No. 04-332

In the Supreme Court of the United States

MICHAEL EDWARD LEBRUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when he voluntarily went to a police station to be interviewed and was advised that he was free to leave at any time.

2. Whether petitioner's confession to murder was involuntary under the Due Process Clause when he was told that he would not be prosecuted if he confessed to a "spontaneous" killing.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-24) is reported at 363 F.3d 715. The panel opinion of the court of appeals (Pet. App. 25-53) is reported at 306 F.3d 545. The order of the district court denying petitioner's motion to suppress (Pet. App. 54-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2004. The petition for a writ of certiorari was filed on July 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Missouri on one count of felony murder, in violation of 18 U.S.C. 1111. Petitioner moved to suppress his confession to the murder. The district court granted petitioner's motion. Pet. App. 54-89. A panel of the court of appeals initially affirmed. *Id.* at 25-53. After granting rehearing en banc, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

1. During the Vietnam war, petitioner served in the Navy as a disbursing clerk aboard the *U.S.S. Cacapon*. Petitioner reported to Ensign Andrew Muns, the ship's disbursing officer. On January 16 or 17, 1968, while the ship was moored in the Philippines, Muns disappeared. After conducting an investigation, the Naval Criminal Intelligence Service (NCIS) concluded that Muns had stolen $8600 from the disbursing office and then deserted. Pet. App. 2.

Thirty years later, Muns's sister convinced the NCIS Cold Case Homicide Unit to reopen the investigation. In 1999, NCIS agents interviewed petitioner four times; on three of those occasions, they administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By that time, petitioner was in his fifties; he had attended college and completed one year of law school. Petitioner voluntarily answered the agents' questions during the interviews. On one occasion, petitioner told the agents that he may have been involved in Muns's death and that he felt he had repressed memories concerning the incident. He asked the officers whether they knew of a therapist who could help him recover those memories. Following those interviews, the agents

had no significant contact with petitioner for approximately ten months, while they investigated other leads. Pet. App. 2-3, 71.

After pursuing those leads, the NCIS agents identified petitioner as the prime suspect in the case. Accordingly, they decided to interview him again. On September 21, 2000, NCIS Special Agent David Early, accompanied by a Missouri Highway Patrol trooper, went to petitioner's place of employment, told him they were conducting an investigation, and asked if he would accompany them to the local Missouri Highway Patrol office for an interview. The officers were dressed in plain clothes and said that they could not tell petitioner the nature of the investigation, though they assured him that it had nothing to do with his family. Petitioner testified that he agreed to accompany the officers because he believed they might be investigating criminal allegations concerning his employer, a real estate developer. When petitioner volunteered to drive to the station himself, the officers stated that they would prefer it if he were to ride with them. Petitioner agreed and rode to the station in the front seat of the officers' unmarked patrol car. The doors of the car were unlocked during the trip, and petitioner was not restrained in any way. Pet. App. 3; Gov't C.A. Br. 7-8.

After arriving at the station, but before going inside, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. The officers then took petitioner to a windowless interview room. NCIS agents had prepared the room by placing enlarged photographs of scenes from petitioner's life on the walls. At the start of the interview, Agent Early and NCIS Special Agent Jim Grebas identified themselves. The NCIS agents did not

administer *Miranda* warnings to petitioner; they testified that they had believed that the warnings were not necessary because petitioner was not "in custody" for *Miranda* purposes. Petitioner testified that he had been aware of his *Miranda* rights during the interview; that, at the start of the interview, he had believed that he was not in custody and was free to leave at any time; and that, as the interview progressed, "[he] believe[d] they would have let [him] go, but [he] wasn't sure." Pet. App. 3-4, 28 n.3; 4/27/01 Tr. 202.

During the interview, the NCIS agents used various strategies to facilitate a confession. For example, the agents told petitioner that there was "absolutely no doubt" about his guilt and that they had significant evidence establishing him as the killer. Specifically, they suggested that there were eyewitnesses to Muns's death and that they had a suicide note from another individual implicating petitioner in the death. They also stated that the United States Attorney for the District of Alaska was preparing to charge petitioner with premeditated murder and that a protracted trial in a distant district would drain his financial resources and ruin his family's reputation. Finally, they told petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, because the statute of limitations for manslaughter had expired. Pet. App. 4, 29, 43-44.[1]

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[1] The exchanges included the following:

> GREBAS: And if you will be man enough and stand up to the plate and say, you know what guys, it was "spontaneous." We are on the phone saying we got a problem with the statute of limitation. It's possible, beyond possible; you won't be prosecuted at all. And

I want to throw-up when I say that, but I will—that's my word to you.

LEBRUN: Right.

GREBAS: Special Agent Early?

EARLY: Absolutely.

LEBRUN: What's the statute of limitation?

GREBAS: There is no second-degree murder.

EARLY: It's five years from the time of the incident. It's called "manslaughter" in the federal system.

* * * * *

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

Pet. App. 42-44.

At the various points during the interview, the agents permitted petitioner to take accompanied breaks in order to use the restroom, have a cup of coffee, and smoke a cigarette. They allowed him to use his mobile telephone to call his wife. And they informed him repeatedly that he would be "going home today." Pet. App. 4, 70; 4/27/01 Tr. 107.

After being questioned for approximately 33 minutes, petitioner confessed to Muns's murder. He explained that, while he was robbing a safe in the disbursing office, Muns had walked into the room. He stated that he had rushed Muns and killed him by strangling him and repeatedly smashing his skull against the deck. He added that he had disposed of Muns's body by dumping it into a tank of caustic fuel oil. At the agents' urging, he then physically reenacted the murder, with Agent Early playing the role of Muns. Pet. App. 4, 30.

After petitioner confessed, the NCIS agents asked him whether he wanted to apologize to Muns's sister, who had flown in from Milwaukee, and to Muns's fictitious brother, an NCIS agent who pretended that he had advanced cancer. Petitioner, who was himself recovering from cancer, agreed to speak to them, told them he was responsible for Muns's death, and apologized. Approximately two hours after the interview began, petitioner consented to a search of his house. The agents drove petitioner to his house and searched it, but found nothing. The agents then left petitioner at home. Pet. App. 4-5, 69-70.

2. Petitioner was subsequently arrested and charged with one count of felony murder, in violation of 18 U.S.C. 1111. Before trial, petitioner moved to suppress his initial confession (together with his subsequent confession to Muns's sister and fictitious brother) on the

grounds (1) that he had been subjected to custodial interrogation without receiving *Miranda* warnings and (2) that his initial confession was involuntary. Agreeing with petitioner on both grounds, the district court granted the motion. Pet. App. 54-89.

3. A panel of the court of appeals initially affirmed. Pet. App. 25-53. After granting rehearing en banc, however, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

a. The en banc court of appeals first held that petitioner was not "in custody" for purposes of *Miranda* at the time of the confession. Pet. App. 5-14. At the outset, the court recognized that, in determining whether petitioner was in custody, "[t]he 'ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 7 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

After considering the totality of the circumstances, the court of appeals determined that petitioner was not in custody. Pet. App. 7. The court discounted the facts that the interview had occurred in a small, windowless room at the station and that the authorities had used psychological tactics, some concededly deceptive, in order to produce incriminating responses. *Id.* at 8. In doing so, the court relied heavily both on this Court's decision in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam), in which the Court held that the mere fact that an interview occurred in a "coercive environment" did not render the interview custodial, and on this Court's subsequent decision in *Beheler*. Pet. App. 8. The court of appeals reasoned that "*Mathiason* and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process," and that the

critical inquiry was instead whether "a reasonable person would perceive the coercion as restricting his or her freedom to depart." *Id.* at 9. Applying those decisions, the court found that "[t]he facts of this case are in all relevant respects indistinguishable from *Mathiason* and *Beheler*, and they dictate the conclusion that [petitioner] was not in custody within the meaning of *Miranda*." *Id.* at 10.[2] The court noted that petitioner was never physically restrained; was never placed in handcuffs; was told before the interview began that he was free to leave; and had his mobile telephone with him and used it to call his wife from the interview room. *Id.* at 9-10. Based on those facts, the court concluded that petitioner "would not have perceived that his freedom of action was restrained to the degree associated with formal arrest, and was therefore not 'in custody.'" *Id.* at 13-14.

b. The court of appeals next held that petitioner's confession was not involuntary under the Due Process Clause. Pet. App. 14-19. The court asserted that, in assessing the voluntariness of a confession, "our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *Id.* at 16-17. The court observed that "[t]he facts surrounding the confession are straightforward." *Id.* at 14. Specifically,

