**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**

**FIRST JUDICIAL DISTRICT AT SITKA**

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| **STATE OF ALASKA,** | ) |
| | ) |
| **Plaintiff,** | ) |
| | ) |
| **v.** | ) |
| | ) |
| **RICHARD D. MULLIGAN,** | ) |
| | ) |
| **Defendant.** | ) |
| | ) **Case No. 1SI-21-47 CR** |

**MEMORANDUM AND ORDER RE: REVISED MOTION TO SUPPRESS**

Mr. Mulligan filed a Revised Motion to Suppress (Revised Motion).[1] The State opposes his Revised Motion. An evidentiary hearing was held on April 3, 2023. The parties appeared and presented evidence.[2] The court took the matter under advisement. Mr. Mulligan's Revised Motion is, for the following reasons, granted in part and denied in part.

## I. ISSUES

Mr. Mulligan's Revised Motion presents the following issues:

1. Whether Mr. Mulligan was illegally seized during his first interaction with the Sitka Police on March 8, 2021.

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[1] Mr. Mulligan's Revised Motion replaces his initial Motion to Suppress so the court herein is focusing only on the Revised Motion.

[2] The parties were represented by their respective counsel of record. State presented the testimony of Sgt. Lance Jamison-Ewers of the Sitka Police Department (SPD) and SPD Sgt. Gary Cranford, and submitted Exhibits 1-11. Mr. Mulligan testified and submitted Exhibits A and B. Per the discussion at the conclusion of the hearing, the court is also considering the Court System's records with respect to 1SI-21-22 SW – the court has reviewed the file materials and listened to the two related March 10, 2021 search warrant application hearings before Judge Pate. There were references in the search warrant applications and during the two hearings to other prior related search warrants. Those warrants were not part of the evidence submitted or referenced by either party so the court has not reviewed the court files for those search warrants.

2. Whether Mr. Mulligan's statements to the Sitka Police during their first interaction with him on March 8, 2021 were voluntary.

3. Whether Mr. Mulligan's statements to the Sitka Police during their second interaction with him on March 8, 2021 were involuntary due to the taint from the first interaction that day or otherwise.

4. Whether Mr. Mulligan's right to remain silent was violated during his contact with the Sitka Police on March 10, 2021.

5. Whether search warrant 1SI-21-22 SW authorized the search of Mr. Mulligan's pickup truck.

## II. FACTS

The State has charged Mr. Mulligan with Tampering With Physical Evidence, in violation of AS 11.56.610(a)(1).[3]

### a. Initial "Hit and Run" Investigation

SPD Sgt. Gary Cranford[4] was on duty on March 8, 2021 at 6:12 a.m. when he was advised by SPD dispatch that SPD had received a report that a vehicle being driven on Halibut Point Road without illuminated headlights had struck a bicyclist - injuring the bicyclist and causing damage to the driver's side front of the vehicle – and had left the area. Sgt. Cranford went to the scene of the incident.

Sgt. Cranford spoke with two witnesses at the scene. He located the bicyclist, Terry Carlson, Jr., in a nearby ditch. He determined that Mr. Carlson was badly injured and urgently in need of immediate life-saving measures by medical professionals, who were

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[3] AS 11.56.610(a)(1) provides that a person commits this offense "if the person (1) destroys, mutilates, alters, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation." The State initially also charged Mr. Mulligan with Hindering Prosecution in the First Degree, which charge has been dismissed.

[4] Sgt. Cranford has 24 years of law enforcement experience, the first 16 years in the military and the last approximately 8 ½ years with SPD.

contacted. Mr. Carlson was transported to the Southeast Alaska Regional Health Consortium (SEARHC) hospital in Sitka where he was at some later point pronounced deceased.[5]

SPD officers found parts of a vehicle at the scene, one of which had a partial serial number. SPD officers researched the serial number using a database and learned that the car parts were from a Jeep Compass. SPD officers used a DMV database to find the number and owners of such a vehicle in Sitka. Brooke Mulligan was identified as the owner of a 2008 Jeep Compass in Sitka. SPD officers were familiar with Ms. Mulligan from prior contacts. They decided to investigate whether her 2008 Jeep Compass (Jeep) was involved in the incident.

The DMV vehicle registration records for Ms. Mulligan's Jeep reflected that she resided at 107 Shelikof Way, which is the home address of her father, Richard Mulligan. The residence is 1-2 miles from SPD.[6]

**b. <u>SPD's First March 8, 2021 Contact with Mr. Mulligan</u>**

SPD Officer Chandler went to Mr. Mulligan's residence and was joined a short time later by Sgt. Cranford. They observed a 2008 Jeep Compass with significant driver's side front end damage parked next to the residence.[7] The damage was partially covered by a tarp.[8] Ms. Mulligan was outside the residence. Sgt. Cranford saw that she had bandages on both of her hands.

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[5] It is not clear from the record before the court when Mr. Carlson died except that it was prior to the application for 1SI-21-22 SW being prepared.

[6] Mr. Mulligan was 70 years of age. He owned the 107 Shelikof Way residence, which was subject to a mortgage. He was a commercial fisherman and professional deckhand. He owned and operated a 70-foot wooden troller, the F/V Sea Lark. He had lived in Sitka since 1981. He had been stopped by an SPD officer for DUI in Sitka in 2016, was read his ***Miranda*** rights, and exercised his right to remain silent. The outcome of that matter, whether he was charged and – if so - the outcome of the case - is not in the record.

[7] ***See***, Exhibits B, 5, and 6. All of the facts set forth herein are based on the evidence in the record and the court's witness credibility determinations. The court is not providing specific record citations for each stated fact. And when such citations are provided the same are not necessarily intended to be exhaustive.

[8] ***See***, Exhibit 5 and Mr. Mulligan's hearing testimony.

Sgt. Cranford greeted Ms. Mulligan and asked her to come with him to contact her father inside the residence.[9] Sgt. Cranford asked if he could come into the residence and was told by Mr. Mulligan that he could. He had had previous contacts with Mr. Mulligan and they greeted each other. Sgt. Cranford advised that they needed to talk about the damage to the Jeep outside. He asked Mr. Mulligan who had been driving the Jeep and Mr. Mulligan twice said "I was driving."

Sgt. Cranford told Mr. Mulligan that he was going to advise him of his rights and ask that he come to the SPD station for a formal interview. Mr. Mulligan said "OK". Sgt. Cranford informed Mr. Mulligan that he was impounding the Jeep and its contents and Mr. Mulligan responded "all right." Sgt. Cranford asked Mr. Mulligan if he had any questions. Mr. Mulligan said "no" but asked to speak with Ms. Mulligan. Sgt. Cranford had evidentiary concerns with Mr. Mulligan and Ms. Mulligan speaking privately and told Mr. Mulligan he did not think that was a good idea at that point because he understood both had been in the car. He told Mr. Mulligan they could talk in the Officers' presence but otherwise they would be separated.

Sgt. Cranford informed Mr. Mulligan and Ms. Mulligan of their ***Miranda*** rights, including their rights to have an attorney present during police questioning and their right to terminate the questioning at any time.

Sgt. Cranford asked Mr. Mulligan if he understood his rights and Mr. Mulligan said "Yes." He asked Mr. Mulligan if he was willing to talk with him and Mr. Mulligan paused for a few seconds and then said "I wasn't driving." Sgt. Cranford asked if he was now "changing your story and saying you weren't driving?" Mr. Mulligan said "right."

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[9] ***See***, Exhibit 1. Exhibit 1 is the SPD audio recording of Sgt. Cranford's contact with Mr. Mulligan during this, their first interaction on March 8, 2021. The recording reflects that Officer Chandler was present, at least at Mr. Mulligan's home, but did not speak with Mr. Mulligan.

Sgt. Cranford asked Ms. Mulligan if she understood her rights. She indicated she did. He asked if she was "wishing to talk to us now." She indicated she did not want to talk with the police. Sgt. Cranford said 'ok, all right, not a problem, well, that's fine." He did not question her further.

Sgt. Cranford said that they "would still take a ride down to the PD, OK?" Mr. Mulligan responded "yeah." Sgt. Cranford told them to bring minimal things – cellphone and wallet. Mr. Mulligan advised that he had an appointment at 9:00 a.m. at SEARHC and asked if he would make it. Sgt. Cranford noted that it was 7:52 a.m. and advised that if it looked like he was not going to make the appointment he would have the opportunity to call SEARHC. Mr. Mulligan advised that the appointment was for a physical in advance of a knee surgery scheduled for the next day. Sgt. Cranford said that they would see how it going once at SPD and he would have the opportunity to call. Mr. Mulligan said he maybe should be calling right now because "it looks like this is going to be a procedure" and Sgt. Cranford advised that Mr. Mulligan he could call as soon as they got to SPD if he wanted to do so. Mr. Mulligan said "yeah."

Sgt. Cranford called for another SPD officer to come to the residence in order to secure the Jeep as he contemplated that he would drive Mr. Mulligan to SPD and that Officer Chandler would drive Ms. Mulligan.

Mr. Mulligan asked if he was driving to SPD or Sgt. Cranford was taking him. Sgt. Cranford asked that Mr. Mulligan ride with him. Mr. Mulligan said "OK". Sgt. Cranford told him he would not be cuffed or anything like that, saying "we've been very respectful and stuff." Mr. Mulligan asked if he could bring his coffee and Sgt. Cranford said "sure." Sgt. Cranford noted that he "has all this stuff up here" – referencing the front seat where he had his duty bag – and indicated that Mr. Mulligan would sit in the backseat of his patrol car.

Mr. Mulligan during the drive said "it must be a serious thing all the sudden" and Sgt. Cranford responded "yeah, a little bit." Mr. Mulligan stated that Ms. Mulligan had been a

"handful" and that if the police are showing up like this then something is going on. Sgt. Cranford noted that most of the time when they have talked it has been about Mr. Mulligan. Mr. Mulligan said he needed to "get her to own up to shit." Sgt. Cranford said that is why they needed to keep them separated at the moment, that he had nothing to hide and will be up front with Mr. Mulligan. Mr. Mulligan said she does not live at his house. Sgt. Cranford radioed dispatch and asked that additional photographs be taken of the Jeep before it was impounded.

Sgt, Cranford, as they neared SPD, asked Mr. Mulligan if he wanted to make the phone call when they arrived. Mr. Mulligan advised that he had postponed the surgery once and he needs the physical so can have the surgery the next day, and it is important or he will have to postpone the surgery until the end of the summer after the fishing season. Sgt. Cranford said they would take a few minutes – start with some procedures and if it looks like it would "be short and sweet" then he would make the appointment and if looks like it will be longer then they will "stop and give you the opportunity to" – Mr. Mulligan then said "I can always come back" – meaning go to his appointment and then return to SPD – and Sgt. Cranford said "yeah." They then arrived at SPD. The drive lasted approximately 5 minutes.

