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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari from the Colorado Court of Appeals Case No. 2018CA1877	
Petitioner RACHEL ANN NIEMEYER v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 6,267 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-Appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

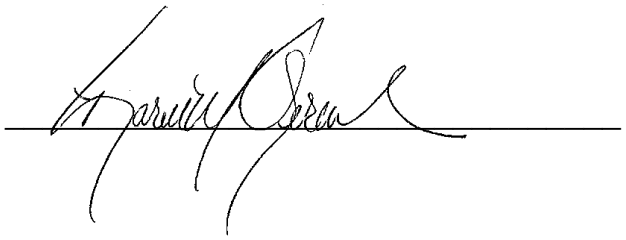

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

ISSUE ANNOUNCED BY THE COURT

Whether an accused is in custody where she is intoxicated, without transportation, required to undergo testing, and under the supervision and direction of police who refuse to consider her requests to leave until she submits to testing and interrogation?

STATEMENT OF THE CASE

Rachel Niemeyer was charged with first degree murder,[1] second degree assault,[2] and two counts of prohibited use of a weapon.[3] CF, p64. She tried her case to a jury that returned verdicts finding her guilty of second degree murder[4] and the remaining charged counts. CF, p605; Tr. (5-14-18) p316:2-21. Judgment of conviction entered on August 14, 2018, when the trial court imposed a controlling sentence of eighteen years in the Department of Corrections. CF, p689; Tr. (8-14-18) pp29-30.

Ms. Niemeyer timely filed a notice of appeal, CF, p697, and the Court of

[1] Section 18-3-102(1)(a), C.R.S., F1
[2] Section 18-3-203(1)(c), C.R.S., F4 (causing bodily injury with intent to prevent peace officer from performing a lawful duty)
[3] Sections 18-12-106(1)(a), C.R.S. (knowingly and unlawfully aims) and (1)(d), C.R.S. (possess while intoxicated), M2.
[4] Section 18-3-103(1), C.R.S., F2

Appeals affirmed the conviction in an unpublished opinion. (Attached as Appendix A).

STATEMENT OF THE FACTS

Police were called to a motel in Craig where they found Ms. Niemeyer inside a room, kneeling in front of her husband, Michael Freese, and holding his head in her hands. (Edwards BC). Police ushered her outside where she remained with and under the direction of Officer Roland, while paramedics assisted her husband. Tr. (3-19-18) pp47-48, 53-54; *see* (Roland BC 1). Mr. Freese had suffered a gunshot wound to the head and subsequently died from his injuries. Tr. (5-9-18) pp15-16, 50:3-4.

Both Mr. Freese and Ms. Niemeyer were significantly intoxicated - .237 and .231, respectively – and neither police nor medical personnel knew who pulled the trigger or the circumstances of the shooting. Tr. (5-8-18) pp163:7-19 (injury could have been accidental or self-inflicted), 199-200 (detective did not know who shot the decedent or how it occurred); (5-9-18) pp25:19 (same, from treating doctor), 66:10-12 (could be self-inflicted). DNA and fingerprint analysis did not support that Ms. Niemeyer was last in possession of the gun. Id., pp134-35, 176-77.

But that information was revealed later; police undertook no investigation prior to Ms. Niemeyer's arrest except to bag and swab Ms. Niemeyer's hands for

gunshot residue – which was negative (Tr. (5-9-18) p117:22-25) - and to interrogate her. From the time police responded to the motel, Ms. Niemeyer, who was distraught and intoxicated, was never outside the presence, surveillance, or direction of police. Tr. (3-19-18) pp59-60; *see* Env. (Roland BC 1).

Officer Roland arrived at the hotel and approached Ms. Niemeyer to inquire what had happened. (Roland BC 1, 1:39). Ms. Niemeyer relayed that Mr. Freese had the gun but she did not think it was loaded when he pulled the trigger, until she saw blood. (Roland BC 1, 2:18-3:16). About six minutes into the conversation, the paramedics arrived; they removed Mr. Freese from the room four minutes later. (Roland BC 1, 6:03, 10:06).

