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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 63

CLIFFORD GRAHAM,

Appellant.

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Syracuse University College of Law  
950 Irving Avenue  
Syracuse, New York 13244  
March 25, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's do number 63,  
2 People v. Graham.

3 MR. BANASIAK: May I reserve - - -

4 CHIEF JUDGE LIPPMAN: Counsel, do you want  
5 any rebuttal time?

6 MR. BANASIAK: Yes, two minutes, please,  
7 Your Honor.

8 CHIEF JUDGE LIPPMAN: Two minutes, go  
9 ahead, counsel.

10 MR. BANASIAK: Good afternoon, Your Honors,  
11 and may it please the court, my name is Piotr  
12 Banasiak, and I represent Mr. Clifford Graham in this  
13 case.

14 The right against self-incrimination has  
15 been called the hallmark of our democracy. It's  
16 const - - -

17 CHIEF JUDGE LIPPMAN: Counsel, what's the  
18 significance in this case as to the counsel arranging  
19 for this session with the police, where he was going  
20 to be interrogated? I know at the time, the counsel  
21 believing that it was in the best interests of the  
22 defendant, but what is the significance that he  
23 arranged it, even though - - - and - - - and during a  
24 period, maybe twenty minutes later - - - whatever it  
25 is - - - left from the room when the police were

1           interrogating the defendant. Is that significant in  
2           terms of the - - - the alleged failure to - - - to  
3           give the Miranda warning?

4                   MR. BANASIAK: I don't think it is, Your  
5           Honor, because - - -

6                   CHIEF JUDGE LIPPMAN: Why not? Why not?

7                   MR. BANASIAK: Because - - - because the  
8           trial court found that Mr. Graham was in custody, and  
9           so Miranda applies when there is custodial - - -

10                   CHIEF JUDGE LIPPMAN: Yeah, but if you have  
11           advice from counsel, does that change the dynamic?

12                   MR. BANASIAK: Our position is that - - -  
13           that it does not. Counsel - - - in and of - - -  
14           counsel's presence, in and of itself, does not  
15           substitute - - -

16                   CHIEF JUDGE LIPPMAN: Under what cases do  
17           we know that, that - - - that - - - that the  
18           counsel's presence is not a substitute for a Miranda  
19           warning? What cases?

20                   MR. BANASIAK: Our position is that Miranda  
21           stands for that proposition, but we've also cited  
22           out-of-state cases from - - - from West Virginia - -  
23           -

24                   CHIEF JUDGE LIPPMAN: Have we dealt with  
25           this case in New York?

1 MR. BANASIAK: I don't - - -

2 CHIEF JUDGE LIPPMAN: This - - - this  
3 situation in New York?

4 MR. BANASIAK: I don't think this court has  
5 dealt with this precise issue and - - -

6 JUDGE PIGOTT: Do - - - doesn't it sound  
7 kind of funny if - - - if somebody's - - - a  
8 defendant is sitting there with his lawyer, and - - -  
9 and he wants to talk, because he's trying to get a  
10 better deal out of something, for the police to say,  
11 now, you know you're entitled to an attorney?

12 MR. BANASIAK: Well, Your Honor,  
13 respectfully, we're - - - we're not - - - we're - - -  
14 I guess I should be clear. We're not saying that the  
15 police have to read the panoply - - -

16 JUDGE PIGOTT: And if you can't afford an  
17 attorney, we'll appoint one for you.

18 MR. BANASIAK: I - - - I - - I understand  
19 your point, Your Honor, but we're not saying that  
20 that specific warning is required. All - - -

21 JUDGE PIGOTT: What should they have done  
22 then?

23 MR. BANASIAK: All we're saying is that if  
24 an attorney is present, the police should at - - -  
25 the - - - at minimum, warn a suspect that he has the

1 right to remain silent, as well as the consequences  
2 of foregoing that right - - -

3 JUDGE READ: Does that happen in every  
4 case, or is it just because the attorney left after  
5 so many minutes in this case that you make that  
6 argument?

