THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0575

The State of New Hampshire

v.

Dominic Carrier

STATE'S APPEAL PURSUANT TO RSA 606:10 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT, SOUTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 Minute Oral Argument)

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Issue preserved by the defendant's motion to suppress, Br.:[1] 73-84, the State's objection, Br.: 85-94, the motion to suppress hearing, SHTr.1: 1-99; SHTr.2: 1-13, the trial court's order Br.: 45-71, the State's motion to reconsider, Br.: 95-105, the defendant's objection, Br.: 106-108, and the trial court's order denying the State's motion, Br.: 72.

2. Whether the trial court erred when it concluded that law enforcement's mere reference to the defendant's prior interview, without reference to the substance of that interview, improperly tainted his subsequent, post-*Miranda* interview and suppressed the defendant's statements from that interview.

Issue preserved by the defendant's motion to suppress, Br.: 73-84, the State's objection, Br.: 85-94, the motion to suppress hearing, SHTr.: 1-99; SHTr.2: 1-13, the trial court's order Br.: 45-71, the State's motion to reconsider, Br.: 95-105, the defendant's objection, Br.: 106-108, and the trial court's order denying the State's motion, Br.: 72.

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[1] Br.: refers to this brief, including supplemental documents appended to this brief.
SHTr.1: refers to the suppression hearing transcript.
SHTr.2: refers to the suppression hearing "designation of record" transcript.
App.: refers to the separately filed appendix.

STATEMENT OF THE CASE AND FACTS

A. Indictments

A Hillsborough County grand jury indicted the defendant, Dominic Carrier, on one count of aggravated felonious sexual assault. Br.: 45; RSA 632-A:2 (2016). The indictment stemmed from allegations made by the victim, M.G., that the defendant had entered her bedroom on November 20, 2017, and touched her vagina while she was sleeping. Br.: 45. The victim was thirteen years old at the time of the assault. Br.: 45.

B. First Contact with the Defendant

On November 20, 2017, officers from the Nashua Police Department went to the victim's home after receiving a report that a sexual assault had occurred there. SHTr.: 4-5, 14, 36. At 9:09 a.m., after law enforcement arrived and secured the scene, the defendant returned to the home. SHTr.: 5-6, 21. The defendant had spent the night at the victim's home and had been planning to reside there for the foreseeable future. SHTr.: 8, 25; App.: 5, 8.

Because the victim and other witnesses were still in the home, Officer Michael Kekejian asked the defendant to leave the house and went to stand with him on the porch. SHTr.: 5-6, 21. The weather that day was cool, in the thirties, and a bit windy. SHTr.: 40, 61. The defendant wore a sweatshirt and pants. SHTr.: 8; App.: 8. Officer Kekejian wore his normal police uniform complete with a badge and duty belt. SHTr.: 14-15.

After returning to the porch, Officer Kekejian placed himself in front of the door so the defendant could not reenter the home. SHTr.: 6-7, 21. On the porch, the two had a short conversation, approximately five to ten

minutes long, about where the defendant had been and other unrelated topics. SHTr.: 6, 12, 26. Officer Kekejian explained to the defendant why he could not enter the home and asked if he could pat frisk the defendant, to which the defendant agreed. SHTr.: 11, 21. At some point, the defendant began to use his cell phone and Officer Kekejian, aware that the defendant had received messages from his family and concerned that he may delete messages or other evidence or try to contact family members in the home, seized the phone from him. SHTr.: 11-12, 22-23, 35. The defendant's cell phone operated on wi-fi, so it may not have been able to make calls or send messages from the porch. SHTr.: 24, 31-33. Officer Kekejian never told the defendant that he had to stay and never blocked him from leaving the porch. SHTr.: 8, 10. The defendant had access to the stairs to leave throughout their entire conversation. SHTr.: 10.

Later, another police officer arrived and waited on the porch with the defendant and Officer Kekejian. SHTr.: 9, 24. Officer Kekejian messaged dispatch to determine if the detectives would like him to hold the defendant for questioning or let the defendant go. SHTr.: 7, 37, 55. Detective Steven Hallam initially decided to wait until after the victim's forensic interview to question the defendant and relayed that information back to Officer Kekejian. SHTr.: 7, 37. Officer Kekejian gave Detective Hallam's contact information to the defendant and began assisting the defendant with finding somewhere to go. SHTr.: 7-8.

As the defendant prepared to leave the house, Detective Hallam informed Officer Kekejian that he would like the defendant to remain at the scene for questioning. SHTr.: 8, 27, 36-38, 56. Officer Kekejian asked the defendant if he would stay and wait to speak with the detectives, and the

defendant agreed. SHTr.: 8, 27. Officer Kekejian never told the defendant that he had to stay, but also never told him he could leave or refuse to answer questions. SHTr.: 8, 30. Officer Kekejian and the defendant continued to have an innocuous conversation until Detective Hallam and Detective Jaclyn McIver arrived. SHTr.: 13, 30.

At approximately 10:00 a.m., Detectives Hallam and McIver arrived in an unmarked cruiser, a Chevrolet Impala. SHTr.: 38-39, 59. Detective Hallam parked the unmarked cruiser across the street from the victim's home. SHTr.: 38-39. Neither detective wore a uniform; instead, they had dressed in regular dress clothes. SHTr.: 39-40. Both had their service weapons and badges, but the guns were only partially visible under their jackets. SHTr.: 40, 59.

When Detective Hallam arrived, he saw the defendant on the porch with Officer Kekejian. SHTr.: 40. The detectives approached the porch and asked the defendant if he would speak with them. SHTr.: 40. The defendant agreed and the three moved away from the porch. SHTr.: 41. Detective Hallam asked the defendant if he would be willing to speak with them in their car because it would be more private and warmer. SHTr.: 42, 63. Detective Hallam was aware that the defendant had prior interaction with law enforcement. SHTr.: 64. The defendant agreed and the three entered the unmarked cruiser. SHTr.: 42. Detective Hallam sat in the driver's seat, Detective McIver sat in the back seat, and the defendant sat in the front passenger's seat. SHTr.: 43. Nothing in the cruiser restricted the defendant's movement or otherwise restrained him. SHTr.: 43-44. Once they entered the unmarked cruiser, the interview began. SHTr.: 44-45.

C. First Interview

Upon entering the car, Detective Hallam received permission from the defendant to record the interview. SHTr.: 45; App.:[2] 5. At the outset, Detective Hallam learned that the defendant was twenty-two years old and had voluntarily agreed to participate in the interview. App.: 4-6. Detective Hallam told the defendant, "I just wanted to make sure, I don't want you to feel forced to talk to me," and the defendant responded, "No, no, no, dude, I'm willing to do it." App.: 6. Detective Hallam also informed the defendant that he had unlocked the doors to the car and that the defendant could leave at any time. App.: 6.

After gathering some general background information, Detective Hallam asked the defendant about what the defendant had done after he woke up that morning. App.: 7-15. The defendant explained that he woke up around 3:00 a.m., showered, dressed, and made some coffee. App.: 15. Then, his dad picked him up around 4:15 a.m. to take him to work. App.: 15. Over the course of the interview, this initial story evolved to include the defendant going upstairs to get something to drink, App.: 18, 22, looking for his younger brother, App.: 29, 32-33, going into the victim's room to look for his brother, App.: 36, approaching the victim's bed to look for his glasses in her closet, App.: 44-46, putting his hand on the victim's bed and possibly touching her, App.: 48-50, definitively touching the victim, App.: 55, possibly touching her vaginal area, App.: 66, 69, rubbing her vagina, and masturbating afterward, App.: 79, 86-87.

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[2] The transcripts of both interviews refer to Detective Hallam as Detective Helm. This appears to be a typo based upon the transcriptionist's phonetic understanding of Detective Hallam's name.

Detective Hallam explained that the tone of the interview was "laid back, casual, as if I was talking to my friend." SHTr.: 46. He noted that, at times, he would express skepticism regarding the defendant's claims and would question the defendant's version of events and how they lined up with the allegations. SHTr.: 46, 69-70. Detective Hallam denied that the interview became confrontational or that the tone changed. SHTr.: 46, 69-70. The interview ended at approximately 11:00 a.m. and had lasted approximately one hour. SHTr.: 48. At no point during the interview did the defendant ask to take a break or try to leave. SHTr.: 48. Once the interview ended, Detectives Hallam and McIver helped the defendant arrange for somewhere to stay and drove him to that location. SHTr.: 48.

D. Arrest and Second Interview

The investigation continued and law enforcement arrested the defendant later that day. SHTr.: 49. After his arrest, the defendant agreed to speak with Detective Hallam a second time. SHTr.: 49. Detective Anthony Murray also participated in the interview. SHTr.: 49. The defendant agreed to have the second interview recorded. SHTr.: 50; App.: 113. The interview began at around 10:19 p.m. and lasted approximately forty-five minutes. SHTr.: 50; App.: 113.

At the outset of the second interview, Detective Hallam went over the defendant's *Miranda* rights in detail. SHTr.: 50; App.: 114-19. Detective Hallam used a written form to explain the *Miranda* rights to the defendant. App.: 114. The defendant acknowledged that he had received *Miranda* rights a "couple" of times before. App.: 115. Detective Hallam explained each of the rights to the defendant and asked the defendant if he

understood those rights. App.: 116-19. The defendant acknowledged that he understood his rights and agreed to waive them. App.: 116-19. He signed a *Miranda* waiver form to that effect. App.: 119.

After going over the defendant's *Miranda* rights, Detective Hallam acknowledged the interview that morning and explained that he felt "like there [was] still a little bit of inconsistenc[y]" and asked for the "100 percent straight truth." App.: 120. From there, the defendant admitted to touching the victim and that his sole purpose for going to her room was to touch her. App.: 121, 123. He admitted that he touched under her shorts and rubbed her vagina with his finger. App.: 124, 126-27, 137-40, 147-52. He also admitted that he masturbated after touching the victim and that he touched her for sexual gratification. App.: 142, 158.

On approximately three other occasions during the interview, Detective Hallam mentioned the morning's interview. App.: 125, 127, 152. On two of those occasions, Detective Hallam never had the opportunity to ask a question before the defendant interrupted him and provided additional information. App.: 125, 127. On the third occasion, Detective Hallam simply referenced that they had spoken earlier. App.: 152. Additionally, the detectives took a break in the middle of the interview. App.: 145-46. They offered the defendant something to drink or eat during the break. App.: 145-46. After the detectives returned from the break, they reminded the defendant of his *Miranda* rights, and the defendant agreed to continue to speak with them. App.: 146.

E. Suppression Motion

On April 25, 2018, the defendant moved to suppress two interviews that he had given to law enforcement. Br.: 73-84. He gave one interview on the morning of November 20, 2017, without having received *Miranda* warnings and the other interview on the night of November 20, 2017, after law enforcement had arrested him and given him *Miranda* warnings. Br.: 74-75. He alleged that he was in custody when he gave the first interview and therefore, entitled to receive *Miranda* warnings. Br.: 75-80. He also alleged, in three sentences, that his second interview was invalid because of the taint created by the invalid first interview, and separately, that the *Miranda* waiver was invalid. Br.: 81-83. On May 7, 2018 the State objected. Br.: 85-95. On June 25, 2018, the trial court (*Colburn*, J.) held a hearing on the defendant's motion at which Officer Michael Kekejian and Detective Steven Hallam, both from the Nashua Police Department, testified. SHTr.: 1-99.

On July 19, 2018, the trial court granted the defendant's motion to suppress both interviews. Br.: 71. Regarding the first interview, the trial court concluded that totality of the circumstances supported suppressing the defendant's statements from the interview, after a certain point in time at which Detective Hallam accused the defendant of lying. Br.: 65. The trial court also found other facts that it marshalled in support of its conclusion, such as: (1) Officer Kekejian stayed with the defendant on the porch, Br.: 55; (2) nobody informed the defendant that he was not under arrest, Br.: 56; (3) Officer Kekejian seized the defendant's phone, Br.: 57; and (4) the alleged accusatory tone of the questioning, Br.: 59-62. The trial court, therefore, suppressed the first interview. Br.: 65.

Regarding the second interview, the trial court found that it had to determine "whether the second confession [was] the product of an essentially free and unconstrained choice." Br.: 66 (quotation omitted). The trial court pointed to the factors outlined in *State v. Ruiz*, 170 N.H. 553 (2018), and *State v. Fleetwood*, 149 N.H. 396 (2003). Br.: 66-67. The trial court then included "[a]nother relevant factor . . . the manner in which the officers utilized [the defendant's] prior confession in obtaining a second confession." Br.: 67 (quotation omitted). The trial court drew this factor from *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985), which the trial court found to be "particularly persuasive authority." Br.: 67. The trial court concluded that the factors enumerated by this Court in *Ruiz* and *Fleetwood* supported admitting the confession. Br.: 67-68. The trial court also concluded that law enforcement's reliance upon the first interview, without informing the defendant that his first confession could not be used against him, tainted the second interview and therefore, the second confession was involuntary. Br.: 70-71. The trial court suppressed the second interview. Br.: 71.

On July 30, 2018, the State filed a motion to reconsider in which it alleged that the trial court overlooked or misapprehended points of law and fact when it suppressed both confessions. Br.: 95-105. On August 20, 2018, the defendant filed a brief objection. Br.: 106-108. On September 10, 2018, the trial court denied the State's motion without discussion. Br.: 72.

This appeal followed.

SUMMARY OF THE ARGUMENT

1. The trial court erred when it concluded that the defendant was in custody during the first interview and suppressed his statements to law enforcement. Many factors supported the conclusion that the defendant was not in custody including his familiarity with his surroundings, his prior experience with law enforcement, the lack of physical restraint, his willingness to speak with law enforcement, the fact that the detectives told him that he was free to leave the unmarked cruiser, the lack of aggressive questioning, and the fact that the detectives not only released the defendant but drove him where he wanted to go after the interview. Although the trial court cited several factors supporting a finding that the defendant was in custody, portions of the trial court's analysis were unsupported or contradicted by evidence in the record, which undermines the trial court's conclusion. Accordingly, this Court must reverse.

2. The trial court erred as a matter of law when it added a new factor to the *Fleetwood* factors that demanded that law enforcement be able to predict whether the trial court would suppress an earlier, unwarned statement. Neither this Court nor the United States Supreme Court has demanded that law enforcement perform a legal analysis to determine the validity of an earlier statement. In fact, both courts have cautioned trial courts against placing such a demand on law enforcement. The *Fleetwood* factors all supported denying the defendant's motion to suppress. The trial court's adoption of an additional factor directly contradicted this Court's holding in *Fleetwood*. The trial court's decision to raise its new factor to paramount importance only further emphasized the contradiction. To the

extent the trial court could consider such a factor, the evidence did not support its conclusion in this case and the factor should be of minimal importance. Accordingly, this Court must reverse.

ARGUMENT

1. DETECTIVE HALLAM DID NOT NEED TO GIVE THE DEFENDANT *MIRANDA* WARNINGS DURING THE FIRST INTERVIEW BECAUSE THE DEFENDANT WAS NOT IN CUSTODY AT THAT TIME.

At no point during the defendant's interactions with law enforcement before his arrest was he in custody and entitled to receive *Miranda* warnings. Aside from not allowing him into the victim's home, officers never physically restrained the defendant. Officers told him that he was free to leave on multiple occasions. Officers asked him if he was willing to speak with detectives. Officers engaged with him in a polite and conversational tone, even when questioning whether he was being completely truthful. Officers did not accuse him of committing a crime. Officers questioned him in a familiar setting. And, officers arranged for him to find a place to stay and took him exactly where he wanted to go after the interview. Taken together, and even with some negative considerations, these factors overwhelmingly support the conclusion that the defendant was not in custody. Thus, this Court must reverse.

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Part I, article 15 of the New Hampshire Constitution accords a similar protection and provides that "[n]o subject shall be . . . compelled to accuse or furnish evidence against himself."

Miranda v. Arizona, 384 U.S. 436 (1966), "addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can

be brought to bear upon a suspect in the context of a custodial interrogation." *Berkemer v. McCarthy*, 468 U.S. 420, 428 (1984). "[T]he Court saw as inherently coercive any police custodial interrogation conducted by isolating the suspect with police officers; therefore, the Court established a *per se* rule that all incriminating statements made during such interrogation are barred as 'compelled.'" *United States v. Washington*, 431 U.S. 181, 187 n.5 (1977). *Miranda* recognized that "[e]ven without employing brutality [or] the 'third degree' . . . , the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U.S. at 455.

"To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney." *Maryland v. Shatzer*, 559 U.S. 98, 103-04 (2010). This rule applies, however, only "if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above." *Berkemer*, 468 U.S. at 429. Or, as this Court has stated the rule, "two conditions must be met before *Miranda* . . . warnings are required: (1) the suspect must be 'in custody'; and (2) she must be subject to 'interrogation.'" *In re B.C.*, 167 N.H. 338, 342 (2015). Because the trial court is not "in an appreciably better position than" this Court to determine whether a reasonable person would feel as if he were in custody, this Court "will not overturn the factual findings unless they are contrary to the manifest weight of the evidence," but it will "review the determination of custody *de novo*." *State v. McKenna*, 166 N.H. 671, 677 (2014).

"Custody entitling a defendant to *Miranda* protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *State v. Jennings*, 155 N.H. 768, 772 (2007). "In the absence of formal arrest, [this Court] must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation." *Id.* Generally, to determine custody, "the trial court should consider the totality of the circumstances of the encounter, including: the suspect's familiarity with [his] surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." *B.C.*, 167 N.H. at 342.

