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COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
CERTIORARI TO THE COURT OF APPEALS Case No. 2018CA1877 Opinion by Dailey, J. Furman, J., concurs Richman, J., dissenting	
MOFFAT COUNTY DISTRICT COURT Honorable Michael A. O'Hara III, Judge Case No. 2017CR238	
Petitioner: RACHEL ANN NIEMEYER **v.** **Respondent:** THE PEOPLE OF THE STATE OF COLORADO	**▲ COURT USE ONLY ▲**
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BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) & (3), C.A.R. 32, and C.A.R. 29.

This brief complies with the word limits set forth in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief). It contains 4,718 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

/s/ Jacob McMahon

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The American Civil Liberties Union (ACLU) of Colorado and the National Association of Criminal Defense Lawyers (NACDL) respectfully submit this brief of *amici curiae* pursuant to C.A.R. 29.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members, is a state affiliate of the ACLU. Because the ACLU of Colorado is dedicated to the constitutional rights and civil liberties of all Coloradans, the organization has a unique interest in guaranteeing judicial enforcement of the rights of people subject to custodial interrogation like Rachel Niemeyer.

The NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of over 10,000 lawyers, thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, in

cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in cases like this one that involve criminal suspects being interrogated by law enforcement without the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966).

SUMMARY OF THE ARGUMENT

The Court of Appeals decision that Ms. Niemeyer was not in custody at the time of her interrogation by police erodes *Miranda* protections in Colorado by placing disproportionate importance on police statements. Courts must determine the moment of custody from the true totality of the circumstances, as viewed from the perspective of a reasonable person in the suspect's position. A true totality of the circumstances analysis protects against officers narrating away the reality of conditions they impose on accused people. Due to the deceptive nature of modern police interrogation, and the risks deceptive tactics pose to accused people's rights and the integrity of the legal system, courts must be particularly vigilant against placing undue importance on police statements.

ARGUMENT

I. The Court of Appeals' opinion further erodes Fifth Amendment protections in Colorado through an overreliance on police statements.

Police removed a sobbing and highly intoxicated Ms. Niemeyer from the motel room where her husband was shot, refused her requests to go to the hospital

to be with her injured husband, and transported her instead to the police station, where they interrogated her without reading her *Miranda* rights. *People v. Niemeyer*, No.18CA1877, ¶¶ 2-16, 20-31 (Colo. App. Oct. 27, 2022) (unpublished). The police kept Ms. Niemeyer for more than two hours, refusing no fewer than a dozen requests by her to be taken to the hospital. *Id.* ¶ 52 (Richman, J., dissenting). Without asking permission, the police bagged and zip-tied her hands at the police station. They repeatedly prevented her from removing the bags or zip-ties and told her she "had to" leave them on, including with a raised voice. *Id.* ¶¶ 5-16, 27 (majority opinion). Ms. Niemeyer's husband died, and the State used her intoxicated statements to police – that she did not really remember but might have shot her husband – to convict her of second-degree murder. *Id.* ¶¶ 17-19.

The division majority acknowledged that a reasonable person in Ms. Niemeyer's position "would certainly have considered herself ***not*** free to leave," but apparently not to "the degree associated with a formal arrest." *Id.* ¶ 28 (emphasis added). This cramped and hyper-technical conclusion does violence to the Fifth Amendment and *Miranda*'s fundamental protections. The division placed undue weight on the fact that an officer told the intoxicated Ms. Niemeyer, a single time, that she was not under arrest. This no-custody conclusion ignores the totality of the circumstances, including "the runaround by the police" and "the

circumstances of the interrogation itself" – "Niemeyer and Detective Rimmer by themselves in an interview room at a police station with the door shut." *Id.* ¶ 55 (Richman, J., dissenting). If the decision is allowed to stand, *Miranda*'s procedural shield against the overwhelming power of the state will be eviscerated. Further, police officers will have the ability to narrate their way out of providing *Miranda* warnings to citizens, including those vulnerable to police deception.

A. Courts determining whether a person is entitled to *Miranda* warnings must look at the true totality of the circumstances to adequately safeguard an accused person's rights.