Sgt. Cranford asked Mr. Mulligan to "please" go into the SPD interview room. Mr. Mulligan observed that there was a bar on the wall with cuffs and Sgt. Cranford said they would not be using those. Sgt. Cranford asked Mr. Mulligan to have a seat. Mr. Mulligan had his cellphone and his coffee.

Mr. Mulligan said he was going to make "one quick call." Sgt. Cranford responded that while Mr. Mulligan was "doing that" he had one quick question for Mr. Mulligan– he reminded Mr. Mulligan that he had read him his rights – and he wanted to make sure "100%" that Mr. Mulligan was willing to talk with him about what he knows - Mr. responded by stating that he had "no idea what she does," that his neighbor had told him to check on her, she had cuts on her hand, he did a related alcohol wash, and she does not live with him.

Sgt. Cranford asked if he had seen the Jeep and who had been driving and Mr. Mulligan said he had not and Ms. Mulligan had been driving, and he wants her to be held responsible. Sgt. Cranford asked why Mr. Mulligan had first said he was driving and he said he thought it was a simple thing, he knew she did not have insurance, and he was willing to say he was the driver, but he changed his mind after being read his rights and realizing the situation was more serious.

Sgt. Cranford asked questions about Mr. Mulligan's interactions with Ms. Mulligan that morning. Mr. Mulligan advised that his neighbor Valerie Taylor had contacted him and suggested he check on Mr. Mulligan and her Jeep.[10] He went outside and found her in the back seat of the Jeep with cuts on her hands. He suggested that maybe she was not driving.

Mr. Mulligan then began to look at his cellphone to pull up a video recording, and he told Sgt. Cranford that he had a video of the Jeep arriving and his neighbor also would have a video. Mr. Mulligan located the video and showed it to Sgt. Cranford – stating that it showed Ms. Mulligan drove up at 6:13 a.m. The recording had a loud sound which Mr. Mulligan said was her Jeep. Mr. Mulligan noted that later on the video a person can be seen by the front of the Jeep but he cannot determine who it is.

Sgt. Cranford asked if Mr. Mulligan would give him permission to hold onto his cellphone so the SPD IT person could retrieve the video. Mr. Mulligan said he had been watching TV the night before and he called Ms. Taylor, who confirmed that she had seen him watching TV. Sgt. Cranford affirmed that he heard her.

Sgt. Cranford asked again if he could hold on to Mr. Mulligan's cellphone, and said that he would give him all the opportunity to – and Mr. Mulligan interrupted him and

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[10] Exhibits 9 and 10 reflects that Valerie Taylor had texted Mr. Mulligan – asking if he had seen Ms. Mulligan's car and if she was Ok, he indicted he had not but she sometimes sleeps in her car – Ms. Taylor advised that the car was "smashed up pretty bad" and suggested he check on her if he had not done so – he thanked her – she then asked if Ms. Mulligan was hurt and he responded

mentioned the hospital. Sgt. Cranford said he was going to step out and talk to his supervisor and the DA, because the matter was serious. Mr. Mulligan noted he still had a half hour to make his appointment. Sgt. Cranford asked again if he could take Mr. Mulligan's phone, and Mr. Mulligan agreed. Sgt. Cranford advised that he thought Mr. Mulligan would make his appointment and moved to the door. Mr. Mulligan indicated he would just sit tight while Sgt. Cranford was gone.

Sgt. Cranford returned to the interview room a short time later. He asked Mr. Mulligan to submit to a PBT in order to confirm what he had observed, that Mr. Mulligan was not under the influence of any alcoholic beverage. Mr. Mulligan agreed to the PBT and the results were negative for alcohol.

Sgt. Cranford transported Mr. Mulligan home. Mr. Mulligan made his 9:00 a.m. SEARHC appointment.

Sgt. Cranford's entire interaction with Mr. Mulligan was cordial.

Sgt. Cranford testified that: at no time did he think that Mr. Mulligan was under extreme duress; his purpose in talking with him at this time was to eliminate him as a suspect in the matter; he did not know what he would have done if Mr. Mulligan had said "no" when he asked him to come to SPD in his patrol vehicle, Mr. Mulligan was being cooperative and he may have provided additional explanation for why he wanted Mr. Mulligan to so accompany him, they would be going to SPD no matter what and he was willing to work with Mr. Mulligan on how that happened.

Mr. Mulligan testified that: he was cooperative with Sgt. Cranford during this contact; he initially said he was driving but when mirandized, told the Jeep would be impounded and that he could not talk privately with his daughter he knew this was not a simple matter of

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"no hurt." She responded: "Good to hear. Sorry you are now dealing with this." And she added a safe face emoji. He asked if she had called "the cops" and she responded that she had not.

Ms. Mulligan driving without car insurance, and he could not help her by saying he had driven; he did not know whether or not he had the option to say "no" to going to SPD for the interview and he went along with Sgt. Cranford's request to make it easy; he did not think he had a choice about going to SPD to be interviewed; he considered himself to have been a witness during this police interaction and that he was being asked questions as such, at least until the point when he was asked to take a PBT; and, he understood it had been "iffy" on whether he would make his 9:00 a.m. medical appointment but did not care about that as much as he cared about wanting to get through this brief moment with Sgt. Cranford, and he knew he could call SEAHRC if needed.

**c. <u>SPD's Second March 8, 2021 Contact with Mr. Mulligan</u>**

Sgt. Cranford and Officer Chandler watched the video retrieved from Mr. Mulligan's phone. They saw Mr. Mulligan talking with Ms. Mulligan outside the Jeep and that she put something in a nearby garbage can. Sgt. Cranford had additional questions for Mr. Mulligan. He and Officer Chandler returned to Mr. Mulligan's residence at approximately 10:26 a.m. on March 8, 2021.

Sgt. Cranford and Officer Chandler contacted Mr. Mulligan at his residence.[11] Sgt. Chandler asked how he was doing and said he knew it was a "shitty situation." Mr. Mulligan noted that the police were not telling him anything and he was hearing things. Sgt. Cranford asked what, and Mr. Mulligan asked if it was a hit and run and if Ms. Mulligan had hit somebody.[12] He described her injuries and the damage to the Jeep windshield that he had seen. He said she told him she does not know what happened. He said her mother had mentioned she

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[11] Sgt. Cranford's audio recording of this interaction is Exhibit 2, and the court is primarily relying on Exhibit 2 in describing what occurred during this interaction. Officer Chandler also audio recorded a portion of this interaction, with his recording beginning shortly after Sgt. Cranford's recording and includes a least part of the search of the garbage can which was not part of Exhibit 2. Officer Chandler's recording is Exhibit 3.

[12] Mr. Mulligan had sent a text to Ms. Taylor at 9:26 a.m. that day asking her if she knew something about the incident that he did not, and stating he had heard it was "a hit and run."

had hit a bike. He said he thought it would be more likely she hit a motorcycle if she had hit somebody.

Sgt. Cranford told Mr. Mulligan that he had watched the video and seen him talking with Ms. Mulligan, and asked what was said. Mr. Mulligan said that: she told him she did not know what happened; she got out of the backseat, they talked a bit more and he went in the house. He said he asked to see her injured hands and he told her to come inside and he would take a look at those injuries. Sgt. Cranford asked if Ms. Mulligan said anything about driving or if anybody was in the Jeep with her and he said she told him she did not remember anything. Mr. Mulligan then said she said something about a rock after he pointed out the damage to the windshield. He said he helped her tend to the cuts on her hands. Sgt. Cranford asked additional questions about her injuries which Mr. Mulligan answered.

Sgt. Cranford asked if Mr. Mulligan had taken anything from the Jeep – and he said he had not except his gas can, and he said he had put the tarp on the front of the Jeep.

Sgt. Cranford asked Mr. Mulligan about the garbage can he had seen Ms. Mulligan on the video put something in, whether it was Mr. Mulligan's and whether he would allow them to look in it. Mr. Mulligan said it was his and that they could "look in it, sure."[13]

Sgt. Cranford asked Mr. Mulligan about the texts he had received from Ms. Taylor about the Jeep, and about his subsequent contacts with her. Mr. Mulligan advised that he had told her that he had said he was driving because he thought it was just a citation and he wanted to protect his daughter but once he learned the situation was serious – with her Jeep being impounded- he was no longer willing to do that. Officer Chandler noted that what Mr.

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[13] The police interaction with Mr. Mulligan evidently did not take place inside his house as there is no recorded related conversation about coming in and they all could see the garbage can which was outside.

Mulligan had said was consistent with what he had seen on the video, and asked Mr. Mulligan a couple of questions about the contents of the Jeep.

Sgt. Cranford's interaction with Mr. Mulligan lasted approximately 10 minutes. Their conversation was cordial.

Sgt. Cranford and Officer Chandler searched Mr. Mulligan's garbage can and recovered drug related items. Officer Chandler asked Mr. Mulligan if he used IVs and he said that he did not.[14]

Sgt. Cranford testified that: Mr. Mulligan consented to the search of is garbage can; it appeared to him that Mr. Mulligan did so voluntarily; Mr. Mulligan appeared to be of sound mind; Mr. Mulligan did not appear to be under the influence of anything; and, he was nearly 100% certain by this point that Mr. Mulligan was a material witness not a suspect.

Mr. Mulligan did not testify with respect to his second March 8, 2021 interaction with Sgt. Cranford. He did testify that: after his SEARHC appointment and before his second contact with Sgt. Cranford that day he drove around looking for the incident site, he drove down Halibut Point Road because he had heard sirens from that area earlier that morning, and he located the site; he spoke with Ms. Enloe, who gave him car parts from the incident which he put in a plastic bag in his pickup truck and took with him when he left; and, he spoke with Ms. Mulligan's mother who told him that the Jeep had been involved in a hit and run.

**d. <u>1SI-21-22 SW</u>**

Sgt. Cranford contacted Ms. Taylor and obtained a copy of her video recording of Ms. Mulligan's Jeep.

Sgt. Cranford on March 10, 2021 applied for a search warrant for a sample of Mr. Mulligan's DNA, and submitted a supporting affidavit. Then Sitka Superior Court Judge Jude

Pate had related questions so he went on record with Sgt. Cranford at 2:16 p.m. Sgt. Cranford testified in part concerning Mr. Mulligan's clothing – that after reviewing Ms. Taylor's video they had determined that the clothing they had seized earlier was not the clothing she was wearing at the time of the incident and that they had probable cause to believe that the clothing she had been wearing was located at Mr. Mulligan's residence – 107 Shelikof Way. Judge Pate made probable cause findings and issued 1SI-21-22 SW, authorizing SPD to search Ms. Mulligan for her DNA within the next 30 days and "107 Shelikof Way" within 14 days for certain described clothing.[15]

Sgt. Cranford and SPD Officer Parker White appeared before Judge Pate on March 10, 2021 at 7:41 p.m. to apply for an amendment to 1SW-21-22 SW to also authorize a search for car parts from Ms. Mulligan's 2008 Jeep Compass. Sgt. Cranford and Officer White testified in support of the application. The testimony included: SPD had been contacted a couple of hours earlier by Gloria Enloe; Ms. Enloe lives by the incident scene; she had advised SPD that she had found car parts on her property after the incident that she thought were from the involved vehicle, she had retained the car parts and taken photographs of the items, Mr. Mulligan had come to her residence in a truck, she told him about the auto parts and that the police were coming to taken them into evidence, he asked if her the vehicle involved in the incident could have been a truck, and he took the parts without her permission and left; Officer White had possession of Ms. Enloe's photos and they reflect that they were taken at 9:08 a.m. and 9:35 a.m. on March 8, 2021; and, SPD had confirmed that the truck Ms. Enloe described was registered to Mr. Mulligan.

