Case Number: SU-2022-0063-CA
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STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPREME COURT

STATE OF RHODE ISLAND	:	
v.	:	SU-2022-0063-CA (P1-2020-1885AG)
MARKLYN BROWN	:	

On Appeal from the Granting of Motions to Suppress
Entered in the Superior Court of Providence County

BRIEF OF THE APPELLEE, MARKLYN BROWN

KARA J. MAGUIRE, #8251
Appellate Division
RHODE ISLAND PUBLIC DEFENDER
160 Pine Street
Providence, Rhode Island 02903
(401) 222-1510
kmaguire@ripd.org

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QUESTION PRESENTED

Did the Superior Court err when it suppressed Marklyn Brown's conversation with his mother?

During his seven-hour interrogation, Mr. Brown repeatedly told the detectives that he only wanted to speak to his mother, not to them. As the Superior Court found, and the state is no longer contesting, they continued to question Mr. Brown after he invoked his right to silence. But after three hours of getting nowhere, the officers told Mr. Brown they were "honor[ing]" his request for a one-on-one meeting with his mom. A detective told him that they were "gonna bring Mom in here" and "leave this room." Under these facts, was the Superior Court correct in finding that the police fostered circumstances in which Mr. Brown had a reasonable expectation of privacy in his conversation with his mother?

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KEY TO THE RECORD

The Appendix, which appears under separate cover, contains these documents:

Appendix A:	Transcript of Interrogation, February 6, 2020
Appendix B:	Transcript of Hearing, December 9, 2021
Appendix C:	Docket Sheet, P1-2020-1885AG
Appendix D:	Mr. Brown's Second Motion to Suppress, December 9, 2021
Appendix E:	Order, January 12, 2022
Appendix F:	Exhibit 1, Flash Drive Containing Video Of Interrogation, February 6, 2020 (Included With Hard Copy of Appendix)

TRAVEL AND STATEMENT OF FACTS

This is a state's appeal of the Superior Court's order granting a motion to suppress a recording of a conversation between mother and son.

On February 6, 2020, Providence Police arrested twenty-five-year-old Marklyn Brown at the home he shared with his mother, stepfather, and two younger siblings. Interrogation Transcript ("Tr.") 2; Hearing Transcript ("Hr'g") 67–68. Once at the police station, five officers interrogated Mr. Brown for nearly seven hours. Hr'g 61; Tr. 1, 23, 183. He told the detectives multiple times that he did not want to speak to them, and that he only wanted to speak to his mother. *E.g.*, Tr. 22, 28, 39, 52, 83, 112. After several hours of no progress with Mr. Brown, the detectives called his mother, Judith Colon, to the station. Tr. 61–62. When she arrived, the police told Mr. Brown that they were "gonna bring Mom in here" and "leave this room." Tr. 117. The police led her in, left the room, and closed the door. The police recorded the conversation between mother and son. Tr. 117.

Following Mr. Brown's indictment in P1-2020-1885AG, he moved to suppress both the statement he made to the police and the recorded conversation with his mother. Mot. To Suppress (Nov. 1, 2021); Second Mot. To Suppress (Dec. 9, 2021). A hearing was held before Associate Justice Robert D. Krause on December 9, 2021. The state presented a single witness, Detective Theodore

Michael; the video containing both the interrogation and the conversation was introduced as Exhibit 1. Hr'g 64, 66.[1]

After reviewing the evidence and hearing the parties' arguments, Justice Krause granted Mr. Brown's motions in part, finding (1) that the interrogation continued after Mr. Brown invoked his right to silence; and (2) that the police recorded Mr. Brown's conversation with his mother without their consent, in violation of his right to privacy. *See* Hr'g 83–87, 92–94, 97–99; *see also* Order, Jan. 12, 2022. Based on those findings, Justice Krause suppressed most of the recorded interrogation and all of Mr. Brown's conversation with his mother. *See* Hr'g 84, 97–99. The state appealed.

The case docketed in this Court on February 28, 2022, and a prebriefing conference was held on October 11, 2022. After the case was placed on the plenary calendar, the state filed its brief, abandoning its argument in prebriefing that Mr. Brown had not invoked his right to silence. The only issue remaining is whether the hearing justice erred in suppressing the conversation between mother and son.

[1] The video has been copied onto a flash drive and included as Appendix F. Evidently, the time stamp on the video does not match the actual time of the interrogation. *Compare* Tr. 1 (stating that it was 9:43 a.m.), *with* Appendix F (time stamp begins at 1:25 a.m.). To avoid confusion this brief cites the time elapsed in the video, from 00:00:00 to 07:17:10, when including a direct quote from the interrogation.

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ARGUMENT

I. Mr. Brown Maintained A Reasonable Expectation Of Privacy In His Conversation With His Mother, And The Superior Court Properly Suppressed The Conversation.

Introduction

The conversation between Marklyn Brown and his mom was sandwiched in the middle of a seven-hour-long interrogation. As the hearing justice determined, this "interview should have stopped" forty-two minutes in, when Marklyn Brown invoked his right to silence. Hr'g 85; *see also* Tr. 22–23. But it went "on and on interminably," with the officers verbally "beat[ing]" on Mr. Brown "pretty heavily." Hr'g 85, 97. Indeed, for hours after Mr. Brown invoked, a slew of officers rotated into the interrogation room and questioned him: first Detectives Theodore Michael and Kevin Costa, followed by Sergeant Timothy McGann and Detective Michael Otrando, and, last, by Sergeant Fabio Zuena. Tr. 1, 23, 183. These "relief pitcher[s]" "curse[d] at [Mr. Brown]" and threatened that he would die in prison. Hr'g 98–99; Tr. 223 ("So the only way you're gonna get out of that fucking ACI, if you don't help yourself right now, is in a pine box, man."); Exhibit 1 (05:35:26).