An accused person is in custody and entitled to *Miranda* warnings, if "[s]he has been formally arrested or in the totality of the circumstances a reasonable person in the suspect's position would have felt that [her] freedom of action had been curtailed to a degree associated with a formal arrest." *People v. Mangum*, 48 P.3d 568, 571 (Colo. 2002); *accord People v. Davis*, 2019 CO 84, ¶ 17. *Miranda* warnings are not invoked by a formulaic, rigid structure, such as the phrase "you are under arrest." Rather, they are required where a reasonable person would perceive herself to be restrained to the degree associated with formal arrest; a situation that can appear in many different forms.

This Court has enumerated a list of factors courts should consider in assessing whether an accused person would reasonably feel her freedom had been curtailed to the degree associated with arrest. *People v. Matheny*, 46 P.3d 453, 465

(Colo. 2002); *see id.* (listing, among other factors, the time, place, and purpose of the encounter, the persons present, the tone and words spoken by the officer, and limitations on the accused person's freedom of movement). This Court has been consistent and clear since *Matheny* that no single factor is determinative and that the list is not exhaustive. *People v. Pleshakov*, 2013 CO 18 ¶ 20; *People v. Elmarr*, 181 P.3d 1157, 1162 (Colo. 2008).

The division's analysis of Ms. Niemeyer's interrogation demonstrates that it ignored a true totality-of-the-circumstances custody analysis. It concluded that she was not in custody based largely on its conclusion that "the officer's actions and statements would have led a reasonable person to believe that she would be on her way to the hospital to check on her husband as soon as the hand-bagging procedure was completed." *Niemeyer*, ¶ 29 (majority opinion). That conclusion itself is contradicted by the majority's acknowledgement that a person in Ms. Niemeyer's position "certainly" would not have considered herself "free to leave," *id.* ¶ 28, not to mention the dozen times that the police refused Ms. Niemeyer's requests to go to the hospital, *id.* ¶ 52 (Richman, J., dissenting).

While the division listed several facts, it did not analyze how they fit together to form the circumstances of the interrogation. *Id*. ¶ 27 (majority opinion). Ms. Niemeyer was taken to the police station, despite her repeated requests to be taken to the hospital. *Id.* ¶¶ 5, 7. At the station, police forcibly put bags on her

hands and prevented her from removing them. *Id.* ¶ 9. She asked again, repeatedly, to be taken to the hospital but was not allowed to leave the station. *Id.* ¶ 10. Additionally, she was highly intoxicated and emotional.

The officer's singular statement that she was not under arrest and vague statements that she might be allowed to go to the hospital at some point should carry little to no weight in this situation, because of their context and equivocal content. The Court of Appeals overweighted their importance, and that exaggerated importance skewed the analysis away from its center: whether a reasonable person would believe herself deprived of freedom of action to the degree associated with a formal arrest.

Additionally, the Court of Appeals erred in considering the significance of the bags that were zip-tied to Ms. Niemeyer's hands. Relying on *United States v. Jamison*, 509 F.3d 623, 631 (4th Cir. 2007), the majority found that the hand-bagging did not render an otherwise non-custodial situation custodial. *Niemeyer*, ¶ 30. The correct analysis does not ask whether any single factor transforms a situation into custody, it asks how the totality of the circumstances would cause a reasonable person to feel. Here, the fact that police zip-tied bags over Ms. Niemeyer's hands and did not allow her to remove them should be considered in the context of her situation, including that she was not permitted to leave the police station despite repeatedly asking to go to the hospital.

Including the hand-bagging in an integrated analysis of the totality of the circumstances also illuminates how different Ms. Niemeyer's situation was from the situation in *Jamison*. Mr. Jamison affirmatively sought out police at an emergency room to report that he had been shot. 509 F.3d at 625. His hands were bagged in the hospital where he made multiple statements to police. *Id.* at 625. He was not in a police station. *Id.* He did not ask to leave or go anywhere else, let alone 12 times, and there was no suggestion that he asked to remove the bags or that the police raised their voices in preventing him from doing so. *Id.* at 625-27. In contrast, Ms. Niemeyer's bags were a much more significant restraint than Mr. Jamison's because she repeatedly asked to remove them. *Niemeyer*, ¶ 9. The police were manifestly restraining her from use of her hands against her will which, in combination with the other factors of the police-station detention, would have led any reasonable person to conclude her detention was on par with formal arrest.