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[2] The court of appeals also considered a number of its own decisions and concluded that, "where there is no clear indication that the defendant's freedom to depart has been restricted, we have typically concluded that a police station interview was noncustodial." Pet. App. 11. Although the court acknowledged that it had reached a contrary result in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001), the court reasoned that *Hanson* was "readily distinguishable," and overruled it to the extent it was not. Pet. App. 11-12.

the court noted that petitioner confessed after only 33 minutes of questioning, and that the agents neither physically threatened petitioner nor shouted at him. *Ibid*. Although the court acknowledged that the agents had used psychological tactics to facilitate a confession, it reasoned that the mere use of such tactics was insufficient, by itself, to render a confession involuntary. *Ibid.*

The court of appeals next rejected the district court's conclusion that the psychological tactics, when coupled with the agents' statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, rendered his confession involuntary. Pet. App. 14-15. At the outset, the court of appeals noted that the district court had made no findings as to what, if any, promise the officers had made to petitioner, much less what legal effect such a promise would have. *Id*. at 16. Instead, the court of appeals observed that the district court had found only that petitioner *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing. *Ibid*. Even assuming that the agents' statements could be viewed as a promise to petitioner, however, the court reasoned that such a promise did not render petitioner's confession involuntary *per se*, but served only as one factor in the totality of the circumstances. *Ibid*. In addition to the factors it had already discussed, the court asserted that a number of other countervailing factors suggested that petitioner's confession was voluntary. *Id*. at 18-19. Specifically, the court noted (1) that petitioner testified that he was aware of his *Miranda* rights during the interview; (2) that petitioner was a "sophisticated individual with legal training"; (3) that petitioner "did not display any unique sensitivity that would indicate that the agents might overbear his will"; and (4) that "[t]he videotape of

the interview demonstrates that [petitioner] was composed and aware of his surroundings and the circumstances confronting him." *Ibid.* The court added that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by confessing to 'spontaneous' murder." *Id.* at 19. "Whatever his motivation," the court concluded, "it is clear to us that [petitioner's] capacity for self-determination was not impaired." *Ibid.*

c. Judge Morris Sheppard Arnold, joined by three other judges, dissented. Pet. App. 19-24. In his opinion, Judge Arnold addressed only the issue whether petitioner's confession was voluntary. Judge Arnold first noted that "it appears to me that [petitioner's] confession was the product of an overborne will." *Id.* at 19. He contended that there was ample evidence that "the atmosphere at the interrogation was police-dominated." *Id.* at 20.

With specific regard to the agents' statements concerning a "spontaneous" killing, Judge Arnold noted that, even if the officers had not made an express promise to petitioner, "[t]he coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise." Pet. App. 22. He conceded, however, that "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." *Id.* at 22-23. While "[s]uch techniques may be reprehensible," Judge Arnold continued, "that fact would not seem to contribute to their propensity to overwhelm the will." *Id.* at 23. He suggested that "what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general

uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether 'coercive' or not." *Ibid*.

ARGUMENT

Petitioner renews his claims (Pet. 13-28) that he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his confession, and that his confession to the murder was involuntary. The court of appeals' fact-bound application of settled law to those claims does not warrant further review.

1. Petitioner first contends (Pet. 13-20) that the court of appeals erred by holding that he was not "in custody," and therefore was not entitled to receive *Miranda* warnings, at the time of his confession. That contention lacks merit.

a. Under *Miranda*, statements taken in custodial interrogation must generally be preceded by specified warnings in order to be admissible in the government's case in chief. *Miranda* warnings, however, are not required in every instance of official questioning; instead, they are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In a series of post-*Miranda* decisions, this Court has made clear that, in determining whether an individual was in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495); accord *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam); *Berkemer* v. *McCarty*, 468 U.S.

420, 440 (1984). This Court has emphasized that, in making that determination, a reviewing court must examine "the objective circumstances of the interrogation," *Stansbury*, 511 U.S. at 323, in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave," *id.* at 325.

The court of appeals correctly applied those principles in holding that petitioner was not "in custody" during the interview. When the officers asked petitioner to accompany them to the station, petitioner voluntarily agreed to accompany them. The doors were unlocked during the trip, and petitioner was not restrained in any way. Perhaps most importantly, before going inside the station, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. During the interview, the NCIS agents never physically restrained petitioner, and they informed him repeatedly that he would be "going home today." They also allowed him to use his mobile telephone in order to call his wife. Finally, at the end of the interview, they drove petitioner back to his house. Because all of those facts suggest that a reasonable person in petitioner's position would have felt free to leave, the court of appeals' holding that petitioner was not in custody for purposes of *Miranda* was correct and does not merit further review.[3]

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[3] In concluding that petitioner was not "in custody," the court of appeals also relied on the fact that petitioner was in his fifties; had attended college and completed one year of law school; and had previously been interviewed by NCIS investigators. Pet. App. 12-13. In *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004), issued after the decision below, this Court cast doubt on the relevance to the custody inquiry of a suspect's age, education, and prior experience with law enforcement. See *id.* at 2150-2152. There is no need, however, to

b. With regard to his *Miranda* claim, petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Mathiason*. That contention is erroneous.

In *Mathiason*, an officer investigating a burglary left a card at a suspect's apartment, asking the suspect to call him. The suspect did so and agreed to meet the officer at the state patrol office. When the suspect arrived, the officer told him that he was not under arrest. The officer then told the suspect that the police believed he was involved in the burglary, and falsely informed him that his fingerprints had been found at the scene. The suspect subsequently confessed to the burglary. At the end of the interview, the suspect was allowed to leave the office. 429 U.S. at 493-494.

This Court held that the suspect was not "in custody" for *Miranda* purposes. *Mathiason*, 429 U.S. at 494-496. The Court reasoned that "there [was] no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id*. at 495. The Court noted that the suspect had voluntarily come to the police station, was immediately informed that he was not under arrest, and had left the police station without hindrance once the interview was completed. *Ibid*. The Court specifically rejected the suspect's contention that "a noncustodial situation is * * * converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

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remand this case for further consideration in light of *Yarborough*. Petitioner does not challenge the court of appeals' reliance on those characteristics in making the custody determination, and nothing in the court of appeals' decision suggests that it viewed those characteristics as outcome-dispositive.

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Ibid.* The Court reasoned that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it," and noted that neither the fact that the questioning took place at the station nor the fact that the questioned individual was a suspect altered the analysis. *Ibid.* Finally, the Court reasoned that the officer's false statement concerning the purported discovery of the suspect's fingerprints at the scene "ha[d] nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 496.

This case is materially indistinguishable from *Mathiason*. Although the officers did not specifically offer petitioner the opportunity to decide where and when any interview would take place, petitioner voluntarily consented to the interview, and was not physically restrained either on the way to the interview or during the interview itself. Like the suspect in *Mathiason*, who was told at the outset of the interview that he was not under arrest, petitioner was told that he was not under arrest and that he was free to terminate the interview and leave at any time.

The interview in this case occurred in a windowless room at a police station, much like the interview in *Mathiason*, which took place "behind closed doors at police headquarters." 429 U.S. at 496 (Marshall, J., dissenting). The various psychological tactics used by the officers during petitioner's interview were no different in kind from the false statement made by the officer in *Mathiason*, which the Court concluded was irrelevant to the custody inquiry. 429 U.S. at 496. Finally, to the extent that the agents intended the

interview more closely to resemble a "formal" interrogation, that fact does not justify a different outcome, because this Court has held that the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant to the custody inquiry. *Stansbury*, 511 U.S. at 323.[4] Because the decision below is consistent with *Mathiason* in all relevant respects, and because petitioner identifies no other conflict between the decision below and any other decision of this Court or another court of appeals,[5] further review of petitioner's *Miranda* claim is unwarranted.

2. Petitioner next contends (Pet. 20-27) that the court of appeals erred by holding his confession was voluntary under the Due Process Clause. That contention also lacks merit.

a. An individual's confession is involuntary if, because of the government's conduct, "his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). The court must consider "the

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[4] Petitioner also contends (Pet. 18-19) that, in the course of the interview, the NCIS agents repeatedly made statements implying that he would not be allowed to go home until the interview was completed. In the statements at issue, however, the agents merely suggested that, if petitioner confessed to a "spontaneous" killing, the *investigation* would come to an end—not that petitioner was not free to terminate the interview. See, *e.g.*, Exh. E-2, at 15, 16-17.

