No. 04-894

In the Supreme Court of the United States

MICHAEL S. CZICHRAY, 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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QUESTION PRESENTED

Whether petitioner was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when he was interviewed in his home and was repeatedly advised, before and during the interview, that his participation in the interview was voluntary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A61-A78) is reported at 378 F.3d 822. The district court's memorandum opinion and order granting petitioner's motion to suppress (Pet. App. A12-A60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2004. A petition for rehearing was denied on October 5, 2004 (Pet. App. A79). The petition for a writ of certiorari was filed on January 3, 2005. 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 District of Minnesota on 27 counts of health care fraud, in violation of 18 U.S.C. 1347; false statements relating to health care matters, in violation of 18 U.S.C. 1035; and conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Before trial, petitioner moved to suppress statements he had made during an interview with the Federal Bureau of Investigation (FBI). The district court granted petitioner's motion. Pet. App. A25-A46, A59. The court of appeals reversed. *Id.* at A61-A78.

1. Petitioner, a chiropractor, was a suspect in a long-running FBI investigation of health care fraud in Minnesota. On February 16, 2001, FBI Special Agents Timothy Bisswurm and Sean Boylan interviewed petitioner at his home in Columbia Heights, Minnesota. Around 4:30 a.m. on that date, Agent Bisswurm called petitioner's home to determine whether he was there. When petitioner answered the phone, Agent Bisswurm said that he had the wrong number. Around 6:30 a.m., the FBI agents approached the house and rang the bell or knocked. Petitioner failed to answer the door. When the agents saw through a window that a television and lights were on, they again called the home, and Agent Boylan informed petitioner that he needed to come to the door. Pet. App. A2, A28, A62; C.A. App. 14-15.

When petitioner appeared, clad only in a T-shirt and boxer shorts, Agent Boylan identified himself and Agent Bisswurm as FBI agents and told petitioner that they would like to "take a few minutes of [his] time." The agents specifically advised petitioner that he was free not to talk with them and that, when they were done,

they would "go on [their] way." Petitioner let the agents into the house. Pet. App. A28, A62.

The three men sat down in the living room, and the ensuing interview lasted nearly seven hours. The FBI agents did not administer the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). On several occasions, however, the agents reiterated that petitioner could refuse to speak with them and tell them to leave.[1] At no point did petitioner do so. The agents did not restrain petitioner or threaten to use physical force, nor did they display their weapons or threaten to arrest him. Pet. App. A28, A62-A63; C.A. App. 19, 20.

About an hour into the interview, petitioner asked the agents if he could go to his bedroom to put on some pants. The agents agreed, but Agent Boylan accompanied petitioner to check the room first for a telephone, for the purpose of preventing petitioner from informing others that he was being investigated. Petitioner later asked the agents if he could go to the bathroom; the agents agreed, but Agent Boylan again checked the room first for a telephone.[2] About three hours into the interview, petitioner told the agents that he was late for work. The agents instructed petitioner to call in sick, and directed him not to inform his office about the investigation. Petitioner complied. Although the telephone rang several times during the interview, the agents instructed petitioner not to answer. Petitioner again complied. During the interview, the agents in-

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[1] As the court of appeals noted (Pet. App. A64), the magistrate judge found that the agents advised petitioner "at least eight times" that he could refuse to speak with them and tell them to leave, and noted that "this evidence * * * is not controverted." C.A. App. Add. 113-114.

[2] The magistrate judge found that petitioner also went into the kitchen to get a glass of water and to feed his cat. C.A. App. Add. 74.

formed petitioner that, if he did not cooperate, they would interview his 75-year-old father and others. The agents suggested that they would "light up [his] world" (which petitioner construed to mean that they would "enlighten" his father and others concerning his alleged wrongdoing), and that they could use the power of the FBI to pressure insurance companies to withhold reimbursements from his business. Pet. App. A28-A29, A62; C.A. App. Add. 73-74.

During the course of the interview, petitioner made various incriminating oral statements. At the end of the interview, petitioner also signed a written statement prepared by the FBI agents (after making one correction). In that written statement, petitioner made further admissions and acknowledged that "no one ha[d] threatened, coerced, or promised [him] anything." Petitioner initialed and dated each page and then signed the statement. Petitioner was not arrested at the end of the interview. Pet. App. A30, A63; C.A. App. Add. 75.

