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On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 08CA0974	
ANDREW WAYNE MUMFORD, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondents.	▲COURT USE ONLY▲ Case No. 10SC295
JOHN W. SUTHERS, Attorney General MELISSA D. ALLEN, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5785Telephone: FAX: (303) 866-3955 E-Mail: melissa.allen@state.co.us Registration Number: 23155 *Counsel of Record	

RESPONDENT'S ANSWER 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:

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/s/ Melissa D. Allen
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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the court of appeals erred in determining that the defendant was not in custody for purposes of *Miranda*.

STATEMENT OF THE CASE

On June 20, 2007, detectives with the CSPD Metro Vice Narcotics Unit executed a search warrant at defendant's home in Colorado Springs (3/19/08, pp. 23, 25, 30). In conjunction with that search, Detective Sarkisian asked defendant whether he had anything illegal in his residence (*Id.*, pp. 30-31). Defendant told the detective he had a small amount of cocaine in his bedroom, and described where it could be found (*Id.*, pp. 31-32). The detective found the illegal substance, which later tested positive for cocaine (*Id.*, pp. 134-35).

The prosecution charged defendant with Possession of a Controlled Substance—Schedule II (cocaine)—1 gram or less (F-6), on July 6, 2007 (File, 9-10). A jury found him guilty on March 19, 2008 (File, p. 50). The court thereafter sentenced defendant to 2 years of supervised probation (*Id.*). The court of appeals affirmed the judgment

on March 18, 2010. This Court granted the Petition for Writ of Certiorari in part on November 30, 2010.

STATEMENT OF THE FACTS

I. Motion to suppress

Search and arrest warrants were executed at defendant's home in connection with one of defendant's friends named Timmerman (3/18/09, pp. 7-8). Both warrants related directly to Timmerman and Timmerman's drug transactions out of the home (*Id.*, pp. 7-9). Uniformed police officers knocked on the front door of the residence and cleared it (*Id.*, p. 11). When they first entered the residence, Officer Huston saw Timmerman in the living room and arrested him pursuant to the warrant (*Id.*, pp. 37-38).

Huston testified that he did not have his gun drawn when he made the arrest, and defendant was not handcuffed (*Id.*, pp. 38-39). He and his partner handcuffed Timmerman due to the warrant, and also handcuffed another individual named Huery, who was observed holding marijuana (*Id.*, p. 32). The officers detained those two individuals and

"asked everybody else to come out" and sit down at the curb (*Id.*, pp. 37, 39, 40-41).

Detective Sarkisian made contact with the individuals at the curb *Id.*, pp. 11-12). He had not anticipated contacting defendant, because the only person named in the warrant was Timmerman (*Id.*, p. 14), but approached defendant to determine what his "situation" was with the residence (*Id.*). When he spoke to defendant, Sarkisian was dressed in street clothes, wearing a black vest that said "sheriff" on the front and back (*Id.*, pp. 14-15). His weapon was concealed under his clothing (*Id.*, p. 15). He spoke in a conversational tone, and did not threaten defendant (*Id.*, p. 17). Defendant acknowledged that he lived there, at which point Detective Sarkisian asked whether he had "anything in the room or in the house that [the detective] need[ed] to know about because [they] were there with a search warrant for drugs" (*Id.*). Defendant responded that he had a small amount of personal-use cocaine in a drawer in his room, which the detective subsequently found (*Id.*, pp. 16-17). Detective Sarkisian did not believe defendant was

handcuffed at the time he spoke with him, although Timmerman and another occupant, named Hartman,[1] were (*Id.*, pp. 14, 17-18, 23-24, 34).

Defendant testified that he had been outside on his porch when an officer approached and showed him a picture of Timmerman (*Id.*, p. 51). At that point he was aware the police were looking for Timmerman and "that's the only person they were looking [for] as far as [he] knew" (*Id.*, p. 60). He said he went into the residence and brought Timmerman outside for the officer (*Id.*). When he turned back around to re-enter his home, he alleged that one officer pulled his gun and asked a second officer to detain him (*Id.*, p. 51-52). He said he was handcuffed and led to the curb where he was patted down, had his identification taken, and was questioned (*Id.*, pp. 52-53, 54-56).

Defendant claimed that at that point a second officer "made a couple of statements such as if you tell us the truth nothing bad will —

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[1] Sarkisian testified that Hartman was handcuffed because she was "being very belligerent and out of control" with the officers and "that's when [they] patted her down and she was handcuffed" (3/18/08, p. 24).

you won't get in trouble" (*Id.*, p. 52).[2] He also testified that another individual, who was inside the home and removed with them, was later allowed to leave (*Id.*, p. 53).

