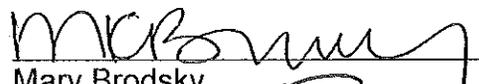


Dated at Barre, Vermont, this 22nd, day of October 2015.

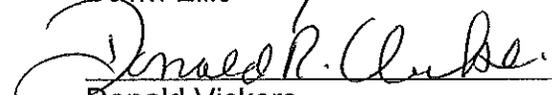
BY: VERMONT HUMAN RIGHTS COMMISSION


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INVESTIGATIVE REPORT

Complainant: Lorenzo Alcudia **Vermont HRC Case PA15-0021**

Respondent: Grand Isle County Sheriff's Department (GICSD)

Charge: Discrimination in public accommodations on the basis of national origin, color and race.¹

Summary of Complaint:

On February 14, 2015, Kerry Martin, a recent graduate of the University of Vermont, and a volunteer at Migrant Justice, picked up Lorenzo Alcudia in Alburgh, VT, at the dairy farm where he worked in order to take him to a Migrant Justice meeting in Burlington. During the ride south, Mr. Martin was pulled over for speeding by Sgt. Blake Allen of the GICSD. Sgt. Allen asked Mr. Martin a few questions regarding the purpose of his visit and presence in Grand Isle County. Sgt. Allen then began focusing almost solely on Mr. Alcudia and directed his questions as to whether he was legally present in the United States. Sgt. Allen contacted the Vermont State Police dispatcher and the dispatcher contacted Border Patrol. Border Patrol arrived a little under an hour later and took Mr. Alcudia into custody. He was later released and filed this complaint with the HRC alleging that the GICSD violated the Vermont Fair Housing and Public Accommodations Act (VFHPAA) by detaining him for an inordinate period of time without sufficient reasonable suspicion thereby depriving him of his right to access, use and enjoyment of Vermont's roads based on national origin/color.

¹ Mr. Alcudia is a Mexican national. "Race" was checked off as a protected category but is inapplicable to this case since there are no facts in support of a claim by Mr. Alcudia that he experienced discrimination on the basis of race, i.e. White, Black or African-American, Asian/Pacific Islander or Native American/Alaska Native, as opposed to his ethnicity, culture or national heritage.

Summary of Response:

On April 17, 2015, the GICSD responded through counsel. They denied violating the VFHPAA and stated that the decision to detain Mr. Alcudia was the result of an order from Border Patrol. The GICSD stated that all of the questions that Sgt. Allen directed at Mr. Alcudia were only for the purpose of determining his identity, not his immigration status. The GICSD stated that Sgt. Allen detected sufficient suspicious indicators that permitted him to inquire about who the two men were and why they were in Grand Isle County. These suspicious indicators included speeding, having out of state plates, not pulling over for a mile after Sgt. Allen activated his sirens, the fact that Mr. Martin answered all the questions Sgt. Allen directed towards Mr. Alcudia and the fact that Mr. Alcudia had no identification.

Preliminary Recommendations:

This investigation makes a preliminary recommendation to the Human Rights Commission to find there are **reasonable grounds** to believe that the Respondent, the GICSD, discriminated against Lorenzo Alcudia on the basis of his national origin and color and violated the VFHPAA.

Documents, Recordings & Video

- 3/20/14 – Complaint
- 04/17/15 – Response to Complaint
- Law Incident Table and accompanying documents 2/14/15
- Video of 2/14/15 stop VTS_01_01.VOB
- Radio Logs between Sgt. Allen and Dispatch
- Call Logs between Dispatch and Border Control

Interviews:

- Lorenzo Alcudia through Interpreter Marita Canedo – 5/28/15
- Sergeant Blake Allen – 6/10/15, 8/26/15
- Sherriff Ray Allen - 6/10/15
- Kerry Martin (Driver) – 8/5/15
- Jim Cronan – Public Safety Answering Point Administrator (PSAP) Administrator with the Vermont State Police (VSP) 8/5/15, 8/26/15
- Jordanne Dow – 9/2/15

*** An attempt was made to contact Border Patrol by phone and email. A Border agent left a message telling me to file a FOIA request, which I did.*

I. OVERVIEW

This investigation was tasked with determining whether the Grand Isle County Sheriff's Department (GICSD) violated Vermont's Fair Housing and Public Accommodations Act (VFHPAA) by illegally detaining Mr. Alcudia without sufficient reasonable, articulable suspicion, thus denying him access to Vermont's roads, which have been determined to be places of public accommodation.

First, the GICSD claimed that Sgt. Allen's only objective in contacting Border Patrol was to verify Mr. Alcudia's identity and that he did not ask for them to respond to the scene. Sgt. Allen claimed that he was not concerned with Mr. Alcudia's immigration status. Second, Sgt. Allen claimed that Mr. Alcudia's lengthy detention was ordered by Border Patrol. Third, he has asserted that the Vermont State Police (VSP) dispatcher in St. Alban's was responsible for requesting that Border Patrol respond to the scene.

With respect to each of the GICSD's claims, this investigation finds that: 1) There is overwhelming evidence that Sgt. Allen was primarily interested in Mr. Alcudia's immigration status and was interested in his identity only insofar as it was bound up with that status; 2) There is insufficient evidence to challenge Sgt. Allen's assertion that Border Patrol ordered him to detain Mr. Alcudia; 3) The video, radio logs, call logs, the functioning of Sgt. Allen's Mobile Data Computer (MDC) and wearable recording microphone raise questions about the content and sequence of events that cannot be fully resolved in GICSD's favor.

This investigation reached this conclusion by reviewing the evidence submitted by the GICSD, including the video of the encounter and the radio and call logs and other related materials. In addition, it considered the interviews with all parties, the impact of search and seizure law and the GICSD's own anti-bias policing policy. Based on the totality of the circumstances, this investigation finds the following:

- 1) Mr. Alcudia's national origin and color played the chief role in the way the GICSD treated him and thus, the GICSD violated the VFHPAA by depriving him of his right of access to Vermont's roads based on his national origin and color.
- 2) In addition, this investigation believes that the GICSD violated Vermont's Article 11 - its search and seizure law - by detaining Mr. Alcudia for a lengthy and unnecessary period of time without sufficient reasonable, articulable suspicion that

he was involved in criminal activity. This investigation finds that the detention was initiated by Sgt. Blake Allen and supported by Sheriff Ray Allen and that they, not Border Patrol or dispatch are primarily responsible for his extended detention. The HRC has no jurisdiction over Border Patrol and there is no evidence that Border Patrol ordered Sgt. Allen to hold Mr. Alcudia.

- 3) This investigation finds that the 2014 version of the GICSD anti-bias policing policy as it is written, while superficially strong, offered little to no protection to Mr. Alcudia due the many potential exceptions that swallow the rule and allow searches and seizures that are not based on solid reasonable, articulable suspicion.

In support of its reasonable grounds recommendation, this investigation will first review the VFHPAA and the legal basis that allows Mr. Alcudia to file a complaint. Second, this report will set forth the elements of proof Mr. Alcudia must establish in order to meet his burden of proof, also known as his *prima facie case*. Third, this report reviews the reasons that the GICSD has offered as evidence that they did not violate the VFHPAA and discriminate against Mr. Alcudia on the basis of his national origin and color. Fourth, this report reviews the proof of pretext – that is that the reasons offered by the GICSD are actually not legitimate and that the GICSD treated Mr. Alcudia in a discriminatory manner. Fifth, this investigation reviews the role of the GICSD’s anti-bias policing policy and, will conclude with a review of the role of Article 11 of the Vermont Constitution as it informs the GICSD’s violation of the VFHPAA.

II. THE VERMONT FAIR HOUSING AND PUBLIC ACCOMMODATIONS ACT

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §4502 provides as follows:

- (a) An owner or operator of a place of public accommodations or an agent or employee of such owner or operator shall not, *because of* the race . . . of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation. (Emphasis added.)

The VFHPAA² is a “remedial” statute which requires broad interpretation to effectuate its purpose. Vermont’s roads are places of public accommodation³ because they afford services, privileges, advantages and benefits to users. They are maintained and controlled by agents of state government such as the Grand Isle County Sheriff’s Department (GICSD), who oversee road safety and the enforcement of roadway and motor vehicle laws. GICSD is thus a caretaker and owner/operator pursuant to the statute.

VFHPAA applies to “persons” which is defined in Article One of Vermont’s Constitution. Article One makes no categorical distinction as to the types of “persons” who are entitled to rights and liberties. Persons outside of Vermont’s borders are not excluded. The authors of Vermont’s Constitution placed a high value on justice and equal access to the law for all persons. Article 4 of the Vermont Constitution reads:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.⁴

In *Plyler v. Doe*,⁵ the U.S. Supreme Court confirmed that “undocumented aliens” were “persons” entitled to equal protection of the laws. In light of Vermont’s own Constitution and long-standing case law, VFHPAA applies to Mr. Alcudia regardless of his citizenship status and he is entitled to file a complaint against the GICSD alleging discriminatory actions.