Here, the defendant's familiarity with his surroundings, the defendant's prior experience with law enforcement, the lack of physical restraint, the defendant's willingness to speak with law enforcement, detectives informing the defendant that he was free to leave the unmarked cruiser, the lack of aggressive questioning, and the fact that detectives not only released the defendant but drove him to where he wanted to go after the interview all supported the conclusion that the defendant was not in custody.

First, the defendant was in safe and familiar surroundings. He interacted with Officer Kekejian primarily on the porch of a home where he had lived in the past and was planning to live for the foreseeable future. After Detectives Hallam and McIver arrived, the defendant agreed to speak with them in their unmarked cruiser, which they had parked directly across the street from his home. The interior of the unmarked cruiser was essentially that of an ordinary car. As the trial court observed, "[t]he

questioning took place in areas that were somewhat familiar to the defendant." Br.: 66. Thus, this factor supports concluding that the defendant was not in custody.

Second, despite being twenty-two years old, the defendant was familiar with the police and had had previous interactions with them. *Cf. State v. Farrell*, 145 N.H. 733, 738-39 (2001) (citing, in the context of a juvenile, the suspect's "previous dealings with the police or court appearances" as a basis for considering whether the suspect had voluntarily waived his privilege against self-incrimination). The evidence demonstrated that the defendant had received *Miranda* warnings from law enforcement on at least a "couple" of prior occasions. App.: 115. Thus, this factor supports a conclusion that the defendant was not in custody.

Third, law enforcement never physically restrained the defendant. None of the officers or detectives placed the defendant in handcuffs. None ever told the defendant that he could not leave or blocked him from doing so. The stairs off the porch and to the street were always available to the defendant. In fact, when Detective Hallam decided to report to the scene, Officer Kekejian asked the defendant, who was about to leave, if he would be willing to stay, and the defendant chose to stay to willingly speak with detectives. *See McKenna*, 166 N.H. at 680 ("[W]hether the defendant was told that he was at liberty to terminate the interrogation provides strong evidence as to whether a reasonable person in the defendant's position would feel free to leave."). Officer Kekejian did ask the defendant to leave the home, pat-frisked the defendant, and seized the defendant's phone, but Officer Kekejian either sought the defendant's assent or explained to the defendant why these things occurred. SHTr.: 11-12; *cf. id.* at 679

(observing that explaining to a suspect the reasons why he could not take certain actions, such as going to a particular location, support a finding that he was not in custody).

Once Detective Hallam arrived, the defendant agreed to go into the unmarked cruiser for the interview. Detective Hallam also informed the defendant that he had unlocked the cruiser's doors and that the defendant could leave at any time. *Cf. id.* Although there was a brief period, after the detectives arrived, when the defendant was in the presence of four officers, for most of the time, he was in the presence of only one or two officers. These considerations support concluding that the defendant was not in a police-dominated atmosphere and was not in custody. *Cf. In re. E.G.*, 194 A.3d 57, 64 (N.H. 2018) (concluding that a limited exercise of control over a defendant "does not weigh heavily" in favor of custody).

Fourth, the nature of the questioning was not inherently coercive. Detective Hallam's questions focused on determining what had happened. When he believed that the defendant had lied, he did confront him with this fact, usually by referring to some of the details he knew from the victim's allegations.[3] He never, however, accused the defendant of having committed a crime. As the interview progressed toward the truth, Detective Hallam entertained the defendant's claims that everything was an accident and he never meant to touch the victim. The tone of the conversation, as the trial court observed, remained "polite." Br.: 62 n.8.

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[3] The allegations that Detective Hallam disclosed in the interview focused on the issue of whether the defendant had gone upstairs from his room in the basement or been in the victim's bedroom. They never gravitated toward an accusation that the defendant had sexually assaulted the victim or otherwise committed a crime.

Whenever Detective Hallam did not believe the defendant, he expressed that relying upon inference or details he had obtained from other sources. *See State v. Green*, 133 N.H. 249, 258 (1990) (finding no custody, in part because police did not accuse the defendant of involvement in crimes for which he was later charged); *State v. Tucker*, 131 N.H. 526, 529 (1989) (finding no custody, in part because the officer had questioned the defendant in connection with a general investigation of an airplane accident and the defendant was not the focus of the investigation). The lack of an accusatory tone during the interview supports the conclusion that the defendant was not in custody. *See McKenna*, 166 N.H. at 681 ("The accusatory nature of questioning is widely recognized as a factor weighing in favor of a finding of police custody.").

Fifth, at the end of the interview, Detectives Hallam and McIver helped the defendant figure out where he could stay and drove him exactly where the defendant asked to go. This, as the trial court observed, supported concluding that the defendant was not in custody during the interview. Br.: 66.

Finally, the length of the interview, approximately one hour,[4] was a neutral factor; it supported neither a finding of custody nor a finding that the defendant was not in custody. In *McKenna*, this Court found that an interview "approximately one hour and fifteen minutes" in length "weighs neither in favor of nor against, a finding of custody." *Id.* at 685. Taken

[4] If this Court were to consider the defendant's time with Officer Kekejian, then two hours had passed between his first contact with law enforcement and the end of the interview.

together, all these factors supported the conclusion that the defendant was not in custody, and this Court must reverse the trial court's ruling.

To the extent that the trial court cited factors in support of its conclusion that the defendant was in custody, this Court should disregard those findings or give them limited weight because several of the trial court's conclusions either stretched reasonable inference to its limit or were wholly unsupported by the record. First, the trial court stated that it "was left with the impression that Officer Kekejian was essentially 'guarding' the defendant on the porch." Br.: 55. The defendant never elicited this fact or any fact that implied it from the officer during cross-examination. Yet, the trial court used this initial conclusion to infect every aspect of its analysis with nefarious intent on the part of law enforcement. *See* Br.: 55-56 ("However, given the atmosphere over the previous hour—essentially being guarded on the porch by two officers—a reasonable person would not believe that he was free to simply leave."); *see also* Br.: 48 (stating, without any support from the record, that despite Officer Kekejian's "apparent altruistic motives," his reason for helping the defendant find a place to go was due to the officer's desire to learn "where the defendant would be staying so that the detective would be able to locate him").

Second, the trial court claimed that Detective Hallam "spent no time explaining what the term 'voluntarily' meant, nor did he confirm the defendant's understanding of that term." Br.: 57. This claim lacks support in the record and is plainly incorrect. At the outset of the interview, after Detective Hallam confirmed the defendant's voluntary participation, Detective Hallam said, "I just wanted to make sure, I don't want you to feel forced to talk to me," and the defendant responded, "No, no, no, dude, I'm

willing to do it." App.: 6. To be sure, Detective Hallam did not explain in great detail what voluntarily meant, but he did confirm that the defendant understood that he was not compelled to speak with the detectives.

Third, the trial court criticized Officer Kekejian's decision to seize the defendant's phone. The trial court concluded, without support from the record, that law enforcement could recover the messages from the defendant's mother's phone. Br.: 56 n.6. This ignores the fact that the defendant's phone still contained evidence, that Officer Kekejian also had concerns that: (1) the defendant may try to communicate with individuals inside the home and (2) that the defendant was attempting to destroy evidence of his communications with others. Additionally, allowing the defendant to keep the phone would not have reduced his sense of isolation as the trial court concluded, Br.: 57, because the record showed that the defendant's phone relied upon a wi-fi connection and likely would not work during the interview in a police cruiser across the street.

Finally, the trial court appeared to accuse Officer Kekejian of trying to conceal the fact that he pat-frisked the defendant and seized his phone by concluding that such information "was only elicited through cross-examination." Br.: 57 n.7. This conclusion also lacks support in the record and is plainly incorrect. Officer Kekejian was forthcoming about his interactions with the defendant and told the trial court on direct examination that he had asked the defendant if he would submit to a pat-frisk and that he seized the defendant's phone. SHTr.: 11-12. These multiple inaccurate conclusions undermine the trial court's ruling, and

when coupled with the evidence that supports finding the defendant was not in custody, necessitate reversal. Accordingly, this Court must reverse.[5]

[5] Should this Court conclude that the trial court erred when it suppressed the first interview, it must automatically conclude that the trial court erred when it suppressed the second interview because the crux of the trial court's reasoning rested on the suppression of the first interview. *See, e.g.*, Br.: 70-71.

2. THE TRIAL COURT ERRED WHEN IT MISAPPLIED THE FACTORS OUTLINE IN *STATE v. FLEETWOOD*, 149 N.H. 396 (2003), CREATED AN ADDITIONAL FACTOR THAT RAN CONTRARY TO *FLEETWOOD*, AND MADE THAT FACTOR OF PARAMOUNT IMPORTANCE.

The trial court misapplied the correct legal standard and unsustainably exercised its discretion when it looked beyond the five factors adopted in *State v. Fleetwood*, 149 N.H. 396 (2003), and disregarded the limitations expressed in that case. Although the trial court concluded that "many of the more traditional voluntariness factors weigh in favor of a voluntariness finding," Br.: 68, considered its own factors, such as the reference to a prior interview in a subsequent interview,[6] and it made those novel factors of paramount importance in conducting its analysis. Br.: 68-71. When the trial court considered these new factors, it demanded clairvoyance on the part of Detective Hallam and the other officers even though both this Court and the United States Supreme Court have recognized that courts cannot expect law enforcement officers to perform complex legal analyses and prognosticate whether a trial court may suppress one set of statements months after an investigation ends. Accordingly, this Court must reverse.

Part I, article 15 of the New Hampshire Constitution provides, in relevant part that "[n]o subject shall be . . . compelled to accuse or furnish evidence against himself." In the context of custodial interrogations, this Court has adopted the rationale of *Miranda* and its progeny and required

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[6] The record does not support the finding or conclusion that Detective Hallam used the substance of any statement the defendant made against him in the second interview. Detective Hallam merely referenced the prior interview.

the police to give prophylactic warnings advising subjects of custodial interrogation of their rights, such as the right to remain silent. *See*, *e.g.*, *McKenna*, 166 N.H. at 676 (discussing the obligation to provide *Miranda* warnings).

When confronted with situations in which a defendant has made a set of incriminating statements without the benefit of *Miranda* and a later set of incriminating statements with the benefit of *Miranda*, this Court applies the "traditional part I, article 15 due process voluntariness inquiry and ask[s] whether considering the totality of the circumstances the second confession is the product of an essentially free and unconstrained choice." *State v. Aubuchont*, 141 N.H. 206, 209 (1996) (quotations and citations omitted). This Court explicitly rejected the "cat out of the bag theory," a variation of which the trial court appeared to have relied. *See United States v. Bayer*, 331 U.S. 532 (1947); *Aubuchont*, 141 N.H. at 209.

Generally, this Court reviews conclusions of voluntariness as questions of fact, which will not be overturned unless contrary to the manifest weight of the evidence, "as viewed in the light most favorable to the State." *State v. Ruiz*, 170 N.H. 553, 560 (2018). The legal interpretation of the voluntariness analysis, however, presents a question of law, which this Court reviews *de novo*. *State v. Ducharme*, 167 N.H. 606, 613 (2015).

A. The United States Supreme Court has recognized that courts cannot expect law enforcement to predict how a trial court will rule on a motion to suppress.

"The [Supreme] Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process

analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment." *Oregon v. Elstad*, 470 U.S. 298, 304 (1985). "The *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive and that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." *Id.* at 305 (quotation and ellipsis omitted). "The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected." *Id.* (quotations and brackets omitted). Because "[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.* (quotation omitted).

In *Elstad*, the United States Supreme Court confronted a situation much like the one presented in this case. *Id.* at 302. A suspect made unwarned and incriminating statements during what was later determined to be a custodial interrogation. *Id.* Later, post-arrest and post-*Miranda* warnings, the defendant made further incriminating statements. *Id.* The question before the Court became whether a trial court must suppress the second set of statements as "fruit of the poisonous tree" because the earlier statements informed the later admissions. *Id.*

The Court rejected that contention. *Id.* at 304. It found that the defendant's argument "misconstrue[d] the nature of the protections afforded by *Miranda* warnings and therefore misread[] the consequences of police failure to supply them." *Id.* The Court observed that the defendant's "contention that his confession was tainted by the earlier failure of the

police to provide *Miranda* warnings and must be excluded as 'fruit of the poisonous tree' assume[d] the existence of a constitutional violation." *Id.* at 305.

The Court went on to explain that "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made." *Id.* at 318. "As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Id.* "The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Id.* The Court also noted that it had "'never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.'" *Id.* at 311 (quoting *Bayer*, 331 U.S. at 540-41).

The Court went on to conclude that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. "A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.*

In reaching this conclusion, the Court expressed significant concern that to hold otherwise would hamstring legitimate law enforcement efforts, explaining that "endowing the psychological effects of voluntary unwarned

admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions." *Id.* at 311. The Court criticized the lower court for "effectively immuniz[ing] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent." *Id.* at 312.

The Court also expressed concern that too strict a rule would demand clairvoyance on the part of law enforcement by requiring them to accurately predict whether a trial court would suppress any or all unwarned statements. *Id.* at 316. The Court observed that "the task of defining 'custody' is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Id.* at 309. "Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held admissible." *Id.* at 316. Thus, "[i]n many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained." *Id.*

The Court's decision in *Elstad* led to criticism that it opened the door to situations in which law enforcement extracts a confession and then issues *Miranda* warnings before extracting a second confession. *See, e.g.*, *State v. Fleetwood*, 149 N.H. 396, 404 (2003) ("The facts of this case bring into sharp focus the concern that *Elstad* may give a green light to law enforcement officers to ignore the requirements of *Miranda* until after such

time as they are able to secure a confession." (Quotation omitted.)). The Court resolved these concerns in *Missouri v. Seibert*, 542 U.S. 600 (2004), when it confronted a situation regarding a law enforcement practice of extracting a confession then using *Miranda* warnings to cure any concerns of voluntariness before extracting the confession a second time. *Seibert*, 542 U.S. at 604.

In response, the Court developed a two-part inquiry to determine whether subsequent statements were voluntary. *Id.* at 622 (*Kennedy*, J. concurring). First, the trial court must determine whether law enforcement employed a technique deliberately designed to circumvent *Miranda*. *Id.* If law enforcement did that, then "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id.* "Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* Such curative measures could include a substantial break in time, a change in circumstances, or warnings that the prior statements could not be used against the suspect. *Id.* Justice Kennedy's test has been widely adopted by the United States Courts of Appeals. *See, e.g.*, *United States v. Blevins*, 755 F.3d 312, 327 (5th Cir. 2014); *United States v. Williams*, 681 F.3d 35, 42 (2d Cir. 2012); *United States v. Kiam*, 432 F.3d 524, 532 (3d Cir. 2006).

B. This Court has recognized that courts cannot expect law enforcement to predict how a trial court will rule on a motion to suppress.

New Hampshire forged a different approach for addressing situations in which suspects make unwarned, incriminating statements and then later make further incriminating statements after receiving *Miranda* warnings. In *Aubuchont*, this Court declined to apply *Elstad* outright under the state constitution. *Aubuchont*, 141 N.H at 209.[7] This Court also rejected

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[7] This Court's reluctance to adopt the standard established in *Elstad* stemmed from concerns that law enforcement may abuse the more permissive rule announced in *Elstad*. *See Fleetwood*, 149 N.H. at 404-06 (expressing concern that *Elstad* can allow law enforcement to perform "an end run around *Miranda*," in the sense that the *Miranda* warning can cure concerns stemming from uncoerced but un-warned statements and allow the police to essentially evade the strictures of *Miranda*). The United States Supreme Court resolved these concerns in *Seibert* by modifying *Elstad*'s analysis to account for law enforcement efforts to circumvent *Miranda*. *See Seibert*, 542 U.S. at 622 (outlining the analysis courts must perform where law enforcement attempts to circumvent *Miranda*). This raises the question of whether New Hampshire's greater protection remains necessary.

Generally, this Court will overrule a prior decision only after considering the following factors:

> (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

State v. Cora, 170 N.H. 186, 192 (2017). "No single factor is dispositive, and the factors are not meant to be rigidly applied or blindly followed." *Id.* The internal contradictions in the *Fleetwood* factors, such as requiring warnings but not expecting law enforcement to predict whether a set of statements could be suppressed, create a system that defies practical workability because the system makes it difficult if not impossible for law enforcement to know when they are acting in harmony or in dissonance with the law. Moreover, the evolution of the Supreme Court's precedent to account for the concerns

the defendant's argument that it should interpret Part I, Article 15 as creating a rebuttable presumption that a second confession is tainted by an earlier unwarned confession. *Id.* Instead, this Court applied its traditional voluntariness analysis to subsequent, post-*Miranda* statements. *Id.* This inquiry "ask[s] whether considering the totality of the circumstances, the second confession is the product of an essentially free and unconstrained choice." *Id.*

In *Fleetwood*, this Court adopted five factors for trial courts to consider when determining whether post-*Miranda* statements are voluntary. *Fleetwood*, 149 N.H. at 406. Those factors are:

> (1) the time lapse between the initial confession and the subsequent statements; (2) the defendant's contacts, if any, with friends or family members during that period of time; (3) the degree of police influence exerted over the defendant; (4) whether the defendant was advised that his prior admission could not be used against him; and (5) whether the defendant was advised that his prior admission could be used against him.