Defendant testified that he was still handcuffed when he spoke to Sarkisian, but acknowledged that "basically, he was just asking . . . who you are, do you live here, do you have any illegal drugs that we need to know about" (*Id.*, p. 66). Defendant admitted the detective's tone was conversational, "not . . . aggressive," and he was not threatening (*Id.*).

II. Trial court ruling

The trial court found that there was "no dispute" that the questioning was some form of interrogation, nor was there any dispute

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[2] In his opening brief, defendant claims that Detective Sarkisian made these statements to him. However, defendant testified that he was put in handcuffs, removed from his home to the curb, and then the "officers" patted him down before one of the officers "made a couple of statements" (3/18/08, p. 52). Later in his testimony he clarifies that Sarkisian came to talk to him *after* the alleged statements about cooperating were made (*Id.*, pp. 53, 55). On re-direct examination he claimed that Sarkisian also made a statement that he would not get in trouble if he cooperated, but it is clear from the testimony as a whole that that statement was made earlier by one of the officers who arrested Timmerman.

that there was no *Miranda* warning given. Thus, from the court's perspective the pivotal issue was custody (3/18/11, p. 92).

The court further found that:

> The ultimate question is under the totality of the circumstances was the police conduct such that it would have communicated to a reasonable person that the person was in police custody; custody of a degree that would be associated with formal arrest. The question is not simply whether the person felt free to leave. The case law is pretty clear that even if someone is not free to leave that's not the same as custody for purposes of Miranda.
>
> The defendant was told not to leave by a uniformed officer. He was told to go to the curb [in front of the residence] with another officer who was nearby, the curb was nearby. . . .
>
> The defendant's identification is requested, and apparently taken from him. Testimony wasn't perfectly clear on that, but that's the Court's finding as to what happened. At least two other people were with him at the curb. . . .
>
> There are one or more officers nearby . . . and [defendant watched as an additional person at the house was allowed to leave].
>
> [S]ome form of reassurance was given to the defendant, . . . something consistent with what

> the defendant testified, that he was told that if he cooperated things would go well for him.[3]

(3/18/08, pp. 93-96).

With respect to the disputed testimony regarding use of weapons and handcuffs, the court found that a weapon was drawn initially, but "the weapons were out for a relatively brief time [and] only during [the initial entry into the residence]" (*Id.*, p. 99). The court also found that defendant was not in handcuffs when he was seated on the curb and while speaking with Detective Sarkisian (*Id.*). The court further found as follows:

> [U]nder the totality of the circumstances . . . the defendant was not in custody at the time of the question and statement at issue. . . .
>
> According to the defendant he is told that if he is truthful all will be fine, some form of release. This is, in fact, what persuaded the defendant to speak at the time though his subjective analysis of the situation is not significant as the legal analysis the Court applies. . . .
>
> The questions were made in a conversational tone and were frankly relatively innocuous. Is there

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[3] Contrary to defendant's assertion, the court did not find that Detective Sarkisian gave defendant this "reassurance" (3/18/08 pp. 95-96; OB p. 5). The court found it came from another officer (*Id.*, pp. 95-96).

> anything I should know about, I believe was the phrasing. There is no testimony that a particular delay or lengthy hold [occurred] at the curb or from the time of the beginning of the encounter. The detective most closely associated with the defendant and . . . the group at the curb -- is Detective Sarkisian and he actually left the defendant. Once by his account; twice by the defendant's account, to go . . . into the residence to get the drugs. There are other officers about but there doesn't appear to be close guard. There doesn't appear to be a situation where the defendant and other people are surrounded by officers, so they're not physically barred.

(*Id.*, pp. 99-101).

The court then concluded that based on the totality of the circumstances, defendant was not in custody when he made his statements to Detective Sarkisian, and therefore a *Miranda* advisement was not required (*Id.*, p. 101). Thus, the trial court denied defendant's motion to suppress (*Id.*). Defendant was subsequently convicted at trial.