III. CAN MR. ALCUDIA ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION: LOOKING AT THE THREE-PART MCDONNELL-DOUGLAS BURDEN SHIFTING FRAMEWORK

Mr. Alcudia’s complaint is evaluated through use of a three-part burden shifting framework that analyzes claims of discrimination when there is no direct

² VFHPAA’s federal counterpart is 42 U.S.C.A. §2000e - Title VII of the Civil Rights Act.

³ Vermont Department of Public Safety v. Vermont Human Rights Commission, Docket No.: 394-6-10 (August 10, 2010, Crawford, J.)

⁴ VT Const. CH I, Art. 4.

⁵ 457 U.S. 202 (1982).

evidence of discriminatory intent.⁶ First, Mr. Alcudia must prove a *prima facie* case of discrimination that satisfies the elements required by statute. Mr. Alcudia's burden at this stage is "relatively light."⁷ If he proves his *prima facie* case by a preponderance of the evidence,⁸ the burden shifts to the GICSD to produce a "legitimate non-discriminatory" reason for its actions.⁹ At this stage, the GICSD's burden is one of production not of persuasion.¹⁰ The burden then shifts back to the complainant to prove that the reason(s) offered by the respondent "were not its true reasons, but were a pretext for discrimination."¹¹

The burden shifting model involved in a Title VII claim of employment discrimination is also the analytical framework for claims of intentional discrimination in public accommodations.¹²

A. Mr. Alcudia establishes a *prima facie* case of discrimination for the following reasons:

1. He is a member of a protected class;

Lorenzo Alcudia is a Mexican national. He has black hair and brown skin. He speaks and understands very little English. Sgt. Allen's questions indicated that he believed he was perhaps undocumented. Sgt. Allen also described him as having a "dark complexion." Sheriff Allen stated during an interview that when Sgt. Allen called him to discuss the stop and what to do about Mr. Alcudia, Sgt. Allen "may have made a reference to skin color that was not that of a normal Caucasian." Mr. Alcudia meets the first element.

2. He was in a position to receive services ordinarily provided by the respondent to all members of the public in the manner they are ordinarily provided (i.e. a place of accommodation, here, roads);

⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷ *Carpenter v. Cent. Vt. Med. Ctr.*, 170 Vt. 565, 566 (1999).

⁸ The "preponderance of the evidence" standard is generally interpreted as "more likely than not." Federal Jury Practice And Instructions define it as follows: "When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it." 3 Fed. Jury Prac. & Instr. § 101:41 (6th ed.).

⁹ *Gallipo v. City of Rutland*, 178 Vt. 244 (2005)(Vermont employment discrimination case adopting the three-part burden shifting analysis set forth in *McDonnell-Douglas*).

¹⁰ *Robertson v. Mylan Laboratories, Inc.*, 176 Vt. 356, 367 (2004).

¹¹ *Id.*

¹² *Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 704 (2000) (Public accommodation cases use burden-shifting framework).

Mr. Alcudia was a passenger in a car driven by Kerry Martin, who was giving him a ride from Alburgh to Burlington to attend a Migrant Justice meeting.¹³ As a traveler on Vermont's roads, Mr. Alcudia was entitled to receive the privileges and benefits that entail when one travels by road, be it as driver or passenger. As a result, he was in a position to receive the services that the GICSD provides as a community caretaker. Mr. Alcudia meets the second element.

3. The respondent a) deprived Mr. Alcudia of the services it provided similarly situated persons outside the protected class in a manner which supports a rational inference of unlawful discrimination and/or (b) he received services in a markedly hostile manner because of his national origin and color that a reasonable person would find objectively unreasonable.¹⁴

Mr. Alcudia meets the third element. Mr. Alcudia was treated in a markedly hostile manner because of his national origin and color in a manner that a reasonable person would find objectively unreasonable. It is obvious from the video, and Sgt. Allen admitted during an interview, that his attention was quickly drawn away from Mr. Martin, the driver, to Mr. Alcudia, who was merely a passenger exercising no control over the car. Sgt. Allen's questions about Mr. Alcudia's identity are directly related to his immigration status. He lets the speeding driver off with a written warning and tells him he is allowed to go. The target of his investigation is Mr. Alcudia's legal status. His calls to Sheriff Allen and dispatch result in Mr. Alcudia's prolonged detention and his being taken into custody by Border Patrol. Based on these facts, Mr. Alcudia can show that he was treated in a markedly hostile manner that a reasonable person would find objectively unreasonable.

III. GICSD'S OFFERS ITS LEGITIMATE NON-DISCRIMINATORY REASONS FOR ITS TREATMENT OF MR. ALCUDIA

1) Overview of GICSD's Argument

Since Mr. Alcudia has established a *prima facie* case of discrimination, the burden shifts to the GICSD to produce evidence of one or more legitimate non-

¹³ Migrant Justice sometimes recruits college students to volunteer as drivers for undocumented workers who have no independent means of transportation.

¹⁴ *Lizardo v. Denny's Inc.*, 270 F.3d 94 (2d Cir. 2001), following, *Callwood v. Dave & Buster's Inc.*, 98 F.Supp.2d 694, 707 (D.Md. 2000)(providing an in depth analysis of competing factors which led to its development of a *prima facie* case for race discrimination in a public accommodations case.).

discriminatory reasons for its treatment of Mr. Alcudia. Again, its burden is a light one – it is one of production only.

The GICSD makes several claims in its defense: 1) that Border Patrol or dispatch, or a combination of the two, were responsible for Mr. Alcudia's detention, not Sgt. Allen or Sheriff Allen. They assert that Sgt. Allen was essentially an agent acting under the command of Border Patrol as conveyed by the dispatcher; 2) that Sgt. Allen was only trying to determine Mr. Alcudia's actual identity – not his immigration status; and 3) that there is no animus towards undocumented workers in Grand Isle County such as Mr. Alcudia; and 4) that there was legitimate suspicion of possible criminal activity by Mr. Martin and Mr. Alcudia and that those factors, in addition to Mr. Alcudia's lack of identification justified an investigation and a call to Border Patrol.

2) Substance of the GICSD's claim that it did not treat Mr. Alcudia in a discriminatory manner

a) *Sgt. Allen says there is no evidence that he requested that Border Patrol come to the scene*

Sgt. Allen claims that there is no evidence that he asked dispatch to send Border Patrol to the scene or that he contacted Border Patrol independently. He states that the dispatcher can be heard asking Border Patrol to have a car "slide" to the scene. He points out that he cannot be heard making a request for them to send an agent at any time on the video or the radio logs. Sgt. Allen stated in the first interview that he ran Mr. Alcudia through his MDC, got nothing back, then "ran him through Border Patrol just to see if he was wanted or a missing person, got nothing back, and then Border advised that they were sending a unit down. I never requested that they send someone down." He said that after that he advised the driver that he could leave, but that "Border Patrol wanted to speak with the passenger" and "I can't tell Border Patrol 'No'."

Later in the interview he said "Border Patrol is the one that requested he be held, not me." When asked again if Border Patrol asked Sgt. Allen to hold Mr. Alcudia there, he twice replied "Yes." Then he said he did not know who said that but that he "got it through whoever, and whoever they [State Police Dispatch] contact or however they called, I don't – I don't even know what number they call or exactly who they call." He added that "To me when somebody asks – that they're on their way to speak to somebody, normally, that doesn't tell ya just to let them go. That was my interpretation of what I was told from dispatch that came from Border Patrol."

When it was pointed out that he was the only person who could prevent Mr. Alcudia from leaving with Mr. Martin, he agreed but said it was “on the authority of Border Patrol.” Sgt. Allen stated that the majority of the time that he calls for a record check on a name, that Border Patrol responds to the scene. Jordanne Dow, the dispatcher, confirmed that Border Patrol was good for pitching in and always willing to back local officers up. She said Border was treated like any other agency in terms of requests for help. He clarified by saying it that wasn’t in every case if for instance, he was to give them a name, then gathered more information at their request which led to a complete picture of the person’s identity. Basically, he defers to Border Patrol. There is also a radio log summary with a line where the dispatcher types in information. In this case, it is impossible to know for certain whether the information is being dictated from Sgt. Allen or is a combination of requests from Sgt. Allen or from the dispatcher. It contains words heard from both parties and there is no way to assign them to one or the other with certainty.

b) Sgt. Allen claims he was only concerned about Mr. Alcudia’s identity, not his immigration status

Sgt. Allen claims that there is evidence that he was only concerned about Mr. Alcudia’s identity because he asked for several different forms of identification- a Vermont ID card, an out of state license or a passport. He stated he cared only about whether Mr. Alcudia was “who he said he was” and that he was not wanted for a crime or a victim of human trafficking or part of some other serious, potentially criminal situation. He pointed to his call to dispatch requesting that they run Mr. Alcudia’s name and date of birth.

