No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES, RESPONDENT

v.

LARRY O' NEAL, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI FROM THE FIRST CIRCUIT COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Did the Appellate Court err in finding Larry O'Neal, an officer with Custom and Boarder Patrol, was not in in-custody, for Miranda purposes, he was directed by the Assistant Port Director to help move a printer as a ruse to lead Mr. O'Neal to three federal agents waiting to interrogate him about a child pornography investigation and subsequently questioned him for over two hours in a closed office space ultimately leading to Mr. O'Neal's arrest in the end?

II. PARTIES TO THE PROCEEDINGS

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III. **OPINION BELOW**

The First Circuit Court of Appeals decision was issued on November 4, 2021 and is not yet reported. A copy of this decision is provided on the appendix. The decision of the district court is not reported and a copy is provided in the appendix.

IV. **STATEMENT OF JURISDICTION**

This matter seeks the review of a decision from the First Circuit Court of Appeals on a decision involving the Fifth Amendment of the United States Constitution. The First Circuit Court of Appeals issued its decision on November 4, 2021.

V. **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

VI. **STATEMENT OF THE CASE**

Larry O'Neal was charged by complaint on January 19, 2018 with one count of possession of child pornography, under 18 U.S.C. Section 2252A(a)(5)(B). On January 25, 2018, Mr. O'Neal was released on conditions. He remained released until convicted after trial on April 26, 2019. He was indicted on the same charge and a subsequent superseding indictment issued on February 14, 2019.

On May 4, 2018, Mr. O'Neal, moved to suppress all statements he provided to law enforcement agents during a January 19, 2018 interrogation at the Houlton Customs and Border Protection Office, because he was in custody at the time and never provided Miranda warnings before the interrogation.

An evidentiary hearing was held on the motion on September 25, 2018. On October 16, 2018, the court issued a written decision denying the motion to suppress finding Mr. O'Neal was not to be in custody at the time of the interview challenged.

An appeal was filed with the First Circuit Court of Appeals. On November 4, 2021, the appellate court affirmed the lower court's decision denying the motion to suppress.

VII. **REASONS FOR GRANTING THE PETITION**

The Court should grant this petition because the lower courts' ruling are inconsistent with this Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny and denied Mr. O'Neal his Fifth Amendment rights.

Mr. O'Neal was in-custody when interrogated by the three federal agents. Mr. O'Neal's superior officer at Custom and Boarder Patrol requested Mr. O'Neal assist him in retrieving a printer from an office area. The superior officer knew there was no printer. He led Mr. O'Neal to where three federal agents were waiting to interrogate him regarding a child pornography investigation. The superior officer left Mr. O'Neal with the three agents and never indicated Mr. O'Neal was free to leave or return to work.

The three agents subsequently interrogated Mr. O'Neal for approximately two and half hours in a small office space with the door closed. They informed him a search warrant was being executed at his home, summarized the evidence against him, and showed him a photograph of suspected

child pornography. The agents never read Mr. O'Neal his Miranda rights.

The lower courts erred in finding Mr. O'Neal was not in custody during the interrogation. The superior officer made sure Mr. O'Neal did not walk into the interrogation voluntarily by creating a ruse to collect a printer and leading Mr. O'Neal to the three agents. Under these circumstances, Mr. O'Neal would not have felt free to leave and return to work and therefore Miranda should have been provided.

1. The Suppression Hearing.

On January 19, 2018, Mr. O'Neal was employed by the Customs and Border Protection (CBP) as and officer. (MTS Tr. at p. 6). He served at the Houlton, Maine port of entry. (Id.)

The night before the interrogation at issue, the Assistant Port Director called Mr. O'Neal into his office and asked him to report to him the next morning when he arrived to work. (Id. at 9, 20). The next day, Mr. O'Neal reported to work, and, as requested, reported to the Assistant Port Director. (Id. at 9).

The Assistant Port Director (APB) is Mr. O'Neal's superior within the CBP. (Id. at 6, 14). The APB is in charge of all passenger operations and CBP officers and supervisors. (Id. at 5, 14-15). He would have supervisory duties over Mr. O'Neal through the supervisors who report directly to him. (Id. at 6). Assistant Port Director was two levels above Mr. O'Neal's position of officer within the CBP. (Id. at 15).

The Assistant Port Director told Mr. O'Neal to help him retrieve a computer from the annex. (Id. at 10) Mr. O'Neal followed the APB ostensibly to recover the printer. (Id.). Once at the annex, Mr. O'Neal discovered three Homeland Security Agents waiting to question him. (Id. at 34).

Homeland Security Investigation (HSI) special agent Chuck Ainsworth, DHS OIG special agent James Perro, and Immigration and Customs Enforcement agent Jonathan Posthumus were waiting for Mr. O'Neal. The Assistant Port Director left Mr. O'Neal without saying anything further to him. (Id. at 10, 14).

