STATE OF MAINE
CUMBERLAND, SS.

UNIFIED CRIMINAL DOCKET
Location: Portland
Docket No.: CUMCD-CR-21-3010

STATE OF MAINE, Plaintiff	))	
v.	)	MR. XXXXX' MOTION TO SUPPRESS
RICKY XXXXX, Defendant	))	

NOW COMES Mr. XXXXX, by and through his attorney, David J. Bobrow, with this Motion to Suppress particularly stated as follows:

(1) This matter is currently before the Court on the State's charge of Gross Sexual Assault.

(2) Mr. XXXXX is a 33 year-old male with limited criminal history.

(3) On or about July 22, 2021, Mr. XXXXX was arrested by Officer Quadland for Gross Sexual Assault. While being transported for processing, Mr. XXXXX made statements prior to being informed of his *Miranda* rights.

(4) On or about July 22, 2021, Mr. XXXXX was interviewed by Detective Jeff Levesque at the South Portland Police Department. Detective Levesque hastily read *Miranda* rights without fully explaining the rights or determining if Mr. XXXXX fully understood. Mr. XXXXX invoked his right to counsel during the

interrogation. The interrogation continued and Mr. XXXXX made incriminating statements and agreed to a DNA swab.

(5) The evidence obtained forms the basis for this Motion.

ISSUES PRESENTED:

1) Was Mr. XXXXX in custody when making initial *Unmirandized* statements?
2) Did Mr. XXXXX provide a knowing and voluntary waiver of *Miranda*?
3) Did Officer Levesque continue to question Mr. XXXXX in violation of the assertion of *Miranda*?
4) Were the statements made by Mr. XXXXX voluntary?
5) Was the DNA swab of Mr. XXXXX lawfully obtained subsequent to his invocation of *Miranda*?

STATEMENT OF UNCONTESTED FACTS[1]:

1) On or about July 21, 2021 at 9:00 A.M., Detectives Levesque and Stearns of the South Portland Police Department made contact with two individuals, identified as Christopher O'Connell and Ricky XXXXX, who were sleeping under a loading dock. *Report of Jeff Levesque; Video of Jonathan Stearns.*

1 The facts are gleaned in this matter from the various reports and videos. Reference is made to each document by citation.

2) When questioned, Mr. O'Connell advised that Mr. XXXXX "seemed like a cool guy." *Id.*

3) Both men were moved from the property at the request of management. *Id.*

4) On or about 11:49 P.M., Officer Quadland was dispatched to the Days Inn on Maine Mall Road due to the allegation that Mr. XXXXX had sexually assaulted Mr. O'Connell. *Report of Zachary Quadland.*

5) Several officers eventually responded to the Days Inn. *Various reports; videos.*

6) During the course of the interview with Mr. O'Connell, the officers expressed concern that Mr. O'Connell was suffering from mental illness or potentially on some substance. *Id.*

7) On or about 5:04 A.M., Officers Kellerns and Quadland located Mr. XXXXX under a loading dock at Party City. Officer Kellearns directed that Mr. XXXXX come out and he was subsequently arrested by Officer Quadland. *Report of Officer Kellerns; Video of Officer Kellerns.*

8) Officer Quadland transported Mr. XXXXX to the South Portland Police Station. During the ride, Mr. XXXXX made statements about the incident. *Miranda* warnings were not read. *Report of Officer Quadland; Video of Officer Quadland*.

9) At the South Portland Police Station, Detective Levesque met with Mr. XXXXX and he was escorted to the interview room, in handcuffs, with the door shut. *Report of Detective Levesque.*

10) Detective Levesque proceeded to hastily read *Miranda* warnings to Mr. XXXXX

without adequately pausing between each section. *Video of Detective Levesque.*[2]

11) Twice during the interrogation, Mr. XXXXX advised that he wanted an attorney because "he didn't understand this." *Report of Detective Levesque.*

12) Detective Levesque inquired whether he wanted an attorney "then or after we were done talking." *Id.*

13) The interrogation continued and Mr. XXXXX made statements that could be viewed as incriminating. *Id.*

14) During the interrogation, Detective Levesque requested that Mr. XXXXX submit to a swab DNA sample from his penis. *Id.*

15) The swab occurred by Mr. XXXXX taking his pants off in front of Levesque and Officer Quadland. *Id.*

16) At no time did Detective Levesque or any other person apply for or attempt to obtain a search warrant. *Id.*

17) Mr. XXXXX was subsequently charged with Gross Sexual Assault and remains incarcerated.