State v. Ruiz, 170 N.H. 553, 560 (2018) (citing *Fleetwood*, 149 N.H. at 405-06). "No single factor is dispositive." *Id.* (citing *Fleetwood*, 149 N.H. at 406).

This Court drew these factors from *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985), a decision issued soon after the United States Supreme Court decided *Elstad*. *Fleetwood*, 149 N.H. at 406. This Court

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raised by this Court in *Fleetwood* raises questions of whether *Fleetwood* and other cases like it continue to retain their vitality or have become remnants of abandoned doctrine. With these considerations in mind, this Court may consider overruling or modifying *Fleetwood* to clarify the analysis under Part I, Article 15. Alternatively, this Court may conclude that federal law now comports with New Hampshire law and look to federal cases as persuasive authority.

immediately limited the application and reliance upon *Wauneka*, however, by explaining that "[i]t is impractical to require the police to determine the admissibility of an unwarned confession. This would require them to make legal determinations regarding whether there had been interrogation and custody." *Id.* at 406-07 (citations omitted). In support of this, the Court turned to *Elstad*. *Id.* Nowhere does the Court discuss or consider "the manner in which the officers utilized this prior confession in obtaining a second confession," *Wauneka*, 770 F.2d at 1440, or which officers remain involved in questioning a suspect.

In *Fleetwood* and its progeny, this Court has emphasized that the lapse of time "is important and sometimes critical evidence in the totality of the circumstances test." *Fleetwood*, 149 N.H. at 407; *see also Ruiz*, 170 N.H. at 560-61 (finding that a minimal lapse in time is not fatal under the *Fleetwood* factors because "there [was] no evidence of 'a police decision to delay giving the required warnings'"). This Court has also emphasized the lack of delay between the arrest and giving of *Miranda* warnings and the lack of "promises, threats, or displays of force" as significant factors for consideration. *Ruiz*, 170 N.H. at 560-61.

At the same time, this Court has consistently minimized the significance of factors that require law enforcement to determine whether the prior statements would be subject to suppression. *Id.* at 561 ("[This Court] also do[es] not consider dispositive the fact that the police failed to advise the defendant that his unwarned confession could not be used against him in court."); *Fleetwood*, 149 N.H. at 406 ("[This Court] do[es] not share the defendant's concern that the trial court did not consider the police officers' failure to advise the defendant that her first unwarned

statement would not be admissible against her."). Moreover, this Court has consistently concluded that post-*Miranda* statements have been voluntary even where multiple factors—including significant factors—militate against a finding of voluntariness. *See Ruiz*, 170 N.H. at 560-61 (affirming even though a minimal lapse of time occurred, and the defendant did not receive warnings about the use of her prior statements); *Fleetwood*, 149 N.H. at 406-07 (same).

C. The trial court erred as a matter of law when it added novel factors for determining the voluntariness of the subsequent, post-*Miranda* statements.

Because this Court has recognized that trial courts cannot expect law enforcement to predict the admissibility of an unwarned confession the trial court acknowledged that the police's failure to inform the defendant that none could use his prior statements against him was of minimal importance. Br.: 65 n.13. Yet, the trial court went on to conclude that simply acknowledging the prior statement—a statement for which it would be "impractical to require the police to determine the admissibility," *Fleetwood*, 149 N.H. at 406—during the second interview so overwhelmed the defendant as to make his second set of incriminating statements involuntary. Br.: 68-70. This conclusion demanded the exact clairvoyance that both this Court and the United States Supreme Court declined to demand of law enforcement. Accordingly, this Court must reverse.

The trial court's conclusion rests solely on the fact that Detective Hallam referred to the fact that he and the defendant had spoken earlier that day. The trial court never found, nor could it have found, that Detective Hallam confronted the defendant with his prior statement or made

accusations regarding his subsequent statement based upon his prior statement. Nor did or could the trial find anywhere that Detective Hallam referenced the substance of the prior interview with the defendant.

Aside from the detective's first statement about getting the "straight truth" from the defendant, Detective Hallam mentioned the previous interview on three separate occasions. On two of those occasions, the defendant interrupted the detective and provided additional details before the detective finished asking his question. On the third occasion, the detective, as he did in the first statement, simply referenced the fact that the two had spoken previously. The trial court's conclusion rests solely on these four references, none of which constituted use of the defendant's prior statement against him.

This Court has never held that detectives must pretend that they have never spoken with a defendant in the past, and in fact has cautioned trial courts from demanding that law enforcement predict whether the trial court would admit or suppress a prior statement. *See Fleetwood*, 149 N.H. at 406. Thus, the trial court erred as a matter of law when it concluded that simple reference to the fact that a prior interview occurred was a factor warranting consideration of paramount importance in this case. Accordingly, this Court must reverse.

D. A correct application of the *Fleetwood* factors supports admitting the defendant's second interview.

Beyond, the trial court's error described above, the trial court erred in its application of the existing *Fleetwood* factors. As mentioned above, in

Fleetwood this Court adopted five factors to determine whether a subsequent, post-*Miranda* statement was voluntary. Those factors are:

> (1) the time lapse between the initial confession and the subsequent statements; (2) the defendant's contacts, if any, with friends or family members during that period of time; (3) the degree of police influence exerted over the defendant; (4) whether the defendant was advised that his prior admission could not be used against him; and (5) whether the defendant was advised that his prior admission could be used against him.

Ruiz, 170 N.H. at 560 (citing *Fleetwood*, 149 N.H. at 405-06). "No single factor is dispositive." *Id.* (citing *Fleetwood*, 149 N.H. at 406).

Here, all the *Fleetwood* factors, which the trial court described as the "traditional inquiry," support admitting the defendant's second interview. Over eleven hours passed between the first and second interviews and during most of that time the defendant was not in police custody but instead, with family members and friends. The defendant agreed to speak with law enforcement for the second interview. SHTr.: 49; App.: 114. Detective Hallam began the second interview by advising and educating the defendant about his *Miranda* rights. The defendant acknowledged that he understood his rights and agreed to waive them. Detectives made no promises or threats, never displayed force, and did not use any other coercive tactics during the interview; instead, the interaction between the detectives and the defendant remained "polite and relaxed." Br.: 67-68.

These factors, the most significant factors this and other courts have articulated, all support admitting the defendant's subsequent, post-*Miranda* statements. *See Fleetwood*, 149 N.H. at 407; *see also Blevins*, 755 F.3d at 327 ("All of the other district court's findings support that neither

Hollingsworth nor any other officer engaged in coercive tactics. There was no evidence of coercion at the field office, where the questioning occurred, removed meaningfully in time and place from [the defendant]'s original statement."); *Kiam*, 432 F.3d at 533 (finding that absent "evidence of coercion or improper tactics," a careful and thorough administration of *Miranda* warnings cures any lingering issues stemming from the unwarned statements). Accordingly, the trial court erred when it suppressed the statements and this Court must reverse.

To the extent that the trial court's novel factor was an appropriate consideration or falls within one of the *Fleetwood* factors, such as factors four and five, this Court has held that those factors are of minimal importance given the fact that trial courts cannot expect law enforcement to anticipate the validity of an earlier confession. *See Ruiz*, 170 N.H. at 561; *Fleetwood*, 149 N.H. at 406. Where the evidence viewed in the light most favorable to the State, *Ruiz*, 170 N.H. at 560, supports the conclusion that law enforcement complied with the dominant factors, it is unlawful for a trial court to allow these minimal factors to control the outcome.

Additionally, for the reasons stated in Section 2.C., Detective Hallam's references to the fact that a prior interview occurred did not so overwhelm the defendant's will that his subsequent, post-*Miranda* confession became involuntary. Thus, even if the trial court could rely upon this novel factor or had correctly applied the *Fleetwood* factors, the trial court unsustainably exercised its discretion when it suppressed the subsequent, post-*Miranda* statements and this Court must reverse.

To the extent that the same officer was involved in both interrogations is a worthwhile consideration, it is of minimal importance

because in both *Fleetwood* and *Ruiz*, this Court confronted situations in which the same police officers had been involved and never commented on that as a consideration. *See Ruiz*, 170 N.H. at 556-57, 562 (describing that the same officer questioned the defendant throughout); *Fleetwood*, 149 N.H. at 399-401, 407 (describing how the same investigators questioned the defendant throughout). Accordingly, this Court must reverse the trial court's decision as a matter of law, as an unsustainable exercise of discretion, or against the manifest weight of the evidence, "as viewed in the light most favorable to the State." *Ruiz*, 170 N.H. at 560.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

The State certifies that the appealed decision is in writing and is appended to this brief.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Attorney General

March 13, 2019

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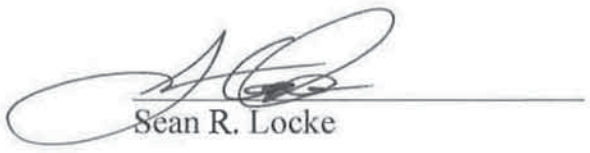
CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,893 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 13, 2019



Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that pursuant to Rule 18 of the 2018 Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing, a copy of the State's brief shall be served on counsel for the defendant, the Appellate Defender Program, through this Court's e-filing system

March 13, 2019

Sean R. Locke

APPENDIX
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THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

Lisa A. Drescher, ESQ
Hillsborough County Attorney's Office
19 Temple Street
Nashua NH 03060

Case Name: **State v. Dominic Carrier**
Case Number: **226-2017-CR-00833**

Enclosed please find a copy of the court's order of July 19, 2018 relative to:

Order on Defendant's Motion to Suppress

July 19, 2018

Marshall A. Buttrick
Clerk of Court

(565)

C: Eleftheria S. Keans, ESQ; Daniel A. Donadio, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2017-CR-00833

State of New Hampshire

v.

Dominic Carrier

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Dominic Carrier, is charged with one count of aggravated felonious sexual assault. The defendant now moves to suppress statements made to the Nashua Police on November 20, 2017. The State objects. The Court conducted a hearing on the defendant's motion on June 25, 2018. It heard testimony from Officer Michael Kekejian and Detective Steven Hallam, both of whom are employed by the Nashua Police Department. Based on its consideration of the evidence, the arguments, and the applicable law, the Court finds and rules as follows.

Factual Findings

The Court makes the following factual findings based on the evidence presented at the suppression hearing. The complainant in this case, M.G., lived at 88 Locke Street in Nashua (the "residence"), which is a multi-unit apartment building with a partially-enclosed front porch. (See Ex. 1.) M.G. lived there with her father and the defendant's mother, who are engaged. The defendant had recently moved in with them and stayed there on the night of November 19, 2017. On November 20th, the defendant left the residence to go to work at 5 a.m. After he left, M.G., who was then thirteen years old, told her father that the defendant had gone into her bedroom during the early hours of the morning and touched her genitals while she was asleep.

M.G.'s father then called the police. Officer Kekejian responded to the residence at approximately 7:00 a.m. M.G.'s father conveyed the substance of his daughter's complaint to the officer. After receiving the initial complaint, Officer Kekejian contacted Sergeant MacLeod. At approximately 8:00 a.m., another sergeant, Sergeant Urban, contacted Detective Hallam, who was a member of the Special Investigations Division. Officer Kekejian then spoke with Detective Hallam and briefed him on the information he had received that morning from M.G.'s father. Due to the sensitive nature of the matter, the officer limited his contact with M.G. to simply asking her if she needed medical attention. The plan was for the Child Advocacy Center ("CAC") to conduct a forensic interview of M.G. regarding the allegations. Officer Kekejian was directed to remain at the residence with the family until M.G. could be interviewed later that day. The interview was scheduled to take place at 1:30 p.m.

While the officer was waiting with the family in the living room, the defendant returned to the residence at 9:09 a.m. The defendant walked through the front door, which entered into the living room, without knocking. The officer immediately ordered him to leave. Officer Kekejian then followed the defendant outside to the front porch and closed the front door to the residence behind him. The officer explained to the defendant that the police were investigating a matter and that the residence was currently "being held as a scene." (Hearing at 1:52.) The weather was cold and windy. The temperature was only in the mid-30s. Officer Kekejian could not recall what clothing the defendant was wearing. In his subsequent statement, however, the defendant suggested that he was not wearing a jacket, and that the officer would not permit him to retrieve one from inside the residence. (See Ex. 4 at 5.)

While on the porch, the officer, who was wearing a full uniform with his badge and gun visible, asked the defendant if he would "be comfortable" with a pat-frisk. (Hearing at 1:52.) The defendant was "cooperative" and the officer patted him down for weapons. (Id.) After the pat-frisk, the defendant took out his cell phone,[1] and, to use Officer Kekejian's words, began "manipulating"[2] it. (Id. at 1:53.) The officer then seized the cell phone. Officer Kekejian was concerned that the defendant could have been deleting text messages sent by his mother[3] and/or trying to contact the people inside of the residence. The officer proceeded to question the defendant about the allegations. Specifically, he asked the defendant "what he had done" that morning, including if he had entered M.G.'s room. (Id. at 2:07.) The officer also asked the defendant questions about his living arrangement at the residence. During this conversation, Officer Kekejian stood in front of the door to the residence to prevent the defendant from entering it. The officer did not tell the defendant that he was free to leave, that he was not under arrest, or that he could refuse to answer his questions.

This conversation lasted approximately ten minutes until another officer—Officer Scott Ciszek—arrived on scene in a fully-marked police cruiser. Officer Ciszek was also in full uniform. After Officer Ciszek arrived, Officer Kekejian called Detective Hallam. Detective Hallam told Officer Kekejian that he would "get in contact with" the defendant at a later time. (Id. at 1:48.) Officer Kekejian then wrote Detective Hallam's

[1] The defendant did not have a cell phone plan and could not use a cellular network. However, his phone could apparently send and receive text messages and phone calls while connected to the internet over a wireless network. (See Ex. 4 at 3.) It is unclear if he had access to a wireless internet network while standing on the porch.

[2] The Court assumes that this term meant that the defendant was "using" his cell phone.

[3] Based on his conversation with the family prior to the defendant's arrival, the officer knew that the defendant's mother had texted him that morning while he was at work. Those text messages were about the allegations. It is not clear if the defendant had received them due to his lack of cell phone service.

contact information on the back of a business card to give to the defendant. The defendant and Officer Kekejian subsequently discussed where the defendant would go in light of the weather and the fact that he was not permitted at the residence. Despite these apparent altruistic motives, the officer appeared more interested in learning where the defendant would be staying so that the detective would be able to locate him.

In the interim, Detective Hallam discussed the case with his supervisor and his partner, Detective Jaclyn McIver. His supervisor told them to interview the defendant before the CAC interview because they "might not be able to find him after or [they] might not be able to get a statement from him at a later date." (Id. at 2:40.) As a result, Detective Hallam called Officer Kekejian and had the officer ask the defendant if the defendant would "stick around" the residence for an interview. (Id. at 1:48.) The detective indicated that "he would be right out [to the residence] to talk to him." (Id. at 2:42.) The defendant, who was apparently about to leave the residence, agreed to wait for the detective. The defendant remained on the front porch with the two officers until the detective arrived. During that time, Officer Kekejian again discussed the defendant's whereabouts that morning and made "small talk" about other topics, including the defendant's employment and cars. (Id. at 1:54.)

At approximately 10:00 a.m., Detectives Hallam and McIver arrived at the residence. The detectives drove an unmarked Chevrolet Impala[4] and parked it across the street from the residence. They wore dress attire with their badges and firearms visible. After they parked, the detectives approached the residence and asked the

[4] The Impala had government license plates and a police radio mounted under the car's normal radio. Other than those features, it was essentially indistinguishable from a non-police Impala. It did not, for instance, have a cage, a mounted laptop computer in the front passenger compartment, or visible blue lights. The front passenger door also opened from the inside.

defendant to speak with them. The defendant left the porch and went with the detectives to an area to the side of the residence. Once there, Detective Hallam asked the defendant to speak with him inside of the Impala. The detective wanted to speak there for privacy reasons and because he was "cold," despite being outside only momentarily. (Id. at 2:24.) The defendant agreed, and they all walked to the Impala. The defendant sat in the front passenger seat, Detective Hallam sat in the driver's seat, and Detective McIver sat in the rear. At that point, the detectives did not inform the defendant that he could refuse to answer questions or that he was not under arrest.

Once they entered the vehicle, Detective Hallam started the recorder, after which the following discussion[5] occurs:

> Detective Hallam: You, you're fine with being audio recorded, that's correct? We talked about that earlier?
>
> Defendant: Yeah, yeah, I don't – yeah, I'm fine.
>
> Detective Hallam: And you're giving a statement voluntarily, right?
>
> Defendant: Yeah.
>
> Detective Hallam: I just wanted to make sure, I don't want you to feel forced to talk to me.
>
> Defendant: No, no, no, dude, I'm willing to do it. I don't know exactly—
>
> Detective Hallam: Well, actually, man, is we're inside this unmarked Impala right here. The doors aren't locked, dude, so I'll make sure they're not locked. They're not locked so if you want to leave at any point, feel free, man. I don't want you to feel like I'm –
>
> Defendant: No, no, obviously we're here.
>
> Detective Hallam: I just want you to understand it's voluntary. Behind me I have Detective Jaclyn McIver as well. So yeah, I came out here to see

[5] This audio recording was transcribed. (See Ex. 4.) The actual conversation, as captured in the audio recording, varies slightly from the transcript. (See Ex. 2.) However, for ease of analysis, the Court will refer to the transcript when quoting the interview.