[5] Petitioner suggests (Pet. 16-18) that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists because, to the extent that *Hanson* conflicted with the decision in this case, the en banc court of appeals expressly overruled it. Pet. App. 11-12.

totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The relevant characteristics of the individual include his age, education, physical condition, mental health, and criminal experience; the relevant details of the interrogation include the use of coercive tactics, the length of the interrogation, and its location. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993); *Schneckloth*, 412 U.S. at 226; *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The court of appeals correctly engaged in the required totality-of-the-circumstances inquiry in concluding that petitioner's confession was voluntary. The court of appeals acknowledged both that the agents used psychological tactics to facilitate a confession and that the agents made statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing. The court, however, then cited a number of facts that suggested that petitioner's confession was voluntary, including (1) that petitioner confessed after only 33 minutes of questioning; (2) that the agents neither physically threatened petitioner nor shouted at him; (3) that petitioner testified that he was aware of his *Miranda* rights at the time of the interview; and (4) that petitioner was in his fifties and had attended college and completed one year of law school. Moreover, after reviewing the videotape of the confession, the court of appeals observed that petitioner remained composed and aware throughout the interview and did not display any unique sensitivity to the agents' questioning, and ultimately determined that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by con-

fessing to 'spontaneous' murder." Pet. App. 19. Based on all of those considerations, the court of appeals concluded that the agents did not overbear petitioner's will and thereby render his confession involuntary. That intensely fact-bound conclusion does not warrant this Court's review.

b. With regard to his voluntariness claim, petitioner does not contend that the court of appeals' decision directly conflicts with any decision of another court of appeals. Instead, he contends only that it conflicts with this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), by refusing to hold petitioner's confession involuntary notwithstanding the agents' statements to petitioner that he would not be prosecuted for a "spontaneous" killing.

Petitioner correctly notes that, in *Bram*, this Court stated that "a confession, in order to be admissible, * * * must not be * * * obtained by any direct or implied promises, however slight." 168 U.S. at 542-543 (citation omitted). The Court has since recognized, however, that "this passage from *Bram* * * * under current precedent does not state the standard for determining the voluntariness of a confession." *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). In the wake of *Fulminante* and other decisions by this Court, "there has been a movement away from treating * * * promises of leniency as *per se* producing involuntariness." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) at 454 (2d ed. 1999). Instead, like the court of appeals in this case, lower courts have treated a promise of leniency as but one factor in the totality of the circumstances under which the voluntariness of a confession is judged. See, *e.g.*, *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.) (noting that "the presence of a direct or implied promise of help

or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision"), cert. denied, 488 U.S. 945 (1988); *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.) (noting that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will"), cert. denied, 479 U.S. 989 (1986). Even assuming, therefore, that the agents' statements to petitioner could properly be characterized as a promise of leniency, the court of appeals did not err by holding that such a promise did not automatically render his confession involuntary.[6]

c. Petitioner appears to contend in the alternative that the agents' broader use of deceptive psychological tactics rendered his confession involuntary. This Court, however, has rejected the view that misrepresentations to a suspect automatically justify exclusion of a suspect's confession. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Indeed, as the dissenting opinion below sug-

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[6] This case would present a poor vehicle for reconsideration of the prevailing rule that a promise of leniency does not automatically render a confession involuntary, insofar as it is questionable whether the agents' statements constituted a relevant promise of leniency at all. The agents did suggest (correctly, see 18 U.S.C. 3282) that petitioner could not be prosecuted if he confessed to a "spontaneous" killing (that is, manslaughter under 18 U.S.C. 1112), but they did not indicate that petitioner would not be prosecuted if he confessed to felony murder (under 18 U.S.C. 1111), and they affirmatively suggested that petitioner *would* be prosecuted if he confessed to premeditated murder (also under 18 U.S.C. 1111). Rather than confessing merely to a "spontaneous" killing, however, petitioner plainly confessed to felony murder, and arguably confessed to premeditated murder as well. Pet. App. 4, 30. The agents therefore did not breach any limited promise of leniency that was made.

gested, "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." Pet. App. 22-23 (opinion of Morris Sheppard Arnold, J.).[7] Ultimately, the court of appeals' conclusion that, under the totality of the circumstances, petitioner's confession was voluntary despite the agents' use of both deceptive and non-deceptive psychological tactics is fact-bound and does not warrant further review.[8]

3. Finally, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charge in this case. If petitioner is acquitted following a trial on the merits, the claims that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claims—together with any other claims he might have—in a petition for writ of certiorari seeking review

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[7] Although the dissenting opinion did suggest that false statements by the police, while not rendering a confession involuntary, may otherwise violate the Due Process Clause, Pet. App. 23 (opinion of Morris Sheppard Arnold, J.), petitioner advances no due process claim apart from an involuntariness claim. This case therefore does not present any broader question concerning the circumstances, if any, under which deceptive police tactics during an interrogation raise due process concerns. Nor was the level and type of trickery here of a character to raise such concerns.

[8] Petitioner also contends (Pet. 27-28) that the court of appeals erred by holding that his subsequent confession to Muns's sister and fictitious brother was admissible. His sole basis for that contention, however, is that the subsequent confession was the "fruit" of the impermissibly obtained initial confession. See *Wong Sun* v. *United States*, 371 U.S. 471, 484-487 (1963). Because the initial confession was in fact constitutionally obtained, petitioner's contention lacks merit.

of the final judgment against him. Accordingly, this Court's review is not necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether petitioner was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when he voluntarily went to a police station to be interviewed and was advised that he was free to leave at any time.

2. Whether petitioner's confession to murder was involuntary under the Due Process Clause when he was told that he would not be prosecuted if he confessed to a "spontaneous" killing.

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No. 04-332

MICHAEL EDWARD LEBRUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-24) is reported at 363 F.3d 715. The panel opinion of the court of appeals (Pet. App. 25-53) is reported at 306 F.3d 545. The order of the district court denying petitioner's motion to suppress (Pet. App. 54-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2004. The petition for a writ of certiorari was filed on July 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Missouri on one count of felony murder, in violation of 18 U.S.C. 1111. Petitioner moved to suppress his confession to the murder. The district court granted petitioner's motion. Pet. App. 54-89. A panel of the court of appeals initially affirmed. *Id.* at 25-53. After granting rehearing en banc, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

1. During the Vietnam war, petitioner served in the Navy as a disbursing clerk aboard the *U.S.S. Cacapon*. Petitioner reported to Ensign Andrew Muns, the ship's disbursing officer. On January 16 or 17, 1968, while the ship was moored in the Philippines, Muns disappeared. After conducting an investigation, the Naval Criminal Intelligence Service (NCIS) concluded that Muns had stolen $8600 from the disbursing office and then deserted. Pet. App. 2.

Thirty years later, Muns's sister convinced the NCIS Cold Case Homicide Unit to reopen the investigation. In 1999, NCIS agents interviewed petitioner four times; on three of those occasions, they administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By that time, petitioner was in his fifties; he had attended college and completed one year of law school. Petitioner voluntarily answered the agents' questions during the interviews. On one occasion, petitioner told the agents that he may have been involved in Muns's death and that he felt he had repressed memories concerning the incident. He asked the officers whether they knew of a therapist who could help him recover those memories. Following those interviews, the agents

had no significant contact with petitioner for approximately ten months, while they investigated other leads. Pet. App. 2-3, 71.

After pursuing those leads, the NCIS agents identified petitioner as the prime suspect in the case. Accordingly, they decided to interview him again. On September 21, 2000, NCIS Special Agent David Early, accompanied by a Missouri Highway Patrol trooper, went to petitioner's place of employment, told him they were conducting an investigation, and asked if he would accompany them to the local Missouri Highway Patrol office for an interview. The officers were dressed in plain clothes and said that they could not tell petitioner the nature of the investigation, though they assured him that it had nothing to do with his family. Petitioner testified that he agreed to accompany the officers because he believed they might be investigating criminal allegations concerning his employer, a real estate developer. When petitioner volunteered to drive to the station himself, the officers stated that they would prefer it if he were to ride with them. Petitioner agreed and rode to the station in the front seat of the officers' unmarked patrol car. The doors of the car were unlocked during the trip, and petitioner was not restrained in any way. Pet. App. 3; Gov't C.A. Br. 7-8.

After arriving at the station, but before going inside, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. The officers then took petitioner to a windowless interview room. NCIS agents had prepared the room by placing enlarged photographs of scenes from petitioner's life on the walls. At the start of the interview, Agent Early and NCIS Special Agent Jim Grebas identified themselves. The NCIS agents did not

administer *Miranda* warnings to petitioner; they testified that they had believed that the warnings were not necessary because petitioner was not "in custody" for *Miranda* purposes. Petitioner testified that he had been aware of his *Miranda* rights during the interview; that, at the start of the interview, he had believed that he was not in custody and was free to leave at any time; and that, as the interview progressed, "[he] believe[d] they would have let [him] go, but [he] wasn't sure." Pet. App. 3-4, 28 n.3; 4/27/01 Tr. 202.

