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## What Constitutes "Custody" Under Miranda?: An Examination of Maine's Test as Applied in *State v. Kittredge*

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WHAT CONSTITUTES “CUSTODY” UNDER  
*MIRANDA*? AN EXAMINATION OF MAINE’S TEST  
AS APPLIED IN *STATE V. KITTREDGE*

*Elizabeth L. Tull*

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## WHAT CONSTITUTES “CUSTODY” UNDER *MIRANDA*?: AN EXAMINATION OF MAINE’S TEST AS APPLIED IN *STATE V. KITTREDGE*

Elizabeth L. Tull\*

### I. INTRODUCTION

In recent years, the Maine Supreme Judicial Court, sitting as the Law Court, has issued several opinions addressing whether a defendant’s statements are admissible when made to law enforcement in the absence of “*Miranda* warnings.”<sup>1</sup> These cases have similar features: a defendant made a personally incriminating statement; raised an appeal alleging that *Miranda* warnings should have been, but were not, read to him or her; and the Court—in many cases—determined that the defendant was not technically in police custody, and thus there was no requirement to recite *Miranda* warnings to him or her.

*Miranda* warnings are an important safeguard that citizens of the United States are afforded to protect themselves from self-incrimination.<sup>2</sup> One reason these warnings are so crucial to a fair defense is because a “defendant’s confession . . . ‘has long been regarded as powerfully incriminating’ evidence” in a criminal trial.<sup>3</sup> In fact, a confession is likely “‘the most probative and damaging evidence that can be admitted against [a defendant]’” because it is direct evidence of facts “‘from the actor himself, the most knowledgeable and unimpeachable source of information.’”<sup>4</sup>

Because confessions have such a powerful impact in a criminal case, it is important that *Miranda* warnings are delivered at a point in time when a defendant

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1. See, e.g., *State v. Kittredge*, 2014 ME 90, 97 A.3d 106; *State v. Bryant*, 2014 ME 94, 97 A.3d 595; *State v. Lowe*, 2013 ME 92, 81 A.3d 360; *State v. Jones*, 2012 ME 126, 55 A.3d 432; *State v. Dion*, 2007 ME 87, 928 A.2d 746; *State v. Higgins*, 2002 ME 77, 796 A.2d 50. Per *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966), persons must be read certain warnings prior to a custodial interrogation. “An accused must be warned that he or she has the right to remain silent, that anything said can and will be used against him or her in court, that he or she has the right to consult with a lawyer and to have the lawyer with him or her during interrogation, and that if he or she is indigent a lawyer will be appointed to represent him or her.” 22 C.J.S. *Criminal Law* §1263 (2015).

2. The Fifth Amendment of the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. Similarly, the Constitution of the State of Maine provides that “[t]he accused shall not be compelled to furnish or give evidence against himself or herself, nor be deprived of life, liberty, property or privileges, but by judgment of that person’s peers or the law of the land.” Me. Const. art. I § 6.

3. Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The “Guilty as Hell” Rule in State Courts*, 36 AM. J. TRIAL ADVOC. 233, 233 (2013) (quoting Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 469 (1997)).

4. *Id.* at 233-34 (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)).

can make a meaningful, informed choice about whether or not to disclose self-incriminating information. Although the rights listed in these warnings may seem obvious to some, research has indicated that there are misconceptions about the extent to which people understand their rights and the content of *Miranda* warnings. In a recent study, researchers set out to determine the extent to which “members of the American public possess a working knowledge of their *Miranda* rights.”<sup>5</sup> Researchers asked several hundred participants to freely recall a *Miranda* warning and fill out quizzes about *Miranda*’s protections.<sup>6</sup> The results indicated that only 54.3 percent of the participants were deemed “knowledgeable” about the basic components of *Miranda* warnings, and “more than two thirds of the [participants] misbelieved that *Miranda* applied in noncustodial situations.”<sup>7</sup> The results of this study are indicative of the importance of reading *Miranda* warnings to suspects as a reminder of the rights afforded to them by the Constitution, as the content of these warnings is not necessarily common knowledge.

There is an important limitation to the scope of *Miranda*’s protection. Confessions obtained during a custodial interrogation are usually inadmissible at trial unless the suspect was *Mirandized*.<sup>8</sup> However, if a suspect is not legally “in custody” during an interview or interrogation, there is no requirement that the suspect have been read *Miranda* warnings.<sup>9</sup> In such situations, any confessions may be used at trial against a defendant to prove guilt, even if the defendant declines to testify.<sup>10</sup>

After a brief review of *Miranda*, this Note will examine the method used by Maine courts to determine whether a person is legally considered “in custody,” which is predicated upon ten factors related to the circumstances of a person’s interview or interrogation.<sup>11</sup> This Note will then explore how the Law Court applied these factors in its 2014 opinion in *State v. Kittredge*.<sup>12</sup> After providing a critique of the Law Court’s analysis in *Kittredge*, this Note will argue that Maine’s ten-factor test may lead to inconsistent results in determining whether an interview is or is not custodial and should thus be reexamined to ensure more consistent custodial determinations in future cases. Potential remedies for the test could include implementing a more thorough, extensive review of each of the ten factors in every case, rather than focusing on just one or a few factors; reintroducing a

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5. Richard Rogers et. al., *General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?* 19 PSYCHOL. PUB. POL’Y & L. 432, 434 (2013) (citations omitted).

6. *Id.* at 435. Participants were a diverse, educated group of individuals randomly drawn from the Dallas County, Texas, jury pool, which researchers created by combining the State’s driver’s license list and voter registration list. *Id.*

7. *Id.* at 436-37.

8. *Miranda*, 384 U.S. at 478-79.

9. *See id.* The Court in *Miranda* supports its holding by reasoning that “when an individual is taken into custody or otherwise deprived of his freedom by the authorities, the privilege against self-incrimination is jeopardized.” *Id.* Thus, the need for “procedural safeguards”—*Miranda* warnings—is only implicated by a custodial interrogation and is not necessary in a noncustodial situation.

10. This was the case in *Kittredge*. The defendant, Karl Kittredge, declined to testify, but the officer who obtained his confession testified under a hearsay exception as to the information Kittredge disclosed to him. *Kittredge*, 2014 ME 90, ¶¶ 11-12, 97 A.3d 106.

11. *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222.

12. 2014 ME 90, 97 A.3d 106.

defendant-specific factor to the “in custody” analysis, such as the subjective intent of the officer or the subjective belief of the defendant as to whether or not he or she is in custody during an interview; or, implementing a policy that incentivizes the recording of interviews with suspects to ensure that important facts about the circumstances of an interrogation are correctly relayed to the Law Court and considered when applying the ten-factor test. Ultimately, Maine’s test should be revisited to ensure that it provides adequate protection of a person’s right to avoid self-incrimination when applied.