> what do you know about what's going on over here? I'm trying to just get like a basic, basic understanding of what you know.
>
> Defendant: Well, I don't know what – why there's police here but when I came here from work, right – right when I got here from work I went right into my house. I still – I still have to take a piss. All right. I went into my house and that young one right there in front of the door was inside and he's like, get out, get out. Or he's like you can step outside for a second. I'm like, why, what did I do? He's like no, you've got to step outside, like okay. So I stepped outside. I know I didn't do anything wrong and stuff. So I'm like why, why can't I go in my house? I can't even get my jacket, I'm like come on.

(Ex. 4 at 3–5.) At no point was the defendant read his Miranda rights, nor was he advised that he was at liberty to decline to answer questions.

At the beginning of the interview, the defendant denied that he had ever left his bedroom, which was in the basement, during the previous night. However, he slowly changed his story as the detective challenged the defendant's version of events. For instance, the defendant subsequently admitted that he had left his room, but only to get a drink and to use the bathroom. As Detective Hallam continued to accuse the defendant of being dishonest, the defendant added more information, including that he went into M.G.'s room to look for his brother, Alex. In response to further accusations of untruthfulness, the defendant stated that, when he went into M.G.'s room to look for Alex, he remembered that he had a pair of work glasses in a closet near M.G.'s bed. The defendant told the detectives that he needed to stand on her bed in order to reach the shelf in the closet, and he suggested that he may have accidentally touched M.G. while he was stepping down from her bed. Towards the end of the interrogation, he gave a more "complete" description of the early morning hours as follows:

> Go up the basement stairs. Peek around the corner, I didn't see Alex. I could see [M.G.'s father] and the TV on. Poured a drink, went and took a piss, came and got my drink. Went and opened the door [to M.G.'s room],

> Alex wasn't in there. So I said fuck it, let me look for my glasses. Stood on the end of the mattress. Looked up on the shelf, reaching around looking for my fucking glasses, wasn't there. I touched fucking her vagina and I came back down and I rubbed [it] then I, well, I didn't rub it . . . The vagina touching was like probably 15 seconds.

(Id. at 85–86.) The defendant also admitted that he had taken Xanax, which made him high, and stated that the effects of the medication had played a role in his actions.

The questioning inside of the Impala lasted approximately one hour. Despite the fact that the defendant informed the detectives that he needed to use the bathroom at the beginning of the interview, they did not afford him an opportunity to do so. The detectives also never took a break and the doors to the Impala remained closed throughout the conversation. Following the interview, it seems from the transcript that the defendant used Detective Hallam's cell phone to call his father. The defendant arranged for his father to pick him up at a nearby convenience store. The defendant told the detectives that he would be staying with his father, and gave them his father's address. The detectives then dropped him off at the convenience store.

M.G. later went to the CAC interview as scheduled, after which a warrant was issued for the defendant's arrest. Detective Hallam arrested the defendant at his father's home in Litchfield at 8:20 p.m. that evening. He was then brought to the Nashua police station for booking. At approximately 10:00 p.m., Detective Hallam approached the defendant in the booking area. The detective asked the defendant if he wanted to speak with him. The defendant agreed and was brought upstairs to an interview room at the police station. Detective Hallam and another detective started that interview at approximately 10:20 p.m. Prior to questioning, Detective Hallam read the defendant his Miranda rights using a standard form. The defendant followed along

as the detective read each right and initialed next to each right. The defendant agreed to waive his rights and to answer questions. During that interrogation, which lasted approximately 45 minutes, the defendant again made incriminating statements.

Analysis

The defendant now moves to suppress both of his recorded statements. He contends that his first statement (inside of the Impala) was involuntary made and also obtained in violation of the rights guaranteed by Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. As to the second statement made at the police station, the defendant maintains that it was also involuntarily made and that his Miranda waiver was ineffective. The defendant raises his arguments pursuant to Part 1, Article 15 of the State Constitution as well as the Fifth and Fourteenth Amendments to the Federal Constitution. However, as the New Hampshire Constitution is at least as protective in this area, the Court "address[es] the defendant's claim under the State Constitution and rel[ies] upon federal law only to aid in" the analysis. State v. Gribble, 165 N.H. 1, 11 (2013) (citing State v. Ball, 124 N.H. 226, 231–33 (1983)). The Court will address each statement in turn.

I. The Morning Statement in the Impala

"Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution afford individuals a privilege against self-incrimination." State v. Thelusma, 167 N.H. 481, 484 (2015) (citations omitted). Under these provisions and the case law interpreting them, "before a defendant's responses made during custodial interrogation may be used against him, the State must prove, beyond a reasonable doubt, that the interrogation did not violate his constitutional rights

under Miranda." State v. Lynch, 169 N.H. 689, 693 (2017) (quotation omitted). However, "the Miranda safeguards come into play [only when] a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (emphasis added). In other words, "where a person is not subject to a custodial interrogation, the obligation on the part of the police to issue Miranda warnings and to respect the invocation of Miranda rights does not attach." State v. Carroll, 138 N.H. 687, 696 (1994). Here, there is no dispute that the defendant was interrogated by the detectives in the Impala on November 20, 2017. There is also no dispute that the defendant was not informed of his Miranda rights during that interrogation. Therefore, the sole issue before this Court is whether the defendant was in custody at any point on the morning of November 20, 2017.

"Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement of the degree associated with formal arrest." State v. Turmel, 150 N.H. 377, 382–83 (2003) (citation omitted). "In the absence of formal arrest, [the Court] must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation." State v. Jennings, 115 N.H. 768, 772 (2007). "To determine whether a reasonable person in the defendant's position would believe himself in custody, the trial court should consider the totality of the circumstances of the encounter," id. (quotation omitted), "including, but not limited to, factors such as the number of officers present, the degree to which the suspect was physically restrained, the interview's duration and character, and the suspect's familiarity with his surroundings," id. at 773; see also State v. McKenna, 166 N.H. 671, 677 (2014) ("A

number of factors must be balanced in determining whether, and at what point, a defendant was in custody during police interrogation."). Determining if a suspect is in custody during a police interrogation "is rarely based on a static set of circumstances." McKenna, 166 N.H. at 677. That is, "[i]nterrogations are fluid: What may begin as noncustodial questioning may evolve over time into custodial questioning." Id.

The Court notes that this case is difficult to analyze because of the actions of Officer Kekejian. The State did not consider any of Officer Kekejian's actions in its custody analysis, instead focusing its argument solely on the actions of the detectives. However, there are several facts arising from the officer's interaction with the defendant that are relevant to the Court's custody determination. Given that the defendant was continuously with the police starting at 9:09 a.m. through the end of the Impala interview, the Court finds it not only appropriate, but necessary, to consider the pre-Impala police conduct in the custody analysis. In other words, the Court will consider the totality of the circumstances. Based on those circumstances, the Court concludes that the defendant was in custody, at the latest, when Detective Hallam repeatedly accused him of lying at the 16:40 minute mark of the Impala recording.

In making this custody determination, one factor the Court examines is "the degree to which the [police] restrained the defendant's movement." Id. at 677–78. "[T]he lack of handcuffs or similar devices is not dispositive; indeed, effective restrictions on a defendant's movement can be a product of verbal, psychological, or situational restraint." Id. at 678 (citations omitted). "This is so because the likely effect on a suspect of being placed under guard during questioning, or told to remain in the sight of interrogating officials, is to associate these restraints with a formal arrest." Id.

In this case, Officer Kekejian initially restrained the defendant's movement when the officer ordered the defendant to leave his own residence. Had that been the end of the officer's interaction with the defendant, the Court would be hesitant to find that this factor weighed in favor of custody. However, after expelling him from his own residence, the officer followed the defendant outside to the porch and remained with him until another officer arrived. The Court was left with the impression that Officer Kekejian was essentially "guarding" the defendant on the porch. For instance, Officer Kekejian waited to call Detective Hallam until Officer Ciszek arrived. This fact strongly suggests—and would convey to a reasonable person in the defendant's position—that Officer Kekejian did not want the defendant to be left unattended. Rather, it seems that Officer Kekejian wanted the defendant to remain at the residence until the officer could speak with the detective to find out what he should do with the defendant.

Moreover, once the defendant agreed to "stick around" to speak with Detective Hallam, the two officers remained by his side. Despite the cold weather, there was no evidence that either officer ever went inside of the residence after the defendant's arrival. This again suggests that the two officers were continuing to guard the defendant until the detectives arrived. Although the officers "did not verbally disclose [their] intent to [guard] the defendant, [their] actions . . . would have conveyed to a reasonable person the reality that the officers did not intend to allow the defendant to leave their sight." Id. Moreover, when the detectives arrived, the defendant was escorted to their Impala where he remained in their sight. The Court recognizes that the Impala doors were unlocked and that the defendant was told as much. However, given the atmosphere over the previous hour—essentially being guarded on the porch

by two officers—a reasonable person would not believe that he was free to simply leave. Accordingly, the Court finds that this factor weighs in favor of custody.

Another factor to consider is whether the police give "a statement to a suspect that he is not under arrest." Id. at 679. Here, it is undisputed that neither Officer Kekejian nor the detectives ever told the defendant that he was not under arrest. Likewise, a somewhat similar, yet more "significant factor" is "whether a suspect is informed that he or she is at liberty to terminate the interrogation." Id. at 680; see also United States v. Griffin, 7 F.3d 1512, 1518 (10th Cir. 1993) ("[T]he extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will often defines the custodial setting."). Here, Officer Kekejian did not inform the defendant that he was free to leave or that he did not have to answer questions. The officer also did not advise the defendant that he did not have to wait around to answer the detective's questions. Indeed, the fact that the defendant waited outdoors in the cold with no coat on while needing to use the bathroom strongly suggests that he did not, in fact, feel free to leave.

The Court recognizes that Detective Hallam told the defendant that the Impala doors were "not locked so if you want to leave at any point, feel free, man." (Ex. 4 at 4.) However, this point was not emphasized. The detective and the defendant were essentially talking over each other in this part of the interview, which is not reflected in the transcript. In addition, there was nothing to suggest that leaving the Impala would be the same as terminating the interview. See McKenna, 166 N.H. at 680 (explaining that "the lack of evidence that he was told he was free to terminate the interrogation supports a finding of custody at some point during the interrogation"); cf. State v.

Censullo, No. 2016-0270, 2017 N.H. LEXIS 128, at *4 (June 16, 2017) (3JX) (defendant not in custody where detective stated, "at any point you want to stop, say, 'I want to stop,' and we'll give you a ride back to wherever you need to go") (emphasis added). Indeed, given that the defendant had previously been questioned outside, he reasonably could have believed that the conversation would have resumed outside of the Impala if he had opened the door and exited the cruiser.

Likewise, the fact that the detective twice mentioned the word "voluntarily"—again while they were talking over each other—is not the same as informing the defendant that he could end the interview or decline to answer questions. Moreover, the detective spent no time explaining what the term "voluntarily" meant, nor did he confirm the defendant's understanding of that term. Cf. Censullo, 2017 N.H. LEXIS 128, at *4 (defendant not in custody where detective "asked the defendant to confirm on the record that he was 'here voluntarily today,' which he did. To avoid any misunderstanding, she asked him, 'What does voluntary mean to you?', and he replied, 'It means I'm here on my own free will . . . to answer any of your questions.'").

The fact that Officer Kekejian seized the defendant's phone for no justifiable reason[6] and never gave it back is also an important fact in the custody analysis. By seizing the defendant's phone, the officer hindered the defendant's ability to find somewhere else to go, which, in turn, made it more likely that he would answer questions. See Jennings, 155 N.H. at 774 (defendant was in custody where police

[6] As noted above, the officer testified that he was concerned that the defendant would delete *incoming* messages from his mother. To the extent those messages would even be relevant, they would have also been found on his mother's phone, and the officer made no attempt to secure her phone. Thus, the Court finds the officer's proffered justification for seizing the defendant's phone to be unreasonable. Moreover, even if the officer had a legitimate reason for seizing the phone, "the relevant inquiry is the effect on the suspect." McKenna, 166 N.H. at 679. Here, there was no evidence that the officer disclosed the reason for taking the phone. Thus, the officer's evidentiary concerns do "not influence the analysis." Id.

"den[ied] the defendant access to his [cell] phones," which "effectively ensured that he was dependent upon them for any further transportation or communication with the outside world"); see also United States v. LeBrun, 363 F.3d 715, 720 (8th Cir. 2004) (noting that possession of a cell phone "is relevant to the question of whether the interview was coercive and whether a reasonable person in the same circumstances would feel restrained"). In addition, a cell phone would have provided the defendant with "a line of communication between himself and the outside world," which to some extent would have "mitigated the incommunicado nature of interrogations with which the Miranda Court was concerned and the psychological pressure associated with being isolated" during interrogation. LeBrun, 363 F.3d at 720. Thus, the fact that the officer took the defendant's phone supports a custody finding.[7]

Also relevant "is the fact that the police initiated the contact with the defendant." McKenna, 166 N.H. at 684. That is, when "confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist." Id. (quoting United States v. Griffin, 922 F.2d 1343, 1351 (8th Cir. 1990)). Here, the Court acknowledges that Officer Kekejian was already at the defendant's residence at the time the defendant arrived. Thus, at least initially, it is arguable that neither party "instigated" the interaction. However, as noted above, Officer Kekejian subsequently followed the defendant onto the porch and then proceeded to question him there. Thus, the Court finds that this factor supports a finding of custody. Cf. Carroll, 138 N.H. at 696–97 (fact that defendant requested and drove himself to interview supported no custody finding).

[7] Curiously, the officer did not include any information about seizing the defendant's cell phone or the pat-frisk in his police report. This information was only elicited through cross-examination.

Next, the Court "turn[s] to the character of the interrogation," McKenna, 166 N.H. at 681, which is an important factor in the custody determination, see Jennings, 155 N.H at 775. In this part of the analysis, the Court "consider[s] the presence or absence of both accusatory questions and accusatory statements made during questioning." McKenna, 166 N.H. at 681. "The accusatory nature of questioning is widely recognized as a factor weighing in favor of a finding of police custody." Id. "Accusatory questioning often conveys an officer's belief in the defendant's guilt and the officer's intent to arrest." Id. (citation omitted).

For instance, in State v. Dedrick, the supreme court upheld a custody finding after it "discerned a sea change in the tenor and character of [the] interview," which "would have signaled [to] a reasonable man in the same circumstances that the freedom officers had accorded him earlier was no longer available and that, as often as he made denials, they would renew their accusations until, in the end, he either confessed or asked, as Dedrick in fact did, to speak with an attorney." 132 N.H. 225, 289 (1989). "That 'sea change' stemmed from the officers' questioning: Where the defendant had previously been 'answering general questions about his background and activities,' the shift occurred when he was 'accused of untruths and confronted with damning information,' and, 'despite his vehement denials,' the officers insisted that he had committed the crime." McKenna, 166 N.H. at 682 (quoting Dedrick).

In this case, as in Dedrick, the detectives'[8] questioning started innocuously enough, but became more intense and confrontational as it progressed. There was a

[8] There was not a significant amount of evidence regarding the nature of Officer Kekejian's previous questions. It seemed that at least part of his conversation with the defendant was unrelated to the accusations. But it is far from clear whether the officer asked any accusatory questions or used a confrontational tone.

definitive "sea change" in the interview's character and tenor at approximately the twelve minute mark of the interview. At that point, when Detective Hallam became unsatisfied with the defendant's repeated denials, the detective accused the defendant of lying, both explicitly and implicitly, as the following exchange demonstrates:

> Defendant: But I was laying back down, fell asleep, woke up and – well, I woke up early enough to get to work.
>
> Detective Hallam: No, I gotcha. Because, because my concern is, is there's something else that's being reported to us right now.
>
> Defendant: And I know that because I don't know what my—you're asking me all these questions. I don't know what's going on. It's weird.
>
> Detective Hallam: I'm honestly trying to get –
>
> Defendant: Yeah, obviously, but me, I'm just lost.
>
> Detective Hallam: I gotcha. And we're, we're getting one side of the story and I want to get your side of the story and I'm trying to allow you to give me what actually happened last night so, so I don't have to like beg for it or anything like that. I think there was another stop on the way to get some water last night, man, that – that you're kind of not telling us about. And I'm asking you to tell me what you did last night, man, when you went to get water, whether –
>
> . . .
>
> Defendant: Yeah. I didn't make any other stop.
>
> Detective Hallam: Did, did you go in [M.G.'s] bedroom at all?
>
> Defendant: No. Why would I go near her room?
>
> Detective Hallam: That's what I'm trying to figure out, man.
>
> Defendant: The fridge isn't even near her room.
>
> . . .
>
> Detective Hallam: --and I'm trying to give you every opportunity, man, to tell me what happened. You weren't near her room at all?
>
> Defendant: No.
>
> Detective Hallam: Because this could be a big misunderstanding or, or –

Defendant: No, I wasn't even near her room at all. I don't know what you mean. I'm telling you the truth. I'm being honest. I didn't go near her room, man.

Detective Hallam: All right. Because, because part of what was alleged to us is that you were in her room at some point last night, man. And I'm, I'm trying to figure out why you were in there and we're trying to figure out why you were in there as well. And I'm not, I don't want to put words in your mouth but if we're talking—we can understand a reason why you were in there then, then it is what it is. But for you just to tell me that you weren't in there at all, that kind of concerns me because I feel like, like you were in there for some reason, man. And every indication we know of what's going on right now tells me that you were inside there. So if you can't even tell me that you were inside the room, then – then what else are you lying about, dude? I'm, I'm being straight up with you, man, like –

Defendant: I'm not lying about anything. I haven't lied to you one since I've been in this car.