2. In the course of its health care fraud investigation, the FBI determined that petitioner had presented false documents and statements to local banks when applying for a federally guaranteed loan. That discovery resulted in petitioner being indicted in the United States District Court for the District of Minnesota on six counts of bank fraud and related offenses. C.A. App. 13; Gov't C.A. Br. 1.

Before trial on the bank fraud charges, petitioner moved to suppress the oral statements he had made during the FBI interview,[3] on the grounds (1) that he had been subjected to custodial interrogation without

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[3] The government decided to offer only petitioner's oral statements, and not his written statement, into evidence. Pet. App. A5 n.1.

receiving *Miranda* warnings and (2) that his statements were involuntary under the Due Process Clause. After conducting an evidentiary hearing at which petitioner and the FBI agents testified, a magistrate judge recommended that petitioner's motion be denied. C.A. App. 13-23. Without conducting an evidentiary hearing of its own, the district court rejected the magistrate judge's report and recommendation and granted petitioner's suppression motion, on the ground that petitioner was "in custody" under *Miranda* during the interview. Pet. App. A1-A11. Because the district court did not announce its decision until immediately after the jury was empaneled, the government was unable to appeal. See 18 U.S.C. 3731. Petitioner was subsequently convicted on three of the six counts, but has yet to be sentenced. See Gov't C.A. Br. 3.

3. On November 19, 2002, a federal grand jury in the District of Minnesota returned a superseding indictment charging petitioner and three others on 27 counts of health care fraud and related offenses. Before trial, petitioner moved to suppress the oral and written statements that he had made during the FBI interview,[4] again on the grounds that he had been subjected to custodial interrogation without *Miranda* warnings and that his statements were involuntary. After a five-day evi-

[4] In their respective opinions, the district court and the court of appeals seemingly operated on the assumption that petitioner was seeking to suppress only his *written* statement. See, *e.g.*, Pet. App. A25-A26, A61. The magistrate judge, however, stated that petitioner was seeking to suppress the "statements" he made to the FBI agents, without drawing any distinction between the oral and written statements. See, *e.g.*, C.A. App. Add. 106. In any event, the *Miranda* inquiry as to petitioner's oral and written statements is identical, because all of those statements were made in the course of the same interview.

dentiary hearing on that motion and others (in which the agents, but not petitioner, testified), a different magistrate judge recommended that the motion be denied. C.A. App. Add. 72-75, 106-128, 153. After reviewing the evidence from the hearing and from the suppression hearing in the bank fraud case, the magistrate judge concluded that the suppression issue was "not a close one." *Id.* at 112 n.33. The magistrate judge also noted that he had "strong misgivings as to [petitioner's] credibility" in his earlier testimony, and that the testimony of Agents Bisswurm and Boylan, by contrast, was credible. *Id.* at 127 n.39.

4. Again without conducting a separate evidentiary hearing, the district court rejected the magistrate judge's report and recommendation in relevant part and granted petitioner's suppression motion, on the ground that petitioner was "in custody" under *Miranda* during the interview. Pet. App. A25-A46, A59. As a preliminary matter, the court rejected petitioner's contention that the disposition of his motion was controlled by the doctrines of law of the case and issue preclusion. *Id.* at A30-A32. On the merits, the court, applying the six-factor test for "in custody" determinations articulated in *United States* v. *Griffin*, 922 F.2d 1343 (8th Cir. 1990), concluded that petitioner was in custody notwithstanding the fact that the FBI agents had repeatedly informed petitioner that he could refuse to speak with them and tell them to leave. Pet. App. A32-A46.