The interrogation dragged on, with long soliloquies by the officers, and little input from Mr. Brown. Hr'g 85; *see* Exhibit 1. The officers did not "scrupulously honor" Mr. Brown's invocation as required. *Michigan v. Mosley*,

423 U.S. 96, 104 (1974). This is why the hearing justice granted Mr. Brown's motion to suppress the statements made during his interrogation. *See* Hr'g 83.

The state has abandoned that issue on appeal and makes little reference to the officers' trampling over Mr. Brown's constitutional rights in its brief. But this context is integral to understanding what the officers hoped to accomplish when they called in Mr. Brown's mom. After three hours of getting stonewalled, the officers tried a different approach. Mr. Brown had been asking to speak with his mom "one-on-one"; she was the only person with whom he wanted to speak. *E.g.*, 22–23, 28, 39; Exhibit 1 (00:41:30, 00:57:10, 01:10:39). This was the detectives' chance. They were going to "honor" his request. Tr. 83; Exhibit 1 (02:38:25). Before she entered, Detective Otrando informed Mr. Brown:

> [DET.] OTRANDO: Boss. Mom's here.
>
> MR. BROWN: All right. How can I speak with her?
>
> OTRANDO: We're gonna bring Mom in here.
>
> MR. BROWN: Okay.
>
> OTRANDO: We're gonna leave this room.
>
> MR. BROWN: Fair enough. I appreciate that.

Tr. 116–17; Exhibit 1 (03:16:56). The officers then left mother and son alone; the pair talked for about fifty minutes. Tr. 117–52; Exhibit 1 (03:21:02–04:08:00).

Without either Mr. Brown's or Ms. Colon's knowledge, the officers recorded the entire conversation. Hr'g 63–65.

The Fourth Amendment prohibits government actors from conducting unauthorized electronic eavesdropping on an individual's private conversations. *Katz v. United States*, 389 U.S. 347, 352–53 (1967). Article 1, Section 6 of Rhode Island's Constitution guarantees an even "higher standard of protection" against this type of state surveillance. *State v. McGuire*, 273 A.3d 146, 153–54 (R.I. 2022) (quotations omitted). And when neither party consents, it is unlawful to record wire, electronic, or oral communications, unless authorized by a wiretap order. *See* R.I.G.L. § 11-35-21. Evidence gathered in violation of these protections must be suppressed. *State v. Maloof*, 333 A.2d 676, 679–80 (R.I. 1975); R.I.G.L. § 12-5.1-12(a)(1); *see also State v. Jennings*, 461 A.2d 361, 368 (R.I. 1983) ("The exclusionary rule bars from introduction at trial evidence obtained either during or as a direct result of searches and seizures in violation of an individual's Fourth Amendment rights."); R.I.G.L. § 9-19-25.

Here, neither Mr. Brown nor his mom consented to the recording, and the hearing justice was therefore correct in suppressing it. Hr'g 63–65, 88. The state argues, however, that Mr. Brown did not have a reasonable expectation of privacy in this conversation. The hearing justice correctly dispatched this argument, and this Court should affirm. Hr'g 90–94. A reasonable expectation of privacy exists

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when an individual has a subjective expectation of privacy, and that expectation is one that society is prepared to accept as reasonable. *See California v. Greenwood*, 486 U.S. 35, 39 (1988); *State v. Sinapi*, 295 A.3d 787, 800 (R.I. 2023)a. As the hearing justice observed, this is a "fact-driven" analysis, Hr'g 90, based on the totality of the facts and circumstances of each case. *Sinapi*, 295 A.3d at 800 (stating that "no single factor invariably will be determinative" (quotations omitted)). As the hearing justice found here, Mr. Brown had a reasonable expectation of privacy because the officers led him into believing that his one-on-one with his mom would be a private moment. Hr'g 90–94.

Standard Of Review

On appeal, this Court applies a deferential standard of review to the hearing justice's fact findings, reversing them only if they are clearly erroneous. *Sinapi*, 295 A.3d at 799. This Court considers whether a defendant's constitutional rights have been violated de novo. *Id.*

A. <u>Subjective Expectation Of Privacy: Mr. Brown Believed He Was Having A Private Conversation.</u>

The hearing justice found that Marklyn Brown subjectively believed that his conversation with his mom was private. First, as the hearing justice observed, Mr. Brown made it clear to the officers that he wanted to speak to his mother and no one else. *E.g.*, Hr'g 84 ("[H]e's made his choice and his choice is singular, very particular, Mom. That's his choice. Nobody else."); Hr'g 93 (stating that

Mr. Brown had "been asking for an hour, or however long it took her to get there"). Before Ms. Colon arrived, Mr. Brown asked to talk to his mother at least six times. Tr. 22, 28, 39, 52, 83, 112 (00:41:30, 00:57:10, 01:10:39, 01:25:35, 02:38:10, 03:12:39). He intended this to be a private conversation, specifying "I want to talk to my mom *myself*" and "I just want to have my *one-on-one* with my mom." Tr. 39, 83 (emphases added); Exhibit 1 (01:10:39, 02:38:10).

In contrast, he refused to speak to the police at all. He *only* wanted to speak to his mom—not the police officers. Hr'g 83–85.