## II. A REVIEW OF *MIRANDA V. ARIZONA*

In 1966, the United States Supreme Court decided one of its most important cases: *Miranda v. Arizona*.<sup>13</sup> In *Miranda*, a man named Ernesto Miranda was arrested and taken into custody at a police station in Phoenix, Arizona.<sup>14</sup> He was brought to an interrogation room where he was questioned by two police officers.<sup>15</sup> After about two hours, the officers had obtained a signed, written confession from Miranda.<sup>16</sup> The statement he signed included a paragraph stating that his “confession was made voluntarily, without threats or promises of immunity and with full knowledge of [his] legal rights, understanding any statement [he made] may be used against [him].”<sup>17</sup> At his jury trial, Miranda’s written confession was admitted as evidence over the defense counsel’s objection, and the officers who interrogated him testified that he made an oral confession as well.<sup>18</sup> A jury found Miranda guilty of rape and kidnapping.<sup>19</sup> The Supreme Court of Arizona affirmed the conviction on appeal, holding there was no violation of Miranda’s constitutional rights when his confession was obtained.<sup>20</sup>

The United States Supreme Court disagreed.<sup>21</sup> The Court found that Miranda was never informed of his right to consult with a lawyer or to have a lawyer present during the police interrogation.<sup>22</sup> Further, the Court determined that Miranda’s right to avoid self-incrimination was “not effectively protected in any other manner.”<sup>23</sup> For these reasons, the Court held that Miranda’s statements were inadmissible.<sup>24</sup> In its holding, the Court explained that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural

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13. 384 U.S. 436 (1966); CNN Library, *Top U.S. Supreme Court Decisions Fast Facts*, CNN (June 21, 2014, 3:24 PM), <http://www.cnn.com/2013/06/21/us/top-u-s-supreme-court-decisions-fast-facts/>; *Landmark Supreme Court Cases*, UNITED STATES COURTS, <http://www.uscourts.gov/educational-resources/get-informed/supreme-court/landmark-supreme-court-cases.aspx>.

14. *Miranda*, 384 U.S. at 491.

15. *Id.*

16. *Id.* at 491-92.

17. *Id.* at 492 (internal quotation marks omitted).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

safeguards effective to secure the privilege against self-incrimination.”<sup>25</sup> The Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>26</sup>

Prior to *Miranda*, statements were only deemed inadmissible upon a showing that they were obtained by “techniques and methods offensive to due process” or in situations when it was clear that the suspect was unable to exercise “a free and unconstrained will.”<sup>27</sup> Following *Miranda*, the new procedural safeguards require that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”<sup>28</sup> The *Miranda* decision stands for the proposition that many previously admissible statements must now be suppressed because of the presumption “that statements made while in custody and without adequate warnings were protected by the Fifth Amendment.”<sup>29</sup>

The Court justified these new requirements by reasoning that “[t]he Fifth Amendment is . . . fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege [is] simple.”<sup>30</sup> Further, it said that courts may merely speculate as to a defendant’s personal characteristics or feelings that contribute to an assumption that he or she is in custody, but “a warning is a clear-cut fact . . . and a warning at the time of the interrogation is indispensable to overcome its pressures and insure that the individual knows he is free to exercise the privilege at that point in time.”<sup>31</sup> However, while the Court noted the “recurrent argument . . . that society’s need for interrogation outweighs the privilege [of a person to remain silent],”<sup>32</sup> it explained that the “limits [it had] placed on the interrogation process should not constitute an undue interference” with the job of law enforcement because the “decision does not in any way preclude police from carrying out their traditional investigatory functions.”<sup>33</sup> In a later case, the Court reiterated that “[*Miranda*’s] safeguards were not intended to ‘create a constitutional straightjacket,’ but rather to provide practical reinforcement for the right against compulsory self-incrimination.”<sup>34</sup>

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25. *Id.* at 444.

26. *Id.*

27. *Haynes v. Washington*, 373 U.S. 503, 514-15 (1940).

28. *Miranda*, 384 U.S. at 444. The Court also explains that a person may waive these rights “provided that waiver is made voluntarily, knowingly and intelligently.” *Id.* Further, if a person requests to speak with an attorney at any point during an interrogation the questioning must stop, and the fact that a person “answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering” further questions until speaking with an attorney. *Id.* at 444-45.

29. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985).

30. *Miranda*, 384 U.S. at 468.

31. *Id.* at 468-69.

32. *Id.* at 479.

33. *Id.* at 481.

34. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (quoting *Miranda*, 384 U.S. at 467).

### III. DETERMINING IF A SUSPECT IS “IN CUSTODY”

An important feature of *Miranda* warnings is that they are only required for statements made during custodial interrogations, so an individual must be legally “in custody” to receive their benefit.<sup>35</sup> The Supreme Court has emphasized on many occasions that determining if a suspect is “in custody” is an objective, not subjective, analysis.<sup>36</sup> There are two key inquiries essential to this determination: first, evaluating the circumstances surrounding the interview or interrogation; and second, deciding if a reasonable person under those circumstances would have felt he or she could terminate the interrogation.<sup>37</sup> Ultimately, the determinative question is whether the person was subject to “a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”<sup>38</sup> The Supreme Court did not list specific circumstances to consider when making this determination, instead requiring courts and police officers to “examine all of the circumstances surrounding the interrogation, including those that would have affected how a reasonable person in the suspect’s position would perceive his or her freedom to leave.”<sup>39</sup> Recent cases have clarified that this inquiry is inherently objective,<sup>40</sup> and the subjective views or mindset of the police officers or of the person being questioned are irrelevant and not to be considered.<sup>41</sup>

In Maine, the Law Court has developed its own objective test to determine whether a suspect is in custody.<sup>42</sup> Similar to the United States Supreme Court’s standard, the basic principle of Maine’s test is that “an interrogation is custodial if ‘a reasonable person standing in the shoes of [the defendant] would have felt he or she was not at liberty to terminate the interrogation and leave.’”<sup>43</sup> The Law Court has developed a non-exhaustive list of ten factors for courts to consider in making this determination:

- (1) the locale where the defendant made the statements;
- (2) the party who initiated the contact;
- (3) the existence or non-existence of probable cause to arrest (to the extent communicated to the defendant);
- (4) subjective views, beliefs, or intent that the police manifested to the defendant, to the extent they would affect how a reasonable person in the defendant’s position would perceive his or her freedom to leave;
- (5) subjective views or beliefs that the defendant manifested to the police, to the extent the officer’s response would affect how a reasonable person in the defendant’s position would perceive his or her freedom to leave;
- (6) the focus of the investigation (as a reasonable person in the defendant’s position would perceive it);
- (7) whether the suspect was questioned in familiar surroundings;

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35. *Miranda*, 384 U.S. at 444.

36. *J.D.B. v. North Carolina* 131 S. Ct. 2394, 2402 (2011).

37. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

38. *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

39. *J.D.B.*, 131 S. Ct. at 2402 (citation omitted) (internal quotation marks omitted).

40. *Id.*

41. *Id.* (citing *Stansbury v. California*, 511 U.S. 318, 323 (1994)).

42. See *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222.

43. *State v. Jones*, 2012 ME 126, ¶ 22, 55 A.3d 432 (alteration in original) (quoting *State v. Prescott*, 2012 ME 96, ¶ 10, 48 A.3d 218).

- (8) the number of law enforcement officers present;
- (9) the degree of physical restraint placed upon the suspect; and
- (10) the duration and character of the interrogation.<sup>44</sup>

Courts are to “consider these factors ‘in their totality, not in isolation.’”<sup>45</sup> Essentially, a court must “weigh” these factors to determine if a person is in custody.<sup>46</sup>

The Law Court first presented these factors as a group in 1998 in *State v. Michaud*.<sup>47</sup> The test developed as a compilation of factors from prior state and federal circuit court decisions, which have changed substantially over the years: earlier “in custody” tests considered several subjective factors, including the subjective intent of the law enforcement officer(s) and the subjective beliefs of a suspect or defendant.