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[14] ***See***, Exhibit 3.

[15] The typed portion of 1SI-21-22 SW focused on the DNA as the clothing situation was a new development. So, Judge Pate hand wrote the clothing provisions on the search warrant.

Judge Pate made probable cause findings and provided hand written amendments to SI-21-22 SW to "permit police search @ 107 Shelikof, Sitka, Alaska for vehicle parts & pieces for a Jeep Compass 2008" and provided that this search would be done "immediately." Judge Pate did not make any revisions to the "evidence of the particular crime" and "tends to show that" portions of the search warrant, which both focused on Ms. Mulligan and crimes she is alleged to have committed, with no reference to Mr. Mulligan or a possible Tampering With Physical Evidence or Hindering Prosecution charge.

**e. <u>March 10, 2021 Execution of 1SI-21-22 CR</u>**

Several SPD officers, approximately 5 or 6, went to Mr. Mulligan's residence to execute 1SI-21-22 SW. The officers included Sgt. Cranford and SPD Sgt. Lance Jamison-Ewers. Some of the officers, including Officer Blackmon, had long rifles. The officers did not know prior to arriving at the residence who all would be present. The number of officers was for officer safety and intended to facilitate the search, prevent tampering with potential evidence, and to allow the officers to know who was coming into and who was leaving the residence. The weapons were present for the perceived need for officer safety.

Sgt. Jamison-Ewers and Sgt. Cranford drove together to Mr. Mulligan's residence. Sgt. Jamison-Ewers told Sgt. Cranford shortly before they arrived to be sure to mirandize Mr. Mulligan because he was now a suspect.[16]

The SPD officers arrived in several patrol vehicles, all with the top lights on.

Mr. Mulligan had his knee surgery on March 9, 2021. He was provided with a small machine which pumps cold water into a wrap that is placed around his knee, held in place by Velcro, in order to reduce the post-surgical swelling. He was home and using the machine when the SPD officers arrived.

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[16] Exhibit 4 is Sgt. Jamison-Ewers' audio recording of a portion of his drive to Mr. Mulligan's residence and the execution of 1SI-21-22 SW at the residence.

Sgt. Cranford or Sgt. Jamison-Ewers knocked on Mr. Mulligan's front door. Mr. Mulligan saw the SPD officers arrive through a window. They could also see him through a window. Sgt. Jamison-Ewers advised that Mr. Mulligan was coming to the door and Sgt. Cranford said that he did not have anything in his hands. Sgt. Jamison-Ewers stated in a loud voice: "Police Department with a warrant, open the door."

Mr. Mulligan opened the door. Sgt. Cranford said "hello Rico" and both he and Sgt. Jamison-Ewers advised that they had a warrant. Sgt. Cranford asked if anybody else was there and Mr. Mulligan said Ms. Mulligan was upstairs. Sgt. Cranford and Sgt. Jamison-Ewers proceeded into the residence, repeatedly proclaiming loudly that they had a search warrant. They located Ms. Mulligan. Sgt. Jamison-Ewers asked her if she had anything in her pockets, and she replied "no."

The other SPD officers entered the residence and verbally "cleared" each room.

Sgt. Jamison-Ewers asked Mr. Mulligan and Ms. Mulligan if there was a kitchen where they could all sit. Sgt. Cranford directed them into the dining room. Sgt. Jamison-Ewers told them that they were free to go but if they remained in the residence they would have to do exactly as they were told, which meant to be seated at the dinner table. He then stated "but you guys are free to go, you're not being held here." Mr. Mulligan asked if that meant he could continue to do what he had been doing – meaning using the wrap machine – and explained that he had just had the knee surgery. Sgt. Jamison-Ewers indicated that he could and then he and Sgt. Cranford realized that they had not intended to tell Ms. Mulligan that she could leave – evidently because they needed the DNA sample from her - and they told her she would need to stay. Sgt. Jamison-Ewers directed Ms. Mulligan to have a seat at the dining room table.

Sgt. Cranford and Mr. Mulligan moved into the room where he had been seated by his wrap machine. Sgt. Cranford asked whether there were any sharp objects in the chair

where he had been seated and he said "no." Officer Blackmon stood behind Mr. Mulligan, with her legs spread and still carrying the long rifle.

Sgt. Cranford saw a Leatherman on the side of Mr. Mulligan's belt and asked Mr. Mulligan about removing it. Mr. Mulligan began to ask if he was under arrest and Sgt. Jamison-Ewers told him he was not and could leave if he wanted to but if he stayed he needed to – and Mr. Mulligan interjected that he understood and "I got it." Mr. Mulligan then began to explain his use of the wrap machine. Sgt. Jamison-Ewers told Mr. Mulligan: "But here's the thing, my partner asked you to take off the knives, so take off the knives." Mr. Mulligan complied and Sgt. Cranford showed him where he was putting those items.

Sgt. Cranford commented to Mr. Mulligan that he did not think they would be there that long and Sgt. Jamison-Ewers said that they "might be here that long, we'll see." Sgt. Cranford talked with other SPD officers about providing copies of the search warrant to Mr. Mulligan and Ms. Mulligan. And Sgt. Cranford and Sgt. Jamison-Ewers directed other officers to turn off the top lights on the patrol vehicles and to then remain to help with the search.

Sgt. Cranford read Mr. Mulligan his ***Miranda*** rights and asked if Mr. Mulligan understood, to which he responded that he did. Sgt. Cranford asked Mr. Mulligan, having those rights in mind, whether he wished to talk with him. Mr. Mulligan responded "No." Sgt. Jamison-Ewers asked Mr. Mulligan if he understood "what he's a suspect of now?" and said "you are in trouble." Mr. Mulligan replied "I am in trouble?" Sgt. Jamison-Ewers responded "you are in big trouble, potentially, but yeah, you are in big trouble, potentially."

Sgt. Cranford gave Mr. Mulligan a copy of 1SI-21-22 SW. He told Mr. Mulligan that the part he was concerned with was his residence and that: they were going to search for the clothes that Ms. Mulligan had been wearing at the time of the incident; he and Ms. Mulligan could cooperate and show them where the clothes are or Sgt. Cranford would take every item of clothing that comes within the scope of the search warrant. Mr. Mulligan asked if this was a

clothing issue. Sgt. Jamison-Ewers said "no" and that more was involved. Sgt. Cranford said he was just reading the first part of the search warrant to Mr. Mulligan.

Mr. Mulligan said he needed his reading glasses from another room and they moved to that room. Sgt. Cranford asked him he would prefer to sit in there so he could read the search warrant and Mr. Mulligan indicated that he would.

Sgt. Cranford then told Mr. Mulligan that the second part of the warrant concerned information they had received that Mr. Mulligan had gone to 2609 Halibut Point Road, spoke with the residents there, and after being told that the police were coming to get some car parts that were there – Mr. Mulligan interjected that was not true. Sgt. Cranford then said "Ok. I'm not asking any questions.' Mr. Mulligan responded: "Right, that is not true."

Sgt. Jamison-Ewers then told Mr. Mulligan that there were allegations that he had car parts for his daughter's Jeep that he took from that residence. Mr. Mulligan said 'right, right but what he just said is not true." Sgt. Jamison-Ewers responded: "Here's the thing though, if it is not handled delicately somebody like the District Attorney could certainly think . . ." Sgt. Jamison-Ewers and Sgt. Cranford then both said "sit down."[17] And Sgt. Jamison-Ewers continued: "somebody could put you in prison for tampering with evidence, which is a felony. Because that's evidence of a crime."

Mr. Mulligan said that this had just happened yesterday, he had gone out to the residence and did talk to the woman and she gave him the parts that were found on her property. Sgt. Jamison-Ewers responded that "there could be a reasonable explanation, like your explaining, but we need those car parts." Mr. Mulligan replied that: "you can have them." Sgt. Jamison-Ewers asked if he still had them and Mr. Mulligan said he did. Sgt. Jamison-Ewers said that was good and that his cooperation would go a long way in his eyes and those of the District

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[17] It is not clear to the court who they were directing to sit down – in context it was either Mr. Mulligan or Ms. Mulligan.

Attorney and asked "where are they?" Mr. Mulligan said the parts were in his truck. Sgt. Jamison-Ewers asked if Mr. Mulligan would give them permission to go get the car parts from inside his truck and Mr. Mulligan said "oh, absolutely." Sgt. Cranford asked Mr. Mulligan to tell Officer White exactly where the parts would be found and Mr. Mulligan said inside a plastic bag.

Mr. Mulligan added that "this is all a timing thing," the whole thing just came down and now he is being accused in the search warrant of holding evidence. Sgt. Jamison-Ewers said "tampering, tampering with evidence." Mr. Mulligan said tampering means hiding and he is not hiding evidence. Sgt. Cranford said this did not mean he was guilty and Sgt. Jamison-Ewers told him that he was not under arrest.

Mr. Mulligan continued to object to the word "tampering." Sgt. Jamison-Ewers said that tampering is a felony offense and that is the name of the crime they are investigating. Mr. Mulligan made additional statements about a timeline and that this was new to everybody and involves what his daughter is going through and what he is going through as a father, and him trying to figure out what was going on, and he is being accused of tampering with evidence and is told he is in big trouble, he has "not had a chance to get my shit straight."

Sgt. Jamison-Ewers advised that they were trying to make sure he knew what was happening, that he is being investigated for tampering with evidence. They continued to discuss the charge. Sgt. Jamison-Ewers mentioned that tampering is a felony and if you are convicted you go to prison.

Ms. Mulligan questioned why the police did not have the parts in the first place. Sgt, Jamison-Ewers asked Mr. Mulligan if he went and picked up the car parts and he responded that he did not, that he was talking to … and Ms. Mulligan interrupted by asking "why the fuck" SPD did not have the parts in the first place to which Sgt. Jamison-Ewers responded that they had her car, the car she killed somebody with. He told her to sit down and relax. Mr. Mulligan said they were dragging him down to the "same circle" she was at.

