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ADVANCE SHEET HEADNOTE
June 12, 2023

2023 CO 36

No. 22SA350, *People v. Smiley*—Custodial Interrogation—Miranda Rights—Self-Incrimination—Waiver—Voluntariness.

In this interlocutory appeal, the supreme court reviews the trial court's order suppressing the defendant's inculpatory statements made during a stationhouse interview. The trial court concluded that the defendant's waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, (1966), was involuntary. Based on the totality of the circumstances, including affirmative misrepresentations by the detectives immediately before they elicited the waiver, the supreme court affirms the trial court's order.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 36

Supreme Court Case No. 22SA350
Interlocutory Appeal from the District Court
Adams County District Court Case No. 21CR3054
Honorable Robert Walter Kiesnowski, Jr., Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Thorvyn Bullcalf Evan Smiley.

Order Affirmed
en banc
June 12, 2023

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JUSTICE HOOD delivered the Opinion of the Court, in which **JUSTICE GABRIEL**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE SAMOUR, joined by **CHIEF JUSTICE BOATRIGHT** and **JUSTICE MÁRQUEZ**, dissented.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 A man was found dead in Thornton, Colorado, and the police suspected homicide. Thornton detectives identified defendant, Thorvyn Bullcalf Evan Smiley, as the sole suspect and, after tracking him down in New Mexico, brought him to a police station there to collect certain samples from him pursuant to a court order.

¶2 After a brief initial chat, and long before executing the order, the detectives told nineteen-year-old Smiley that they needed to read him his rights. Seeing Smiley's obvious concern, they repeatedly reassured him that he wasn't in trouble and that he'd be leaving the police station that day. The detectives then advised Smiley of his rights under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Smiley signed a waiver and agreed to speak with the detectives. During the subsequent interrogation, Smiley confessed to killing the alleged victim.

¶3 As relevant to this interlocutory appeal under C.A.R. 4.1, one of the questions before the trial court was whether the prosecution had proved that Smiley voluntarily waived his *Miranda* rights. Based on the totality of the circumstances, the trial court concluded the answer was no, and it suppressed the statement. We affirm.

I. Facts and Procedural History

¶4 While investigating a suspected homicide in Thornton, police officers identified Smiley as the individual who was most likely responsible for the alleged victim's death and obtained a Crim. P. 41.1 order to collect buccal swabs, fingerprints, and palm prints.[1] Because Smiley was living in Farmington, New Mexico, at the time, three Thornton officers drove there and, with the help of local law enforcement, brought Smiley to a police station to execute the Colorado order. Before obtaining the samples, Detectives Hawkins and Silva interviewed Smiley in a room at the police station. The interview was audio- and video-recorded.

¶5 The detectives first introduced themselves, explaining they were from Colorado and wanted to discuss "an incident in Thornton that [they] think [Smiley] might have some information on." They asked Smiley if he had ever been in Thornton, and he said yes. They then discussed when and why he had been there. The exchange was casual and conversational.

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[1] Under Crim. P. 41.1(c), a court may issue an order for police officers to collect nontestimonial identification evidence from a suspect if the officers have "probable cause to believe that an offense has been committed; . . . reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named . . . in the affidavit committed the offense;" and believe the nontestimonial identification evidence will materially aid "in determining whether the person named in the affidavit committed the offense."

¶6 Just shy of two minutes into the interview, the detectives told Smiley they needed to explain his *Miranda* rights. The video recording shows that Smiley's demeanor changed upon hearing those words: he looked surprised. Detective Hawkins immediately said, "You're not in trouble. You are leaving here today." Detective Silva repeated, "You're leaving here today." And Detective Hawkins reiterated a third time, "You're leaving here today."

¶7 Detective Hawkins then explained that "just because we're from out of state and stuff like that, we just have to give you your *Miranda* rights." Detective Silva added that the *Miranda* advisement was "just a form and it's like on TV. You've probably seen. You know. It's basically the same thing." He then read the standard advisement form and said, "So what I need here . . . , basically, is your signature saying that you understand what I read to you." As Smiley took the pen to sign the form, Detective Hawkins asked, "Do you understand those rights?" Smiley said he did and signed the form. Detective Silva then pointed to another line and said, "And here is your answer if you want to talk to us." Smiley signed again, and the detectives interrogated him for about an hour, during which time Smiley confessed to killing the alleged victim. Soon after this confession, the third officer came into the room to execute the Crim. P. 41.1 order.

¶8 Smiley was arrested and charged with first degree murder, but the prosecution later amended the charge to second degree murder. In a pretrial

motion, Smiley moved to suppress the statements he made during the interrogation, asserting that both his alleged waiver of his rights and his subsequent statements were involuntary. The court held a hearing and, in its written order suppressing the statements, concluded that

> an affirmative misrepresentation about the gravity of a person's criminal exposure and the reckless disregard of the truth or falsity concerning an individual's freedom are inherently coercive and are the precise types of trickery and/or cajoling that the *Miranda* court observed would be the antithesis of a voluntary waiver of the privilege against self-incrimination.

¶9 The prosecution now appeals the trial court's suppression order.[2]

II. Discussion

¶10 After identifying the standard of review, we explain the Fifth Amendment right against self-incrimination and the Supreme Court's protection of that right in *Miranda*. We then discuss an individual's ability to waive the right and how courts should assess whether an alleged waiver was valid, focusing primarily on

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[2] The prosecution raises the following questions in this interlocutory appeal under C.A.R. 4.1(a):

> 1. Did the trial court err by concluding that the defendant's *Miranda* waiver was involuntary?
>
> 2. Was the defendant's waiver of *Miranda* voluntary, knowing, and intelligent?

how to determine if it was voluntary. Finally, we apply those standards to the facts in the case before us.

A. Standard of Review

¶11 A trial court's decision to suppress evidence presents a mixed question of fact and law. *People v. Ashford*, 2020 CO 16, ¶ 9, 458 P.3d 124, 126. We defer to the trial court's findings of fact so long as they are supported by competent evidence in the record, and we review the trial court's legal conclusions de novo. *People v. Humphrey*, 132 P.3d 352, 356 (Colo. 2006).

¶12 Here, the trial court suppressed the evidence because it found Smiley's waiver of his *Miranda* rights involuntary. Whether an alleged waiver was voluntary is a legal question subject to de novo review. *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002). Before reaching that key legal question here, however, it is helpful to first pause and consider the nature of the right at issue and the safeguards designed to protect it.

B. The Right to Avoid Compelled Self-Incrimination

¶13 The United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *accord* Colo. Const. art. 2, § 18. This right extends beyond trial and includes "official questions put to [a defendant] in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future

criminal proceedings." *People v. Coke*, 2020 CO 28, ¶ 12, 461 P.3d 508, 512 (alteration and omission in original) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)); *see also Miranda*, 384 U.S. at 444.

¶14 To protect an individual's rights under the Fifth Amendment, the Supreme Court requires police officers to adhere to certain procedural safeguards when subjecting someone to custodial interrogation.[3] *Miranda*, 384 U.S. at 444. These safeguards require officers to advise all suspects, before any questioning, that they have the right to remain silent; that anything they say can be used as evidence against them; and that they have the right to an attorney, either retained or appointed. *Id.*; *People v. Bonilla-Barraza*, 209 P.3d 1090, 1094 (Colo. 2009).

¶15 A suspect may, of course, waive these rights and choose to speak with law enforcement. *Miranda*, 384 U.S. at 444. To be valid, however, a waiver must be voluntary, knowing, and intelligent under the totality of the circumstances. *Id.*; *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The prosecution bears the burden of proving, by a preponderance of the evidence, that the waiver was valid. *Berghuis v. Thompkins*, 560 U.S. 370, 383–84 (2010); *Sanchez v. People*, 2014 CO 56, ¶ 13, 329 P.3d 253, 257.

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[3] The prosecution doesn't dispute that Smiley was in custody during the interrogation here or that *Miranda*'s safeguards applied.