> [DET.] MICHAEL: I don't want you to snitch. But I do want you to tell me you messed up. I'll take that and then I'll leave you alone, and then we'll figure out where we go from here. I know it's not easy sitting where you are.
>
> MR. BROWN: I want to talk to my mom. That's all I want to talk to.
>
> MICHAEL: I can make that happen. I can definitely make that happen. 'Cause we told your mom that we would call her. Your mom doesn't know what's going on, just to let you know. Okay? I will get on making a call to your mom to come down here. Okay?
>
> MR. BROWN: Yeah, 'cause that's the only person I really want to talk to as of, like, right now. Only person I want to talk to.

Tr. 22; Exhibit 1 (00:40:40).[2] He did not mean that he wanted the police to listen to his conversation with his mom. He *only* wanted to talk to his mom.

Second, as the hearing justice found, Mr. Brown thought it was a private moment because the officers fostered that illusion. After refusing to speak to police again and again and again, the police finally left him alone with his mother. Tr. 116–17; *see supra* at 6. Mr. Brown believed he was getting what he wanted—a private moment with his mom:

> THE COURT: That follows the comment from Mr. Brown on the last line before that, on page 116, when mom arrives, he says, How am I going to speak with her? And so [the detective] says, We're going to bring mom in here. Brown says. Okay. And [the detective] says, We're going to leave this room. Implying without any question, We're going to leave you alone so you can talk to your mother. And he says, Fair enough. I appreciate that.
>
> [In your mind, prosecutor, there is no] expectation of privacy that he's going to be left alone in a room with his mother, when the detective says, Here you go. We're out of here. You and mom talk. What you have been asking for an hour, or however long it took her to get there.
>
> MR. MULLANEY: He's being told he's been physically left alone with the mom.

[2] Although Justice Krause concluded this was the moment when Mr. Brown first invoked his right to silence, Mr. Brown was reluctant to speak even before this point. For example, he told detectives, "I don't have no answers for you guys," and "I can't fill in no blanks for you guys." Tr. 10, 12; Exhibit 1 (00:22:00, 00:24:58). Mr. Brown also stated, "I don't have no comments," to which a detective retorted, "I'm not gonna finish with you yet." Tr. 11; Exhibit 1 (00:23:44).

> When you look at what he says later on –
> THE COURT: Oh, please. Oh, please.
> Is he really saying in your mind, We're going to leave you alone, but we're going to eavesdrop on whatever you happen to talk to your mother about because that's the only one you want to talk to? He's told them a hundred pages earlier, I don't want to talk to you. You're not going to hear what I say. I won't give you any words for you to concern yourself with or to consider. Otrando says, Fine. Go in here with your mother. We'll leave you alone.

Hr'g 92–93. As the hearing justice found, he was set up to believe the officers were granting his request: alone time with his mom.

Third, after being tight-lipped for hours, Mr. Brown opened up to his mom only because he thought the conversation was beyond listening ears. Whereas Mr. Brown responded to the police with "mm hmms," requests for his mom, and (futile) invocations of his right to silence, Mr. Brown let loose with his mother. The intimate conversation lasted nearly an hour. They talked about everything from Marklyn Brown's upbringing to a child he had on the way to a mother's love. Marklyn asked for his mom's advice about whether to talk to the police. Tr. 128 ("What's my options, Ma? Telling?"); Exhibit 1 (03:35:30). He told police that a car spotted on the scene belonged to his friend, Jimmy. Tr. 119; Exhibit 1 (03:24:07). He told his mom, "I was there." Tr. 119; Exhibit 1 (03:25:09). He told her that the police were "play[ing] a mind game" on him, trying to get him "to crack." Tr. 120 (03:26:09). After about fifty minutes, the detectives told them

to wrap it up. Tr. 151. The mother and son shared an emotional parting, and a long, tight, hug. Tr. 152; Exhibit 1 (04:06:35). This was not a conversation he thought he was sharing with the police. In perceived privacy, Mr. Brown could finally speak.

Fourth, as the hearing justice found, no one on the recording—not the police, not Mr. Brown, not Ms. Colon—stated that the conversation would be recorded or otherwise referred to a recording:

> THE COURT: [Page] 117 he is being left alone. He appreciates it. Otrando is escorting him to the room. This is for you and mom. We're out of here. Thank you, he says. Okay.
>
> And by the way, there is nothing in the interview or the discussion with mom about recording. You'll agree with that.
>
> MR. MULLANEY: Yes. There's nothing there. Mom doesn't reference it and Marklyn Brown doesn't reference it.

Hr'g 94; *see also* Hr'g 88. And although Detective Michael claimed that he advised Mr. Brown—off camera and before the interrogation—that they would be "doing a video recording" of his interrogation, he was never told that the recording would extend to the conversation with his mom. Hr'g 69, 88, 94.

Fifth, the hearing justice found—and the state acknowledged—that the interrogation room lacked physical indicia of recording equipment, such as a "red light . . . blinking," that "may tip somebody off that a camera is going on. There's none of that." Hr'g 94. Detective Michael also testified there was no signage to

alert Mr. Brown about the recording. Hr'g 72. The only signs were in the hallway, and contained coded messages that warned officers—not visitors—to attend to recording technology. Hr'g 72–73 ("Case cracker, make sure you turn on" and "Interviews—make sure you go into the conference room to turn off interview when done.").

The state argues that Marklyn Brown did not have a subjective expectation of privacy in the conversation because of a comment he made in the final minutes of the seven-hour interrogation. The hearing justice did not consider this comment because Mr. Brown had invoked his right to silence many times by this point. Hr'g 93–99.[3] In any event, even if the hearing justice had considered this comment, it would not change the analysis. When Mr. Brown met with his mom, he believed that he was speaking to her in confidence. What he believed over three hours later is irrelevant. *See United States v. Jacobsen*, 466 U.S. 109, 115 (1984) ("The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that the invasion occurred.").