III. The court of appeals' opinion

Defendant directly appealed his conviction, contending that his statement regarding the cocaine should have been suppressed because,

as is relevant here, it was elicited without *Miranda* warnings. *People v. Mumford*, ___ P.3d ___, 2010 WL 961644, *1 (Colo. App. Mar. 18, 2010). The majority opinion concluded that at the time the detective asked his questions, "there is no doubt defendant was being temporarily detained." *Mumford*, at *2. However, the court also found that this temporary detention was permissible under the Fourth Amendment, and that under the totality of the circumstances, nothing elevated the encounter "from a temporary detention not requiring *Miranda* warnings to a custodial situation akin to formal arrest." *Id.*

The dissent opined that under the totality of the circumstances, defendant was in custody. *Id.* at *6 (Webb, J., dissenting). Judge Webb pointed out the factors in the present case that would lead "a reasonable person to consider himself in custody." *Id.* at *7 (citing *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001); *People v. Taylor*, 41 P.3d 681, 693 (Colo. 2002)). The dissent also pointed out the factors the majority noted, which were supported in the record, "that would lead to the opposite conclusion." *Id.* Finally, the dissent noted as follows:

> [E]ven if the remaining mix of factors still presents a close case, I would resolve the custody question in defendant's favor because, as the trial court found, "the defendant did hear some form of assurance" from the detective, which was "what persuaded the defendant to speak at that time. . . ."
>
> [H]ere, unless the police "had grounds to arrest," the detective lacked any legitimate basis for offering defendant "some form of reassurance . . . consistent with what the defendant testified," i.e., "if he cooperated things would go well for him." Thus, from this statement a reasonable person would infer he was in custody.

Id. at *7-8.

This Court then granted certiorari on the issue described above.

SUMMARY OF THE ARGUMENT

The trial court properly determined that defendant was not in custody for purposes of *Miranda*. While defendant was temporarily detained when the detective asked his questions, that detention was permissible under the Fourth Amendment, and nothing elevated the encounter from a temporary detention not requiring *Miranda* warnings to a custodial situation akin to formal arrest.

ARGUMENT

I. The court of appeals properly determined that defendant was not in custody for purposes of *Miranda*.

A. Standard of review

The People substantially agree with the standard of review articulated by defendant (OB p. 9). Determining whether an individual is in custody for *Miranda* purposes involves mixed questions of law and fact. *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002). A trial court's findings of historical fact are entitled to deference by a reviewing court and will not be disturbed if supported by competent evidence in the record. *People v. Howard*, 92 P.3d 445, 448 (Colo. 2004). However, a trial court's application of the legal standard to its findings of fact is a matter for de novo appellate review. *Matheny*, 46 P.3d at 462.

B. Law and analysis

Under the Fifth Amendment, a suspect has the right to remain silent and not be compelled to incriminate himself, and the right to have counsel present during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *People v. Jordan*, 891 P.2d 1010,

1014 (Colo. 1995). The police must give a criminal suspect *Miranda* warnings that advise him of these rights when the suspect is subject to custodial interrogation. *Miranda*, 384 U.S. at 478-479; *Matheny*, 46 P.3d at 462; *People v. Redderson*, 992 P.2d 1176, 1180 (Colo. 2000); *People v. Pease*, 934 P.2d 1374, 1377 (Colo. 1997). Thus, for *Miranda* to be applicable, two requirements must be satisfied: 1) the suspect must be in custody; and 2) the statement must be the product of police interrogation. *Redderson*, 992 P.2d at 1180.

The inquiry into whether a suspect is in custody for *Miranda* purposes is whether, under the totality of the circumstances, a reasonable person in the defendant's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *People v. Pascual*, 111 P.3d 471, 476 (Colo. 2005) (quoting *Matheny*, 46 P.3d at 468).

In *Miranda*, the United States Supreme Court's primary concern was with the potential for compulsion inherent in in-custody interrogations, such as where the "individual is swept from his

surroundings into police custody, thrust into an unfamiliar atmosphere, held incommunicado, surrounded by antagonistic forces, and run through menacing police interrogation procedure." *United States v. Gibson*, 392 F.2d 373, 375-76 (4th Cir. 1968). However, a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Beheler*, 463 U.S. at 1124.

Factors that a court may consider when determining whether a person is in custody include, but are not limited to, the following:

> [T]he time, place, and purpose of the interrogation; the persons present during the interrogation; the words the officers spoke to the suspect; the officers' tone of voice and general demeanor; the length and mood of the interrogation; whether any restraint or limitation was placed on the suspect's movement during

> interrogation; the officers' response to any of the suspect's questions; whether directions were given to the suspect during interrogation; and the suspect's verbal or nonverbal responses to such directions.