¶16 A valid waiver has two essential components. *Moran*, 475 U.S. at 421. First, it must be voluntary; meaning, it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.*; *see also People v. Davis*, 2015 CO 36M, ¶ 18, 352 P.3d 950, 955. Second, it must be knowing and intelligent; meaning, it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421. For a waiver to be knowing and intelligent, "[t]he defendant need not understand every consequence of his decision to waive," *People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo. 2002); "[r]ather, the state must present evidence sufficient merely to 'demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him,'" *id.* at 1170 (quoting *People v. Daoud*, 614 N.W.2d 152, 159 (Mich. 2000)). *See also Colorado v. Spring*, 479 U.S. 564, 574 (1987) (concluding that the defendant's waiver was knowing and intelligent because "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege," and the defendant "understood that he had the right to remain silent and that anything he said could be used as evidence against him"); 2 Wayne R. LaFave et al., Crim. Proc. § 6.9(b) (4th ed. 2022) ("A waiver may be knowing and intelligent in the sense that there was awareness of the right to remain silent and a decision to forego that

right, but yet not knowing and intelligent in the sense that the tactical error of that decision was not perceived.”).

¶17 Because the voluntariness component is at issue here, we now more closely examine it.

C. The Voluntariness Component of the Waiver Analysis

¶18 Voluntariness in this context encompasses both the voluntariness of a suspect’s statements and the voluntariness of a suspect’s waiver. While these two forms of voluntariness are factually related, they are “analytically distinct.” *People v. Jiminez*, 863 P.2d 981, 984 n.3 (Colo. 1993); *see also State v. Williams*, 535 N.W.2d 277, 287 (Minn. 1995) (“Whether an accused has knowingly, intelligently, and voluntarily *waived* his right to remain silent and whether he has voluntarily *confessed* are two separate issues.”).

¶19 Here, we examine only the voluntariness of Smiley’s waiver, not his statements.

¶20 For a waiver to be involuntary, two circumstances must exist. First, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Colorado v. Connelly*, 479 U.S. 157, 167, 169–70 (1986) (applying the same “‘voluntariness’ inquiry in the *Miranda* waiver context [as] in the Fourteenth Amendment confession context”); *People v. Ferguson*, 227 P.3d 510, 513–14 (Colo.

2010). "The voluntariness of a waiver of this [Fifth Amendment] privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170. Overreaching can take the form of psychological coercion through affirmative deception. *See Miranda*, 384 U.S. at 476 (holding, in part, that a suspect may not be "threatened, *tricked*, or cajoled into a waiver" of constitutional rights (emphasis added)).

¶21 Second, the officers' conduct must have "played a significant role in inducing the defendant" to waive his rights. *Ferguson*, 227 P.3d at 513 (quoting *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004)). Absent a causal connection between the officers' conduct and the waiver, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164.

¶22 With this framework in mind, we review the effect of certain interrogation practices on the voluntariness of a *Miranda* waiver.

1. The Nature of Officer Conduct

¶23 In seeking a waiver of a suspect's *Miranda* rights, law enforcement officers sometimes withhold information or affirmatively misrepresent information they have about the case, such as the strength of the evidence against the suspect or the seriousness of the potential charges and outcomes. Because the law treats these omissions and commissions differently, we examine each.

¶24 *First, withholding information*: Officers are not required "to tell a suspect all the facts and circumstances which might affect the suspect's decision whether to waive his rights." *Humphrey*, 132 P.3d at 356 (quoting *People v. Pease*, 934 P.2d 1374, 1378 (Colo. 1997)). Thus, we generally don't consider it coercive for officers to withhold information such as the subject matter of the investigation, the strength of the evidence against the suspect, or the fact that the officers have already obtained an arrest warrant. *See, e.g.*, *id.* at 356, 358–59; *Pease*, 934 P.2d at 1378–79.

¶25 *Second, affirmative misrepresentations*: "The use of affirmative misrepresentations to break down a defendant's will is fundamentally different from the mere failure of police to provide information which concerns only the wisdom and not the voluntariness of a defendant's waiver decision." *Pease*, 934 P.2d at 1379. That said, affirmative misrepresentations by law enforcement officers don't always invalidate a waiver. For example, courts have generally concluded that misrepresentations "involving facts of which a defendant has firsthand knowledge," such as the existence or strength of evidence, don't necessarily constitute coercion that undermines the voluntariness of a suspect's waiver of his *Miranda* rights. LaFave, *supra*, at § 6.2(c); *see also* Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601, 616 (2006).

¶26 Likewise, courts have typically held that officers don't offend the Constitution or violate *Miranda* by attempting to create a false camaraderie with the suspect or by telling the suspect that someone else has already confessed. *See Frazier v. Cupp*, 394 U.S. 731, 737–38 (1969); *People v. Zadran*, 2013 CO 69M, ¶¶ 15–19, 314 P.3d 830, 834–35. However, when officers use this "false friend" tactic before advising a suspect of his rights or together with other coercive tactics, it may render the subsequent waiver or confession involuntary. *See People v. Honeycutt*, 570 P.2d 1050, 1055 (Cal. 1977) ("When the waiver results from a clever softening-up of a defendant . . . , the subsequent decision to waive without a Miranda warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a Miranda warning is deemed to be involuntary."); *State v. Baker*, 465 P.3d 860, 875–76 (Haw. 2020).

¶27 Despite offering law enforcement officers some latitude in seeking to elicit a waiver, the law takes a dimmer view of affirmative misrepresentations that directly undercut *Miranda*'s intended protections. *Spring*, 479 U.S. at 576 n.8 (explaining that affirmative misrepresentations can be "sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege"); *United States v. Pinto*, 671 F. Supp. 41, 58–60 (D. Me. 1987) (concluding that under the totality of the circumstances, the officer's implied promises of freedom, which were made just

before and during the *Miranda* advisement, "utterly vitiated any prophylactic effect of the *Miranda* warnings upon the voluntariness of defendant's subsequent statements"); *see also* LaFave, *supra*, at § 6.2(c) (condemning "trickery by 'a lie unrelated to the government's evidence of [the suspect's] guilt'" (quoting *Brisbon v. United States*, 957 A.2d 931, 945 (D.C. 2008))); Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 Tex. Tech L. Rev. 1239, 1265 (2007) (explaining that telling a suspect that making a statement can't hurt him is the type of lie "that directly undercut[s] the statements in the Miranda warnings [and] render[s] the warnings and waiver ineffective").

¶28 For example, courts typically hold that it is coercive for officers to falsely provide a suspect with "the assurance of more favorable treatment or the consequences of a particular conviction or admission." Marcus, *supra*, at 616; *see also Cardman v. People*, 2019 CO 73, ¶ 32, 445 P.3d 1071, 1081–82; *People v. Ramadon*, 2013 CO 68, ¶¶ 3–15, 23–25, 314 P.3d 836, 838–41, 843–44; *Collazo v. Estelle*, 940 F.2d 411, 414–19 (9th Cir. 1991) (concluding that discouraging the suspect from consulting with a lawyer and threatening that "it might be worse" if he doesn't confess constituted coercive conduct and rendered the suspect's waiver involuntary). Indeed, "[t]he harshest judicial language is usually found in cases

in which police officers tell suspects that if they confess they will be released immediately or very soon." Marcus, *supra*, at 616–17.

¶29 It is similarly coercive for officers to say or imply that harm will come to the suspect's friends or family unless they confess. *E.g.*, *People v. Medina*, 25 P.3d 1216, 1225–26 (Colo. 2001); *see also Lynumn v. Illinois*, 372 U.S. 528, 534 (1963); *Spano v. New York*, 360 U.S. 315, 321–24 (1959); *cf. People v. Madrid*, 179 P.3d 1010, 1016 (Colo. 2008) (acknowledging that affirmative misrepresentations can be coercive but concluding that the suspect's waiver was voluntary because the officer didn't "affirmatively misrepresent[] any facts, [seek] to minimize Madrid's culpability, or otherwise coerce[] Madrid into waiving his *Miranda* rights").