[3] The state claims that the hearing justice had to consider this comment but cites no cases addressing whether a suppressed statement must be considered when determining whether an individual has a reasonable expectation of privacy in a conversation. *See* State's Brief 8–9.

And this exchange was not the remarkable concession the state makes it out to be. Rather, when Sergeant Zuena urged Mr. Brown to guess how he knew details about Mr. Brown's private conversation with his mother, Mr. Brown realized that the officers must have listened in:

> [DET.] ZUENA: I mean you told your mom that Ji–, you were in the car with Jimmy. He was pulled up on Detroit.
>
> MR. BROWN: I didn't tell her that. . . .
>
> ZUENA: She told a few things, what you guys discussed, man. That's all. I'm just telling you. How the fuck would I know that?
>
> MR. BROWN: Camera.
>
> ZUENA: The cam–, what's the camera got to do with it?
>
> MR. BROWN: There's a camera in this room, and it's probably being voice-recorded. I know what you guys do in an interrogation room.
>
> ZUENA: Well, yeah. Yeah. Well, of course it . . . yeah. Well, obviously. But you think we can hear everything you say?
>
> MR. BROWN: Yes.
>
> ZUENA: Nah. Doesn't work that way, man. You watch too much TV.
>
> MR. BROWN: No, I've seen videos.

> ZUENA: You've seen videos? From where?
> . . .
> MR. BROWN: Yeah. I've seen dudes getting interrogated in this room.

Tr. 259–61; Exhibit 1 (06:45:28). The state claims that "[h]e did not simply deduce, after the fact, that the room was not a private sanctuary," State's Brief 9, but that is indeed what happened. The officer confronted Mr. Brown with information the officer could have known only from listening in on Mr. Brown's conversation with his mom. Mr. Brown realized that the police had eavesdropped on what he thought was his alone time with his mother. This after-the-fact reveal by the officers does not change that three hours earlier he thought his conversation was private.[4]

This was a man who invoked his right to silence over and over and over. He did not want to make any statements to police. That his mom was present changed nothing. He believed this conversation was private.

[4] If anything, the detective's denial that they could hear the conversation—"Doesn't work that way, man. You watch too much TV"—belies the state's claim that the police "made no misrepresentations or false assurances regarding defendant's privacy." State's Brief 14. Presumably, the state would argue that this later representation did not inform Mr. Brown's expectation of privacy three hours earlier. But the same goes for Mr. Brown's late-in-time realization that the officers heard his conversation with his mother. It does not undercut that, at the time of the conversation, he believed he was getting the opportunity to have a private conversation with his mom.

B. Reasonable Expectation Of Privacy: The Detectives Lulled Mr. Brown Into Believing That His Conversation With His Mom Was Private.

The hearing justice concluded that the detectives fostered circumstances under which it was objectively reasonable for Mr. Brown to believe his conversation with his mom was private. Hr'g 92–93. The police were getting nowhere with Mr. Brown. He refused to speak, repeatedly invoking his right to silence. *See* Tr. 10–12, 22–23, 28, 31. As the hearing justice quipped about Mr. Brown's efforts to shut down the interrogation, "I mean, how much more do you need?" Hr'g 86. The police did not "scrupulously honor" any of Mr. Brown's attempts to invoke. *Mosley*, 423 U.S. at 104.

The officers instead marched on, trying anything to get Mr. Brown to talk. He refused, repeating that he wanted to speak with his mom. Tr. 22, 28, 39, 52, 83, 112. After every tactic failed, they set up a one-on-one meeting with his mother. Tr. 63–64, 83. They even suggested what he should say to her. Tr. 83. Their actions and statements leading up to this moment created an air of privacy, signaling to Mr. Brown that his conversation with his mom was secure. For these reasons, Justice Krause found that the detective was "[i]mplying without any question" to Mr. Brown that he and Ms. Colon were left alone, beyond physical and electronic surveillance. Hr'g 92.

While the state argues that the Fourth Amendment cannot protect a conversation in an interrogation room, the United States Supreme Court has recognized that the "Fourth Amendment protects people, not places." *Katz*, 390 at 351; *accord Sinapi*, 295 A.2d at 800. There are no bright line rules excluding certain zones from protection. Rather, whether there is a reasonable expectation of privacy is a fact-dependent analysis that "is understood to differ according to context." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion). "The touchstone in a constitutional analysis is reasonableness." *Sinapi*, 295 A.3d at 800.[5] Thus, even though a reasonable expectation of privacy does not attach to every conversation in a police station—or even most conversations[6]—it does attach when police lead a suspect into believing he was having a private conversation. *See People v. Hammons*, 5 Cal. Rptr. 2d 317, 319 (Cal. Ct. App. 1991) ("[A]n expectation of privacy can arise, under circumstances where the arrested person and a person with whom he was conversing were lulled into

[5] The state claims that a court determines whether an expectation of privacy is reasonable by balancing an individual's sense of security against the usefulness of the police tactic. State's Brief 10. This standard, tracing back to Justice Harlan's dissent in *United States v. White*, 401 U.S. 745, 786 (1971), has not been adopted by this Court or the United States Supreme Court and has been cited by courts fewer than twenty times since 1971.

[6] For example, in *State v. Marini*, this Court considered whether a defendant had a reasonable expectation of privacy in a conversation with *detectives* in a police station. 638 A.2d 507, 514–15 (R.I. 1994). He did not. *Id*

believing their conversation would be confidential." (quotations omitted)). And that is precisely what happened here.