Roland was still questioning Ms. Niemeyer as she tried to enter her hotel room for a cigarette. He stopped her. (Roland BC 1, 10:40). Ms. Niemeyer told Roland Mr. Freese often threatened to shoot himself and reiterated that she thought the gun was empty. (Roland BC 1, 13:07-14:41). She also reiterated what Roland had perceived: she was "drunk off [her] ass." (Roland BC 1, 18:12, 5:12) (Roland commenting he can tell she had a lot to drink). Roland asked Ms. Niemeyer if she wanted a victim advocate; she replied, "can I please just go see my husband?" He asked if she was cold. Ms. Niemeyer replied that she needed to go to the hospital. (Roland BC 1, 18:45-19:50).

Eventually, after another officer relayed police were "going to be a while" in the room, Officer Roland told Ms. Niemeyer they were going to take her "someplace warm." (Roland BC 2, 11:10). She followed Officer Roland to his truck; he drove her to the police station, despite her requests to be taken to the hospital or ride there in the ambulance. Tr. (3-19-18) pp53-54, 56:3-10; (Roland BC 1, 1-5:11, 6:43, 7:50, 9:56, 10:50); (Roland BC 2, 1-:2:28, 17:37-18:02) (asking again if her husband was okay and saying she needed to go to the hospital; Roland responded they were going to the station). She had been drinking for about five hours, (Roland BC 2, 10:41) and could not drive herself because she was intoxicated. Tr. (3-19-18) p61:6-7.

At the station, Officer Roland directed her to an interrogation room and retrieved plastic bags and zip ties to preserve and collect any gunshot residue. (Roland BC 2, 24:21-25: 50) He did not ask permission, but instead explained "it's just procedure" to make sure her statements comport with the evidence. (Roland BC 3, 1-1:44). Ms. Niemeyer was visibly uncomfortable with the bags and asked more than once to remove them; at one point, she removed one herself and was immediately confronted by officers. (PSC, :22); (Roland BC 4, 1-1:17) ("nope," "you gotta leave them on.").

Ms. Niemeyer had been detained for about two hours when Detective Rimmer entered the room; he knew she was intoxicated and without transportation. Tr. (3-19-18) pp15:18-21, 20:21, 29:20-22. He swabbed her hands and face for GSR while he told her she was not under arrest. (PSC, 2:50-3:42). Ms. Niemeyer replied, "I know I'm not under arrest. If I was under arrest I'd be in handcuffs." Rimmer affirmed, "right, exactly." Ms. Niemeyer added that her rights would have been read to her, and Rimmer again assented. PSC, 2:39-2:55. When he finished, Ms. Niemeyer again asked to go to the hospital. Rimmer replied they had a couple things to do first, then he would "try" to get her up there. (PSC, 5:10). Rimmer did not inform Ms. Niemeyer she had rights short of being under arrest. Instead, all appearances to the contrary, he told her she was "not in custody." (PSC, 2:51). And while he told her she did not have to talk, he did not make her aware of the consequences of a decision to talk; he provided no advisement to ensure she understood her privilege against self-incrimination and her right to counsel in a custodial situation.

According to the detective, he viewed Ms. Niemeyer as a witness to a possible suicide, and it is "standard procedure to bag people's hands" in that circumstance so police can determine whether they fired a gun. Tr. (3-13-18) p21:12-20. Of course, as it was not her suicide, such standard practice made little

sense. Notably, though, police did not test Mr. Freese for gunshot residue, even though they were able to do so. Tr. (5-9-18) pp30-31. That, too, was policy. Id., pp119-20.

After returning from the bathroom under police escort, Ms. Niemeyer, likely believing the gunshot residue testing complete, asked, "so did I shoot him? Am I the one who shot him?" The detective responded, "that's what I'm here to talk to you about." (PSC, 6:30, 10:15-21). Rimmer still did not advise Ms. Niemeyer of her rights. Instead, he began the hour-long interrogation in earnest.

At Rimmer's behest, Ms. Niemeyer detailed her activities throughout the day. She then recounted that during the evening, both drunk, she and her husband began playing with her husband's rifle, which was a custom .22 caliber with a shorter than standard barrel. Tr. (5-9-18) pp209-10. Mr. Freese had assured her there were no bullets in the gun. They were "messing around," and each pulled the trigger a couple times without the gun firing. But "next thing [she knew], there was blood everywhere." (PSC, 16:59-20:35). During the interview, Ms. Niemeyer made several inquiries of the detective, as she was unable to remember clearly the night's events:

- Did I shoot him?
- That bastard. He said there were no bullets.