. . .

Detective Hallam: Because, because, it's being reported to us that you were inside of her bedroom and, and all I want to hear from you first, why – what could have possibly led you into her bedroom? And, and are you being 100 percent honest? We, we could –

Defendant: Yeah, I'm being honest, man.

. . .

Detective Hallam: Is that—oh, so you were in her room because you were looking for your brother?

Defendant: No, I didn't even go into her room, you know what I mean? Like I didn't know where my brother was and then I seen him on the couch with [M.G.'s father], that's how I knew he was on the couch with [M.G.'s father].

. . .

Detective Hallam: Yeah, and – and that's all well but I'm just trying to figure out – because all indications point to that, that you were inside of her room and, and nobody – I mean nobody has any reason to lie in there, like you said. You have no issues with any of them. It would make no sense for them to tell us that you were inside of, of [M.G.'s] bedroom for, for no reason. Like what do they have against you? You just moved back in yesterday. They have no issue with you. They allowed you to come back in.

Defendant: Yeah, I know, I was (inaudible).

> Detective Hallam: Yeah. And they're kind of trying to figure out why, why you were in her bedroom as well, and that's what we're trying to figure out. If it was something like, like you mean no harm, like no, I was just in there for this reason, I wasn't doing anything else, that's the only reason I was in there for that reason, then we could kind of understand. But if, if you're just telling us you weren't in there at all then –

(Ex. 4 at 23–29 (emphases added); see also Ex. 2 at 15:00–16:40.) As the foregoing makes clear, the defendant stated multiple times that he did not go into M.G.'s room during the night. However, as the underlined portions make equally clear, the detective repeatedly accused the defendant of being dishonest. This is the type of accusatory questioning that is "a significant factor weighing in favor of a finding of custody." McKenna, 166 N.H. at 683.[9]

Also relevant to the Court's analysis is the fact that there were at least four officers and three police vehicles present at one point. United States v. Hughes, 640 F.3d 428, 434 (1st Cir. 2011) (noting in custody analysis that the presence of four officers was "impressive but not overwhelming"). Although only two detectives were interviewing the defendant inside of the Impala, the defendant could still see other police cars and Officer Kekejian from inside of the car. See McKenna, 166 N.H. at 685 (although only questioned by two officers, a third officer's "presence in his marked cruiser during the interrogation contributed to a police-controlled atmosphere"); see also United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982) (defendant in custody where he "was questioned in a closed FBI car with two officers for well over an hour while police investigators were in and around his house. The agents allowed him to repeat his

[9] The Court recognizes that the tone of the interview was, for the most part, polite. However, that fact has little significance in this case given the accusatory nature of the questioning. See McKenna, 166 N.H. at 684 ("Neither the absence of hostility on the part of the officers, nor the polite tone of the interrogation, neutralizes the content or import of the accusatory questions and statements, nor diminishes the weight which we accord to them.").

exculpatory story, then for 15 minutes confronted him with evidence of his guilt, and told him it was time to tell the truth, but did not advise him of his rights.").

There are a number of other facts that also weigh in favor of a custody finding, which the Court will only briefly cite. Officers Kekejian and Ciszek were wearing full police uniforms with their weapons displayed. Cf. State v. Hammond, 144 N.H. 401, 404 (1999) (facts that officers were not wearing their uniforms and that their weapons were not visible suggested no custody). The defendant was not afforded an opportunity to use the bathroom, despite needing to use it upon his arrival at the residence and explicitly telling the detectives as much. See United States v. Robinson, 833 F.Supp.2d 406, 411 (D. Vt. 2011) (fact that defendant "was not allowed to go to the bathroom" at her apartment suggested she was in custody). The defendant had to stand outside in cold and windy conditions without a jacket for approximately one hour. See Earl v. Turnbull, No. 3:02-CV-224-HRH, 2008 WL 11398892, at *13 (D. Alaska July 9, 2008) (noting that "there are factors weighing in favor of a finding that he was in custody, such as . . . the fact that Earl was cold and was not provided a coat"). Officer Kekejian also pat-frisked the defendant before questioning him. See Jennings, 155 N.H. at 773 (fact that police "patted [the defendant] down" prior to questioning suggested custody); cf. Turmel, 150 N.H. at 385 (fact that "the officers did not frisk the defendant" weighed against custody finding); see also State v. Lonkoski, 828 N.W.2d 552, 561 (Wis. 2013) (noting that "whether a frisk is performed" is factor in custody analysis). Finally, the defendant was not offered food or beverage. Cf. Howes v. Fields, 565 U.S. 499, 515 (2012) (fact that prisoner "was offered food and water" during questioning supported a finding of no custody).

As in most cases, there are some facts that weigh against a finding of custody. The defendant was never placed in handcuffs. Cf. State v. Belton, 150 N.H. 741, 748 (2004) (trial court found that "the defendant reasonably believed he was in custody as soon as Officer McCarthy placed him in handcuffs"). He was not otherwise physically restrained, and went to the Impala on his own volition. See Locke, 149 N.H. at 6 (defendant not in custody where he went to "police headquarters by his own agreement and without physical restraint"). The detectives wore dress attire, and although their weapons were visible, they never brandished them. See id. (no custody where "[t]wo plain-clothes officers questioned the defendant. They did not display their weapons, and the defendant was not handcuffed"). The questioning took place in areas that were somewhat familiar to the defendant—on the front porch of his residence and in a car parked in front of his house. See McKenna, 166 N.H. at 685 (noting that "a defendant's familiarity with his surroundings, taken in isolation, often weighs against a finding of custody"). As discussed above, the Impala doors were unlocked and the Detective Hallam told the defendant "feel free" to leave the Impala. See United States v. Ramos, No. CR. 17-50010-JLV, 2017 U.S. Dist. LEXIS 183204, at *7 (D.S.D. Nov. 6, 2017) (defendant not in custody where agent told him "that the car doors were unlocked and [that he] was free to leave"). Last, the defendant was actually permitted to leave at the conclusion of interview. See Hammond, 144 N.H. at 404 (finding no custody based, in part, on defendant driving himself to the interview and being permitted to leave at its conclusion).[10]

[10] The Court notes that the total length of the defendant's interaction with the police was approximately two hours. This length is a relatively neutral factor. Compare, e.g., Jennings, 155 N.H. at 774 ("nearly two hours" of questioning supported conclusion of custody); with, e.g., Locke, 149 N.H. at 6 (no custody even though interrogation lasted three and a half hours).

Taking all of these facts into consideration, the ultimate question is, at what point, if any, was there "restraint on freedom of movement of the degree associated with formal arrest." McKenna, 166 N.H. at 676 (citations omitted). After reviewing the "totality of the circumstances of the encounter," Jennings, 155 N.H. at 772 (quotation omitted), and "balancing all of the relevant factors," McKenna, 166 N.H. at 686, the Court finds that the defendant was in custody, at the latest, when Detective Hallam repeatedly accused him of lying at the 16:40 mark in the audio recording. Because he was then subject to custodial interrogation, the defendant was entitled to Miranda warnings, which were undisputedly withheld.[11] Accordingly, pursuant to Part I, Article 15 of the New Hampshire Constitution, any incriminating statements made by the defendant beyond that point are suppressed. In light of the Court's decision on the Miranda issue, it is unnecessary to address the defendant's voluntariness argument.

II. The Post-Arrest Statement

The defendant next argues that his second confession must be suppressed as involuntary. The defendant's argument is primarily based on the "cat out of the bag" theory. This theory was first recognized by the United States Supreme Court in United States v. Bayer, where the Court explained:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat

[11] It is worth repeating that "[c]ustody should not be a mystical concept to any law enforcement agency." McKenna, 166 N.H. at 686 (citation omitted). There is "no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of Miranda warnings." Id. (citation omitted). "Effective law enforcement is not frustrated when police inform suspects of their rights," and "[s]uch practices protect the integrity of the criminal justice system by assuring that convictions obtained by means of confessions do not violate fundamental constitutional principles." Id. (citations omitted). Thus, in situations where the defendant can make a colorable claim of custody, the supreme court has made clear that Miranda warnings should be given.

> back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

331 U.S. 532, 540 (1947). Some courts have held that, under the "cat out of the bag theory," the

> extraction of an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession, even if preceded by proper Miranda warnings, is tainted by the initial illegality, and therefore, the State must establish that the constitutional right to be free from self-incrimination was not waived due solely to the psychological pressures resulting from giving the previous statement.

State v. Aubuchont, 141 N.H. 206, 209 (1996) (citing State v. Smith, 834 S.W.2d 915, 919 (Tenn. 1992); Commonwealth v. Smith, 593 N.E.2d 1288, 1295–96 (Mass. 1992)). The New Hampshire Supreme Court, however, explicitly "reject[ed] this approach," and instead held that the "traditional part I, article 15 due process voluntariness inquiry" applies in "cat out of the bag" situations premised on prior Miranda violations. Aubuchont, 141 N.H. at 209; see also United States v. Rogers, 659 F.3d 74, 79 (1st Cir. 2011) ("If the pre-warning questions occurred in circumstances not clearly custodial, without manifesting a preplanned interrogation, and reflecting no policy to diminish the Miranda safeguards, the test for admissibility will be the familiar [voluntariness] one.")

This "traditional" inquiry requires the Court to determine whether "the second confession is the product of an essentially free and unconstrained choice." Aubuchont, 141 N.H. at 209 (citations and quotations omitted). However, since Aubuchont was decided, the supreme court has identified specific factors for the trial court to consider when a "defendant's post-Miranda confession is preceded by an earlier voluntary confession that violated his Miranda rights." State v. Ruiz, 170 N.H. 553, 560 (2018). Specifically, the Court should consider:

> (1) the time lapse between the initial confession and the subsequent statements; (2) the defendant's contacts, if any, with friends or family members during that period of time; (3) the degree of police influence exerted over the defendant; (4) whether the defendant was advised that his prior admission could not be used against him; and (5) whether the defendant was advised that his prior admission could be used against him.

Id. (citing State v. Fleetwood, 149 N.H. 396, 405–06 (2003)) (hereinafter the "Fleetwood factors"). Another relevant factor includes "the manner in which the officers utilized []his prior confession in obtaining a second confession." United States v. Wauneka, 770 F.2d 1434, 1440 (9th Cir. 1985).[12] "No single factor is dispositive." Ruiz, 170 N.H. at 560 (citation omitted). Rather, the Court should consider "the totality of the circumstances." State v. Cloutier, 167 N.H. 254, 258 (2015) (citation omitted). "Whether a confession is voluntary is initially a question of fact for the trial court," id. (citation omitted), and the State must "prove, beyond a reasonable doubt, that a defendant's confession is voluntary," Ruiz, 170 N.H. at 559 (citation omitted).

This case presents a close call. On the one hand, over eleven hours lapsed between the end of the defendant's unwarned confession and the beginning of his post-Miranda confession. During the majority of that time, the defendant was not in police custody. See Aubuchont, 141 N.H. at 209 (lapse of seventeen hours between interviews, during which time defendant was not in custody, supported finding of voluntariness). Indeed, the evidence suggested that he spent at least some of that time with his father and at his father's home in Litchfield. Thus, the first two Fleetwood factors suggest that the defendant's statement was voluntary.

[12] Notably, the Fleetwood factors are derived from the Wauneka decision. Thus, the Court finds Wauneka to be particularly persuasive authority.

In addition, many of the more traditional voluntariness factors weigh in favor of a voluntariness finding. For instance, the defendant was advised of his Miranda rights at the start of the second interview, and based on the Court's review of the video recording, it appears that he understood those rights and voluntarily waived them. See State v. Bilodeau, 159 N.H. 759, 764 (2010) (compliance with Miranda is a "factor that a trial court can consider" in voluntariness inquiry). The detectives also never "made any promises, threats, or displays of force in an attempt to induce the defendant to confess." Ruiz, 170 N.H. at 560 (citations omitted). Likewise, based on the video recording, it seems that the second interaction between the detectives and the defendant was "polite and relaxed." Id. at 561.

On the other hand, however, it is undisputed that Detective Hallam did not advise the defendant that his prior inculpatory statement could not be used against him.[13] But the most concerning factor is the manner in which Detective Hallam utilized the defendant's "prior confession in obtaining [the] second confession." Wauneka, 770 F.2d at 1440. That is, less than twenty seconds after Detective Hallam finished the Miranda process, he stated:

> So obviously I wanted to bring you up, man, I wanted to talk to you again. I know we went over this already and, and we talked about it in the car out at the, the scene. Just a couple inconsistencies, man, we want to make sure we paint the clearest picture possible and, and get exactly what happened there. Right now would you just be able to give me, you know, the 100 percent truth, man. I know, I know you said you gave me the truth the first time, 100 percent. But I feel like there's a little bit of

[13] This factor is arguably less significant in this case because it was not clear that the defendant was in custody at the time of his unwarned statement. As noted in Fleetwood, it "is impractical to require the police to determine the admissibility of an unwarned confession. This would require them to make legal determinations regarding whether there had been interrogation and custody." 149 N.H. at 406. Indeed, Detective Hallam testified that he did not read the defendant his Miranda rights prior to the first statement because he did not believe that the defendant was in custody. As such, while this factor weighs in the defendant's favor, it does not necessarily carry the weight it may in other circumstances.

> inconsistencies. Could you agree that there's a little bit that you kind of left out when you, when you were speaking with me the first time, where you kind of led me in the wrong direction a little bit like as far as the reasons you were in the room and stuff to that extent? If you could start from the beginning, man, and give me the 100 percent straight truth, we're here today, man, and – and let's just [get it] handled right now, dude. Can, can we be honest and just get it handled? It is what it is. You've been arrested. Let's, let's get past this, man, and – and move on from it, 100 percent honest right now, man. Start from when, from when you showed up at the house on Sunday? Time frame, give me everything, paint me a picture, man? We'll, we'll start with what time did you show up on Sunday?
>
> . . .
>
> What was your point in going upstairs? And like I said, let's be 100 percent honest, man, skip all that B.S. that we were doing out there. We had like a 50 minute conversation about B.S. until we got to the truth, man. I don't want to do that again, dude. . . . I want to be, I want to be straight to the point. When you left downstairs you said around 1 or 2 o'clock, what were you going upstairs for, man? Share it up right now.

(Ex. 5 at 10–12.) As the foregoing makes clear, the detective's[14] use of the first statement was instrumental, from the very beginning, in obtaining the second statement. In this case, this is even more troublesome because, as discussed above, the detective was only able to extract the first confession after repeatedly accusing the defendant of lying and ignoring his consistent denials. See Wauneka, 770 F.2d at 1440 (court should consider "the combined effect of the entire course of the officer's conduct upon the defendant" in determining voluntariness of post-Miranda statement).

Indeed, in Aubuchont, the supreme court implied that this was a factor weighing in favor of an involuntariness finding. 141 N.H. at 209 (standing "alone," fact that detective "scheduled the interview to 'go over a statement that the defendant had given at the hospital,'" did "not give rise to the conclusion that the second confession was

[14] That the same detective was involved in extracting both confessions is also a factor to consider. See, e.g., Medeiros v. Shimoda, 889 F.2d 819, 824 (9th Cir. 1989) (fact that second statement was made to different officers, who did not even have knowledge of prior confession, supported finding of voluntariness); United States v. Pettigrew, 468 F.3d 626, 638 (10th Cir. 2006) (despite fact that first two statements violated Miranda, third statement was voluntary where it was made "to a different officer").

involuntary") (brackets and ellipses omitted). However, the court discounted that factor in that case because

> the defendant himself testified that he *agreed to speak* with the police in order to "deny what I had said the day before," and that he waived his right to have a lawyer present "because the first thing I told them was I wasn't going to repeat what I said at the hospital because it was not true."

Id. at 209–10 (emphasis in original). Here, unlike in Aubuchont, there is no evidence that the defendant agreed to speak with the detective in order to disavow his previous, unwarned statement. Indeed, the defendant was not even afforded an opportunity to do so, as Detective Hallam began the second interrogation by incorporating the defendant's pre-Miranda statement into his questions. This indicates "that the police sought to use his prior admission as a lever to overcome an inclination [the defendant] might have had to remain silent." United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010); cf. Pettigrew, 468 F.3d at 638 (finding third statement voluntary, even though first two statements violated Miranda, because there was no evidence that police used the "first two statements to obtain another incriminating statement").

In sum, the voluntariness of a confession is determined under the totality of the circumstances. Cloutier, 167 N.H. at 258 (citation omitted). In the Court's view, despite the existence of several factors supporting a voluntariness finding, the detective's decision to begin the second interview by referencing the unwarned statement, coupled with his failure to advise the defendant that his previous statement could not be used against him, creates a reasonable doubt as to the voluntariness of his second statement. Accordingly, the Court finds that the State has failed to meet its burden of proof. See Ruiz, 170 N.H. at 559 (State has burden of proving voluntariness beyond a reasonable doubt). The defendant's motion to suppress his second statement is therefore

GRANTED. In light of this decision, the Court need not address the defendant's remaining arguments in support of suppression.

So ordered.