¶30 As these examples demonstrate, the difference between coercive and noncoercive misrepresentations is that when officers lie to a suspect about information related to the alleged offense, a suspect can more freely choose whether to speak or remain silent based on his own assessment of his actions and the risk to his own liberty. But when officers lie about things beyond the offense itself, the suspect loses his ability to weigh the risk of speaking against his knowledge of his own actions. Threats to the suspect's friends or family change the decision from an assessment of personal risk to a consideration of others' well-being, regardless of the suspect's guilt or innocence. Similarly, if a suspect is told he will go free even if he chooses to make a potentially inculpatory statement, he

no longer needs to consider possible risks because he has, in essence, been told there aren't any. *See, e.g.*, *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992) ("Inflating evidence of [the suspect's] guilt interfered little, if at all, with his 'free and deliberate choice' of whether to confess, for it did not lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police had garnered enough valid evidence linking him to the crime." (citation omitted) (quoting *Moran*, 475 U.S. at 421)).

2. The Timing of the Misrepresentation

¶31 In addition to the nature of the officers' conduct, the timing of any affirmative misrepresentation may be significant for determining voluntariness. Coercive conduct that occurs immediately before officers advise a suspect of their rights under *Miranda* is particularly troublesome because it is more likely to render the advisement ineffective. *See, e.g.*, *Ramirez v. State*, 739 So. 2d 568, 577 (Fla. 1999) (concluding that the suspect's waiver was involuntary because "[i]t is simply inappropriate for the police to make a representation intended to lull a young defendant into a false sense of security and calculated to delude him as to his true position at the very moment that the *Miranda* warnings are about to be administered"); *Honeycutt*, 570 P.2d at 1055 ("The self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive

and then offer the accused an opportunity to rescind that decision after a Miranda warning, than if they afford an opportunity to make the decision in the first instance with full knowledge of the Miranda rights.”).

¶32 A law review article provides a helpful analogy to explain why timing is so crucial. In that article, Professor Mosteller analogizes an individual subjected to custodial interrogation to someone floating unaided down a river. Mosteller, *supra*, at 1255–56. The *Miranda* advisement is a “lifeline”: the suspect can grab ahold and pull himself to dry land (invoke his rights) or he can throw the lifeline aside (waive his rights) and continue down the river into whatever dangers it may hold. *Id.* at 1256. But it is particularly troubling if, just before throwing the lifeline to the suspect, the officers say that the river is safe or that the lifeline is unnecessary; that is, if the officers “diminish[] the suspect’s interest in being saved before placing the lifeline in the suspect’s hand.” *Id.* at 1259. If the suspect is given a solid lifeline and nonetheless throws it away, the suspect’s subsequent statements are more likely to be found voluntary. But “if lies are told to the suspect before the Miranda warnings are ever given . . . courts should properly treat the pre-warnings situation as particularly sensitive and therefore legally critical because it precedes the suspect’s first opportunity for safety.” *Id.*; *see also id.* at 1265, 1270.

¶33 With these concepts in mind, we now consider the case before us.

D. Application

¶34 To determine the validity of Smiley's waiver, we must consider the totality of the circumstances, including but not limited to Smiley's age, education, background, and intelligence; his experience with the criminal justice system; how his *Miranda* rights were explained and when they were given; whether the detectives engaged in any potentially coercive conduct; and the timing of the alleged misconduct. *See, e.g.*, *Platt*, 81 P.3d at 1065–66; *see also Miller v. Fenton*, 474 U.S. 104, 116 (1985) (emphasizing that voluntariness must be analyzed by considering the circumstances "as applied to *this* suspect"). No single factor is determinative. *Platt*, 81 P.3d at 1065. And although the use of a single coercive tactic may not render a waiver invalid, the use of multiple coercive tactics may do so when considered collectively. *See Baker*, 465 P.3d at 876.

¶35 The detectives interrogated nineteen-year-old Smiley a year after the victim's death. At the time of the interrogation, Smiley was experiencing homelessness. He had recent experience with law enforcement, having been arrested twice in the two months before the interview, but not for any offense as serious as murder.

¶36 Smiley appeared calm when the detectives entered the interrogation room and began speaking with him. Before advising Smiley of his rights, the detectives asked him when he had last been in the Denver area and then what "took him" to

the Thornton area. The detectives were calm and spoke in a non-threatening manner.

¶37 But Smiley's facial expression changed as soon as the detectives said they needed to read him his *Miranda* rights. Seeing Smiley's reaction, the detectives immediately and repeatedly told Smiley he was not in trouble and would be leaving the police station that same day. They also said they only had to Mirandize him because they were from out of state. The detectives then read the *Miranda* advisement, and Smiley signed the waiver form. By telling Smiley that he was not in trouble and that he would be leaving the police station that day, the detectives were engaging in a form of psychological coercion for which the law has less tolerance.

¶38 The statements were not simply omissions of information; they were affirmative misrepresentations apparently employed to trick Smiley into waiving his rights and making inculpatory statements.[4] The detectives knew that forensic evidence from the crime scene made Smiley their sole suspect; that's why they wanted to obtain his statement while they were in New Mexico. In her affidavit

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[4] Although this court has previously held that it is unconstitutional for police officers to use a Crim. P. 41.1 order executed on less than probable cause as "a ruse intended to put the defendant in a position where he might talk," *People v. Harris*, 762 P.2d 651, 657, 658 (Colo. 1988), that issue is not before us here.

in support of the Crim. P. 41.1 order, Detective Hawkins explained that although she didn't yet have probable cause to arrest Smiley, she had reasonable grounds to believe he had killed the alleged victim. At the crime scene, police had found DNA belonging to the deceased and to Smiley, along with Smiley's fingerprints on a liquor bottle and in some blood. There was no evidence that anyone other than Smiley and the deceased had been at the scene during the relevant timeframe. As the trial court observed, the detectives knew from the outset that Smiley "most definitely was in trouble" and that their statements to the contrary were false. *See United States v. Giddins*, 858 F.3d 870, 884 (4th Cir. 2017) (concluding that where interrogating officers told the defendant that he wasn't in trouble, despite knowing he had committed a crime and that they intended to arrest him, it "stretche[d] the definition of 'trouble' too far").

¶39 The detectives also couldn't honestly promise that Smiley would be leaving after talking to them. Yet, they did anyway. Significantly, the statements here weren't mere statements of possibility that Colorado courts have previously concluded aren't coercive. *See, e.g.*, *People v. Perez-Rodriguez*, 2017 COA 77, ¶ 52, 411 P.3d 259, 270 (concluding that "the alleged promises were merely conjectures that prosecutors or judges may show leniency"); *People v. Springsted*, 2016 COA 188, ¶¶ 32, 33, 410 P.3d 702, 711 (concluding that the officer's comment that the defendant "would receive 'more slack' if he was honest . . . comes close to

constituting an implied promise," but because it didn't overbear the defendant's will, it didn't render the confession involuntary); *see also State v. Griffin*, 262 A.3d 44, 75–76 (Conn. 2021).

¶40 For example, in *People v. McIntyre*, 2014 CO 39, ¶¶ 34–37, 325 P.3d 583, 590–91, we compared the statement fragment—"You'll walk out of here"—to the complete statement in context—"I honestly think that, with a guy like you with a clean record, I can give [Detective Otto] a call. . . . You'll walk out of here"; "You'll walk out of here, I'll talk to [Detective Otto], you guys'll probably make another appointment, you can come in and sit down and talk with her." (Alterations and omission in original.) We concluded that while the first statement, "[i]n a vacuum, . . . would indeed appear to improperly promise confidentiality and freedom from prosecution," *id.* at ¶ 36, 325 P.3d at 591, the full statements did no such thing and "did not imply a promise of immunity from prosecution," *id.* at ¶ 34, 325 P.3d at 591.

¶41 Here, the detectives affirmatively and without condition told Smiley that he would be leaving the police station that day. *Cf. Griffin*, 262 A.3d at 94 (Ecker, J., concurring in part and dissenting in part) (collecting cases from the "[m]any courts [that] have recognized that an implied promise of leniency can convey the same message as an express one").