During the interview, the NCIS agents used various strategies to facilitate a confession. For example, the agents told petitioner that there was "absolutely no doubt" about his guilt and that they had significant evidence establishing him as the killer. Specifically, they suggested that there were eyewitnesses to Muns's death and that they had a suicide note from another individual implicating petitioner in the death. They also stated that the United States Attorney for the District of Alaska was preparing to charge petitioner with premeditated murder and that a protracted trial in a distant district would drain his financial resources and ruin his family's reputation. Finally, they told petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, because the statute of limitations for manslaughter had expired. Pet. App. 4, 29, 43-44.[1]

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[1] The exchanges included the following:

> GREBAS: And if you will be man enough and stand up to the plate and say, you know what guys, it was "spontaneous." We are on the phone saying we got a problem with the statute of limitation. It's possible, beyond possible; you won't be prosecuted at all. And

I want to throw-up when I say that, but I will—that's my word to you.

LEBRUN: Right.

GREBAS: Special Agent Early?

EARLY: Absolutely.

LEBRUN: What's the statute of limitation?

GREBAS: There is no second-degree murder.

EARLY: It's five years from the time of the incident. It's called "manslaughter" in the federal system.

* * * * *

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

Pet. App. 42-44.

At the various points during the interview, the agents permitted petitioner to take accompanied breaks in order to use the restroom, have a cup of coffee, and smoke a cigarette. They allowed him to use his mobile telephone to call his wife. And they informed him repeatedly that he would be "going home today." Pet. App. 4, 70; 4/27/01 Tr. 107.

After being questioned for approximately 33 minutes, petitioner confessed to Muns's murder. He explained that, while he was robbing a safe in the disbursing office, Muns had walked into the room. He stated that he had rushed Muns and killed him by strangling him and repeatedly smashing his skull against the deck. He added that he had disposed of Muns's body by dumping it into a tank of caustic fuel oil. At the agents' urging, he then physically reenacted the murder, with Agent Early playing the role of Muns. Pet. App. 4, 30.

After petitioner confessed, the NCIS agents asked him whether he wanted to apologize to Muns's sister, who had flown in from Milwaukee, and to Muns's fictitious brother, an NCIS agent who pretended that he had advanced cancer. Petitioner, who was himself recovering from cancer, agreed to speak to them, told them he was responsible for Muns's death, and apologized. Approximately two hours after the interview began, petitioner consented to a search of his house. The agents drove petitioner to his house and searched it, but found nothing. The agents then left petitioner at home. Pet. App. 4-5, 69-70.

2. Petitioner was subsequently arrested and charged with one count of felony murder, in violation of 18 U.S.C. 1111. Before trial, petitioner moved to suppress his initial confession (together with his subsequent confession to Muns's sister and fictitious brother) on the

grounds (1) that he had been subjected to custodial interrogation without receiving *Miranda* warnings and (2) that his initial confession was involuntary. Agreeing with petitioner on both grounds, the district court granted the motion. Pet. App. 54-89.

3. A panel of the court of appeals initially affirmed. Pet. App. 25-53. After granting rehearing en banc, however, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

a. The en banc court of appeals first held that petitioner was not "in custody" for purposes of *Miranda* at the time of the confession. Pet. App. 5-14. At the outset, the court recognized that, in determining whether petitioner was in custody, "[t]he 'ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 7 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

After considering the totality of the circumstances, the court of appeals determined that petitioner was not in custody. Pet. App. 7. The court discounted the facts that the interview had occurred in a small, windowless room at the station and that the authorities had used psychological tactics, some concededly deceptive, in order to produce incriminating responses. *Id.* at 8. In doing so, the court relied heavily both on this Court's decision in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam), in which the Court held that the mere fact that an interview occurred in a "coercive environment" did not render the interview custodial, and on this Court's subsequent decision in *Beheler*. Pet. App. 8. The court of appeals reasoned that "*Mathiason* and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process," and that the

critical inquiry was instead whether "a reasonable person would perceive the coercion as restricting his or her freedom to depart." *Id.* at 9. Applying those decisions, the court found that "[t]he facts of this case are in all relevant respects indistinguishable from *Mathiason* and *Beheler*, and they dictate the conclusion that [petitioner] was not in custody within the meaning of *Miranda*." *Id.* at 10.[2] The court noted that petitioner was never physically restrained; was never placed in handcuffs; was told before the interview began that he was free to leave; and had his mobile telephone with him and used it to call his wife from the interview room. *Id.* at 9-10. Based on those facts, the court concluded that petitioner "would not have perceived that his freedom of action was restrained to the degree associated with formal arrest, and was therefore not 'in custody.'" *Id.* at 13-14.

b. The court of appeals next held that petitioner's confession was not involuntary under the Due Process Clause. Pet. App. 14-19. The court asserted that, in assessing the voluntariness of a confession, "our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *Id.* at 16-17. The court observed that "[t]he facts surrounding the confession are straightforward." *Id.* at 14. Specifically,

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[2] The court of appeals also considered a number of its own decisions and concluded that, "where there is no clear indication that the defendant's freedom to depart has been restricted, we have typically concluded that a police station interview was noncustodial." Pet. App. 11. Although the court acknowledged that it had reached a contrary result in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001), the court reasoned that *Hanson* was "readily distinguishable," and overruled it to the extent it was not. Pet. App. 11-12.

the court noted that petitioner confessed after only 33 minutes of questioning, and that the agents neither physically threatened petitioner nor shouted at him. *Ibid*. Although the court acknowledged that the agents had used psychological tactics to facilitate a confession, it reasoned that the mere use of such tactics was insufficient, by itself, to render a confession involuntary. *Ibid.*

The court of appeals next rejected the district court's conclusion that the psychological tactics, when coupled with the agents' statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, rendered his confession involuntary. Pet. App. 14-15. At the outset, the court of appeals noted that the district court had made no findings as to what, if any, promise the officers had made to petitioner, much less what legal effect such a promise would have. *Id*. at 16. Instead, the court of appeals observed that the district court had found only that petitioner *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing. *Ibid*. Even assuming that the agents' statements could be viewed as a promise to petitioner, however, the court reasoned that such a promise did not render petitioner's confession involuntary *per se*, but served only as one factor in the totality of the circumstances. *Ibid*. In addition to the factors it had already discussed, the court asserted that a number of other countervailing factors suggested that petitioner's confession was voluntary. *Id*. at 18-19. Specifically, the court noted (1) that petitioner testified that he was aware of his *Miranda* rights during the interview; (2) that petitioner was a "sophisticated individual with legal training"; (3) that petitioner "did not display any unique sensitivity that would indicate that the agents might overbear his will"; and (4) that "[t]he videotape of

the interview demonstrates that [petitioner] was composed and aware of his surroundings and the circumstances confronting him." *Ibid.* The court added that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by confessing to 'spontaneous' murder." *Id.* at 19. "Whatever his motivation," the court concluded, "it is clear to us that [petitioner's] capacity for self-determination was not impaired." *Ibid.*

c. Judge Morris Sheppard Arnold, joined by three other judges, dissented. Pet. App. 19-24. In his opinion, Judge Arnold addressed only the issue whether petitioner's confession was voluntary. Judge Arnold first noted that "it appears to me that [petitioner's] confession was the product of an overborne will." *Id.* at 19. He contended that there was ample evidence that "the atmosphere at the interrogation was police-dominated." *Id.* at 20.

With specific regard to the agents' statements concerning a "spontaneous" killing, Judge Arnold noted that, even if the officers had not made an express promise to petitioner, "[t]he coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise." Pet. App. 22. He conceded, however, that "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." *Id.* at 22-23. While "[s]uch techniques may be reprehensible," Judge Arnold continued, "that fact would not seem to contribute to their propensity to overwhelm the will." *Id.* at 23. He suggested that "what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general

uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether 'coercive' or not." *Ibid*.

ARGUMENT

Petitioner renews his claims (Pet. 13-28) that he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his confession, and that his confession to the murder was involuntary. The court of appeals' fact-bound application of settled law to those claims does not warrant further review.

1. Petitioner first contends (Pet. 13-20) that the court of appeals erred by holding that he was not "in custody," and therefore was not entitled to receive *Miranda* warnings, at the time of his confession. That contention lacks merit.

a. Under *Miranda*, statements taken in custodial interrogation must generally be preceded by specified warnings in order to be admissible in the government's case in chief. *Miranda* warnings, however, are not required in every instance of official questioning; instead, they are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In a series of post-*Miranda* decisions, this Court has made clear that, in determining whether an individual was in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495); accord *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam); *Berkemer* v. *McCarty*, 468 U.S.

