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

II. THE ROOTS OF *MIRANDA* CUSTODY AND *TERRY*

Miranda v. Arizona designed a set of "procedural safeguards" to combat "[the] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[22] This includes advising suspects that they have

> the right to remain silent, that anything [they say] can be used against [them] in a court of law, that [they have] the right to the presence of an attorney, and that if [they] cannot afford an attorney one will be appointed for [them] prior to any questioning if [they] so [desire].[23]

This is only necessary, however, if suspects are subjected to questioning while in "custody or otherwise deprived of [their] freedom of action in any significant way."[24]

More specifically, custody is ultimately determined by whether a suspect's freedom of movement is restricted to the degree associated with a formal arrest.[25] In determining custody "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[26] However, some Texas appellate courts also look to whether the officer's actions were justified under *Terry v. Ohio* for determining custody.[27] Under *Terry*, officers may detain and search suspects under certain circumstances without probable cause.[28] In Texas, for example, an officer

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22. Miranda v. Arizona, 384 U.S. 436, 467, 478 (1966).

23. *Id.* at 479.

24. *Id.* at 444.

25. *See* Stansbury v. California, 511 U.S. 318, 322 (1994).

26. *Id.* at 324 (quoting Berkemer v. McCarty, 469 U.S. 420, 442 (1984)).

27. *See, e.g.*, Koch v. State, 484 S.W.3d 482, 489, 491 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that the detention was an "investigative detention" under *Terry*, so it was not "custody" under *Miranda*); Placide v. State, No. 14-13-00725-CR, 2014 WL 4854598, at *5–6 (Tex. App.—Houston [14th Dist.] Sept. 25, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that the suspect was not in custody for *Miranda* purposes because the amount of force used was reasonable under the circumstances according to a *Terry* analysis); Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *2–3 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication) (holding that a *Terry* stop is not "custody" for the purposes of *Miranda*); *see also* Terry v. Ohio, 392 U.S. 1 (1968).

28. *Terry*, 392 U.S. at 30. *Terry* held that,

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him in the absence of probable cause to do so. *See id*. The United States Supreme Court defined probable cause as instances in which "'the facts and circumstances with . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175–

may use "force as is reasonably necessary to effect the goal of the stop: investigation, maintenance of the status quo, or officer safety."[29] The Texas appellate courts that include *Terry* in their *Miranda* custody analysis reason that if the officer's actions were justified under *Terry*, then there was no formal arrest, and therefore, the detention is not the equivalent of a formal arrest.[30]

A. Distinguishing the Purposes of Miranda *and* Terry

Texas appellate courts commonly incorporate a Fourth Amendment *Terry* analysis into their Fifth Amendment *Miranda* rights determinations.[31] However, the holdings of *Terry* and *Miranda* were designed for different purposes, and their intermingling results in contradictions with the purpose of the *Miranda* holding.[32] An analysis of why suspects should be read *Miranda* rights in the first place and why some detentions are allowable under *Terry* better explains why the intermingling of *Terry* and *Miranda* is inappropriate.

1. Preventing Coercion from the Suspect's Perspective

The purpose behind requiring *Miranda* warnings in situations involving custodial interrogation is better understood by looking at the source of the requirement—*Miranda v. Arizona*.[33] In *Miranda*, police arrested the suspect and took him to an interrogation room in a police station where he was questioned for two hours, without being advised of his right to have an attorney present, until he gave a written confession.[34] The Court held that a person's privilege against self-incrimination is jeopardized when he is placed in custody, or otherwise deprived of his freedom in any significant way by an authority, and questioned.[35] *Miranda* sought "to counteract the inherently compelling and intimidating pressures of police custodial interrogation and to create an environment where a suspect can freely and knowingly invoke

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76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

29. Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997).

30. *See, e.g.*, *Koch*, 484 S.W.3d at 491.

31. *See, e.g.*, *id.* at 489, 491 (holding that the detention was an "investigative detention" under *Terry*, so it was not "custody" under *Miranda*); *Placide*, 2014 WL 4854598, at *5–6 (holding that the suspect was not in custody for *Miranda* purposes because the amount of force used was reasonable under the circumstances according to a *Terry* analysis); *Gonzalez*, 2005 WL 1836939, at *5–6 (holding that a *Terry* stop is not "custody" for the purposes of *Miranda*); *see also Terry*, 392 U.S. at 30–31; Miranda v. Arizona 384 U.S. 436 (1966).

32. Bates v. State, 494 S.W.3d 256, 283 (Tex. App.—Texarkana 2015, pet. ref'd) (Burgess, J., concurring).

33. *See Miranda*, 384 U.S. at 436.

34. *Id.* at 491–92.

35. *Id.* at 478.

his constitutional rights if he so desires."[36] The Court reversed the suspect's conviction because he was not apprised of his right to an attorney or his right to not be compelled to incriminate himself and noted that the compulsion to speak in isolated settings may be greater than in settings with impartial observers to guard against intimidation or trickery.[37]

Miranda custody is ultimately determined when a suspect's freedom of movement is restricted to the degree associated with a formal arrest.[38] The Court in *Stansbury v. California* further held that an officer's subjective, undisclosed views do not bear upon the determination of custody.[39] In the *Stansbury* case, Stansbury was investigated for a homicide.[40] Police arrived at Stansbury's home and asked him to accompany them to the police station for questioning about the homicide, and Stansbury accepted a ride to the police station in the front seat of the patrol car.[41] The officers questioned Stansbury while at the police station but never gave him his *Miranda* warnings.[42] Stansbury eventually confessed to rape, kidnapping, and child molestation.[43] Stansbury moved to have his statements made at the police station suppressed, but the trial court denied the request.[44] While the California Supreme Court affirmed the decision, the United States Supreme Court reversed and remanded it for the California Supreme Court to decide whether Stansbury was in custody based on the objective circumstances surrounding the incident.[45]

The Court elaborated on how an officer's point of view relates to a *Miranda* analysis by noting that an officer's subjective, undisclosed view that a person is a suspect is not relevant to a *Miranda* custody analysis.[46] Furthermore, an officer's subjective beliefs bear upon the "custody" analysis only when they are conveyed to the suspect, and even then, those beliefs are only relevant to the extent that they affect how a reasonable person would gauge his or her freedom of movement.[47] The Court also reasoned that, in determining custody, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[48] *Terry*, on the

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36. Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 717 (1994); *see also Miranda*, 384 U.S. at 465.
37. *See Miranda*, 384 U.S. at 467, 492.
38. *See* Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam).
39. *Id.* at 319.
40. *Id.* at 320.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 321.
45. *Id.* at 326–27.
46. *See id.* at 323–24.
47. *See id.* at 324–25.
48. *Id.* at 324 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

other hand, is concerned with inquiries outside of the suspect's point of view.[49]

2. Allowing Reasonable Searches Using the Officer's Perspective

While *Miranda*'s purpose is to diminish the effect of custodial interrogation on a suspect's Fifth Amendment rights, *Terry v. Ohio* focuses on "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[50] In *Terry*, the officer noticed the suspect walking in front of a store and looking inside of the store's window multiple times.[51] The officer followed the suspect, approached him, and asked for his name.[52] The officer patted down the suspect and felt a gun inside the suspect's overcoat.[53] Unable to remove the gun, the officer removed the suspect's coat and found a .38-caliber revolver.[54] The suspect moved to suppress the gun from being introduced into evidence, but the trial court denied his motion.[55] On appeal, the Court held that the gun was properly admitted into evidence because the officer reasonably believed that the suspect was armed and dangerous and because his actions were reasonably necessary to protect himself and others.[56]

Under *Terry*, the determining question for whether a search is reasonable is "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[57] The *Terry* Court instructed judges determining whether the search or seizure was unreasonable to decide whether "the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate[]."[58] In other words, *Terry*'s purpose of allowing a temporary detention is to protect police officers and the general public.[59] *Terry* and *Miranda* are both concerned with determining whether a suspect was in custody, however, and custody under each case seemingly overlapped when the Court decided *Berkemer v. McCarty*.[60]