In *State v. Inman*,<sup>48</sup> one of Maine’s earliest post-*Miranda* cases that dealt with a dispute as to whether an interview was or was not custodial, the Law Court relied on case law from several jurisdictions in determining what facts should be considered in the custody analysis.<sup>49</sup> These factors included whether the defendant was restrained when questioned,<sup>50</sup> the “tone and technique” of the interrogation,<sup>51</sup> the location where the questioning took place,<sup>52</sup> whether there was probable cause for arrest,<sup>53</sup> and the subjective intent of the police.<sup>54</sup> A few years later the Law Court presented revised criteria for determining whether an individual is in custody, explaining that consideration may be given to where statements were made, which party initiated the contact, the existence of probable cause for arrest, the subjective views of the police, the subjective belief of the suspect, and the investigation’s focus.<sup>55</sup>

In 1985, in *State v. Thibodeau*, these six factors were confirmed by the Court as the proper criteria to consider in a custodial analysis.<sup>56</sup> Just one year later, however, the subjective criteria from *Thibodeau* were abandoned in *State v. Gardner*.<sup>57</sup> In that case, the Court explained that courts should consider whether the suspect was questioned in a place with which he or she was familiar, the number of law enforcement officers present during the interrogation, the amount of physical restraint exercised against the suspect, the duration of the interrogation, and its character.<sup>58</sup> The ten-factor test adopted by the *Michaud* Court derived in

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44. *Id.* (quoting *Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222).

45. *Id.* (quoting *Prescott*, 2012 ME 96, ¶ 11, 48 A.3d 218).

46. *See State v. Kittredge*, 2014 ME 90, ¶ 18, 97 A.3d 106 (explaining that “several factors weigh against a finding of custody” when analyzing the factors).

47. 1998 ME 251, ¶ 4, 724 A.2d 1222.

48. 350 A.2d 582 (Me. 1976).

49. *Id.* at 598.

50. *Id.* (citing *United States v. Akin*, 435 F.2d 1011 (5th Cir. 1970)).

51. *Id.* (citing *People v. Arnold*, 426 P.2d 515 (Cal. 1967)).

52. *Id.* (citing *Windsor v. United States*, 389 F.2d 530 (5th Cir. 1968)).

53. *Id.* (citing *United States v. Montos*, 421 F.2d 215 (5th Cir. 1970)).

54. *Id.*

55. *State v. Cochran*, 425 A.2d 999 (Me. 1981) (citing *Montos*, 421 F.2d at 223).

56. 496 A.2d 635, 640-41 (Me. 1985).

57. 509 A.2d 1160 (Me. 1986).

58. *Id.* at 1163 (citing *United States v. Streifel*, 781 F.2d 953, 961 n.13 (1st Cir. 1986)).

part from these earlier cases<sup>59</sup> and from *Stansbury v. California*—a 1994 United States Supreme Court case expressly stating that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.”<sup>60</sup>

The ten factors from *Michaud* are regularly considered by Maine courts to determine whether a defendant is in custody and often lead to courtroom dispute.<sup>61</sup> Issues arise regarding whether or not certain factors are satisfied and how circumstances surrounding an interview contribute to whether a person was “in custody.” The case of *State v. Kittredge*<sup>62</sup> is an example of when such a dispute led to litigation.

#### IV. THE “IN CUSTODY” TEST IN *STATE V. KITTREDGE*

##### A. *Facts of the Case*

In *State v. Kittredge*, the Law Court considered a challenge to a trial court’s denial of a defendant’s motion to suppress self-incriminating statements made in the absence of *Miranda* warnings.<sup>63</sup> The defendant, Karl Kittredge, confessed to his involvement in a burglary during an interview with police and was found guilty by a jury after a trial in which he did not testify, but his statements were admitted as evidence against him.<sup>64</sup>

The facts, as recited by the Law Court in its opinion, were as follows: sometime in early 2012, Kittredge had installed a safe in a bedroom belonging to his wife’s friend, Vicki Lachance,<sup>65</sup> so that she could store her prescription medications and other valuable items in a secure place.<sup>66</sup> At the time, Kittredge was on probation because he pled guilty to several counts of theft and burglary in 2008.<sup>67</sup> On June 11, Ms. Lachance complained of a headache and Kittredge’s wife took her to the hospital.<sup>68</sup> After his wife left, Kittredge had a discussion with his adult son, Karl Kittredge Jr. (Karl Jr.), and his friend, Patty Raymond,<sup>69</sup> about the

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59. Both *Thibodeau* and *Gardner* are cited to for support of the factors in *Michaud*. *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222.

60. 511 U.S. 318, 323 (1994).

61. *See supra* note 1.

62. 2014 ME 90, 97 A.3d 106.

63. *Id.* ¶ 1. In addition to challenging the denial of his motion to suppress a confessions, the defendant also appealed on the grounds that the court “improperly presented to the jury an uncharged count of theft by receiving stolen property” and that there was insufficient evidence to support a conviction for this charge. *Id.* This note will only review the portions of the case relevant to the challenge of the motion to suppress.

64. *Id.*

65. While the Law Court did not use the victim’s name in its opinion, names of the victim and others involved were referenced in the recitation of facts in the briefs filed by appellant and appellee. *See* Brief for Defendant-Appellant at 1, *State v. Kittredge*, 2014 ME 90, 97 A.3d 106 (No. Ken-13-439) [hereinafter Blue Br.]; Brief for Plaintiff-Appellee at 2, *State v. Kittredge*, 2014 ME 90, 97 A.3d 106 (No. Ken-13-439) [hereinafter Red Br.].

66. *Kittredge*, 2014 ME 90, ¶ 2, 97 A.3d 106.

67. *Id.* ¶ 3.

68. *Id.*

69. *See supra* note 65.

fact that Ms. Lachance had certain medications at her house.<sup>70</sup> Karl Jr. left to go to an undisclosed destination and later called Kittredge and Ms. Raymond on the phone requesting that they pick him up.<sup>71</sup> When Kittredge and Ms. Raymond stopped to pick up Karl Jr. in a vacant lot near Ms. Lachance's house, Kittredge saw that his son had a bag with Ms. Lachance's safe in it.<sup>72</sup> Kittredge then drove to his mother's house and took some of the pills that were in the safe.<sup>73</sup>

When Ms. Lachance arrived back home, she saw that the safe was missing.<sup>74</sup> She had more than \$1,000 worth of "medications, including oxycodone, jewelry, and cash" in the safe.<sup>75</sup> There was a video surveillance system in Ms. Lachance's home, but the tape had been removed.<sup>76</sup> Kittredge had known that her home had a surveillance system because he had seen the cameras during a visit.<sup>77</sup>

On August 16, 2012, Kittredge went to meet with his probation officer at the officer's request.<sup>78</sup> The meeting took place in the probation office.<sup>79</sup> Two state troopers, armed and in uniform, met Kittredge when he arrived and the three of them went into a room and sat down.<sup>80</sup> As described in the Law Court's opinion, the state troopers informed Kittredge that he was not under arrest but that they wanted to talk with him about something that had happened at Ms. Lachance's residence.<sup>81</sup> Neither of the troopers read *Miranda* warnings to Kittredge.<sup>82</sup> The door to the room was closed but unlocked; Kittredge knew that he was able to leave the room, but he was not sure that he would be permitted to leave the building he was in.<sup>83</sup> There was a tape recorder in the room, but the interview was not recorded for unknown reasons.<sup>84</sup>

The troopers told Kittredge that they knew he was involved in the incident based on comments from others, but Kittredge denied any involvement.<sup>85</sup> The troopers told Kittredge several times that another witness gave them information that led them to believe Kittredge was not telling the truth.<sup>86</sup> Kittredge eventually "broke down and said 'that friggen son of mine,'" and made self-incriminating statements.<sup>87</sup> The trial court found that the troopers did not make any promises to

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70. *Kittredge*, 2014 ME 90, ¶ 4, 97 A.3d 106.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* ¶ 5.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* ¶¶ 6-7. The Law Court does not indicate in its opinion why this meeting was called, but Kittredge's brief explains that Ms. Lachance "came under a belief that [Kittredge's son] had been involved with the taking of her safe" and that "[t]his belief motivated the investigating officers to attempt to interrogate [Kittredge] about the safe." Blue Br. at 4.