7 MR. BANASIAK: Our primary contention is  
8 that it should happen in - - - in every case, but our  
9 alternative is that, at the very least, it should - -  
10 -

11 CHIEF JUDGE LIPPMAN: Can there ever be an  
12 equivalent to Miranda? I guess that's the kind of  
13 issue that some of the federal courts have dealt with  
14 and other state courts have dealt with. Can you ever  
15 have that equivalent? Is there something that  
16 substitutes for the Miranda warning, i.e., counsel  
17 being there or arranging it?

18 MR. BANASIAK: I think there are  
19 substitutes, but the presence of counsel by - - - by  
20 itself is not an adequate substitute.

21 CHIEF JUDGE LIPPMAN: Right, I get - - - I  
22 get it that that's your main argument, that - - -  
23 that presence of counsel is not enough. What would  
24 be an equivalent? What would be a situation where it  
25 would be equivalent? I see that some of the cases

1 talk about maybe if the police don't do the Miranda  
2 warning exactly right. They do it, but they kind of  
3 mix up some of the language or botch it a little bit.  
4 Is that what we're talking about when we're talking  
5 about equivalents, that maybe you could have a  
6 warning that doesn't say every magic word, but is the  
7 equivalent? Is that where it could be equivalent,  
8 but nothing else?

9 MR. BANASIAK: I think that could be an  
10 equivalent and I suppose the police could also obtain  
11 confirmation from counsel that - - - have you advised  
12 your client of his rights and the - - - and the  
13 Constitutional - - -

14 CHIEF JUDGE LIPPMAN: And that could be the  
15 equivalent? If you ask counsel - - - you tell - - -  
16 you know, et cetera, that could be enough?

17 MR. BANASIAK: I think that would be  
18 affirmative proof that the suspect was actually aware  
19 of his - - -

20 JUDGE PIGOTT: Had he - - - had he waived  
21 his rights previously?

22 MR. BANASIAK: He did nearly three weeks  
23 ago, and - - -

24 JUDGE PIGOTT: All right. So - - - so the  
25 police had him, gave him his Miranda warnings; he

1 signed off. So they've got him, and then he starts  
2 talking about this forgery. The next thing that  
3 happens, at least in the record, unless there's  
4 something in between, is that his lawyer brings him  
5 to the cops, and said, look, he's willing to  
6 cooperate, so have at him.

7 Is - - - is the three weeks a big deal? Do  
8 you think if it would been a day before or do you  
9 think that it's got to be like when you sign on to an  
10 app on your computer, and you always have to agree?

11 MR. BANASIAK: Two points with respect to  
12 that. First, the trial court admitted the August  
13 22nd warnings specifically with respect to August  
14 22nd alone, so at least in this case, that - - - the  
15 relevance of that evidence doesn't go beyond August  
16 22nd. But also generally, as a matter of law, the  
17 Appellate Divisions have - - - have roundly held that  
18 interrogation has to occur within a reasonable time  
19 after a suspect is warned - - -

20 JUDGE PIGOTT: That's the measure, right,  
21 reasonable time?

22 MR. BANASIAK: Reasonable time, yes.

23 JUDGE PIGOTT: So it's - - -

24 JUDGE ABDUS-SALAAM: Also we - - - I'm  
25 sorry; go ahead.

1 JUDGE PIGOTT: No, please go ahead.

2 CHIEF JUDGE LIPPMAN: Go ahead, negotiate -

3 - -

4 JUDGE ABDUS-SALAAM: Finish your point.

5 JUDGE PIGOTT: Well, I was just going to  
6 say you - - - so - - - so reasonable time. Here  
7 you've got Miranda warnings, a time, which you say is  
8 unreasonable, three weeks, I assume. But in the - -  
9 - in the mix is the lawyer saying, he's going to talk  
10 to you now. What - - - what - - - what are the  
11 police officers supposed to do?

12 MR. BANASIAK: Your Honor, when somebody's  
13 read their rights three weeks prior to, there - - -  
14 there's no - - - at least taking that by itself - - -  
15 there's absolutely no assurance that the suspect  
16 still remembers what he was told or still understands  
17 the implications of those warnings. With respect to  
18 the presence of - - -

19 JUDGE RIVERA: Maybe he acted on them,  
20 right? Maybe getting a lawyer and deciding I want to  
21 have a conversation, maybe that's based on that  
22 information of what the warnings are, deciding, okay,  
23 I want to talk; I want my lawyer in the room.