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49. *See* Terry v. Ohio, 392 U.S. 1, 19–20 (1968).
50. *Id.* at 19; *see also* Miranda v. Arizona, 384 U.S. 436, 465 (1966); Godsey, *supra* note 36, at 718.
51. *Terry*, 392 U.S. at 6.
52. *Id.* at 6–7.
53. *Id.* at 7.
54. *Id.*
55. *Id.* at 7–8.
56. *Id.* at 30.
57. *Id.* at 19–20.
58. *Id.* at 21–22.
59. *See* Bates v. State, 494 S.W.3d 256, 282 (Tex. App.—Texarkana 2015, pet. ref'd) (Burgess, J., concurring).
60. *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

B. Intermingling Miranda *and* Terry

Texas appellate courts often rely on the language in *Berkemer v. McCarty* when incorporating a *Terry* analysis into *Miranda* custody determinations.[61] The language in *Berkemer* that seemingly intermingled *Terry* and *Miranda* was reiterated more recently in *Maryland v. Shatzer*.[62] As explained below, while *Berkemer* and *Shatzer* mention *Terry* stops in relation to determining *Miranda* custody, they do not say that all valid *Terry* stops are dispositive of *Miranda* custody.[63]

1. Deciding Miranda*'s Relation to Traffic Stops*

The United States Supreme Court intermingled a Fourth Amendment *Terry* stop analysis into a Fifth Amendment *Miranda* analysis in *Berkemer v. McCarty*.[64] In *Berkemer*, the Court held that persons detained pursuant to ordinary traffic stops are not in custody for the purposes of *Miranda*.[65] There, an officer stopped McCarty's vehicle for swerving and performed a field sobriety test on him, which he failed.[66] When asked whether he had consumed any intoxicants, McCarty responded that "he had consumed two beers and had smoked several joints of marijuana a short time before."[67] McCarty was then arrested and taken to jail, where he was further questioned and at no point was given his *Miranda* warnings.[68] The Court affirmed McCarty's conviction, reasoning he was not in *Miranda* custody until he was formally arrested.[69]

The Court did not hold that *Miranda* warnings are never required during a valid *Terry* stop.[70] Instead, the Court reiterated the test laid out in *California v. Beheler*, which held that *Miranda* custody exists when the suspect is restrained to the degree associated with a formal arrest.[71] On the other hand, the Court did mention that a "usual traffic stop is more analogous

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61. *See, e.g.*, Koch v. State, 484 S.W.3d 482, 488 (Tex. App.—Houston [1st Dist.] 2016, no pet.); Bartlett v. State, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008, pet. ref'd).

62. *See* Maryland v. Shatzer, 559 U.S. 98, 113 (2010) (quoting New York v. Quarles, 467 U.S. 649, 655 (1984)).

63. *See Berkemer*, 468 U.S. at 439; *see also* Godsey, *supra* note 36, at 727 (explaining that the Court in *Berkemer* analogized a traffic stop to its view of a valid *Terry* stop at the time and held that, because such stops were minor intrusions, *Miranda* was not applicable).

64. *See Berkemer*, 468 U.S. at 436–37.

65. *Id.* at 440; *see also* Daniel R. Dinger, *Is There a Seat for* Miranda *at* Terry*'s Table?: An Analysis of the Federal Circuit Court Split over the Need for* Miranda *Warnings during Coercive* Terry *Detentions*, 36 WM. MITCHELL L. REV. 1467, 1503 (2010).

66. *Berkemer*, 468 U.S. at 423.

67. *Id.*

68. *Id.* at 423–24.

69. *See id.*

70. Dinger, *supra* note 65, at 1502.

71. *See Berkemer*, 468 U.S. at 440 (citing California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

to a so-called '*Terry* stop[]' . . . than to a formal arrest."[72] The Court explained in a footnote that no more was meant by this analogy than that most traffic stops resemble the types of stops authorized by *Terry*.[73] The analogy suggested that in typical *Terry* stops the officer only asks a moderate number of questions to determine the suspect's identity and to confirm or dispel the officer's suspicions, and if the answers do not provide the officer with probable cause, the suspect must be released.[74]

The Court explained that, because this type of situation is not the coercive atmosphere with which *Miranda* was concerned, none of the Court's opinions suggested that all *Terry* stops are subject to the dictates of *Miranda*.[75] However, the Court dispelled the respondent's fears that officers will simply delay formally arresting suspects to bypass their obligation to read suspects their *Miranda* warnings by reiterating that "the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'"[76] In other words, although not all *Terry* stops are subject to the dictates of *Miranda*, some traffic stops are subject to the dictates of *Miranda*, and the test to determine which traffic stops are subject to these dictates is determined by whether the suspect was restrained to the degree associated with a formal arrest.[77]

2. Revisiting Miranda *and Traffic Stops*

The issue of how *Terry* stops correlate with *Miranda* custody was visited again in 2010 when the Court decided *Maryland v. Shatzer*.[78] There, the suspect was serving a prison sentence when he was accused of sexually abusing his three-year-old son.[79] The investigator interviewed the suspect after reading his *Miranda* warnings to him, but the suspect declined to answer any questions without his attorney present.[80] Two years and six months later, another investigator questioned the suspect about the abuse, and after receiving his *Miranda* warnings, the suspect confessed to the crime.[81]

While the main issue in *Shatzer* was whether there was a sufficient break in custody for the *Edwards* rule to apply, the Court also addressed custody

72. *Id.* at 439.
73. *See id.* at 439 n.29.
74. *See id.* at 439–40.
75. *See id.* at 440.
76. *Id.* (quoting *Beheler*, 463 U.S. at 1125).
77. *See id.* at 439–40.
78. *See* Maryland v. Shatzer, 559 U.S. 98 (2010).
79. *Id.* at 100.
80. *Id.* at 112.
81. *Id.* at 101–02.

under *Berkemer*.[82] The Court noted the "freedom-of-movement-test" is a necessary condition to satisfy *Miranda* custody and not a sufficient condition.[83] Furthermore, the Court addressed a *Terry* stop's role in the custody analysis by noting "the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody."[84] Neither the United States Supreme Court nor the Texas Court of Criminal Appeals has expressly forbid combining *Terry* and *Miranda* in a *Miranda* custody analysis, but Texas has defined more specifically when a reasonable person would feel restrained to the degree associated with a formal arrest.[85]

C. Describing Miranda *Custody under the Texas Court of Criminal Appeals*

Miranda is codified in Texas under the Texas Code of Criminal Procedure § 38.22.[86] Relying on § 38.22 and the ruling in *Miranda*, the Texas Court of Criminal Appeals refined the determination of *Miranda* custody in *Dowthitt v. State*, describing four situations that constitute *Miranda* custody.[87] The court further explained these situations in *State v. Ortiz*.[88] The court incorporated *Berkemer* into its decision in *State v. Stevenson*, but it did not hold that all valid *Terry* stops are not *Miranda* custody.[89]

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82. *See id.* at 112–13. The *Edwards* rule is "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," and that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

83. *See Shatzer*, 559 U.S. at 113. The freedom-of-movement test refers the rule that *Miranda* custody is where "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id*. at 112 (quoting New York v. Quarles, 467 U.S. 649, 655 (1984)). Black's Law Dictionary defines "necessary" as "needed for some purpose or reason; essential," and it defines "sufficient" as "[a]dequate; of such quality, number, force, or value as is necessary for a given purpose." *Necessary*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014); *Sufficient*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

84. *Shatzer*, 559 U.S. at 113.

85. *See infra* Part II.B (describing the intermingling of *Terry* and *Miranda*; *supra* Part II.C (explaining the Texas *Miranda* rule).

86. *See* TEX. CODE CRIM. PROC. ANN. § 38.22 (West 2017).

87. Dowthitt v. State, 931 S.W.2d 244, 254–57 (Tex. Crim. App. 1996).

88. *See* State v. Ortiz, 382 S.W.3d 367, 376 (Tex. Crim. App. 2012) (quoting *Dowthitt*, 931 S.W.2d at 249, 255).