People v. Elmarr, 181 P.3d 1157, 1162 (Colo. 2008) (citing *Matheny*, 46 P.3d at 465-66); *see also People v. Taylor*, 41 P.3d 681, 691 (Colo. 2002). None of the aforementioned factors is determinative, and the question of custody is determined based upon the totality of the circumstances. *Elmarr*, 181 P.3d at 1162 (citing *People v. Dracon*, 884 P.2d 712, 717 (Colo. 1994)).

Here, the trial court's factual findings are supported by the record. Although defendant was present in the house when two officers in uniform served the warrant, he knew that the warrant was not for him (3/18/08, pp. 14, 60). While defendant claims that he was present "while nine armed officers were searching his home," the evidence showed that he was outside on the curb, and had no idea how many officers were in the house (OB p. 13). Moreover, while one officer pointed a gun at him upon his initial entry into the residence, the weapon was quickly re-

holstered, and no one displayed any weapons while defendant was questioned (3/18/08, p. 99).

The trial court specifically found that defendant was not handcuffed when he was questioned by the detective. *See Elmarr*, 181 P.3d at 1161 (reviewing court defers to trial court's findings of historical facts, if supported by the record). Thus, the fact that "[t]hey handcuffed the three other people who were with [defendant]," demonstrates that defendant knew he was not someone the officers considered a threat, nor was he a focus of their investigation (OB p. 13).

Detective Sarkisian's interaction with defendant was very short, and initially the detective approached him to determine his association with the residence (3/18/08, p. 15). He spoke in a conversational tone, and did not threaten defendant (*Id.*). Indeed, defendant himself acknowledged that Sarkisian asked him general questions in a non-threatening, non-aggressive, conversational manner (*Id.*, p. 66). The detective then asked defendant whether he had any drugs they needed to know about (*Id.*).

Defendant relies on several supreme court decisions in support of his custody argument. However, those cases are distinguishable.

In *Moore*, the defendant was escorted to his apartment, where a search pursuant to a warrant was already under way. When he entered, three officers drew their revolvers on him, causing him to raise his arms over his head out of fear of being shot. Although Moore was told that he was not under arrest, he stated that none of the officers indicated to him that he could leave his apartment. Moreover, during the thirty-five minute search, he remained on his couch with an officer standing right next to him. *People v. Moore*, 200 P.2d 66, 72-73 (Colo. 1995).

Meanwhile, back at the car in which the defendant had been a passenger, an officer had found suspected cocaine inside a wallet that contained Moore's driver's license. The wallet was taken inside the apartment where an officer asked Moore what was inside it. Moore responded, "Three eight-balls." *Moore*, 200 P.2d at 68, 72. "Thus, by the time Moore was asked the pointed question that led to his incriminating answer, officers already had stopped the car in which he

was a passenger, escorted him back to his apartment, pointed guns directly at him, and seized his wallet containing suspected cocaine." *Mumford*, at *4.

In contrast, here weapons were drawn only as the officers made initial entry into the house, and that was only for a very brief period of time. Further, the detective's questioning of defendant occurred soon after the warrant was served, outside of the residence and away from the ongoing search. Moreover, by his own admission, defendant knew he was not the subject of the warrant, and he acknowledged that the detective asked him non-threatening, general questions.

Also unpersuasive is defendant's reliance on *People v. Polander*, 41 P.3d 698 (Colo. 2001), where the supreme court found that a suspect, who had already been seized and in whose (joint) possession contraband had already been discovered, had every reason to understand that she would not be released after brief interrogation and that she was already effectively under arrest. *Polander*, 41 P.3d at 705. "In that situation, the suspect was not only aware that she had been seized and was no longer free to leave but also that the police had already discovered

evidence virtually precluding the possibility of her release from custody short of formal arrest." *People v. Holt*, 223 P.3d 1194, 1220 (Colo. 2010) (Coats, J., dissenting).

Here, defendant knew that the warrant being served was not for him. He was removed from the house and asked to sit on the curb while the search was under way. According to his testimony, he watched one of the home's occupants answer a few questions and then be allowed to leave the scene. Thus, "at the time of the detective's brief questioning, there was nothing to indicate that defendant was ultimately going to be arrested rather than simply detained temporarily during a search focused primarily on someone else." *Mumford*, at *3.

In *Holt, supra*, this Court found that certain circumstances persuaded it that the defendant was in custody at the time he was interrogated. Six to nine officers entered Holt's apartment with their weapons drawn. *Holt*, 223 P.3d at 1197. He was told not to move, handcuffed, and subject to "significant physical restraint" for five minutes after the officers entered his apartment. *Id.* He also appeared to be the prime suspect in the officers' execution of a warrant to search

and seize his computer for child pornography. *Id.* None of these facts is present in the underlying case.