- Oh my God I shot him…I don't remember giving it back to him. I just remember screaming.
- I think I shot him. . .How else would it have happened?. . .Did he shoot himself?. . . How else would it have happened?. . . It was only us two in the room. . . Did I shoot him?. . . Did I shoot him? I think I shot him.
- I think I did it.
- I didn't do it.
- Yeah I thought he did it. But now that I think about it, I think I did.

(PSC, 18:05-45, 21:03-27:02, 32:45).

Here, for the first time, the detective advised Ms. Niemeyer of her constitutional rights. (PSC, 36:43 (he would "protect" her by informing her of her rights since "you admitted that you think you shot him"). Ms. Niemeyer immediately invoked her right to counsel. Too late, as the interrogation was over. Rimmer arrested her. (PSC, 37:23, 53:31-50) (police have "your side of the story" so "until we know more, this is what we're going to do.").

During booking at the jail, Ms. Niemeyer asked about her husband; she received no information. She requested a lawyer as she was told she could call from booking; police again deferred her request. Finally, she said, "I don't know

what happened. We were both drunk as shit." (BC 5 12:03-13:27, 24:51-25:12). Police did not take other hotel witnesses for statements. Tr. (3-19-18) p30:6.

SUMMARY OF THE ARGUMENT

From their initial response, police directed and controlled Ms. Niemeyer's movement. At their direction, over Ms. Niemeyer's protests to go to the hospital, police took her to the police station and placed her in an interrogation room. This contact lasted about two hours. Still without her permission, the police zip-tied GSR bags over her hands. They admonished her to leave them on when she tried to remove them, and they repeatedly ignored her further pleas to leave and to be taken to the hospital.

Police knew she was significantly intoxicated, without transportation, and unable to leave the interrogation room without permission and a police escort. At this point, still without a *Miranda* advisement, Detective Rimmer interrogated her for an hour. Rimmer finally informed her of her rights after she (drunkenly and inconsistently) implicated herself as the shooter, when it was too late for her to exercise them. She was in custody as early as her transport to the police station, but certainly at the placement of zip-tied bags on her wrists, when policed created a situation where she reasonably would not believe she could extricate herself from

their presence. They were obligated to advise her of her rights against self-incrimination before interrogating her.

ARGUMENT

Ms. Niemeyer was in custody and police were required to advise her of her rights against self-incrimination and to counsel before interrogating her.

A. Standard of Review

A custody determination presents a mixed question of law and fact. An appellate court defers to a trial court's findings of historical fact where they are supported by competent evidence in the record and may also consider undisputed facts evident in the record, including independent review of video recordings. The court reviews *de novo* a legal conclusion whether the facts amount to custody. *People v. Davis*, 2019 CO 84, ¶18.

Errors of constitutional dimension preserved by objection are reviewed for constitutional harmless error, and require reversal unless the prosecution proves the error was harmless beyond a reasonable doubt. *James v. People*, 426 P.3d 336, 340 (Colo. 2018), citing *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1967). Reversal is required if there is a reasonable possibility that the error might have contributed to the conviction. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012) (*quoting Chapman v. California*, 386 U.S. 18, 24 (1967)).

Ms. Niemeyer preserved this issue by filing a motion to suppress statements and evidence resulting from statements she made during her police station interrogation. 5th Supp.R. (motion to suppress). The trial court denied the motion after a hearing. Tr. (3-19-18) p96:15.

B. Law and Analysis

1. The determination of custody and the importance of *Miranda* warnings.

State and federal constitutions guarantee that no person shall be compelled to be a witness against himself in any criminal case. U.S. Const. amend. V; Colo. Const. art. II, §18; *People v. Clark*, 2020 CO 36, ¶24. In order to safeguard a suspect's Fifth Amendment right against self-incrimination, the prosecution may not present, in its case-in-chief, statements derived from custodial interrogation unless the suspect was advised of his constitutional rights, including his right to remain silent and to an attorney, and validly waived those rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Mumford v. People*, 2012 CO 2.