89. *See generally* State v. Stevenson, 958 S.W.2d 824, 828–29 (Tex. Crim. App. 1997).

1. Introducing the Custodial Situations

The Texas Court of Criminal Appeals addressed *Miranda* custody in *Dowthitt v. State*.[90] There, the court held that the suspect, Dowthitt, was in custody after he admitted to being present during the murders of two young girls.[91] Dowthitt went to the police station to give a written statement at 9:00 a.m. on June 20, 1990 and finished his statement at 11:00 a.m. on the same day.[92] He returned to the police station at 1:00 p.m. and was interrogated for five hours when he signed a new written statement.[93] Dowthitt then took a polygraph test from 7:00 p.m. until 11:00 p.m.[94] The interrogation continued until Dowthitt made an incriminating statement at 1:00 a.m.[95] The officer did not give Dowthitt his *Miranda* warnings at any point during the twelve hours, so the court held that he was in custody at the point the incriminating statement was made because of the length of the interrogation, factors involving the exercise of police control, and Dowthitt's statement establishing probable cause to arrest.[96]

The court noted four factors that are relevant to determining *Miranda* custody: (1) probable cause to arrest; (2) the subjective intent of the police; (3) the focus of the investigation; and (4) the subjective belief of the defendant.[97] Factors two and four, however, are irrelevant unless manifested to the suspect through the words or actions of the officer because "the custody determination is based entirely upon objective circumstances."[98] The court also noted four situations which may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.[99]

For the first three situations, the court, referencing *Stansbury v. California*, noted that the restriction on the suspect's freedom of movement must rise to the degree associated with an arrest as opposed to an investigative

90. *See generally Dowthitt*, 931 S.W.2d 244.
91. *Id.* at 249, 257.
92. *Id.* at 252.
93. *Id.*
94. *Id.*
95. *Id.* at 253.
96. *Id.* at 257.
97. *See id.* at 249, 254.
98. *Id.* at 254.
99. *Id.* at 255 (citing Shiflet v. State, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)).

detention.[100] At the same time, the Supreme Court in *Stansbury* stated that an officer's belief is not relevant to the custody analysis unless it is somehow conveyed to the suspect.[101] This portion of the *Dowthitt* opinion is incorporated into many Texas appellate court decisions as a rule that a valid investigative detention under *Terry* is not custody for the purposes of *Miranda*.[102] For the fourth situation, "the officers' knowledge of probable cause [must] be manifested to the suspect."[103] The court did not determine whether these were the only situations that could constitute *Miranda* custody, or whether they reflected only some situations that could constitute *Miranda* custody until it decided *State v. Ortiz* in 2012.[104]

2. Clarifying Custody Outside of the Custodial Situations

The Texas Court of Criminal Appeals again visited the custodial situations in *State v. Ortiz*.[105] There, the court held that a reasonable person would have believed he was in custody after the suspect made incriminating statements.[106] The officer stopped Ortiz for speeding, asked him to step out of his car, and questioned him.[107] The officer then questioned Ortiz's wife and when her answers conflicted with Ortiz's answers, called for backup and returned to questioning Ortiz.[108] Ortiz's wife was handcuffed when the officer's backup arrived, and the officer handcuffed Ortiz when something was discovered under his wife's skirt.[109] The officer asked Ortiz, in Spanish, what was under his wife's skirt, and Ortiz responded "cocaina."[110] Ortiz never received his *Miranda* warnings prior to making these statements.[111]

The court held that Ortiz was in custody at the time the incriminating statements were made because the stopping and handcuffing of the suspect by three officers, and the report of the finding of something under the wife's skirt by another officer, would have led a reasonable person to believe they were in custody.[112] In applying the four *Dowthitt* factors, the court explained that, while the factors are not an exhaustive list of situations that constitute

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100. *See id.* at 249, 254 (referencing Stansbury v. California, 511 U.S. 318, 324–25 (1994) (per curiam)).

101. *Stansbury*, 511 U.S. at 325.

102. *See* Caballero v. State, No. 05-11-00367-CR, 2012 WL 6035259, at *15 (Tex. App.—Dallas Dec. 5, 2012, pet. ref'd) (not designated for publication); Bartlett v. State, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008, pet. ref'd); Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *5 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication).

103. *Dowthitt*, 931 S.W.2d at 249, 254.

104. *See* State v. Ortiz, 382 S.W.3d 367, 376 (Tex. Crim. App. 2012).

105. *See id.* at 369.

106. *See id.* at 375.

107. *Id.* at 369–70.

108. *Id.* at 370.

109. *Id.*

110. *Id.* (explaining "cocaina" is the Spanish word for cocaine).

111. *Id.*

112. *See id.* at 374–75.

Miranda custody, the factors are instead situations that "*at least* . . . may constitute custody."[113] If, however, the court were to fit this situation into one of the *Dowthitt* categories, then it would fall under the first category because the suspect was "physically deprived of his freedom of action . . . to the degree associated with an arrest."[114] The Texas Court of Criminal Appeals decided whether a traffic stop was a *Miranda* custody situation in *State v. Stevenson*.[115]

3. Interpreting Berkemer

The Texas Court of Criminal Appeals incorporated *Berkemer* into its decision in *State v. Stevenson*.[116] There, the court held that Stevenson was not in *Miranda* custody when he was involved in an automobile accident and admitted to driving the car in response to the officer's questioning.[117] He also failed a field sobriety test, and he was not given *Miranda* warnings at any point.[118]

Stevenson established only that traffic stops that are only as intrusive as the traffic stop in *Berkemer* do not constitute *Miranda* custody and did not conclude that *Terry* should be included in a *Miranda* custody determination.[119] The court of criminal appeals interpreted *Berkemer* not to mean a traffic stop does not constitute *Miranda* custody, but rather that events subsequent to the stop could escalate the encounter into a custodial situation.[120] The traffic stop in *Stevenson* was no more intrusive than the traffic stop in *Berkemer*, so some subsequent event would have had to escalate the encounter for it to constitute *Miranda* custody.[121] The situation in this case was not converted into custody requiring *Miranda* warnings because the focus-shift to Stevenson was not conveyed to him, and because it was not conveyed to him, it was irrelevant under the rule in *Stansbury v. California*.[122] Texas appellate courts, however, still differ on whether *Terry* should be included in a *Miranda* custody analysis.[123]

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113. *Id.* at 376 (quoting Dowthitt v. State, 931 S.W.2d 244, 249, 255 (Tex. Crim. App. 1996)) (emphasis in original).

114. *Id.* at 377 (quoting *Dowthitt,* 931 S.W.2d at 249, 255). The first *Dowthitt* category is a situation in which "the suspect is physically deprived of his freedom of action in any significant way . . . ." *Dowthitt*, 931 S.W.2d at 249, 255.

115. *See* State v. Stevenson, 958 S.W.2d 824, 828–29 (Tex. Crim. App. 1997).

116. *See id.* at 828.

117. *See id.* at 825.

118. *Id.* at 825–26.

119. *See id.* at 828–29.

120. *See id.* at 828.

121. *See id.* at 829.

122. *See id.* The rule in *Stansbury* is the officer's subjective beliefs are irrelevant unless they are conveyed to the suspect. *See* Stansbury v. California, 511 U.S. 318, 324 (1994).

123. *See infra* Part III (explaining the differing approaches or whether *Terry* should be applied to a *Miranda* inquiry).