The correction for overweighting a single factor is more complex than to simply weigh officers' statements *equally* with other factors. That approach will also produce error. In *People v. Willoughby*, this Court concluded that an accused person was not in custody, 2023 CO 10, ¶ 41, although he was told he was under arrest no less than four times, *id.* ¶ 49 (Berkenkotter, J., dissenting). The majority opinion reached this conclusion by considering which factors weighed in favor of custody (6) and which against (9) and finding that "the factors weighing against

custody outweigh the factors in favor of custody." *Id.* ¶ 40 (majority opinion). The dissent disagreed with the "mathematical tally" of the factors, because "under different circumstances the factors necessarily bear different weights." *Id.* ¶ 89 (Berkenkotter, J., dissenting).

While amici disagree with the majority's conclusion in *Willoughby*, the result here must be understood in the context of the Court's decision in in that case. There, the police tell a person he is under arrest at least four times and yet the conclusion is that he is ***not*** under arrest and no *Miranda* warning is necessary. Here, the police detain and restrict a person's freedom of movement for more than two hours, interrogate them at a police station behind a closed door, but tell them a single time that they are not under arrest, and the lower court concludes that she is also ***not*** under arrest and no *Miranda* warning is necessary. Unless reversed, the erosion of *Miranda*'s fundamental constitutional protections will continue.

Instead, this Court must make clear that *Miranda* custody can occur in innumerable permutations. The privilege against self-incrimination is and "has always been as broad as the mischief against which it seeks to guard." *Miranda*, 384 U.S. at 450 (quotations omitted). Both turning the analysis into a counting exercise and allowing a single factor to consume the analysis hamstring a reviewing court's ability to identify when a citizen is subject to the "interrogation atmosphere and the evils it can bring." *Id.* at 456.

This Court should conclude that Ms. Niemeyer was in custody and reverse, making clear lower courts must consider the true totality of circumstances.

B. Officers must not be allowed to narrate their way out of the reality of the conditions they impose on accused people.

When officers' statements are overweighted, as they were by the Court of Appeals in this case, courts risk allowing officers to narrate their preferred version of the facts into existence. This risk is particularly acute in the era of body-worn cameras. While Colorado's deployment of body cameras may alleviate certain problems in interactions between civilians and police, *see* § 24-31-902(1)(a)(I), C.R.S. (declaring that all local law enforcement agencies shall provide body-worn cameras to officers by July 1, 2023), giving officers cameras creates new and different risks. Body-worn cameras are not impervious to manipulation, even without technical manipulation. The angle of a camera and its focus can distort the interaction. Saul M. Kassin, *The Social Psychology of False Confessions*, 9 Social Issues and Policy Review 25, 43 (2015) (finding in laboratory experiments that observers underestimate law enforcement pressure when visual attention is directed toward the accused).

Officer narration also can distort the interaction, as the officer attempts to provide "facts" in anticipation of their judicial or public audience. The classic example is the officer who yells "stop resisting!" in an encounter with an unresisting citizen. In many widely publicized police beatings (and sometimes

killings) of Black civilians this manipulation occurred. In Louisville, Kentucky, during a search for a suspect, an officer wearing a body-worn camera ordered his police dog to bite an unresisting Black child. Civil Rights Division, United States Department of Justice, *Investigation of the Louisville Metro Police Department and Louisville Metro Government*, 15 (2023), https://www.justice.gov/crt/case-document/file/1572951/download. An officer yelled "stop fighting my dog," as the child was laying still, with one arm behind his back and the other arm in the dog's mouth. *Id.*

In Ocean City, Maryland, a Black nineteen-year-old was vaping on a boardwalk in violation of a city ordinance. Julia Jacobo & Alice Chambers, *Vaping Arrest Turns Into Violence Encounter with Police on Ocean City, Maryland Boardwalk*, ABC7 Eyewitness News, June 15, 2021, https://6abc.com/ocean-city-maryland-vaping-arrests-caught-on-camera-police-officer-kneeing-man/10792164/. After a contentious interaction, four officers held him on the ground. *Id.* Bystander video shows the young man curled on the ground and police shouting at him to "stop resisting." *Id.* The young man can be heard saying "I'm not resisting," as police brutally knee him multiple times in the ribs. *Id.*