¶42 The detectives also downplayed the importance of the advisement and the rights contained therein. They told Smiley they only had to advise him because they were from out of state. Not only is this statement objectively false; it implied that the advisement was a mere formality. *See People v. Parada*, 533 P.2d 1121, 1122 (Colo. 1975) (affirming the trial court's findings that the officers' statement that they were "not here necessarily to try and get [the defendant] in trouble" amounted to a promise not to use the defendant's statements against her, rendering her subsequent confession involuntary); *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) ("It appears that by telling [the defendant] that signing the waiver would not hurt him the agents contradicted the *Miranda* warning . . . , thereby misleading [the defendant] concerning the consequences of relinquishing his right to remain silent."); *see also Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 528 (Mass. 2004) (explaining that minimization techniques, such as implied offers of leniency, when combined with other coercive tactics, such as affirmatively misrepresenting the strength of the evidence, will likely worsen, not dispel, presumptions of voluntariness).

¶43 The timing of the detectives' misrepresentations was also critical. The detectives had already elicited incriminating statements from Smiley before advising him. In response to their initial questions, and before being advised of his rights, Smiley admitted to the detectives that he had been in the area where the

victim was found during the time that the victim was killed. And as soon as the detectives saw concern on Smiley's face at the mention of *Miranda*—again, before any advisement of rights—they promised him freedom and downplayed the significance of the advisement. Such timing strongly indicates that the detectives gave Smiley these false assurances so he would drop his guard and keep talking. While gamesmanship at other junctures can prove less problematic, affirmative deceit that induces a waiver is a recipe for suppression. *See Logan v. State*, 882 A.2d 330, 356–57 (Md. Ct. Spec. App. 2005) (emphasizing that because "the statements in issue were made immediately *prior* to and *during* the advisement of rights" and because the statements "constituted affirmative misstatements that conflicted with the *Miranda* advisement," they nullified the advisement and rendered the defendant's waiver invalid).

¶44 We join the trial court in concluding that these misrepresentations played a significant role in Smiley's decision to sign the waiver form. Smiley was a teenager living on the streets. The detectives exploited his relative vulnerability by engaging in "friendly," pre-advisement conversation that they knew would elicit incriminating statements; promising him freedom; and downplaying the significance of the advisement just before he waived his *Miranda* rights. Based on the totality of these circumstances, we agree with the trial court that the prosecution failed to prove that Smiley's waiver was voluntary. *See*

DiGiambattista, 813 N.E.2d at 524 ("[W]here the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression, but that if the circumstances contain additional indicia suggesting involuntariness, suppression will be required."). Like the trial court, we therefore see no need to address whether Smiley's waiver was knowing and intelligent.

III. Conclusion

¶45 We affirm the trial court's suppression order finding that Smiley's waiver was invalid. We remand the case to the trial court for further proceedings.

JUSTICE SAMOUR, joined by **CHIEF JUSTICE BOATRIGHT** and **JUSTICE MÁRQUEZ**, dissented.

JUSTICE SAMOUR, joined by CHIEF JUSTICE BOATRIGHT and JUSTICE MÁRQUEZ, dissenting.

¶46 Today's decision proceeds from a fundamental misconception of the Fifth Amendment. The majority concludes that Thorvyn Bullcalf Evan Smiley's waiver of his right to remain silent was involuntary, despite the total absence of evidence that the interviewing detectives engaged in coercive conduct, much less coercive conduct that overcame his will and critically impaired his capacity for self-determination. In doing so, the majority cites no *current* cases from the Supreme Court or this court supporting its involuntariness determination—there are none. Instead, it leans heavily on law review articles and commentary by a couple of professors, and it cherry-picks out-of-context passages from different opinions (including outdated ones that predate the Supreme Court's watershed decisions in *Colorado v. Connelly*, 479 U.S. 157 (1986), and *Colorado v. Spring*, 479 U.S. 564 (1987), and their fruitful progeny). Because the majority's opinion directly contravenes Supreme Court jurisprudence, muddles Colorado's legal landscape, and curbs law enforcement's ability to effectively investigate crimes, I respectfully dissent. I'm concerned that the majority has unwittingly upset the Fifth Amendment applecart in Colorado.

I. Introduction

¶47 In September 2021, Thornton police detectives traveled to New Mexico to execute a Colorado court order, issued pursuant to Crim. P. 41.1, to collect nontestimonial identification evidence from Smiley, a nineteen-year-old unhoused man who was the suspect in an investigation concerning the November 2020 death of another unhoused man in Thornton, Colorado. The coroner had concluded that multiple blunt force injuries to the victim's head, chest, and abdomen during a physical assault had resulted in his death.

¶48 The detectives met with Smiley at a police station. At the beginning of the meeting, they accurately introduced themselves as detectives, correctly stated that they were with the Thornton Police Department, and specifically disclosed that they were talking with him because they were investigating an incident in Thornton that they thought he might have information about. Then, in response to a couple of preliminary questions, Smiley said that he'd been in the Denver area between August 2020 and January 2021, and that he and his brother had been in Thornton during that timeframe looking for work.

¶49 Less than two minutes into the interview, the detectives told Smiley they needed to read him his *Miranda* rights. Although—or perhaps because—this was not Smiley's first run-in with law enforcement and he'd been advised of his *Miranda* rights before, he appeared concerned when he heard that his *Miranda*

rights would have to be read. The detectives thus informed him that he was "not in trouble" and that he would be "leaving here today."[1] Neither statement was false: (1) while Smiley was the suspect in the investigation and it was possible he could later be in trouble, depending on how the investigation unfolded, he was not in trouble at that time; and (2) the detectives didn't have probable cause to believe that Smiley was responsible for the death under investigation and thus hadn't obtained a warrant for his arrest, which meant that, if he denied any wrongdoing, he'd be free to leave the station at the end of the interview.

¶50 Following an oral *Miranda* advisement, the detectives handed Smiley a *Miranda* advisement form. After Smiley read the form and indicated that he understood his rights, he *expressly and without hesitation waived them and agreed to speak with the detectives*. During the ensuing fifty minutes, he engaged in an amicable exchange with the detectives and confessed to killing the victim.[2]

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[1] The detectives told Smiley he was "leaving here today" three times. For the sake of convenience, however, I refer to it as a single statement throughout this dissent.

[2] Smiley expressly acknowledges that this case doesn't involve the type of impermissible two-step interrogation technique in which officers obtain a confession from an in-custody suspect before reading the *Miranda* warnings and then obtain another confession after reading those warnings, all as part of a deliberate attempt to undermine the effectiveness of the *Miranda* warnings. *See Verigan v. People*, 2018 CO 53, ¶¶ 4, 20, 420 P.3d 247, 248–49, 251.

¶51 Nothing about this interaction suggests that Smiley's decision to waive his right to remain silent was involuntary. Nonetheless, the majority today holds that the detectives' statements to Smiley—that he was not in trouble and would be able to leave the station that day—somehow amounted to such coercion that it overbore his will to remain silent and critically impaired his capacity for self-determination. This holding stretches the concept of involuntariness well beyond Supreme Court precedent. In the process, the majority risks confusing law enforcement, litigants, and our courts, all while unduly curtailing the effectiveness of legitimate police work.

II. Analysis

A. There Were No Affirmative Misrepresentations by the Detectives

¶52 The majority's decision, in addition to contradicting controlling Supreme Court authority, rests on a shaky factual foundation: the trial court's finding that the detectives engaged in affirmative misrepresentations. Because this finding is belied by the record, it isn't worthy of our deference. *See People v. Humphrey*, 132 P.3d 352, 356 (Colo. 2006). That is especially the case considering that: Smiley's interview was videorecorded, there are no disputed facts outside the recording, and "we are in a similar position as the trial court to determine whether the statements should be suppressed." *People v. Kutlak*, 2016 CO 1, ¶ 13, 364 P.3d 199, 203.