Sgt. Cranford acknowledged that there were different versions of the events at Ms. Ms. Enloe's residence and said that he should have contacted them once he had possession of the possible evidence. Mr. Mulligan mentioned his surgery. Sgt. Cranford asked whether they had not worked very closely with him the other day about getting him to his appointment and Mr. Mulligan responded "oh absolutely, absolutely, absolutely, right, absolutely."[18]

Mr. Mulligan's truck was parked next to his house.[19] Officer White searched the truck and located the car parts, with a few other small items, in a closed plastic bag in the cab.[20]

Sgt. Jamison-Ewers testified that: his impression was the Mr. Mulligan was not moving very well and needed to be seated; Mr. Mulligan was seated most of the time; and, Mr. Mulligan wanted to be cooperative, and he was very cooperative and very helpful.

Sgt. Cranford testified that: he often tells the subjects of a search warrant what it is he is there to search for and asks if the person can tell him where the item(s) is/are located in order to minimize the search time; he did so in this case, telling Mr. Mulligan, after he said he did not want to waive his right to remain silent, what the officers were there to search for as part of his providing Mr. Mulligan with a copy of 1SI-21-22 SW; it was obvious that Mr. Mulligan had just had surgery as he was moving very slowly; and, Mr. Mulligan otherwise appeared to be his normal self, he did not appear to be impaired in any way, and he voluntarily consented to the officers searching his truck.

Mr. Mulligan testified on direct that: he was just in front of Officer Blackmon as she was standing behind him with a rifle; he did not know where Officer Blackmon was after

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[18] The recording continued beyond this point. The court is focusing here only on the potion of Exhibit 4 that was played by the State during Sgt. Jamison-Ewers' hearing testimony, which the court understands is the only portion of the recording in evidence for purposes of the instant motion. The court listened to all of Exhibit 3 because it was not played during the hearing but was submitted into evidence at the conclusion of the hearing without objection or stated limitations.

[19] ***See***, Exhibits A and 7.

they moved to the dining room so he could read the search warrant, which is further into the house; he did not feel free to not answer the officer's questions once he had said "no" when they had asked if he wanted to speak with them and they kept speaking with him; he did not feel free to not consent to the officers' retrieving the car parts from his truck; and, he did not feel that he was free to leave his residence after he was told that he was in big trouble, noting the effects of his knee surgery.

Mr. Mulligan testified on cross that: when the officers came to his house to serve the search warrant he had no interest in leaving; he went along with the program as he had no way to prepare for it and he was going with the situation as it arose; he did not think he had done anything wrong by taking possession of the car parts, in the back of his head he was thinking he would take them to SPD; and, he went along with whatever he was asked because he wanted to make it easy and to help out.

Additional facts are stated in the Discussion section.

## III. DISCUSSION

### a. First March 8, 2021 SPD Contact - Seizure

#### 1. Parties' Positions

Mr. Mulligan contends that: he was "arrested" during Sgt. Cranford's first interaction with him on March 8, 2021; and Sgt. Cranford did not have probable cause to arrest him; so, his statements to Sgt. Cranford during this interaction must be suppressed.[21] Mr. Mulligan is, in effect, arguing that he was unlawfully seized. The State counters that Sgt. Cranford engaged in general on the scene witness questioning during this interaction with Mr.

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[20] ***See***, Exhibits 8 and 11.

[21] Mr. Mulligan also contends that Ms. Mulligan was arrested without probable cause during this police contact.

Mulligan and did not arrest him or subject him to custodial interrogation, in effect, that he was not unlawfully seized.

## 2. Applicable Law

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I section 14 of the Alaska Constitution provides that:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants may issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Alaska Supreme Court has recognized that the Alaska constitutional guarantee against unreasonable searches and seizures is broader than that provided by the Fourth Amendment.[22] So, the court is focusing primarily on Alaska law.

The Alaska Court of Appeals has stated that:

> There are essentially three types of contact between the police and private citizens which have received attention in the reported cases: (1) A generalized request for information, for example, questions put to bystanders during an on-the-scene investigation of a crime. (2) An investigatory stop, supported by articulable reasonable suspicion that a person has committed or is about to commit a crime. Finally, an arrest, based on facts and circumstances which would lead a prudent person to believe that a crime had been committed and that the person arrested had committed it. . .
>
> An inquiry of someone at the scene is not necessarily a fourth amendment seizure. An investigatory stop and arrest are fourth amendment seizures.[23]

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[22] ***See, Zehrung v. State***, 569 P.2d 189, (Alaska 1977). ***See also, Brown v. State,*** 182 P.3d 624, 633 (Alaska App. 2008).

### A. Generalized Request for Information – No "Seizure"

"For Fourth Amendment purposes, a seizure occurs whenever a police officer engages in a 'show of official authority such that a reasonable person would have believed that he [or she] was not free to leave.'"[24] The focus is not on whether the police officer would have let the person go but rather "whether a reasonable person would have felt free to go."[25] And the reasonable person is a "person who is innocent of any crime."[26]

> Thus, the test becomes whether a reasonably prudent person who is innocent of any crime would treat the police officer's actions as indicating an intent to restrain or confine the person, considering all the circumstances. It is important to stress that the controlling factor is what a reasonable person would perceive the officer's intentions to be, based upon the officer's words and actions, rather than what the officer's intentions were.[27]

"The factor which distinguishes an on-the-scene investigation from an investigatory stop or arrest is that the person encountered 'on-the-scene' is under no obligation to remain, may decline to listen to any questions, and may go on his way."[28]

### B. Investigatory Stop

A proper "investigatory stop" is not an "unreasonable" seizure. A police officer can conduct an investigatory stop of a person in Alaska when: "'(1) the police officer has an

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[23] ***Howard v. State***, 664 P.2d 603, 608 (Alaska App. 1983) (citations omitted). ***See also***, ***Pooley v. State***, 705 P.2d 1293, 1305 (Alaska App. 1985); ***Martin v. State***, 797 P.2d 1209, 1214 (Alaska App. 1990).

[24] ***Castle v. State***, 999 P.2d 169, 171 (Alaska App. 2000) (quoting ***Rogers-Dwight v. State***, 899 P.2d 1389, 1390 (Alaska App. 1995) (quoting ***Florida v. Royer***, 460 U.S. 491, 502 (1983)). ***See also***, ***Pooley***, 705 P.2d at 1305 ((citations omitted). ***See also***, ***Waring v. State***, 670 P.2d 357, 363 (Alaska 1983) (A person is "seized" when a peace officer "by means of physical force or show of authority has in some way restrained the liberty of a citizen.") (quoting ***Terry v. Ohio***, 392 U.S. 1, 19 n. 16 (1968)).

[25] ***Pooley***, 705 P.2d at 1306.

[26] ***Romo v. Municipality of Anchorage***, 697 P.2d 1065, 1068 (Alaska App. 1985).

[27] **Id.**

[28] ***Howard***, 664 P.2d at 608.

actual suspicion that 'imminent public danger exists or serious harm to persons or property has recently occurred', and (2) this suspicion is reasonable."[29]

The "reasonable suspicion" element requires that:

> . . . the officer must have 'some minimal level of objective justification for making the stop.' The objective justification must be 'something more than an inchoate and unparticularized suspicion or hunch.' The officer must be able to point to specific and articulable facts which, under the totality of the circumstances known to the officer and in light of the officer's experience, support making the stop.[30]

It is sufficient that "there exists a substantial *possibility* that criminal conduct has occurred, is occurring, or is about to occur."[31]

With respect to the "seriousness", "imminent", and "recently occurred" elements:

> The determination of the seriousness of harm to persons or property in any given case is inherently relative. What constitutes a trifling inconvenience to some may seem a major imposition to others. From one perspective, the line between misdemeanor and felony offenses may seem a sensible distinction between serious and nonserious harm; from another, the fact that the legislature has chosen to characterize certain conduct as criminal, subjecting offenders to incarceration, would require that the harm resulting from all such criminal conduct be deemed serious rather than inconsequential.
>
> In our view, ***Coleman***, addresses the problem of differentiating serious from nonserious harm by espousing a flexible approach based on practical necessity, rather than a rigid standard of categorical exclusion. ***Coleman*** requires a determination of the issue based on the circumstances in each case. While the theoretical seriousness of the crime for which reasonable suspicion exists is a significant factor in each case, it is not itself determinative.
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> ***Coleman*** speaks in terms of imminent threats to public safety and recently committed serious harm. In so doing, ***Coleman*** recognizes that the extent of danger threatened by a potential crime or the seriousness of harm resulting from a

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[29] ***Waring,*** 670 P.2d at 365 (quoting ***Coleman v. State,*** 553 P.2d 40, 46 (Alaska 1976)).

[30] ***State v. Miller,*** 207 P.3d 541, 544 (Alaska 2009) (quoting ***McQuade v. State,*** 139 P.3d 973, 976-77 (Alaska App. 2006) (quoting ***In the Matter of J.A.,*** 962 P.2d 173, 176 (Alaska App. 1998)).

[31] ***Miller,*** 207 P.3d at 547-48 (quoting ***State v. Moran,*** 667 P.2d 734, 735-36 (Alaska App. 1983) (emphasis in original)).

crime that has already been committed cannot be evaluated in the abstract. Rather, a threat to public safety must be considered in conjunction with the imminence of that threat. A given threat to public safety might not justify an investigative stop when the danger threatened is not immediate and when circumstances would permit additional efforts to obtain probable cause. As the danger becomes more immediate and the opportunity for additional investigation diminishes, the same threat might justify a stop based on reasonable suspicion alone. Likewise, once a crime has been committed, the seriousness of the resulting harm must be considered in connection with the recency of the crime. The less recent the crime, the more serious the offense must be before an investigative stop based on reasonable suspicion alone will be justified.

These factors must in turn be balanced against the strength of an officer's reasonable suspicion and the actual intrusiveness of the investigative stop. The seriousness of harm necessary to support an investigative stop will thus increase or decrease in any given case depending on the totality of the circumstances surrounding the stop itself. A minimally intrusive stop based on solid information indicating that a crime is actually in progress or has just been completed may be justified under ***Coleman*** even when the crime itself is not a felony and involves harm that in other contexts might not seem particularly serious.