In support of the position that the GICSD does not focus on immigration status, Sheriff Allen stated “I know every dairy farm in this county. I know roughly the number of undocumented persons they have working on their property. I see them on the road when I drive in uniform in my cruiser to work. I bump into ‘em in the store when I’m on duty and when I’m off duty. I don’t interact with them. I know they’re there. I know Vermont’s philosophy and view on it. It’s not a priority to me.”

c) Sgt. Allen claims there is no bias towards migrant workers in Grand Isle County

Sgt. Allen provided several statements in support of his third claim - that he has no animus or ill will towards undocumented workers. He stated that he sees “them” [migrant farmworkers] on the roads and at gas stations and has no interest in asking about their immigration status. He said he has tried to talk to “a couple of

them” in the store but that they won’t talk to him and that they look at him and “run away.” He was somewhat sensitive to their often horrendous living conditions, but said that the “bosses” won’t let law enforcement onto their property to answer calls for help made by the workers. He stated “the bosses” did not want the GICSD around – “they want us as far away from their hired help as possible...” “...we know there’s things that are going on and we try to help out or investigate it and we pretty much get shut down because they won’t allow us.” He also said he does not just go out and look for people to arrest on the basis of their immigration status. Sheriff Allen said any staff person who did that would be subject to severe discipline.

Sheriff Allen, Sgt. Allen’s father, confirmed he was aware of the plight of undocumented workers. He noted that some workers make \$300 a week working 100 hours a week and live in filthy and unsafe conditions and have to pay for items such as their rent, food, gloves and clothes. He stated “I do not agree with the lack of services we can offer or being restricted to intervene.” However Sheriff Allen stated that people in Grand Isle County are “not afraid” of police. He said a “high percentage of its 7000 residents” have his personal cell number. This investigation neglected to ask how many of those 7000 persons were migrant workers.

Additionally, Sheriff Allen stated that he has “hands-on” experience with migrant workers. He stated “My family owns apple orchard in south part of the county. My kids were brought up with Jamaicans. They were brought in through the Department of Agriculture...They’re great - I don’t lock my doors I don’t worry about them. We have dinners and stuff together and in the past 2 Mexicans that applied through program too...so there is no racism, biased [sic] or any of that.. in this Department and it would not be tolerated point blank.” He added, “I want you to understand who we are and where we come from and our beliefs.”

d. Sgt. Allen claims there was a legitimate suspicion of possible criminal activity that justified an investigation and a call to Border Patrol

Sgt. Allen said the initial incident and Mr. Martin’s behavior, as well as Mr. Alcudiva’s behavior contributed to his suspicions that Mr. Alcudiva might be involved in criminal activity. This included having out of state plates, not stopping even when Sgt. Allen deployed his sirens or indicating that he intended to pull over. In addition, the fact that Mr. Martin challenged Sgt. Allen’s right to ask Mr. Alcudiva questions and answered questions that Sgt. Allen directed at Mr. Alcudiva. In addition, Sgt. Allen stated that Mr. Alcudiva displayed deceptive behaviors, such as avoiding eye contact, seeming nervous and seeming like he didn’t want to be there. Sgt. Allen said

he wasn't sure if Mr. Alcudia was faking an ability to understand and speak English. He said he had "no clue" what language he might be speaking in spite of the fact that he stated he sees migrant workers every single day on the road and in the stores and he initially told Mr. Martin to quit answering questions he directed at Mr. Alcudia, and to cease translating. However after Mr. Martin's attitude became more subdued, Sgt. Allen became relatively friendlier to him and to Mr. Alcudia and allowed Mr. Martin to translate.

During an interview with this investigation, the GICSD took an opportunity to point out that they believed that Mr. Martin and Mr. Alcudia were did not tell Sgt. Allen the truth in two respects. The GICSD stated that Mr. Martin's statements that Mr. Alcudia lived in Vermont and had left his identification in his wallet were both untrue since Mr. Alcudia was not in the U.S. legally and had no identification.

Sheriff Allen stated that Mr. Martin's Colorado license was a flag for him. He stated that Colorado has a very bad human trafficking problem and that legalization of marijuana has made it worse. He also stated that the main concern is being responsible for letting someone go who might be a terrorist or a criminal, not whether they are legally in the country. He also referenced the now famous prison escape in Dannemora, NY, and that one of the escaped men was of Mexican descent – and posed the question what would have happened if the GICSD had encountered them and had let them go? He stated he would not let someone go if they had no identification, regardless of nationality or skin color. He emphasized that law enforcement personnel must approach all such incidence with suspicion for their own protection as well as the communities they serve.

IV. MR. ALCUDIA PROVIDES PROOF OF PRETEXT

In order to expose the GICSD's proffered reasons as pretext, Mr. Alcudia must present evidence that contradicts the assertions and evidence they have offered. This report will discuss the following evidence in-depth:

- 1) There is no objective evidence that Border Patrol ordered Sgt. Allen to detain Mr. Alcudia;
- 2) There is evidence that Sgt. Allen was responsible for initiating the call to Border Patrol and for their arrival to the scene. Based on Sgt. Allen's representation of the GICSD's relationship with Border he either knew or should have known they would respond. It is possible that Sgt. Allen assumed that when he said "Give Border a 21" that they would come automatically

because “9 times out of 10” they come. Indeed they are essentially back-up – GICSD’s “go-to guys.” In addition, both the dispatcher, Jordanne Dow,¹⁵ and the VSP PSAP Administrator, Jim Cronan, stated that it is not the policy or practice for a dispatcher to request that another unit or agency respond to the scene on his or her own initiative for anything other than officer safety or a major emergency. In addition, they both raised the possibility that Sgt. Allen engaged in instant messaging (IM) from Sgt. Allen’s Mobile Data Computer (MDC);

- 3) The video is solid evidence that Sgt. Allen was primarily interested in Mr. Alcudia’s immigration status and his identity only as it related to that status.
- 4) GICSD’s attitude the migrant worker community is not entirely benign.
- 5) Sgt. Allen was permitted to ask Mr. Alcudia for identification, however Mr. Alcudia was not required to have identification since he was only a passenger in the car.
- 6) Sgt. Allen removed evidence important to the investigation; and
- 7) Vermont law suggests that Sgt. Allen did not possess a reasonable, articulable suspicion of criminal activity based on Mr. Alcudia’s lack of identification or any other factors. Sgt. Allen’s and Sheriff Allen’s post hoc suppositions about possible criminal activity had no factual basis, and thus there was no reasonable articulable suspicion of criminal activity sufficient to justify the prolonged detention.

The sources that support evidence of pretext include:

- 1) The recorded video of the stop;
- 2) The functioning of the recording microphone on Sgt. Allen’s external carrier.
- 3) The audio logs provided by GICSD including radio calls between Sgt. Allen and dispatch as well as calls between dispatch and Border Patrol.
- 4) Evidence in the radio log summary and incident report provided by the Respondents.
- 5) Interviews.

¹⁵ Ms. Dow stated she worked as a dispatcher for about a year and a half and received six (6) months of on the job training with multiple trainers.

A. Video – Evidence that Sgt. Allen’s primary purpose was obtaining information about immigration status

The video of the stop is perhaps the most significant objective evidence that Sgt. Allen was principally interested in Mr. Alcudia’s immigration status. Mr. Martin is stopped for speeding¹⁶ and fails to pull over promptly even after Sgt. Allen deploys his sirens. Not surprisingly, Mr. Martin’s license plate was covered by salt and snow due to the February weather conditions. Sgt. Allen walks up to Mr. Martin’s window and Mr. Martin hands over his license and registration. Sgt. Allen sternly admonishes him about his failure to pull over. When Mr. Martin tells him he did not see him because the rear windshield was not sufficiently clean, Sgt. Allen tells him that is what his side mirrors are for. After lecturing him, Sgt. Allen’s attention quickly shifts to Mr. Alcudia. From that point on, his questions focus on Mr. Alcudia’s residency status and ultimately result in an extended detention of Mr. Alcudia.

The video shows Sgt. Allen addressing Mr. Martin, the driver, at 02:04 minutes into the video. At 02:51 Sgt. Allen addresses Mr. Alcudia, asking - “*Do you live out here?*” At 02:56 Sgt. Allen says, “*Do you have any ID with you passenger?*” At 03:05 Sgt. Allen asks Mr. Martin: “*Is he supposed to be here?*”¹⁷ Mr. Martin finds himself in the unenviable bind of trying to answer Sgt. Allen’s questions, defend himself, translate for Mr. Alcudia, as well as mounting somewhat of a challenge with respect to Sgt. Allen’s right to ask Mr. Alcudia for ID. Sgt. Allen responds to Mr. Martin’s challenge by saying, “I don’t have to follow that rule, I’m not State Police...I’m with the Sheriff’s Department...And I wasn’t asking you I was asking him. So...let’s start again. Because, the reason why I asking is cuz I’m asking questions and it’s ok that if you don’t speak English in this country but I’m trying to ascertain because you’re from Colorado, and I’m asking what you’re doing up here, and you’re picking up a friend of yours in Alburgh and I’m asking where he lives and you’re answering every single question for him when I’m trying to ask him questions see how that’s kind of suspicious?” Unlike his father, Sheriff Allen, Sgt. Allen never mentions having a heightened suspicion of Mr. Martin specifically because he had

¹⁶ Note that Mr. Martin’s memory with respect to speeding in GI County was short. About a month and half later he got another speeding ticket – from Sgt. Allen’s twin brother, Deputy Allen. Mr. Martin thought that he was being ticketed by Sgt. Allen and did not understand why he did not recognize him. Later, through investigation, it was revealed that Sherriff Allen had not one, but two sons on the force and that they were identical twins.