5. The court of appeals reversed. Pet. App. A61-A78.

a. At the outset, the court of appeals noted that "the ultimate question in determining whether a person is in 'custody' for purposes of *Miranda* is 'whether there is a formal arrest or restraint on freedom of movement of

the degree associated with a formal arrest.'" Pet. App. A63 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). The court reasoned that "[t]he most obvious and effective means of demonstrating that a suspect has not been taken into custody" is to inform the suspect that he may terminate the interview at will, *id.* at A64 (quoting *Griffin*, 922 F.2d at 1349), and added that the FBI agents in this case "exercised this 'obvious and effective' means of demonstration in spades," *ibid.* The court observed that the agents' repeated assurances that petitioner could terminate the interview constituted "powerful evidence" that a reasonable person would have understood that he was free to terminate the interview, *ibid.*, and noted that it could not identify a single case from this Court or from any court of appeals (except for one Ninth Circuit case "decided under an outmoded standard of review") holding that an individual was in custody despite such assurances, *id.* at A64-A65.

The court of appeals then reasoned that the "weighty inference" that petitioner was not in custody after receiving the FBI agents' assurances was "strengthened further by the context in which the interview occurred—the living room of [petitioner's] home." Pet. App. A65. The court noted that it had repeatedly held that, when an individual was questioned in his own home, such surroundings were "not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation." *Ibid.* (quoting *United States* v. *Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985)). The court added that, in the only case in which this Court had considered whether an individual was in custody during questioning in a private home absent formal arrest, the Court had held that *Miranda* warnings were

not required. *Id.* at A65-A66 (citing *Beckwith* v. *United States*, 425 U.S. 341 (1976)).

Finally, the court of appeals rejected the various factors on which the district court had relied in concluding that petitioner was in custody. Pet. App. A66-A71. The court noted that the factors identified in its earlier decision in *Griffin*, *supra*, were "not by any means exclusive," and that the *en banc* Eighth Circuit had recently reviewed a custodial determination without so much as citing *Griffin*. *Id.* at A67 (citing *United States* v. *LeBrun*, 363 F.3d 715 (2004), cert. denied, 125 S. Ct. 1292 (2005)). According to the court of appeals, a reviewing court "must consider whether the *historical facts*, as opposed to the one-step-removed *Griffin* factors[,] establish custody." *Ibid.* As to those facts, the court of appeals reasoned that it was not significant that the FBI agents had instructed petitioner not to use the telephone, on the ground that "an effort to preserve opportunities to cooperate should not be understood by a reasonable person as a restriction on movement akin to formal arrest." *Id.* at A68. "[P]lacing certain ground rules on an interview," the court continued, "does not preclude a reasonable person from foregoing the interview altogether." *Ibid.* With regard to the fact that the agents, and not petitioner, had initiated the interview, the court concluded that that fact was "not significant evidence of restraint on [petitioner's] freedom of movement": to the contrary, petitioner's decision not to *terminate* the interview, when measured against the agents' repeated assurances that he was free to do so, suggested "an exercise of free will, rather than restraint to a degree associated with formal arrest." *Id.* at A69. And as to the agents' alleged threats to "light up [petitioner's] world" and to inform insurance companies of

petitioner's alleged wrongdoing, the court of appeals reasoned that "[i]t is appropriate for an investigator to advise a suspect of the potential course and consequences of a criminal investigation," and that "the presentation of [such] information * * * does not tend to restrain a person's freedom of movement such that he should be deemed in custody." *Id.* at A69-A70. Under the totality of the circumstances, the court concluded, petitioner was not in custody. *Id.* at A71.

b. Judge Morris Sheppard Arnold dissented. Pet. App. A72-A78. Although Judge Arnold recognized that the FBI agents had repeatedly informed petitioner that he could refuse to speak with them and tell them to leave, *id.* at A74, he reasoned that the agents' "restrictions" on petitioner's movements and access to telephones "significantly undermined" the effect of the agents' assurances, *id.* at A78. Applying the multifactor test from *Griffin*, *supra*, Judge Arnold concluded that "[a] reasonable person in [petitioner's] position would not believe that he was free to end the interview or to ask the agents to leave." *Ibid.*

c. The court of appeals denied petitioner's petition for rehearing en banc, with five judges voting to grant the petition. Pet. App. A79.

ARGUMENT

Petitioner renews his claim (Pet. 8-16) that he was "in custody," and therefore entitled to receive the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his statements to the FBI agents. Further review of that fact-bound claim is unwarranted. The court of appeals' decision is correct and consistent with this Court's decisions, and petitioner does not contend that it conflicts with any decision of another court

of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. 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 order to determine 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 totality of the circumstances in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave." *Stansbury*, 511 U.S. at 325.