The APB knew the agents were waiting to interrogate Mr. O'Neal. (Id. at 8-9). He spoke with the agents the night

before regarding the investigation of Mr. O'Neal for child pornography. (Id. at 17-18). The APD never told Mr. O'Neal he was under investigation. (Id. at 18). He made up the task of retrieving the printer to get Mr. O'Neal to where the agents were waiting to interrogate him. (Id. at 19, 20-21, 23). The APB never told Mr. O'Neal he was free to go back to work, or did not have to speak to the agents. (Id. at 26). Mr. O'Neal was on duty at the time the APD left him with the agents. (Id. at 26).

Agent Ainsworth asked Mr. O'Neal to go into an office room. (Id. at 36, 74, 92-93). At the start of the interview, one of the agents read Mr. O'Neal Beckwith rights and had him sign a form waiving his rights. (Govt. MTS Ex. 1.). It was a disputed issue at the hearing as to whether the agents told Mr. O'Neal he was not under arrest and free to leave at the start of the interrogation.

The three agents subsequently interrogated Mr. O'Neal for approximately two and half hours inside a closed office room with the door pushed shut. (Id. at 41, 45, 80, 93). Two other agents waited outside of the interview room. (Id. at

93). The room where the interrogation took place was approximately 12 by 15 feet. (Id. at 66). The interrogation occurred in an area Mr. O'Neal did not typically work in. (Id. at 24). Mr. O'Neal was seated at a desk facing two of the agents seated across from him. (Id. at 96). One the agents stood and "floated around" the room during the interview. (Id. at 79). In order to get out of the room, Mr. O'Neal would have to walk past two of the agents to get out of the closed office door. (Id. at 59-60, 79).

The agents told Mr. O'Neal he was being investigated for possession of child pornography. (Tr 74-75, 81). They told Mr. O'Neal a search warrant was being executed at his home to obtain evidence related to the investigation. (Id. at 61, 103-104). The agents explained to Mr. O'Neal a summary of the evidence they had connecting him to the offense and showed him a photograph of suspected child pornography. (Id. at 61, 102).

The agents never read Mr. O'Neal his Miranda rights. (Id. at 39, 61, 102). After the two and half hour interrogation,

Mr. O'Neal is given a polygraph examine, and then arrested by the agents. (Id. at 63, 88).

2. The Courts Erred in Not Suppressing Statements Made by Mr. O'Neal.

The lower courts erred in not suppressing Mr. O'Neal's statements to law enforcement agents during an interrogation at the Houlton Customs and Border Protection Office, because Mr. O'Neal was in custody at the time and never provided Miranda warnings before the interrogation.

It is well known that under *Miranda v. Arizona*, 384 U.S. 436 (1966), a suspect must be informed of his rights while in custody and before any questioning.

A person is in custody if a reasonable person in the same situation would "have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Custodial interrogation consists of "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." *Miranda*, 384 U.S. at 444.

This Court declared that custodial interrogation generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he does not otherwise do so freely." Miranda, 384 U.S. at 467. The Government may not use statements elicited through custodial interrogation unless the use of procedural safeguards guarantee that the accused has been informed of and has freely waived the Constitutional privileges of the Fifth Amendment. *Id.* at 444-45.

The rule of *Miranda* is a prophylactic one. A statement made in violation of Miranda must be suppressed even if it was made "voluntarily." *Id.*

The lower courts ruling did not comply with the purpose and protections of Miranda because Mr. O'Neal was in custody. The interrogation took place at his place of employment while he was on duty. It occurred in an area Mr. O'Neal did not typically work at—inside a closed office space approximately 12' x 15', with three federal agents present, and two more agents outside the door. Mr. O'Neal was seated across from two of the agents while a third agent stood. Mr.

O'Neal would have had to walk past the standing agent to leave through the closed door.

Mr. O'Neal was questioned for over two hours by the agents. He was told his house was being search by agents, that he was a suspect in a child pornography investigation, and shown a photograph of suspected child pornography.

Perhaps, most significantly, Mr. O'Neal was led to the interview by his Assistant Port Director, under a ruse that he was going to retrieve a printer. Once Mr. O'Neal arrived at the location of the supposed printer, he encountered the three agents waiting to interview him. He was then left there by his Assistant Port Director. Under these circumstances Mr. O'Neal would not have felt free to walk away from the agents and return to work after he was just led and left there by his superior officer.

The CBP made certain Mr. O'Neal did not walk into the questioning voluntarily—he was told to go to that area, and led there by his superior officer, without being told the true reason for going there. Mr. O'Neal was told by his superior officer to report to him in the morning, and when he did, was

requested to follow the superior officer to retrieve a printer. Mr. O'Neal was then taken to a room where three agents waited to interview him. His superior officer then left, never giving Mr. O'Neal permission to leave and return to work.