Defendant emphasizes two factors that he suggests demonstrate he was in custody when he was questioned. First, he claims that he was under close guard while seated at the curb, and that the trial court's finding that he was not was "clearly erroneous" (OB p. 13, fn 3). He bases this on the fact that Officer Huston testified that defendant and the others were "under guard" because some of them were "probably" going to be facing charges (3/18/08, p. 40).

However, it is clear from the testimony that any officers who were outside were "standing around," and that they were "in and out" of the house while the warrant was being executed (*Id.*, pp. 15, 26, 27). Furthermore, Officer Huston's subjective belief that the suspects were being "guarded" is irrelevant to the custody determination, because the court may not consider the "unarticulated thoughts or views of the officers." *Elmarr*, 181 P.3d at 1162 (citing *Stansberry v. California*, 511 U.S. 318, 323 (1994)).

Defendant also places great importance on the fact that the detective offered him "reassurance" before questioning him (OB p. 13). However, whether the officer's "reassurance" played a role in defendant's decision to speak has nothing to do with whether his freedom of movement was restricted.

Any deceptive reassurance might be relevant to the issue of whether a *Miranda* waiver was valid or a statement was involuntary, but it is not determinative of the issue of custody. *See People v. Gonzalez-Zamora*, 251 P.3d 1070, 1075 (Colo. 2011) (*Miranda* waiver can be rendered invalid based on "intimidation, misconduct, or trickery" on the part of the police); *People v. Bostic*, 148 P.3d 250 (Colo. 2006) (officer's comment to the defendant telling her that the police had found a quantity of drugs in the motel room and that she should probably be cooperative did not constitute either a threat or a promise, and the trial court properly concluded that both the defendant's statement and her waiver of her *Miranda* rights were voluntary); *People v. Pease*, 934 P.2d 1374 (Colo. 1997) (voluntariness prong of *Miranda* waiver focuses on whether police conduct was coercive, including whether there were

affirmative misrepresentations that are designed to break down a defendant's will, and the knowing and intelligent prong focuses on the suspect's state of mind, and the deliberate failure to tell a defendant that there is a warrant for his arrest does not by itself make a custodial statement involuntary); *People v. Wickham*, 53 P.3d 691 (Colo. App. 2001) (promises made by police relevant to whether confession was voluntary).

Any unarticulated intent on the part of the detective to arrest defendant if drugs were located, or subjective belief of defendant that he would not be arrested if the officers found only his small stash of personal-use cocaine, does not bear on the question of "custody" at the time the questions were asked, as neither relates to the objective circumstances surrounding the restraint associated with formal arrest. *See People v. Matheny*, 46 P.3d 453 (Colo. 2001) (custody depends on objective circumstances, not on the subjective views of the interrogating officers or the person questioned); *Effland v. People*, 240 P.3d 868 (Colo. 2010) (a police officer's unarticulated plan has no bearing on whether an individual is in custody for *Miranda* purposes); *People v. Hankins*, 201

P.3d 1215 (Colo. 2009) (defendant was not in custody where the officers encouraged him to tell the truth and warned him of the consequences of lying); *People v. Minjarez*, 81 P.3d 348 (Colo. 2003) (a police officer's unarticulated knowledge, intentions, or beliefs are not relevant to a custody determination).

In any event, whatever reassurance was given to defendant came from one of the officers who initially contacted him and his companions in the house, not the detective who later questioned him. It was that officer who made a couple of statements *to the group at the curb* suggesting "if you tell us the truth . . . you won't get in trouble" (3/18/08, p. 52). The defense attorney clarified from whom this reassurance came by asking defendant, "Did anything about the officer who was detaining you, that he said to the whole group, also affect your decision that you felt like you had to talk to [Detective] Sarkisian?" Defendant indicated yes, and then stated:

> I just felt like it was such a minimal amount that I wasn't going to get in trouble for it. I mean, that's what the police said. Basically, if you cooperate you're not going to get in trouble. Tell

> us what you have; nothing bad is going to happen to you.

(3/18/08, p. 55) (*See* Exhibit A).