2 The video's audio is set very low thus it is difficult to understand the questions and answers at various times.

ARGUMENT:

I. MR. XXXXX *UNMIRANDIZED* STATEMENTS AFTER HIS ARREST SHOULD BE SUPPRESSED

Miranda warning must be provided to any Defendant in custody and subject to an interrogation. *Arizona v. Miranda,* 384 U.S. 436 (1966). The *Fifth Amendment* {based on *Miranda*} requires "the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the *Fifth Amendment* privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it." *Minnesota v. Murphy,* 465 U.S. 420, 430 (1984). The purpose of the *Miranda* doctrine is to combat the specific characteristics of custodial interrogation that "work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda,* 384 U.S. at 467. Accordingly, *Miranda* "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States,* 445 U.S. 552, 560 (1980). "Custody" for purposes of *Miranda* must be “narrowly circumscribed” to effectuate the precise purpose of the warnings. See *Murphy,* 465 U.S. at 430. In determining whether a person was in custody for this purpose, therefore, a court must keep in mind that "[t]he warnings protect persons who, exposed to such interrogation without the assistance of counsel, otherwise might be unable to make a free and informed choice to remain silent." *Roberts,* 445 U.S. at 560-61. *Miranda* warnings would be required “as soon as a suspect's freedom of action

is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty,* 468 U.S. 420, 440 (1984) (quoting *Beheler*, 463 U.S. at 1125).

By Officer Quadland's own admission, Mr. XXXXX had been arrested and *Miranda* had not been read, therefore the statements made on the way to the South Portland Police Department should be suppressed.

II. MR. XXXXX DID NOT PROVIDE A KNOWING AND INTELLIGENT WAIVER OF HIS MIRANDA RIGHTS

Constitutional rights, including the right to counsel, may be waived as long as the waiver is voluntary, knowing, and intelligent. *State v. Caldwell,* 2003 ME 85, ¶¶ 8, 10, 828 A.2d 765, 767, 768; *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "The State bears the burden of establishing a knowing, intelligent, and voluntary waiver of *Miranda* rights by a preponderance of the evidence." *State v. Coombs*, 704 A.2d 387 (Me. 1998)

A person who is in custody and subject to interrogation must be advised of the rights referred to in *Miranda v. Arizona* in order for statements made during the interrogation to be admissible against him or her at trial. *State v. Bridges,* 829 A.2d 247, 254 (Me. 2003). This is because a "custodial interrogation [is] ordinarily conducted by officers who are acutely aware of the potentially incriminatory nature of the disclosures sought, [and that] the custodial setting [contains] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he

would not otherwise do so freely." *Minnesota v. Murphy*, 465 U.S. 420, 429-30, 104 S.Ct. 1136 1143, 79 L.Ed.2d 409 (1984). As with all fundamental constitutional rights, every reasonable presumption must be indulged against waiver. *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *State v. Watson*, 2006 ME 80, 900 A.2d 702 (Me. 2006).

When Detective Levesque hastily read the *Miranda* warnings to Mr. XXXXX, the circumstances show that there was not a valid waiver. The interview occurred at the early morning hours, in the police station interview room, while Mr. XXXXX remained handcuffed. The statements were recited from a card without hesitation between each recitation.[3] The questions were not repeated. Mr. XXXXX was never asked to read a document or initial a statement. A written waiver is helpful to determine if there is a valid waiver. *United States v. Fox* Criminal No. 03-26-P-H (D. Maine 2003). When confronted with arguments against waiver, Courts have demanded more from Officers. See *State v. Hazelton*, 330 A.2d 919 (Me. 1975)(Officer explained them (defendant's '*Miranda*' rights) to him. He did not read them from the card, he explained them to him … he explained to him that he was a police officer, that he wanted to talk to him about an incident that happened up on York Street and that he didn't have to talk if he didn't want to, and that anything he said could be used against him in a court of law; that he had the right to an attorney before any questioning started and during any questioning, and while he was questioning him … to stop and ask for an attorney … If he could not afford an

3 At the end of each section, Detective Levesque asked do you understand and proceeded to the next portion.

attorney, one would be found for him. He asked if he understood that, and he said 'yes.' Detective Thurston testified that he had also informed defendant that if he wished, he could make a telephone call.)