Any CBP officer in Mr. O'Neal's situation would not have felt free to leave or stop talking with the agents after being led and left there by his superior officer.

Therefore, the Court should hear this appeal to determine whether the lower courts erred in find Mr. O'Neal was not in custody during the interrogation.

VIII **CONCLUSION**

For all of the reasons set forth above, it is respectfully requested the Court grant the petition for certiorari.

Dated: February 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2022 I sent a copy of the Petition to:

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Portland, ME 04101

/s/ Hunter J. Tzovarras
Bar No. 1135960

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United States Court of Appeals
For the First Circuit

No. 20-1184

UNITED STATES,

Appellee,

v.

LARRY O'NEAL,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Jon D. Levy, U.S. District Judge]

Before

Kayatta and Barron, Circuit Judges,
and O'Toole,* District Judge.

Hunter J. Tzovarras and Pelletier Faircloth & Braccio LLC on brief for appellant.

Julia M. Lipez, Assistant United States Attorney, Donald E. Clark, United States Attorney, and Chris Ruge, Assistant United States Attorney, on brief for appellee.

November 4, 2021

* Of the District of Massachusetts, sitting by designation.

KAYATTA, Circuit Judge. Larry O'Neal was employed by U.S. Customs and Border Protection (CBP) when he came under investigation for downloading child pornography on his home computer. Following his indictment and a trial, a jury convicted O'Neal of one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

O'Neal now raises two issues on appeal, each concerning pretrial conduct by the investigating agents. First, he argues that the district court erred in refusing to suppress incriminating statements O'Neal made when interviewed at his workplace by federal agents. O'Neal contends that the interview was custodial; the district court held that it was not. Second, O'Neal argues that the district court erred in denying a post-trial motion aimed at obtaining a Franks hearing to review an error in an affidavit that was used to secure the search warrant that led to the discovery of incriminating evidence on O'Neal's home computer. For the following reasons, we find O'Neal's arguments unconvincing.

I.

We consider first whether the district court committed reversible error in finding that O'Neal's interview was not custodial. In so doing, we accept the district court's findings of fact and its credibility determinations unless clearly erroneous. See United States v. Rodríguez-Pacheco, 948 F.3d 1, 6 (1st Cir. 2020). We review de novo any conclusions of law,

including the ultimate determination of whether the defendant was in custody for Miranda purposes. United States v. Campbell, 741 F.3d 251, 265 (1st Cir. 2013).

A.

In January 2018, federal agents with Homeland Security Investigations (HSI), an investigative branch of the U.S. Department of Homeland Security (DHS), determined that two files containing child pornography had been downloaded by a device with an IP address assigned to O'Neal. At the time, he was employed as an officer with CBP (also part of DHS) at the Houlton, Maine Port of Entry. United States v. O'Neal, 1:18-cr-00020-JDL, 2018 WL 5023336, at *1 (D. Me. Oct. 16, 2018). In the course of HSI's investigation, Special Agent Edward Ainsworth used resources from a law enforcement database that monitors an online peer-to-peer file-sharing network as well as the HSI Cyber Crimes Center, which maintains a library of suspected child pornography files. United States v. O'Neal, 1:18-cr-00020-JDL, 2019 WL 3432731, at *1 (D. Me. July 30, 2019). Through the Cyber Crimes Center, Ainsworth was able to view a copy of one of the two files associated with O'Neal's IP address. Id. Ainsworth determined that that video "depicted a prepubescent female having sexual intercourse with an adult male." Id.[1]

[1] The file was referred to throughout the proceedings below

Ainsworth prepared an affidavit in support of a search warrant for O'Neal's home, vehicles, and person, which relied in part on the video of the prepubescent girl. Id. On January 17, 2018, that search warrant was issued. The search of O'Neal's home took place on January 19, 2018, while O'Neal was at work. It resulted in the seizure of O'Neal's computers and hard drives. Id.

HSI agents arranged with O'Neal's supervisor, Assistant Port Director Joseph Ewings, to interview O'Neal at his workplace that morning while the search was conducted. O'Neal, 2018 WL 5023336, at *1. After his arrival at work that day, O'Neal checked his firearms and duty gear into a lock box. Shortly thereafter, Director Ewings asked him to help move a printer. When O'Neal followed Director Ewings toward the ostensible location of the printer, he arrived at a common area that served as a break and copy room, where he was greeted by Agent Ainsworth. Id. Ainsworth introduced himself and asked O'Neal to enter a room not occupied at the time by CBP personnel. O'Neal agreed. He and Ainsworth entered the room, where Agents Jonathan Posthumus and James Perro were waiting.[2] O'Neal spent approximately the next two-and-a-half

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as the "12yo video" because of its filename. O'Neal, 2019 WL 3432731, at *1 n.1.