The court of appeals correctly applied those principles in holding that, under the totality of the circumstances, petitioner was not in custody during the interview with the FBI agents. Notably, the agents informed petitioner, both at the outset of the interview and repeatedly thereafter, that he could refuse to speak with them and tell them to leave; at no point did petitioner seek to exercise that right. In cases in which the

individual being questioned is informed that he is free to terminate the interview, lower courts have consistently concluded that the individual is not in custody for *Miranda* purposes. See, *e.g.*, *United States* v. *Wolk*, 337 F.3d 997, 1006 (8th Cir. 2003); *United States* v. *Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001), cert. denied, 534 U.S. 1151 (2002); *United States* v. *Menzer*, 29 F.3d 1223, 1232-1233 (7th Cir.), cert. denied, 513 U.S. 1002 (1994); cf. *Mathiason*, 429 U.S. at 493 (holding that individual was not in custody when he was told at outset of interview that he was not under arrest). Moreover, the agents interviewed petitioner in the comfort of his own home, rather than in the "police-dominated atmosphere" of a station house. *Miranda*, 384 U.S. at 445. In cases in which an individual is questioned in his own home (or in other familiar surroundings), lower courts have again routinely held that the individual is not in custody. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 14 (1st Cir. 2003); *United States* v. *Parker*, 262 F.3d 415, 419 (4th Cir. 2001); *United States* v. *James*, 113 F.3d 721, 727 (7th Cir. 1997). When taken together, therefore, the fact that petitioner was repeatedly told that he was free to terminate the interview and the fact that petitioner was interviewed in his own home justify a "natural inference" that petitioner was not in custody for *Miranda* purposes. Pet. App. A71.

Other circumstances supported the court of appeals' holding that petitioner was not in custody. The FBI agents did not restrain petitioner during the interview or threaten to use physical force, nor did they display their weapons or threaten to arrest him. Petitioner was free to move about the house, and, while he was accompanied to his bedroom and to the bathroom, he was then left unsupervised. Petitioner was allowed to get

dressed, use the bathroom, and (according to the magistrate judge) get a drink and feed his cat. And petitioner was allowed to call his office, though he was told not to inform it of the investigation. All of those circumstances confirm that a reasonable person in petitioner's position would have felt free to terminate the interview, and thus that petitioner was not in custody.

Neither the fact that the FBI agents instructed petitioner not to answer the telephone (and accompanied him around the house), nor the fact that the agents told petitioner that they would "light up [his] world" (and put pressure on insurance companies) if he refused to cooperate, rendered him in custody. The agents told petitioner not to answer the telephone (and accompanied him around the house), for the purpose of preventing petitioner from informing others that he was being investigated.[5] In conducting an interview, officers are entitled to take reasonable steps to prevent the interviewee from compromising the integrity of the overall investigation. See, *e.g.*, *United States* v. *Sutera*, 933 F.2d 641, 647-648 (8th Cir. 1991) (upholding prohibition on using telephone). A reasonable person in petitioner's position would not have construed the agents' actions as imposing "restraint on freedom of movement of the degree associated with a formal arrest," *Beheler*, 463 U.S. at 1125; instead, given the agents' repeated assurances that the interview was voluntary, a reasonable person in petitioner's position would have concluded that he retained the option either to submit to the interview un-

[5] The agents also testified that they accompanied petitioner around the house in order to ensure their own safety. Pet. App. A34. The district court noted, however, that the agents did not communicate this justification to petitioner. *Ibid.*

der the modest conditions imposed by the agents, or to terminate the interview altogether.

The FBI agents' statements that they would inform others about petitioner's alleged wrongdoing if he did not cooperate did not create or contribute to custodial conditions. Although the agents' statements may have affected petitioner's calculus in deciding *whether* to terminate the interview, they did not suggest that petitioner was not free to terminate the interview at all. As this Court has noted, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it"; indeed, even *false* statements by an officer designed to induce a confession are irrelevant to the custody inquiry. *Mathiason*, 429 U.S. at 495-496. Because the agents' statements, and their conduct during the interview, would not have suggested to a reasonable person that he was not free to terminate the interview, the court of appeals' holding that petitioner was not in custody was correct and does not merit further review.