Date: July 19, 2018

Hon. Jacalyn A. Colburn,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

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http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **State v. Dominic Carrier**
Case Number: **226-2017-CR-00833**

Please be advised that on September 06, 2018 Judge Colburn made the following order relative to:

State's Motion for Reconsideration of July 19, 2018 Order- Denied

September 10, 2018

Marshall A. Buttrick
Clerk of Court

(852)

C: Eleftheria S. Keans, ESQ; Lisa A. Drescher, ESQ; Daniel A. Donadio, ESQ

LAD /AMA 72

COPY

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT—SOUTH

Hillsborough, ss. APR 26 2018 April Term, 2018

STATE OF NEW HAMPSHIRE

v.

DOMINIC CARRIER 226-17-CR-833

MOTION TO SUPPRESS

The defendant, Dominic Carrier, through counsel, Eleftheria S. Keans and Daniel A. Donadio, moves to suppress his statements to the police because they were obtained in violation of his state and federal constitutional rights against compelled self-incrimination and due process. N.H. Const. pt. I art. 15; U.S. Const. amends. V & XIV. Dominic made two recorded statements to the police. The first was made while subject to custodial interrogation and without the benefit of Miranda warnings. It was also given involuntarily. The second statement, though made after Dominic received notice of and waived his rights under Miranda, is irredeemably tainted by the first statement's unconstitutional genesis. It was both involuntary and the product of an invalid Miranda waiver.

FACTS

1. In the early morning on November 20, 2017, John Garcia called the Nashua Police Department to report that Dominic Carrier had sexually assaulted Mr. Garcia's 13-year-old daughter (M.G.) sometime during the night. Officer Kekejian arrived around 7:00 a.m. to investigate Mr. Garcia's report. He spoke with and obtained statements from Mr. Garcia and Mr. Garcia's fiancée, Angela Rooney.[1] He also briefly spoke with M.G. to determine whether she was injured, but did not pursue a full statement due to her age. From Mr.

[1] Rooney is Dominic's mother, and she, along with Dominic and his younger brother, lived with Mr. Garcia and M.G. in Mr. Garcia's home.

Garcia, Kekejian learned M.G.'s account of what had happened—basically, that Dominic had entered her room in the middle of the night, while she was sleeping, had touched her genitals, and had left when she started to wake up. Kekejian also learned that Ms. Rooney had text messaged Dominic around 6:30 a.m., after she heard about M.G.'s allegations. In the messages, she told Dominic what M.G. was claiming he had done to her; that Mr. Garcia was calling the police; and that Dominic was not welcome at the home anymore.

2. Dominic was not home when Officer Kekejian arrived, having left for work around 5:00 a.m. Kekejian remained at the home with Mr. Garcia, M.G., and Ms. Rooney. Dominic came home shortly after 9:00 a.m. (9:09 according to Kekejian's report), entering the house without knocking. Kekejian told Dominic to exit the house. Officer Ciszek arrived to assist Kekejian. Kekejian questioned Dominic outside the house about where he had been that morning, and about whether he had entered M.G.'s room that night. Dominic said he had been at work and denied entering M.G.'s room. Kekejian contacted Detective Hallam to inform him that Dominic had arrived at the house. Kekejian did not inform Dominic that he was free to leave the area, instead standing by with Dominic until detectives arrived.

3. Detective Hallam and Detective McIver arrived at 10:00 a.m.—fifty minutes after Kekejian required Dominic to exit the house—and met Kekejian and Dominic on the front porch of the house, where Kekejian had apparently waited with Dominic for the detectives' arrival. Hallam asked Dominic to speak with him and McIver inside their unmarked police cruiser, parked across the street from the home. Hallam apparently made this request "due to the cold and windy weather conditions as well as for privacy reasons." Dominic agreed, and the three entered the police cruiser around 10:05 a.m.

4. Detective Hallam sat in the driver's seat, Dominic sat in the front passenger seat, and Detective McIver sat in the backseat. Hallam started recording their conversation. Hallam

asked Dominic if he knew he was being recorded, and if he was giving this statement voluntarily. Dominic answered yes to both questions. Hallam then informed Dominic that the doors were unlocked and that he was free to leave at any time. Dominic said he understood. Hallam proceeded to question Dominic about what had happened that night. The questioning lasted over an hour, and can fairly be characterized as adversarial in nature. The detectives repeatedly challenged Dominic's account at each step, gradually producing a confession out of what began as a flat denial. The detectives told Dominic over and over again that they did not believe him, and that he needed to admit what he'd done so they could all "move on" and so M.G. wouldn't feel "crazy." Dominic initially denied the allegations, but over the course of the questioning made admissions to intentionally entering M.G.'s bedroom, while high on Xanax, and touching the outside of her genitals for about ten seconds.

5. The detectives dropped Dominic off at Lock Street Market that morning. They obtained an arrest warrant that afternoon. Dominic was arrested around 8:00 p.m. that night. Detective Hallam, along with Detective Murray, questioned Dominic again at Nashua Police Department around 10:00 p.m. This interview was audio and video recorded. Hallam read Dominic his Miranda rights, and Dominic waived and agreed to speak to Hallam. Dominic made further admissions to penetrating M.G.'s vagina with his finger the previous night.

LEGAL ARGUMENTS

Statement #1 must be excluded because it was obtained in violation of Miranda.

6. The state and federal constitutions protect the right against compelled self-incrimination. N.H. Const. pt. I, art. 15; U.S. Const. amends. V & XIV. The Miranda warnings are a key guarantor of that right. Miranda v. Arizona, 384 U.S. 436 (1966). Miranda warnings are required whenever a person is subjected to custodial interrogation, in recognition that "the

very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Miranda, 384 U.S. at 455. Even in the absence of "overt physical coercion or patent psychological ploys," custodial interrogation tends to "subjugate the individual to the will of his examiner." Id. at 457. It is psychologically effective because through it, individuals are "thrust into an unfamiliar environment and run through menacing police interrogation procedures." Id.

7. There is no sure test for determining whether an individual is in custody for Miranda purposes. The New Hampshire Supreme Court has identified the factors that characterize custody:

> Custody entitling a defendant to Miranda protections requires formal arrest or restraint on freedom of movement to the degree associated with formal arrest. State v. Turmel, 150 N.H. 377, 382-83 (2003) (citation omitted). In the absence of formal arrest, we must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable person in the suspect's position would have understood the situation. Id. "The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station." State v. Johnson, 140 N.H. 573, 578 (1995) (quotations and citations omitted). To determine whether a reasonable person in the defendant's position would believe himself in custody, the trial court should consider, "the totality of the circumstances of the encounter, including 'the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character.'" State v. Grey, 148 N.H. 666, 670 (2002) (quoting State v. Graca, 142 N.H. 670, 675 (1998)).

State v. Jennings, 155 N.H. 768, 772 (2007). The courts apply an objective standard to the custody analysis, asking "how a reasonable [person] in the suspect's position would have understood his situation." State v. Dedrick, 132 N.H. 218, 224 (1989).

8. Dominic was not formally under arrest at the time of his first round of questioning in the cruiser. Nonetheless, the questioning took place in an atmosphere of police domination. A reasonable person in Dominic's position would have understood herself to be in custody and not free to leave, despite any rote recitations by police that she could. Jennings, 155

N.H. at 775. First, consider the lead-up to the questioning in the cruiser. Dominic arrived home, entered his house, and was immediately told to exit. Officer Kekejian stood outside the house with Dominic and questioned him about the previous night. Officer Ciszek arrived at some point as backup. Kekejian then contacted Detective Hallam, and waited with Dominic for fifty minutes before Hallam arrived. Dominic was not allowed to enter his house during this period of waiting, in spite of it being "cold and windy" outside. By the time Hallam and McIver arrived fifty minutes later, the message was clear: Dominic's movements were restricted, and he would go where he was told.

9. Next, Detective Hallam asked Dominic to follow him inside his cruiser. This was another effective control tactic. Dominic had already been refused the familiar environment of his home, and was now being asked to enter the wholly unfamiliar and unwelcoming environment of a police cruiser. Though Dominic was seated in the front passenger seat, rather than the rear, he was flanked to one side by Detective Hallam, and to the rear by Detective McIver. And though he was told the doors were unlocked and that he was free to leave, these words did not alter the basic facts: that Dominic was inside a police cruiser, in close quarters with two detectives; that he had been made to stand outside his own home, in the cold, for fifty minutes awaiting their arrival; that at least two more police officers waited somewhere outside the cruiser; and that he knew by this point that he was being investigated for a sexual assault against his stepsister. Control had been established long before Dominic was told he was free to leave.

10. What followed was over an hour of adversarial interrogation inside the cruiser, which weighs towards a finding of custody. The detectives did not simply take Dominic's statement as it was. Instead, they repeatedly confronted Dominic over inconsistencies, told him they did not believe him, and implored him to come clean and admit what he'd done.

There was no pretense to neutrality—the detectives plainly told Dominic they believed his stepsister's account, and that they just needed to hear Dominic admit what he'd done so they could all "move on." None too subtly, the detectives conveyed the message that the questioning would continue until Dominic confessed to sexually assaulting M.G.—and continue it did, for over one hour. The "accusatory nature of the interview is undeniable," as in Jennings,155 N.H. at 775.

11. The circumstances point to police domination—in short, they point to custody. Dominic was not formally under arrest. But he was thrust into an unfamiliar environment, and a particularly unnerving one at that. This factor is even more poignant in view of the fact that a familiar environment—his own home—was just across the street, yet barred to him. He was flanked in a police cruiser by two detectives, with at least two more officers somewhere nearby to prevent him from entering his home. He was subjected to an hour of adversarial questioning. These factors all point to custody. The major factor weighing against a finding of custody is that Dominic was told he was free to leave and that his statement was voluntary. Taken in context, though, a reasonable person would not have perceived herself as free to simply exit the cruiser and go about her day. A reasonable person would have felt herself to be trapped until the detectives were satisfied.

12. State v. Jennings, 155 N.H. 768 (2007), is a particularly instructive case, and is worth quoting at length. In Jennings, the N.H. Supreme Court made a finding of custody where the defendant had been asked to accompany detectives to the police station from his home, and had then been questioned in an interview room for two hours, though he had been told he was free to leave.

There are times when actions speak louder than words. Ultimately, "police conduct should be judged in terms of what was done rather than what the officer may have called it at the time." *Turmel*, 150 N.H. at 387 (Brock, C.J., dissenting).

> (quotation omitted). Here, as noted above and as found by the trial court, many indicia of custody were present, and the accusatory nature of the interview is undeniable. By the time the police confronted the defendant in the closed-door interview room with both his daughter's accusations and their own certainty that the accusations were true, a reasonable person in the defendant's position would have found his freedom curtailed to the extent that *Miranda* warnings were required. Thus, we think it implausible "that the defendant could have risen from his seat and freely exited the interview room in the middle of an escalating period of interrogation and gone along on his merry way, especially when the detectives had developed a theory which directly implicated him, and it was their intention to question him further at that point about his involvement." *State v. Dedrick*, 132 N.H. 218, 223, 564 A.2d 423 (1989) (quotation omitted), *cert. denied*, 494 U.S. 1007, 110 S. Ct. 1305, 108 L. Ed. 2d 481 (1990).
>
> In light of our discussion of the totality of the circumstances, we agree with the trial court that even if Sergeant Jackson informed the defendant that it was "voluntary" as to whether he went to the police station and once inside the interview room told the defendant he could leave at any time, "it would be naive of the court to suggest that a reasonable person in the position of the defendant would have believed that he could have simply declined to accompany the detectives to the police station, and once there to have believed he would be allowed to get up and leave."

Jennings, 155 N.H. at 775-76. Here, as in Jennings, actions spoke louder than words. And what the officers' and detectives' actions told Dominic that morning was that refusal to cooperate and answer their questions the way they wanted, was not an option.

13. Dominic, while inside the cruiser, "found his freedom curtailed to the extent that Miranda warnings were required." Id. at 775. There is also no doubt he was subject to interrogation, as that is exactly what occurred inside the police car. In addition, by the time the detectives questioned Dominic, they had "developed a theory which directly implicated him" and knew that the interrogation was likely to lead to an incriminating response, especially as they did not take his denials at face value, but continued to question him. Jennings,155 N.H. at 755; see also Dedrick, 132 N.H. 225 (noting that a non-custodial situation can turn custodial when suspect is "accused of untruths and confronted with damning information);

Rhode Island v. Innis, 446 U.S. 291 (1980). Miranda warnings were required. Because he was never given these warnings, his statements inside the cruiser must be suppressed.

Statement #1 must be excluded because it was involuntary.

14. The State has the burden of proving beyond a reasonable doubt that a defendant's statement was voluntary. State v. Rezk, 150 N.H. 483, 486 (2004). "No single definition of voluntariness exists that can be mechanically applied. The focus of the inquiry is whether the actions of an individual are the product of an essentially free and unconstrained choice. The decision to confess must be freely self-determined. A confession cannot be the product of a will overborne by police tactics, or of a mind incapable of conscious choice." State v. Bilodeau, 159 N.H. 759, 762 (2010) (quotations omitted). The Due Process Clause requires that a determination of voluntariness be made in view of the totality of circumstances. Rezk, 150 N.H. at 487. Courts are to analyze "both the characteristics of the accused and the details of the interrogation." Id.

15. The Miranda discussion, *supra*, incorporates the essential reasons why Dominic's statement inside the cruiser was involuntary. The interview took place in an atmosphere of police domination: Dominic's movements were restricted; he was made to wait outside his own home for nearly an hour in the cold (after being denied even the chance to get a jacket); he was not given access to friends or family; the interview took place inside a police cruiser; at one point during the interview Dominic expressed a need to use the bathroom that went unremarked upon by the detectives. The interview itself was adversarial and coercive. The detectives started from the assumption that Dominic was guilty, and badgered him for an hour until he made full admissions. They repeatedly told Dominic he needed to admit what he'd done so they could figure out how to move on, and so M.G. wouldn't feel like she was crazy. Over an hour of confrontation, they broke down Dominic's will to resist them.

The custodial setting of the interview heightened the effects of the detectives' interrogation tactics. Though never spoken aloud, the message that was conveyed to Dominic that morning was that he would not be free until he confessed. In addition, at the time of the interview, Dominic was only 22, with an 11th grade education, with at most 2 prior arrests. He was not a sophisticated or experienced individual interacting with police. Thus, both the characteristics of Dominic and the details of the interview lead to a finding that his statement was not the product of a free will, and is therefore involuntary.

Statement #2 must be excluded because Statement #1 was involuntary.

16. Because Dominic's first statement was involuntary, his second statement must be excluded. "When there was more than one confession, a finding that the first confession was involuntary could render all subsequent confessions inadmissible because after an accused has once let the cat out of the bag by confessing,...he is never thereafter free of the psychological and practical disadvantaged of having confessed. He can never get the cat back in the bag." State v. Fleetwood, 149 N.H. 396, 403 (2003).

Statement #2 must be excluded because it is the product of an invalid Miranda waiver.

17. The State has the burden of proving beyond a reasonable doubt that a Miranda waiver is knowing, intelligent, and voluntary. State v. Lewis, 129 N.H. 787, 791 (1987). A valid waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Id. The N.H. Supreme Court has never addressed the validity of a subsequent Miranda waiver after a first confession obtained in violation of Miranda. See Fleetwood, 149 N.H. at 406.

18. However, the U.S. Supreme Court addressed this question in Missouri v. Seibert, 542 U.S. 600 (2004). In that case, the U.S. Supreme Court held the "question-first" technique—that is, the practice of securing an un-Mirandized confession and only then administering

Miranda warnings to inoculate the second confession from constitutional attack—unconstitutional on the ground that it renders the Miranda warnings ineffective. Seibert, 542 U.S. 611-12 ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires."). As the Court observed,

> After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.

Id. at 613.

19. Seibert requires courts to consider a "series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." Id. at 615.

20. Applying these factors to this case, Dominic's waiver was invalid because the warnings he received could not have served their purpose. The second statement was obtained later the same day as his first un-Mirandized confession, which had occurred in an atmosphere of police domination and intimidation. It was to that extent an empty formality. Detective Hallam, the same detective who had questioned him for an hour in his cruiser that morning, re-approached Dominic for another statement that night. Dominic had already made a

complete confession to him in violation of his Miranda rights. The Miranda waiver was meaningless, because the damage had already been done. This tactic—securing an un-Mirandized confession and only then administering Miranda warnings—is little more than an end-run around Miranda.

21. A portion of the second interview speaks to this point, and is worth quoting at length. Right after Dominic signed the Miranda waiver, Detective Hallam said this:

> So obviously I wanted to bring you up, man, I wanted to talk to you again. I know we went over this already and, and we talked about it in the car out at the, the scene. Just a couple inconsistencies, man, we want to make sure we paint the clearest picture possible and, and get exactly what happened there. Right now would you just be able to give me, you know, the 100 percent truth, man. I know, I know you said you gave me the truth the first time, 100 percent. But I feel like there's a little bit of inconsistencies. Could you agree that there's a little bit that you kind of left out when you, when you were speaking with me the first time, where you kind of led me in the wrong direction a little bit like as far as the reasons you were in the room and stuff to that extent? If you could start from the beginning, man, and give me the 100 percent straight truth, we're here today, man, and—and let's just get it handled right now, dude. Can, can we be honest and just get it handled? It is what it is. You've been arrested. Let's, let's get past this, man, and—and move on from it, 100 percent honest right now, man.