¶53 The record is barren of any indication that the detectives' statements constituted misrepresentations *at the time they were made*. Before interviewing Smiley, the detectives did not have probable cause to believe that he was responsible for the death under investigation. The Crim. P. 41.1 order they'd obtained didn't require *probable cause*; it merely required *reasonable suspicion*. *See* Crim. P. 41.1(c)(2) (authorizing the collection of nontestimonial identification evidence if "there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense"). Given the lack of probable cause, the detectives had not sought a warrant to arrest Smiley. According to the detectives' own testimony, which the district court did not discount as incredible, had Smiley declined to speak with them, they would have simply executed the Crim. P. 41.1 order and collected buccal swabs, fingerprints, and palm prints from him before returning to Colorado. It was only after Smiley confessed to killing the victim that the detectives obtained probable cause to arrest him.[3]

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[3] To the extent the majority's opinion may be read as implying that the detectives went into the interview with probable cause to believe that Smiley was guilty, Maj. op. ¶ 38, it is incorrect and, in any event, misses the point. The detectives lacked probable cause. And regardless, the point is that they didn't believe they had probable cause and, accordingly, had not sought a warrant for his arrest or made plans to detain him.

¶54 Thus, the detectives weren't lying when they told Smiley before the interview that he was not in trouble and would get to leave at the end of the interview. At that time, he was *not* in trouble, even if it was possible that he might later be in trouble. And at that time, he *was* free to leave, even if it was possible that he could incriminate himself during the interview and thereby give the detectives probable cause to detain him.

¶55 But even assuming the detectives' statements constituted affirmative misrepresentations, as the majority concludes, they did not so taint Smiley's *Miranda* waiver as to render it involuntary under the totality of the circumstances. The majority's contrary determination is a radical departure from longstanding precedent.

B. Law Governing *Miranda* Waivers

¶56 The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege "is fully applicable during a period of custodial interrogation." *Miranda v. Arizona*, 384 U.S. 436, 460–61 (1966). In *Miranda*, the Supreme Court concluded that, absent "proper safeguards," an interrogation of a person who is in custody and suspected of a crime "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*

at 467. Consequently, the court formulated procedural safeguards to protect the privilege against self-incrimination during custodial interrogations. *Id.* at 444–45.

¶57 The *Miranda* Court held that a defendant's statements during a custodial interrogation are inadmissible unless the police have first provided an advisement of certain constitutional rights, including, as relevant here, the right to remain silent. *Id.* at 444. The *Miranda* warnings are "prophylactic," *New York v. Quarles*, 467 U.S. 649, 653 (1984), and may be waived, but such a waiver must be "made voluntarily, knowingly and intelligently," *Miranda*, 384 U.S. at 444.

¶58 The sole issue in this case concerns the voluntariness of a waiver. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context." *Connelly*, 479 U.S. at 169–70.

¶59 Where a waiver of *Miranda* rights results in an inculpatory statement, it is considered to be involuntary only if coercive governmental conduct, whether physical or psychological, played a significant role in inducing the defendant to make the confession or statement. *Id.* As the *Connelly* Court put it, "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Id.* at 170. The voluntariness requirement "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id.* Thus,

there are two necessary predicates to finding an involuntary waiver: (1) there must have been coercive conduct by law enforcement; and (2) that coercive conduct must have been so great that it overbore the defendant's will to remain silent and critically impaired the defendant's capacity for self-determination. *Id.* at 167; *Spring*, 479 U.S. at 574.

¶60 In assessing whether a waiver is voluntary, courts must examine the totality of the circumstances surrounding it. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The prosecution need only prove the validity of a waiver "by a preponderance of the evidence." *Connelly*, 479 U.S. at 168.

C. The Detectives' Conduct Did Not Amount to Coercion

¶61 The majority misperceives the type of police conduct that constitutes coercion. In particular, its conclusion that the detectives' statements amounted to coercion finds no support in the law.

¶62 I am unaware of a single court in the land that has concluded after *Connelly* and *Spring* that the types of statements made by the detectives to Smiley under the circumstances present here amount to coercive conduct. At most, the detectives' statements lulled Smiley into feeling comfortable and safe. But that does not constitute coercion—psychological or otherwise. "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns." *Illinois v. Perkins*, 496 U.S

292, 297 (1990); *see also Spring*, 479 U.S. at 575 (noting that Spring read the part of *Miranda* referring to "trickery" "out of context and without due regard to the constitutional privilege the *Miranda* warnings were designed to protect").

¶63 *Berghuis v. Thompkins*, 560 U.S. 370 (2010), is instructive. There, in rejecting Thompkins's contention that the waiver of his right to remain silent was involuntary, the court described the type of police conduct required to satisfy the coercion predicate of involuntariness:

> Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by *other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats.* The fact that [the interviewer's] question referred to Thompkins' religious beliefs also did not render Thompkins' statement involuntary.

Id. at 386–87 (citation omitted) (emphasis added).

¶64 The coercive police behaviors referenced in *Thompkins* are absent here too. What's more, the detectives' statements to Smiley that he was not in trouble and would be able to leave the station pale in comparison to those behaviors. The investigators did not threaten or injure Smiley at any point, and there is no basis to believe he was ever fearful during the interview. Further, the duration of the interview was about a third of Thompkins's and was conducted in the middle of

the day in a spacious room. And Smiley was not incapacitated, sedated, or deprived of sleep or food. Smiley's allegations simply do not relate to "the traditional indicia of coercion: 'the duration and conditions of detention . . . , the manifest attitude of the police toward [the defendant], [the defendant's] physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control.'" *Spring*, 479 U.S. at 574 (omission in original) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

1. The Majority Fails to Fairly Consider the Nature of the Detectives' Statements and Overlooks the Lack of a Nexus Between Those Statements and Smiley's Waiver

¶65 As mentioned, the majority hitches its wagon to affirmative misrepresentations, which it distinguishes from omissions. Maj. op. ¶ 23 (differentiating between "omissions and commissions"). To its credit, the majority concedes that "affirmative misrepresentations by law enforcement officers don't always invalidate a waiver." *Id.* at ¶ 25. Unfortunately, however, despite this acknowledgement, the majority's overbroad holding improperly sweeps a lot of noncoercive affirmative misrepresentations under the coercion umbrella.

¶66 According to the majority, whether an affirmative misrepresentation by the police is coercive turns primarily on whether the misrepresentation concerns information related to the offense. *Id.* at ¶ 30. As the majority sees it, if officers lie about information *unrelated* to the offense (such as the defendant's family), the

defendant "loses his ability to weigh the risk of speaking against his knowledge of his own actions," but if officers lie about information *related* to the offense (such as the strength of the evidence), the suspect "can more freely choose whether to speak or remain silent based on his own assessment of his actions and the risk to his own liberty." *Id.* In concluding that the detectives engaged in coercive conduct with Smiley, the majority underscores that their statements were unrelated to the offense. *See id.* at ¶¶ 30, 38.

¶67 But this analysis is overly simplistic and leads the majority astray. The majority fails to fully appreciate that the authority on which it relies is distinguishable in two pivotal respects: (1) the nature of the affirmative misrepresentations involved; and (2) the connection, or lack of connection, between any affirmative misrepresentation and the waiver of the right to remain silent. I discuss each in turn.

¶68 First, I explore the nature of the affirmative misrepresentations. Whether an interrogating officer makes, on the one hand, an affirmative misrepresentation via a *promise* of freedom or leniency in exchange for speaking, or, on the other, an affirmative misrepresentation via a *threat* of negative consequences for refusing to speak, if the affirmative misrepresentation does not constitute coercion, it cannot render a waiver involuntary. *Spring*, 479 U.S. at 574.