[2] Special Agent James Harvey, the Resident Agent-in-Charge of the Houlton HSI office, was also present in the common area when O'Neal first arrived, as was someone from CBP's Office of

hours inside the room with the three agents, with the door pulled shut but not locked. Two other individuals affiliated with the government waited outside the room. The room was approximately 12 or 14 feet by 15 or 16 feet in size. O'Neal sat in a chair facing a desk. Although he would have had to walk past at least one agent to exit, nothing obstructed his path to the door. Id. at *1-2. The agents were dressed in plain clothes and no weapons were visible, although Ainsworth carried a holstered firearm. Id. at *2.

Two of the agents present at the interview -- Posthumus and Ainsworth -- later testified at the district court's hearing on O'Neal's motion to suppress. Posthumus testified that he told O'Neal at least twice that "he wasn't under arrest, he was free to leave at any time." Ainsworth also testified that Posthumus told O'Neal, "[Y]ou are not under arrest, you're free to go." The district court credited this testimony in concluding that "the agents told O'Neal [before the interview] that he was free to leave." Id. at *3.

One of the agents also read O'Neal his "Beckwith rights."[3] O'Neal signed a form waiving those rights. He was not

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Professional Responsibility with the last name Millar. Neither Harvey nor Millar interacted with O'Neal or attended his interview.

[3] Beckwith v. United States, 425 U.S. 341 (1976), did not mandate any warnings, but instead held that the defendant in that case was not entitled to Miranda warnings. Id. at 347–48. The

apprised during the interview of his right to counsel under Miranda v. Arizona, 384 U.S. 436 (1966). At no point did O'Neal ask to leave or to stop the questioning. O'Neal, 2018 WL 5023336, at *2.

The agents discussed a variety of topics with O'Neal, including hunting, motorcycles, potato farming, and church. The agents also told O'Neal he was being investigated for possession of child pornography and that a search warrant was being executed at his home. During the course of the interview, O'Neal admitted to knowingly searching for and downloading child pornography. At some point, O'Neal was asked whether he had had any sexual contact with children; he responded that he had not. Id. At the conclusion of the interview, the agents asked whether O'Neal would be willing

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Federal Service Impasses Panel then adopted a proposal to advise employees of their so-called "Beckwith rights" when employees undergo non-custodial interviews involving criminal matters. In re Dep't of the Treasury Bureau of Engraving & Printing & Ch. 201, Nat'l Treasury Emps. Union, Case No. 99 FSIP 96 (1999), https://www.flra.gov/fsip/finalact/99fs_096.html (last visited Oct. 15, 2021). As the district court explained:

> [Beckwith] rights are provided to people in the course of internal affairs investigations before interviews are conducted. The Beckwith warnings advise that the interviewee has the right to remain silent, that anything the person says may be used as evidence in a later administrative or criminal proceeding, and that the person's silence may be given evidentiary value in a later administrative proceeding.

O'Neal, 2018 WL 5023336, at *2.

to take a polygraph to verify that fact, and he agreed. Before he took the polygraph, O'Neal took a break and left to use the restroom. Id. No one accompanied him to or from the restroom, which was located outside the area of the office in which the interview was conducted. Id. at *3.[4] He returned to the then-empty larger office to wait while the polygraph machine was set up in a nearby smaller office. Before O'Neal took the polygraph, he was read his Miranda rights, which he waived. After he completed the polygraph test, the agents arrested O'Neal. Id. at *2.

B.

Miranda warnings must be given before a custodial interrogation. United States v. Swan, 842 F.3d 28, 31 (1st Cir. 2016). There is no dispute here that the agents subjected O'Neal to an interrogation during the interview. See United States v. Melo, 954 F.3d 334, 339 (1st Cir. 2020) ("Interrogation for Miranda purposes includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" (alteration in original) (quoting United States v. Sanchez, 817 F.3d 38, 44

[4] In light of the clear error standard of review, we defer to the district court's view of the facts. We note, however, that the hearing record is somewhat ambiguous as to whether one of the agents joined O'Neal in using the restroom. However, no party has disputed the district court's finding that O'Neal was "unaccompanied."

(1st Cir. 2016))). Consequently, the pivotal question is whether O'Neal was in custody. See id.; Swan, 842 F.3d at 31.

We answer that question by first ascertaining "whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" Melo, 954 F.3d at 339 (alteration in original) (quoting Howes v. Fields, 565 U.S. 499, 509 (2012)). Factors that can shed light on whether an individual was in custody include "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." Id. at 340 (quoting Swan, 842 F.3d at 31).

The interview commenced with the officers' explanation for their visit and their inviting O'Neal to speak with them in private. As Agent Posthumus explained at the suppression hearing:

> I said that he's not under arrest, he's free to leave at any time. However, there were some things that had come up in an investigation. I'd like to explain some things to him so he could be made aware of why we wanted to speak with him and that hopefully he could clarify some things for us and asked him if he would be willing to speak in the office as some of the matters were sensitive and somewhat private in nature.