Defendant uses this testimony to buttress his argument that this was a coercive environment in which he made his comment about the cocaine. However, his testimony did not establish that the environment was coercive or that he was deprived of his freedom of action to the degree associated with a formal arrest. Indeed, defendant acknowledged, and the trial court properly found, that the detective asked general questions "in a conversational tone" and did not threaten him (03/18/08, p. 66). The atmosphere and tone of the interview did not therefore "evince any attempts by the police to 'subjugate the individual to the will of his examiner.' " *People v. Cowart*, 244 P.3d 1199, 1205 (Colo. 2010) (citing *Matheny*, 46 P.3d at 467).

Defendant's testimony on this point is also important, because the deciding factor for the dissent in the court of appeals to resolve the issue of custody in defendant's favor was the fact that defendant received reassurance *from Detective Sarkisian.* Judge Webb stated:

> [E]ven if the remaining mix of factors still presents a close case, I would resolve the custody question in defendant's favor because, as the trial court found, 'the defendant did hear some form of assurance' **from the detective**, which was 'what persuaded the defendant to speak at the time.'

Mumford, at *7 (emphasis added).

However, the trial court did not make that finding. Rather, it noted that once the group was sent to the curb, one of them was released and allowed to leave. "According to the defendant he is told that if he is truthful all will be fine, some form of release. This is, in fact, what persuaded the defendant to speak at the time" (3/18/08, p. 100). The court merely reiterated defendant's testimony that he had been given some form of assurance *by the officer at the curb* and this is what persuaded him to speak to the detective *later*. The court did not make a finding that defendant was persuaded to talk by the detective. Indeed, the detective "did not even know who defendant was or how he was connected to the house," so there would be no reason for him to use allegedly coercive tactics to get him to speak. *Mumford*, at *4 (*see also* 3/18/08, p. 93).

Furthermore, even if this Court somehow finds, contrary to defendant's own testimony, that the detective "assured" defendant that if he cooperated things would go well for him, this rather innocuous statement – coupled with the casual, non-threatening environment in which defendant was questioned – is nothing like the more coercive environments and tactics to which defendant compares it. *See, e.g., People v. Sandoval*, 218 P.3d 307, 309-10 (Colo. 2009) (reasonable person "would feel restrained to a degree associated with formal arrest" because while questioning defendant at a hospital, police told him that if he did not come voluntarily to the police station, he would be brought there involuntarily); *State v. Coen*, 125 P.3d 761, 767 (Or. App. 2005) ("[A]t the point where the trooper told defendant he would be arrested if he did not cooperate without the benefit of a lawyer's advice – the nature of the questioning created an environment in which a reasonable person would have felt compelled to answer the troopers question."); *cf. U.S. v. Czichray,* 378 F.3d 822, 829 (8th Cir. 2004) (some degree of coercion is part and parcel of the interrogation process, and the coercive aspects of a police interview are largely irrelevant to the determination

whether a person is in custody for purposes of *Miranda*, except where a reasonable person would perceive the coercion as restricting his or her freedom to depart).

Defendant also claims that the court of appeals' majority improperly relied on two Supreme Court cases, *Maryland v. Shatzer*, 559 U.S. ___, 130 S.Ct. 1213 (2010), and *Michigan v. Summers*, 452 U.S. 692 (1981), in making its determination that defendant was not in custody. However, he is mistaken. These cases are relevant because the court found that at the time the detective asked his questions, "there is no doubt defendant was being detained temporarily. But there is also no doubt this temporary detention was permissible under the Fourth Amendment." *Mumford*, at *2.

Defendant repeatedly emphasizes that he was "not free to leave" (OB pp. 3, 5, 13, 14). However, whether he was free to leave is not the relevant question. Such a restraint on freedom may be a seizure within the meaning of the Fourth Amendment, but not every "seizure" constitutes "custody" under *Miranda*. *Shatzer* reemphasized this point, where the Court wrote:

> [T]he freedom-of movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it 'talismanic power,' because *Miranda* is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated' (citations omitted). Thus, the temporary and relatively nonthreatening detention involved in a traffic or *Terry* stop . . . does not constitute *Miranda* custody.

Shatzer, 130 S.Ct. at 1224.

Thus, *Shatzer* is relevant to the analysis here, since it discusses the fact that a temporary and relatively nonthreatening detention, similar to the one at issue in this case, does not constitute *Miranda* custody. And while *Summers* does not involve a *Miranda* issue, it is instructive because it involves the temporary detention of a homeowner during the execution of a search warrant. Furthermore, it discusses in detail an "intrusion" similar to the one at issue here, where "the type of detention imposed . . . is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention," *Summers*, 452 U.S.at 702. This

is especially true where, as here, defendant was not the subject of the warrant.