¶69 The majority seeks refuge for its involuntariness determination in a footnote in *Spring*, *see* Maj. op. at ¶ 27 (citing *Spring*, 479 U.S. at 576 n.8), but the effort founders. After rejecting Spring's *Miranda*-based "trickery" contention, the *Spring* Court dropped a footnote noting that it was "not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation" and that, therefore, it didn't have to "reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance." *Spring*, 479 U.S. at 576 n.8. In the same footnote, the court acknowledged that it had previously "found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege." *Id.*

¶70 The part the majority leaves out, however, is that the *Spring* Court then cited two cases in which it had deemed affirmative misrepresentations as sufficient to render a *Miranda* waiver involuntary. *Id.* Both of those cases involved *threats of negative consequences for refusing to waive the right to remain silent.* *Id.* (citing *Lynumn v. Illinois*, 372 U.S. 528 (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary), and *Spano v. New York*, 360 U.S. 315 (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary)).

¶71 The type of affirmative misrepresentations the *Spring* Court was referencing in footnote eight clearly amounted to coercion. The record before us, however, is devoid of coercive affirmative misrepresentations. As the majority concedes, the detectives uttered no threat whatsoever to Smiley. More specifically, they at no point informed him that his choice to remain silent would carry negative consequences, let alone significant ones like those implicated in *Lynumn* (deprivation of financial aid for the defendant's dependent child) and *Spano* (loss of employment as a police officer by the defendant's friend).

¶72 True, analyzing a voluntariness question is more involved than simply asking whether law enforcement officers made a threat. Depending on the totality of the circumstances, a promise of freedom or leniency may also amount to coercion. *See Cardman v. People*, 2019 CO 73, ¶ 32, 445 P.3d 1071, 1081–82.[4]

¶73 Here, however, we don't even have a promise. Contrary to the majority's view, the detectives' vague and brief statements, even if considered affirmative

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[4] *Cardman* involved repeated promises that if Cardman confessed to some inappropriate sexual conduct with the victim, he would not be prosecuted. *Cardman*, ¶ 32, 445 P.3d at 1081–82. The detective emphasized that if Cardman confessed, he could "turn [his] life around right now today" and "get back with [his] wife, go to church, live [his] life, and put all of this behind [him]." *Id.* at ¶ 5, 445 P.3d at 1075–76. We found that the relentless and emotionally manipulative nature of this interrogation rendered it coercive. *Id.* at ¶ 32, 445 P.3d at 1081–82.

misrepresentations, were not "promise[s]" of "freedom" or "leniency." Maj. op. ¶¶ 41–43. Smiley had not been arrested, and the detectives simply told him that he wasn't in trouble and would be able to leave the station "today"—i.e., at the end of the interview. Those statements said nothing about what might happen later, including whether Smiley might be charged and prosecuted, and if so, whether he'd receive leniency. "A court will not . . . readily imply an improper promise . . . from vague or ambiguous statements by law enforcement officers." *United States v. Haak*, 884 F.3d 400, 410 (2nd Cir. 2018).

¶74 As the majority admits, the law gives police officers "some latitude in seeking to elicit a waiver." Maj. op. ¶ 27. If the vague and brief statements made by the detectives to Smiley were out of bounds, where's that latitude? The detectives' statements were benign and did not "directly undercut *Miranda*'s intended protections." *Id.* *Directly* undercutting *Miranda*'s intended protections would be to tell a defendant like Smiley that he need not invoke his right to remain silent because he's not under investigation and will never be in trouble for the incident in question or to inform him that declining to answer questions would be silly because he will never lose his freedom as a result of the incident at issue. Because the majority fails to fairly consider the nature of the detectives' statements, it errs.

¶75 Second, I examine the connection, or lack of connection, between any affirmative misrepresentation and the waiver of the right to remain silent. An affirmative misrepresentation that rises to the level of coercion typically dangles a carrot or brandishes a stick in front of the defendant. Stated differently, the misrepresentation promises a benefit or threatens a harm *in exchange for or to elicit a waiver.* The very authority on which the majority relies demonstrates as much. *Id.* at ¶¶ 27–29. Yet the majority overlooks the absence of a nexus between the detectives' statements and Smiley's waiver.

¶76 The detectives didn't make their statements to get Smiley to waive any of his rights. And they never connected their statements to his *Miranda* waiver. For example, they didn't say "you're not in trouble *if you agree to speak to us*" or "you will leave here today *if you waive your rights*." Instead, it was clear in the interview that the detectives made the statements because, immediately after they mentioned "*Miranda* rights," Smiley became concerned. Thus, they made the statements to lull Smiley into feeling comfortable and safe, not to improperly obtain a waiver of those rights. I note that the detectives didn't have to twist Smiley's arm; he waived his rights without any hesitation.

¶77 The lack of a link between the detectives' statements and Smiley's waiver undercuts the majority's emphasis on the fact that the statements preceded the *Miranda* advisement. *Id.* at ¶ 32 (relying on a professor's commentary via an

analogy to support this aspect of the analysis). I am not aware of any case in this jurisdiction or elsewhere that attributes so much importance to the timing of affirmative misrepresentations vis-à-vis the *Miranda* advisement.

¶78 In *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), *see* Maj. op. ¶ 31, the court did *not* focus on the temporal proximity of the police's affirmative misrepresentations to the *Miranda* advisement. There, the court found that Ramirez, a juvenile, involuntarily waived his *Miranda* rights because he was only advised of his rights after the police had begun interrogating him and he had admitted to breaking into the victim's house on the night of the murder. *Ramirez*, 739 So. 2d at 572, 576–78. Further, the interrogating detective used Ramirez's unwarned statements to then suggest to Ramirez that he should waive his *Miranda* rights. *Id.* at 572. The detective did so by remarking, in front of Ramirez, that a fellow officer should "let [Ramirez] know about his rights. I mean, he's already told us about going in the house and whatever. I don't think that's going to change [his] desire to cooperate with us." *Id.* To make matters worse, when Ramirez then asked if he was under arrest, the interrogating detective responded, "No, no, I'm just reading your rights at this time," even though the detectives had "ample probable cause" to arrest Ramirez in connection with the murder. *Id.* at 572, 576–77. Ramirez waived his

Miranda rights and later admitted to his involvement in the murder. *Id.* at 572. These facts clearly differ from the facts in this case.[5]

¶79 Smiley waived his rights because he voluntarily chose to do so, not because, prior to his *Miranda* advisement, he was deceived into believing that there would be no adverse consequences if he agreed to talk with the detectives. No one can reasonably dispute that Smiley *was* given "a lifeline" when his *Miranda* rights were read to him and that he was never told that "the lifeline [was] unnecessary" because "the river [was] safe." Maj. op. ¶ 32 (quoting Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 Tex. Tech L. Rev. 1239, 1259 (2007)). As pertinent here, Smiley was expressly told, and he confirmed he understood, that he had the right to refuse to speak to the detectives—i.e., that he could "grab ahold" of the "lifeline" and "pull himself to dry land," *id.* This isn't a case of someone who refused the lifeline because he was misled into believing he didn't need it; this is a case of someone who voluntarily refused the lifeline after being specifically told he could drown in the river.

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[5] The majority also cites a case out of California from nearly a half century ago, *People v. Honeycutt*, 570 P.2d 1050, 1055 (Cal. 1977). *See* Maj. op. ¶ 31. But *Honeycutt* must be taken with a grain of salt because it preceded *Connelly* and *Spring*.

¶80 It is obviously more difficult for a defendant like Smiley, who is explicitly told he is free to decline to answer any questions, to later complain that his statements were the result of intimidation or psychological coercion. *Humphrey*, 132 P.3d at 364 (Coats, J., concurring in part and dissenting in part). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Spring*, 479 U.S. at 576 (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)).