The *Miranda* Court recognized the constitutional foundations of the privilege against self-incrimination and the police practices that necessitated protections for citizens. Broadly, "the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens[;]" "our accusatory system of criminal justice demands

that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* at 460. The privilege is fulfilled only when a person is guaranteed the right to remain silent unless she chooses to speak in the unfettered exercise of her own will. *Miranda* at 460.

The Court considered police practices at the time, including police manuals that stressed privacy: "in his office, the investigator possesses all the advantages." *Miranda* at 449-50. There, in combined cases, the defendants were questioned in a room cut off from the outside world and were not given a full and effective warning of their rights at the outset of the interrogation process. *Miranda* at 445. Being that compulsion is greatest in a police station, and that coercion can be mental as well as physical, it is incumbent on interrogating police to undertake appropriate safeguards "*at the outset of the interrogation*" to ensure that a person's statements were truly the product of free choice. *Miranda*, 448-50, 457, 459-60 (the privilege is as broad as the mischief it seeks to guard against) (emphasis added).

The threshold requirement for exercising a right is to be made aware of it, which also serves to make a person aware that she is in the presence of adversaries rather than those acting in her interest. *Miranda* at 467-69. The advisement is an

"absolute pre-requisite to interrogation" and is required to inform a person in custody of her rights, in clear and unequivocal terms, so that she, not police, may decide whether to exercise them. *Miranda* at 471, 480-81 (finding a person's exercise of her rights does not impede police from carrying out their investigative function). Thus, the prosecution may not use statements stemming from custodial interrogation unless it demonstrates the use of procedural safeguards – the advisement – to secure the privilege against self-incrimination. *Miranda* at 444.

Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom of action in any significant way." *Miranda* at 444, 467 (the privilege serves to protect persons in all settings in which their freedom of action is curtailed in any significant way). "*Miranda* is a constitutional decision, and state law enforcement officers are bound by its strictures." *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002), referencing *Dickerson v. United States*, 530 U.S. 428, 432, 438-39 (2000).

Over time, courts grappled with what circumstances are custodial. In *Oregon v. Mathiason*, for example, defendant came voluntarily to the police station for an interview, after which he left; he was not deprived of his freedom of action in any significant way, so police suspicion and the setting of the police station did

not convert a noncustodial situation to a coercive one. 429 U.S. 492, 495 (1977) (The *Miranda* warnings are required when there has been "such a restriction on a person's freedom as to render him 'in custody'"); *compare Orozco v. Texas*, 394 U.S. 324, 325 (1969) (defendant was in custody in his home where four officers entered his bedroom; he was "not free to go where he pleased but was 'under arrest'"). Citing *Oregon v. Mathiason*, *supra*, *California v. Beheler* defined the custody inquiry as "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." 463 U.S. 1121, 1125 (1983); *accord Matheny* at 467.

"Two discrete inquiries are essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Having made such determinations, a court must then apply an objective test to resolve "the ultimate inquiry:" was there a formal arrest or restrain on freedom of movement of the degree associated with a formal arrest? *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *JDB v. North Carolina*, 564 U.S. 261, 270 (2011); *see Matheny* at 459 (adopting Keohane's mixed question standard). Plainly said, "[c]ustody for *Miranda* purposes is a state of mind. When police create a situation in which a

suspect reasonably does not believe [she] is free to escape their clutches, [she] is in custody and, regardless of their intentions (not that there's any doubt about what those intentions were in this case), entitled to the *Miranda* warnings." *United States v. Slaight*, 620 F.3d 816, 820 (7th Cir. 2010).

The custody analysis is an objective one, intended to avoid burdening police with the task of anticipating the idiosyncrasies of every individual and how those traits affect a person's subjective state of mind. The objective inquiry "involves no consideration of the 'actual mindset' of the particular person subjected to police questioning, and gives clear guidance to police. *JDB* at 271; *accord Matheny* at 465. That said, an officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, 'by word or deed" to the person being questioned where they affect how a reasonable person in such position would gauge the breadth of her freedom of action. *Stansbury v. California*, 511 U.S. 318, 322, 325 (1994); *Matheny* at 464-65 (same); *see People v. Minjarez*, 81 P.3d 348 356 (Colo. 2003) (a factor in the totality of the circumstances includes the facts that the interrogating officer communicated his belief in defendant's culpability to the defendant). So, too, characteristics – circumstances – known to police are relevant to inform what a reasonable person in the same circumstances would perceive. *JDB* at 271

(finding the age of a detained juvenile, where known to police, must factor into a custody analysis).