420, 440 (1984). This Court has emphasized that, in making that determination, a reviewing court must examine "the objective circumstances of the interrogation," *Stansbury*, 511 U.S. at 323, in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave," *id.* at 325.

The court of appeals correctly applied those principles in holding that petitioner was not "in custody" during the interview. When the officers asked petitioner to accompany them to the station, petitioner voluntarily agreed to accompany them. The doors were unlocked during the trip, and petitioner was not restrained in any way. Perhaps most importantly, before going inside the station, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. During the interview, the NCIS agents never physically restrained petitioner, and they informed him repeatedly that he would be "going home today." They also allowed him to use his mobile telephone in order to call his wife. Finally, at the end of the interview, they drove petitioner back to his house. Because all of those facts suggest that a reasonable person in petitioner's position would have felt free to leave, the court of appeals' holding that petitioner was not in custody for purposes of *Miranda* was correct and does not merit further review.[3]

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[3] In concluding that petitioner was not "in custody," the court of appeals also relied on the fact that petitioner was in his fifties; had attended college and completed one year of law school; and had previously been interviewed by NCIS investigators. Pet. App. 12-13. In *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004), issued after the decision below, this Court cast doubt on the relevance to the custody inquiry of a suspect's age, education, and prior experience with law enforcement. See *id.* at 2150-2152. There is no need, however, to

b. With regard to his *Miranda* claim, petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Mathiason*. That contention is erroneous.

In *Mathiason*, an officer investigating a burglary left a card at a suspect's apartment, asking the suspect to call him. The suspect did so and agreed to meet the officer at the state patrol office. When the suspect arrived, the officer told him that he was not under arrest. The officer then told the suspect that the police believed he was involved in the burglary, and falsely informed him that his fingerprints had been found at the scene. The suspect subsequently confessed to the burglary. At the end of the interview, the suspect was allowed to leave the office. 429 U.S. at 493-494.

This Court held that the suspect was not "in custody" for *Miranda* purposes. *Mathiason*, 429 U.S. at 494-496. The Court reasoned that "there [was] no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id*. at 495. The Court noted that the suspect had voluntarily come to the police station, was immediately informed that he was not under arrest, and had left the police station without hindrance once the interview was completed. *Ibid*. The Court specifically rejected the suspect's contention that "a noncustodial situation is * * * converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

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remand this case for further consideration in light of *Yarborough*. Petitioner does not challenge the court of appeals' reliance on those characteristics in making the custody determination, and nothing in the court of appeals' decision suggests that it viewed those characteristics as outcome-dispositive.

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Ibid.* The Court reasoned that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it," and noted that neither the fact that the questioning took place at the station nor the fact that the questioned individual was a suspect altered the analysis. *Ibid.* Finally, the Court reasoned that the officer's false statement concerning the purported discovery of the suspect's fingerprints at the scene "ha[d] nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 496.

This case is materially indistinguishable from *Mathiason*. Although the officers did not specifically offer petitioner the opportunity to decide where and when any interview would take place, petitioner voluntarily consented to the interview, and was not physically restrained either on the way to the interview or during the interview itself. Like the suspect in *Mathiason*, who was told at the outset of the interview that he was not under arrest, petitioner was told that he was not under arrest and that he was free to terminate the interview and leave at any time.

The interview in this case occurred in a windowless room at a police station, much like the interview in *Mathiason*, which took place "behind closed doors at police headquarters." 429 U.S. at 496 (Marshall, J., dissenting). The various psychological tactics used by the officers during petitioner's interview were no different in kind from the false statement made by the officer in *Mathiason*, which the Court concluded was irrelevant to the custody inquiry. 429 U.S. at 496. Finally, to the extent that the agents intended the

interview more closely to resemble a "formal" interrogation, that fact does not justify a different outcome, because this Court has held that the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant to the custody inquiry. *Stansbury*, 511 U.S. at 323.[4] Because the decision below is consistent with *Mathiason* in all relevant respects, and because petitioner identifies no other conflict between the decision below and any other decision of this Court or another court of appeals,[5] further review of petitioner's *Miranda* claim is unwarranted.

2. Petitioner next contends (Pet. 20-27) that the court of appeals erred by holding his confession was voluntary under the Due Process Clause. That contention also lacks merit.

a. An individual's confession is involuntary if, because of the government's conduct, "his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). The court must consider "the

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[4] Petitioner also contends (Pet. 18-19) that, in the course of the interview, the NCIS agents repeatedly made statements implying that he would not be allowed to go home until the interview was completed. In the statements at issue, however, the agents merely suggested that, if petitioner confessed to a "spontaneous" killing, the *investigation* would come to an end—not that petitioner was not free to terminate the interview. See, *e.g.*, Exh. E-2, at 15, 16-17.

[5] Petitioner suggests (Pet. 16-18) that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists because, to the extent that *Hanson* conflicted with the decision in this case, the en banc court of appeals expressly overruled it. Pet. App. 11-12.

totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The relevant characteristics of the individual include his age, education, physical condition, mental health, and criminal experience; the relevant details of the interrogation include the use of coercive tactics, the length of the interrogation, and its location. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993); *Schneckloth*, 412 U.S. at 226; *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The court of appeals correctly engaged in the required totality-of-the-circumstances inquiry in concluding that petitioner's confession was voluntary. The court of appeals acknowledged both that the agents used psychological tactics to facilitate a confession and that the agents made statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing. The court, however, then cited a number of facts that suggested that petitioner's confession was voluntary, including (1) that petitioner confessed after only 33 minutes of questioning; (2) that the agents neither physically threatened petitioner nor shouted at him; (3) that petitioner testified that he was aware of his *Miranda* rights at the time of the interview; and (4) that petitioner was in his fifties and had attended college and completed one year of law school. Moreover, after reviewing the videotape of the confession, the court of appeals observed that petitioner remained composed and aware throughout the interview and did not display any unique sensitivity to the agents' questioning, and ultimately determined that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by con-

fessing to 'spontaneous' murder." Pet. App. 19. Based on all of those considerations, the court of appeals concluded that the agents did not overbear petitioner's will and thereby render his confession involuntary. That intensely fact-bound conclusion does not warrant this Court's review.

b. With regard to his voluntariness claim, petitioner does not contend that the court of appeals' decision directly conflicts with any decision of another court of appeals. Instead, he contends only that it conflicts with this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), by refusing to hold petitioner's confession involuntary notwithstanding the agents' statements to petitioner that he would not be prosecuted for a "spontaneous" killing.

Petitioner correctly notes that, in *Bram*, this Court stated that "a confession, in order to be admissible, * * * must not be * * * obtained by any direct or implied promises, however slight." 168 U.S. at 542-543 (citation omitted). The Court has since recognized, however, that "this passage from *Bram* * * * under current precedent does not state the standard for determining the voluntariness of a confession." *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). In the wake of *Fulminante* and other decisions by this Court, "there has been a movement away from treating * * * promises of leniency as *per se* producing involuntariness." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) at 454 (2d ed. 1999). Instead, like the court of appeals in this case, lower courts have treated a promise of leniency as but one factor in the totality of the circumstances under which the voluntariness of a confession is judged. See, *e.g.*, *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.) (noting that "the presence of a direct or implied promise of help

or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision"), cert. denied, 488 U.S. 945 (1988); *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.) (noting that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will"), cert. denied, 479 U.S. 989 (1986). Even assuming, therefore, that the agents' statements to petitioner could properly be characterized as a promise of leniency, the court of appeals did not err by holding that such a promise did not automatically render his confession involuntary.[6]

c. Petitioner appears to contend in the alternative that the agents' broader use of deceptive psychological tactics rendered his confession involuntary. This Court, however, has rejected the view that misrepresentations to a suspect automatically justify exclusion of a suspect's confession. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Indeed, as the dissenting opinion below sug-

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[6] This case would present a poor vehicle for reconsideration of the prevailing rule that a promise of leniency does not automatically render a confession involuntary, insofar as it is questionable whether the agents' statements constituted a relevant promise of leniency at all. The agents did suggest (correctly, see 18 U.S.C. 3282) that petitioner could not be prosecuted if he confessed to a "spontaneous" killing (that is, manslaughter under 18 U.S.C. 1112), but they did not indicate that petitioner would not be prosecuted if he confessed to felony murder (under 18 U.S.C. 1111), and they affirmatively suggested that petitioner *would* be prosecuted if he confessed to premeditated murder (also under 18 U.S.C. 1111). Rather than confessing merely to a "spontaneous" killing, however, petitioner plainly confessed to felony murder, and arguably confessed to premeditated murder as well. Pet. App. 4, 30. The agents therefore did not breach any limited promise of leniency that was made.