We emphasize that the ***Coleman*** rule is ultimately rooted in common sense and practicality. In each case, compliance with ***Coleman's*** requirement of recently committed serious harm must be evaluated with a view toward the fundamental concern of the ***Coleman*** court: the risk that an investigatory stop based on mere suspicion may be used as a pretext to conduct a search for evidence. As indicated in ***Coleman***, the fundamental inquiry in each case is whether 'a prompt investigation [was] required . . . as a matter of practical necessity.'[32]

The flexible ***G.B.*** approach to ***Coleman*** requires that the court:

> . . . consider four questions: (1) How serious was the alleged crime to which the officer was responding? (2) How immediate was the alleged crime to the investigative stop? (3) How strong was the officer's reasonable suspicion? (4) How intrusive was the stop?[33]

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[32] ***State v. G.B.,*** 769 P.2d 452, 455-56 (Alaska App. 1989) (quoting ***Coleman,*** 553 P.2d at 46 (quoting ***Goss v. State,*** 390 P.2d 220, 224 (Alaska 1964), ***cert. denied*** 379 U.S. 859 (1964))). ***See also, Gibson v. State,*** 789 P.2d 383, 384 (Alaska App. 1990), ***Adams v. State,*** 103 P.3d 908, 910-11 (Alaska App. 2004), ***Joseph v. State,*** 145 P.3d 595, 600-01 (Alaska App. 2006) (applying the flexible approach but finding no basis for an investigatory stop under the facts and circumstances of the case – smoking marijuana in a public place), ***Newsom v. State,*** 199 P.3d 1181, 1182-86 (Alaska App. 2009) ("in ***G.B.*** . . . this Court adopted a broad interpretation of the ***Coleman*** rule", 199 P.3d at 1185), ***Miller,*** 207 P.3d at 544-51.

[33] ***Miller,*** 207 P.3d at 544.

> When the court analyzes:. . . close or borderline cases, the court should focus on two principles highlighted by the ***Coleman*** decision. The first is to ensure that the police do not employ an investigative stop (*i.e.*, a temporary custody based merely on reasonable suspicion rather than probable cause) as a pretext to conduct a search for evidence. The second is to allow the police to perform temporary stops when 'a prompt investigation [is] required as a matter of practical necessity.'[34]

The Alaska Court of Appeals has also recognized that a police officer:

> [u]nder appropriate circumstances . . . may approach and stop a person for the purpose of investigating a crime even though the officer has no reason to believe that the person stopped has committed the crime which is being investigated. However, courts generally seem to be in agreement that the fourth amendment does not allow the police to stop potential witnesses to the same extent as suspects of a crime. It appears the police are justified in stopping a witness only where exigent circumstances are present, such as where a crime has recently been reported.[35]

Considerations pertinent to the exigent circumstances requirement include: whether the crime at issue was serious; whether the crime had just occurred; whether the police officer was confronted with a "fast-moving scenario"; whether the police officer had reasonable cause to believe that the person had information that would materially aid in the investigation; whether the police officer's action was reasonably necessary to obtain the person's information; and whether the well-being of a crime victim was at risk.[36]

## C. Arrest

Alaska Statute 12.25.030(a)(2) provides that a peace officer may arrest a person without a warrant "when the person has committed a felony, although not in the presence of person making the arrest." Alaska Statute 12.25.030(a)(3) provides that a peace officer may

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[34] ***Newsom,*** 199 P.3d at 1186 (quoting ***G.B.,*** 769 P.2d at 456 (citing ***Coleman,*** 553 P.2d at 46)).
[35] ***Metzker v. State***, 797 P.2d 1219, 1221 (Alaska App. 1990) (citations omitted). ***See also, Beauvois v. State***, 837 P.2d 1118, 1121 (Alaska App. 1992); ***Castle***, 999 P.2d at 170, 173-74; ***Hamilton v. State***, 59 P.3d 760, 766-67 (Alaska App. 2002); ***City of Kodiak v. Samaniego***, 83 P.3d 1077, 1082-86 (Alaska 2004).
[36] ***Samaniego***, 83 P.3d at 1084-85.

make a warrantless arrest "when a felony in fact has been committed, and the person making the arrest has reasonable cause for believing the person to have committed it."

Probable cause exists when:

> . . . the facts and circumstances known to the officer support a reasonable belief that an offense has been or is being committed by the suspect . . . . Probable cause is determined objectively and requires only a fair probability or substantial chance of criminal activity, not an actual showing that such activity occurred.[37]

"[T]he existence of probable cause [is determined] under an objective standard without regard to the officer's subjective intent."[38] "In determining whether an officer . .. has probable cause for arrest, [courts] look to the objective information which the officer has."[39]

The Alaska statutes contemplate that a police officer will formally arrest a suspect.[40] But an "arrest" may be found in the absence of a police officer formally placing a person under arrest. An investigatory stop may become a de facto arrest when the "seizure exceeds the bounds of an investigative stop."[41] The Alaska Court of Appeals in this regard had directed that:

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[37] ***Yi v. Yang***, 282 P.3d 340, 345 (Alaska 2012) (quoting ***State v. Joubert***, 20 P.3d 1115, 1118-19 (Alaska 2001) (internal citations and quotation marks omitted)).

[38] ***Yi***, 282 P.3d at 347 (citing ***Devenpeck v. Alford***, 543 U.S. 146, 153-54 (2004); ***Bertilson v. State***, 64 P.3d 180, 185 (Alaska App. 2003); ***Joubert***, 20 P.3d at 1119).

[39] ***Martin***, 797 P.2d at 1214.

[40] AS 12.25.060 provides that:

> When making an arrest without a warrant, the peace officer shall inform the person to be arrested of the officer's authority and the cause of the arrest, unless the person to be arrested is then engaged in the commission of a crime, or is pursued immediately after its commission or after an escape.

AS 12.25.050 provides that: "An arrest may be made by the actual restraint of a person or by a person's submission to the custody of the person making the arrest."

[41] ***Howard***, 664 P.2d at 608 (quoting ***Royer***, 460 U.S. at 506). ***See also***, ***Pooley***, 705 P.2d at 1309; ***Haag v. State***, 117 P.3d 775, 779 (Alaska App. 2005).

> First, a court should examine the purpose for the detention and, specifically, the kind of criminal activity being investigated.
>
> Second, a court should examine whether the detention was for a limited and specific inquiry. That is, a court should ask whether the police were diligently pursuing a means of investigation that was likely soon to resolve whether a crime had occurred, or to soon resolve the issue of whether the suspect had participated in the crime.
>
> Third, a could should examine whether the detention was of brief duration – although, for these purposes, whether a detention will be brief must depend, in part, on what the police learn during the encounter. If the results of the encounter dispel the questions in the officer's mind, the detention can go no further ·· and any continued detention will constitute an improper stop or illegal arrest. If, on the other hand, the results of the encounter confirm the officer's suspicions or further arouse those suspicions, then the detention may justifiably be prolonged or its scope enlarged.
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> Fourth, a court should examine whether, during the detention, the police required the suspect to travel with them to another location. If the suspect is involuntarily transported a lengthy distance, or if the suspect is detained at another location for a lengthy period of time, the detention will be deemed an arrest.
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> And fifth, a court should examine the amount of force used by the police in effectuating the detention. The amount of force used in an investigative stop must be proportional to the risk reasonably foreseen by the officers at the time they make the stop.[42]

### 3. Decision

The court finds that Mr. Mulligan was "seized," without a warrant, at the point while still at his residence when Mr. Mulligan told Sgt. Cranford about his important SEARHC 9:00 a.m. appointment and Sgt. Cranford responded by telling him that if it looked like he would not make the appointment he would have the opportunity to call SEARHC to so advise.

Prior to that point: Mr. Mulligan knew that his daughter's Jeep was parked outside his residence and that the Jeep had substantial front-end damage; Sgt. Cranford had come to his home; Sgt. Cranford asked him who had been driving the damaged Jeep; he said he had and Sgt.

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[42] ***Haag***, 117 P.3d at 779-80 (citations omitted).

Cranford responded by telling him he would be read his rights and the Jeep would be impounded, and he wanted to interview them at SPD, alerting him that Sgt. Cranford was there investigating a serious matter; Sgt. Cranford would not allow him to speak privately in his own home with Ms. Mulligan, his daughter;[43] Sgt. Cranford had mirandized him; he had then said he had not been driving, and Sgt. Cranford correctly noted that he had changed his story; and, Sgt. Cranford had asked him to come to SPD for an interview, something he was willing to do. But Sgt. Cranford's response to his question about his SEARHC appointment in 68 minutes would have made it quite clear to a reasonable innocent person that Sgt. Cranford would not allow him to discontinue the police interview, potentially even if it was not finished by 9:00 a.m.

So, the question then is whether Sgt. Cranford had a lawful basis for "seizing" Mr. Mulligan. The court finds that he did for three reasons:

First, Sgt. Cranford had a lawful basis for subjecting Mr. Mulligan to an "investigatory stop" as a material witness based on the present exigent circumstances.

Said circumstances included: SPD was investigating very serious crimes[44] – Sgt. Cranford had probable cause to believe that a bicyclist, Mr. Carlson, while biking on Halibut Point Road had been struck within the past approximately two hours by Ms. Mulligan's 2008 Jeep Compass, causing life threatening injuries to Mr. Carlson, which had left the scene without stopping and had been driven by either Ms. Mulligan or Mr. Mulligan;[45] SPD's investigation was

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[43] The court is not finding that Sgt. Cranford did not have related valid evidentiary concerns.

[44] The crimes, depending on the outcome of the investigation could have included: Assault 1st Degree (AS 11.41.200(a)(1) (A felony) and failing to comply with the duties of an operator of a vehicle involved in an accident resulting in injury or death of a person (AS 28.35.050, 060) (punishable by up to 10 years in jail and a fine of up to $10,000). And could have included one or more homicide charges if Mr. Carlson succumbed to his injuries.

[45] Mr. Mulligan's briefing, evidentiary hearing questions, and evidentiary hearing arguments reflect that he contends Sgt. Cranford did not have a valid evidentiary basis to even come to his residence on March 8, 2021. The record clearly demonstrates that the initial phase of SPD's investigation had expeditiously, effectively, and legally resulted in a focus on Ms. Mulligan's Jeep and Mr. Mulligan's residence, and once Officer Chandler and Sgt. Cranford arrived at his

just beginning; this was SPD's first contact with Mr. Mulligan and Ms. Mulligan; her Jeep was found parked outside Mr. Mulligan's residence; the car had sustained significant damage; Mr. Mulligan had initially said he had been driving the Jeep; Mr. Mulligan asked to speak with Ms. Mulligan, evidently privately, when Sgt. Cranford told him he would be read his rights and the Jeep would be impounded; then a few moments later after Mr. Mulligan had been mirandized, he said he had not been driving; and, SPD needed to determine whether Mr. Mulligan and/or Ms. Mulligan had been in her Jeep when it struck Mr. Carlson and which of the two was driving.

Second, Sgt. Cranford did not formally arrest Mr. Mulligan, and the investigatory stop did not develop into an arrest, based on the following: the serious crimes being investigated; the exigent circumstances discussed above; the detention was for a limited and specific inquiry – who had been in Ms. Mulligan's Jeep and who had been driving; Mr. Mulligan had expressed his willingness, after being mirandized, to speak with Sgt. Cranford about these matters; the place of detention – SPD – was only 1-2 miles away, a drive of approximately 5 minutes; the period of detention was brief in view of the need for and purpose of the interview and what Sgt. Cranford learned from Mr. Mulligan during the interview, which ended once Mr. Mulligan had provided his pertinent information; and, Sgt. Cranford did not use any force during this contact with Mr. Mulligan – he never drew or referred to a weapon, he did not search Mr. Mulligan, he did not place Mr. Mulligan in restraints, he allowed Mr. Mulligan to bring his coffee, he allowed Mr. Mulligan to bring his cellphone, and he allowed Mr. Mulligan to use his cellphone.