It is necessary to evaluate all circumstances of an interrogation, "including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive [their] freedom to leave.'" *JDB* at 270-71, citing *Stansbury* at 325; *Minjarez* at 353 (a court's first responsibility in a custody analysis is to examine all the circumstances under which an interrogation occurred). To this end, courts have delineated factors to help determine whether a person was in custody for *Miranda* purposes. In Colorado, these include:

> (1) the time, place, and purpose of the encounter;
> (2) the persons present during the interrogation;
> (3) the words spoken by the officer to the defendant;
> (4) the officer's tone of voice and general demeanor;
> (5) the length and mood of the interrogation;
> (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
> (7) the officer's response to any questions asked by the defendant;
> (8) whether directions were given to the defendant during the interrogation; and
> (9) the defendant's verbal or nonverbal response to such directions.

Davis, ¶19; *accord Matheny* at 465-66; *Mumford*, ¶13; *People v. Willoughby*, 2023 CO 10, ¶21.

But rote application of factors that may or may not suggest custody in any given case is less important than an evaluation of the entirety of the encounter. A factor that may, generally, dictate against custody – telling a person they are free to leave – may actually be a tactic to avoid *Miranda* warnings and induce a person to talk to police. Indeed, police interrogation tactics have "adapted" to the requirement of *Miranda* warnings:

> Police recast what would otherwise be a custodial interrogation as a non-custodial interview by telling the suspect that [she] is not under arrest and that [she] is free to leave—sometimes even after detectives have transported the suspect to the stationhouse with the express purpose of questioning [her] inside the interrogation room and eliciting incriminating information.

Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 Mich. L. Review 1000, 1017 (2001). This circumvents the legal necessity of having to issue *Miranda* warnings and avoids the risk that the suspect will terminate the interrogation by exercising her rights. 99 Mich. L. Review at 1017. It is an attempt to disguise a custodial encounter as noncustodial to tell a

suspect they are "free to leave when all external circumstances appear to the contrary;" *Minjarez* at 357; *Miranda* warnings are still required.

2. The custody analysis here.

Relying on *People v. Hankins*, 201 P.3d 1215 (Colo. 2009) (that reversed a custody ruling from the district court in this case), the court found that the circumstances here did not compel suppression: Ms. Niemeyer was not being investigated for criminal activity. And while "I certainly might be concerned with [sic] I was a witness and someone comes over and puts bags around my hands . . . the only evidence that I have is that it's protocol." Tr. (3-13-18) p92:10-21. Even if police believed she committed a crime, there was no obligation to advise her of her *Miranda* rights. Id. pp94-95.

The trial court thus made insufficient findings to support a conclusion that Ms. Niemeyer was not in custody, and its analysis was otherwise inapposite. Subjective police intent or beliefs do not inform the issue, nor does the fact that defendant is or is not suspected of a crime, unless that belief is conveyed to the person being interrogated. *Stansbury* at 323; *Hankins* at 1218; *Clark* at ¶26. Rather, the inquiry is how a reasonable person in defendant's position would gauge the breadth of her freedom of action, *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984), protocol or not.

For its part, the Court of Appeals' majority opinion found:

- The purpose of the police "encounter" was "to determine what had happened;"
- Ms. Niemeyer was "severely intoxicated and obviously unsafe to drive;"
- Police did not draw their weapons or place her in handcuffs and their tone was conversational rather than accusatory; they even gave Ms. Niemeyer a blanket and retrieved her cigarettes for her;
- After riding with police to the station, police escorted her into an interview room and zip-tied bags around her hands, but told her she was not under arrest;
- Police agreed to help her go to the hospital after testing procedure was completed.