79. *Kittredge*, 2014 ME 90, ¶ 7, 97 A.3d 106.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* ¶ 8.

86. *Id.*

87. *Id.*

Kittredge, but told him that he “should cooperate because it might help him with the district attorney’s office” and that “it was best to tell the truth.”<sup>88</sup> Additionally, the troopers did not make any threats, physically restrain Kittredge in any way, or “make threatening gestures.”<sup>89</sup> The interview lasted forty-five to sixty minutes,<sup>90</sup> and when the questioning concluded, Kittredge left the office.<sup>91</sup>

Kittredge was charged with burglary and theft by unauthorized taking or transfer in November 2012 and was indicted in January 2013.<sup>92</sup> He filed a motion to suppress the statements he made at the probation office,<sup>93</sup> but his motion was denied.<sup>94</sup> The trial court held that “Kittredge spoke voluntarily and that *Miranda* warnings were not required because Kittredge was not in custody.”<sup>95</sup> A two-day-long jury trial on the charges was held in August 2013.<sup>96</sup> One of the state troopers who was at the interview with Kittredge testified that “Kittredge admitted to him that he had picked up his son, had driven to his mother’s house . . . had seen the victim’s safe inside his son’s duffel bag, and had taken oxycodone pills from the safe.”<sup>97</sup> Kittredge exercised his right not to testify.<sup>98</sup> The jury found Kittredge not guilty of burglary, but guilty of theft by unauthorized taking or transfer of property that it determined was worth more than \$1,000.<sup>99</sup> Kittredge was subsequently sentenced to five years in prison, with all but forty-two months suspended, followed by a two-year probation period and an obligation to pay \$3,975.99 in restitution to the victim.<sup>100</sup> Kittredge appealed.<sup>101</sup>

### B. Arguments on Appeal

In Kittredge’s brief, he addressed each of the ten *Michaud* factors and applied them to the circumstances of his interrogation to argue that he was in custody during his interview at the probation office.<sup>102</sup> He argued that the trial court erred

88. *Id.* ¶ 9.

89. *Id.*

90. *Id.* ¶ 8.

91. *Id.* ¶ 9.

92. *Id.* ¶ 6. The burglary charge is a Class B crime under 17-A M.R.S.A. § 401(1)(A), (B)(4) (2013). The theft by authorized taking or transfer is a Class C crime under 17-A M.R.S.A. § 353(1)(A), (B)(4) (2013). In addition to these charges, a motion to revoke Kittredge’s probation was filed by the state. *Kittredge*, 2014 ME 90, ¶ 6, 97 A.3d 106. The motion to suppress filed by Kittredge was in response to both the criminal charges and the motion for probation revocation. *Id.*

93. *Kittredge*, 2014 ME 90, ¶ 1, 97 A.3d 106.

94. *Id.* ¶ 10.

95. *Id.*

96. *Id.* ¶ 11.

97. *Id.*

98. *Id.* ¶ 12.

99. *Id.* ¶ 13. After it presented evidence, the State made a motion “for the court to instruct the jury on a count for receiving stolen property as a lesser included offense.” *Id.* The State’s motion was granted “because theft by receiving stolen property is an alternative basis for a theft charge and is subject to consolidation pursuant to 17-A M.R.S. § 351 (2013).” *Id.*

100. *Id.* ¶ 14.

101. *Id.*

102. Blue Br. at 7-14. The brief was accompanied by a Rule 19 memorandum requesting that the Court allow Kittredge to appeal from his probation revocation, as his probation was revoked upon the jury finding him guilty of theft. *Id.* at 1.

in its denial of his motion to suppress because “[e]very single prong of the aforementioned [ten-factor] test [was] a positive result for custodial interrogation.”<sup>103</sup> Some of the assertions he made to support his contention were: “the trial court found that [Kittredge] did not feel at liberty to leave”;<sup>104</sup> that Kittredge was called into his probation office—a law enforcement setting—by his probation officer but was directed to a room where police officers were waiting for him, which contributes to the custodial setting and the party who initiated the contact;<sup>105</sup> the officers made it clear to Kittredge that he was being investigated and the officers accused him of lying, which contributes to the existence of probable cause to arrest;<sup>106</sup> “the police clearly and plainly manifested to [Kittredge] that he was not free to leave” and that “a reasonable person in [Kittredge]’s position would not feel free to leave”;<sup>107</sup> he was not in familiar surroundings and that a police station or probation office is “the opposite of a familiar surrounding” for an ordinary person;<sup>108</sup> there was no reason to have two officers present aside from creating “an environment of intimidation”;<sup>109</sup> and “the interrogation went on and on until the officers were able to break [Kittredge] down,” lending to the character of the interview.<sup>110</sup>

The State, in its brief, also used the ten-factor test as the basis for determining whether the interview was custodial.<sup>111</sup> It asserted that the trial court correctly determined that Kittredge was not in custody for a number of reasons:

The officers told Kittredge that he was not under arrest; [t]he interview lasted 45 minutes to an hour; [o]nly two officers were present during the interview; [t]he officers made no threats, promises, or inducements to Kittredge; [t]here were no physical restraints of any kind used on Kittredge; Kittredge drove himself to his probation office; Kittredge was seated in a conference room in his probation office next to a door that was unlocked with respect to him; Kittredge was very polite and very cooperative throughout the interview; Kittredge . . . did not suffer any kind of incapacitating emotional or mental health meltdown during the interview; [t]he officers did not communicate to Kittredge that they had probable cause to arrest him; [t]he officers did not tell Kittredge that he was the focus of their investigation.<sup>112</sup>

To support its contentions, the State cited a recent Law Court case, *State v. Poblete*,<sup>113</sup> which held that an interview is not custodial even when it takes place at a police station;<sup>114</sup> there was little discussion of the other factual circumstances that the State cited as support for its contention that the interview was not custodial.

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103. *Id.*

104. *Id.* at 9.

105. *Id.* at 9-10.

106. *Id.* at 10.

107. *Id.*

108. *Id.* at 11.

109. *Id.* at 12-13.

110. *Id.* at 13.

111. Blue Br. at 9-10 (citing *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222).

112. *Id.* at 10-11.

113. 2010 ME 37, 993 A.2d 1104.

114. *Id.* ¶ 23.