Police narration is a systemic problem in Colorado too. In 2020, the Colorado Office of the Attorney General, prompted by the police killing of Elijah McClain, a young Black man, opened an investigation into the Aurora Police

Department (APD) and Aurora Fire Rescue. Colorado Office of the Attorney General, *Investigation of the Aurora Police Department and Aurora Fire Rescue* (2021), https://coag.gov/app/uploads/2021/09/Pattern-and-Pracice-Investigation-Report.pdf. The Attorney General's report found that not only did APD have a pattern and practice of using excessive force, APD had a pattern and practice of officers "reciting 'stop resisting' reflexively during encounters even when the body-worn camera videos did not show resistance." *Id*. at 80. "This purported resistance was often used to justify force" in later review. *Id.* Police also "used language that apparently was designed to support […] potential chemical sedative use by Aurora Fire." *Id.* at 81. Officers described people using words like "jacked up" and "superhuman strength" to describe people, in what the Attorney General believed was an attempt to induce Aurora Fire to deploy chemical sedatives, rather than to describe a person's actual behavior. *Id.*

The division's no-custody determination puts on display police narration's power to re-make a suspect's world. The division noted an officer told Ms. Niemeyer "that they had to go to the Safety Center" before they could take her anywhere else. *Niemeyer*, ¶ 7 & n.1. The Safety Center is a police station, not a hospital, or other neutral location. *Id.* Calling a police station a Safety Center, although it may function to lull a suspect into a false sense of security, does not remove the inherent pressures of the police station interrogation, held in an

interview room at a police station with the door shut, that so troubled the *Miranda* court.

Ms. Niemeyer was eventually told that she was not under arrest, after having been held at the police station for hours, her hands restrained, despite her repeated pleas to go to the hospital and remove the bags from her hands. The officer's single statement that she was not under arrest did not free Ms. Niemeyer from the restrictions to which she was subject. Those restrictions existed, regardless of what the police officer said into the camera. Reviewing courts should not allow themselves to be misled by police narration and should follow the material facts where they go; in Ms. Niemeyer's case, to an unequivocal finding of custody.

II. Law enforcement's routine use of deception in interrogation requires courts to be vigilant, as an officer's statements can conceal the reality of the accused person's situation.

A. Officers routinely deceive people during interrogations.

Virtually every law enforcement agency in the United States uses some version of an interrogation technique commonly referred to as the Ried Technique. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 Am. Psych. 215, 215 (2005). This technique arose as an alternative to physically coercive interrogation, and substitutes deception for physical coercion. Richard Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 Crime, Law, and Social Change 35, 38-43 (1992);

Fred Inbau & John Reid, *Criminal Interrogation and Confessions* 163-64 (1962) ("Deceit is inherent in every question asked to the suspect and in every statement made by the interrogator.").

Interrogation pursuant to this technique has two phases. Margareth Etienne & Richard McAdams, *Police Deception in Interrogation as a Problem of Procedural Legitimacy*, 54 Texas Tech L. Rev. 21 (2021); *see generally* Inbau & Reid, *supra*. In the first, the goal is to render the subject hopeless – convince her that the evidence against her is strong and her likelihood of conviction high. Etienne & McAdams, *supra*, at 28. In the second, police attempt to extract a confession by convincing the suspect that denial is more costly to her interests than confession. *Id.* The first phase often involves a deception of maximization (exaggerating the strength of the case) and the second, a deception of minimization (downplaying the severity of the offense and the cost of confession). *Id.* Minimization is the deceptive practice most likely to impact *Miranda* warnings; interrogators seek to persuade suspects that it is in their best interests to confess and that the interrogator is sympathetic to them.

While documenting police deception in actual interrogation has been difficult for social scientists because police interrogations are largely inaccessible to researchers, the existing social science has found deception to be common. One study of approximately 120 interrogations revealed that police used false evidence

in 30% of them, and minimization in 29%. Richard Leo, *Inside the Interrogation Room*, 86 J. of Crim. L. & Criminology 266, 278 (1996) (minimization tactic percentages have been combined and may overlap with interrogations involving false evidence.).