gested, "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." Pet. App. 22-23 (opinion of Morris Sheppard Arnold, J.).[7] Ultimately, the court of appeals' conclusion that, under the totality of the circumstances, petitioner's confession was voluntary despite the agents' use of both deceptive and non-deceptive psychological tactics is fact-bound and does not warrant further review.[8]

3. Finally, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charge in this case. If petitioner is acquitted following a trial on the merits, the claims that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claims—together with any other claims he might have—in a petition for writ of certiorari seeking review

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[7] Although the dissenting opinion did suggest that false statements by the police, while not rendering a confession involuntary, may otherwise violate the Due Process Clause, Pet. App. 23 (opinion of Morris Sheppard Arnold, J.), petitioner advances no due process claim apart from an involuntariness claim. This case therefore does not present any broader question concerning the circumstances, if any, under which deceptive police tactics during an interrogation raise due process concerns. Nor was the level and type of trickery here of a character to raise such concerns.

[8] Petitioner also contends (Pet. 27-28) that the court of appeals erred by holding that his subsequent confession to Muns's sister and fictitious brother was admissible. His sole basis for that contention, however, is that the subsequent confession was the "fruit" of the impermissibly obtained initial confession. See *Wong Sun* v. *United States*, 371 U.S. 471, 484-487 (1963). Because the initial confession was in fact constitutionally obtained, petitioner's contention lacks merit.

of the final judgment against him. Accordingly, this Court's review is not necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2005

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-24) is reported at 363 F.3d 715. The panel opinion of the court of appeals (Pet. App. 25-53) is reported at 306 F.3d 545. The order of the district court denying petitioner's motion to suppress (Pet. App. 54-89) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2004. The petition for a writ of certiorari was filed on July 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Missouri on one count of felony murder, in violation of 18 U.S.C. 1111. Petitioner moved to suppress his confession to the murder. The district court granted petitioner's motion. Pet. App. 54-89. A panel of the court of appeals initially affirmed. *Id.* at 25-53. After granting rehearing en banc, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

1. During the Vietnam war, petitioner served in the Navy as a disbursing clerk aboard the *U.S.S. Cacapon*. Petitioner reported to Ensign Andrew Muns, the ship's disbursing officer. On January 16 or 17, 1968, while the ship was moored in the Philippines, Muns disappeared. After conducting an investigation, the Naval Criminal Intelligence Service (NCIS) concluded that Muns had stolen $8600 from the disbursing office and then deserted. Pet. App. 2.

Thirty years later, Muns's sister convinced the NCIS Cold Case Homicide Unit to reopen the investigation. In 1999, NCIS agents interviewed petitioner four times; on three of those occasions, they administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By that time, petitioner was in his fifties; he had attended college and completed one year of law school. Petitioner voluntarily answered the agents' questions during the interviews. On one occasion, petitioner told the agents that he may have been involved in Muns's death and that he felt he had repressed memories concerning the incident. He asked the officers whether they knew of a therapist who could help him recover those memories. Following those interviews, the agents

had no significant contact with petitioner for approximately ten months, while they investigated other leads. Pet. App. 2-3, 71.

After pursuing those leads, the NCIS agents identified petitioner as the prime suspect in the case. Accordingly, they decided to interview him again. On September 21, 2000, NCIS Special Agent David Early, accompanied by a Missouri Highway Patrol trooper, went to petitioner's place of employment, told him they were conducting an investigation, and asked if he would accompany them to the local Missouri Highway Patrol office for an interview. The officers were dressed in plain clothes and said that they could not tell petitioner the nature of the investigation, though they assured him that it had nothing to do with his family. Petitioner testified that he agreed to accompany the officers because he believed they might be investigating criminal allegations concerning his employer, a real estate developer. When petitioner volunteered to drive to the station himself, the officers stated that they would prefer it if he were to ride with them. Petitioner agreed and rode to the station in the front seat of the officers' unmarked patrol car. The doors of the car were unlocked during the trip, and petitioner was not restrained in any way. Pet. App. 3; Gov't C.A. Br. 7-8.

After arriving at the station, but before going inside, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. The officers then took petitioner to a windowless interview room. NCIS agents had prepared the room by placing enlarged photographs of scenes from petitioner's life on the walls. At the start of the interview, Agent Early and NCIS Special Agent Jim Grebas identified themselves. The NCIS agents did not

administer *Miranda* warnings to petitioner; they testified that they had believed that the warnings were not necessary because petitioner was not "in custody" for *Miranda* purposes. Petitioner testified that he had been aware of his *Miranda* rights during the interview; that, at the start of the interview, he had believed that he was not in custody and was free to leave at any time; and that, as the interview progressed, "[he] believe[d] they would have let [him] go, but [he] wasn't sure." Pet. App. 3-4, 28 n.3; 4/27/01 Tr. 202.

During the interview, the NCIS agents used various strategies to facilitate a confession. For example, the agents told petitioner that there was "absolutely no doubt" about his guilt and that they had significant evidence establishing him as the killer. Specifically, they suggested that there were eyewitnesses to Muns's death and that they had a suicide note from another individual implicating petitioner in the death. They also stated that the United States Attorney for the District of Alaska was preparing to charge petitioner with premeditated murder and that a protracted trial in a distant district would drain his financial resources and ruin his family's reputation. Finally, they told petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, because the statute of limitations for manslaughter had expired. Pet. App. 4, 29, 43-44.[1]

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[1] The exchanges included the following:

> GREBAS: And if you will be man enough and stand up to the plate and say, you know what guys, it was "spontaneous." We are on the phone saying we got a problem with the statute of limitation. It's possible, beyond possible; you won't be prosecuted at all. And

I want to throw-up when I say that, but I will—that's my word to you.

LEBRUN: Right.

GREBAS: Special Agent Early?

EARLY: Absolutely.

LEBRUN: What's the statute of limitation?

GREBAS: There is no second-degree murder.

EARLY: It's five years from the time of the incident. It's called "manslaughter" in the federal system.

* * * * *

LEBRUN: So, am I hearing that I won't be prosecuted?

GREBAS: That's what you are hearing.

LEBRUN: Is that what I am hearing?

GREBAS: That's what you are hearing.

EARLY: If it's spontaneous and that's the truth, you will not be prosecuted.

GREBAS: That's absolutely right.

LEBRUN: I am here to tell you there was no premeditation.

EARLY: All right.

LEBRUN: It was spontaneous.

Pet. App. 42-44.

At the various points during the interview, the agents permitted petitioner to take accompanied breaks in order to use the restroom, have a cup of coffee, and smoke a cigarette. They allowed him to use his mobile telephone to call his wife. And they informed him repeatedly that he would be "going home today." Pet. App. 4, 70; 4/27/01 Tr. 107.

After being questioned for approximately 33 minutes, petitioner confessed to Muns's murder. He explained that, while he was robbing a safe in the disbursing office, Muns had walked into the room. He stated that he had rushed Muns and killed him by strangling him and repeatedly smashing his skull against the deck. He added that he had disposed of Muns's body by dumping it into a tank of caustic fuel oil. At the agents' urging, he then physically reenacted the murder, with Agent Early playing the role of Muns. Pet. App. 4, 30.

After petitioner confessed, the NCIS agents asked him whether he wanted to apologize to Muns's sister, who had flown in from Milwaukee, and to Muns's fictitious brother, an NCIS agent who pretended that he had advanced cancer. Petitioner, who was himself recovering from cancer, agreed to speak to them, told them he was responsible for Muns's death, and apologized. Approximately two hours after the interview began, petitioner consented to a search of his house. The agents drove petitioner to his house and searched it, but found nothing. The agents then left petitioner at home. Pet. App. 4-5, 69-70.

2. Petitioner was subsequently arrested and charged with one count of felony murder, in violation of 18 U.S.C. 1111. Before trial, petitioner moved to suppress his initial confession (together with his subsequent confession to Muns's sister and fictitious brother) on the

grounds (1) that he had been subjected to custodial interrogation without receiving *Miranda* warnings and (2) that his initial confession was involuntary. Agreeing with petitioner on both grounds, the district court granted the motion. Pet. App. 54-89.