Consistent with the explanation that privacy was called for, the door to the conference room was closed but not locked.

The agents did not exercise physical control over O'Neal or restrain him. He made a trip to the bathroom, unaccompanied, between the interview and the polygraph examination. O'Neal, 2018 WL 5023336, at *3 (distinguishing United States v. Mittel-Carey, 493 F.3d 36, 40 (1st Cir. 2007), in which this court concluded that a defendant was in custody in his home when agents exercised physical control over him by escorting him everywhere, including to the bathroom).

The number of officers present -- three in the room itself, with an additional two outside -- was undoubtedly concerning, but not so overwhelming as to establish custody by itself. See Melo, 954 F.3d at 340 (finding suspect was not in custody although two armed officers were present for questioning with two additional law enforcement personnel on scene); Swan, 842 F.3d at 32–33 ("We have previously declined to find that a defendant was in custody even when confronted by as many as five police officers." (citation omitted)); United States v. Infante, 701 F.3d 386, 397 (1st Cir. 2012) (finding no custody where "two officers were in the room, joined briefly by two others"). The agents carried concealed weapons, but they were never drawn. See Swan, 842 F.3d at 33 ("We also note that the deputies never drew their weapons at any point during their interactions with [the defendant]."); United States v. Hughes, 640 F.3d 428, 436 (1st Cir. 2011) (finding interrogation non-custodial when officers

"carried visible weapons" which "remained in their holsters throughout the visit").

We have previously described a ninety-minute interview as "relatively short." Hughes, 640 F.3d at 437 (citing Beckwith, 425 U.S. at 342–43, 347–48). This one was admittedly longer -- about two-and-a-half hours altogether -- although the tone of the conversation was "relatively calm and nonthreatening." O'Neal, 2018 WL 5023336, at *3 (quoting United States v. Guerrier, 669 F.3d 1, 6 (1st Cir. 2011)).

The foregoing description of the circumstances of the interview leads us to agree with the district court's conclusion that the interrogation was not custodial. We reach that result most confidently because of the two express statements agents made to O'Neal, telling him that he was indeed free to leave. See Swan, 842 F.3d at 32 ("These unambiguous statements would have led a reasonable person in [the defendant's] position to understand that she was not 'in custody.'").

This is not to say that such warnings necessarily preclude finding that an interview is custodial. For example, in United States v. Rogers, this court held that the defendant was in custody despite an officer saying, "we're not forcing you to be right here . . . that door's unlocked [and] [n]obody's going to jump out and try to stop ya . . . ." 659 F.3d 74, 76, 79 (1st Cir. 2011) (Souter, J.) (alterations in original).

In Rogers, however, the otherwise plainly noncustodial effect of the "free to leave" statement was undercut by the fact that the defendant was a noncommissioned military officer, ordered by his commanding officer to meet with the law enforcement officers who interviewed him. Id. at 76, 78. We cited "the influence of military authority" in finding that the commander effectively ordered the defendant, a subordinate, into the custody of the police. See id. at 77–78.

Here, no such military influence is involved. And while we do not doubt that a direct order from the Assistant Port Director would carry perhaps more weight than a direct order from a supervisor in some other jobs, no one would confuse O'Neal's relationship with his boss with that of a subordinate and his commanding officer in the military. Moreover, O'Neal's direct supervisor never gave such an order, instead resorting to pretext to lead O'Neal to the agents.

O'Neal also relies on United States v. Slaight, 620 F.3d 816, 819 (7th Cir. 2010), where the Seventh Circuit determined that an individual was in custody although "[t]he police repeatedly told [the defendant] that he was free to leave." But in that case, after first telling the defendant that he was free to leave, the law enforcement officer did not object when the defendant replied that "he had no choice but to remain because they were going to arrest him anyway." Id. Additionally, in Slaight, "nine (possibly

ten)" federal and local officers arrived at the defendant's home before the interrogation. Id. at 818. They entered the house with "drawn guns, including assault rifles," and found Slaight naked in his bed. Id. at 818, 820. Two of the officers escorted Slaight from the home, where they told him they would prefer to interview him at the police station. Slaight accompanied them to the station, where he was interviewed in "the smallest interrogation room [the trial judge had] ever seen." Id. at 819. Toward the end of the interview, Slaight asked to leave the room to smoke a cigarette, id. at 820; in contrast to O'Neal's use of the restroom, Slaight's request was denied. Moreover, when the officers later left the room for forty minutes, they locked him in. Id. The court found that "[a]nyone in [Slaight's] situation would have thought himself in custody." Id.