C. *The Law Court's Decision*

In affirming the trial court's denial of Kittredge's motion to suppress, the Law Court noted that because it was clear that Kittredge was subject to interrogation its review of the case would focus on the question of whether Kittredge was in custody during the interrogation.<sup>115</sup> The Court considers this determination a question of both fact and law, giving deference to the trial court's factual findings, but reviewing *de novo* whether a person was legally in custody.<sup>116</sup> In such cases, the question presented is whether the trial court's findings of fact “demonstrate as a matter of law that a reasonable person in [the defendant]'s situation would have felt he or she was not at liberty to terminate the interrogation.”<sup>117</sup> The ten factors presented in *Michaud* are what the Court traditionally considers when making this determination.<sup>118</sup>

At the beginning of its analysis of whether Kittredge was in custody, the Law Court stated that:

[S]everal factors weigh against a finding of custody: the troopers told Kittredge that he was not under arrest; Kittredge did not manifest any belief that he was not free to leave; he was in a familiar building that he had been in before, though not necessarily in that particular room; only two law enforcement officers were present during the interview; he was under no physical restraint; and the interrogation only lasted forty-five minutes to one hour in an unlocked room without any additional coercive conditions.<sup>119</sup>

The Court also listed factors that weighed in favor of a finding that Kittredge was in custody:

Kittredge made the statements at the probation office where he was required to report; his probation officer—not he—initiated the contact; and the troopers communicated to Kittredge that they had information suggesting that he was involved in a crime, which suggested that he was a focus of the investigation.<sup>120</sup>

The Law Court then began to analyze the factors. The bulk of the Law Court's discussion focused on the fact that Kittredge's probation officer had called him to come to the probation office.<sup>121</sup> Citing as authority several cases from the United States Supreme Court and other jurisdictions,<sup>122</sup> the Court concluded “that the State's exercise of its authority” in requiring Kittredge, or any probationer, to appear at his probation office “does not, standing alone, place the probationer in custody” for purposes of *Miranda*.<sup>123</sup> The Court continued by pointing out that

115. *State v. Kittredge*, 2014 ME 90, ¶ 17, 97 A.3d 106.

116. *Id.* (citing *State v. Lowe*, 2013 ME 92, ¶ 13, 81 A.3d 360).

117. *Id.* (quoting *Lowe*, 2013 ME 92, ¶ 14, 81 A.3d 360).

118. *Id.* See also *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222 (recounting the “*Michaud* factors”).

119. *Kittredge*, 2014 ME 90, ¶ 18, 97 A.3d 106 (citations omitted).

120. *Id.*

121. *Id.* ¶ 19.

122. The Law Court cited to the following three cases in its analysis: *Minnesota v. Murphy*, 465 U.S. 420 (1984); *United States v. Cranley*, 350 F.3d 617 (7th Cir. 2003); *State v. Scott*, 765 N.E.2d 930 (Ohio Ct. App. 2001).

123. *Kittredge*, 2014 ME 90, ¶ 22, 97 A.3d 106.

“that the few factors that weigh in favor of a finding of custody are insufficient, without more, to establish that Kittredge was in custody.”<sup>124</sup> The Court explained:

Although Kittredge was called in by his probation officer upon suspicion of criminal conduct and was met by two troopers who wanted to interview him, the troopers told him that he was not under arrest, he subjectively realized that he could leave the room, he ultimately left without arrest, the interview was held in a building that was familiar to Kittredge, he was not physically restrained, he was not threatened in any way, the door was unlocked, only two troopers questioned him, and they concluded the interview within forty-five minutes to one hour.<sup>125</sup>

The Court did not, however, go into detail about the significance of these factors. Because the Court determined that Kittredge was not in custody, *Miranda* warnings were not necessary, and the trial court was not required to suppress his incriminating statements.<sup>126</sup>

The Court then considered whether Kittredge’s statements were voluntary, as statements or confessions are not admissible in court unless made voluntarily—even if they were not made in the context of a custodial interrogation.<sup>127</sup> Voluntariness must be proven by the State beyond a reasonable doubt.<sup>128</sup> A confession is considered voluntary if it is made by the “free choice of a rational mind, if it is not a product of coercive police conduct, and if under all of the circumstances its admission would be fundamentally fair.”<sup>129</sup>

In *Kittredge*, the primary issue relating to voluntariness was whether an “impermissible offer of leniency” had occurred when the troopers told Kittredge that he “should cooperate because it might help him with the district attorney’s office.”<sup>130</sup> The Law Court reviewed previous cases in which statements were found not to be impermissible offers of leniency<sup>131</sup> and ultimately concluded that the statements made to Kittredge were “vague and generalized” and were not impermissible. As such, the trial court did not err in finding that Kittredge’s statements were voluntary beyond a reasonable doubt.<sup>132</sup>

#### D. Analysis

In its opinion, the Law Court seemed to accept the State’s succinct list of reasons supporting the conclusion that Kittredge was not in custody. A puzzling

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124. *Id.*

125. *Id.*

126. *Id.* ¶ 23.

127. *See id.* ¶ 24 (citing *State v. Lowe*, 2013 ME 92, ¶¶ 20-21, 81 A.3d 360).

128. *State v. Rees*, 2000 ME 55, ¶ 11, 748 A.2d 976 (Saufley, J., dissenting) (noting the Court’s holding that “no out-of-court statement of a defendant may be used against that defendant unless the State proves beyond a reasonable doubt that the statement was voluntary”).

129. *Kittredge*, 2014 ME 90, ¶ 25, 97 A.3d 106 (citations omitted).

130. *Id.* ¶ 27.

131. Statements that the court previously held not to constitute impermissible offers of leniency are: “[t]he more cooperative you are, the better things are for you,” *State v. Nadeau*, 2010 ME 71, ¶ 57, 1 A.3d 445; if the defendant confessed, it would “look better,” *State v. Dion*, 2007 ME 87, ¶ 34, 928 A.2d 746; an officer telling a defendant with whom he was an acquaintance, “I’m with you,” *State v. Schueler*, 488 A.2d 481, 484 (Me. 1985).

132. *Kittredge*, 2014 ME 90, ¶ 28, 97 A.3d 106.

aspect of the Law Court's analysis in *Kittredge*, however, is its brief, non-exhaustive application of the ten *Michaud* factors. The Court only considered one aspect of the situation in depth—the fact that Kittredge's probation officer requested that he come to the probation office—to support its conclusion that Kittredge was not in custody.<sup>133</sup>

Further, the cases that the Law Court used to support its conclusion are distinguishable from Kittredge's case. The Law Court cited the United States Supreme Court's opinion in *Minnesota v. Murphy*, a case factually similar to *Kittredge* in that a probation officer requested a meeting with the defendant after learning about possible criminal activity.<sup>134</sup> During the meeting, the defendant made self-incriminating statements in the absence of *Miranda* warnings.<sup>135</sup> In that case, however, the probation officer conducted the meeting alone; no police officers were present.<sup>136</sup> The Minnesota Supreme Court barred the defendant's confession because it determined that a probation officer may be able to coerce or “compel [a defendant's] attendance and truthful answers.”<sup>137</sup> The United States Supreme Court disagreed. On appeal, the Court found that the fact that the interview took place at probation office made the interview *less* coercive because an interview conducted by a person's probation officer “subjected [the defendant] to less intimidating pressure than is imposed on grand jury witnesses.”<sup>138</sup> Unlike the interview in *Murphy*, Kittredge's interview was not conducted by his less-coercive probation officer—it was conducted by two armed state troopers. This fact makes the *Murphy* case substantially different from *Kittredge*, and thus less persuasive as precedent.

Similarly, in *State v. Scott*,<sup>139</sup> an Ohio appeals court case cited by the Law Court, a probation officer asked a defendant to come to the probation office where he was subsequently interviewed by a sheriff.<sup>140</sup> The sheriff told the defendant that he was not under arrest and he would be free to leave after the interview.<sup>141</sup> After approximately fifteen minutes, the defendant expressed that he may have been involved in criminal activity, and at that point, the sheriff read him *Miranda* rights and began to record the rest of the interview.<sup>142</sup> The court concluded that the defendant “was not formally arrested nor was there any restraint on his freedom of movement of the degree associated with a formal arrest” when he made his initial

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133. Concededly, the Law Court noted that it focused on this issue because the trial court did. However, as noted earlier, the Law Court's standard of review for in custody determinations is *de novo*, so it accepts the trial court's findings of fact to make a *de novo* decision about whether the facts add up to an “in custody” finding.