Similarly, *United States v. Davis*, 530 F.3d 1069 (9th Cir. 2008), is instructive in that it involved a seizure effected by law enforcement while executing a valid search warrant, and the questioning of the person seized during the detention. *Davis*, 530 F.3d 1081. Because the court determined that Davis was detained incident to the warrant, it needed to determine "whether the officers' questioning of him stayed within the bounds of those permitted during a *Terry* stop. During a *Terry* stop, officers 'may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.' " *Id.* (quoting *Berkemer v. McCarty*, 468 U.S.420, 439, 104 S.Ct. 3138 (1984)).

In *Davis*, the defendant had an initial encounter with deputies, who briefly questioned him about who he was and why he was on the property. *Davis*, 530 F.3d at 1081. During that initial questioning, a deputy asked Davis to retrieve his driver's license from his car, which he did. That deputy took it from him and handed it over to another

deputy. *Id.* at 1075. The search warrant was then read to Davis and he was patted down, at which point deputies found hashish oil in a tin on his person. The two contacts at that point lasted a total of approximately 20 minutes. *Id.*

Davis was next questioned by an agent while he stood in the driveway, and a conversation ensued which Davis described as "casual" and "low-key." *Id.* at 1075, 1081. The agent asked Davis about his living situation and what he knew about what was going on with respect to the large marijuana grow operation in the shop on the property. Davis responded that he knew "everything" about it. *Id.* at 1076. The agent asked what his role was in the operation, to which Davis replied that he helped. When the agent asked his third question regarding how long he had been involved in the operation, Davis responded that he thought he should speak to an attorney, and the conversation ended. *Id.* at 1076.

The Ninth Circuit Court of Appeals found that:

> None of these questions went beyond those that would normally be permissible during a *Terry* stop. The total number of questions asked of

> [Davis] by law enforcement officers was minimal. The deputies' initial questions were directed at determining [Davis's] identity and reason for being on the property. The four or so questions asked by Agent Wright were all aimed at obtaining information to confirm or dispel Agent Wright's suspicion that [Davis] might be a part of the marijuana growing operation given that he was related to the property owners and arrived at the property via a locked, electric gate. Accordingly, law enforcement officers were not required to advise Richard Davis of his *Miranda* rights.

Davis, 530 F.3d at 1082.

Defendant's attempt to distinguish this case from *Davis* fails. Contrary to his assertion in his brief, defendant was not removed from his home at gunpoint, guarded by police, or persuaded to incriminate himself by the detective who questioned him (OB p. 18). Rather, he and the others in the house were directed to the curb, he was aware he was not the subject of the search, he was not handcuffed, the group at the curb was told that if they cooperated things would go well for them, and he was subsequently asked a brief series of general questions regarding who he was, whether he lived there, and whether he had any illegal drugs they should know about, in a conversational, nonaggressive,

nonthreatening manner. These questions were aimed at determining defendant's association with the house and Timmerman, and "to confirm, or dispel" the detective's suspicion that defendant might also be involved in the illegal activity.[4] *See Davis*, 530 F.3d at 1082.

In sum, the totality of the circumstances in this case do not support a conclusion that a reasonable person in defendant's position would believe that he was restrained to a degree tantamount to a formal arrest, regardless of the questions asked by Detective Sarkisian. Absent the deprivation of his freedom of action to such a degree, he was not in custody when asked questions by the detective. Thus, he was not required to be provided with a *Miranda* advisement prior to the

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[4] The trial court determined that there was "no dispute" that the questioning was some form of interrogation (3/18/08, p. 92). However, the prosecution did not concede that interrogation occurred and simply focused their argument on the issue of custody (*Id.*, pp. 81-86). Thus, this Court is not prevented from considering the question of whether defendant was interrogated. *See Moody v. People*, 159 P.3d 611, 615 (Colo. 2007) ("appellate courts have the discretion to affirm decisions, particularly denial of suppression motions, on any basis for which there is a record sufficient to permit conclusions of law, even though they may be on grounds other than those relied upon by the trial court.") (citing *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006)); *see also Davis*, *supra* (no interrogation or custody under circumstances similar to those presented here).

questioning, and the lower courts properly determined that the statements should not have been suppressed.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the ruling of the court of appeals.