In his reply brief, O'Neal for the first time "suggests it was clear error by the lower court to credit the two agents[']testimony that they told Mr. O'Neal he was not under arrest and free to leave at the start of the interrogation." "[A]rguments raised for the first time in an appellate reply brief ordinarily are deemed waived." United States v. Casey, 825 F.3d 1, 12 (1st Cir. 2016). Even were we to assume that O'Neal has not waived his challenge to the district court's finding that the agents told him he was free to leave, that challenge would fail. O'Neal argues that the agents were not believable because they did not document

their statements that O'Neal could leave. But the report from the two-and-a-half hour interview was only approximately two pages long. One could readily imagine that the agents would focus on memorializing what O'Neal said, rather than what they routinely state in such interviews. More importantly, we find no reason to believe that the district court's decision, which weighed the agents' testimony on this point, was clearly erroneous.

In sum, while the warnings alone may well have been insufficient to preclude a finding of custody, here they decisively tip the scales in favor of a conclusion that a reasonable person in O'Neal's spot would have believed that departure was an option. The agents were therefore not obligated to read O'Neal his Miranda rights before he made the incriminating statements at issue in this appeal.

II.

We next consider the district court's denial of O'Neal's request to file a post-trial motion for a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). This argument arises from the procurement of the warrant used to search O'Neal's premises. In reviewing a district court's decision to deny a Franks hearing, this court reviews factual determinations for clear error and its legal conclusions -- such as the probable cause determination -- de novo. United States v. Barbosa, 896 F.3d 60, 67 (1st Cir. 2018).

A.

In preparing the affidavit used to obtain the warrant authorizing the search of O'Neal's home, vehicle, and person, Ainsworth made a mistake: He stated in the affidavit that the video of the prepubescent girl was last associated with O'Neal's IP address on December 28, 2017 (the date a different video not viewed by Ainsworth was downloaded), rather than on October 3, 2017 (when the prepubescent-girl video was actually downloaded). O'Neal, 2019 WL 3432731, at *1-2. When this error was noted, the government provided O'Neal's counsel with a corrected affidavit. The government also used the October 3 date in its pretrial submissions. O'Neal's counsel later stated that he did not notice the change until the first day of trial, when the lead government witness testified that the video of the prepubescent girl was associated with O'Neal's IP address on October 3, 2017. Having belatedly noticed the change, defense counsel opted to do nothing about it during the ensuing four days of trial. Instead, after the jury returned a guilty verdict, counsel filed a motion citing the error in the original warrant application as reason to conduct a Franks hearing. Id. at *1.

In that motion, O'Neal contended that the search warrant application "contained false and misleading information." Id. at *2. He reasoned that a viewing on October 3rd, rather than December 28th, gave less cause to think that the video would still

be on the computer on January 18th, the day the affidavit for the search warrant was drawn up. The district court found O'Neal's motion untimely, as "[a] request for the suppression of evidence 'must be raised by pretrial motion'" unless "the party shows good cause." Id. at *2 (quoting Fed. R. Crim. P. 12(b)(3)(C), 12(c)(3)). The district court further held that "even if the request is treated as timely, O'Neal has failed to make the required preliminary showing that would entitle him to a Franks hearing." Id. O'Neal, in the district court's estimation, failed to show that any false statement or omission was made "knowingly and intentionally or with reckless disregard for the truth." Id. at *3 (quoting United States v. McLellan, 792 F.3d 200, 208 (1st Cir. 2015)). The District Court also found that the affidavit, when reformed to correct the error, was sufficient to support a finding of probable cause.

B.

When, as here, incorrect information is contained in an affidavit that is used to obtain a warrant, the trial court may hold a so-called Franks hearing to determine whether evidence obtained with the warrant should be excluded at trial. 438 U.S at 156. However, "[a] defendant is entitled to a Franks hearing . . . only if he first makes a 'substantial preliminary showing' of the same two requirements that he must meet at the hearing." United States v. Arias, 848 F.3d 504, 511 (1st Cir. 2017) (quoting

McLellan, 792 F.3d at 208). First, he must show that "a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth," and second, he must establish "that the false statement or omission was 'necessary to the finding of probable cause.'" Id. (quoting McLellan, 792 F.3d at 208).

An application for a Franks hearing ordinarily is required to meet timeliness standards: A request for the suppression of evidence "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(C). "[I]f the party shows good cause," a court may consider an untimely request. Fed. R. Crim. P. 12(c)(3).

The premise of O'Neal's argument -- that Ainsworth intentionally included materially false information in the affidavit -- is dubious. We see no reason to view the several-month difference in dates as material. Nor does the mistake appear to have been intentional. See United States v. Tanguay, 787 F.3d 44, 49 (1st Cir. 2015) (errors that are clearly only negligent do not call for a Franks hearing). In any event, we agree with the district court that O'Neal's motion was untimely. All of the relevant information was available to O'Neal before his trial began. Counsel admits noticing the error on the first day of trial, but chose to wait to see what the verdict would be before

raising the issue. O'Neal has therefore not provided any "good cause" for the delayed filing of his request.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
	)	
v.	)	
	)	**1:18-cr-00020-JDL**
LARRY O'NEAL,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The Defendant, Larry O'Neal, is charged with possession of child pornography in violation of 18 U.S.C.A. § 2252A(a)(5)(B) (West 2018). O'Neal moves to suppress statements that he made on January 19, 2018, to three federal agents during an interview at the Customs and Border Protection (CBP) Port of Entry in Houlton, Maine, where he worked. ECF No. 39. A hearing on the Defendant's motion was held on September 25, 2018. For the reasons discussed below, I deny the motion.