134. 465 U.S. 420, 423 (1984).

135. *Id.* at 424-25.

136. *See id.* at 429 n.5 (The situation would be different “if [the defendant] had been interviewed by the police themselves . . .”); *see also id.* at 432 (explaining that [the defendant] was not surprised that his remarks made at the interview with the probation officer “would be made available to the police” later on).

137. *Id.* at 431.

138. *Id.*

139. 765 N.E.2d 930 (Ohio Ct. App. 2001).

140. *Id.* at 932.

141. *Id.* at 936.

142. *Id.* at 932.

statements, so “he was not entitled to *Miranda* warnings” at that point.<sup>143</sup> Like *Murphy*, this case is substantially different from *Kittredge*. In *Scott*, the un-*Mirandized* portion of the interview was short, and the defendant was read *Miranda* rights as soon as he began to make incriminating statements. *Kittredge* was not read *Miranda* rights at any time during his interview with his probation officer.

The Law Court nonetheless used these cases to establish that, by itself, the fact that *Kittredge*’s interview took place at his probation officer’s office did not indicate that *Kittredge* was in custody during the interview. Not only were those cases readily distinguishable from *Kittredge*, but the Law Court failed to give much consideration to any of the other ten factors from *Michaud*. Courts are supposed to consider the factors “in their totality, not [in] isolation.”<sup>144</sup> What makes the analysis even more difficult is that there is not yet any explicit guidance or explanation as to how the ten factors should be weighed against each other or considered as a group. Regarding the interview taking place in the probation office, even the case law the Law Court relied on did not examine how much weight to give to that fact in the context of other factors. As it currently stands, the “in custody” test and analysis used by the Law Court leave substantial room for potentially inconsistent results when applied.

An example of such an inconsistency is present in *State v. Lowe*, another recent Law Court decision involving a motion to suppress a confession, where the Court applied the factors to statements a suspect made to a state trooper while in a hospital.<sup>145</sup> In that case, an eighteen-year-old girl named Kristina Lowe and three others were taken to the hospital after being involved in a single-car accident.<sup>146</sup> Soon after Lowe arrived, a police officer who was armed and in uniform requested to interview her about the accident.<sup>147</sup> After questioning began, the trooper took a five-minute break and learned that two people had died in the accident and that Lowe was suspected to have been the driver of the car.<sup>148</sup> Questioning resumed, and Lowe made incriminating statements without first being *Mirandized*.<sup>149</sup> As in *Kittredge*, the Law Court recited the ten *Michaud* factors as what it would consider in determining whether the statements were made in a custodial situation.<sup>150</sup> In its analysis in *Lowe*, the Court first stated that the trial court was correct in determining that hospitalization did not create a custodial situation on its own.<sup>151</sup> However, the Court determined that Lowe was in custody for several other reasons: the trooper had acquired information during the break that made the girl a suspect in a criminal case; the questioning was “focused, aggressive, and insistent;” the trooper urged Lowe to tell the truth; and the trooper failed to repeatedly tell Lowe that she was free to stop answering questions.<sup>152</sup> The Court held that “[v]iewed

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143. *Id.* at 936.

144. *State v. Kittredge*, 2014 ME 90, ¶ 17, 97 A.3d 106 (quoting *State v. Lowe*, 2013 ME 92, ¶ 16, 81 A.3d 360).

145. 2013 ME 92, ¶ 19, 81 A.3d 360.

146. *Id.* ¶ 3.

147. *Id.* ¶ 5.

148. *Id.* ¶¶ 6-8.

149. *Id.* ¶ 8.

150. *Id.* ¶ 16.

151. *Id.* ¶ 19.

152. *Id.*

objectively, the information that the trooper learned over the break [in questioning] and communicated to Lowe produced a change in [her] liberty to end the interview” and concluded that “[a] reasonable person in [her] position would not have felt at liberty to end the interrogation.”<sup>153</sup> Therefore, the Court determined that Lowe was in custody when she made statements to the police.<sup>154</sup>

Inconsistency is present here because several of the circumstances that the Court determined had created a custodial interrogation in *Lowe* were present in *Kittredge* as well: the troopers had reason to suspect that Kittredge was involved in a crime and they expressed this belief to Kittredge; they told Kittredge that they did not believe he was telling the truth; the questioning was direct and focused; and the law enforcement officer had initiated the contact.<sup>155</sup> Furthermore, additional factors were present in *Kittredge* that were not present in *Lowe*: there was not one, but two fully uniformed police officers present during Kittredge’s questioning; he was in a place associated with law enforcement; and, he was unsure he would be allowed to leave the building he was in.<sup>156</sup> Notwithstanding these seemingly important parallels between the two cases, the Law Court came to two different results: Lowe’s interrogation was custodial; Kittredge’s was not.<sup>157</sup>

#### V. REVISITING MAINE’S “IN CUSTODY” TEST

The different results in these two cases demonstrate that the ten-factor test from *State v. Michaud* is being applied inconsistently and may lead to different determinations of whether an interview is custodial in similar situations. The test purports to be objective, but the benefits of an objective test are lost without more guidance and consistency in its application. Several measures could be taken to achieve this result.

##### A. More Thorough Consideration of the Ten Factors

In the Law Court’s analysis of the *Michaud* factors in Kittredge’s case, there was no explanation or cited precedent that indicated how the factors should be weighed against each other to determine whether an interview is custodial. The Court identified circumstances that both supported and refuted a finding that Kittredge was not in custody, but did not expressly explain the weight or importance of these factors.

In their briefs, Kittredge and the State had conflicting arguments regarding what factual circumstances should have been considered when the Law Court reviewed the trial court’s custody determination on appeal.<sup>158</sup> It is possible that the

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153. *Id.*

154. *Id.*

155. See Blue Br. at 9-13; *Kittredge*, 2014 ME 90, ¶¶ 7-8, 97 A.3d 106.

156. *Kittredge*, 2014 ME 90, ¶ 7, 97 A.3d 106.

157. While the Law Court cited to *Lowe* in the *Kittredge* opinion, the citation was general and there was no attempt to distinguish the cases.

158. Kittredge’s brief analyzes each of the ten factors individually, making an argument that the circumstances weigh in favor of a finding of custody. Blue Br. at 9-13. The State lists factual circumstances that indicate the defendant was not in custody during his interview and provides a brief analysis for fewer factors. See Red Br. at 10-13.

Court could have reached a different conclusion if it had placed more weight on certain other circumstances of Kittredge's interview, such as "the party who initiated the contact," the "existence . . . of probable cause to arrest (to the extent communicated to the defendant)," the subjective views that the police manifested to the defendant, the investigation's focus, "the number of law enforcement officers present," and the "duration and character of the interrogation."<sup>159</sup> As the Law Court recognized, the facts indicated that the probation officer requested the interview, the police had reason to suspect Kittredge of a crime and made him aware of this information, there was more than one state trooper present, and Kittredge was likely the focus of the investigation—all factors that weigh in favor of a finding that he was in custody.<sup>160</sup> While the Law Court recognized these facts, it nonetheless placed nearly all of its emphasis on the fact that the interview took place at the request and location of the probation officer.<sup>161</sup>

Under the Court's self-imposed charge to consider these factors "in their totality, not in isolation,"<sup>162</sup> the Law Court should have conducted a more thorough analysis of the circumstances of Kittredge's interview or weighed the factual findings against one another more evenly to determine if a finding of custody was warranted. If the Court had more completely examined the applicability to each of the ten *Michaud* factors to the factual circumstances in its *de novo* review of the trial court's decision,<sup>163</sup> it may have come to a different conclusion about whether or not Kittredge was "in custody" when he made his incriminating statements.