JOHN W. SUTHERS
Attorney General

MELISSA D. ALLEN, 23155*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Respondent-Appellee
*Counsel of Record

AG ALPHA: DADD QGCG
AG File: Q:\AP\APALLEMD\MUMFORD.SCT.ANSWER.DOCX

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONDENT'S ANSWER BRIEF** upon **RYANN S. HARDMAN**, Deputy State Public Defender, by delivering copies of same in the Public Defender's mailbox at the Colorado Court of Appeals office this 25th day of August 2011.

C. D. Minor

and asked his fellow officer to detain me.
Q And when you were detained, how were you detained?
A I was put in handcuffs and I was taken outside of my home.
Q To where?
A To the curb.
Q And did the officers say anything to you when you got to the curb?
A Yes, sir. He asked me if I had anything illegal in my pockets or anything that might harm him.
Q And did you?
A No, sir.
Q Then what happened?
A I was asked to sit on the curb. Actually, beforehand, he took my identification out of my pockets after he asked me whether I had anything harmful or not, patted me down, took my identification. Had us all sit on the curb and made a couple of statements such as if you tell us the truth nothing bad will -- you won't get in trouble.
Q And is this a uniformed officer that was telling you this?
A I don't believe so, sir. My recollection is the only uniformed officer was Officer Huston.
Q The -- how many people were in the house -- or the

Exhibit A

apartment that day?
A Myself and four other people; Ms. Hartman, Mr. Timmerman, Mr. Huery, a friend of Mr. Huery's named Matt, and myself. Five people all together.
Q What happened to the friend of Mr. Huery named Matt?
A I believe that the police thought he wasn't involved in any way, and they told him basically it was his lucky night and to find a new hobby or something of that nature.
Q And then what happened to him?
A He walked down the street and he left.
Q Did you feel like you were free to walk down the street and leave?
A No, sir. Not at any time.
Q Tell me about the discussion you were having with the officer about what he said if you tell the truth you won't get in trouble?
A That was kind of directed to the whole group. It wasn't necessarily directed towards me. It was kind of he was looking over at us while we were sitting there, just basically probing for information.
Q Did you get questioned individually by any of the detectives that evening?
A Yes.

Q Who was the first detective and when did that happen?
A Besides the detective who detained me, I'm not sure what his name was, but he was implying I was a methamphetamine user and I might have drugs on my person. I'm not sure who he was, and later on in the evening Mr. Sarkisian --
Q The detective who testified earlier?
A Yes, sir. Detective Sarkisian came and directly spoke to me. We had a one-on-one conversation.
Q When you had this conversation were you in handcuffs?
A Yes.
Q Were you standing or sitting?
A I was -- I believe I was sitting when he contacted me but he might have asked me to stand up and maybe come over to the side a little bit. He contacted me several times, whereas the information I told him, he couldn't find the narcotics that I was confessing to and he came back and contacted me more than once.
Q When he asked you questions did you answer them?
A Yes, sir.
Q Did you tell him the truth?
A Yes.
Q Why did you tell him the truth?

A There was a lot of police officers in my house. I was scared and felt like the police team was getting frustrated and felt like I had to answer them.
Q Did anything about the officer who was detaining you, that he said to the whole group, also affect your decision that you felt like you had to talk to Officer Sarkisian?
A Yes, sir, it did.
Q Tell me about that.
A I just felt like it was such a minimal amount that I wasn't going to get in trouble for it. I mean, that's what the police said. Basically, if you cooperate you're not going to get in trouble. Tell us what you have; nothing bad is going to happen to you.
Q Is this the first time you've been charged with a felony?
A No, sir.
Q Later you were arrested?
A Yes, sir. I was finally arrested and read my Miranda when I was -- after I was taken in the cruiser to the, I believe the downtown holding cell and then some more undercover officers came and told me what I was being charged with, read me my Miranda, asked me to cooperate with their undercover investigation.
Q Okay. What did you understand that to mean?

A I understood that to mean they wanted me to be a snitch.
Q And did they read you your Miranda Rights?
A Yes, sir.
Q After they read you your Miranda Right and you were informed of those rights, did you agree to speak with them?
A No, sir. I was polite to them. They asked me to cooperate and I said no, sir and they put me back in my cell -- the whole time I was in custody. Sorry, sir.
Q If you would have known that you didn't have to speak to Detective Sarkisian would you have spoken to him?
A No, sir.
MR. WERNER: No further questions.
THE COURT: Cross examination.

EXAMINATION

BY MS. BAUER:
Q So you did live at the location of the search warrant; 2640 East Monument Street, correct?
A Yes, ma'am.
Q And how long had you lived there?
A At the time, maybe eight months. I don't know. It was definitely past my six-month lease. I'm just