I. FACTUAL BACKGROUND

O'Neal is employed as a CBP officer at the Houlton Port of Entry. In the days leading up to the interview on January 19, Homeland Security Investigations (HSI) Special Agent Edward Ainsworth became aware of a computer that was trading in child pornography. He traced the IP address for that computer to O'Neal's house and then obtained a search warrant for the house. Because O'Neal works as a CBP officer and typically carries a weapon, Agent Ainsworth decided to execute the warrant when O'Neal would not be at home, as a matter of officer safety. Agent Ainsworth obtained

O'Neal's work schedule and arranged for O'Neal to be interviewed at the Houlton Port of Entry during one of his shifts, simultaneously with the execution of the warrant at O'Neal's home.

Agent Ainsworth, along with Jonathan Posthumus, a Senior Special Agent with Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR), and James Perro, a Special Agent with the Department of Homeland Security (DHS) Office of Inspector General (OIG), arrived at the Houlton Port of Entry just before 7:30 in the morning on January 19. O'Neal arrived not long afterwards wearing his CBP uniform, including an outer ballistics vest and duty belt, which holds a firearm, handcuffs, a baton, pepper spray, and a multi-tool or knife. O'Neal was scheduled to work that day at an Enrollment Center located on the other side of the border in Canada. Officers are not allowed to bring their firearms and duty gear over the border, so he checked those items in a lock box upon arriving at the Port of Entry.

After O'Neal checked his duty gear in, the Assistant Port Director, Joseph Ewings, asked O'Neal to go upstairs with him to retrieve a printer to take over to the Enrollment Center, a task Ewings had asked O'Neal the previous evening to see him about when he arrived for work the next day. Ewings and O'Neal took the elevator up to the second floor and walked down the hallway until they reached a doorway that leads to a common area, which serves as a break and copy room, and through which there are three additional offices. Agent Ainsworth was waiting just outside the doorway, and as O'Neal and Ewings approached, he introduced himself to O'Neal

and asked if O'Neal would be willing to talk with him inside the adjacent room. O'Neal agreed, and he and Agent Ainsworth walked through the door into the common area; Ewings turned and walked back down the hall.

Inside the common area, Agent Posthumus and Agent Perro introduced themselves to O'Neal. Agent Posthumus then told O'Neal that he was not under arrest, that he was free to leave at any time, and that they would like to speak with him in connection with an active investigation. Agent Posthumus invited O'Neal to speak with them inside one of the adjoining offices because the subject matter was sensitive and private; again, O'Neal agreed, and he and the three agents entered the largest of the three offices. After they entered the office, one of the agents closed the door.

The office where the interview took place is approximately fourteen feet by sixteen feet in size. That day, there was a desk located slightly to the left, from the perspective of a person walking through the door, that was askew so that one side of the desk faced the door and the other side faced the wall and window opposite the door. The front of the desk faced the right wall of the office but was not parallel to it. O'Neal sat in a chair facing the front of the desk. Agent Ainsworth sat in a chair on the far side of the desk, while Agent Posthumus sat in a chair on the side of the desk closest to the door; both faced O'Neal. O'Neal would have had to walk past Agent Posthumus to exit the room, but nothing obstructed his path to the door. Agent Perro stood behind the desk during the interview. The agents were dressed in plain clothes,

and although Agent Ainsworth had a holstered firearm on his person, it was hidden from view.

Before beginning the interview, Agent Perro explained to O'Neal his *Beckwith* rights. *See Beckwith v. United States*, 425 U.S. 341, 348 (1976). These rights are provided to people in the course of internal affairs investigations before interviews are conducted. The *Beckwith* warnings advise that the interviewee has the right to remain silent, that anything the person says may be used as evidence in a later administrative or criminal proceeding, and that the person's silence may be given evidentiary value in a later administrative proceeding. O'Neal read and signed a form acknowledging that he had been read these rights. O'Neal was not provided *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The agents then interviewed O'Neal for approximately two and a half hours, and in the course of the interview O'Neal admitted to searching for and downloading child pornography on his home computer. During the interview, O'Neal was engaged, cooperative, and he never asked to leave or to stop the interview.

At some point during the interview, the agents asked O'Neal whether he had had any sexual contact with children and he responded that he had not. When the interview concluded, the agents asked O'Neal if he would be willing to take a polygraph test to verify the fact that he had not had any inappropriate contact with children, and he agreed. Before O'Neal took the polygraph test, however, he took a break. While the polygraph machine was being set up in one of the smaller offices, O'Neal left the office area where the interview had taken place to use the restroom,

then went back into the then-empty larger office to wait. After the polygraph test, the agents placed O'Neal under arrest.