¹⁷ Sheriff Allen said he disapproved of this phraseology and there had been “discussions” about its appropriateness, although no disciplinary action.

Colorado plates. He simply noted he had out of state plates, was speeding and would not stop and that made him suspicious.

Once Sgt. Allen establishes that Mr. Alcudia has no identification, he becomes almost chatty with Mr. Martin, in spite of the earlier hostility and defensiveness on both sides.¹⁸ He asks Mr. Martin if he goes to UVM and what his major is. Mr. Martin responds he studies English and that he has graduated to which Sgt. Allen replies “Awesome!” He continues “Finally over – four years of crap.” Mr. Martin can be heard saying “..long four years,” and Sgt. Allen responds “I hear ya.” Sgt. Allen then asks for Mr. Alcudia’s name and date of birth and does not object to Mr. Martin’s assistance in helping Mr. Alcudia at this juncture, although he had initially stopped Mr. Martin’s efforts to translate and told Mr. Martin that answering for Mr. Alcudia was a potentially suspicious indicator of wrongdoing.¹⁹

Sgt. Allen asks Mr. Martin if he comes to the area often. Mr. Martin tells him not that often and can be heard apologizing for speeding and Sgt. Allen says he will give him a warning – “I’m not gonna hook you up with a ticket.” He then comments on the fact Mr. Martin has summer tires and laughs incredulously, saying “Holy crap! How’d you even make it like [inaudible].” During these more informal, chatty interludes he asks Mr. Alcudia what country he is from. At 06:34 he says, “*Are you supposed to be here?*” and then, “*Do you work at one of the dairy farms up there?*” Thus, in the span of only a few minutes, almost all of the questions Sgt. Allen asks of or about Mr. Alcudia have to do with Mr. Alcudia’s immigration status.

Sgt. Allen returns to his car at the 07:00 minute mark on the video and gets in at which point, the recording device goes silent. About eight and a half (8.5) minutes later, at 15:53, he presumably gets out of his car, comes back into view, wipes off Mr. Martin’s license plate, then goes to the driver’s side window and gives Mr. Martin a written warning. The conversation cannot be heard because the recording unit is still muted. It is during this period that Sgt. Allen tells Mr. Martin that he can leave but that Mr. Alcudia is not free to go. At 18:50 minutes, Sgt. Allen walks back to his car. Mr. Alcudia has been detained approximately sixteen minutes and forty-six seconds (16:46) – that is, from the time Sgt. Allen first spoke to Mr. Martin.

¹⁸ Mr. Martin said he thought that Sgt. Allen was not allowed to ask for identification (he was incorrect) and said so twice, to which Sgt. Allen responded that he was not VSP and he could do that. Mr. Martin said in hindsight he felt that his defensiveness had only made things worse for Mr. Alcudia.

¹⁹ During the first interview, Sgt. Allen said he had no idea what language Mr. Alcudia was speaking and stated he thought that Mr. Alcudia could have been acting like he could not speak or understand English.

B. Recording Device on Sgt. Allen's External Carrier – Evidence that Sgt. Allen was primarily responsible for the prolonged detention of Mr. Alcudia

The issue of the muted recording device is problematic for the GICSD. Although Sgt. Allen stated that the recorder went off accidentally as a result of his bulky equipment hitting the mute switch, the evidence suggests that he turned it off on purpose not only once, at the beginning, but twice thereafter. According to the Sheriff, use of the recorder is optional, so there was no violation of departmental policy, however turning it off prejudiced the GICSD's defense of its actions and gave rise to the suspicion that there was an intentional effort to pick and choose what information would be heard and subject to scrutiny.

The muted recorder meant that the content of Sgt. Allen's call to Sheriff Allen cannot be heard, nor could additional conversations with Mr. Martin and Mr. Alcudia. There is also an incomplete record of Sgt. Allen's conversations with Sgt. Dustin Abell, another GICSD officer, and the Border Patrol Agent. The gap in information deprived this investigation of the ability to verify some of the issues in question and to match versions of events. The silence also deprives this investigation of the opportunity to assess things such as tone of voice, emphases and characterizations.²⁰

The recording device first goes off after Sgt. Allen walks back to his cruiser having left Mr. Martin's car. Sgt. Allen said the bulkiness of his utility belt, bullet proof vest and Taser, along with the fact he was not in his normal cruiser, must have worked in combination to accidentally hit the mute button when he sat down. He said that he wasn't "100% good at double-checking to make sure that it's still recording. I thought it was still recording...um, yeah, that's the only thing I can think of." When asked, he stated he did not intentionally mute the device. He said that at one point he knew he had turned it off, and thought "Oh crap...I didn't...[have it on]." The video does in fact show Sgt. Allen looking down at one point and unmuting it.

This seemed like an inconvenient but possibly reasonable explanation until it became clear from watching the video that the microphone was switched on and off

²⁰ See State v. Winters, 2015 WL 5165424 *¶16. The Winters court examined the type of officer conduct that could elevate an investigatory stop to an illegal detention. The court reviewed factors such as the officers' tone of voice, manner, persistence and the content of the questions asked of the vehicle occupant(s). The lack of sound deprived this investigation of the ability to assess these factors.

on three other occasions in both seated and standing positions. The sound is off at the very beginning of the video when Sgt. Allen first begins following Mr. Martin. It is switched to "on" within seconds as he follows Mr. Martin's car and the cruiser's sirens can be heard. It remains on without interruption throughout the period of time that he exits his cruiser and has the first encounter with Mr. Martin and Mr. Alcudia. With all of that sitting, exiting and standing, it is odd that his vest, utility belt and Taser did not accidentally mute it more randomly during the act of driving, getting out of his car, walking to Mr. Martin's car, leaning down to talk to Mr. Martin and Mr. Alcudia for several minutes and then walking back to his car. It again becomes muted not during the act of getting in his cruiser and sitting down, but once he is seated and has shut the door.

Once muted, he makes a call to Sheriff Allen. There is no way to know what else he does although separate records show he radioed dispatch and ran Mr. Martin's name through his MDC. He represented that he did no texting or IM to dispatch but this cannot be verified since there is no sound and this is critical because texting is so routine according to the two other witnesses interviewed by this investigation. Texting is also important because he may have texted dispatch and requested that Border Patrol send an agent to the scene.

He is adamant that his MDC signal went down but the lack of sound means this cannot be independently verified. This is important because he represented things happening in a certain sequence based on the lack of a signal, but the silence means there is no way to verify what he says. He had a cell phone connection because he called his father on the work cell. He stated that the air card on the MDC is "not as good as the cell service." He also explained that the "computer program shuts down when there is no connectivity because there must be a secure connection to send data."²¹ He can be heard texting and typing into his MDC and receiving "blings" quite a bit later when the sound is turned back on, but those first critical minutes are lost depriving the investigation of order of events, substance and substantiation. The GICSD asks this investigation to take its word that events unfolded as it represented but there is enough other evidence and lack of evidence – that raises questions about the version of events as they have presented them. Sgt. Allen's act of turning off the recording device in the first instance damaged any opportunity to verify their version with any certainty.

²¹ Note that the quotation marks represent the response through his counsel.

Examining this sequentially, the sound is muted at 00:00 as Sgt. Allen begins following Mr. Martin. He switches the sound **on** from a seated position at 00:33 – thirty-three seconds -- and his sirens are heard. The sound stays on through the initial encounter and questioning of Mr. Martin and Mr. Alcudia. Sgt. Allen returns to his car and gets in, shuts his door, then the sound is turned to **off** at 07:09. At 25:31 minutes the sound comes back **on** and Sgt. Allen clearly must have switched it back on. At 43:46 Sgt. Allen radios dispatch: “Can you see if you can get an ETA for Border?” At 44:31, dispatch responds that Border is about ten (10) minutes out. In his second interview, Sgt. Allen claims he did not believe he texted dispatch and offered this radio communication as proof of that. In essence, his argument is “Why would I radio dispatch and ask for an ETA if I could just text and ask?” This investigation does not have an answer to that question but that fault derives from issues created by Sgt. Allen.

At 50:46 Sgt. Allen radios dispatch that Border has arrived. He gets out of his car with the microphone still running. He can be heard getting out of his car and presumably walks to the back left of his car because he does not come into view. There is a brief exchange between Sgt. Allen and the Border Agent and Sgt. Allen. Sgt. Allen tells the Agent *that he asked Alcudia if he was a U.S. citizen* – again showing that his primary concern was over his immigration status. The Border Agent asked how the driver knew Mr. Alcudia.