### B. Returning a Subjective Factor to the Analysis

The United States Supreme Court has repeatedly emphasized that determining whether a suspect is in custody for the purpose of *Miranda* warnings is a fundamentally objective analysis.<sup>164</sup> While simpler to administer, a purely objective test fails to take into account certain circumstances, such as the personal characteristics or feelings of an individual, which may affect whether or not that person feels free to leave the interview—the crux of the objective test.<sup>165</sup> Coercive tactics may often be used in interviews and interrogations with suspects and defendants;<sup>166</sup> law enforcement officers are specially trained on how to speak with suspects and obtain confessions in ways that are legal, yet focused and aggressive.<sup>167</sup> Police interrogations are designed to be "psychologically oriented," taking place in rooms that isolate the suspect and make him or her

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159. *Kittredge*, 2014 ME 90, ¶ 17, 97 A.3d 106 (quoting *Lowe*, 2013 ME 92, ¶ 16, 81 A.3d 360).

160. *Id.* ¶ 18.

161. *See id.* ¶¶ 18-23.

162. *Id.* ¶ 17 (citing *Lowe*, 2013 ME 92, ¶ 16, 81 A.3d 360).

163. *Id.* ¶ 15 ("We review the denial of a motion to suppress for clear error as to factual issues and *de novo* as to issues of law. . . .") (citation omitted).

164. *Stansbury v. California*, 511 U.S. 318, 323 (1994) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation . . . .").

165. *Kittredge*, 2014 ME 90, ¶ 17, 97 A.3d 106 ("[T]he question is whether [the] facts demonstrate . . . that a reasonable person in [the defendant]'s situation would have felt he or she was at liberty to terminate the interrogation.") (third alteration in original) (citations omitted).

166. Saul M. Kassir & Gisli H. Gudjonsson, *The Psychology of Confessions*, 5 PSYCHOL. SCI. IN THE PUB. INT. 2, 41 (2004).

167. *See infra* notes 168-169 and accompanying text.

uncomfortable.<sup>168</sup> One modern interrogation method, called the Reid technique, dictates a nine-step process for police to use when questioning a suspect.<sup>169</sup> The purpose of the process, as explained by experts in the field of psychology, is “to get suspects to incriminate themselves by increasing the anxiety associated with denial, plunging them into a state of despair, and minimizing the perceived consequences of confession.”<sup>170</sup> This type of pressure could impact an individual’s perception of whether they are free to leave an interrogation in a way that may not necessarily be captured by an exclusively objective test.

A entirely subjective, case-by-case analysis is not likely feasible or desirable: if a purely subjective analysis was employed, law enforcement officers would need “to become *de facto* competency evaluators for custodial purposes . . . [which] would probably not be in accordance with their particular skill set or primary objective of apprehending unlawful individuals.”<sup>171</sup> However, the addition of a defendant-specific factor, such as the subjective intent of the interviewing officer or the subjective belief of the defendant as to whether he or she was in custody, into the analysis could be a workable, fair alternative to the purely objective “in custody” test. In *Kittredge*, for example, the trial court found as fact that Kittredge did not know whether he was free to leave the building<sup>172</sup> and that the state troopers had information that made them believe Kittredge was involved in the crime prior to interviewing him.<sup>173</sup> If considered by the Court, both of these facts could have tipped the scales in favor of a finding that Kittredge was in custody. Although subjective factors were abandoned in favor of the simplicity of an objective test,<sup>174</sup> it is certainly feasible that some consideration of the officer’s intent or the defendant’s actual knowledge and belief be added back into the custodial analysis.<sup>175</sup>

In fact, a defendant-specific factor infiltrated the purely objective approach to custody determinations at the United States Supreme Court level in a recent case,

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168. Kassin, *supra* note 166, at 42 (citation omitted).

169. *Id.* The nine-step Reid Technique includes the police developing themes of psychological justification for the crime, refusing to accept a suspect’s denial, preventing a suspect from withdrawing, showing sympathy, getting the suspect to remember details of the crime, and then making an oral or written statement of guilt. *Id.* at 42-43.

170. *Id.* at 43.

171. Tobias Wasser & Laurel Edwards, *Mentally Ill in Police Custody: Subjective Standard Denied*, 41 LEGAL DIG. 121, 122 (2013).

172. *State v. Kittredge*, 2014 ME 90, ¶ 7, 97 A.3d 106.

173. *Id.* ¶ 8.

174. *Stansbury v. California*, 511 U.S. 318, 323 (1994).

175. Illinois case law provides a good example of how a subjective factor may be integrated in to the analysis. To determine “whether an arrest has occurred and, therefore, whether a person is in custody,” Illinois courts should consider the following factors: “(1) the time, place, length, mood, and mode of the encounter between the defendant and the police; (2) the number of police officers present; (3) any indicia of formal arrest or restraint, such as the use of handcuffs or drawing of guns; (4) the intention of the officers; (5) the subjective belief or understanding of the defendant; (6) whether the defendant was told he could refuse to accompany the police; (7) whether the defendant was transported in a police car; (8) whether the defendant was told he was free to leave; (9) whether the defendant was told he was under arrest; and (10) the language used by officers.” *Ries v. City of Chicago*, 919 N.E.2d 465, 475 (Ill. App. 3d 2009).

*J.D.B. v. North Carolina*.<sup>176</sup> In that case, a thirteen-year-old seventh-grader, J.D.B., was attending school and was taken from his classroom by a police officer in uniform.<sup>177</sup> He was brought to a conference room where he was questioned by police for half an hour about some nearby break-ins in the neighborhood.<sup>178</sup> The questioning began with small talk, but J.D.B. confessed that he was involved in the break-ins after learning that he could possibly go to a juvenile detention center.<sup>179</sup> Prior to the questioning, he was not read *Miranda* warnings, did not have the opportunity to talk with his grandmother (his caretaker), and was not told that he was free to leave the room.<sup>180</sup> The Supreme Court, in its opinion, recognized that whether a suspect is in custody is an objective question.<sup>181</sup> The Court explained that using an objective test is helpful because it avoids burdening police with having to anticipate a defendant's "subjective state of mind" during an interview.<sup>182</sup> However, the Court continued by saying that "[i]n some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"<sup>183</sup> The Court said it has "observed that children are generally less mature and responsible than adults; . . . they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; and they are more vulnerable [than adults]."<sup>184</sup> Therefore, the Court held that so long as a child's age is known to an officer at the time of questioning "or would have been objectively apparent to a reasonable officer," age should be included as a factor in the custody analysis.<sup>185</sup>

Writing for the dissent, Justice Alito argued that the "[majority's] decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures . . . ."<sup>186</sup> The dissent points out that other characteristics may affect a person's susceptibility to these pressures, which will lead to additional issues for the Court to resolve in the future.<sup>187</sup> To solve these problems, the dissent explained, the Court will then have to "choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures" or "be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory."<sup>188</sup> In sum, the dissenters in

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176. 131 S. Ct. 2394 (2011).

177. *Id.* at 2399.

178. *Id.*

179. *Id.* at 2399-40.

180. *Id.* at 2399.

181. *Id.* at 2402.

182. *Id.*

183. *Id.* at 2402-03 (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994)).

184. *Id.* at 2403.

185. *Id.* at 2406.

186. *Id.* at 2409 (Alito, J., dissenting).