Slip op., ¶27. With that, the majority held that "a reasonable person in Niemeyer's position would certainly have considered herself not free to leave. But that is not the test for 'custody.'" The majority continued:

> Before Detective Rimmer placed Niemeyer under arrest, neither the police nor the victim advocate did or said anything that would have led a reasonable person to expect or believe that they were not going anywhere anytime soon. Indeed, just the contrary, the officer's actions and statements would have led a reasonable

> person to believe that she would be on her way to the hospital to check on her husband as soon as the hand-bagging procedure was completed.[5] A reasonable person in Niemeyer's situation would not have considered herself deprived of freedom of action to the degree associated with a formal arrest."

Slip op., ¶¶28-29. Finally, because the hand-bagging procedure "would not convey the message that the person is under arrest," that "in and of itself" did not support a finding of custody. *Slip op*., ¶30. The majority's conclusions are not supported by the record and do not accurately reflect the analysis required for a determination of custody.

First, contrary to the division's analysis here, *slip op*., ¶28, whether a person in such circumstances would have considered herself free to leave is not the ultimate inquiry, *see People v. NAS*, 2014 CO 65, ¶20, but it *is* a relevant inquiry. *See Keohane* at 112 (relevant inquiries are what were the circumstances of the interrogation and whether a reasonable person in those circumstances have felt at liberty to terminate the interrogation and leave); *JDB* at 270 (same); *Effland v. People*, 240 P.3d 868, 874 (Colo. 2010) (same); *People v. Klinck*, 259 P.3d 489, 493 (Colo. 2011) (same); *Andrew v. White*, 62 F4th 1299, 1333 (10th Cir. 2023)

[5] This is contradicted by the majority's voluntariness findings: "It is a stretch to say that such vague answers amounted to a promise of any sort, implied or otherwise." *Slip op*., ¶39.

same); *Matheny* at 459-60 (adopting *Keohane* but omitting reference to the second inquiry); *Minjarez* at 353 (same). These inquiries are necessary to answer the ultimate inquiry whether there was a restraint on a person's freedom or movement to a degree associated with formal arrest. *Keohane* at 112; *People v. Cisneros*, 2014 COA 49, ¶72 (to determine the ultimate inquiry a court considers whether a reasonable person would have felt free to terminate the interrogation and leave).

Second, finding that the purpose of the encounter was to "determine what had happened" makes an extended, coercive situation sound benign. Police tested and questioned the one person present in the hotel room who was not shot. True, police obtained her cigarettes and brought her a blanket. *Slip op*., ¶27. But that was because they had restrained her movement. (Roland BC 1, 10:45). In that vein, she accompanied Roland to the police station. But it was at his direction and despite her pleas to see her husband. (Roland BC 1, 18:45-19:50; Roland BC 2, 17:55). Similarly, while Ms. Niemeyer rode with the police because she could not drive, her intoxication was also readily apparent to police. (Roland BC 1, 5:29). She was reliant on them for transportation wherever they chose to take her, and her perception, judgment, and memory were also that of an intoxicated person.

Third, she was not placed in handcuffs, but there is no meaningful distinction between handcuffs and zip-ties; both are restraints and a person who is

restrained is likely in custody. *People v. Holt*, 233 P.3d 1194, 1197-98 (Colo. 2010); 2 Wayne R. LaFave, Crim. Proc., §6.6(f) (4th ed.) (a finding of custody is likely with physical restraints or placing a person in a patrol car). Ms. Niemeyer had large bags zip-tied to her hands without her permission and under the direction of police who refused to remove them, and that prevented any significant movement on her part. *See* (Roland BC 4, 1:13, 14:50). While the use of plastic bags to preserve evidence may not automatically convert the situation into a custodial one, "we have in this case a situation where the person was forced to keep the bags on her hands against her will and for about an hour." *Slip op*., ¶54, Richman, J., *dissenting*. *See also Self v. Milyard*, 2012 WL 365998, *19 (D. Colo. 2012) (defendant reluctantly gave permission for GSR bags, but was nevertheless in custody when police secured them with handcuffs on his porch).