III. THE TEXAS SPLIT STEMMING FROM *MIRANDA* AND *TERRY*

Consider the hypothetical presented in Part I: whether a "reasonable man in the suspect's position" would think he is in custody when he is placed in handcuffs and in a patrol car after being involved in an accident[124] depends on the Texas appellate court answering the question.[125] In *Koch v. State*, the case from which the hypothetical is derived, the Houston appellate court held that although the suspect's freedom of movement was significantly restricted, he was not in custody for *Miranda* purposes—a Fifth Amendment inquiry—because it was a temporary detention authorized by *Terry*—a Fourth Amendment case.[126] However, the Texarkana appellate court in *Bates v. State* came to a different conclusion on a similar fact pattern.[127]

In *Bates*, like in *Koch*, Bates was involved in a car accident.[128] Also like *Koch*, the officer placed Bates in handcuffs and in the back of a patrol car, and the court agreed that Bates's freedom of movement was significantly restricted.[129] Bates told the officer his vehicle was in gear and the gas pedal got stuck, he had not had much to drink that day, and the collision was the result of an accident.[130] In contrast to the outcome in *Koch*, the *Bates* court held that Bates was in custody for *Miranda* purposes when he was handcuffed and placed in the patrol car.[131]

The incriminating statements in *Koch* were used to convict the suspect of driving while intoxicated, while the court in *Bates* was forced to look at evidence outside of the incriminating statements made to obtain a conviction.[132] Given the limited facts in the *Koch* opinion, the reader is left wondering whether the shock of an accident, combined with questioning by an authoritative figure, caused the suspect to make inaccurate statements and ultimately incriminate himself. The split between Texas appellate courts delineates how a uniform standard needs to be developed and applied for future *Miranda* issues.[133]

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124. *Stansbury*, 511 U.S. at 324; *see supra* text accompanying notes 12–16 (asking whether the suspect was restrained to the degree associated with a formal arrest).

125. *Compare* Koch v. State, 484 S.W.3d 482, 485 (Tex. App.—Houston [1st. Dist.] 2016, no pet.), *with* Bates v. State, 494 S.W.3d 256, 263 (Tex. App.—Texarkana 2015, pet. ref'd) (demonstrating a appellate court split interpretation on what constitutes custody).

126. *See Koch*, 484 S.W.3d at 491 (relying on Terry v. Ohio, 392 U.S. 1, 30–31 (1968)).

127. *See Bates*, 494 S.W.3d at 263.

128. *Id.*

129. *Id.*

130. *Id.* at 263–64.

131. *See id.* at 271.

132. *See id.* at 272; *see also* Koch v. State, 484 S.W.3d 482, 487 (Tex. App.—Houston [1st. Dist.] 2016, no pet.).

133. *See generally supra* text accompanying notes 124–31 (discussing the split in Texas appellate court jurisprudence over what is required for determining *Miranda* custody).

A. Combining Terry *Stops with* Miranda *Custody*

The Houston, Waco, Austin, and Dallas appellate courts' rationale for applying a *Terry* analysis to a *Miranda* case can be summarized by a statement from *Bartlett v. State*: "[A] valid investigative detention, which is characterized by lesser restraint than an arrest, does not constitute custody."[134] This rationale is based solely on interpretations of *Berkemer* and *Dowthitt*; the former interpreted as "traffic stops and *Terry* stops" are not *Miranda* custody, and the latter interpreted as "the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention."[135] Some courts improperly include an officer's subjective, undisclosed perspective in violation of *Stansbury v. California*, while others misapply the Texas Criminal Court of Appeals' usage of the phrase "investigative detention."[136]

1. Violating Stansbury v. California

The Houston appellate court in *Placide v. State* and the Austin appellate court in *Bartlett v. State* are examples of Texas appellate courts violating *Stansbury v. California* when using *Terry* to determine *Miranda* custody.[137] The officer in *Placide* received a report that Placide was dealing narcotics and loading guns.[138] Upon arrival, police handcuffed Placide and placed him in the back of a patrol car.[139] Having received no *Miranda* warnings, Placide eventually confessed to owning the car and to living at the address where the vehicle was registered.[140]

The Houston appellate court held that Placide was not in custody because his arrest and placement in the back of a patrol car while handcuffed was reasonably necessary to protect the officer and those around the officer in a high-crime area in which the officer previously responded to calls concerning narcotics and weapons.[141] The court rejected Placide's argument that he was restrained to the degree associated with a formal arrest by distinguishing his case from the two cases he cited in support of his

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134. Bartlett v. State, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008, pet. ref'd).

135. *Id.*

136. *See, e.g.*, Placide v. State, No. 14-13-00725-CR, 2014 WL 4854598, at *12–14 (Tex. App.—Houston [14th Dist.] Sept. 25, 2014, pet. ref'd) (mem. op., not designated for publication); Caballero v. State, No. 05-11-00367-CR, 2012 WL 6035259, at *15–16 (Tex. App.—Dallas Dec. 5, 2012, pet. ref'd) (not designated for publication); Bartlett v. State, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008 pet. ref'd); Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *8 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication).

137. *See generally Bartlett*, 249 S.W.3d at 658; *Placide*, 2014 WL 4854598, at *13–14 (referencing Terry v. Ohio, 392 U.S. 1, 22 (1968)).

138. *Placide*, 2014 WL 4854598, at *2–3.

139. *Id.*

140. *Id.*

141. *See id.* at *15.

argument.[142] Instead, the court analogized Placide's case to *Balentine v. State* in which the Texas Court of Criminal Appeals decided only that the suspect's rights were violated under the Fourth Amendment—the *Terry* analysis.[143] Further, the *Balentine* court did not decide whether the suspect's Fifth Amendment rights were violated.[144]

Bartlett was also analyzed under the rule that "a valid investigative detention . . . does not constitute custody."[145] The Austin appellate court held that Bartlett's detention was an investigative detention, not an arrest, and that the trial court did not err in denying Bartlett's motion to suppress.[146] Bartlett, while at a motorcycle rally, was involved in an altercation with another person.[147] Two officers used their patrol car to get to Bartlett, who was located within a large crowd of people.[148] The arresting officer claimed he handcuffed Bartlett to assure his own safety and escorted him to the patrol car, which was located "'a few thousand' yards away."[149] Bartlett was placed in the back of the patrol car and driven approximately two thousand yards away to a location where the officer uncuffed Bartlett and interviewed him.[150] During the interview, Bartlett was assured that he was not under arrest and that the officer only wanted to speak with him about his side of the story.[151] Bartlett gave a statement concerning the altercation after he was given his *Miranda* warnings.[152] He argued on appeal that he was in custody for *Miranda* purposes when he gave the written statement to the officer.[153]

The Austin appellate court stated that investigative detentions under *Terry* are not "custody" for the purposes of *Miranda*.[154] Bartlett argued his

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142. *See id.* at *16–18. The suspect cited to *Ramirez v. State* and *Alford v. State* to support his argument. *See generally* Ramirez v. State, 105 S.W.3d 730 (Tex. App.—Austin 2003, no pet.) (holding that the suspect was in *Miranda* custody because he was significantly deprived of his freedom of action, told he could not leave, and a reasonable person would believe his freedom of movement was significantly restricted); Alford v. State, 22 S.W.3d 669 (Tex. App.—Fort Worth 2000, pet. ref'd) (holding that the suspect was in custody for the purposes of *Miranda* when he was put on the ground and handcuffed after being pulled over).

143. *Placide*, 2014 WL 4854598, at *19; *see also* Balentine v. State, 71 S.W.3d 763, 766, 769–71 (Tex. Crim. App. 2002).

144. *See Balentine*, 71 S.W.3d at 766, 769–71; *see also Placide*, 2014 WL 4854598, at *19.

145. Bartlett v. State, 249 S.W.3d 658, 668 (Tex. App.—Austin 2008, pet. ref'd).

146. *Id.* at 671.

147. *Id.* at 663.

148. *Id.*

149. *Id.* at 664.

150. *Id.* at 665.

151. *Id.*

152. *Id.* at 665–66.

153. *See id.* at 667.