O'Neal moves to suppress the statements that he made during the interview with Agents Ainsworth, Posthumus, and Perro on January 19. ECF No. 39. He argues that he was in custody when he was questioned but was not provided the required warnings under *Miranda*.

II. LEGAL ANALYSIS

"The Fifth Amendment requires police to provide a criminal suspect a *Miranda* warning before subjecting him to 'custodial interrogation.'" *United States v. Davis*, 773 F.3d 334, 338 (1st Cir. 2014) (citing *Dickerson v. United States*, 530 U.S. 428, 432 (2000)). If a suspect is not in custody when he is questioned, no warning is required. *United States v. Swan*, 842 F.3d 28, 31 (1st Cir. 2016). "In this context, custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* (internal quotation marks omitted) (quoting *Howes v. Fields*, 565 U.S. 499, 508-09 (2012)). A person is in custody if, "in light of the objective circumstances of the interrogation," a reasonable person would not have felt "at liberty to terminate the interrogation and leave." *Id.* (quoting *Howes*, 565 U.S. at 508-09). The First Circuit has identified several relevant factors including "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *Id.* (quoting *United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987)).

Here, O'Neal was questioned at his workplace, which was familiar territory. More importantly, the agents did not exercise any physical control over O'Neal; for example, during the break between the initial interview and the polygraph test, O'Neal left the immediate area where the interview was conducted unaccompanied to use the bathroom. *See United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007) (concluding that defendant was in custody in his home when agents exercised physical control over him by escorting him everywhere, including to the bathroom). O'Neal also was not physically restrained: he was not handcuffed at any point during the interview, his path to the doorway of the office was not obstructed, and no agent brandished a weapon. *See Swan*, 842 F.3d at 33; *United States v. Hughes*, 640 F.3d 428, 436 (1st Cir. 2011). Although the interview took place in a closed office, the agents told O'Neal beforehand that he was free to leave and offered that location for the sake of privacy. *See Swan*, 842 F.3d at 32-34 (concluding that interview behind closed doors at sheriff's office was noncustodial when, among other things, "the deputies made it clear to [the suspect] that she was free to leave and that the door was closed only for the sake of privacy.").

By all accounts, the atmosphere of the interview was "relatively calm and nonthreatening." *United States v. Guerrier*, 669 F.3d 1, 6 (1st Cir. 2011). None of the agents raised their voices, "badgered [O'Neal] for answers, or menaced him in any way." *Id.* O'Neal was engaged in the conversation with the agents, and he never asked to leave or to stop the interview. Furthermore, nothing suggests that the "[agent]-to-suspect[] ratio was overwhelming" to O'Neal. *United States v. Campbell*,

741 F.3d 251, 267 (1st Cir. 2013). Finally, the length of the interview does not tip the balance towards a finding of custody. The First Circuit has described a 90-minute interview as "relatively short" in duration, and the interview here lasted about an hour more than that benchmark. *Hughes*, 640 F.3d at 437. Based on the totality of the circumstances, I conclude that O'Neal was not in custody during his interview with the three agents.

O'Neal asserts that the First Circuit's decision in *United States v. Rogers*, 659 F.3d 74 (1st Cir. 2011), is analogous to the facts here and supports a finding of custody. In that case, the court held that the defendant, a naval officer, was in custody after his commanding officer ordered him to go home, where the commanding officer knew that state and local police were executing a search warrant for child pornography. *Rogers*, 659 F.3d at 76-78. O'Neal argues that the circumstances here are similar because O'Neal's supervisor, the Assistant Port Director, brought him to the area where the three federal agents were waiting and did not tell him that he was free not to talk to the agents. ECF No. 39 at 10.

O'Neal's situation is easily distinguished from the facts of *Rogers*. In that opinion, the First Circuit emphasized the importance of the fact that Rogers was "under a military order" to be at his house at the time he was questioned. *Rogers*, 659 F.3d at 78 ("[T]he most significant element in analyzing the situation is that the military had made certain that Rogers did not walk into it voluntarily . . . ."). The "inherently coercive force of military organization" made Rogers's situation unique, even as compared to a law enforcement agency. *Id.* Here, O'Neal was not subject to

a military order nor was he subject to any order which compelled him to meet with the federal agents; rather, Ewings simply asked O'Neal to accompany him to the second floor to retrieve a printer. Therefore, *Rogers* does not support a finding that O'Neal was in custody.

III. CONCLUSION

For the reasons stated above, the Defendant's Motion to Suppress (ECF No. 39) is **DENIED**.

SO ORDERED.

Dated this 16th day of October, 2018.

/s/ JON D. LEVY
U.S. DISTRICT JUDGE