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SUPREME COURT  
STATE OF WASHINGTON  
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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Supreme Court Case No. 97268-1

Court of Appeals Division III Case No. 35812-7-III

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STATE OF WASHINGTON,  
Respondent,

v.

ALEJANDRO ESCALANTE,  
Petitioner.

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**SUPPLEMENTAL BRIEFING OF THE STATE OF WASHINGTON**

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## I. ARGUMENT

### 1. THE TOTALITY OF MR. ESCALANTE'S CIRCUMSTANCES SHOULD INCLUDE A JUXTAPOSITION OF HIS CIRCUMSTANCES AND THOSE OF HIS TWO ARRESTED COMPANIONS.

“‘Custody’ for the purposes of *Miranda* is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest.” State v. Ferguson, 76 Wash.App. 560, 566, 886 P.2d 1164, 1167 (Div. I, 1995). “The inquiry should focus on the *objective circumstances* of the interrogation, not the subjective views of the officers or the individual being questioned.” United States v. Kim, 292 F.3d 969, 978 (9<sup>th</sup> Cir., 2002) (O’Scannlain dissenting) (emphasis in original). “An objective standard avoids imposing upon police officers the often impossible burden of predicting whether the person they question, because of characteristics peculiar to him, believes himself to be restrained.” Id.

Apparent to Mr. Escalante, and any objective analysis, was that two of his companions had been discovered with drugs on their persons. Those two companions had been summarily arrested upon discovery of the drugs; The two arrested companions were being held in cells. Mr. Escalante, on the other hand, did not have any drugs on his person and his detention was, from

what he could perceive and anyone viewing the situation objectively, not further restricted. Mr. Escalante was permitted to remain in the waiting room. Objectively, Mr. Escalante was not under arrest or the equivalent because he was still in a waiting room with other travelers, rather than in a 6x10 foot cell with a metal bench and a steel door.

**2. GIVEN THE SPECIAL RULES APPLICABLE IN BORDER SEARCHES, NEITHER THE DEGREE NOR THE DURATION OF THE RESTRAINT OF MR. ESCALANTE REQUIRED MIRANDA WARNINGS.**

“Detention and questioning during routine searches at the border are considered reasonable within the meaning of the Fourth Amendment.” United States v. Zaragoza, 295 F.3d 1025, 1027 (9th Cir., 2002). “[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border.” United States v. Montoya de Hernandez, 473 U.S. 531, 539–40, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985).

“That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of

the fact that they occur at the border, should, by now, require no extended demonstration.” United States v. Ramsey, 431 U.S. 606, 616, 97 S.Ct. 1972, 1978, 52 L. Ed. 2d 617 (1977).

“Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations.” Id. at 619. “The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country.” Id. at 620.

“Any person required to submit to a secondary customs search may apprehend some increased level of official suspicion. It has been decided, however, that this perception of increased official suspicion is not sufficient by itself to apply coercive pressures equivalent to custodial questioning.” United States v. Pratt, 645 F.2d 89, 90 (1st Cir., 1981). “During [a border search], some period of detention for those persons is inevitable. Nevertheless, so long as the searches are conducted with reasonable dispatch **and the detention involved is reasonably related in duration to the search**, the detention is permissible under the Fourteenth Amendment.” United States v. Espericueta Reyes, 631 F.2d 616, 622 (9th Cir., 1980) (emphasis added).

Here, the Border Patrol Agents conducted a thorough search of the van in which Mr. Escalante and his companions had ridden. The alternative to a thorough search would have been twofold. First, the Border Patrol Agents had already discovered drugs on two of the four occupants of the van, leading to further suspicion that more criminal activity was afoot. Second, had the Border Patrol Agents ceased their search of the van, they would have been taking a risk that drugs or other contraband would proceed to the interior of the United States. Once the Border Patrol Agents began the search of the van, they were obligated to do a thorough job.

**3. REGARDLESS OF THE SPECIAL RULES APPLICABLE IN BORDER SEARCHES, IF THIS COURT APPLIES THE MULTIPLE-FACTOR TEST USED BY FEDERAL COURTS WITHIN THE 9<sup>TH</sup> CIRCUIT, NEITHER THE DEGREE NOR THE DURATION OF THE RESTRAINT OF MR. ESCALANTE REQUIRED MIRANDA WARNINGS.**

Even without considering the special circumstances presented in a border search, the Border Patrol Agents were not required to give Miranda warnings prior to asking Mr. Escalante about the backpack. In-custody determinations made by federal courts in situations **outside** of the increased governmental interests at border crossings consider, “(1) the language used to summon the individual; (2) the extent to which the

defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir., 2001); see also United States v. Kim, 292 F.3d 969, 978 (9th Cir., 2002).

Even without the gloss of broadly permissive border searches, Mr. Escalante was not subject to the equivalent of formal arrest because the degree and duration of restraint were not more than what was necessary to conduct the search of the vehicle.

The Border Patrol Agents did not summon Mr. Escalante. Mr. Escalante and his three companions came to the border for entry into the United States. The Border Patrol Agents did not invade the privacy afforded a citizen's home, nor did they conduct a warrantless search of a cell phone, or other equally protected place. Instead, the Border Patrol Agents searched a vehicle that came to them, not the other way around.

Mr. Escalante was confronted with the question of who owned a particular backpack, not who owned the drugs discovered therein. The Border Patrol Agents asked who owned the backpack; they did not remove the drugs and confront Mr. Escalante with accusations and lengthy questioning.

Mr. Escalante was, unlike two of his companions, in a comfortable

room, with another of his companions. The room in which Mr. Escalante waited was a room in which other travelers, including children, would be accommodated. The room was a waiting room, not a 6x10 foot cell with a metal bench and a steel door.

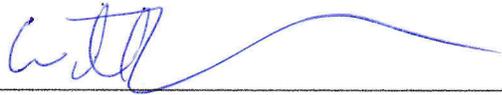
The duration of the detention was directly related and inextricably linked to the thoroughness of the search of the vehicle. Had the Border Patrol Agents spent little to no time searching the vehicle, Mr. Escalante's detention would have been brief. However, the Border Patrol Agents had already found drugs on the persons of two of Mr. Escalante's companions, therefore pointing to the possibility of more drugs in their vehicle.

Thus, even without considering the prevailing governmental interest in protecting our borders, the Court of Appeals came to the correct legal conclusion: Mr. Escalante was not in custody for purposes of Miranda at the time he was asked about the backpack.

## II. CONCLUSION

This Court should affirm the decision of the Court of Appeals. Mr. Escalante was not in custody for purposes of Miranda when he was asked who owned the backpack.

Dated this 4<sup>th</sup> day of November, 2019.



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### Transmittal Information

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