154. *Id.* at 668 (citing Stansbury v. California, 511 U.S. 318, 322 (1994); Berkemer v. McCarty, 468 U.S. 420, 438–39 (1984)). Bartlett argued that his statement was the product of an unlawful arrest, and the Austin court equated "arrest" with custody for both Fourth Amendment purposes and *Miranda* purposes. *Id.* at 666–68. However, the court determined that an investigative detention does not constitute custody under either doctrine. *Id.* at 666. The court analyzed the *Miranda* custody issue despite the officer giving Bartlett *Miranda* warnings prior to the interrogation because it determined that custody for *Miranda* purposes could still constitute an unlawful arrest for Fourth Amendment purposes. *See id.* at 666–71.

restraint "would have caused a reasonable person to believe his freedom of movement was restrained to the degree associated with a formal arrest."[155] The court disagreed, reasoning that placing Bartlett in handcuffs and in the patrol car was the safest way for the officer to transport Bartlett from the crime scene.[156] On the other hand, the officer conveyed to Bartlett his purpose behind placing Bartlett in handcuffs and in the patrol car, and this was relevant because an officer's subjective views are relevant to the custody analysis when those views are communicated to the suspect and "would affect a reasonable person's understanding of his freedom of action."[157]

These courts incorrectly reasoned that custody under *Terry* is synonymous with custody under *Miranda* and consequently determined the custody issue from the officer's perspective despite the Supreme Court's clear holding in *Stansbury* that the officer's belief is only relevant when it is conveyed to the suspect.[158] One of the factors for determining the reasonableness of the detention under a Fourth Amendment analysis in Texas is whether the officer conducted an investigation after the detention.[159] Under *Stansbury*, this factor would only be relevant if the officer conveyed it to the suspect, but the trial court's findings of fact in *Placide* did not mention whether the officer conveyed to Placide that he was being detained while the officer conducted an investigation.[160] Had the Houston appellate court not decided this case using a *Terry* analysis, the "police officer's subjective view"—the court's only noted distinction from two other *Miranda* custody cases—would not have been relevant, and Placide's case would have been analogous to the two other *Miranda* custody cases.[161]

On the other hand, while the Austin appellate court in *Bartlett* correctly analyzed how the officer's articulated plans would have affected a reasonable person's perception, it should not have analyzed the officer's underlying purpose in effectuating the stop.[162] That court correctly recognized that an officer's subjective views are only relevant to the custody analysis when they would affect a reasonable person's understanding of the situation, yet it still included the officer's unarticulated subjective views in its custody analysis.[163] The officer in *Bartlett* may have articulated his subjective views to the extent that a reasonable person would not believe he was restrained to the degree associated with a formal arrest, but because the court also included

155. *Id.* at 669.

156. *See id.* at 669–70.

157. *Id.* at 670 (citing *Stansbury*, 511 U.S. at 325).

158. *See id.* at 668; *Stansbury*, 511 U.S. at 324–25; Placide v. State, No. 14-13-00725-CR, 2014 WL 4854598, at *12–14 (Tex. App.—Houston [14th Dist.] Sept. 25, 2014, pet. ref'd) (mem. op., not designated for publication).

159. *See Placide*, 2014 WL 4854598, at *13, *17.

160. *See id.* at *5–7.

161. *See id.* at *17–18; *Stansbury*, 511 U.S. at 324.

162. *See* Bartlett v. State, 249 S.W.3d 658, 669–70 (Tex. App.—Austin 2008, pet. ref'd).

163. *See id*.

the officer's subjective views in the custody analysis, the extent to which the officer's articulated subjective views would have affected a reasonable person is unclear.[164] While the Houston and Waco appellate courts violated *Stansbury*, the Austin and Dallas appellate courts misinterpreted the Texas Court of Criminal Appeals precedent to reach their conclusions.[165]

2. Misinterpreting "Investigative Detention"

The Waco and Dallas appellate courts incorrectly interpreted the Texas Court of Criminal Appeals' usage of "investigative detention" as being applicable to all *Miranda* custody cases.[166] In *Gonzalez v. State*, Gonzalez was at the scene of a murder when Officer Berndt approached him for questioning at 1:45 a.m.[167] Gonzalez was not responding to questions, was not under arrest, and was not handcuffed.[168] Further, he was not a suspect or prevented from leaving.[169] According to Gonzalez, if Officer Berndt would have tried to arrest him at that point, he would have fought the officers.[170] He was, however, kept on the scene as a witness at that time.[171] Another officer, Officer Mathews, began watching Gonzalez at 4:00 a.m. and asked Gonzalez whether he would consent to an "atomic absorption test," to which he responded affirmatively as he bent down to rub dirt on his hands.[172] At this time, Gonzalez was still being held as a witness, was not asked any questions about the murder, was not allowed to leave, and was not told that he was under arrest.[173] Later, a detective questioned Gonzalez in his home when Gonzalez told her that something might happen to her or her family if she made it so that his kids went without shoes.[174] When Gonzalez made these statements, he was not under formal arrest and was not read his *Miranda* warnings, but he was told that he was a suspect and that he could not leave until the investigators discovered what he witnessed.[175] He also made a recorded statement, at which point he was permitted to leave.[176]

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164. *See id.*

165. *See* Caballero v. State, No. 05-11-00367-CR, 2012 WL 6035259, at *15–16 (Tex. App.—Dallas Dec. 5, 2012, pet. ref'd) (not designated for publication); Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *8 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication).

166. *See Caballero*, 2012 WL 6035259, at *15–16; *Gonzalez*, 2005 WL 1836939, at *8.

167. *Gonzalez*, 2005 WL 1836939, at *2.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at *2–3.

173. *Id.* at *3.

174. *Id.*

175. *Id.* at *3–4.

176. *Id.* at *4.

The Waco appellate court held this situation was not *Miranda* custody because it was a valid, investigative detention under *Terry*, and the officers' actions did not elevate the non-custodial interrogation to custodial interrogation.[177] The court began by noting an "investigative detention" is not custody for the purposes of *Miranda* and defined the phrase using *Terry*.[178] It also explained an investigative detention could be elevated to a custodial situation by looking at how a reasonable person would have understood the situation and whether the police officer's treatment could be "characterized as the functional equivalent of a formal arrest."[179]

In a similar case from the Dallas Court of Appeals, *Caballero v. State*, two officers visited an apartment based on a tip that it was a location for drug sales.[180] The apartment's residents invited the officers inside, and the officers smelled burning marijuana upon entering the apartment.[181] After hearing movement, one of the officers went upstairs to secure the residence for his own safety.[182] He knocked on the bedroom door and asked the four occupants, including Caballero, to walk downstairs with him.[183] At this point, the officer asked Caballero what his name was and what he was doing there.[184] After the officers patted the occupants down, one of the officers conducted a protective sweep in the upstairs bedroom while the other officer held the suspects downstairs.[185] Caballero moved to suppress his statements given to the police because the officers did not read him his *Miranda* warnings.[186]

Like *Gonzalez*, the court in *Caballero* analyzed its *Miranda* issue using the rule that a valid investigative detention under *Terry* does not constitute *Miranda* custody.[187] The court conceded that the suspect's freedom of movement was restricted.[188] It held, however, that it was not restricted to the degree associated with an arrest because his movement was restricted only in conjunction with the officers' protective sweep and investigation, which was permissible under *Terry*.[189]

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177. *See id.* at *8.
178. *Id.*
179. *Id.* at *7 (quoting Berkemer v. McCarty, 468 U.S. 420, 441–42 (1984)).
180. Caballero v. State, No. 05-11-00367-CR, 2012 WL 6035259, at *1–2 (Tex. App.—Dallas Dec. 5, 2012, pet. ref'd) (not designated for publication).
181. *Id.* at *2.
182. *Id.* at *3.
183. *Id.* at *3–4.
184. *Id.* at *4.
185. *Id.*
186. *Id.* at *12–13.
187. *See id.* at *15–16.
188. *See id.* at *16.
189. *See id.* at *10–11, 15–16.