3. A panel of the court of appeals initially affirmed. Pet. App. 25-53. After granting rehearing en banc, however, the court of appeals reversed and remanded for further proceedings. *Id.* at 1-24.

a. The en banc court of appeals first held that petitioner was not "in custody" for purposes of *Miranda* at the time of the confession. Pet. App. 5-14. At the outset, the court recognized that, in determining whether petitioner was in custody, "[t]he 'ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 7 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

After considering the totality of the circumstances, the court of appeals determined that petitioner was not in custody. Pet. App. 7. The court discounted the facts that the interview had occurred in a small, windowless room at the station and that the authorities had used psychological tactics, some concededly deceptive, in order to produce incriminating responses. *Id.* at 8. In doing so, the court relied heavily both on this Court's decision in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (per curiam), in which the Court held that the mere fact that an interview occurred in a "coercive environment" did not render the interview custodial, and on this Court's subsequent decision in *Beheler*. Pet. App. 8. The court of appeals reasoned that "*Mathiason* and *Beheler* teach us that some degree of coercion is part and parcel of the interrogation process," and that the

critical inquiry was instead whether "a reasonable person would perceive the coercion as restricting his or her freedom to depart." *Id.* at 9. Applying those decisions, the court found that "[t]he facts of this case are in all relevant respects indistinguishable from *Mathiason* and *Beheler*, and they dictate the conclusion that [petitioner] was not in custody within the meaning of *Miranda*." *Id.* at 10.[2] The court noted that petitioner was never physically restrained; was never placed in handcuffs; was told before the interview began that he was free to leave; and had his mobile telephone with him and used it to call his wife from the interview room. *Id.* at 9-10. Based on those facts, the court concluded that petitioner "would not have perceived that his freedom of action was restrained to the degree associated with formal arrest, and was therefore not 'in custody.'" *Id.* at 13-14.

b. The court of appeals next held that petitioner's confession was not involuntary under the Due Process Clause. Pet. App. 14-19. The court asserted that, in assessing the voluntariness of a confession, "our polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *Id.* at 16-17. The court observed that "[t]he facts surrounding the confession are straightforward." *Id.* at 14. Specifically,

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[2] The court of appeals also considered a number of its own decisions and concluded that, "where there is no clear indication that the defendant's freedom to depart has been restricted, we have typically concluded that a police station interview was noncustodial." Pet. App. 11. Although the court acknowledged that it had reached a contrary result in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001), the court reasoned that *Hanson* was "readily distinguishable," and overruled it to the extent it was not. Pet. App. 11-12.

the court noted that petitioner confessed after only 33 minutes of questioning, and that the agents neither physically threatened petitioner nor shouted at him. *Ibid*. Although the court acknowledged that the agents had used psychological tactics to facilitate a confession, it reasoned that the mere use of such tactics was insufficient, by itself, to render a confession involuntary. *Ibid.*

The court of appeals next rejected the district court's conclusion that the psychological tactics, when coupled with the agents' statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing, rendered his confession involuntary. Pet. App. 14-15. At the outset, the court of appeals noted that the district court had made no findings as to what, if any, promise the officers had made to petitioner, much less what legal effect such a promise would have. *Id*. at 16. Instead, the court of appeals observed that the district court had found only that petitioner *believed* that he would not be prosecuted if he confessed to a "spontaneous" killing. *Ibid*. Even assuming that the agents' statements could be viewed as a promise to petitioner, however, the court reasoned that such a promise did not render petitioner's confession involuntary *per se*, but served only as one factor in the totality of the circumstances. *Ibid*. In addition to the factors it had already discussed, the court asserted that a number of other countervailing factors suggested that petitioner's confession was voluntary. *Id*. at 18-19. Specifically, the court noted (1) that petitioner testified that he was aware of his *Miranda* rights during the interview; (2) that petitioner was a "sophisticated individual with legal training"; (3) that petitioner "did not display any unique sensitivity that would indicate that the agents might overbear his will"; and (4) that "[t]he videotape of

the interview demonstrates that [petitioner] was composed and aware of his surroundings and the circumstances confronting him." *Ibid.* The court added that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by confessing to 'spontaneous' murder." *Id.* at 19. "Whatever his motivation," the court concluded, "it is clear to us that [petitioner's] capacity for self-determination was not impaired." *Ibid.*

c. Judge Morris Sheppard Arnold, joined by three other judges, dissented. Pet. App. 19-24. In his opinion, Judge Arnold addressed only the issue whether petitioner's confession was voluntary. Judge Arnold first noted that "it appears to me that [petitioner's] confession was the product of an overborne will." *Id.* at 19. He contended that there was ample evidence that "the atmosphere at the interrogation was police-dominated." *Id.* at 20.

With specific regard to the agents' statements concerning a "spontaneous" killing, Judge Arnold noted that, even if the officers had not made an express promise to petitioner, "[t]he coercive effect, if any, of a reasonably perceived promise is exactly the same as that of an actual promise." Pet. App. 22. He conceded, however, that "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." *Id.* at 22-23. While "[s]uch techniques may be reprehensible," Judge Arnold continued, "that fact would not seem to contribute to their propensity to overwhelm the will." *Id.* at 23. He suggested that "what lies at the bottom of these kinds of cases is not merely an aversion to something called coercion, but a general

uneasiness about the fairness of admitting confessions that were induced by knowing, lurid falsehoods and unfulfilled promises, whether 'coercive' or not." *Ibid*.

ARGUMENT

Petitioner renews his claims (Pet. 13-28) that he was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his confession, and that his confession to the murder was involuntary. The court of appeals' fact-bound application of settled law to those claims does not warrant further review.

1. Petitioner first contends (Pet. 13-20) that the court of appeals erred by holding that he was not "in custody," and therefore was not entitled to receive *Miranda* warnings, at the time of his confession. That contention lacks merit.

a. Under *Miranda*, statements taken in custodial interrogation must generally be preceded by specified warnings in order to be admissible in the government's case in chief. *Miranda* warnings, however, are not required in every instance of official questioning; instead, they are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In a series of post-*Miranda* decisions, this Court has made clear that, in determining whether an individual was in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495); accord *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam); *Berkemer* v. *McCarty*, 468 U.S.

420, 440 (1984). This Court has emphasized that, in making that determination, a reviewing court must examine "the objective circumstances of the interrogation," *Stansbury*, 511 U.S. at 323, in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave," *id.* at 325.

The court of appeals correctly applied those principles in holding that petitioner was not "in custody" during the interview. When the officers asked petitioner to accompany them to the station, petitioner voluntarily agreed to accompany them. The doors were unlocked during the trip, and petitioner was not restrained in any way. Perhaps most importantly, before going inside the station, Agent Early told petitioner that he was not under arrest and that he was free to terminate the interview and leave at any time. During the interview, the NCIS agents never physically restrained petitioner, and they informed him repeatedly that he would be "going home today." They also allowed him to use his mobile telephone in order to call his wife. Finally, at the end of the interview, they drove petitioner back to his house. Because all of those facts suggest that a reasonable person in petitioner's position would have felt free to leave, the court of appeals' holding that petitioner was not in custody for purposes of *Miranda* was correct and does not merit further review.[3]

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[3] In concluding that petitioner was not "in custody," the court of appeals also relied on the fact that petitioner was in his fifties; had attended college and completed one year of law school; and had previously been interviewed by NCIS investigators. Pet. App. 12-13. In *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004), issued after the decision below, this Court cast doubt on the relevance to the custody inquiry of a suspect's age, education, and prior experience with law enforcement. See *id.* at 2150-2152. There is no need, however, to

b. With regard to his *Miranda* claim, petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Mathiason*. That contention is erroneous.

In *Mathiason*, an officer investigating a burglary left a card at a suspect's apartment, asking the suspect to call him. The suspect did so and agreed to meet the officer at the state patrol office. When the suspect arrived, the officer told him that he was not under arrest. The officer then told the suspect that the police believed he was involved in the burglary, and falsely informed him that his fingerprints had been found at the scene. The suspect subsequently confessed to the burglary. At the end of the interview, the suspect was allowed to leave the office. 429 U.S. at 493-494.

This Court held that the suspect was not "in custody" for *Miranda* purposes. *Mathiason*, 429 U.S. at 494-496. The Court reasoned that "there [was] no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id*. at 495. The Court noted that the suspect had voluntarily come to the police station, was immediately informed that he was not under arrest, and had left the police station without hindrance once the interview was completed. *Ibid*. The Court specifically rejected the suspect's contention that "a noncustodial situation is * * * converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the

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remand this case for further consideration in light of *Yarborough*. Petitioner does not challenge the court of appeals' reliance on those characteristics in making the custody determination, and nothing in the court of appeals' decision suggests that it viewed those characteristics as outcome-dispositive.

absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Ibid.* The Court reasoned that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it," and noted that neither the fact that the questioning took place at the station nor the fact that the questioned individual was a suspect altered the analysis. *Ibid.* Finally, the Court reasoned that the officer's false statement concerning the purported discovery of the suspect's fingerprints at the scene "ha[d] nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 496.