The state zeroes in on the minute or two preceding Mr. Brown's conversation to conclude that "the police merely said that they were leaving the room and physically did so." State's Brief 15. But Mr. Brown's interaction with the police began more than three hours before that moment, a fact the state ignores. A review of the lead up to the meeting with his mom is necessary to show how Mr. Brown was led into believing he was having a private conversation.

The questioning began at 9:43 a.m., with Detective Michael and Detective Costa laying out their theory of the murder. Tr. 5–10. Mr. Brown remained quiet, punctuating their allegations with "mm hmms" and "yeahs." After the detectives' narrative, Detective Michael told him, "I want you tell me why." Tr. 10. The detective's command was met with silence. Exhibit 1 (00:20:40). A minute later, Detective Michael asked the same question, "We know what happened. We just know . . . want to know why." Tr. 10; Exhibit 1 (00:21:55). This time, Mr. Brown responded, "I don't have no answers for you guys." Tr. 10; Exhibit 1 (00:22:00).

Detectives Costa and Michael kept questioning Mr. Brown. He refused to speak, telling officers:

- "Man, I don't have no comments." Tr. 11; Exhibit 1 (00:23:44).

- "No, I can't fill in no blanks for you guys. My apologies." Tr. 12; Exhibit 1 (00:24:58).
- "I just said I don't got no answers for you guys." Tr. 15; Exhibit 1 (00:30:32).

Mr. Brown then asked the detectives for his mother: "I want to talk to my mom. That's all I want to talk to." Tr. 22; Exhibit 1 (00:41:31). Detective Michael responded:

> I can make that happen. I can definitely make that happen. 'Cause we told your mom that we would call her. Your mom doesn't know what's going on, just to let you know. Okay? I will get on making a call to your mom to come down here. Okay?

Tr. 22; Exhibit 1 (00:41:35). Mr. Brown was relieved: "Yeah, 'cause that's the only person I really want to talk to as of, like, right now. Only person I want to talk to." Tr. 22; Exhibit 1 (00:42:09).[7] Detective Michael told him to "think about" making a statement, while he "work[ed] on Mom right now." Tr. 22; Exhibit 1 (00:42:22).

Detective Michael and Detective Costa left the room, and after about eight minutes, two new officers came in, Sergeant McGann and Detective Otrando.

[7] The hearing justice found that Mr. Brown invoked his right to silence at this point. Hr'g 83–85. The hearing justice also found that Mr. Brown made even "more statements" invoking his right to silence after page 22, including "at page 31, line 21, 'I'm not saying anything.'" Hr'g 86. As the hearing justice remarked, "[H]ow much more do you need?" Hr'g 86.

They told Mr. Brown that "the other two guys are, are getting in contact with your mom right now." Tr. 23; Exhibit 1 (00:50:08). The interrogation continued much the same as it had with the last two detectives; the detectives pressed on with few responses from Mr. Brown. After a few minutes of the new detectives trying to elicit a statement, Mr. Brown again asked for his mother:

> MR. BROWN: I'd like to talk to my mom.
>
> [SGT.] McGANN: Your mom . . .
>
> MR. BROWN: That's who [inaudible] . . .
>
> McGANN: Y–,w–, we're, we're trying to contact your mom right now.
>
> MR. BROWN: That's the person I'd like to speak to right now.

Tr. 28; Exhibit 1 (00:57:10).

The officers explicitly offered Mr. Brown his mom as a carrot for cooperating, about an hour into the interrogation:

> [DET.] OTRANDO: Well, you know what? You're, you're asking us to do you a solid, right? You want your mom, right?
>
> MR. BROWN: That's just . . .
>
> OTRANDO: And we're entertaining that. Hold on for a minute. We're entertaining that, and you're sitting there with your chin in your hand and you're just stone-

faced. I mean, come on, man. Y–, we're gonna do it for you, right? But what are you gonna do for us? You know how that, you know how that works. What are you doing for us? Why should we let you talk to your mom? 'Cause you asked us. And we're all men. We all have mothers and we all have families, and we know that family means a lot so we're entertaining that. We're doing that for you. And yet you're sitting here, pretty much lying to our face. And that's okay. Y–, you can . . .

MR. BROWN: I'm not . . .

OTRANDO: You ca–…

MR. BROWN: . . . lying. I'm not saying anything.

OTRANDO: Well, you know . . .

MR. BROWN: That's also what I'm not doing.

OTRANDO: Right. And, and silence says a lot. Silence says a lot, okay, especially when they present this case in front of a judge.

Tr. 31–32; Exhibit 1 (1:00:32).

The detectives kept going. Several minutes later, they returned to Mr. Brown's mom:

> OTRANDO: You want me to get your mother . . . here. That's what you want? You want me to bring your mother here so you can talk to your mother. You can't even answer a simple question.

Tr. 38–39; Exhibit 1 (01:09:58). The detective continued:

> Listen to me. I asked you a simple que–, you asked me to do something for . . . you asked two detectives to do something, and they're coming through on it. I ask you to answer a goddamn question, a simple yes or no, you can't even do that. Why should I get your mother? Simple yes or no, do you regret taking that ride with Jimmy and Johnny that night?

Tr. 39; Exhibit 1 (01:10:07). Mr. Brown responded that all he wanted was a private conversation with his mother: "I just want to have my one-on-one with my mom before y'all bring me in there. That's it." Tr. 39; Exhibit 1 (01:10:39). The detective then withdrew the offering: "I don't think we should get his mother here, sarge. I do–, I don't think he deserves that courtesy, but that's your call." Tr. 39; Exhibit 1 (01:10:59).