These courts incorrectly interpreted language in *Dowthitt* to mean that a valid *Terry* stop is dispositive of whether a suspect is in *Miranda* custody.[190] The *Dowthitt* court's usage of "investigative detention" was applicable to the first three of the four custodial situations, which, as *State v. Ortiz* dictated, "*at least* . . . may constitute custody."[191] The *Ortiz* court explained that, although the facts of the case did not fit into any one of the four categories, the lower court still correctly held that the suspect was in *Miranda* custody.[192] Therefore, if not all cases must fit into one of the four categories to constitute *Miranda* custody, a proper investigative detention under *Terry*, which is applicable to only three of those four categories, is not dispositive of whether the suspect is in *Miranda* custody under Texas Court of Criminal Appeals precedent.[193] The Houston, Waco, Austin, and Dallas appellate courts incorrectly use a *Terry* analysis to determine *Miranda* custody, but the Amarillo and Texarkana appellate courts correctly exclude *Terry* from their *Miranda* custody determinations.[194]

B. Looking Only to an Objective Standard

The Amarillo and Texarkana appellate courts have explicitly refused to interpret *Berkemer* to mean that any valid *Terry* stop is not *Miranda* custody.[195] Instead, they adhere to the general rule that *Miranda* custody arises when a reasonable person would believe his freedom of movement is restricted to the degree associated with a formal arrest.[196]

1. Applying Only the Reasonable Person Standard

Unlike the Austin, Dallas, Houston, and Waco appellate courts, the Amarillo appellate court explicitly stated that a *Terry* analysis is irrelevant to a *Miranda* custody determination.[197] In *Ortiz*, the Amarillo court reversed the trial court's decision and held that a reasonable person in Ortiz's position

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190. *See id.* at *15–16; Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *8 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication). The Waco court considered "investigative detention" under *Dowthitt*'s requirement that restraint "must amount to the degree associated with [a formal] arrest as opposed to an investigative detention" to be synonymous with a valid *Terry* stop. *See Gonzalez*, 2005 WL 1836939, at *5; *see also* Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).

191. State v. Ortiz, 382 S.W.3d 367, 376 (Tex. Crim. App. 2012) (quoting *Dowthitt*, 931 S.W.2d at 249, 255 (emphasis in original)).

192. *See Ortiz*, 382 S.W.3d at 376–77.

193. *See id.*; *Dowthitt*, 931 S.W.2d at 255.

194. *See* Bates v. State, 494 S.W.3d 256, 271 (Tex. App.—Texarkana 2015, pet. ref'd); State v. Ortiz, 346 S.W.3d 127, 134 (Tex. App.—Amarillo 2011, pet. granted), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012).

195. *See Bates*, 494 S.W.3d at 271; *Ortiz*, 346 S.W.3d at 134.

196. *See Bates*, 494 S.W.3d at 271; *Ortiz*, 346 S.W.3d at 133.

197. *See Ortiz*, at 133–34.

would believe that "his freedom of movement was restrained to the degree associated with a formal arrest."[198] In that case, as discussed previously, Ortiz was stopped for speeding and was subsequently handcuffed and questioned about the contents found in his wife's skirt, but he was not given his *Miranda* warnings prior to the questioning.[199]

Ortiz was in *Miranda* custody because by the time he was placed in handcuffs a reasonable person would have believed his freedom of movement was restrained to the degree associated with a formal arrest.[200] The court rejected the state's argument, stemming from *Terry*, that "[w]hether a seizure is an actual arrest or an investigative detention depends on the reasonableness of the intrusion under all the facts."[201] It rejected intermingling *Terry* and *Miranda* when it noted that the reasonableness of the officer's decision to place Ortiz in handcuffs was not determinative of whether Ortiz was in *Miranda* custody.[202]

In Texarkana, the appellate court did not explicitly state that a *Terry* approach to determining *Miranda* custody is incorrect, but noted that a rule that investigative detentions under *Terry* do not constitute *Miranda* custody was too broad.[203] In *Bates v. State*, Bates drove while intoxicated and crashed into the victim's apartment.[204] A neighbor took Bates from his car and sat him on the neighbor's front porch until the police arrived.[205] The officer arrived and asked Bates what happened, whether he had any weapons on him, and whether he was the driver of the vehicle.[206] Shortly thereafter, the officer placed Bates in handcuffs and in the patrol car.[207] Subsequently, another officer asked Bates about his name, what was going on, whether he had consumed any alcohol, whether he knew the victim, and whether he attempted to help the victim.[208] The officers did not read Bates his *Miranda* warnings at any point during the questioning.[209]

The Texarkana appellate court determined that Bates was in *Miranda* custody because the officers created a situation in which a reasonable person would believe his freedom of movement was restricted to the degree associated with a formal arrest.[210] He was handcuffed and isolated in a police cruiser, was not told he was under arrest, and was not free to leave.[211] The

198. *Id.* at 134.
199. *See id.* at 129–30; *supra* text accompanying notes 105–11 (discussing the facts of *State v. Ortiz*).
200. *Ortiz*, 346 S.W.3d at 134.
201. *Id.* at 133 (quoting the State's brief).
202. *See id.*
203. *See* Bates v. State, 494 S.W.3d 256, 271 (Tex. App.—Texarkana 2015, pet. ref'd).
204. *Id.* at 271–72.
205. *Id.*
206. *Id.* at 263.
207. *Id.*
208. *Id.* at 263–64.
209. *Id.* at 263.
210. *See id.* at 271.
211. *See id.*

court also noted that even if the police only intended the stop to be an investigative detention, Bates was nonetheless still in *Miranda* custody.[212]

The Amarillo and Texarkana appellate courts correctly defined custody under *Miranda* and contributed to a more uniform standard for defining *Miranda* custody.[213] Although the Texas Court of Criminal Appeals has suggested that handcuffing suspects does not automatically constitute *Miranda* custody, *Ortiz* and *Bates* illustrate two scenarios in which handcuffing a suspect is *Miranda* custody.[214] These courts followed the rule that suspects are in *Miranda* custody when a reasonable person would believe the detention to be long term and established that a reasonable person would believe such when they are removed from their car, asked whether they are carrying drugs or under the influence, questioned about their purpose for traveling, and placed in handcuffs.[215] Police officers and Texas appellate courts considering whether a handcuffed suspect is in custody can reference these opinions to further define when reasonable people would believe that they are restrained to the degree associated with a formal arrest.

2. Addressing the Appellate Court Split

In a concurring opinion in *Bates*, Justice Burgess specifically addressed why intermingling *Terry* and *Miranda* is inappropriate for a determination of custody.[216] He prefaced his concurrence by stating that the rule in *Bartlett v. State* goes too far because: (1) *Berkemer v. McCarty* did not resolve the issue of whether a suspect could be subjected to an investigative detention and *Miranda* custody at the same time; (2) *Miranda* and *Terry* were designed to accomplish different goals; (3) reviewing the Fourth and Fifth Amendments together would upset the balance of competing interests in the two amendments; and (4) *Terry* was intended to expand, but *Miranda* was intended to remain constant.[217]

Justice Burgess suggested in his first reason for disagreement that the Court's opinion in *Berkemer* did not resolve the issue of whether a person could be in *Miranda* custody during a valid *Terry* stop.[218] He claimed that *Berkemer* never considered *Miranda* custody because the stop was not very

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212. *See id.*

213. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); *Bates*, 494 S.W.3d 256; State v. Ortiz, 346 S.W.3d 127 (Tex. App.—Amarillo 2011, pet. granted), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012).

214. *See Bates*, 494 S.W.3d at 263–64, 271–72; *Ortiz*, 346 S.W.3d at 132–33.

215. *See Bates*, 494 S.W.3d at 263–64, 271–72; *Ortiz*, 346 S.W.3d at 132–33.

216. *See Bates*, 494 S.W.3d at 277 (Burgess, J., concurring). *See generally* Terry v. Ohio, 392 U.S. 1 (1968); *Miranda*, 384 U.S. at 436.

217. *Bates*, 494 S.W.3d at 279–84. *See generally* Berkemer v. McCarty, 468 U.S. 420 (1984); *Terry*, 392 U.S. at 1; *Miranda*, 384 U.S. at 436; Bartlett v. State, 249 S.W.3d 658 (Tex. App.—Austin 2008, pet. ref'd). The rule in *Bartlett* is that "a valid investigative detention, which is characterized by lesser restraint than an arrest, does not constitute [*Miranda*] custody." *Bartlett*, 249 S.W.3d at 668.