III. MR. XXXXX ASSERTED HIS MIRANDA RIGHTS

When confronted with questions about the propriety of post-invocation questioning concerning the right to counsel, courts are bound by the rule of *Edwards v. Arizona*, which requires that, once an accused has invoked his right to have counsel present, so long as he remains in custody, he may not be subjected to further interrogation until either counsel has been made available to him, or he reinitiates further communication with the police. 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

In this matter, Mr. XXXXX twice stated he did not understand and wanted to speak to an attorney. See *State v. Capitan*, Me., 363 A.2d 221 (1976)(the police read the defendant his *Miranda* warnings and, after a waiver, began questioning him. When the defendant suddenly announced that he intended to consult his lawyer about the matter in question, the police abruptly broke off the interrogation and returned the defendant to his cell). See also *State v. Stone*, 397 A.2d 989 (Me. 1979); *State v. Grant*, 2008 ME 14, 939 A.2d 93 (Me. 2008)("Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that

he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his *Fifth Amendment* privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.")

In fact, Mr. XXXXX was so clear in his request that Detective Levesque inquired whether "he wanted an attorney then or after we were done talking." When an individual invokes, even ambiguously, the right to remain silent or the right to an attorney, he or she has invoked the *Miranda* rights. *State v. Holloway*, 760 A.2d 223, 226, 228 (Me. 2000)(vacating the murder conviction because two detectives improperly continued to question an unwarned suspect after he repeatedly stated that he had said everything he had to say). At no time did Detective Levesque seek clarification on the assertion of *Miranda* rights. See *Davis v. United States*, 512 U.S. 452, 461(1994)(noting that it is good police practice to clarify whether a suspect is asserting the *Miranda* rights); *State v. Alley*, 841 A.2d 803, 811 (Me. 2004).

IV. THE STATEMENTS BY MR. XXXXX WERE NOT VOLUNTARY

A confession is admissible in evidence only if voluntary, and the State bears the burden of establishing voluntariness beyond a reasonable doubt. *State v. Coombs*, 704

A.2d 387, 390 (Me.1998). In order to find a statement voluntary, it must first be established that it is the result of defendant's exercise of his own free will and rational intellect. *State v. Rees*, 748 A.2d 976 (Me.2000). The voluntariness requirement protects against objectionable police practices, protects the mental freedom of the individual, and preserves the quality of fundamental fairness in the criminal justice system. *State v. Mikulewicz*, 462 A.2d 497, 500 (Me.1983). Factors that the Court considers in determining voluntariness are: "details of the interrogation, duration of the interrogation, location of the interrogation, whether the interrogation was custodial, recitation of the *Miranda* warnings, number of officers involved, persistence of the officers, police trickery, threats, promises or inducements made to the defendant, the defendant's age, physical and mental health, emotional stability, and conduct." *Rees* at 977. If the statements were not voluntary, and were not the result of free will and rational intellect, then use of the statements at trial would potentially violate {XXXXX'} rights under the *Fifth and Fourteenth Amendments of the United States Constitution and Art. I, Section 6 of the Constitution of Maine*. *State v. Edwards*, Cumberland Sup. Court, *J. Studstrup*, May 4, 2007. The Maine Supreme Court has previously identified three values that are served by the voluntariness requirement: "(1) it discourages objectionable police practices; (2) it protects the mental freedom of the individual; and (3) it preserves a quality of fundamental fairness in the criminal justice system." *State v. Sawyer*, 2001 ME 88, ¶ 8, 772 A.2d 1173, 1176 quoting *State v. Mikulewicz*, 462 A.2d 497, 500 (Me.1983).