The common use of deception in police interrogation requires this Court to maintain vigilant *Miranda* protections and not overweigh police statements like those to Ms. Niemeyer here. As the dissent explained, "it is not as though Detective Rimmer offered to take Niemeyer to the hospital when the hand-bagging procedure was completed. To the contrary, while he was removing the bags from her hands, she asked, 'can I go to the hospital now and see my husband?' To which he responded, '[U]m, there's a couple things I gotta do here first, and then I'll work on trying to get you up there." *Niemeyer*, ¶ 53 (Richman, J., dissenting). The detective then took Ms. Niemeyer to a police interview room and interrogated her without *Miranda* warnings.

B. When police use deception, they risk violating accused people's rights and producing false confessions.

While police deception is common in the United States, it is largely illegal in Europe, due to the risks it poses to accused people's rights and the risk of eliciting false confessions. For example, German law bans all deceptive practices in interrogation, including affirmative misrepresentation and non-verbal conduct that may induce misleading impressions. Thomas Weigend, "German Rules of

Criminal Procedure," in *Criminal Procedure: A Worldwide Study*, 202-203 (2007). Any misunderstandings a suspect has about the law must be affirmatively corrected by interrogators. *Id*. If deceptive practices are used, any resulting statements must be suppressed, officers are subject to disciplinary action, and suspects may pursue damages. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 Oxford J. Legal Stud. 443, 447 (2008). The United Kingdom, Australia, and New Zealand also ban affirmative misrepresentation during interrogation. Amanda Cain, et. al, "Interviewing Suspects in Australia and New Zealand," in *International Developments and Practices in Investigative Interviewing and Interrogation*, (2015).

When police deceive people, particularly as to the nature of their contact with police, their right not to incriminate themselves is eroded. *Miranda* warnings are intended, in part, to make a person "more acutely aware that [s]he is faced with a phase of the adversary system—that [s]he is not in the presence of persons acting solely in [her] interest." *Miranda*, 384 U.S. at 469. *Miranda* guarantees actual, meaningful choices: to talk to the police or to remain silent, to consult an attorney or proceed alone. When police mislead a person about how adversarial an interaction is, they undercut those choices, forcing the person to proceed on inaccurate information.

Ms. Niemeyer was given deceptive, vague statements that she would be taken to the hospital to see her husband "soon" after unspecified tasks had been completed. The Court of Appeals itself found that these were not promises and could not have been reasonably interpreted to be. *Niemeyer*, ¶ 39 (majority opinion). She spoke to the police in ignorance of her true situation, custodial interrogation, and it was incumbent on police to provide *Miranda* warnings to inform her of it. Instead, police fooled Ms. Niemeyer as to the severity of her situation, perhaps because she was heavily intoxicated and recently traumatized. A reasonable person would have understood herself to be under significant restraint, not permitted to leave or free her hands. The officers' statements should not lead this Court down the wrong path in this case. Wherever deceptive police practices are used, reviewing courts should exercise increased vigilance and ensure that Fifth Amendment (and other) rights are protected.

The rights of the accused are not the only interests endangered by police deception. Deceptive tactics create a high risk of false confession, especially from innocent people and those who are cognitively vulnerable. Kassin, *supra*, *The Social Psychology of False Confessions*, at 42. Laboratory experiments have shown that when college students were falsely accused of minor rule-breaking, about 48% of students confessed falsely under interrogation; when they were confronted with fake evidence that they had committed the rule violation, about

94% of students confessed falsely under interrogation, most coming to believe they had broken the rule. *Id.* at 34. Minimization, a common and minor form of police deception, also increased the rate of false confessions. *See id.* at 35 (finding use of minimization tactic tripled rate of college students' false confessions to cheating allegation from 6% to 18%).

Deceptive tactics have a particularly high risk of extracting what scholars call a coerced-internalized false confession. *Id.* at 34. A coerced-internalized false confession occurs when an innocent person genuinely comes to believe that she committed the offense she is accused of through the interrogation process. Saul M. Kassin & Lawrence Wrightsman, "Confession Evidence," in *The Psychology of Evidence and Trial Procedure* 78 (1985). Research indicates the stress, fatigue, pressure, and suggestiveness of interrogation can alter a subject's memory. *Id.* Often a person who gives a coerced-internalized false confession will give the interrogator statements like "I don't remember, but I must have" or "maybe I did." *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychological Science in the Public Interest 33, 50 (2004). Once the person confesses, repeating the story may function to further alter their own perception of the event. Kassin & Wrightsman, *supra*, at 79-80. Here, the intoxicated and traumatized Ms. Niemeyer asked at one point, "God damn. Did I fucking shoot him?" *Niemeyer*, ¶ 11. Then, she later stated that both

she and her husband had been "playing around" with her husband's rifle, "passing it back and forth and pointing it at each other," and that she "thought she shot him, but was not sure." *Id.* ¶¶ 11, 16.