There is some further inaudible conversation then Sgt. Allen can be heard telling the Border Agent that Kerry Martin told him he could not ask “those” questions and Sgt. Allen says he told Mr. Martin “I’m not VSP” [Vermont State Police]” and again stated that VSP rules didn’t apply to him. Sgt. Allen remains hidden talking to someone else – presumably Sgt. Abell -- as the Border Agent approaches the passenger side of Mr. Martin’s car after looking at the license plate. Sgt. Allen can be heard talking about Mr. Martin’s attitude and he indignantly repeats what Mr. Martin said to him about not being allowed to ask Mr. Alcudia questions.

At this point - at 53:19 - while still out of view, and still talking to Sgt. Abell, the sound is muted to **off** again. At 56:15, the Border Agent opens the door and Mr. Alcudia gets out. It appears one wrist is cuffed and turns to face the car for a pat down. Sgt. Allen reappears on screen at 56:19 and goes to the driver’s side. The sound is still muted so no conversations can be heard. At this point, Sgt. Abell,

wearing a "Sheriff" sweater, is present to the right. Sgt. Allen reaches the window at 56:24 and begins speaking to Mr. Martin. At 57:12, Sgt. Allen walks to the back of Mr. Martin's car. At 57:16 he looks first at his car, then down at his belt and appears to switch something on, and immediately, at 56:17, the sound comes back on.

Mr. Alcudia is escorted away by the Border Agent and leaves camera view at 57:33. Sgt. Allen is on the passenger side of his car but out of view. Sgt. Abell, is the last figure to leave camera view at 57:36. At 57:58, after what sounds like murmured words and walking, the sound is muted to **off** once again, meaning that the listener is not privy to the final conversation between Sgt. Allen, Sgt. Abell and the Border Agent. At 1:00:36, the Border Agent walks back to Mr. Martin's car to speak to him through the passenger side window. Lack of sound means it is impossible to hear what Sgt. Allen and Sgt. Abell are discussing. By 1:03:19, the Border Agent has gone off camera. At 1:04:15 Sgt. Allen slips around the front of his car and is back in it and out of site at 1:04:17. At 1:04:18, the sound goes back **on**. The video stops recording at 1:04:34.

These snippets of conversation that can be heard are not particularly flattering to Sgt. Allen and undermine his assertion that he did not care about Mr. Alcudia's immigration status. They also reveal an attitude of a law enforcement officer who does not completely understand the parameters of his role and who suggests that he is somehow less accountable to citizens he encounters than a Vermont State Trooper would be. The fact that they can be heard might suggest that Sgt. Allen was not purposefully muting the recorder, however it does not dissuade this investigation from concluding that he meant to mute it but just that he did not do so as "neatly" as he could have.

The recording microphone, along with the video, acts as a behavioral monitor and a method by which to hold law enforcement accountable. It reflects their attitudes towards those they encounter. If the purpose of having a recording device is to provide police accountability, the policy should be to keep both it and the video running throughout an encounter. Knowing it is on can help to restrain behaviors and attitudes that should be restrained.

C. Interviews, radio logs, call logs, radio log summary and incident report

The interviews, radio logs, call logs, radio log summary and incident report are also problematic for the GICSD. Taken as a whole, they raise questions about everything from bias, to accountability, to whether there was any real suspicion of criminal activity. Sgt. Allen has strenuously and consistently asserted that he did not ask for Border Patrol to send an agent and there is no proof that he actually did. Yet there are several factors which suggest that at the very least, he expected and intended that Border come to the scene and did nothing to deter them which indicates that his intent was that they come.

There were four parties in communication. Sgt. Allen communicated with Sheriff Allen by work cell phone (which cannot be heard). Sgt. Allen communicated with the VSP dispatcher by phone, and the VSP dispatcher called and spoke to an unnamed Border Patrol employee. Sgt. Allen claims that Border either came on its own initiative or that dispatch asked them to come and that therefore Border – not Sgt. Allen – is responsible for Mr. Alcudia’s detention. When Sgt. Allen radios dispatch he asks for dispatch to “Give Border a 21” – that is, to give Border Patrol a call for information only - and asked her to run Mr. Alcudia’s name through her database. After they disengage, the dispatcher can be heard calling Border and asking the Border employee who picks up the phone to have a car “slide” to Sgt. Allen’s location. She does not give him Mr. Alcudia’s name or DOB to check.

This investigation interviewed Jim Cronan the VSP PSAP Administrator in Williston, and Jordanne Dow, the dispatcher. Ms. Cronan and Sgt. Allen do not know each other, nor does she know Sheriff Allen. She worked for Mr. Cronan, but is no longer a state employee and has entered Air Force training school. Mr. Cronan does not know either of the Allen’s. Ms. Dow did not recall the incident even after reviewing the call and radio logs. However she said she would not ordinarily ask for Border Patrol to send an agent to the scene unless officer safety or a significant emergency had occurred. Ms. Dow and Mr. Cronan said it was not, and is not, a VSP policy to have dispatchers independently ask another agency to send resources to a scene absent a request from the on-site officer. The only exceptions would be if it was an emergency or officer safety was at issue. Mr. Cronan said it was not impossible that Ms. Dow had asked for Border to “slide” on her own, but it was against policy and training and he was not convinced she would have done so absent a text/IM request from Sgt. Allen.

Ms. Dow said if she had “perfect communication with him, [Sgt. Allen], then I wouldn’t have asked him [Border Patrol] to go on my own [initiative].” There were

no indicators that her communication with Sgt. Allen was problematic or cause for concern. When asked to give her opinion on why Sgt. Allen would not have just asked for a car right away, rather than just made a request for a "21," Ms. Dow, said she did not know, but hypothesized that he might have thought of it after the radio request and it might have been easier just to text/IM the request to her than to call back due to the fact that both officer and dispatcher might be multi-taking. She said if she was handling more than one call texting/IM would be the fastest and easiest way to communicate. She said "Honestly, I don't remember, my best guess, we would, um, IM all the time, if you's just - uh pulled over somewhere usually in a traffic stop you [an officer] could IM me and ask them [support agency] to slide or something - so I'm guessing that's what happened there...due to the - to the recording cuz he never said on the phone have them slide and then when I called them I asked them to slide, so I think what happened was he sent me an instant message from the stop and said just have them slide this way if they're close....Cause that, usually - if like the Border Patrol people are in the area, they just like will go and help out."

Other indicators suggest there was texting/IM taking place. For instance, when the dispatcher called Border Patrol, she characterized Sgt. Allen's interactions with Mr. Martin and Mr. Alcudia. She told Border they were telling Sgt. Allen "weird stories." It is an odd statement considering she was not at the scene. There are no radio logs where Sgt. Allen makes any characterizations of the interactions with the men. There seem to be missing communications which, raised the possibility of text messaging. Ms. Dow said she did not remember and did not know why she had said that. When this investigation emphasized that it was trying to figure out why there would be a call to Border Patrol for what was initially a speeding violation, Ms. Dow said she viewed the incident (after reviewing the audio and call logs) as involving a situation where Border had been involved because someone did not have citizenship.

In addition, there are different versions of what Sgt. Allen did first. According to his incident report in the Law Incident Table, which is supposed to be written contemporaneously with the event, "I had dispatch run the males [sic] name and they advised they could not get any records on the male. I then asked dispatch to contact Border Patrol to run the males [sic] name to see if they could get anything to come back....Dispatch advised that an Agent was en route to speak with the male." This statement differs from the first interview in which Sgt. Allen said that he ran Mr. Martin first through his MDC, then tried to run Mr. Alcudia, but could not because the signal for his MDC was down. He stated that he used a work cell phone, which apparently had a signal, and called Sheriff Allen for permission to call Border Patrol

for a name check only. However the radio logs suggest that he investigated Mr. Alcudia first, not second. The Radio log shows him radioing dispatch at 10:09:27. In that call his first request to the dispatcher is "Can you give Border a 21?" [a "call"], and he also asks her to run Mr. Alcudia's name and date of birth through her state database. At 10:11:05 and 10:11:06 a.m., he runs Mr. Martin's name and driver's license through his MDC which is reflected on the Radio Log Summary. He runs a vehicle inquiry on Mr. Martin's car at 10:23:56 and 10:23:57. The two versions contradict each other. The log shows that his first investigative acts were focused on Mr. Alcudia, not the speeding driver, which runs counter to what he said.

Sgt. Allen stated that all he wanted was for Border to use their databases to run Mr. Alcudia's name - "All I wanted was just a records check." He also stated that sometimes people would hand ID to Border but not to local law enforcement. However none of his actions support this assertion. Instead, it seems reasonable to think that Sgt. Allen knew and intended for Border to come. First, if all he intended was to have them do a name check, he certainly would not have needed to ask for the Sheriff's permission.²² Using Border to check names is apparently common and the GICSD's anti-bias policing policy clearly allows for the use of federal databases for this purpose. Second, there is no evidence that Sgt. Allen made any effort to follow-up on his request for a record check. There is no evidence he radioed dispatch back and asked for a status on the record check. Instead, the only evidence of follow-up was his radio to dispatch to get an "E.T.A." on Border after he had been waiting for them for quite a while.