Third, if it were somehow determined on the basis of the present record that Mr. Mulligan had been "arrested," Sgt. Cranford, regardless of his subjective intent, objectively had probable cause to arrest Mr. Mulligan for one or more crimes - felony assault and leaving the

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residence they found her Jeep parked next to the residence, with a tarp hiding at least the windshield damage, and saw that the front of the Jeep and driver's side windshield were

scene as discussed above - at the point that Mr. Mulligan said he had been driving based on the totality of the facts stated above.[46]

### b. First March 8, 2021 SPD Contact - Voluntary

#### 1. Parties' Positions

Mr. Mulligan claims that his statements to Sgt. Cranford during their first March 8, 2021 interaction must be suppressed, regardless of whether he had been unlawfully "seized" or not, because his statements were not made voluntarily because he was threatened with not making his 9:00 SEAHRC appointment. The State counters that his statements were voluntarily made.

#### 2. Applicable Law

The Alaska Supreme Court has held that:

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substantially damaged, consistent with what SPD had found and learned at the incident scene. And they contacted Ms. Mulligan outside by her car and saw that she had bandages on her hands. [46] Evidence that Ms. Mulligan's Jeep had been involved in the hit and run, the Jeep was found parked at Mr. Mulligan's residence a relatively short time later, and he told Sgt. Cranford he had been driving it, in context, meaning driving when it was damaged.

Three additional points merit mention. First, Mr. Mulligan has not shown that he has standing to raise any issues concerning Ms. Mulligan, including her being "seized," but Sgt. Cranford also could lawfully subject her to an investigatory stop and could also have lawfully arrested her. Second, Mr. Mulligan claims that Sgt. Cranford violated his right under AS 12.25.150(b) to "immediately after an arrest" telephone an "attorney and any relative or friend." No such violation occurred as, per the above discussion, he was not arrested, and he if he was arrested, he had his cellphone with him at all pertinent times and was able to call whomever he wanted whenever he wanted, and did so. And, in any event, suppression is not an available remedy for such a claimed violation as he has not argued or shown that his ability to exercise his related constitutional rights or to prepare or present a defense were prejudiced. ***See***, ***Winfrey v. State***, 78 P.3d 725, 730 (Alaska App. 2003). Third, he claims that the PBT was unlawful per AS 28.35.031(a), but AS 28.35.031 – Alaska's DUI implied consent statute – does not sets forth the only circumstances in which a breath test can be administered, particularly when the person being tested, Mr. Mulligan in this case, voluntarily took the PBT. Finally, the court notes that if the PBT results somehow are subject to suppression the same basically nets Mr. Mulligan nothing as the results were negative and he is not claiming that his statements to Sgt. Cranford were involuntary because he was intoxicated.

> A confession is not admissible into evidence unless it is voluntary. In determining whether a confession is the product of a free will or was the product of a mind overborne by coercion the totality of the circumstances surrounding the confession must be considered.[47]

The State "must prove the voluntariness of the confession by a preponderance of the evidence."[48]

This totality of the circumstance test requires that:

> First, a court must find the external, historical facts surrounding the confession [statement]. Second, the court must infer the defendant's mental state from the external, historical facts. Third, the court must assess the legal significance of the inferred mental state. . . Among the circumstances to consider are "the age, mentality, and prior criminal experience of the accused, the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."[49]

The Alaska Supreme Court has "recognized that 'certain improper conduct is so coercive as to render a ***Miranda*** warning involuntary without regard to the totality of the circumstances.'"[50] Such improper conduct can include threats of violence, and threat of harsher treatment if a person does not confess.[51]

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[47] ***Beavers v. State***, 998 P.2d 1040, 1044 (Alaska 2000) (quoting ***Sovalik v. State***, 612 P.2d 1003, 1006 (Alaska 1980) (quoting ***Ladd v. State***, 568 P.2d 960, 967 (Alaska 1977)).

[48] **Id.** ***See also***, ***Vent v. State***, 67 P.3d 661, 664 (Alaska App. 2003).

[49] ***Jones v. State***, 65 P.3d 903, 906 (Alaska App. 2003) (quoting ***Sprague v. State***, 590 P.2d 410, 414 (Alaska 1979) (quoting ***Brown v. United States***, 356 F.2d 230, 232 (10th Cir. 1966)).

[50] **Id** (quoting ***Webb v. State***, 756 P.2d 293, 297 (Alaska 1988)). In ***Webb*** the police officer had taken the defendant's driver's license and conditioned it being returned on the defendant making a statement to the police – which required that he chose between his constitutional right to remain silent and the loss of a constitutionally protected property interest. Other such improper conduct includes a false promise of confidentiality or immunity. ***See***, ***Jones***, 65 P.3d at 907-08; ***Carney v. State***, 249 P.3d 308, 312-13 (Alaska App. 2011).

[51] ***See***, ***Beavers***, 988 P.2d at 1044 (threats of violence) and 1045-46 (the police officer told a 16-year old seated in a patrol vehicle who was suspected of involvement in a series of robberies that he would be "hammered" if he tried to hide the truth about the robberies. The Court found this in effect resulted in the police telling the defendant that he would be punished for exercising his fundamental right to remain silent.), and that his subsequent statements must be suppressed even though he had been mirandized and told he could leave at any time.).

## 3. Decision

The State has shown that Mr. Mulligan's statements to Sgt. Cranford during their first interaction on March 8, 2021 were voluntary for two reasons.

First, the State has shown that Sgt. Cranford did not engage in the type of conduct which results in a per se finding of lack of voluntariness.

Sgt. Cranford did not threaten Mr. Mulligan with violence. Nor did he threaten Mr. Mulligan with an increased penalty if he did not speak with the police.

With regards to the SEARHC appointment, and presuming requiring a person in Mr. Mulligan's circumstances to choose between missing a scheduled pre-op medical appointment and speaking with the police comes within the scope of the per se involuntariness rule, Sgt. Cranford did not explicitly or implicitly threaten that Mr. Mulligan would only make the appointment if he talked with the police.[52]

Sgt. Cranford did not specifically tell Mr. Mulligan he could go to the SEARHC appointment only if he first agreed to be interviewed by Sgt. Cranford.

Mr. Mulligan's conversations with Sgt. Cranford about this matter are somewhat ambiguous. It appears they understood that if the interview was still in progress at the time of the appointment, then Mr. Mulligan could go to appointment and return to SPD to complete the interview. The other possibility is that they understood that Mr. Mulligan would miss the appointment if the interview was still in progress at the time of the appointment, though he could

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[52] The court notes that Mr. Mulligan has not claimed that Sgt. Cranford asking to keep his cellphone in order to retrieve the video created a ***Webb*** type situation.

certainly call and try to reschedule. In either scenario there is simply no threat that Mr. Mulligan could only make the appointment if he spoke with Sgt. Cranford.[53]

Finally, the court notes that Mr. Mulligan was quite willing to be interviewed by Sgt. Cranford and, per Mr. Mulligan's hearing testimony, he knew that it was "iffy" whether he would make the SEARHC appointment and he did not care as much about missing the appointment as he did about his getting through the "brief moment" -- the interview – with Sgt. Cranford.

Second, application of the three-part voluntariness test shows that Mr. Mulligan voluntarily spoke with Sgt. Cranford during their first interaction on March 8, 2021.

With regards to the first step – the external, historical circumstances surrounding Mr. Mulligan's statements to Sgt. Cranford – the same show that Mr. Mulligan's statements were the product of his free will and not the result of his mind being overborne by police coercion.

Mr. Mulligan was 70 years of age, a commercial fisherman who owned his own vessel, he owned his own home, he was of at least average intelligence, he was not under the influence of anything, he had slept the night before, and he had limited prior police contact, evidently consisting of a DUI matter during which he was mirandized and effectively exercised his right to remain silent.

The pertinent circumstances at Mr. Mulligan's residence are: Mr. Mulligan was contacted by two uniformed police officers at his home; both had arrived in patrol vehicles; he knew Sgt. Cranford; Sgt. Cranford asked if they could enter the residence, and he agreed; he was generally aware why the officers were there as he had seen Ms. Mulligan's damaged Jeep parked next to his residence and her injuries; he knew he had not been driving the Jeep; Sgt. Cranford's

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[53] The court again notes the above discussed exigent circumstances.

procedural approach was reasonable – he was investigating a very serious incident involving the Jeep, he asked Mr. Mulligan who had driven the Jeep and he responded that he had, Sgt. Cranford told Mr. Mulligan and Ms. Mulligan that her Jeep would be impounded and he mirandized both of them, he asked Mr. Mulligan to come to SPD for an interview, and he would not allow Mr. Mulligan and Ms. Mulligan, potential suspects or witnesses, to confer privately though he advised they could speak in his presence; Sgt. Cranford honored Ms. Mulligan's invocation of her right to remain silent; Sgt. Cranford pointed out that Mr. Mulligan had changed his story when he said he had not been driving, but he did not accuse him of any crime or threaten any punishment; Sgt. Cranford did make or offer any inducements; Mr. Mulligan agreed to go to SPD to be interviewed; Sgt. Cranford – as discussed above- did not threaten Mr. Mulligan that he would miss his SEARHC appointment if he did not agree to the interview; Sgt. Cranford asked Mr. Mulligan to go with him in his patrol car, and Mr. Mulligan agreed; Sgt. Cranford did not search Mulligan or place him in restraints; Mr. Mulligan had his cellphone and his coffee; and, Sgt. Cranford indicated to Mr. Mulligan that he was riding in back because Sgt. Cranford had gear on the front seat.

The pertinent circumstances concerning the drive to SPD are: Mr. Mulligan was not in any restraints; he had his coffee and cellphone; the drive was 1-2 miles; the drive lasted some 5 minutes; Sgt. Cranford did not actively interrogate him during the drive, though he did volunteer information; and, Sgt. Cranford made no threatening statements, including with respect to the SEARHC appointment, and offered no inducements.

The pertinent circumstances at SPD are: the interview took place in SPD's interview room; Sgt. Cranford was the only SPD officer present; Mr. Mulligan was not searched and he was not placed in any restraints; he had his coffee and cellphone; he made a phone call –

to Ms. Taylor – when he wanted to do so, without first asking for permission from Sgt. Cranford; Sgt. Cranford did not offer any inducements and did not make any threatening statements, including with respect to the SEARHC appointment; Mr. Mulligan appeared to be quite willing to speak with Sgt. Cranford; and, the interview was relatively brief - it was completed, including the PBT, and Mr. Mulligan returned home in sufficient time for him to attend the 9:00 a.m. SEARHC appointment.