While it may seem counter-intuitive, research demonstrates that deceptive tactics, like fabricated evidence, can extract coerced-internalized false confessions from ordinary adults. In one experiment about computerized gambling, researchers used digital editing software to fabricate video evidence of study participants "stealing" money from the bank during a losing round. Kassin, *supra*, *The Social Psychology of False Confessions*, at 34. "Presented with this false evidence, ***all*** participants confessed—and most internalized the belief in their own guilt." *Id.* (emphasis added). "[N]ormal adults, not overly naive or impaired, confess to crimes they did not commit as a way of coping with the stress of police interrogation." Kassin & Gudjonsson, *supra*, at 56.

Deceptive tactics are particularly likely to extract coerced-internalized confessions and other forms of false confessions from cognitively vulnerable people, including people with disabilities, children, and people who were intoxicated during the events. Researchers have long agreed that people with cognitive impairments or psychological disorders are particularly susceptible to false confessions, especially internalized ones. Samson J. Schatz, *Interrogated with Intellectual Disabilities*, 70 Stan. L. Rev. 643, 645 (2018). People with cognitive

disabilities may be more prone to be fooled by police deception, more eager to please authority, and may have less well-developed senses of causation, causing them to assume unwarranted responsibility for events. *Id.* at 666.

Intoxication also makes suspects vulnerable to police deception. *See* Jacqueline R. Evans, Nadja Schreiber Compo, & Melissa B. Russano, *Intoxicated Witnesses and Suspects: Procedures and Prevalence According to Law Enforcement*, 15 Psychology, Public Policy, and Law 194, 196 (2009) (suggesting from research studies that intoxication-related cognitive impairments make people more vulnerable to memory impairment and drawing comparison to other vulnerable groups like children). Indeed, because intoxication provides a plausible reason for doubting one's memory, "[s]uspects who were intoxicated at the time a crime took place may find themselves more prone to coerced-internalized false confessions specifically." *Id.* at 198. As noted, Ms. Niemeyer was cognitively vulnerable at the time she was interrogated because she was intoxicated at the time of the events police interrogated her about. *Niemeyer*, ¶ 27.

Again, perhaps counter-intuitively, factual innocence may also constitute a cognitive vulnerability to police deception, particularly regarding the consequences of her interaction with police. "[A] range of cases and research studies" suggest innocent people "have a naive faith in the power of their own innocence to set them free." Kassin & Gudjonsson, *supra,* at 40; *see id.* (noting "a generalized and

perhaps motivated belief in a just world"). An innocent person under the stress and isolation of interrogation "may confess under the misguided belief that he or she will not be prosecuted or convicted." *Id.* at 45.

Officers' statements during interrogation are often intentionally deceptive and unreliable: it is part of the interrogation method. The widespread use of deception and its risks, including violating accused people's rights and eliciting false confessions, should make reviewing courts especially wary of overweighting police statements in a custody analysis. Where police are lying to a suspect or misrepresenting her situation, courts should vigilantly guard against the risk that they too will be misled by the officers' statements or that the officer is intentionally narrating for them.

A totality of the circumstances approach, which preserves a reviewing court's ability and obligation to consider all relevant factors and weigh them according to the needs of the case, is the only way to accurately assess custody. The custody analysis must be flexible enough to be useful, to actually protect individuals in the wide variety of interactions with police. Neither a checklist approach nor an overreliance on police statements offers adequate protection. This Court should look to the totality of Ms. Niemeyer's circumstances and suppress her statements given during custodial interrogation, without the benefit of *Miranda* warnings.

CONCLUSION

Based on these reasons and authorities, the ACLU of Colorado and the NACDL respectfully ask this Court to reverse Ms. Niemeyer's convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER** was electronically filed and served via Colorado Courts E-Filing on the following counsel of record:

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