2. The Authority on Which the Majority Relies Is Unpersuasive

¶81 Significantly, when one fairly considers the nature of the detectives' statements and accounts for the fact that they weren't uttered in conjunction with an attempt to get Smiley to waive his rights, this case stands in stark contrast to the authorities cited by the majority. To wit, Smiley was *not*:

- told "that making a statement [couldn't] hurt him," Maj. op. ¶ 27 (citing Mosteller, *supra*, at 1265);
- given "assurance of more favorable treatment" or informed of "the consequences of a particular conviction or admission," *id.* at ¶ 28 (quoting Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601, 616 (2006));
- discouraged "from consulting with a lawyer and threaten[ed] that 'it might be worse' if he [didn't] confess," *id.* (quoting *Collazo v. Estelle*, 940 F.2d 411, 414 (9th Cir. 1991));
- advised that if he confessed, he'd be "released immediately or very soon," *id.* (quoting Marcus, *supra*, at 616–17); or

- made aware that "harm" would come to his "friends or family" unless he confessed, *id.* at ¶ 29 (citing *People v. Medina*, 25 P.3d 1216, 1225–26 (Colo. 2001)).

¶82 The district court put great stock in *United States v. Giddins*, 858 F.3d 870, 884 (4th Cir. 2017), and while the majority doesn't follow suit, it nevertheless cites the case in support of its analysis. Maj. op. ¶ 38 (citing *Giddins* and indicating that the court there held that the interrogating officers "stretche[d] the definition of 'trouble' too far" when they told Giddins he wasn't in trouble). But *Giddins* is readily distinguishable.

¶83 Unlike the detectives here, the interrogating officers in *Giddins* already had a warrant for Giddins's arrest before they interviewed him. *Giddins*, 858 F.3d at 884. The court reasoned that "[t]he fact that an arrest warrant existed for Giddins and that [the detective] knew about and possessed the warrant meant that Giddins was, in fact, 'in trouble' from the moment he walked into the police station." *Id.* Perhaps most importantly, the interrogating officers threatened Giddins with indefinitely retaining his car if he refused to answer their questions, and he depended on his car for his livelihood. *Id.* at 881–83. This, the court understandably found, was "unduly coercive" and problematic. *Id.* at 883. Hence, rather than support the district court's suppression order or the majority's decision, *Giddins* highlights why the detectives' statements to Smiley fall woefully

short of the type of coercive conduct necessary to render a *Miranda* waiver involuntary.

¶84 The majority next turns our decision in *People v. McIntyre*, 2014 CO 39, 325 P.3d 583, on its head. Quoting dicta out of context from that lengthy opinion, the majority suggests that telling Smiley he'd leave the station that day was a promise of freedom, not a "mere statement[] of possibility." Maj. op. ¶¶ 39–40. Ironically, our rationale in *McIntyre* was that we couldn't do precisely what the majority does here—pluck portions of an interrogating officer's statements and consider them "[i]n a vacuum." *McIntyre*, ¶ 36, 325 P.3d at 591. Although we noted in *McIntyre* that some of the statements by the interrogating officer "*would . . . appear* to improperly promise confidentiality and freedom from prosecution," we were quick to add that the interrogating officer had not "induc[ed] [a] confession[] through . . . false promises." *Id.* (emphasis added). And we ultimately reversed the suppression order because the trial court had "failed to properly consider whether, under the totality of the circumstances," the interrogating officer had "overbore McIntyre's will." *Id.* at ¶ 37, 325 P.3d at 591. More specifically, we observed that:

> [I]n focusing on select comments from [the interrogating officer], the trial court [had] afforded little-to-no weight to a number of factors militating in favor of voluntariness: that McIntyre received *Miranda* warnings and knew he could leave at any time, that he never felt threatened or uneasy, that [the interrogating officer] did not exploit

> any unique vulnerability of McIntyre's, and that [the interrogating officer] made clear that he could "make no legal promises."

Id. All of these circumstances, save for the last one, are present here, which makes *McIntyre* a case that supports my dissent, not the majority's opinion.[6]

3. There Was Absolutely No Exploitation of a Unique Vulnerability and No Psychological Coercion

¶85 Still, the majority insists, in summary fashion, that the detectives engaged in psychological coercion because they "exploited [Smiley's] relative vulnerability" as a nineteen-year-old living on the streets. Maj. op. ¶ 44. Indeed, the majority strums this refrain throughout the opinion. However, the majority fails to connect Smiley's vulnerability—his youth and lack of housing—to any specific act of exploitation. In *Giddins*, the interrogating officers exploited Giddins's dependence on his car for his livelihood, thereby engaging in "economic coercion." *Giddins*, 858 F.3d at 882–83. Where was the exploitation here? That is,

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[6] The majority also cites *People v. Parada*, 533 P.2d 1121, 1122 (Colo. 1975), where our court said that the interrogating officers' statement—that they were "not here necessarily to try and get you in trouble"—constituted a promise not to use Parada's statements against her and rendered her subsequent confession involuntary. *See* Maj. op. ¶ 42. But we announced *Parada* more than a decade before our court was reversed by the Supreme Court in *Connelly* and *Spring*, which are widely recognized as pillars of Fifth Amendment jurisprudence. Apparently, history is doomed to repeat itself, as the majority today sides with *Parada* over *Connelly* and *Spring*.

even assuming Smiley had a unique vulnerability, *how* did the detectives exploit it to coerce him into confessing? The majority doesn't tell us; instead, the majority says that "[t]he detectives exploited [Smiley's] relative vulnerability by engaging in 'friendly,' pre-advisement conversation." Maj. op. ¶ 44. If that's all it takes, then every legitimate police interrogation will inherently involve exploitation of a defendant's vulnerability. The reality is that there was zero exploitation of any unique vulnerability Smiley purportedly had.

¶86 The detectives certainly did not promise to provide Smiley housing in exchange for his confession or even for his agreement to waive his right to remain silent. Nor did they make a threat based on his lack of housing (such as threatening to return him to the area where the victim's friends might retaliate against him) to coerce him to speak or, worse, to take the fall for the victim's death. And, though Smiley is young, the detectives went over his *Miranda* rights (both orally and in writing) and ensured he understood them before he waived them.

¶87 Notably, our court has dealt with exploitation of a defendant's vulnerability during a custodial interrogation before, so we know what it looks like. *See People v. Ramadon*, 2013 CO 68, 314 P.3d 836. It looks nothing like what took place here.

¶88 In *Ramadon*, we upheld in part a suppression order excluding a portion of a police interview as involuntary. *Id.* at ¶ 3, 314 P.3d at 838. There, the interrogating officer suggested to Ramadon, a native of Iraq, that he would likely be deported if

he did not cooperate with the police. *Id.* at ¶ 13, 314 P.3d at 840. We concluded that this statement was coercive because deportation "was a uniquely terrifying prospect for Ramadon . . . [who] was brought to the United States for his safety after members of his family were killed by the Iraqi military." *Id.* at ¶ 25, 314 P.3d at 844.

¶89 Law enforcement clearly exploited Ramadon's vulnerability—his status in this country and the danger he faced in his home country—by threatening, albeit impliedly, to deport him to his home country if he didn't tell the truth. *Id.* Nothing even remotely close to that occurred here. The statements by the detectives informing Smiley that he wasn't in trouble and would be able to leave the station were in no way linked to any vulnerability Smiley may have had. The police exploitation in *Ramadon* and the detectives' behavior here are night-and-day different.

¶90 This case is much closer to *Thompkins* than it is to *Ramadon*—in fact, there is stronger evidence of voluntariness here than in *Thompkins*. In *Thompkins*, the fact that the interrogator referred to Thompkins's religious beliefs during questioning didn't constitute exploitation of a vulnerability. 560 U.S. at 387. And the court mentioned that the interrogators had not attempted to exploit any other vulnerability, such as lack of sleep or lack of food. *Id.* Here, the detectives didn't even incorporate Smiley's youth or lack of housing into any of their questions. Nor

did they otherwise exploit any unique vulnerability to get him to waive his rights. Under the totality of the circumstances, the detectives didn't exploit any unique vulnerability and their statements were plainly not psychologically coercive.