218. *See Bates*, 494 S.W.3d at 280–81.

intrusive and the scope of a valid *Terry* stop has increased since *Berkemer* was decided.[219] Justice Burgess's second reason for disagreement was that *Miranda* and *Terry* were meant to accomplish different goals.[220] He emphasized that the purpose of *Terry* was to protect police officers and the general public, while the purpose of *Miranda* was to protect fairness at trial.[221]

His third reason centered around the idea that the Constitution's framers' balancing of competing interests spurred the exceptions to the protections of the Fourth and Fifth Amendments.[222] He explained that analyzing the two exceptions together would upset that balance.[223] He supported this assertion by claiming that, "under the Fourth Amendment the State may have both the evidence and the prosecution, but under the Fifth Amendment [it] must choose between having the testimony and having the prosecution."[224] He also argued that, if the definition of custody under *Terry* expanded, then the definition of custody under *Miranda* would contract, so the justification for contracting *Miranda* would be reasonableness because the justification for expanding *Terry* is also reasonableness.[225] Therefore, allowing *Terry* to dictate custody for *Miranda* would "allow Fourth Amendment reasonableness to invade into the Fifth Amendment's restraint custody analysis."[226]

Finally, Justice Burgess argued that the Court, knowing that *Terry*'s scope may expand, intended *Miranda*'s requirements to remain intact.[227] Quoting *Terry*, he noted that the opinion allowed courts to determine the boundaries of permissible restraint in investigative detentions.[228] But Justice Burgess quoted *Howes v. Fields* to argue that the doctrine announced in *Miranda* should be followed strictly in those types of situations that empowered the *Miranda* decision.[229] He ultimately concluded that even though the ceiling above a valid *Terry* stop is raised, "the floor beneath

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219. *See id*.

220. *See id.* at 282. *See generally Terry*, 392 U.S. at 1; *Miranda*, 384 U.S. at 436.

221. *See Bates*, 494 S.W.3d at 282 (Burgess, J., concurring).

222. *Id.*

223. *Id.*

224. *Id.* at 282–83.

225. *Id.* at 283.

226. *See id.*

227. *Id.*; *see generally* Miranda v. Arizona, 384 U.S. 436 (1966). "Restraint custody" is synonymous with *Miranda* custody. *See Bates*, 494 S.W.3d at 278.

228. *See Bates*, 494 S.W.3d at 283 (Burgess, J., concurring); *see also* Terry v. Ohio, 392 U.S. 1 (1968).

229. *Bates*, 494 S.W.3d at 283–84 (Burgess, J., concurring); *see* Howes v. Fields, 565 U.S. 499, 515–16 (2012). In *Howes v. Fields*, the Court held that the respondent was not in custody within the meaning of *Miranda* when he was escorted from his prison cell and placed in an interview room because he was advised that he was free to leave the interview and go back to his prison cell, which was his usual environment, at any time; he was not physically restrained or threatened; and he was offered food and water. *Howes*, 565 U.S. at 515–16. This was not a custodial situation implicating the type of environment that powered the *Miranda* decision. *See id*. at 514–16.

restraint custody under *Miranda* has not moved with it."[230] For these and other reasons, *Terry* and *Miranda* should not be intermingled in *Miranda* cases.

IV. LEAVING *TERRY* BEHIND

The Amarillo and Texarkana appellate courts use the correct test for *Miranda* custody because *Terry v. Ohio*, and those cases stemming from that decision, should not be a factor in determining whether a suspect was in *Miranda* custody. The purpose of *Miranda* is to alleviate what suspects perceive as a coercive environment, while the purpose of *Terry* is to allow searches and seizures when it is reasonable from an officer's perspective.[231] Combining these two doctrines could allow "the police to circumvent the constraints on custodial interrogations established by *Miranda*," a concern envisioned in *Berkemer*.[232] Furthermore, the inconsistent results regarding *Miranda* custody determinations in Texas courts of appeal are confusing for prosecutors and defense attorneys alike, and leave defendants susceptible to having incriminating statements improperly admitted in court.

A. Establishing the Appropriate Rule

Texas appellate courts should uniformly hold that suspects are in custody when a reasonable person would believe that he or she was restrained to the degree associated with a formal arrest. Such an analysis should exclude any considerations stemming from *Terry*, such as whether the officer reasonably believed the force used was necessary to protect the status quo or for officer safety.[233] *Miranda* warnings were designed to protect suspects from being placed in situations in which they might feel compelled to speak against their will, and the Supreme Court decided that a custodial interrogation is a situation that gives rise to such a concern.[234] Courts defeat this purpose when they use a *Terry* analysis to determine *Miranda* custody because a suspect could be subjected to a coercive situation that is otherwise justified under *Terry,* such as to maintain the status quo or for officer safety.[235] While combining *Terry* and *Miranda* can violate Supreme Court

230. *Bates*, 494 S.W.3d at 284.

231. *See* Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 452–59 (2004); Francesca Muratori & Craig A. Benson, *Custodial Interrogations*, 87 GEO. L.J. 1231, 1233–35 (1994).

232. Berkemer v. McCarty, 468 U.S. 420, 441 (1984). The *Berkemer* Court refused to adopt a bright-line rule that *Miranda* does not apply until a suspect is placed under formal arrest because doing so would allow "the police to circumvent the constraints on custodial interrogations established by *Miranda*." *Id*.

233. *See* Rhodes v. State, 945 S.W.2d 115, 117 (Tex. Crim. App. 1997).

234. *See* Miranda v. Arizona, 384 U.S. 436, 465, 478 (1966).

235. *See Rhodes*, 945 S.W.2d at 117.

precedent, following the rule that *Miranda* custody occurs when a reasonable person feels restrained to the degree associated with a formal arrest not only follows Supreme Court precedent but also precedent from the Texas Court of Criminal Appeals.[236] If the "reasonable person" approach were followed consistently in Texas courts, these courses would develop a more uniform standard for deciding when a reasonable person would feel restrained to the degree associated with an arrest.

1. Intermingling Terry *and* Miranda *Can Violate United States Supreme Court Precedent*

The rule for a valid *Terry* stop could violate Supreme Court precedent when it is used to determine *Miranda* custody. In *Berkemer*, the respondent argued that exempting traffic stops from *Miranda* would allow police officers to circumvent the dictates of *Miranda*, but the Court dismissed this fear based on the notion that *Miranda* is applicable once the suspect is restrained "to a 'degree associated with formal arrest.'"[237] In the same decision, the Court explained the reason McCarty was not in custody by stating, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[238] The *Terry* Court's approach came from a different perspective in which it stated that the inquiry for a *Terry* stop is whether "a man of reasonable caution" would have taken the same action given the facts available to the officer at the time of the seizure.[239] In short, the decisions suggest that *Miranda* custody should be determined from the perspective of the suspect, while a *Terry* stop may be determined from the perspective of the police officer.[240]

These two perspectives cannot coexist in a *Miranda* custody determination because using both would inquire into whether the officer acted as a man of reasonable caution given the facts known at the time of the seizure when the only relevant inquiry should be how a reasonable man in the suspect's position would have understood his situation.[241] Although a man of reasonable caution may have restrained a suspect in a similar fashion, the suspect could still feel restrained to the degree associated with a formal arrest because the officer's belief does not always bear on how the suspect feels.[242] Such a scenario violates Supreme Court precedent, defeats *Miranda*'s purpose, and implicates the *Berkemer* respondent's fear because

236. *See Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

237. *Berkemer*, 468 U.S. at 440.

238. *Id.* at 441–42.

239. Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

240. *See id.*; *Berkemer*, 468 U.S. at 440.

241. *See Berkemer*, 468 U.S. at 441–42; *Terry*, 392 U.S. 1 at 21–22.

242. *See Terry*, 392 U.S. at 21–22 (quoting *Carroll*, 267 U.S. at 162); *see also* Stansbury v. California, 511 U.S. 318, 323–25 (1994).