It is clear from Detective Hallam's words that this second interview, and this waiver, took place deep in the shadow of the first interview. It was nothing more than a continuation of the first interview. Dominic's waiver was invalid because, in practice, he had no rights left to waive. They had already been stripped by the first interview, in which he had waived his right against self-incrimination in response to an un-Mirandized custodial interrogation. The subsequent Miranda waiver was an exercise in form rather than function. Such a waiver cannot be effective, and therefore cannot be constitutionally meaningful.

CONCLUSION

Both of Dominic's statements must be excluded from trial. The first, because it was obtained in violation of Miranda, and because it was involuntary. The second, because it was the product of a first involuntary confession, and because it was the product of an invalid Miranda waiver. N.H. Const. pt. I art. 15; U.S. Const. amends. V & XIV.

Respectfully submitted,

Daniel A. Donadio #268485
Eleftheria S. Keans #18328
N.H. Public Defender
44 Franklin Street
Nashua, NH 03064

April 25, 2018

I certify that a copy of this motion has been forwarded to ACA Lisa Drescher.

Daniel A. Donadio

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2017-CR-00833

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

DOMINIC CARRIER

STATE'S OBJECTION TO MOTION TO SUPPRESS

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Motion to Suppress, stating in support as follows:

FACTS

1. The defendant, Dominic Carrier, is charged with Aggravated Felonious Sexual Assault.

2. On November 20, 2017, Nashua Police responded to a report of a sexual assault. Upon arrival at the home, it was reported by J.G. that his 13 year old daughter, M.G. disclosed being sexually assaulted during the night by the defendant. The defendant is the son of J.G.'s fiancée.

3. From J.G., the police learned that when J.G. awoke this morning his daughter indicated that she needed to tell him something. She told him that the defendant had touched her genital area. She indicated that at approximately 3:00 a.m. she awoke to the defendant in her bedroom touching her.

4. At the time the police spoke with J.G., the defendant was not present, as he generally leaves for work around 5:00 a.m. The bedroom was secured as a crime scene and the police remained on scene.

5. Just after 9:00 a.m. the defendant returned to the residence. Officer Kekejian told the defendant to exit the residence and spoke with him outside. He indicated that he had slept at the residence the night before, as he had been staying there on and off for the past two months. The defendant reported that he had awoken at 3:00 a.m. and got ready for work. He claimed that at no time during the evening did he enter M.G.'s room. After speaking with the defendant, Officer Kekejian contacted Detective Hallam who responded to the scene.

6. Detective Hallam and Detective McIver made contact with the defendant. Due to the cold and windy weather, as well as for privacy, Detective Hallam asked the defendant if he was willing to speak with the detectives in the unmarked Chevrolet Impala which was parked across the street. The defendant agreed. He also agreed to being audio recorded. The defendant also understood that he was providing the statement voluntarily. The doors to the vehicle were unlocked during the interview.

7. The defendant stated that he had been living at the address for about two months. He had moved in during September, but then moved out to live with a friend. Two weeks into the arrangement, the friend's landlord found out he was staying there and he returned to his mother's address the day prior to this incident.

8. The defendant initially denied that anything inappropriate happened with M.G. He reported he went to bed at approximately 10:30 p.m. on November 19, 2017 and awoke between 3:00 or 3:30 a.m. on November 20, 2017. He left for work between 4:15 a.m. and 4:20 a.m.

9. During the conversation, the defendant first indicated that he did not wake during the night but then confirmed that he did in fact get a drink from the refrigerator in the kitchen. It was established that M.G.'s bedroom was off the kitchen. After getting a drink, he claimed to

have returned to his basement bedroom. Prior to falling back asleep he was on Facebook and listening to music.

10. The defendant then recalled that he did in fact enter M.G.'s room briefly because he didn't know where his brother, who also stays at the residence, was. He said he opened M.G.'s bedroom door, saw her, and then proceeded back to the living room where he saw both J.G. and his brother asleep.

11. When Detective Hallam indicated that he believed the defendant went further into M.G.'s room, the defendant admitted to entering about two steps, realized it was her based on the furniture and walked out, closing the door. He estimated the length of time in the room to be about ten seconds. He admitted to being within an arm's length but denied touching or moving her. The defendant also stated M.G. did not wake.

12. The defendant was further asked what he was doing in the room for ten seconds. He responded he "just walked in, arms-length, he wasn't there, looked in the closet to see if my glasses were still up there, they weren't there." After checking the closet, he left the room. He elaborated that when checking the closet, he stood on the end of her bed, near her feet and he may have touched her "foreleg", shin or foot. The detectives asked if it was possible he touched higher up on her leg and he stated he didn't know. When detectives told the defendant that M.G. indicated that she was touched closer to her genital area, he responded "really?"

13. The defendant then claimed it was possible that he did touch M.G.'s vagina while stepping down from the bed. When asked by Detective Hallam if his hand was on M.G.'s vagina he said it was but claimed it was an accident. He said the touch over the clothing lasted about a second and he left the room. The defendant reported that the M.G. did not say anything but did move. Upon further discussion he admitted to rubbing her vagina.

14. The defendant claimed that "I didn't know like really if it was her." He further indicated he was high on Xanax. He would go on to admit that he made skin to skin contact with M.G.'s vagina which lasted for at least ten seconds. The defendant admitted his intention was to touch her vagina and then go to his bedroom to masturbate.

15. Later that day, at approximately 8:18 p.m. the defendant was arrested at a family member's home in Litchfield. At the police station he agreed to participate in an interview, which was audio and video recorded. The defendant was read his Miranda rights which he subsequently waived. During the interview, he claimed he was up all night and on Xanax. At approximately 3:00 a.m. he got ready for work and while waiting for his ride he went into M.G.'s bedroom. She had a blanket on her but it only covered her legs. During the course of the interview he indicated that he digitally penetrated her. He further stated that he was not under the effect of Xanax at the time although he had been up all night.

16. The defendant now moves to suppress the statements he made to the police claiming they were in violation of his Miranda rights and not voluntary. The State objects.

LEGAL ARGUMENT

Statement #1 was a non-custodial statement not requiring Miranda warnings

17. Before a defendant's statements made during a custodial interrogation may be used as evidence against him, the State must prove beyond a reasonable doubt that he was warned of his constitutional rights, that he waived those rights, and that any subsequent statements were made knowingly, voluntarily and intelligently." State v. Johnson, 140 N.H. 573, 577 (1995). However, where a person is not subject to a custodial interrogation, the defendant's right to Miranda warnings does not attach. State v. Carroll, 138 N.H. 687, 696 (1994).

18. Whether a defendant is in custody for purposes of Miranda is essentially a

question of fact, and the trial court's finding will be upheld unless contrary to the manifest weight of the evidence or the result of an error of law. State v. Cook, 148 N.H. 735, 740 (2002). A person is in custody if formally arrested or restrained to the degree associated with formal arrest. Id. If there has been no formal arrest, the trial court must determine the degree to which the suspect's freedom of movement was curtailed, and how a reasonable person in the suspect's position would have understood the situation. Johnson, 140 N.H. at 578. To determine whether a reasonable person in the defendant's position would think he or she was in custody under this standard, the trial court reviews the totality of the circumstances of the encounter, including "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." State v. Graca, 142 N.H. 670, 675 (1998); State v. Carpentier, 132 N.H. 123, 126 (1989).

19. "[A] defendant is not 'in custody' for Miranda purposes merely because his freedom of movement has been curtailed so that he has been 'seized' in a fourth amendment sense." Johnson, 140 N.H. at 578 (1995) (citing Berkemer v. McCarty, 468 U.S. 420, 439, 441-42 (1984)). The locus of police questioning is not determinative of custody. Compare Cook, 148 N.H. at 740. (defendant not in custody when he spoke with officers in a private area at the defendant's place of employment) and State v. Pehowic, 147 N.H. 52, 55 (2001) (defendant not in custody for Miranda purposes even though he was incarcerated) with State v. Mitchell, 113 N.H. 542, 543 (1973) (defendant in custody in police cruiser when he was handcuffed, told he was under arrest and transported to the police department) and Kaupp v. Texas, 538 U.S. 626, 632-633 (2003) (defendant was in custody in his bedroom when he was awakened at 3:00 a.m., told by police that "we need to go and talk", taken to a police cruiser in handcuffs, in underwear, without shoes, to a crime scene and then the police station). In addition, a defendant's status as a

suspect does not convert an interview into a custodial interrogation. State v. Portigue, 125 N.H. 352, 362 (1984). Therefore, Miranda warnings are not required simply because the questioned person is one whom the police suspect. Id. Finally, a non-custodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that even in the absence of any formal arrest or restraint on freedom of movement the questioning took place in a "coercive environment," because any interview of one suspected of a crime by a police officer will have coercive aspects to it. Id. For instance, Miranda requirements are not imposed simply because the questioning takes place in the station house. Id.

20. In support, the Court in Johnson stated that the location of questioning is not, by itself, determinative: a defendant may be "in custody" in his own home, see Orozco v. Texas, 394 U.S. 324, 327 (1969), but not "in custody" at a police station. 140 N.H. at 577; citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977). A defendant is not "in custody" for Miranda purposes merely because his freedom of movement has been curtailed so that he has been "seized" in a fourth amendment sense. McCarty, 468 U.S. at 439. The trial court should review all circumstances of the encounter, considering in particular "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." Carpentier, 132 N.H. at 127.

21. Again, the procedural safeguards established by the United States Supreme Court in Miranda v. Arizona apply only to *custodial interrogation.* 384 U.S. 436, 478 (1966). (emphasis added). "[W]here a person is not subject to a custodial interrogation, the obligation on the part of the police to issue Miranda rights does not attach." State v. Carroll, 138 N.H. 687, 696 (1994); Graca, 142 N.H. at 675; State v. Gravel, 135 N.H. 172, 176 (1991).

22. For instance, in Carroll, the defendant appealed convictions of Second Degree

Murder and Conspiracy to Commit Murder. 138 N.H at 689. In support of his appeal, the defendant argued that his statements were not made voluntarily and were made after he invoked his right to remain silent after being read his Miranda warnings. Id. The Court affirmed the judgment of the lower court, stating that the defendant's confession was voluntary and his that right to remain silent was not violated as he was not in custody at the time of the police interrogation. Specifically, the Court stated that, "while Miranda and Laurie collectively require that persons subject to a custodial interrogation be advised of their right to remain silent, and that the police scrupulously honor an invocation of that right, where a person is not subject to a custodial interrogation, the obligation on the part of the police to issue Miranda warnings and to respect the invocation of Miranda rights does not attach. Id. at 696 (citing State v. Gravel, 135 N.H. 172, 176 (1991); see also State v. Lewis, 129 N.H. 787, 796-97 (1987) (Miranda imposed no obligation on police where defendant, who was not in custody, requested a lawyer); Portigue, 125 N.H. at 345 (police need not honor defendant's assertion of right to silence or counsel where defendant was not in custody).

23. While the interview took place in a police cruiser, the cruiser doors were unlocked and the defendant entered the car voluntarily. The police confirmed to the defendant at the beginning of the interview that the doors were unlocked. The cruiser was in the defendant's neighborhood, an area he was completely familiar with. The cruiser was stationary and defendant would not have been in any physical danger if he chose to exit, unlike if the vehicle was moving. The defendant was not physically restrained in any manner. The police did not place him in handcuffs, place their hands on him or restrain him in any manner. The tone of the interview was largely cordial. In fact, at one point, when one officer suggested more there was more to the story than the defendant was telling, the second officer interjects and asks if there are

any problems between the residents which would cause someone to lie. The officers tell the defendant what he is saying makes sense and they are simply looking for clarification and understanding. There is one brief moment which the defendant is more forcefully confronted but quickly dissipates. The interview remains so cordial that at the end of the interview the defendant even compliments Det. Hallam's clothing. Because he was not in custody, Miranda warnings were not necessary.

Statement #1 was voluntary

24. "In determining whether a confession is voluntary, the court looks at whether the actions of an individual are the product of an essentially free and unconstrained choice or are the product of a will overborne by police tactics." State v. Rezk, 150 N.H. 483, 487 (2004) (citing State v. Hammond, 144 N.H. at 405.) The court will utilize the totality-of-the-circumstance test to determine the voluntariness of the defendant's confession. State v. Aubochont, 141 N.H. 206, 209 (1996); State v. McDermott, 131 N.H. 495, 500 (1989). When statements, free from coercion, are made to the police, which occur before the defendant has been properly Mirandized, the fact finder "must examine the surrounding circumstances and the entire course of the police conduct with respect to the suspect in evaluating the voluntariness of his statements. Oregon v. Elstad, 470 U.S. 298, 318 (1985).

25. Applying the "totality of the circumstances" test to this case, it is clear that the defendant's statement to the police was voluntary. Nothing suggests that his will was overborne by police tactics. The interview was not unusually long nor aggressive. The defendant was a 22 year old employed adult. His presentation was that of an individual of normal intelligence. He did not present as a person who emotional makeup prevented him from making conscious choices or was particularly susceptible to suggestion.

Statement #2 was voluntary

26. The defendant moves to exclude his second statement, made post-arrest on the grounds that State v. Fleetwood 149 N.H. 396 (2003) prohibits its use as not being voluntary. The defendant's reading of Fleetwood is overly broad. Fleetwood involves multiple interviews occurring at the police station in the same evening. While breaks were taken, the breaks were relatively brief and it appears the defendant remained at the police station. The Court in Fleetwood indicated a "totality of the circumstances" test once again would be the proper method of determining the voluntariness of subsequent statements. Id. at 406.

27. In this case, over 10 hours passed between the two interviews. During the intervening hours, the defendant spent time at a family member's home in Litchfield and did not have contact with the police until his arrest. The defendant was advised of his Miranda rights and once again took part in an interview which was cordial and not particularly lengthy. Under the totality of the circumstances, the defendant's statement was voluntary.

Statement #2 was a properly Mirandized statement

28. The defendant relies on Missouri v. Seibert, 542 U.S. 600 (2004) to argue the defendant's post arrest statement must be excluded because of an invalid Miranda waiver. Specifically, the defendant argues that because he did not receive Miranda warnings earlier in the day, his post arrest statement, even with Miranda warnings is invalid.

29. The defendant's reliance on Seibert is misplaced. In Seibert the U.S. Supreme Court struck down a post-arrest, pre-Miranda statement made during a police interrogation. Once admissions had been made, a brief break was taken, the arrestee was Mirandized and questioned about the earlier statement. Seibert is factually distinct from the case before this Court. First, the defendant was not in custody during his first statement, thus Miranda warnings

do not apply. Second, after making the statement in the police cruiser the defendant was in the community for several hours before being arrested, being properly Mirandized, and making the second statement. Thus the Miranda waiver was in fact valid.

CONCLUSION

30. The defendant's initial statement to the police was non-custodial and thus did not require Miranda warnings. The atmosphere was non-coercive and there was nothing about the behavior of the police, the defendant or the interview generally which would have caused the defendant's will to be overborne by the police. For the second, custodial interview, the police obtained a valid Miranda waiver and the defendant once again provided a voluntary statement. Thus neither statement should be suppressed.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the Defendant's Motion to Suppress;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: May 7 2018

Respectfully Submitted,

Lisa A. Drescher #14189
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Eleftheria S. Keans, Esq., counsel for the defendant.

Lisa A. Drescher

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
DOCKET NO. 226-2017-CR-00833 SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

DOMINIC CARRIER

STATE'S MOTION FOR RECONSIDERATION OF JULY 19, 2018 ORDER

The State of New Hampshire, pursuant to New Hampshire Rule of Criminal Procedure 43, asks this Court to reconsider and reverse the order issued on July 19, 2018 suppressing two sets of statements the defendant, Dominic Carrier, gave to law enforcement. In support of this motion the State submits the following:

Background

1. The defendant currently faces a charge of Aggravated Felonious Sexual Assault stemming from allegations made by a thirteen-year-old girl, M.G., who reported to her father that the defendant had sexually assaulted her in the early morning of November 20, 2017. Police interviewed the defendant when he returned to the victim's residence, where he was also living, on the morning of November 20, 2017. During that interview, the defendant made incriminating statements. After the victim had undergone a forensic interview, police arrested the defendant, and he agreed to a further interview. During that interview, police Mirandized the defendant; he then waived his rights under *Miranda*, spoke with police, and made further incriminating statements.

Argument

I. This Court overlooked or misapprehended points of law or fact regarding the defendant's first statement to the police affecting the application of the totality of the circumstances test.

2. In its analysis the Court considered the actions of Ofc. Kekejian as part of the totality of the circumstances in suppressing the statement in the Impala. However, Ofc. Kekejian's interactions with the defendant were distinct from Det. Hallam's interview. Notably, the contact with Ofc. Kekejian had essentially concluded when Det. Hallam chose to respond to the address. In fact, Ofc. Kekejian testified the defendant had been told he could leave and was preparing to leave when Det. Hallam asked if he would be willing to remain and answer questions. Until that point, the contact with Ofc. Kekejian had been relatively brief. Portions of the contact had a direct relationship to the investigation, but a portion of the time was also spent attempting to find a place for the defendant as he could not return to his home. While waiting for Det. Hallam, the conversation between Ofcs. Kekejian and Cizek and the defendant was light. The defendant was freely moving about the porch area. The Court noted that the defendant "had" to stand in the outside in the cold for approximately one hour. The evidence however shows that the defendant was not required to do so, but rather chose to remain on site.