D. The Detectives' Conduct Did Not Overbear Smiley's Will

¶91 Even assuming the detectives' statements amounted to coercion, that alone cannot render Smiley's waiver involuntary. *See People in Int. of Z.T.T.*, 2017 CO 48, ¶ 12, 394 P.3d 700, 703. To render a defendant's waiver involuntary, the police's conduct must be so coercive that it "overbear[s] the defendant's will." *Id.* (quoting *McIntyre*, ¶ 16, 325 P.3d at 587). "[O]ur polestar always must be to determine whether or not the authorities overbore the defendant's will and critically impaired his capacity for self-determination." *United States v. Thunderhawk*, 799 F.3d 1203, 1206 (8th Cir. 2015) (quoting *United States v. LeBrun*, 363 F.3d 715, 725 (8th Cir. 2004)). Whether a defendant's will has been overborne by coercive police conduct must be judged by evaluating the entire constellation of circumstances surrounding the waiver, paying particular attention to "the significant details surrounding and inhering in" the police's conduct. *Z.T.T.*, ¶ 12, 394 P.3d at 703.

¶92 Evaluating the totality of the circumstances here, it is apparent that Smiley's will was not overborne by the detectives' statements. After accurately identifying themselves and their police department, the detectives were truthful with Smiley

in informing him that they were investigating an incident in Thornton. Although they then asked Smiley a couple of preliminary questions, they administered a *Miranda* advisement less than two minutes into the interview and began questioning him immediately thereafter. Leading up to and during the advisement, Smiley appeared relaxed, listening attentively to the verbal advisement given by Detective Silva and periodically nodding his head in agreement. Smiley then read and initialed the written advisement form provided, indicating that he understood his rights. Detective Hawkins nevertheless asked Smiley if he understood his rights, to which he immediately nodded and responded, "Yeah. I do." Smiley orally agreed to talk to the detectives. When Detective Silva pointed out that Smiley had failed to complete the portion of the advisement form indicating that he had agreed to waive his rights and speak with them, Smiley completed it without delay.

¶93 There is no basis to believe that Smiley didn't understand the oral and written advisements provided or his waiver of his *Miranda* rights and his corresponding choice to speak to the detectives. During the interview, Smiley disclosed that he had previous experience with the criminal justice system—both

as a juvenile and as an adult—and had been advised of his *Miranda* rights before.[7] And there is no evidence that anything about Smiley's youth, experience, education, background, or intelligence inhibited his ability to understand his rights or the consequences of waiving them.

¶94 The remainder of the interview is likewise bereft of any evidence that Smiley's will was overcome or that his capacity for self-determination was critically impaired. The detectives took a conversational, if not oversolicitous, tone with Smiley during the interview. Smiley appeared at ease and comfortable, often laughing and smiling as he spoke.

¶95 It wasn't until the detectives told Smiley (roughly thirty minutes into the approximately fifty-minute interview) that his fingerprint had been found on a spot of blood at the crime scene that his demeanor began to change.[8] And understandably so. Up until that point, Smiley had admitted contact with the victim in a public location but had denied injuring or killing him; indeed, Smiley had maintained that the victim was in perfect health when he last saw him. Now,

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[7] At one point during the verbal advisement, Smiley actually mouthed the words of the *Miranda* advisement as Detective Silva read it to him.

[8] The majority notes that (1) Smiley's fingerprint was also recovered from a liquor bottle, and (2) testing of a DNA mixture found on a cigarette butt revealed that Smiley may have been a contributing source. *See* Maj. op. ¶ 38. But this evidence hadn't been disclosed to Smiley at that juncture in the interview.

having been told about the presence of his fingerprint at the crime scene, and after a half-hearted attempt to resume his previous narrative, Smiley leaned back in his chair, smiled at the detectives, and said, "You know what? You guys are pretty good. You guys are pretty good." His confession followed shortly thereafter.

¶96 The majority goes through the motions of discussing these circumstances. However, it fails to fairly consider them. For example, the majority says that the detectives "elicited incriminating statements from Smiley before advising him." Maj. op. ¶ 43. But all Smiley had said before the advisement is that he'd been in the Thornton area with his brother looking for work between August 2020 and January 2021. That's information the detectives already had before the interview. Recall that they had recovered two of Smiley's fingerprints and possibly his DNA at the crime scene in Thornton. What they didn't know is whether Smiley had any involvement in the murder under investigation. Had Smiley been present during the victim's murder? Did Smiley even know the victim was dead? Was Smiley an eyewitness? Were Smiley and the deceased both victims of an attack? Did Smiley act in self-defense?

¶97 Additionally, perhaps recognizing that its decision stands on infirm constitutional ground, the majority seeks to steady its footing by complaining that the detectives "downplayed the importance of the advisement" by telling Smiley

that they had to read his *Miranda* rights "because [they were] from out of state and stuff like that." *Id.* at ¶¶ 7, 42. But this protestation can't save the majority.

¶98 First, the detectives downplayed *the reason* why they were providing an advisement, not *the advisement* itself. The real reason why they needed to advise Smiley, of course, is that they were required to do so by law because they were about to conduct a custodial interrogation. But the detectives didn't say something like "you don't need to worry about remaining silent or consulting with a lawyer because you're going to be free no matter what." Nor did they say something like "you should talk to us because, no matter what you say, you're not going to be in any trouble." *Cf. id.* ¶ 42 (citing *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991), where law enforcement agents told the defendant that "signing the waiver would not hurt him," thereby "contradict[ing] the *Miranda* warning" and "misleading" him regarding "the consequences of relinquishing his right to remain silent").

¶99 Second, the detectives' statement that they were from out of state is not proof that Smiley's will was overcome through coercion or that his capacity for self-determination was critically impaired. That statement may be probative of whether Smiley's waiver was knowing and intelligent, but it is not evidence of coercion that overbore his will. *See Spring*, 479 U.S. at 570, 573–74 (explaining that neither the police's failure to convey that the interrogation was related to a

homicide nor the lack of any basis to allow a reasonable inference that the interrogation would extend to that subject had anything to do with "coercion of a confession by physical violence or other deliberate means calculated to break [Spring's] will"); *see also Humphrey*, 132 P.3d at 365 (Coats, J., concurring in part and dissenting in part) (criticizing the majority for disregarding *Spring* and conflating "the volitional and cognitive aspects, or prongs, of the *Miranda* inquiry" by "making clear its own understanding that 'to be voluntary an act must be informed'").

¶100 Even assuming the detectives' statements were unequivocal promises of freedom or leniency that could amount to coercive police conduct, any suggestion that Smiley's will was overcome because the detectives' statements led him to believe that he would not be prosecuted or would receive leniency is belied by the record. About halfway through the interview, after Detective Hawkins had asked Smiley to be honest with her and Detective Silva, Smiley acknowledged, "This is a serious thing. Like I could go to jail—I could go to prison for this." When Detective Hawkins asked why Smiley thought he could go to jail, he responded, "Well, it's a murder charge, you said he's deceased. You know? You said there's blood." Detective Hawkins then asked him why he thought there would be a murder charge when they had simply told him at that point that it was a death investigation, and Smiley responded, "Well, yeah. Don't you think it's a murder

charge? . . . I know you guys never said it was a murder charge, but you said there's blood there . . . ."

¶101 During this exchange, Smiley was remarkably calm, smiling incredulously at the detectives throughout. It's difficult to understand why Smiley would express concern about being sent to jail for murder if he thought the detectives had already guaranteed his freedom or promised him leniency. And one might wonder why Smiley went through such pains for the first thirty minutes of the interview to deny any involvement in the victim's death if he believed that the detectives had already promised him he would bear no responsibility or would receive leniency for that death.

¶102 Smiley didn't act like a promise had been made to him because, in fact, no promise had been made to him. Accordingly, the detectives' statements cannot be deemed to have overcome his will to remain silent and to have critically impaired his capacity for self-determination.

III. Conclusion

¶103 The prosecution proved by at least a preponderance of the evidence that Smiley voluntarily waived his *Miranda* rights. The district court was wrong in finding otherwise, and the majority exacerbates that mistake by affirming the suppression order. Because I believe that today's decision reflects a fundamental

misunderstanding of the law, and because the majority's error will have adverse ramifications, I respectfully dissent.

I am authorized to state that CHIEF JUSTICE BOATRIGHT and JUSTICE MÁRQUEZ join in this dissent.