Under the factors enunciated in *Rees*, the statements were involuntary. The

interrogation took place in the early morning hours, at the police station interview room, while Mr. XXXXX was in handcuffs. While the Detective's tone was subdued, the interrogation was confrontational with the Detective inquiring about motives. During the interrogation, the Detective repeatedly challenged XXXXX' statements. This was an attempt to extract additional information from XXXXX. The defense concedes that this action, by itself, will not render a statement involuntary but it is a factor in the determination of voluntariness. See *State v. Knight*, 482 A.2d 436, 442 n.4(Me.1984)("mere admonitions or exhortations to tell the truth will not, *by themselves*, render a statement involuntary.")(*emphasis added*). Additionally, the Detective stated that he was not trying to trick Mr. XXXXX but the entirety of an interrogation is to elicit statements. The Constitution's tolerance for the use of deception as an investigatory tactic by the police is not boundless. See, e.g., *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (holding confession involuntary when police falsely threatened to remove children from defendant's custody if she did not cooperate); *United States v. Byram*, 145 F.3d 405, 408 (1st Cir.1998) (stating that police trickery that rises to the level of coercion may result in determination that a confession is involuntary). A deception that actually compromises a suspect's ability to make a "free choice of a rational mind," *State v. Coombs*, 704 A.2d 387, 390 (Me. 1998), is inherently coercive and fundamentally unfair. See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 524 (Mass.2004)('ongoing research has identified the use of false statements as a significant factor that pressures suspects into waiving their rights and making a confession…).

Other state courts have addressed police trickery in similar fashion. See *State v. Patton*, 826 A.2d 783 (N.J. Super. Ct.App.Div.2003); *State v. Cayward*, 552 S.2d 971 (Fla.Dist.Ct.App.1989); *Sheriff, Washoe County v. Bessey*, 914 P.2d 618 (Nev.1996); *Lincoln, Jr. v. State*, 882 A.2d 944 (Md.Ct.Spec.App.2005); State v. Phillips, 30 S.W.3d 372 (Tenn.Crim.App. 2000).

Intentional deception by law enforcement risks "the criminal law [being] used as an instrument of unfairness." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). As the Supreme Court explained, "voluntariness" has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws... . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." *Id*.

Schneckloth and half a century of confession cases have recognized that police coercion may be "implied," " subtle," and " psychological." See, e.g., *Id*. at 226-29, 93; *Haynes v. Washington*, 373 U.S. 503, 515, (1963); *Blackburn v. Alabama*, 361 U.S. 199, 206, 80; *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (" [T]he Court has recognized that the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally

impermissible compulsion." (*emphasis supplied*)). The Supreme Court of New Hampshire has similarly recognized the concerns of statements made to law enforcement:

> "A confession is a special type of evidence. Its acceptance basically amounts to conviction. Confessions are usually obtained in the psychological atmosphere of police custody and in the greatest secrecy in which the cards can be stacked against the accused. He has no means of combating the evidence produced by the police save by his own testimony. The stakes are too high and the risk of error too great to permit a determination of admissibility to be decided by a balance of probabilities."
>
> *State v. Phinney*, 117 N.H. 145, 146 (1977).

Courts and juries are required to decide whether a confession represents the suspect's free and voluntary decision to acknowledge criminal wrongdoing, free from coercion by the police. Sometimes, however, the issue is not so much whether the confession was the product of police coercion but whether the interrogation methods used by the police, which often include sophisticated psychological ploys and techniques, caused the suspect to make a false admission. See, e.g., B. Garrett, "*The Substance of False Confessions*," 62 Stan. L.Rev. 1051, 1060 (2010) ("People have long falsely confessed not just in cases involving police torture or the 'third degree' but also in cases involving psychological techniques commonly used in modern police interrogations. Over the past two decades, scholars, social scientists, and writers have identified at least 250 cases in which they determined that people likely falsely confessed to crimes. New cases are regularly identified.")