Fourth, the circumstances do not indicate a reasonable person would have expected to be "on her way" soon. *Slip op*., ¶29. Police refused her repeated requests to go anywhere but the station. In fact, during the two hours between the time police first contacted Ms. Niemeyer and Rimmer's interrogation started, Ms. Niemeyer:

> made no fewer than a dozen requests to go [to] the hospital. But rather than take her to the hospital, the police repeatedly brushed her requests aside, either

> ignoring them altogether or responding with comments like 'we gotta take care of our stuff first' and 'we'll work on that as soon as we can.' Far from assuring [Ms. Niemeyer that she would be going to the hospital 'soon,' the officers' responses – and non-responses, for that matter – communicated that they would not even consider taking her to the hospital until after they completed any number of unspecified, potentially time-consuming tasks."

Slip op., ¶52, Richman, J., *dissenting*. *Compare United States v. Wallace*, 178 Fed. Appx. 76, 80 (2d Cir. 2006) (no custody where defendant was told he was free to leave, said he wanted to leave, and police took him home); *People v. Zaragoza*, 374 P.3d 344, 371 (Calif. 2016) (no custody where defendant voluntarily went to station, was not handcuffed or restrained, told he was not under arrest, and police drove him home after the interview even though he did not ask to leave).

Here, Ms. Niemeyer did not want to be there (and it was possible to have questioned her at the hospital (Tr. (3-19-18) p31:9)), but her hands had been zip-tied in large plastic bags without her consent and she could not leave the room without police escort. Tr. (3-13-18) pp26-27. *See Commonwealth v. Medley*, 612 A.2d 430, 433 (Pa. 1992) (where, as here, a person is transported to the police station and placed in a secure waiting area until interrogated, and has been frisked and effectively handcuffed, she is in custody); *Effland* at 874-76 (custody found

even where defendant's mobility was impeded by medical – rather than police - reasons and defendant was informed he was not under arrest but told police he did not want to speak to them); *compare Matheny* at 467 (defendant was asked – not told – to come to the station, he drove himself and was met by his mother, and he was told he could leave at any time). Unlike *Hankins*, where the defendant agreed to officers' requests to transport him to the burial site, Ms. Niemeyer was without options; she "had every reason to believe she would not be briefly detained and then released." *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001); *see* LaFave, Crim. Proc., §6.6(d) (if the "invitation" to the station involves going in the company of police, a finding of custody is much more likely).

Aside from the question whether police would ever have taken Ms. Niemeyer to the hospital – and all indications are they would not have[6] - the record affirmatively does not support a reasonable conclusion her detention would end once testing was complete, *slip op*., ¶29, since that marked the beginning of Rimmer's interrogation.

[6] *Accord slip op*., ¶53, Richman, J., *dissenting* (Rimmer did not offer to take her to the hospital after swabbing her hands; instead, when she asked, "'can I go to the hospital now and see my husband?' . . .he responded, "U]m, there's a couple things I gotta do here first, and then I'll work on trying to get you up there.'").

Finally, Ms. Niemeyer's intoxication is a relevant circumstance. Indeed, any circumstance that "'would have affected how a reasonable person' in the suspect's position 'would perceive their freedom to leave'" is relevant to the custody analysis. *JDB* at 270-71. In *JDB*, for example, police detained a 13-year-old boy at school after having him escorted from class by a school resource officer. He was interrogated by police and school administrators without a guardian, and confessed after learning he could be held in a detention facility if he chose not to talk. Even though he was then told he could refuse to answer questions, how a reasonable 13-year-old would understand his freedom to terminate questioning and leave is vastly different, obviously, from someone with more age and experience:

> Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity.

JDB at 275-76. Here, too, Ms. Niemeyer's intoxication and lack of transportation were objectively observable and they inform how someone in her position would gauge her freedom of movement.

Finally, Rimmer was not accusatory and he told Ms. Niemeyer she was not "under arrest." But a conversational tone does not render the totality of the circumstances noncustodial. "[B]eing polite to a suspect questioned in a police station and telling him repeatedly that he's free to end the questioning and leave do not create a safe harbor for police who would prefer to give *Miranda* warnings after the suspect has confessed rather than before." *Slaight* at 820. He was interrogating her to determine whether she fired the gun, and he waited to advise her until after she made incriminating statements. (PSC, 10:15-10:50, 37:00).