Miranda was designed to protect suspects from being placed in situations in which they feel compelled to speak against their will, such as when a suspect feels restrained to the degree associated with a formal arrest.[243] Because the *Terry* perspective cannot coexist in a *Miranda* custody determination, the reasonable person rule is a more appropriate rule to follow.[244]

2. Following the Reasonable Person Rule Does Not Violate Texas Precedent

Inquiring only as to how a reasonable person would have understood the situation does not violate the Texas Court of Criminal Appeals' precedent. The Court of Criminal Appeals noted in *Dowthitt v. State* that, under the four categories of custodial situations, "the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention."[245] While "investigative detention" is the language commonly used to describe a *Terry* stop,[246] this restriction is only applicable to the first three custodial situations: (1) when suspects are significantly deprived of their freedom of action; (2) suspects are told by an officer that they cannot leave; and (3) an officer creates a situation in which reasonable people would believe their freedom of movement is significantly restricted.[247] Additionally, these custodial situations are not exclusive.[248] A situation could still constitute *Miranda* custody even if it does not fit into any one of the four custodial situations.[249] If the requirement that the restriction on the suspect's freedom of movement must amount to more than that of an investigative detention is only applicable to some of the custodial situations, there can be circumstances that constitute *Miranda* custody despite the suspect being restrained only to the degree associated with an investigative detention.[250] Therefore, adhering to the rule that *Miranda* custody occurs when a reasonable person believes he is restrained to the degree associated with an arrest, even if he is realistically restrained only to the degree associated with an investigative detention, does not violate the court of

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243. *See* Miranda v. Arizona, 384 U.S. 436, 465 (1966); *see also Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

244. *See supra* text accompanying note 240 (explaining that the two tests have conflicting perspectives).

245. Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996).

246. *See, e.g.*, Bartlett v. State, 249 S.W.3d 658, 667 (Tex. App.—Austin 2008, pet. ref'd); Gonzalez v. State, No. 10-04-00164-CR, 2005 WL 1836939, at *5 (Tex. App.—Waco Aug. 3, 2005, pet. ref'd) (mem. op., not designated for publication).

247. *Dowthitt*, 931 S.W.2d at 255 (stating, "[c]oncerning the first through third situations," the restriction on the suspect's freedom of movement must rise "to the degree associated with an arrest as opposed to an investigative detention").

248. *See* State v. Ortiz, 382 S.W.3d 367, 376 (Tex. Crim. App. 2012).

249. *See id.*

250. *See id.* at 376–77.

criminal appeals' precedent. Additionally, uniformly following the reasonable person rule in Texas would further refine it.

3. Contributing to a More Uniform Standard

If Texas appellate courts would look uniformly to the reasonable person test, *Miranda* custody opinions could be utilized to determine more precisely when suspects reasonably believe they are restrained to the degree associated with an arrest. Because the appellate courts are split, however, cases incorporating a *Terry* analysis into a *Miranda* custody determination likely cannot be used by courts that do not incorporate *Terry* because those cases often do not determine how a reasonable person would have felt in the situation, but rather hold generally that the suspect either was or was not in *Miranda* custody.[251] This is a problem because if a Texas appellate court that does not incorporate *Terry* is faced with a situation analogous to a case from a Texas appellate court that does incorporate *Terry*, the former court would not be able to determine whether the latter court came to its conclusion based on the reasonable person test or based on *Terry*, unless the latter court specified how a reasonable person would have felt. In the meantime, if Texas appellate courts do not adopt any changes in their *Miranda* custody determinations, practitioners should be aware of the Texas appellate court split on the *Miranda* custody issue.

B. Approaching Custody in the Absence of Change

Without a uniformly adopted rule, practitioners should be aware of each appellate court's position on whether to incorporate *Terry* into a *Miranda* analysis.[252] Prosecutors and defense attorneys alike should tailor their arguments to follow the reviewing court's position. Prosecutors should be careful to only argue against a holding of *Miranda* custody using a *Terry* analysis when the reviewing appellate court adheres to that position. For example, the State's brief in *Bates v. State* focused primarily on proving that the stop was an investigative detention instead of an arrest.[253] The Texarkana Appellate Court, however, relied only on how a reasonable person would have perceived the situation and held against the State, even noting that Bates was in custody regardless of whether the stop was an investigative detention.[254] On the other hand, the State's brief in *Roberts v. State* argued that a reasonable person would not have felt restrained to the degree

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251. *See, e.g.*, *Bartlett*, 249 S.W.3d at 669–70.

252. *See, e.g.*, *id.*

253. *See* Brief for Appellee (State) at 25–30, Bates v. State, 494 S.W.3d 256 (Tex. App.—Texarkana 2015, pet. ref'd) (No. 06-14-00096-CR).

254. *Bates*, 494 S.W.3d at 271–72.

associated with a formal arrest.[255] In that case, the Amarillo Court of Appeals held for the State for reasons similar to the arguments made in the State's brief.[256] While there certainly may be other reasons these courts held as they did, the underlying point is that these courts have heard the arguments in favor of using *Terry* in a *Miranda* analysis and rejected them.[257] Similarly, defense attorneys should argue that the restraint was not reasonable under *Terry* in addition to arguing how a reasonable person would have felt if the Texas appellate court incorporates *Terry* in its *Miranda* custody analysis. Instead of relying on precedent from other jurisdictions and devoting an appellate brief to a previously rejected position, attorneys would be better off knowing which position the court follows and devoting the entire brief to that position.

V. A NEW RULE BLOOMING FROM THE OLD

Miranda and *Terry* should not be intermingled in a determination of *Miranda* custody. Under *Berkemer*, the only relevant inquiry in determining *Miranda* custody is how a reasonable suspect would have understood the situation, and *Stansbury* added to this ruling by holding the officer's subjective views, if not disclosed to the suspect, are not relevant to the determination of custody.[258] While the Texas Court of Criminal Appeals has held that certain custodial situations must be more than an investigative detention to constitute *Miranda* custody, it has not concluded that all situations must be more than an investigative detention to be *Miranda* custody.[259] It has, however, said that the four custodial situations in *Dowthitt* are not an exhaustive list and situations that do not fall under any one of the situations could still be *Miranda* custody.[260]

The Houston, Waco, Austin, and Dallas appellate courts incorrectly incorporate *Terry* considerations into their *Miranda* custody analyses.[261] These courts violate *Stansbury* when they analyze the officer's undisclosed perspective to determine *Miranda* custody and misinterpret *Dowthitt* when they hold that no investigative detention constitutes *Miranda* custody.[262]

The Amarillo and Texarkana appellate courts correctly look only to whether a reasonable person in the suspect's position would believe they

255. Brief for the State at 28–31, Roberts v. State, No. 07-15-00282-CR, 2017 WL 282377 (Tex. App.—Amarillo June 28, 2017, no pet. h.).

256. *See id.*; *Roberts*, 2017 WL 282377, at *16.

257. *See Bates*, 494 S.W.3d at 271; State v. Ortiz, 346 S.W.3d 127, 133 (Tex. App.—Amarillo 2011, pet. granted), *aff'd*, 382 S.W.3d 367 (Tex. Crim. App. 2012).

258. *See supra* Part II.B.

259. *See supra* Part II.C.

260. *See* Dowthitt v. State, 931 S.W.2d 244, 249, 255 (Tex. Crim. App. 1966).

261. *See supra* note 136 and accompanying text (describing misapplications of a *Terry* analysis in a *Miranda* custody analysis).

262. *See supra* Part III.A.

were restrained to the degree associated with a formal arrest.[263] This rule adheres to *Miranda*'s purpose more closely than a rule incorporating *Terry* into a *Miranda* custody analysis and is compatible with the Texas Court of Criminal Appeals' precedent.[264] Unlike the Houston, Waco, Austin, and Dallas appellate courts, the Amarillo and Texarkana appellate courts do not run the risk of violating a suspect's constitutional protections.[265] The purpose of *Miranda* is to protect suspects from coercive environments.[266] A coercive environment defined as custody under either *Miranda* or *Terry* would be as coercive.[267]

263. *See supra* Part III.B.
264. *See supra* Part IV.
265. *See supra* Parts III.A–B.
266. *See supra* Part II.A.1.
267. *See supra* Part II.A.1.