2. 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 decisions in *Beckwith* v. *United States*, 425 U.S. 341 (1976), and *Orozco* v. *Texas*, 394 U.S. 324 (1969), involving custodial determinations for individuals being questioned at home, and with this Court's decision in *Thompson* v. *Keohane*, 516 U.S. 99 (1995), concerning the standard of review for custodial determinations. Those contentions lack merit.

a. In *Beckwith*, as in this case, two law-enforcement officers interviewed an individual in his home. 425 U.S. at 342. The officers did not inform the individual that he was free to terminate the interview, though they did inform him that they could not compel him to answer

their questions and that he could seek the assistance of an attorney. *Id.* at 343. The officers proceeded to interview the individual for approximately three hours. *Id.* at 342-343. The Court held that the individual was not in custody under *Miranda*, notwithstanding the fact that he was the "focus" of the officers' investigation. *Id.* at 347. Contrary to petitioner's contention (Pet. 13), the Court did not affirmatively "open[] a door to future claims like [petitioner's]"; instead, the Court stated only that "noncustodial interrogation might possibly in some situations, by virtue of some special circumstances," give rise to statements that were *involuntary* for purposes of the Due Process Clause. 425 U.S. at 347-348. In any event, the court of appeals in this case did not hold that an individual being questioned at home could *never* be in custody for *Miranda* purposes; instead, it held only that, under the totality of circumstances, *petitioner* was not in custody. See, *e.g.*, Pet. App. A71. Nothing in the court of appeals' decision thus conflicts with *Beckwith*.

In *Orozco,* four police officers investigating a murder arrived at a boardinghouse around 4 a.m., entered an individual's bedroom, and began to question him. 394 U.S. at 325. One of the officers conceded that the individual was not free to leave during the questioning, but was already under arrest. *Ibid.* The Court, after rejecting a bright-line rule that an individual being questioned at home could never be in custody for *Miranda* purposes, held that the individual was in custody. *Id.* at 326-327. This case critically differs from *Orozco* because petitioner was affirmatively, and repeatedly, told that he could refuse to speak with the agents and tell them to leave; for that reason, a reasonable person in petitioner's position would have felt free to terminate

the interview. Since the court of appeals' decision did not *foreclose* the possibility that an individual being questioned at home may nevertheless be in custody, it is does not conflict with *Orozco*.

b. Petitioner's reliance on *Thompson* is likewise misplaced. In *Thompson*, the Court held that a state court's custodial determination was subject to independent review by a federal habeas court. 516 U.S. at 116. Consistent with *Thompson*, the court of appeals in this case (following Eighth Circuit precedent) noted that a federal district court's ultimate custodial determination was reviewed *de novo* on direct review, but that its underlying factual findings were reviewed only for clear error. Pet. App. A63. Petitioner does not directly challenge this standard, but instead seemingly contends only that the court of appeals ("[c]ontrary to *Thompson*," Pet. 9) failed to *adhere* to this standard by substituting its own findings for those of the district court. The court of appeals, however, expressly noted that "[t]he district court * * * [had] made extensive findings of fact" and that "the government does not assert on appeal that any of these findings were clearly erroneous." Pet. App. A61-A62. Petitioner does not identify a single inconsistency between the facts as found by the district court and as recited by the court of appeals; instead, petitioner challenges only the court of appeals' concededly differing assessment of the legal *significance* of the facts. See Pet. 8-11. Because the court of appeals was required to defer to the district court only with respect to its underlying findings, any asserted conflict with *Thompson* is illusory.[6]

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[6] Petitioner also suggests (Pet. 14-15) that the court of appeals' decision conflicts with its earlier decisions in *United States* v. *Griffin*,

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 charges in this case. In addition, because the district court held that petitioner's statements should be suppressed because he was in custody for *Miranda* purposes, it did not reach petitioner's alternative claim that his statements were involuntary under the Due Process Clause. If the statements are suppressed on that basis, or if petitioner is ultimately 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 of the final judgment against him. Accordingly, the case is not ripe for review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2005

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922 F.2d 1343 (8th Cir. 1990), and *United States* v. *Longbehn*, 850 F.2d 450 (8th Cir. 1988). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).