Several minutes later, now about an hour and twenty-five minutes into the unsuccessful interrogation, Mr. Brown again asked for his mother:

> I wasn't trying to do this back-and-forth. What I'm saying, I just wanted to talk to my mom. You know what I'm saying? Say our goodbyes. . . . Say our goodbyes or whatever 'cause, you know what I'm saying, you guys are gonna send me to jail.

Tr. 51–52; Exhibit 1 (01:25:35). Sergeant McGann and Detective Otrando exited, and Detectives Michael and Costa returned fifteen minutes later. Tr. 61. Detective Michael had news: "Hey, I, called your mom. Okay? Well, I had to wait 'til I put a call in to your mom, but your mom's coming down." Tr. 62; Exhibit 1 (01:52:11). While they waited, Detective Michael reiterated the seriousness of the charges and explained that some carried "double-life sentences." Tr. 62–63. Again, he told Mr. Brown, "I'm gonna get your mom down here." Tr. 64; Exhibit 1 (01:56:30). And again Mr. Brown said, "That's, that who I want to speak to." Tr. 64; Exhibit 1 (01:56:33).

Detectives Michael and Costa left, and Sergeant McGann and Detective Otrando returned to have another go at Mr. Brown. Tr. 78. Mr. Brown asked where his mom was and told them, "all I'm thinking about right now" is my mom. Tr. 78–79; Exhibit 1 (02:31:46). Detective Otrando told Mr. Brown he was "trying to honor" what Mr. Brown wanted, which was "to talk to [his] mom [himself]." Tr. 83; Exhibit 1 (02:38:10). Still getting nowhere with the questioning, Sergeant McGann suggested that Mr. Brown make a statement to his mom when she arrived: "I mean you tell her, 'Mom, they got me on video. The . . . my DNA [is] on the guns. My phone is there. I'm in the same clothes. I'm in the Durango." Tr. 83–84; Exhibit 1 (02:38:55).

The interrogation continued. Again, Mr. Brown circled back, "I just want to talk to my mother." Tr. 106; Exhibit 1 (03:05:59). Several minutes later, he repeated it: "I just want to talk to my mom, man. That's, that's really what it is. I, I want to speak to her." Tr. 112; Exhibit 1 (03:12:39).[8]

As their interrogation persisted, and Mr. Brown continued to maintain his silence, the officers' statements showed their refusal to take no for an answer:

- "[S]ilence says a lot. Silence says a lot, okay, especially when they present this case in front of a judge." Tr. 31–32; Exhibit 1 (01:01:15).
- "[Y]our silence is saying a lot." Tr. 54; Exhibit 1 (01:29:14).
- "[Y]our silence is speaking volumes." Tr. 92; Exhibit 1 (02:49:00).
- "[Y]our silence is, is saying a lot." Tr. 99; Exhibit 1 (02:59:27).
- "[Y]our silence is hurting and I can't say, say it enough." Tr. 100; Exhibit 1 (03:00:35).

[8] The court also suppressed Mr. Brown's statements after page 160, finding that Mr. Brown again invoked his right to silence. Hr'g 96–97; Tr. 160 ("I don't want to answer no more questions."); Exhibit 1 (04:26:05). But the officers just kept going. Hr'g 97–99. The questioning continued even after Mr. Brown asked the officers for cuffs, extending his arms to show he was ready to be escorted back to his cell. Tr. 161. The officers refused: "No, have a seat." Tr. 161; Exhibit 1 (04:29:05). And later, Mr. Brown said "I'm ready to go back to my cell." Tr. 258; Exhibit 1 (06:42:24). But the questions kept coming.

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The interrogation was still going at the three-hour mark, with no progress. Detective Otrando entered to let them know that Mr. Brown's mom was there.

> [DET.] OTRANDO: Boss. Mom's here.
>
> MR. BROWN: All right. How can I speak with her?
>
> OTRANDO: We're gonna bring Mom in here.
>
> MR. BROWN: Okay.
>
> OTRANDO: We're gonna leave this room.
>
> MR. BROWN: Fair enough. I appreciate that.

Tr. 116–17; Exhibit 1 (03:16:56). They closed the door. And for the first time in three hours, Mr. Brown—who had invoked his right to silence, to no avail—was made to feel comfortable, alone with his mom.

The detectives created a situation where Mr. Brown reasonably believed he was being left to have a private conservation with his mother. The facts are much like those in *Hammons*, 5 Cal. Rptr. 2d at 317. There, two suspects were arrested for burglary; one invoked his right to silence and the other requested to speak with his co-conspirator. *Id.* at 318. A detective testified that he placed the two together in a room; he then told them that the officers were leaving the room and that the two could talk. *Id*. at 318–19. The detective admitted that he led the suspects to believe it was a conversation between the two of them but denied

telling the suspects it would be a "private conversation." *Id.* at 319. Once alone, the suspects confessed to each other. *Id.*

The court found that the detective "led defendants into believing there would be a private conversation." *Id*. at 320. The court found the trial judge erred in failing to suppress the statements because the police created a legitimate and reasonable expectation of privacy. *Id.* The same was true here. While the police did not explicitly say, "We are leaving you to have a private conversation," they said, "we're going to leave this room," and purposefully led Mr. Brown to believe that he was alone with his mom.