Other pertinent circumstances include: neither Sgt. Cranford nor Officer Chandler brandished or referenced any weapon; neither raised their voices; and, Sgt. Cranford was cordial with Mr. Mulligan throughout their interactions.

With regards to the second step, inferring[54] Mr. Mulligan's mental state: Mr. Mulligan knew that Mr. Mulligan's Jeep, parked next to his residence, had sustained significant front-end damage, he had found her in the back seat, and he had seen and tended to her hand injuries; he did not know that Ms. Mulligan's Jeep had struck a bicyclist causing life-threatening injuries and had not stopped at the scene; he did not know whether she had been driving or was a passenger, though he suspected she had been driving; he knew he had not been the driver; he told Sgt. Cranford at the outset that he had driven because he thought the police were investigating a minor matter, such as Ms. Mulligan driving without insurance, and he was willing to protect her from that; but once he was aware that the police were investigating a more serious matter, though he did not know what, he was not willing to cover for her and he said he had not driven the Jeep; he knew he was a witness and was probably being interviewed as such; he thought that Ms. Mulligan would need to own up to whatever she may have done; and, he was quite willing to tell Sgt. Cranford what he knew concerning the same.

With regards to the third step, the legal significance of Mr. Mulligan's inferred mental state, the same, and the totality of the circumstances, clearly show that Mr. Mulligan's statements to Sgt. Cranford during their first interaction on March 8, 2021 were voluntary.

### c. Second March 8, 2021 SPD Contact - Voluntary

#### 1. Parties' Positions

Mr. Mulligan contends that his statements to Sgt. Cranford, including his consent to search his garbage can, during their second contact on March 8, 2021 were involuntary due to the taint lingering from the circumstances that had warranted the suppression of his statements made during their first interaction that day. The State counters that there was no such taint and Mr. Mulligan's statements during this contact were voluntary.

#### 2. Applicable Law

When a court has found that a violation requiring suppression of statements made during a first police interview had occurred, the test for whether said violation also requires the suppression of statements made during a second police interview is whether the person's "decision to submit to the second . . . interview[ ] was 'sufficiently an act of free will to purge the . . . taint' of the . . . violation at the first interview."[55]

A court deciding a "taint" claim should consider the following factors:

> the purpose and flagrancy of the initial illegal act, the amount of time between the illegal act and the defendant's subsequent statement, the defendant's physical and mental condition at the time of the subsequent statement, whether the defendant remained in custody or was at liberty during this interval, whether the defendant had the opportunity to contact legal counsel or friends during this interval, whether the subsequent interview took place at a different location, whether the defendant's interrogators were the same officers who committed the prior illegal

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[54] The court notes that the court has the benefit of Mr. Mulligan's related hearing testimony.

[55] ***Halberg v. State***, 903 P.2d 1090, 1097 (Alaska App. 1995) (quoting ***Brown v. Illinois***, 422 U.S. 590, 602 (1975)). ***See also***, ***Kalmakoff v. State***, 257 P.3d 108, 124-26 (Alaska 2011).

> act, whether the evidence obtained from the prior illegal act affected the defendant's decision to submit to a subsequent interview, whether the police used lies or trickery to influence the defendant's decision and whether there were other intervening events that affected the defendant's decision.[56]

### 3. Decision

The court need not address this claim because the court's above-findings results in their being no "taint" to consider.

To the extent that it is somehow determined that there was a "taint" from Sgt. Cranford's first interview with Mr. Mulligan, his decision to submit to the second interview was the product of his own free will, which purged said "taint."

The court bases this finding on the following: presuming Sgt. Cranford's conduct during the first contact with regards to the SEARHC appointment (the basis for Mr. Mulligan's related claim) is the basis for the suppression causing the claimed "taint," his conduct was not extremely egregious and was part of his reacting to exigent investigatory circumstances; the second interview occurred approximately two hours after the first interview; Mr. Mulligan was still sober and well-rested; he had learned in the interim that the Jeep had been involved in a hit and run incident; he was at liberty during the interval; he had the opportunity to call friends and an attorney, and had, at a minimum, communicated with the mother of Ms. Mulligan; the second interview occurred at his residence; Sgt. Cranford and, to a much lesser extent, Officer Chandler, were involved in both interviews and both were cordial with Mr. Mulligan throughout both interviews; the police did not use any lies or trickery; and, Mr. Mulligan's statements during the first interview did not materially affect his decision to speak with the police the second time.

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[56] **Id.** at 1098.

With regards to the last point – the effect of Mr. Mulligan's statements during the first police interview - the court notes that: Mr. Mulligan knew that the police were independently aware that Ms. Mulligan's Jeep had been involved in the hit and run, and sustained significant related damages, the Jeep was found at his residence, Ms. Mulligan was found at his residence, she had injuries to her hands, and he had told the police both that he had driven and then that he had not driven the Jeep;[57] he also knew he had not been driving the Jeep and thought that he was being interviewed as a witness; he thought that Ms. Mulligan should own up to what she had done; and, though the officers had referenced what they had learned as a result of their prior contact, including from watching the video he had provided, he was quite willing to speak to the police and would have done whether or not the same had been mentioned.[58]

Mr. Mulligan does not appear to be claiming that his statements to Sgt. Cranford during their second interaction on March 8, 2021 were involuntary independent of the claimed "taint" from their first interaction. To the extent he somehow has made this claim, the State has shown that these statements were voluntary – based on the court's above findings with respect to both interactions and also noting that: neither SPD officer used or reference a weapon during this brief second interaction; Mr. Mulligan was not searched; he was not placed in restraints; the officers were cordial during this interaction; and, the officers did not threaten him or offer him any inducements.

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[57] Mr. Mulligan made these statements during the first contact before any mention was made of his SEARHC appointment and would not be suppressed if he had prevailed on his related claim.

[58] This analysis includes Mr. Mulligan's consent to allow the police to search his garbage can, located outside his residence. The State has shown that he gave unequivocal permission for the search and the same was untainted by any duress or coercion. ***See, Nason v. State***, 102 P.3d 966, 971 (Alaska App. 2004).

### d. March 10, 2021 – Right to Remain Silent

#### 1. Parties' Positions

Mr. Mulligan claims that all of his statements to the police, including his consent to the search of his truck for the car parts, made after he invoked his right to remain silent must be suppressed, as must the car parts the police retrieved from his truck, because the police violated his right to remain silent. The State disagrees.[59]

#### 2. Applicable Law

The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." Article I, § 9 of the Alaska Constitution provides that "No person shall be . . . compelled in a criminal proceeding to be a witness against himself."[60]

"'A criminal suspect's right to remain silent in the face of police interrogation represents one of the most fundamental aspects of our constitutional jurisprudence.'"[61] "[T]he privilege against self-incrimination is . . . 'enforceable in any setting where a suspect is subject to custodial police interrogation.'"[62] "Both the United States and the Alaska Constitutions require

. . . . . .

[59] The State did not address this specific claim in its Opposition because Mr. Mulligan did not make it until his Reply, but it is evident from what occurred during the evidentiary hearing that the State opposes this claim, and contends that no violation of his related rights occurred, primarily because he was not in custody and also because he volunteered statements.

[60] The Alaska appellate courts have held that Article I, § 9 of the Alaska Constitution is to be interpreted more broadly than its analogue in the U.S. Constitution, the Fifth Amendment. ***See, Scott v. State***, 519 P.2d 774, 785 (Alaska 1974); ***Diggs v. State,*** 274 P.3d 504, 507 (Alaska App. 2012); ***Munson v. State***, 123 P.3d 1042, 1049 (Alaska 2005); ***Olson v. State***, 262 P.3d 227, 231 (Alaska App. 2011). So, the court in this analysis is focusing primarily on Alaska law.

[61] ***Kalmakoff***, 257 P.3d at 119 (quoting ***Beavers***, 998 P.2d at 1045).

[62] **Id.** (quoting ***Munson***, 123 P.3d at 1047) (citations omitted).

that, prior to a custodial interrogation, a suspect be informed of his right to remain silent and his right to counsel."[63]

A person is in "custody" if a reasonable person in their position would not have felt that they were "at liberty to terminate the interrogation and leave."[64] In making this determination, the court considers: the pre-interrogation events (i.e. how the person got to the place of questioning); the circumstances of the interrogation[65]; and, post-interrogation events (i.e. whether the defendant was allowed to leave or was arrested).[66] The court must consider the totality of the circumstances on a case-by-case basis, with no single factor being dispositive.[67]

Statements subject to suppression must be the product of interrogation. "Interrogation" means "express questioning or its functional equivalent."[68] "Functional equivalent" means:

> . . . words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.[69]

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[63] ***Olson***, 262 P.3d at 230. ***See also, Kalmakoff v. State***, 257 P.3d at 120.

[64] ***State v. Smith***, 38 P.3d 1149, 1154 (Alaska 2002); ***Shay v. State***, 258 P.3d 902, 904-05 (Alaska App. 2011); ***McBath v. State***, 108 P.3d 241, 248-49 (Alaska 2005).

[65] For example, when and where the interrogation occurred, how long the interrogation lasted, how many police were involved, what was said, whether any physical restraint was used, whether weapons were drawn or a guard posted at the door, and whether the defendant was questioned as a suspect or a witness. ***See, Kalmakoff***, 257 P.3d at 121; ***Smith***, 38 P.3d at 1154; ***Hunter v. State***, 590 P.2d 888, 895 (Alaska 1979).

[66] ***Smith***, 38 P.3d at 1154. (citing ***Hunter,*** 590 P.2d at 895).

[67] ***Smith,*** 38 P.2d at 1154-55.

[68] ***Beagel v. State,*** 813 P.2d 699, 705 (Alaska App. 1991) (quoting ***Rhode Island v. Innis,*** 446 U.S. 291, 300 (1980)).

[69] **Id.** (quoting ***Rhode Island v. Innis,*** 446 U.S. at 300-01). ***See also, Balthazor v. State***, 653 P.2d 662, 664 (Alaska App. 1982).

This definition "extends only to words or actions which the officers 'should have known' were reasonably likely to elicit [an incriminating] response" and "[a]ny knowledge which the police have of an 'unusual susceptibility' of the defendant is taken into account in determining whether they should have known their actions would elicit [an incriminating] response."[70]

The foregoing ***Miranda*** rule does not apply to "volunteered statements."[71]

**3. Decision**

**A. Custody**

The court finds that Mr. Mulligan was in "custody" by the point that Sgt. Cranford mirandized him, he clearly stated that he understood his rights and that did not want to speak with the officers and Sgt. Jamison-Ewers responded by asking him if he understood he was now a suspect and telling him that he was in trouble. A reasonable person in his position at that point would not have felt at liberty to terminate the interrogation.