187. *See id.*

188. *Id.*

*J.D.B.* clearly believe that the door to the inclusion of other defendant-specific factors has opened, and this case could provide support for courts to allow some subjectivity to infiltrate the “in custody” test.

In Maine, court opinions prior to *Michaud* did consider the subjective intent of the officer and the subjective beliefs of a suspect when determining if that person was in custody.<sup>189</sup> Whether or not these or other subjective circumstances will be considered in future custody analyses remains to be seen. Nonetheless, incorporating a defendant-specific component back into the custodial test would seem to be in sync with Maine’s past approach and could help provide results in a custody determination that account for more of the circumstances surrounding an interview and differences in individuals’ mental abilities and susceptibility to interrogative pressures.

### C. A Policy that Encourages Recording Interviews and Interrogations

Because the Law Court defers to the trial court’s factual findings to determine *de novo* if a person was in custody during questioning,<sup>190</sup> it is crucial that these facts are accurate—especially facts that relate to whether a suspect was told he or she was free to leave, not under arrest, or that express the tone of the interview, as these factors can be indicative of whether an interview is or is not custodial under the *Michaud* test.<sup>191</sup> One way to ensure an accurate recitation of events could be to encourage or require the recording of interviews and interrogations in order for statements to be admissible in court. While there was a recorder in the room where Kittredge was questioned, it was not recording the interview “for reasons that [could not] be determined.”<sup>192</sup> If it had been recording, the Law Court would have known for certain the tone of the interview, the attitude of the officers, what the officers told Kittredge about suspicions of his guilt, and other facts that the parties characterized differently in their briefs that may have impacted its custody determination.

Several states already have judicially created requirements to record interrogations. In 1985, “the Alaska Supreme Court held that ‘an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process’” according to the state constitution.<sup>193</sup> Alaska was the first state to require that all custodial interrogations occurring in a place of detention be recorded.<sup>194</sup> While Alaska is the only state to have gone as far as recognizing a due process right to the recording of interviews,<sup>195</sup> courts in

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189. See, e.g., *State v. Thibodeau*, 496 A.2d 635, 639 (Me. 1985); *State v. Cochran*, 425 A.2d 999, 1002 (Me. 1981).

190. *State v. Kittredge*, 2014 ME 90, ¶ 17, 97 A.3d 106 (citation omitted).

191. See *State v. Michaud*, 1998 ME 92, ¶ 4, 81 A.3d 360.

192. *Kittredge*, 2014 ME 90, ¶ 7, 97 A.3d 106.

193. Michael Kiel Kaiser, *Wrongful Convictions: If Mandatory Recording is the Antidote, Are the Side Effects Worth It?* 67 ARK. L. REV. 167, 173 (2014) (quoting *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985)).

194. See *Stephan*, 711 P.2d at 1162.

195. Kaiser, *supra* note 193 (citing Marjorie A. Shields, *Criminal Defendant’s Right to Electronic Recordation of Interrogations and Confessions*, 69 A.L.R. 6th 579, 604-25 (2011)).

Minnesota have followed suit by requiring that interviews be recorded.<sup>196</sup> In both states, “with some exceptions, the court would suppress products of an unrecorded interview at trial.”<sup>197</sup>

In 2004, the Massachusetts Supreme Judicial Court created recording requirements, but it took a slightly different approach.<sup>198</sup> Instead of automatically excluding statements that have not been recorded, failure to electronically record a custodial interrogation “entitles the suspect to a favorable jury instruction.”<sup>199</sup> Later, in 2005, the New Jersey Supreme Court changed its court rules to require that interrogations be recorded in all cases involving a violent crime,<sup>200</sup> and in 2009, the Indiana Supreme Court mandated that interviews be recorded for all felony cases via an amendment to the state’s rules of evidence.<sup>201</sup>

Maine is one of a handful of states that has a statutory recording requirement, but the requirement is not all-inclusive.<sup>202</sup> The statute currently only mandates that law enforcement have policies in place regarding the recording of interviews with suspects of “serious crimes” and that law enforcement preserve “investigative notes and records in such cases.”<sup>203</sup> Expanding the circumstances in which recordings are required or adding an incentive to record interviews, such as a jury instruction favoring the defendant, could help to ensure that courts are examining accurate facts in cases involving custodial interrogations. There are many other benefits to recording interviews as well: recordings create a permanent record of what occurred during an interview, including how officers treated the suspect being interviewed; motions to suppress statements based on police coercion are easily resolved by listening to the recorded interview; and the public’s confidence in the police and their practices increases because the recordings show that they have nothing to hide.<sup>204</sup> Further, as evidenced in research collected by a lawyer, police officers, sheriffs, and prosecutors have indicated that a policy of recording interviews does not affect the police’s ability to obtain admissions in most instances.<sup>205</sup>

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196. *Id.*

197. *Id.* (citing *Stephan*, 711 P.2d at 1162; *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994)).

198. *Id.*

199. *Id.* at 173-74 (citing *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533 (Mass. 2004)).

The jury instruction informs the jury “that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable” and “that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.” *DiGiambattista*, 813 N.E.2d at 533-34.

200. N.J. R. CT. 3:17(a).

201. Order Amending Rules of Evidence, No. 94S00-0909-MS-4 (Ind. 2009), available at [http://www.in.gov/ilea/files/Evidence\\_Rule\\_617.pdf](http://www.in.gov/ilea/files/Evidence_Rule_617.pdf) (requiring audio and visual recording of custodial interrogations, with limited exceptions); see also IND. R. EVID. 617(a) (the amended rule).

202. Other jurisdictions with a statutory recording requirement include the District of Columbia, New Mexico, Montana, Nebraska, North Carolina, and Wisconsin. See D.C. Code §§ 5-116.01-.03 (West 2013); N.M. Stat. Ann. § 29-1-16(A) (West 2013); Mont. Code Ann. §§ 46-4-406-411 (West 2013); Neb. Rev. Stat. Ann. §§ 29-4501-4508 (West 2013); N.C. Gen. Stat. Ann. § 15A-211 (West 2013); Wis. Stat. Ann. §§ 968.073, 972.115 (West 2013).

203. 25 M.R.S.A. § 2803-B(1)(K) (2013).

204. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1129-30 (2005).

205. *Id.* at 1129.

## VI. CONCLUSION

*Miranda* warnings are necessary to the maintenance of a fair criminal justice system and to protect the constitutional rights of suspects and defendants. To ensure these goals are met in practice, the Law Court should broaden its consideration of the factors it announced in *State v. Michaud* when determining whether a person is in custody during an interview or interrogation. A more comprehensive analysis of the ten factors may also shed light on the weight and value that should be given to various factual circumstances, which would help develop more informative precedent to use in future cases. Including a defendant-specific factor into the analysis could be an additional way to protect suspects from coercive police tactics by recognizing that some individuals may react differently than others to certain situations and pressures. A purely objective inquiry for *Miranda* purposes may be simpler to evaluate, but when the result affects whether or not a defendant's confession is presented to a jury, the consequences of violating a person's rights may outweigh the benefit of simplicity. Maine should also consider a policy that incentivizes the recording of interviews and interrogations in which suspects make incriminating statements to ensure that the circumstances of a particular interview are accurately presented in a later proceeding. If the Law Court had followed the alternative approaches in this Note, the result in *Kittredge* may have been different.

The importance of an interrogation's status as "custodial" cannot be overstated, and the method a court uses to arrive at that determination is the key. While Maine's current test is comprehensive as to objective considerations, it should be reviewed to ensure that, in practice, it is achieving its intended result while protecting the rights of citizens against self-incrimination.