3. Should the Court not reconsider its finding that Ofc. Kekejian's interactions played a role in its determination, the State requests the Court reconsider weight afforded to those interactions. Specifically, the Court concluded that the defendant's contact with the defendant was approximately one hour. However, very little of that time actually related to the investigation. The vast majority of the contact related to assisting the defendant regarding where he would be staying and "small talk" regarding cars and his employment. As "the relevant inquiry is the effect on the suspect", there is nothing in the record which would indicate that the defendant was suspicious of the officers' motives in speaking with him on the porch while awaiting Det. Hallam, that he believed he was being guarded, or that he could no longer leave despite having been told he could. State. v. McKenna, 166 N.H. 671, 679 (2014).

4. The Court was also critical of Ofc. Kekejian's decision to secure the defendant's phone noting that the information sought could have also been located on the mother's phone. However, as Ofc. Kekejian noted the investigation was in its very early stages. The text messages on the defendant's phone, regardless of their availability from another source, were still evidence. By seizing the phone, the officer preserved the evidence. Not knowing the dynamics of the situation, preservation of the evidence was still necessary. For instance, the mother indicated that text messages were sent to the defendant. Questions would remain however as to whether he actually received the messages, did she send them to the correct person etc. While the Court indicated that its analysis was not affected by the officer's evidentiary concerns, it appears that it did influence the Court's determination of his credibility.

5. Additionally, the Court noted that the seizure of the phone hindered the defendant in finding other accommodations. However, using the McKenna standard regarding the "effect on the suspect" Ofc. Kekejian, exhibited an active interest in assisting the defendant to find appropriate accommodations. The defendant had no reason, based on his interactions with Ofc. Kekejian, to believe that he would be left stranded by the Nashua Police Department.

6. The Court also noted, in respect to Ofc. Kekejian's interactions with the defendant that the defendant had to use the bathroom while dealing with Ofc. Kekejian. There is no evidence the defendant ever indicated his need to use the bathroom to Ofc. Kekejian, that he was denied the opportunity to do so by Ofc. Kekejian or even when his urge to use the bathroom manifested itself, until he notes such to Det. Hallam.

7. The State also requests that this Court reconsider its order as it relates to Det. Hallam's interactions with the defendant. The Court stated that Det. Hallam did not emphasize that the car doors were unlocked. However as the testimony and transcript indicate, Det. Hallam

not only told the defendant that the car doors were not locked but he also demonstrated such.

8. Significantly, the discussion regarding the car doors occurs during the time Det. Hallam is confirming the defendant's voluntary participation in the interview. Det. Hallam, in a conversational tone, confirms the defendant is giving a voluntary statement, that he doesn't feel forced to talk to the police, that the car doors are unlocked, tells the defendant if he wants to leave at any point he should feel free to do so and follows by reminding the defendant his participation is voluntary. Under the circumstances, a reasonable person in the defendant's position would believe that he was in fact free to leave and was not in custody. State v. Jennings, 115 N.H. 768, 772 (2007). Further, a reasonable person would understand, in light of Det. Hallam's statements, that stepping out of the car would not necessarily mean that the interview would continue outdoors. It is clear from the context that Det. Hallam conveyed to the defendant that the defendant could terminate the interview at any time.

II. This Court misapplied the factors outlined in *State v. Fleetwood*, 149 N.H. 396 (2003), by creating additional factors that ran contrary to the admonitions in *Fleetwood* and making that factor of paramount importance; this error comprises both an error of law and an unsustainable exercise of this Court's discretion.

9. In its order on the defendant's motion to suppress, this Court purported to apply a totality of the circumstances analysis, as embodied in the five factor test adopted by the New Hampshire Supreme Court in *State v. Fleetwood*, 149 N.H. 396 (2003), however, its order looked beyond those five factors and ignored the limitations expressed in *Fleetwood*. Specifically, the Court concluded that "many of the more traditional voluntariness factors weigh in favor of a voluntariness finding." Yet, it went on to carve out brand new considerations, such as use of the unwarned incriminating statements in a subsequent interview, and raised those considerations to level of paramount importance in conducting its analysis. In creating these new considerations, the Court ignored the fact that both the New Hampshire Supreme Court and the United States

Supreme Court do not demand clairvoyance on the part of law enforcement with respect to knowing whether a court may suppress one set of statements months after an investigation ends. Yet, the Court demanded such clairvoyance on the part of the officers involved in this case. In doing so, this Court has misunderstood and misapplied the appropriate legal standards and must reconsider its earlier order suppressing the second set of statements.

10. In *Oregon v. Elstad*, 470 U.S. 298, 304 (1985), the United States Supreme Court confronted a situation much like the one presented in this case, a suspect made unwarned and incriminating statements during what was later determined to be a custodial interrogation. *Elstad*, 470 U.S. at 302. It concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314. "A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.*

11. The Court also expressed concern that too strict a rule would demand clairvoyance on the part of law enforcement by demanding they know whether a trial court would suppress any or all unwarned statements. *Id.* at 316. The Court observed that "the task of defining 'custody' is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Id.* at 309. "Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held admissible." *Id.*

at 316. Thus, "[i]n many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained." *Id.*

12. The Court's decision in *Elstad* led to criticism that it opened the door to situations where law enforcement extracts a confession and then issues *Miranda* warnings before extracting a second confession. *See, e.g., State v. Fleetwood*, 149 N.H. 396, 404 (2003) ("The facts of this case bring into sharp focus the concern that *Elstad* may give a green light to law enforcement officers to ignore the requirements of Miranda until after such time as they are able to secure a confession." (Quotation omitted.)). The Court resolved these concerns in *Missouri v. Seibert*, 542 U.S. 600 (2004), when it confronted a situation regarding a law enforcement practice of extracting a confession then using *Miranda* warnings to cure any concerns of voluntariness before extracting the confession a second time. *Seibert*, 542 U.S. at 604.

13. New Hampshire forged a different approach for addressing situations where suspects make unwarned, incriminating statements and then later make further incriminating statements after receiving *Miranda* warnings. In *State v. Aubuchont*, 141 N.H. 206 (1996), the New Hampshire Supreme Court declined to apply *Elstad* outright under the state constitution. *Aubuchont*, 141 N.H at 209.[1] It also rejected the defendant's argument that it should interpret

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[1] Worth noting is that the New Hampshire Supreme Court's reluctance to adopt the standard established in *Elstad* stemmed from concerns that law enforcement may abuse the more permissive rule announced in *Elstad*. *See Fleetwood*, 149 N.H. at 404-06 (expressing concern that *Elstad* can allow law enforcement to perform "an end run around *Miranda*"). The United States Supreme Court resolved these concerns in *Seibert* by modifying *Elstad*'s analysis to account for law enforcement efforts to circumvent *Miranda*. *See Seibert*, 542 U.S. at 622. This raises the question of whether New Hampshire's greater protection remains necessary.

Generally, the New Hampshire Supreme Court will overrule a prior decision only after considering the following factors:

> (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and

Part I, Article 15 as creating a rebuttable presumption that a second confession is tainted by an earlier unwarned confession. *Id.* Instead, the Court applied its traditional voluntariness analysis to subsequent, post-*Miranda* statements. *Id.* This inquiry "ask[s] whether considering the totality of the circumstances, the second confession is the product of an essentially free and unconstrained choice." *Id.*

14. In *Fleetwood*, the Court adopted five factors for trial courts to consider when determining whether post-*Miranda* statements are voluntary. *Fleetwood*, 149 N.H. at 406. Those factors are:

> (1) the time lapse between the initial confession and the subsequent statements; (2) the defendant's contacts, if any, with friends or family members during that period of time; (3) the degree of police influence exerted over the defendant; (4) whether the defendant was advised that his prior admission could not be used against him; and (5) whether the defendant was advised that his prior admission could be used against him.

State v. Ruiz, 170 N.H. 553, 560 (2018) (citing *Fleetwood*, 149 N.H. at 405-06). "No single factor is dispositive." *Id.* (citing *Fleetwood*, 149 N.H. at 406).

15. The Court drew these factors from *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985), a decision issued soon after the United States Supreme Court decided *Elstad*. *Fleetwood*, 149 N.H. at 406. The Court immediately limited the application and reliance upon *Wauneka*, however, by explaining that "[i]t is impractical to require the police to determine the

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> (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

State v. Cora, 170 N.H. 186, 192 (2017). "No single factor is dispositive, and the factors are not meant to be rigidly applied or blindly followed." *Id.*

The internal contradictions in the *Fleetwood* factors, such as requiring warnings but not expecting law enforcement to predict whether a set of statements could be suppressed, create a system that defies practical workability because the system makes it difficult if not impossible for law enforcement to know when they are acting in harmony or in dissonance with the law. Moreover, the evolution of the Supreme Court's precedent to account for the concerns raised by the New Hampshire Supreme Court in *Fleetwood* raises questions of whether *Fleetwood* and other cases like it continue to retain their vitality or have become remnants of abandoned doctrine. With these considerations in mind, the Court may consider overruling or modifying *Fleetwood* to clarify the analysis under Part I, Article 15.

admissibility of an unwarned confession. This would require them to make legal determinations regarding whether there had been interrogation and custody." *Id.* at 406-07 (citations omitted). In support of this, the Court turned to *Elstad*. *Id.* Nowhere does the Court discuss or consider "the manner in which the officers utilized this prior confession in obtaining a second confession," *Wauneka*, 770 F.2d at 1440, or which officers remain questioned a suspect.

16. In *Fleetwood* and its progeny, the Court indicated that the lapse of time "is important and sometimes critical evidence in the totality of the circumstances test." *Fleetwood*, 149 N.H. at 407; *see also Ruiz*, 170 N.H. at 560-61 (finding that a minimal lapse in time is not fatal under the *Fleetwood* factors because "there [was] no evidence of 'a police decision to delay giving the required warnings'"). It has also emphasized the lack of delay between the arrest and giving of *Miranda* warnings and the lack of "promises, threats, or displays of force" as significant factors for consideration. *Ruiz*, 170 N.H. at 560-61.

17. The Court has consistently minimized the significance of factors that require law enforcement to determine whether the prior statements would be subject to suppression. *Ruiz*, 170 N.H. at 561 ("[This Court] also do[es] not consider dispositive the fact that the police failed to advise the defendant that his unwarned confession could not be used against him in court."); *Fleetwood*, 149 N.H. at 406 ("[This Court] do[es] not share the defendant's concern that the trial court did not consider the police officers' failure to advise the defendant that her first unwarned statement would not be admissible against her."). Moreover, the Court has consistently concluded that post-*Miranda* statements have been voluntary even where multiple factors—including significant factors—militate against voluntariness. *See Ruiz*, 170 N.H. at 560-61 (affirming despite the fact that a minimal lapse of time occurred and the defendant did not receive warnings about the use of her prior statements); *Fleetwood*, 149 N.H. at 406-07 (same).

18. Here, this Court's order acknowledged that a significant lapse of time occurred between the two sets of statements, that the defendant had access to family and others during that time, that the defendant had been immediately advised of his *Miranda* rights at the start of the second interview, that the defendant understood and waived his rights, that the police never promised, threatened, displayed force, or used other coercive tactics to induce the defendant to confess, and that the "the second interaction between the detectives and the defendant was 'polite and relaxed.'"[2] Order at 23-24. These are the most significant factors as articulated by the New Hampshire Supreme Court and other courts that have considered these issues. *See Fleetwood*, 149 N.H. at 407.

19. This Court's order further acknowledged that the fact that police did not warn the defendant that his prior statements could not be used against him is of minimal importance because the New Hampshire Supreme Court has recognized that law enforcement cannot be expected to determine the admissibility of an unwarned confession. Order at 24 n.13.

20. Yet, in the very next sentence, and throughout the remainder of the order, this Court went on to conclude that use of the prior statement—a statement for which it would be "impractical to require the police to determine the admissibility," *Fleetwood*, 149 N.H. at 406—during the second interview so overwhelmed the defendant as to make his second set of incriminating statements involuntary. Order at 24-26. This conclusion demanded the exact clairvoyance that both the New Hampshire Supreme Court and the United States Supreme Court declined to demand of law enforcement. It relied upon factors that the New Hampshire Supreme Court has never adopted or endorsed. Thus, to the extent that it is an appropriate consideration,

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[2] It is also worth noting that the defendant agreed to speak with police before any discussion of his prior, unwarned statements had begun.

it is of equally minimal importance as those factors actually identified by the New Hampshire Supreme Court.

21. Moreover, to the extent that the same officer was involved in both interrogations is a worthwhile consideration, it is of minimal importance because in both *Fleetwood* and *Ruiz* the Court confronted situations where the same police officers had been involved and never even commented on that as a consideration. *See Ruiz*, 170 N.H. at 556-57, 562 (describing that the same officer questioned the defendant throughout); *Fleetwood*, 149 N.H. at 399-401, 407 (describing how the same investigators questioned the defendant throughout).

22. At least one additional factor supports a finding that the defendant's statement was voluntary. For example, the unwarned statements were made in response to impromptu questioning rather than at the close of a well-prepared interrogation. *See, e.g., United States v. Williams*, 681 F.3d 35, 42 (2d Cir. 2012) (recognizing that where police are questioning a suspect unexpectedly, a weaker presumption of deliberateness arises when compared to circumstances where police have thoroughly investigated a matter and prepared a line of questioning with which to attack the suspect).

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Grant this Motion to Reconsider; and
(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

Date: July 30, 2018

Lisa A. Drescher

I hereby certify that a copy of the within Motion has been sent this date to Eleftharia Keans, Esquire and Daniel Donadio, Esquire, counsel for the defendant.

Lisa A. Drescher

LISA LADIAMA

THE STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT--SOUTH

AUG 20 2018

Hillsborough, ss. August Term, 2018

STATE OF NEW HAMPSHIRE

v.

DOMINIC CARRIER 17-CR-833

OBJECTION TO STATE'S MOTION FOR RECONSIDERATION OF JULY 19, 2018 ORDER

The defendant, Dominic Carrier, by and through counsel, Daniel A. Donadio and Eleftheria Keans, objects to the State's motion to reconsider the Court's order of July 19, 2018, suppressing the defendant's statements. His reasons follow:

1. Mr. Carrier is charged with Aggravated Felonious Sexual Assault and Sexual Assault. The defense filed a motion to suppress Mr. Carrier's two statements to law enforcement. After a hearing on the defense's motion, the Court suppressed both statements. The Court suppressed Mr. Carrier's first statement on Miranda grounds. The Court suppressed Mr. Carrier's second statement on voluntariness grounds.
2. The State asks the Court to reconsider its suppression order. However, the State has raised nothing to justify reconsidering the Court's order.
3. As for the Court's suppression of the first statement, the State's basic argument is that the Court gave undue weight to Officer Kekejian's actions in its custody analysis. The defense notes that the State did not address Officer Kekejian's actions in its initial objection. The State now argues that the Court should not have considered Officer Kekejian's actions at all, or alternatively that the Court should have given less weight

to Officer Kekejian's actions. The State also argues that the Court improperly weighed Officer Hallam's actions.

4. For the reasons noted in the Court's order and the defense's motion to suppress, which need not be repeated here, the Court properly considered and weighed Officer Kekejian's actions in its custody analysis. The Court also properly weighed Detective Hallam's actions in its order. Therefore, there is no basis for reconsideration, and the suppression of the first statement should not be disturbed.

5. The State also moves for reconsideration of the suppression of the second statement, arguing that the Court made an error of law and abused its discretion in considering Officer Hallam's thoroughgoing incorporation of Mr. Carrier's first statement in his extraction of Mr. Carrier' second confession.

6. While the State's discussion of the second statement is notably more detailed than it was in the State's initial objection, the State introduces no grounds for reconsidering the Court's order. The State disagrees with the Court's weighing of the totality of circumstances in view of Fleetwood and Wauneka. However, the Court neither made an error of law nor abused its discretion in its consideration of the use of the first statement.

7. In its argument that the Court made an error of law, the State essentially attempts to turn a question of fact into a question of law. "Whether a confession is voluntary is initially a question of fact for the trial court, whose decision will not be overturned unless it is contrary to the manifest weight of the evidence, as viewed in the light most favorable to the State." State v. Fleetwood, 149 N.H. 396, 402 (2003). The voluntariness test is a totality of the circumstances test, which presents a question of fact. Fleetwood makes clear that the Court is bound to consider all relevant factors, but

the weight assigned to each factor is not to be disturbed unless contrary to the manifest weight of the evidence.

8. The Court's order did consider all the Fleetwood factors. Further, the Court did not commit legal error in relying on the use of the first statement in obtaining the second. Fleetwood should not be read to set out a strict and exhaustive list of factors. It explicates a totality of the circumstances test, which can never be strictly and exhaustively delimited. Indeed, Fleetwood is itself based on Wauneka, and the Fleetwood decision gives no reason to suggest that the Supreme Court intended to excise particular relevant factors from the totality of the circumstances analysis. Nor did the Court abuse its discretion in its weighing of the relevant factors. The Court acknowledged that the case presented a close call, and carefully and properly weighed the various factors in its order. Its finding was not contrary to the manifest weight of the evidence, and its suppression of the second statement should not be disturbed.

WHEREFORE, Mr. Carrier objects to the State's motion for reconsideration of the Court's suppression order.

Respectfully submitted,

Eleftheria S. Keans

Daniel A. Donadio, #268485
Eleftheria S. Keans, #18328
N.H. Public Defender

August 20, 2018

I hereby certify that a copy of this objection has been forwarded to Assistant County Attorney Lisa Drescher.

Eleftheria S. Keans

Eleftheria S. Keans