The "custody" finding is based on the following circumstances: Mr. Mulligan had been mirandized twice before – in 2016 and on March 8, 2021 – and in the first instance the police had honored his invocation of his right to remain silent and in the second he had agreed to speak with Sgt. Cranford but he had contemporaneously seen Sgt. Cranford honor Ms. Mulligan's invocation of her right to remain silent; he was questioned by Sgt. Cranford on March 8, 2021 primarily as a witness, with respect to the serious hit and run itself, and he understood as much; five or six police in uniform and patrol vehicles with overhead lights flashing arrived at his residence on March 10, 2021 at night, with more than one officer carrying a long-rifle; the officers loudly proclaimed as they entered that they had a search warrant and began "clearing"

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[70] **Id.** (citing ***Rhode Island v. Innis,*** 446 U.S. at 302, 302 n. 8).
[71] ***McCracken v. State,*** 914 P.2d 893, 896 (Alaska App. 1996).

rooms in the residence; Sgt. Jamison-Ewers had told he and Ms. Mulligan that they were free to go, but if they stayed they had to do as directed by the police, which meant sitting at the dining room table; Mr. Mulligan's knee situation – apparent to the officers- meant that it would be very difficult for him to actually leave; he then heard Sgt. Cranford and Sgt. Jamison-Ewers tell Ms. Mulligan that she could not leave; he was seated with an officer standing right behind him with legs spread holding a long rifle; he had been forcefully instructed by Sgt. Jamison-Ewers to remove his "knives;" Sgt. Jamison-Ewers had told him, correcting a statement made by Sgt. Cranford, that the police may be there a lengthy period of time; Sgt. Cranford had mirandized him; he had stated in response that he understood his rights and he did not want to speak with the officers; and, Sgt. Jamison-Ewers had responded by asking him a question - if he understood that he is now a suspect and telling him that he was in big trouble, reasonably indicating that the police would not honor his invocation of his right to remain silent.[72]

**B. <u>Interrogation</u>**

As noted above: Sgt. Cranford properly informed Mr. Mulligan of his right to remain silent; he said he understood his rights and expressly and unequivocally invoked his right to remain silent.

The officers responded by interrogating him. Sgt. Jamison-Ewers had asked him at the point the court has found that he was in "custody" if he knew he was now a suspect and

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[72] The court is not finding that the police engaged in any improper conduct to this point. Rather, the record reflects that the police employed normal procedures given the circumstances. The court also notes that Sgt. Jamison-Ewers and Sgt. Cranford had decided prior to interacting with Mr. Mulligan that they should mirandize him because he was now a suspect with respect to new possible charges related to but independent of the charges Ms. Mulligan was or would be facing. The State argued at the conclusion of the evidentiary hearing that the ***Miranda*** warnings were not necessary and were provided out of an abundance of caution, but neither Sgt. Cranford or

told him he was in trouble, potentially "in big trouble." Sgt. Cranford interrogated him by telling him that he and Ms. Mulligan should cooperate with their search by telling them where to find the clothes she was wearing at the time of the hit and run incident or they would seize every item of clothing that came within the scope of the warrant[73] Sgt. Cranford then interrogated him by telling him they were there for more than the clothing, and what Ms. Enloe had said about his taking the car parts.[74] Sgt. Jamison-Ewers, in response to Mr. Mulligan's statements that what Sgt. Cranford had just said were not true, interrogated him further by telling him that the District Attorney could see it that way if the matter was not handled delicately, that he could be charged with tampering with evidence, a felony.[75] Mr. Mulligan provided an incriminating response, and Sgt. Jamison-Ewers responded by questioning him about the car parts. Mr. Mulligan responded with more incriminating statements, including that the car parts were in his truck. Sgt. Jamison-Ewers then asked Mr. Mulligan if the police could search his truck for the parts and Mr. Mulligan said the police could. Mr. Mulligan thereafter made additional incriminating statements in response to questions and police interrogation.

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Sgt. Jamison-Ewers testified that they did not think mirandizing Mr. Mulligan was required under the circumstances.

[73] This clearly was a statement intended to elicit statements. Sgt. Cranford had a legitimate procedural reason for asking such a question in general -- to focus and shorten the search. But a response clearly would also often be inculpatory as the person would thereby be admitting that they know that the item(s) being searched for is or are present, and where the same can be located.

[74] The court is not finding that an officer reading a search warrant to a person whose residence is being searched is an improper procedure. It is not. But in the circumstances of this case these statements to Mr. Mulligan constituted interrogation – they were accusatory statements that Sgt. Cranford should know were reasonably likely to elicit an incriminating response from the suspect, Mr. Mulligan.

[75] Again, in the court's view, a statement Sgt. Jamison-Ewers should have known was reasonably likely to elicit an incriminating response from Mr. Mulligan.

## C. Violation of Right to Remain Silent

The police, given the foregoing, violated Mr. Mulligan's right to remain silent.

The police at no time after Mr. Mulligan invoked his right to remain silent asked as he was making the incriminating statements in response to the police interrogation whether he had changed his mind and had decided to waive his right to remain silent and to talk with the police. The mere fact that he did make incriminating statements in response to said interrogation instead of remaining silent does not show that he had made a knowing, intelligent and voluntary waiver of his right to remain silent.

Given the foregoing, all of Mr. Mulligan's statements after he was in custody, including his consent to the search of his truck for the car parts, must be suppressed, as must the car parts, unless the search was authorized by 1SI-21-22 SW.

### e. 1SI-21-22 SW

Mr. Mulligan claims that 1SI-21-22 SW did not authorize the police to search his truck. The State did not address this claim in its Opposition, likely because Mr. Mulligan did not raise it until his Reply. And the State did not specifically argue during the evidentiary hearing that his truck was within the scope of 1SI-21-22 SW. The court can decline to address this claim as it was made in the Reply, but the court doing so, under the circumstances, would work to the benefit of the party who delayed making the claim until the Reply, to which the State is not entitled to file a response. So, the court is addressing the claim.

Article I, section 14 of the Alaska Constitution and the Fourth Amendment, as noted above, in part require that search warrants "particularly describe[ ] the place to be searched." The purpose of this requirement is to prevent the police from conducting

"'generalized or overbroad searches or seizures'"[76] and to "reinforce the fundamental rule that seizure of property cannot be permitted in the absence of probable cause," and it provides notice of the scope of the officer's lawful authority to search to the owner of the premises.[77] The "required degree of particularity is difficult to state with precision" and "'is determined by the totality of the circumstances."[78]

1SI-21-22 SW does not mention Mr. Mulligan's truck. There was testimony during the search warrant application hearing before Judge Pate that the vehicle parts were in Mr. Mulligan's truck when he left Ms. Enloe's residence, but neither Officer White nor Sgt. Cranford testified that there was probable cause to believe that the parts were still in his truck, and Judge Pate was not called upon, and did not make, a probable cause finding that the same were in the truck. So, 1SI-21-22 SW expressly authorized SPD to search only "107 Shelikof Way," Mr. Mulligan's residence, for the vehicle parts and pieces. Thus, Mr. Mulligan's truck was not within the scope of locations to be searched in 1SI-21-22 SW, and 1SI-21-22 SW did not authorize the police to search his truck.

Mr. Mulligan cited the Alaska Court of Appeals' unreported decision in ***Cabral v. State***[79] in his Reply and during his argument at the conclusion of the evidentiary hearing. The Court in ***Cabral*** found that the seizure of evidence from a vehicle pursuant to a warrant which authorized the search of a residence but did not mention the vehicle was permissible under the inevitable discovery doctrine – that the police would have utilized certain proper and predictable evidentiary procedures to obtain this evidence had the officer realized that the search warrant did

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[76] ***Cleveland v. State***, 469 P.3d 1215, 1216 (Alaska App. 2020) (quoting ***Jones v. State***, 646 P.2d 243, 248 (Alaska App. 1982)).

[77] ***Namen v. State***, 665 P.2d 557, 560 (Alaska App. 1983).

[78] ***Cleveland***, 469 P.3d at 1216-17 (quoting ***Namen***, 665 P.2d at 560).

not cover the vehicle – which was parked below the defendant's residence – as the officer would have reapplied for the warrant, including the vehicle, and there would have been probable cause to support authorizing a search of the vehicle for the evidence.

Mr. Mulligan argues that ***Cabral*** is authority for the proposition that a warrant to search a residence does not include authorization to search a vehicle found at the residence. The court agrees.[80]

The court notes that the State in its Opposition provided a cursory argument that the inevitable discovery doctrine applies to certain other evidence at issue herein,[81] but has not made that claim with respect to a search of Mr. Mulligan's truck. To the extent that the court can and should address such a claim, the State has not shown that the doctrine applies. It reasonably appears that absent Mr. Mulligan's consent to the search of his truck the SPD officers would have searched his residence in vain for the car parts, and there could have been probable cause to believe that the parts were in his truck parked outside. The court could speculate that Sgt. Cranford or another SPD officer would have decided to then seek a search warrant for the truck, which would have been issued, but there is no direct evidence that Sgt. Cranford or any other SPD officer would have done so.

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[79] 2008 WL 110493 (Alaska App. January 9, 2008).

[80] The State has not cited and the court is not otherwise aware of legal authority for the proposition that search warrant authorization to search a residence necessarily includes the owner's vehicle parked on the road next to the residence (or in a driveway). And the court is considering ***Cabral*** for its persuasiveness, though it has no precedential value, per ***McCoy v. State***, 80 P.3d 757, 762-64 (Alaska App. 2002).

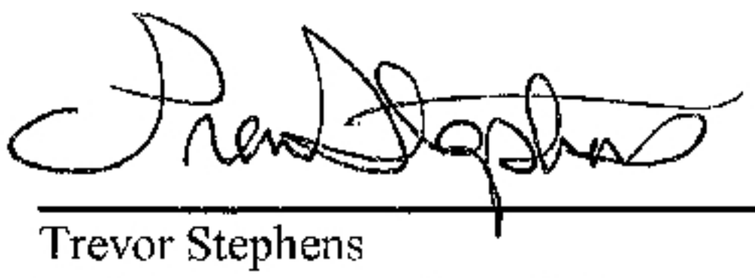
[81] The court was not required to address this doctrine in the context of that evidence given the court's findings on Mr. Mulligan's related claims. The court would not have addressed the doctrine in that context if the State had not prevailed on said claims because of the cursory

## IV. CONCLUSION

Mr. Mulligan's Revised Motion is denied with respect to all of his claims except that his right to remain silent was violated during his March 10, 2021 interaction with the SPD officers during the execution of 1SI-21-22 SW. All evidence obtained as a result of said violation – including his statements and the car parts seized from his truck – are suppressed.

**IT IS SO ORDERED.**

Dated at Ketchikan, Alaska this 10th day of April 2023.



Trevor Stephens
Pro Tem Superior Court Judge

briefing. ***See, Tuttle v. State***, 65 P.3d 884, 887 (Alaska App. 2002); ***Blair v. Federal Insurance Company***, 433 P.3d 1048, 1055 (Alaska 2018).

# Alaska Trial Courts

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**Case Title: SOA VS. MULLIGAN, RICHARD D**

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