Sgt. Allen's request for an ETA is also odd considering there is no audio communication from dispatch to Sgt. Allen telling him that Border is sending an agent down. He certainly could have assumed they were coming which supports the assertion that he is responsible for detaining Mr. Alcudia, or he asked for them to come via a text message, or dispatch texted him that they were coming. He was given an opportunity to explain how he knew this in a second interview but he could not offer a satisfactory explanation.

Sgt. Allen has also claimed that Border ordered him to hold Mr. Alcudia until they got there. However, there is no evidence of Border telling either the dispatcher or Sgt. Allen to hold Mr. Alcudia. Border Patrol's own communication with dispatch is fairly innocuous and not representative of an agency chomping at the bit to take

²² Part of the problem of course is that Sgt. Allen and Sheriff Allen's conversation cannot be heard because Sgt. Allen's microphone was muted.

control of the scene or Mr. Alcudia. Sgt. Allen said that he was holding Mr. Alcudia "on the authority of Border." He also said "When they say they're on their way down to speak to someone you don't just let them go." There simply is no direct or indirect evidence that Border conveyed any order.

The dispatcher calls Border and asks if they can send anyone down for a "traffic stop" (not an issue of officer safety or an emergency). The person on the phone at Border says "What's going on, what do you guys need?" She tells him to hold briefly, and says she is on the other line with Sgt. Allen. When she hangs up with him she turns back to the Border employee and says "Uh, sorry what'd you say – It's Grand Isle 6" (meaning Sgt. Allen). The Border employee says "Sure – what's going on, what do you need?" She then explains the traffic stop and the "weird stories," the lack of identification, and "one of them's from Mexico." Border asks her to hold the line to see if there is agent availability. He comes back and says someone is on his way. Later, when Sgt. Allen asks for the ETA, she calls Border back and the Border employee apologizes for the delay, saying "He should be there within ten (10) minutes. He was out of pocket when he started heading that way." Border also has to call dispatch back to ask for Mr. Alcudia's name and DOB. At no time does Border request or order that dispatch tell Sgt. Allen he must hold Mr. Alcudia until they arrive.

Again, Sgt. Allen has consistently denied texting/IM dispatch and has stated that his MDC was down (although the amount of time it was down is undetermined) which meant he would have been unable to. However Ms. Dow and Mr. Cronan raise issues that this investigation cannot dismiss and the inability to overhear anything once Sgt. Allen gets back in the car makes it impossible to resolve these issues in favor of GICSD. Sgt. Allen never mentioned texting in his first interview. In his second interview he stated he didn't think he had texted the dispatcher – "I don't believe I did. If I couldn't run a name I couldn't send a text to the dispatcher." However once his recording device comes back on around 25:31 minutes, he can be heard texting on a phone and typing on his MDC and "blings" can be heard outgoing and incoming fairly regularly. It is impossible to know the content of those communications. It is also impossible to know for sure whether he texted prior to that because his microphone was muted. In any case, texts/IM cannot be captured or saved so there is no way to know for sure.

The factual discrepancies with respect to the timing of events, the unexplained missing pieces of information, what appears to be the selective use of the recording

microphone, the lack of any order from Border Patrol, the possibility that there was text messaging are part of a pattern of present and missing evidence which does not weigh in the GICSD's favor. Perhaps these indicators are not indicative of intentional efforts to sanitize the record but they appear that way and they erode GICSD's assertion of non-bias and lend support to the argument that pretext exists.

V. ARTICLE 11 OF THE VERMONT CONSTITUTION

This investigation evaluated the legality of Mr. Alcudia's detention by looking at Article 11 of the Vermont Constitution²³ with respect to illegal detentions and reasonable suspicion, and the GICSD's anti-bias policing policy.

Article 11 is the State analogue to the Fourth Amendment to the United States Constitution, the provision that protects persons from unlawful governmental intrusions. The Vermont Supreme Court has held that Article 11 affords greater protection than its federal counterpart with respect to some aspects of search and seizure law.²⁴ If Mr. Alcudia can show an Article 11 constitutional violation, he can certainly show a violation of VFHPAA, which is a civil statute (versus a constitutional right). Alternatively, even if he cannot show a constitutional violation, he could show a violation of a civil statute because his burden of proof is lighter. Thus, an Article 11 analysis informs the VFHPAA analysis since the issue is the right to access places of public accommodation free from restraints by public agencies on the basis of protected status like national origin and/or color. Essentially, if Mr. Alcudia filed a lawsuit, he would be alleging a constitutional tort on 4th Amendment grounds – a civil rights complaint, in addition to VFHPAA and whatever other relief he was eligible to seek. The Article 11 analysis helps establish the pretext Mr. Alcudia must show in order to prevail.

There is no question that Sgt. Allen had the right to stop Mr. Martin's car to investigate him for speeding.²⁵ He also had the right to ask Mr. Alcudia, the passenger, for identification as part of an effort to assess the situation. Since officers may ask passengers to exit vehicles under certain circumstances, it is permissible to make a less intrusive request for a license.²⁶ By stopping the car and requesting

²³ Article 11 is the Vermont version of the federal 4th Amendment.

²⁴ See, e.g., *State v. Badger*, 141 Vt. 430, 448–49 (1982) (“[O]ur constitution is not a mere reflection of the federal charter.... It is an independent authority, and Vermont’s fundamental law.”); *In re Town Highway No. 20*, 191 Vt. 231, 248 (2012) (While certain wrongs may find redress under federal law, we recognize the inherent and independent value in the rights and protections enshrined in our own constitution); *State v. Cunningham*, 183 Vt. 401, 410 (2008).

²⁵ See *State v. Lussier*, 171 Vt. 19, 23–24 (2000).

²⁶ See, e.g., *See Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (holding that officer can ask driver for identification) and *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) (holding that in some circumstances, police can ask passengers to exit

identification, Sgt. Allen affected a temporary seizure of both the driver and the passenger.²⁷ A temporary seizure of a driver and passenger is reasonable and police may inquire into matters unrelated to the reason for the traffic stop as long as those inquiries “do not measurably extend the duration of the stop.”²⁸ In addition, “the [the subsequent investigation] [must be] reasonably related in scope to the circumstances which justified the interference in the first place.”²⁹ If the officer gathers information during the investigation that “provid[es] reasonable suspicion that some other criminal activity is afoot, the officer may extend the detention to investigate that activity³⁰ however law enforcement officers cannot proceed on “an unparticularized suspicion or hunch of criminal activity,”³¹ but instead must be able to articulate actual behavior(s) and/or facts that legitimate a restriction of a person’s freedom. In *State v. Santaw*,³² the court found that the trooper had reasonable articulable suspicion the driver had been drinking because the trooper could smell alcohol on the man’s breath, had observed him cross the center line, observed he had bloodshot eyes and the man admitted he had been drinking. Thus, based on the “totality of the circumstances” the trooper’s detention of the motorist were lawful. Here, Sgt. Allen could not match up any of his observations of “deceptive behavior” with anything concrete. This invalidates his actions.

the vehicle). Compare the Eight Circuit case of *U.S. v. Rodriguez-Hernandez*, 353 F.3d 632 (2003). *Rodriguez-Hernandez* is not controlling in Vermont, however in that case, the court found that during the course of a traffic stop, the officer could inquire about matters related to immigration status and refer the person to Border Patrol after the driver told the officer that the passenger was not legally in the country. However in *Rodriguez-Hernandez*, the court noted that upon stopping the car, “Deputy Decker noticed a folding knife in the pocket of the driver’s side door. The deputy also observed the shaft of an ink pen with white residue on it, which he believed was used to ingest illegal drugs. Deputy Decker asked Ayon for permission to conduct a pat-down search, and Ayon agreed. During the pat-down, the deputy believed he felt a drug scale in Ayon’s pocket. Decker told Ayon to take a seat in the patrol car, and called for backup because he had located a weapon and suspected drug paraphernalia.” *Id.* at 634. This case is clearly factually distinguishable from this case.

²⁷ *Brendlin v. California*, 551 U.S. 249, 263 (2007). See also *United States v. Glover*, 957 F.2d 1004, 1008 (1992) (In order to determine whether a “seizure” has occurred “triggering the Fourth Amendment’s protections,” the court must consider “‘if, in view of all of the circumstances surrounding the [encounter], a reasonable person would have believed that he [or she] was not free to leave.’”) (citations omitted).

²⁸ *State v. Sprague*, 175 Vt. 123, 125, 129 (2003) (“We have long held that the police may stop and temporarily detain a vehicle based on little more than a reasonable and articulable suspicion of wrongdoing....Implicit in this rule, however, is the corollary requirement that the police intrusion proceed no further than necessary to effectuate the purpose of the stop.”) (citations omitted).

²⁹ See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); see also *State v. Chapman*, 173 Vt. 400, 402 (2002).

³⁰ *State v. Cunningham*, 183 Vt. 401, 408, (2008).

³¹ *State v. Simoneau*, 176 Vt. 15, 20 (2003).

³² 189 Vt. 546, 553 (2010).