This case is materially indistinguishable from *Mathiason*. Although the officers did not specifically offer petitioner the opportunity to decide where and when any interview would take place, petitioner voluntarily consented to the interview, and was not physically restrained either on the way to the interview or during the interview itself. Like the suspect in *Mathiason*, who was told at the outset of the interview that he was not under arrest, petitioner was told that he was not under arrest and that he was free to terminate the interview and leave at any time.

The interview in this case occurred in a windowless room at a police station, much like the interview in *Mathiason*, which took place "behind closed doors at police headquarters." 429 U.S. at 496 (Marshall, J., dissenting). The various psychological tactics used by the officers during petitioner's interview were no different in kind from the false statement made by the officer in *Mathiason*, which the Court concluded was irrelevant to the custody inquiry. 429 U.S. at 496. Finally, to the extent that the agents intended the

interview more closely to resemble a "formal" interrogation, that fact does not justify a different outcome, because this Court has held that the "subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant to the custody inquiry. *Stansbury*, 511 U.S. at 323.[4] Because the decision below is consistent with *Mathiason* in all relevant respects, and because petitioner identifies no other conflict between the decision below and any other decision of this Court or another court of appeals,[5] further review of petitioner's *Miranda* claim is unwarranted.

2. Petitioner next contends (Pet. 20-27) that the court of appeals erred by holding his confession was voluntary under the Due Process Clause. That contention also lacks merit.

a. An individual's confession is involuntary if, because of the government's conduct, "his will has been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). The court must consider "the

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[4] Petitioner also contends (Pet. 18-19) that, in the course of the interview, the NCIS agents repeatedly made statements implying that he would not be allowed to go home until the interview was completed. In the statements at issue, however, the agents merely suggested that, if petitioner confessed to a "spontaneous" killing, the *investigation* would come to an end—not that petitioner was not free to terminate the interview. See, *e.g.*, Exh. E-2, at 15, 16-17.

[5] Petitioner suggests (Pet. 16-18) that the court of appeals' decision conflicts with its earlier decision in *United States* v. *Hanson*, 237 F.3d 961 (8th Cir. 2001). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists because, to the extent that *Hanson* conflicted with the decision in this case, the en banc court of appeals expressly overruled it. Pet. App. 11-12.

totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The relevant characteristics of the individual include his age, education, physical condition, mental health, and criminal experience; the relevant details of the interrogation include the use of coercive tactics, the length of the interrogation, and its location. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 693-694 (1993); *Schneckloth*, 412 U.S. at 226; *Payne* v. *Arkansas*, 356 U.S. 560, 567 (1958).

The court of appeals correctly engaged in the required totality-of-the-circumstances inquiry in concluding that petitioner's confession was voluntary. The court of appeals acknowledged both that the agents used psychological tactics to facilitate a confession and that the agents made statements to petitioner that he would not be prosecuted if he truthfully confessed to a "spontaneous" killing. The court, however, then cited a number of facts that suggested that petitioner's confession was voluntary, including (1) that petitioner confessed after only 33 minutes of questioning; (2) that the agents neither physically threatened petitioner nor shouted at him; (3) that petitioner testified that he was aware of his *Miranda* rights at the time of the interview; and (4) that petitioner was in his fifties and had attended college and completed one year of law school. Moreover, after reviewing the videotape of the confession, the court of appeals observed that petitioner remained composed and aware throughout the interview and did not display any unique sensitivity to the agents' questioning, and ultimately determined that "it is apparent that [petitioner] is an intelligent, calculating person who erroneously perceived a potential loophole in the prosecution's case and tried to take advantage of it by con-

fessing to 'spontaneous' murder." Pet. App. 19. Based on all of those considerations, the court of appeals concluded that the agents did not overbear petitioner's will and thereby render his confession involuntary. That intensely fact-bound conclusion does not warrant this Court's review.

b. With regard to his voluntariness claim, petitioner does not contend that the court of appeals' decision directly conflicts with any decision of another court of appeals. Instead, he contends only that it conflicts with this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), by refusing to hold petitioner's confession involuntary notwithstanding the agents' statements to petitioner that he would not be prosecuted for a "spontaneous" killing.

Petitioner correctly notes that, in *Bram*, this Court stated that "a confession, in order to be admissible, * * * must not be * * * obtained by any direct or implied promises, however slight." 168 U.S. at 542-543 (citation omitted). The Court has since recognized, however, that "this passage from *Bram* * * * under current precedent does not state the standard for determining the voluntariness of a confession." *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). In the wake of *Fulminante* and other decisions by this Court, "there has been a movement away from treating * * * promises of leniency as *per se* producing involuntariness." 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.2(c) at 454 (2d ed. 1999). Instead, like the court of appeals in this case, lower courts have treated a promise of leniency as but one factor in the totality of the circumstances under which the voluntariness of a confession is judged. See, *e.g.*, *Green* v. *Scully*, 850 F.2d 894, 901 (2d Cir.) (noting that "the presence of a direct or implied promise of help

or leniency alone has not barred the admission of a confession where the totality of the circumstances indicates it was the product of a free and independent decision"), cert. denied, 488 U.S. 945 (1988); *Miller* v. *Fenton*, 796 F.2d 598, 608 (3d Cir.) (noting that "it does not matter that the accused confessed because of [a] promise, so long as the promise did not overbear his will"), cert. denied, 479 U.S. 989 (1986). Even assuming, therefore, that the agents' statements to petitioner could properly be characterized as a promise of leniency, the court of appeals did not err by holding that such a promise did not automatically render his confession involuntary.[6]

c. Petitioner appears to contend in the alternative that the agents' broader use of deceptive psychological tactics rendered his confession involuntary. This Court, however, has rejected the view that misrepresentations to a suspect automatically justify exclusion of a suspect's confession. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Indeed, as the dissenting opinion below sug-

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[6] This case would present a poor vehicle for reconsideration of the prevailing rule that a promise of leniency does not automatically render a confession involuntary, insofar as it is questionable whether the agents' statements constituted a relevant promise of leniency at all. The agents did suggest (correctly, see 18 U.S.C. 3282) that petitioner could not be prosecuted if he confessed to a "spontaneous" killing (that is, manslaughter under 18 U.S.C. 1112), but they did not indicate that petitioner would not be prosecuted if he confessed to felony murder (under 18 U.S.C. 1111), and they affirmatively suggested that petitioner *would* be prosecuted if he confessed to premeditated murder (also under 18 U.S.C. 1111). Rather than confessing merely to a "spontaneous" killing, however, petitioner plainly confessed to felony murder, and arguably confessed to premeditated murder as well. Pet. App. 4, 30. The agents therefore did not breach any limited promise of leniency that was made.

gested, "it is not immediately apparent why statements by interrogators that are untrue, and known to be false, are more 'coercive' than statements that are true." Pet. App. 22-23 (opinion of Morris Sheppard Arnold, J.).[7] Ultimately, the court of appeals' conclusion that, under the totality of the circumstances, petitioner's confession was voluntary despite the agents' use of both deceptive and non-deceptive psychological tactics is fact-bound and does not warrant further review.[8]

3. Finally, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charge in this case. If petitioner is acquitted following a trial on the merits, the claims that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claims—together with any other claims he might have—in a petition for writ of certiorari seeking review

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[7] Although the dissenting opinion did suggest that false statements by the police, while not rendering a confession involuntary, may otherwise violate the Due Process Clause, Pet. App. 23 (opinion of Morris Sheppard Arnold, J.), petitioner advances no due process claim apart from an involuntariness claim. This case therefore does not present any broader question concerning the circumstances, if any, under which deceptive police tactics during an interrogation raise due process concerns. Nor was the level and type of trickery here of a character to raise such concerns.

[8] Petitioner also contends (Pet. 27-28) that the court of appeals erred by holding that his subsequent confession to Muns's sister and fictitious brother was admissible. His sole basis for that contention, however, is that the subsequent confession was the "fruit" of the impermissibly obtained initial confession. See *Wong Sun* v. *United States*, 371 U.S. 471, 484-487 (1963). Because the initial confession was in fact constitutionally obtained, petitioner's contention lacks merit.

of the final judgment against him. Accordingly, this Court's review is not necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2005