As the hearing justice found, the detective secured Ms. Colon in response to Mr. Brown's repeated requests for a one-on-one, and then made him think it was a private conversation:

> THE COURT: That follows the comment from Mr. Brown on the last line before that, on page 116, when mom arrives, he says, How am I going to speak with her? And so [the detective] says, We're going to bring mom in here. Brown says. Okay. And [the detective] says, We're going to leave this room. Implying without any question, We're going to leave you alone so you can talk to your mother. And he says, Fair enough. I appreciate that.
>
> [In your mind, prosecutor, there is no] expectation of privacy that he's going to be left alone in a room with his mother, when the detective says, Here you go. We're out of here. You and mom talk. What you have been asking for an hour, or however long it took her to get there.

> MR. MULLANEY: He's being told he's been physically left alone with the mom.
>
> When you look at what he says later on –
>
> THE COURT: Oh, please. Oh, please.
>
> Is he really saying in your mind, We're going to leave you alone, but we're going to eavesdrop on whatever you happen to talk to your mother about because that's the only one you wanted to talk to? He's told them a hundred pages earlier, I don't want to talk to you. You're not going to hear what I say. I won't give you any words for you to concern yourself with or to consider. Otrando says, Fine. Go in here with your mother. We'll leave you alone.

Hr'g 93–94. The police created an expectation of privacy, and the hearing justice was correct to suppress the statement.

Courts have also recognized that a defendant was lulled into a false sense of privacy when, as here, the police set up the conversation as a tactic to get around a suspect's invocation of his constitutional rights. *See Lundberg v. State*, 127 So. 3d 562, 567 (Fla. Dist. Ct. App. 2012) ("A determinative factor, therefore, appears to be whether the conduct of the detectives deliberately creates a false sense of privacy for the purpose of overcoming the assertion of constitutional rights in order to obtain incriminating statements from the defendant.").

For example, in *State v. Calhoun*, the court found that the defendant had a reasonable expectation of privacy when the police twice placed a defendant alone in an interview room with his brother. 479 So. 2d 241, 242–43 (Fla. Dist. Ct.

App. 1985). The first time, the defendant requested to speak to his brother and the police agreed. *Id.* at 242. After that conversation, the defendant invoked his right to silence and his right to counsel. *Id.* The detectives terminated the interview, but placed the brother back in with the defendant. *Id.* at 243. This investigative maneuver sought to circumvent the defendant's assertion of his right to silence:

> Furthermore, and perhaps even more significantly, after the first conversation the defendant specifically exercised his right to remain silent and his right to counsel. Not only were these rights totally ignored by the police but the officers circumvented them by bringing the brother back into the room and then taping the conversation which is the subject of the motion to suppress. To rule that under these circumstances the defendant's statements to his brother are admissible is to make a mockery of the *Miranda* rights.

Id. Setting up this conversation was not a reasonable government intrusion. Rather, it was an attempted end-run around the Constitution that violated the defendant's privacy. Put another way, the defendant's brother "became the unwitting agent of law enforcement and through him the Sheriff's agents vicariously initiated and participated in an 'interrogation' of the defendant who had just invoked his constitutional right to remain silent and to counsel." *Id.* at 245. So, the police "were able to accomplish indirectly what they could not

legally accomplish directly." *Id.*[9] That was the case here, too. The detectives did not intend to honor Mr. Brown's request to remain silent, no matter what he said, or how many times he said it. This one-on-one with his mom was just another tactic to get him to speak. And the hearing justice saw this conversation for what it was: a maneuver to get around Mr. Brown's refusal to incriminate himself.

The cases cited by the state are distinguishable. In *Cuomo v. State*, the detectives did not circumvent the defendant's assertion of his right to silence by facilitating a conversation with his mother. 98 So. 3d 1275, 1276 (Fla. Dist. Ct. App. 2012). To the contrary, they "scrupulously respected [the defendant's] right to remain silent for an estimated nine to ten hours before his mother requested visitation." *Id.* at 1281. In further contrast to this case, the defendant in *Cuomo* did not ask to speak to his mother—it was the other way around. *Id.* at 1282. And unlike in this case, Cuomo did not ask for a private, one-on-one meeting. *Id.* at 1282. Whereas the police in this case and in "*Calhoun* . . . actively manipulated the circumstances in order to intentionally foster an expectation of privacy in defendants who had distinctly expressed their desire for privacy," the police in

[9] The Florida Supreme Court cited *Calhoun* approvingly in *Allen v. State*, 636 So. 2d 494 (Fla. 1994). There, that court found that a defendant did not have a reasonable expectation of privacy in a conversation with a codefendant but cautioned that the result would be different "if police deliberately fostered an expectation of privacy in the inmates' conversation, as happened in [*State v. Calhoun*], especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent." *Allen*, 646 So. 2d at 497.

Cuomo accommodated the mother's desire to speak with her son. *Id.* at 1281. Under these distinguishable facts, society could not reasonably recognize a subjective expectation of privacy. *Id.* at 1282.

Lundberg v. State is also dissimilar. 127 So. 3d at 562. There, the defendant, unlike Mr. Brown, did not invoke his right to remain silent. Rather, Lundberg freely spoke to police and then repeated his statement to his girlfriend. *See id.* at 564. As the court found, under those circumstances, the police "conduct [was] not the type of deliberate fostering of an expectation of privacy in order to avoid the defendant's assertion of his constitutional rights" that would require suppression. *Id.* at 567. Likewise, in *State v. Scheineman*, the court found that placing codefendants together in a room did not foster an expectation of privacy where no one was "threatened, tricked, or cajoled into waiving his Fifth Amendment self-incrimination privilege." 77 S.W.3d 810, 814 (Tex. Crim. App. 2002). Indeed, that case did not even "involve a custodial interrogation" of the defendant. *Id.* The same cannot be said here, where Mr. Brown asserted his right to silence during a custodial interrogation and stated that he did not want to speak to anyone but his mom.