The Vermont Supreme Court has held that the analysis involves a “totality of the circumstances” analysis.³³ Thus, officers can “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”³⁴ However, the Court stated that “observations,” without an explanation why observations lead an officer to say that there is a reasonable and articulable suspicion that a crime was being committed falls short of the mark.³⁵ The situation is much the same in this case. Sgt. Allen made observations about nervousness and deceptive behaviors that are not all that uncommon when people encounter police and someone in Mr. Alcudia’s situation would be even more nervous. However other than making these statements Sgt. Allen never connected them to anything concrete other than Mr. Martin’s actions and his suspicions about him dissipated enough so that he told him he could go with only a written warning. His suspicions of Mr. Alcudia were based in the fact that he had brown skin, did not speak English and had no ID.

The Vermont Supreme Court has frowned on baseless suppositions. In discussing “anonymous tips,” the Court has held that generic forms of information cannot suffice for the purpose of supporting “reasonable, articulable suspicions.”³⁶ This is noteworthy, because again, Sgt. Allen has exactly nothing at all to act on specific to Mr. Alcudia, not even a vague tip of any kind. In addition, the majority of his suspicions were offered after the fact during the interview.

The issue of prolonged detention and unsubstantiated information was addressed in *State v. Cunningham*,³⁷ which involved two separate stops and detentions of the same defendant only twelve days apart. The defendant challenged the extended detention and canine sniff that evolved out of one of the stops. The court addressed the “question of whether defendant was detained for too long, and with too little justification...”³⁸ The court found that the police violated Article 11 in the first stop because they expanded the detention beyond the original purpose of the stop, which was to issue a variety of traffic tickets, when they called in a canine sniff. The court dismissed so called “objective facts” offered by the officer including the statement that the officer “had heard that defendant had prior involvement with drugs

³³ *State v. Davis*, 182 Vt. 573, 574 (2007) (citations omitted).

³⁴ *Id.* at 575.

³⁵ *Id.*

³⁶ *State v. Wood*, 2011 WL 4976125 (unpublished). Cf. *State v. Boyea*, 171 Vt. 401 (2000), wherein the court discussed when a “tip” would suffice to allow office to detain individual.

³⁷ 183 Vt. 401 (2008).

³⁸ *Id.* at 421 (Skoglund, J. concurring).

from the [CAD] system and from other sources.”³⁹ The court wrote “These other sources were not named, and the CAD entry relied upon did not disclose any detail regarding the information's reliability, the nature of defendant's purported involvement, or the identity of the source from whom police heard of the involvement.”⁴⁰

The court went on to review the other evidence put forth by the state in support of the defendant's detention and ultimate arrest. They emphasized the need for “particularized” or “predictive” information where confidential informants are concerned.⁴¹ The court opined:

Here, the information from ‘other sources’ was even less reliable than the tip we rejected in Langlois. First, the informant in Langlois did provide a name, albeit one unknown to police, while the “other sources” here [in Cunningham] were wholly anonymous. Second, the Langlois informant provided at least some specific information beyond a mere statement of wrongdoing, while here the record reflects that ‘other sources’ merely accused defendant of dealing drugs and provided no corroborating information at all, much less any unique information that could form a basis to determine the reliability of the information. While Langlois concerned probable cause, and here defendant's prolonged detention could be justified based on a lesser showing of reasonable suspicion, the accusations by anonymous “other sources” do not surmount even that lower threshold.”⁴²

The Cunningham court also found that information from the CAD system did not support “a reasonable suspicion that a drug-related crime was afoot” because it was also derived from an anonymous source, “which undercuts its reliability.”⁴³ With respect to the information in CAD in general, the court stated that “the mere fact that the information was contained in this particular database does not greatly increase its value as a basis for reasonable suspicion; there is nothing in the record to suggest that information undergoes any sort of vetting prior to inclusion in the database.”⁴⁴ The

³⁹ Id. at 412.

⁴⁰ Id.

⁴¹ Id. See State v. Langlois, 164 Vt. 173, 177 (1995). Officer did not have probable cause to search an automobile based on a telephone informant who stated that the defendant was driving around downtown Bennington in a 1989 pickup with fresh front-end damage and a bag of marijuana behind the front seat. The court concluded that “the information ... provided [about the vehicle] was readily available to any member of the public who could observe defendant's vehicle” and noted that “[t]here was nothing particularized or predictive about the information.”

⁴² Cunningham at 413.

⁴³ Id.

⁴⁴ Id.

court noted the ease with which someone could be accused of involvement with drugs: "...the 'prior drug involvement' could have arisen from an incident as innocuous as a neighbor's hypothesis and unsubstantiated assertion that defendant was involved in some way with drugs, or from defendant's mere association with someone suspected to be involved with drugs."⁴⁵ Ultimately then, and significantly for Mr. Alcudia who was connected not even by rumor or anything else to any wrongdoing, the court held that "Article 11 does not permit prolonged detention based on an officer's having heard what amounts to little more than a rumor of wrongdoing."⁴⁶

Sgt. Allen's actions and questions elevated an investigatory stop into an illegal detention. Sgt. Allen's questions were "not innocuous" or "open-ended." They were blatantly intended to determine legal status separate and apart from Mr. Alcudia's actual identity. Sgt. Allen focuses on Mr. Martin for about 40 seconds before he shifts to Mr. Alcudia and his questions are pointed – "Is he supposed to be here," "Are you supposed to be here?" and "So, you're not supposed to be here?" These questions have nothing to do with wanting to know who Mr. Alcudia is – they are solely focused upon his immigration status. They show the beginning of the shift away from Mr. Martin, the speeding driver, to Mr. Alcudia, the passenger.

Sgt. Allen stated that Mr. Alcudia displayed "deceptive behaviors." Failure to make eye contact,⁴⁷ say hello or greet him in some fashion, and the appearance of nervousness are not uncommon and describe plenty of people who encounter the police. Sgt. Allen said he saw no preliminary indications of alcohol or drugs when he approached the car. He asked only perfunctory questions and spent most of his time scolding Mr. Martin and trying to find out if Mr. Alcudia was "legal" or not. He failed to get the full picture of why the two men were together and where they were heading. Mr. Martin's somewhat combative and challenging behavior, though well meant, did not help Mr. Alcudia. However in the end, his behavior wasn't so suspicious that Sgt. Allen investigated him more in depth. Instead, he gave him a written warning and joked with him a little about the toll of four years of college and told him he was free to leave the scene although Mr. Alcudia could not. Any suspicions he had about Mr. Martin appeared to have sufficiently dissipated and they should have also dissipated with respect to the passenger, who had committed no civil

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Making eye contact in some cultures is not an act of rudeness, but of deference and it might in fact be considered rude to make the eye contact, especially if that person is somehow perceived as a person of power.

or criminal violation except that he was a brown-skinned, non-English speaking passenger who had no ID with him.

During the interview both Sgt. Allen and Sheriff Allen gave an extensive number of possible crimes that Mr. Alcudia (and Mr. Martin for that matter) could have been involved in, ranging from terrorism, to being a parole violator, to being a murderer or involved in human trafficking. None of Sgt. Allen's questions at the car however related to any of these possible crimes and there was not a single shred of evidence that connected either man to any criminal activity. In addition, Sgt. Allen figured out by guessing that Mr. Alcudia worked at one of the dairy farms in Alburgh because he knew the area, knew the "bosses" and knew, generally speaking, where migrant workers were situated. Sgt. Allen stated that had Mr. Martin taken the invitation and left the scene he would have put Mr. Alcudia in his cruiser, in the front seat, un-cuffed to await Border Patrol. Or, if Border Patrol had arrived and said Mr. Alcudia could go on his way, or called and said they weren't coming, that he would have taken Mr. Alcudia home. This does not sound like an officer who has a "reasonable articulable suspicion that criminal activity is afoot." The GICSD's statements about Mr. Martin giving false information are also unconvincing. Saying that Mr. Martin lied about Mr. Alcudia living in Vermont doesn't pass muster because Mr. Alcudia did in fact live in Vermont a dairy farm in nearby Alburgh and again Sgt. Allen correctly guessed this. Mr. Alcudia may also have had a wallet but left its contents in his residence. To say Mr. Martin lied about Mr. Alcudia's identity because he claimed Mr. Alcudia had left his wallet at home is a very weak basis for suspicion and would have been a lie to Sgt. Allen only because he suspected there would be no proof of legal citizenship in it. It shows yet again that immigration status – not identity – was Sgt. Allen's focus. In support of this, Mr. Alcudia, through Mr. Martin (who was now allowed to translate) says he has no identification with him – no passport, Driver Privilege Card, license from any state or the like. Sgt. Allen replies: "So, you're not supposed to be here?"

At 56:16, the video shows Mr. Alcudia being taken into custody by Border Patrol, making the total length of detention approximately 54 minutes and 12 seconds. The whole encounter from start to finish is indicative of discriminatory treatment and Mr. Alcudia can prove that the GICSD's reasons are pretextual. In a colloquial sense it is the desire to jam someone up because you can – because you have the power to do so and because it is an easy score for the home team, regardless of the consequences to the individual. In Mr. Alcudia's case, it meant fear, arrest, possible deportation and the inability to support his family.