A false confession may seem counterintuitive to most, but " [a] variety of factors can contribute to a false confession during a police interrogation." Innocence Project, " *False Confessions*," available at http://www.innocenceproject.org/understand/False-Confessions.php. They include “duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and a misunderstanding of the situation.” *Id*. The common denominator is a decision that “confessing will be more beneficial to them than continuing to maintain their innocence." *Id*. In one study involving forty proven cases of false confessions, "innocent people not only falsely confessed, but they also offered detailed information i.e. ‘inside information’ that only the actual criminal could have known. Because it was later determined that these people were not at the crime scene, in many cases, the police likely disclosed those details during the interrogations by telling exonerees how the crime happened." B. Garrett, *supra*, 62 Stan. L.Rev. at 1054. This further highlights the fragile balance that exists during the police-suspect interaction process.

“{{T}here is data to} suggest that interrogation-induced false confession{s} may be a bigger problem for the American criminal justice system than ever before. Although we do not presently know the frequency with which police elicit confessions from the innocent, researchers have discovered and documented far more cases of false confession in recent years than in any previous time period.” S. Drizin & R. Leo, " *The Problem of False Confessions in the Post-DNA World*," 82 N.C. L.Rev. 891, 921 (2004); see id., at

891-92 (analyzing " demographic, legal, and case-specific descriptive data from ... 125 [documented] cases" of interrogation induced false confessions). It is clear that police-induced false confessions are the leading cause of wrongful convictions. *Facts and Figures*, FalseConfessions.org (2009), available at http://falseconfessions.org/fact-a-figures.

It is the State's burden to prove the voluntariness of Mr. XXXXX' statements to the police on July 22, 2021 beyond a reasonable doubt. Because the actors for the State used deceptive and objectionable police practices, as well as the other factors of the of the interrogation, the State cannot meet that burden. Accordingly, the statements from July 22, 2021 should be suppressed.

V. THE EVIDENCE OBTAINED FROM THE SWAB OF MR. XXXXX SHOULD BE SUPPRESSED

The *Fourth Amendment and article I, section 5 of the Maine Constitution* guarantee "[t]he right of the people to be secure ... against unreasonable searches and seizures." See also *U.S. Const. amend. IV.9.* The collection of DNA from a person constitutes a "search or seizure" within the meaning of both provisions. See *United States v. Amerson*, 483 F.3d 73, 77 (2nd Cir.2007); *State v. Hutchinson*, 969 A.2d 923, 2009 ME 44 (Me. 2009). "'[A] warrantless search is generally unreasonable unless it was conducted pursuant to a recognized exception to the warrant requirement." *State v.*

Melvin, 955 A.2d 245, 247 (Me. 2008).

While Mr. XXXXX concedes that valid consent is an exception to the warrant requirement, there was neither valid consent because there was not a knowing and voluntary waiver of *Miranda* and an invocation of *Miranda*. See *Sections II-IV, infra; Wong Sun v. United States*, 371 U.S. 471, 488 (1963)(fruit of the poisonous tree doctrine applies to evidence seized as a result of a violation of constitutional rights).

Because of the invocation, the proper procedure should have been obtaining a search warrant. See *State v. Grant*, 2008 ME 14, 939 A.2d 93 (Me. 2008)(after invocation of Miranda, detective immediately ceased questioning Grant and, authorized by the search warrant, executed a search of Grant's body, during which the detective took hand and nail swabbings, nail clippings, pubic hair combings, a penile swab … .) Therefore, the evidence obtained as a result of the DNA swab should be suppressed.

WHEREFORE Ricky XXXXX respectfully requests that this Honorable Court suppress any and all statements made to the police during the interrogations that occurred on July 22, 2021 as well as the results from the DNA swab together with any and all other relief that this Honorable Court deems fit and just.

RESPECTFULLY SUBMITTED:
RICKY XXXXX
By His Attorney
DAVID J. BOBROW, Bar No. 9164
P.O. Box 366
9 Bradstreet Lane

Eliot, Maine 03903
(207) 439-4502

Date: 11/29/2021 s/DJB
David J. Bobrow, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this date I mailed, postage paid, a copy of this Motion to: Jennifer Ackerman, Esq. of the Cumberland County District Attorney's Office, Federal Street, Portland, ME.

Date: 11/29/2021 s/DJB
David J. Bobrow, Esq.