The state's reliance on *Belmer v. Commonwealth*, 553 S.E.2d 123 (Va. Ct. App. 2001), is also misplaced. In that case, a detective left the defendant with family members in an interrogation room, telling them he had to go do some

paperwork. *Id.* at 125. The detective did not say they could speak or that he was leaving them alone to speak. He "simply left the room." *Id*. at 129. Indeed, Belmer had not even asked to speak to his family members. *Id*. Because the detective had not led the defendant into believing he was having a private conversation with relatives, there was no reasonable expectation of privacy. *Id*.

The situation here was different. Detective Otrando did not simply leave Mr. Brown and his mom together. Rather, after Mr. Brown had made clear he only wanted to speak to his mother, Otrando said he would honor Mr. Brown's request for a one-on-one. Hr'g 92–93. Detective Otrando then brought in Ms. Colon, and he told Mr. Brown that the officers would leave them. *Id*. The detective led them to believe that they would be speaking privately.

Many cases cited by the state, like *Belmer*, involve the police simply leaving a suspect with another person, without the suspect asking to speak privately with that person or the police leading them to believe the conversation would be private. *See United States v. Swift*, 623 F.3d 618, 620–21 (8th Cir. 2010) (two suspects put in an interrogation room together before questioning began); *Davis v. State*, 121 So. 3d 462, 471, 485–87 (Fla. 2013) (suspect's parents entered the interrogation room; police said nothing to suspect about the conversation and no request was made to speak to them); *Lazelere v. State*, 676 So. 2d 394, 405 (Fla. 1996) ("[A]ppellant did not ask to speak with her son privately; they were

simply placed in a cell together before a [court] hearing."); *Easterling v. Commonwealth*, 580 S.W.3d 496, 505 (Ky. 2019) (police simply left suspect alone with family members in an interrogation room; no request was made to speak to them). And in *Ahmad A. v. Superior Court*, a defendant was left alone with his mother but was not lulled into believing he was having a private conversation. 263 Cal. Rptr. 747, 751 & n.5 (Cal. Ct. App. 1989); *see also Hammons*, 5 Cal. Rptr. 2d at 319–20 (distinguishing the police station conversation in *Ahmad A.* and other cases from one in which a defendant was lulled into believing their conversation was confidential). None of these cases bear resemblance to this case, where Mr. Brown refused to speak with police, asked to speak one-on-one with his mom, and was led by police to believe that they had granted that request. In such a situation, his expectation of privacy was reasonable.[10]

[10] At least two of the cases cited by the state to dispute the reasonableness of Mr. Brown's belief have holdings that pertain to the defendants' subjective expectation of privacy. *See, e.g.*, *United States v. Delibro*, 347 F. App'x 474, 474 (11th Cir. 2009) (finding that the "Defendant was well aware that law enforcement could be monitoring his conversations"); *Dickerson v. State*, 666 S.E.2d 43, 47 (Ga. Ct. App. 2008) ("It is unnecessary, however, to decide that question [of reasonable expectation of privacy] because, under the facts of this case, no subjective expectation of privacy was exhibited."). Unlike those defendants, Mr. Brown believed that his conversation with his mom was private. *See supra* Part A.

Finally, *Lanza v. New York* is also inapt. 370 U.S. 139 (1962). That case involved the recording of a convicted and sentenced prisoner and his visitor in a prison visiting room. *Id*. at 139–42. In dicta, the Court stated that "[i]n prison, official surveillance has traditionally been the order of the day." *Id*. at 143. This is not a controversial point. No one disputes that there is no reasonable expectation of privacy in a detention facility, whether in phone calls or visiting room conversations—and there are warnings advising prisoners as such. That point is irrelevant here, however; neither Mr. Brown nor his mother were convicted and sentenced prisoners, and the conversation did not take place in a prison.[11]

Mr. Brown invoked his right to silence and refused to speak to the police, telling them he would only speak to his mom. When the detectives failed to elicit any meaningful information from Mr. Brown, they granted him his request—a one-on-one moment with his mother—leading him to believe he was speaking to her in private. Because Mr. Brown maintained a reasonable expectation of privacy in the conversation with his mom, and because neither he nor Ms. Colon consented to the recording, the hearing justice correctly granted the motion.

[11] The cases cited by the state about privacy when simply placed in the back of a police car are also off base. *See, e.g.*, *United States v. Clark*, 22 F. 3d 799 (8th Cir. 1994); *State v. Smith*, 641 So. 2d 849 (Fla. 1994); *State v. McAdams*, 559 So. 2d 601 (Fla. Dist. Ct. App. 1990).

CONCLUSION

For these reasons, Marklyn Brown asks that this Honorable Court affirm the Superior Court's order granting his motion to suppress and remand this case to the Superior Court for trial.

Respectfully submitted,

MARKLYN BROWN

By his Attorney,

/s/ Kara J. Maguire
Kara J. Maguire, Reg. #8251
Assistant Public Defender
Chief, Appellate Division

RHODE ISLAND PUBLIC DEFENDER
160 Pine Street
Providence, Rhode Island 02903
(401) 222-1510
kmaguire@ripd.org

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

1. This brief contains 7,727 words, excluding the parts exempted from the word count by Rule 18(b).
2. This brief complies with the font, spacing, and type-size requirements stated in Rule 18(b).

/s/ Kara J. Maguire

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2023, I filed and served this document through the electronic filing system on Virginia M. McGinn, Esq., Assistant Attorney General. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Elizabeth Munro