Sgt. Allen could have called the dairy farm to confirm Mr. Alcudia's identity or followed them back to the dairy farm in the time it took to sit and wait for Border Patrol and then let them go to Burlington. If he had asked a few more questions, or Sheriff Allen told him to ask a few more questions, he might have been able to determine the purpose of the journey – a meeting in Burlington- and the relationship between Mr. Alcudia and Mr. Martin – a friend and provider of a ride. At that point, he would have had to determine whether or not to still run a name check or just let them go on their way. Had either of those options occurred it is possible that the case would not be before this commission.

VI. THE GICSD'S ANTI-BIAS POLICING POLICY

The Anti-Bias Policing Policy does little to protect Mr. Alcudia in spite of its vigorous sounding language and its reference to what appear to be Article 11 standards of reasonable articulable suspicion. The GICSD policy has four sections that are most relevant to this case. Section D reads as follows:

D. *Except as provided in 'C' above:*

a. Law enforcement will not consider race ethnicity or other personal criteria in establishing reasonable suspicion or probable cause. [C above allows them to consider those factors if tied to specific persons with specific descriptions].

E. Preventing Perception of Bias

a.....

b.....

c. Officer should continue the contact [with persons] for only that time which is necessary to meet the objectives of that which justified the stop to begin with unless reasonable suspicion or probable cause develops during the initial stop, i.e. if the stop is for a traffic violation, officer should not prolong the stop beyond the time it takes to write the citation....

G. Matters Relating to Immigration and Citizenship Status: General Policies

a. Detecting and apprehending individuals whose only violation of law is that they are foreign citizens present in the United States without authorization and proper documentation is not a law enforcement priority for this agency. Accordingly, except as noted below, members should not use agency resources,

equipment or personnel for the purpose of detecting or apprehending individuals whose only violation of law is that they are present in the United States without authorization and proper documentation.

b. Members of this agency shall not stop, investigate, detain or question an individual solely for the purpose of determining whether the individual is in the United State without authorization and proper documentation.

c. An individual's presence in the United States without proper documentation or authority, standing alone, when that individual has not been previously removed, is not a criminal violation. Therefore, members may not initiate an investigation based solely on information or suspicion that an individual is in the United State without proper documentation.

H. Inquiries Concerning Citizenship Status

a. Members of this agency should not ask an individual about his or her immigration status when addressing a civil violation. If a member needs to identify an individual and that individual does not have identification, the member may use whatever tools, including federal databases that are reasonably necessary to identify the individual under the circumstances. Identification methods may include a foreign passport, consular identification or other government issued documents that are reasonably reliable, subject to the same reasonable scrutiny and follow-up for authentication as any other forms of identification.

b. With regard to investigations involving criminal offenses or suspicious activity, a member may ask an individual about his immigration status under the following circumstances:

- i. If the member is conducting a criminal investigation or an investigation of suspicious activity based on reasonable suspicion AND the immigration status of the suspect is relevant to the investigation, provided the investigation is initiated for a reason or reasons independent of information or suspicion that an individual is (or individuals are) in the United States without proper authorization in violation of the civil provision of federal immigration law; or*
- ii. After a suspect has been arrested for a criminal violation.*

This policy offers Mr. Alcudia almost no protection on the basis of national origin or color. While it states that he should not be asked about matters pertaining to immigration status in the context of a civil violation, i.e. being a passenger in a speeding car, it gives officers the right to obtain identification if the officer “needs to identify that individual.” This meaningless terminology allows officers complete latitude to make up any reason to do whatever they want even in a low level “civil encounter” whether at the time or after the fact. Furthermore, the policy gives no guidance as to what the officer should do if he or she finds someone is not legally in the country or, like Mr. Alcudia, has no identification. This provision allowed for Mr. Alcudia to be taken into custody although one could argue that in the absence of any directive it would have been as permissible to let him go in light of section G if there was no other substantive indicator of criminal activity.

Section G states that determining immigration status is a low priority for the GICSD when the person’s only violation of law is that they are present in the United States without authorization and proper documentation. It discourages the use of agency resources in trying to determine immigration status. However once Sgt. Allen began to identify Mr. Alcudia’s so-called deceptive behaviors, he moved the encounter into H territory. Section H is the portion of the policy where any number of exceptions can swallow the rule. A four-corners reading of section G should have resulted in nothing happening to Mr. Alcudia. However Sgt. Allen wanted to determine his identity only in order to determine his legal status. A lot of resources and time were involved, including the time of two sergeants, the Sheriff and Border Patrol. After review, this investigation concludes that the policy offered Mr. Alcudia little to no substantive protection.

In sum the Bias Free Policing Policy is an example of window dressing - a sort of meaningless document that sounds powerful but that is actually full of procedural bypasses and exceptions to the rules that swallow the principles it sets forth. The interviews with Sgt. Allen and Sheriff Allen revealed that any stop, detention or arrest, can be justified by the merest hint of their completely subjective version of reasonable suspicion which involved everything from a “funny little feeling that something’s just not quite right” or a sum of “suspicious indicators.” Sgt. Allen tried to define a “normal” non-suspicious-acting citizen. However it seemed that just about every kind of citizen reaction to a police officer could be suspicious. If someone is too friendly they are suspicious – if they aren’t friendly enough they are suspicious. If they don’t look at the officer they are suspicious, if they do look at the officer they must be careful not to be overly friendly.

In one statement he said people are “not glad to see” him. In another he said that “normally, in motor vehicle stops, everybody wants to see the cop,” “everybody wants to look,” “everybody wants to see who it is – that type of thing.” In this case, Sgt. Allen described Mr. Alcudia as “evasive,” unwilling to make eye contact, displaying “deceptive behaviors” “like he was trying to hide,” that Mr. Martin was answering all the questions for him. In addition, in Sgt. Allen’s mind, being in Grand Isle County with out of state plates was suspicious. Not stopping for a mile when being pursued by a cruiser with sirens on was suspicious. Having summer tires was suspicious. Sgt. Allen also admitted to taking note of Mr. Alcudia’s skin color. Sheriff Allen, after evading a number of questions about his telephone call with Sgt. Allen, finally acceded that Sgt. Allen might have said something about Mr. Alcudia not having the skin color of a “normal Caucasian” – whatever that is. The exchange proceeded thusly:

Investigator: “So, uh, why did you tell him to call Border Patrol?”

Sheriff Allen: “Because that’s who we use to run names through.”

Investigator: “But what did he tell you about the occupants of the vehicle that made you think that Border Patrol should be contacted?”

Sheriff Allen: “Just, we use Border Patrol as a resource, no different than our dispatch.”

Investigator: “But how did he describe the occupants of the vehicle – I mean he must have said something about the, the, the person in the vehicle that made you think Border Patrol – was – nee- - potentially needed?”

Sheriff Allen: “Any further, uh, database access would be automatically through Border Patrol.”

Investigator: “So did he describe, um..the complexion of the passenger, the fact that the passenger wasn’t speaking English, that he had no ID, that he seemed like he might be a migrant worker or any of those things?”

Sheriff Allen: “No.”

Investigator: “So he didn’t describe anything about the passenger like that?”

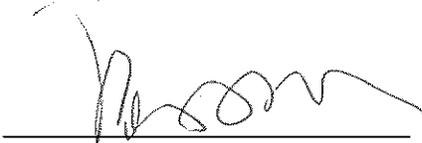
Sheriff Allen: “No.” No..umm..just the passenger would not make eye contact, very deceptive. I think he did comment or may have made a reference to skin color was not that of a normal Caucasian. Ummm...and given my knowledge of Colorado and

the human trafficking that occurs there and comes through here...which I've actually been involved in investigations before..."

VII. CONCLUSION

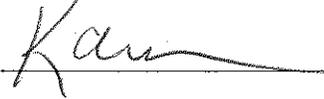
Sgt. Allen's actions inseparably linked Mr. Alcudia's identity and his immigration status. He and Sheriff Allen were responsible for contacting Border Patrol and for the detention of Mr. Alcudia, in light of the fact that there is no evidence that Border Patrol ordered the detention and in light of the fact that Sgt. Allen stated that "9 times out of 10" Border Patrol comes to a scene. He did nothing to dissuade them from coming. He failed to ask the kind of questions he could have asked that would have resulted in proof of Mr. Alcudia's identity. He failed to follow up with Border Patrol or dispatch to find out what the hold up on the record check was. There is insufficient evidence of reasonable, articulable suspicion of wrongdoing by Mr. Alcudia. His lengthy detention violated Mr. Alcudia's Article 11 right to be free of illegal seizures. There is therefore a finding that the GICSD violated the VFHPAA and deprived Mr. Alcudia of his use and enjoyment of Vermont's roads.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation to the Human Rights Commission to find that there are reasonable grounds to believe that the Grand Isle County Sheriff Department, discriminated against Lorenzo Alcudia in violation of 9 VSA §4502(a).

 9/24/2015

Nelson M. Campbell
Administrative Law Examiner

APPROVED:

 9/25/15

Karen Richards
Executive Director and Legal Counsel