Likewise, an officer's statement that suspect is "free to leave" is not sufficient to establish that an interview was non-custodial, when all external circumstances appear to the contrary." *People v. Elmarr,* 181 P.3d 1157, 1163 (Colo. 2008); *accord Minjarez* at 357 (same, finding law enforcement "must begin this type of interrogation with the Miranda advisements); *Buck v. State,* 956 A.2d 884, 908 (Md. 2008) (finding custody despite "what the detectives said about . . . not being under arrest and being free to leave," in part because the detectives used "catchphrases" in an effort to create an interrogation that could be labeled non-

custodial); *United States v. Colonna*, 511 F.3d 431, 436 (4th Cir. 2007) (FBI agent's initial advisement that the defendant was not under arrest was nullified by agent's executing a search warrant for the defendant's house early in the morning, escorting him to an FBI cruiser, and questioning him for three hours in the cruiser); *accord* LaFave, *Criminal Procedure*, §6.6(d), n.64 (noting an assurance the suspect is free to leave "will not carry the day where it is, in effect, nullified by other police conduct").

Here, Rimmer confirmed Ms. Niemeyer's understanding of a formal arrest, but he did nothing to ensure she was aware of or could freely, fully, and knowingly exercise her Fifth Amendment rights in that custodial setting. Rimmer was likely aware that such a statement in an official record may be viewed by a court as a factor tending against custody. *E.g., Matheny* at 465 (finding no custody and noting defendant was told he was free to leave and not under arrest); *People v. Dracon* 884 P.2d 712, 717 (Colo. 1994) (finding custody and noting defendant was never told she was free to leave); *Elmarr* at 1163 (even though a statement that a person is free to leave is "not sufficient" to establish an interview is non-custodial, it was important that police never told defendant he was not under arrest or free to leave); *Buck* at 908 (using non-custodial "catchphrases"). But he left it to Ms.

Niemeyer, in her intoxicated state, to intuit her right against self-incrimination and choose to exercise it.

The totality of circumstances shows that Ms. Niemeyer was under police control from the initial police response and was in continuous police custody that required an advisement of her constitutional protections before questioning from the time she entered the police car, but certainly when police zip-tied bags to her hands. Indeed, the defendant in *Dracon* was in custody where, absent intoxication and restraints, she was transported to the station in a police car, was questioned for several hours, and had her movements curtailed while there. *Dracon* at 717. Ms. Niemeyer was distraught and drunk. She had no practical or realistic ability to refuse police instructions, leave their presence, or end the encounter, as police refused to leave her at the motel or take her anywhere but the police station. She was in a closed interrogation room with a detective that knew there were two people in the motel room and chose to test only one of them for gunshot residue, obviously seeking evidence that she was the shooter. She had no family in the area, she was not told she could make a phone call for a ride or any other purpose, and she had no mode of transportation because she was intoxicated and could not drive. *Compare State v. Huffaker*, 374 P.3d 563, 569 (Id. 2016) (not restrained by law enforcement where defendant lived a 10-minute walk away); *United States v.*

Scheets, 188 F.3d 829, 842 (7th Cir. 1999) (even though agents refused to let defendant drive because he was intoxicated, he had money to secure transportation or use a hotel shuttle from the casino where he was detained).

Police were obligated to advise Ms. Niemeyer to make sure she understood her constitutional protections before speaking to them. Indeed, once she was so informed – too late, as the interrogation was over – she immediately exercised those rights. Tr. (3-19-18) pp40-41. Instead of ensuring that Ms. Niemeyer make a free and uncoerced choice whether to talk to police, she was, in fact, reliant on police to terminate the interrogation and let her leave. Obtaining statements under these circumstances is directly contrary to the constitutional protections our accusatory system affords its citizens as guaranteed by *Miranda et al.* and this Court's long-standing authority.

CONCLUSION

For the reasons and authorities above, Ms. Niemeyer requests that this Court find she was in custody when she was in the presence of police who should have, but failed, to inform her of her constitutional rights against self-incrimination and to counsel, and to reverse the Court of Appeals' majority that affirmed the denial of her suppression motion.

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CERTIFICATE OF SERVICE

I certify that, on October 30, 2023, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on Grant R. Fevurly of the Attorney General's Office.