24 MR. BANASIAK: But - - - but in - - -

25 JUDGE RIVERA: Why isn't that an



1 appropriate inference based on the - - - the unique  
2 facts of this case?

3 MR. BANASIAK: I think that's not an  
4 appropriate inference here because we know that  
5 counsel was assigned at arraignment, so this wasn't  
6 Mr. Graham going out and - - - and seeking an  
7 attorney. It was just as a matter - - -

8 JUDGE ABDUS-SALAAM: Counsel, we've - - -

9 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam?

10 JUDGE ABDUS-SALAAM: - - - we've been  
11 talking - - - we've been talking about the merits,  
12 but did you ever make or did your client ever make  
13 the argument below that he was entitled Miranda  
14 warnings in that second interview in September?

15 MR. BANASIAK: I - - - I think - - - I  
16 think he did make that argument, and I think the  
17 court's decision may - - - or the court's decision  
18 makes that apparent, starting from the omnibus  
19 motion, which might have been general, I would - - -  
20 I might concede that in terms of did Mr. Graham argue  
21 that his rights under the U.S. Constitution, the New  
22 York Constitution, and CPL 60.45 were violated.

23 But the court in granting the motion  
24 understood that this specific issue was going to be  
25 whether his rights under Miranda v. Arizona were - - -

1 - were violated. And then when the court made its  
2 decision, it made a Miranda-specific finding of Mr.  
3 Graham being in custody and then also relying on  
4 People v. Farrell, from the Fourth Department, which  
5 was a case principally concerned about whether a - -  
6 - a suspect could - - - could waive - - - or whether  
7 police could infer that a suspect has waived his  
8 Miranda rights.

9 JUDGE STEIN: Well, interestingly enough,  
10 other than that reference to Farrell, I don't find  
11 any reference to Fifth Amendment rights in - - - in  
12 the suppression hearing or decision or in the  
13 request. I mean, the defendant was talking about  
14 probable cause and the judge kept redirecting him and  
15 saying this isn't a probable cause hearing. And then  
16 when we get to the very end, the judge says that the  
17 "defendant was in custody, represented by counsel,  
18 and therefore couldn't waive counsel unless counsel  
19 was present", and it seems that the - - - the court  
20 was referring to the indelible attachment of - - - of  
21 counsel, and the fact that counsel had left.

22 And then, yes - - - and then says all of  
23 that and cites Farrell. So it's - - - it's  
24 questionable, I think, as to really what the court  
25 was - - - was addressing.

1 MR. BANASIAK: I would respectfully point  
2 Your Honor to - - - to - - - to two places. The - -  
3 - the first place is at page 168 in the record when  
4 Mr. Graham was asking the irrelevant questions about  
5 probable cause. The - - - the court pointed out that  
6 he was not going into the circumstances surrounding  
7 his Miranda rights, and I think that demonstrates  
8 that the court was on notice that the issue here was  
9 whether Miranda had been complied with by police.  
10 And again the second - - -

11 JUDGE STEIN: Well, do we make a distinct -  
12 - - do we talk about Miranda generally? Do we make a  
13 distinction here? Are we talking about right to  
14 counsel? Are we talking about Fifth Amendment or are  
15 we - - -

16 MR. BANASIAK: Mr. Graham's omnibus motion  
17 never argued that his right to counsel specifically  
18 was violated, nor did the court's pre-hearing order  
19 on motions acknowledge that the issue was right to  
20 counsel but - - -

21 JUDGE ABDUS-SALAAM: But isn't that the  
22 point, that it wasn't specific and - - - and that  
23 Farrell - - - as you started to say, counsel - - - is  
24 primarily about waiver of the attorney-client  
25 privilege or waiver of an attorney, not so much

1 waiver of the Miranda warnings?

2 MR. BANASIAK: I - - - I would respectfully  
3 disagree. The - - - the trial court in People v.  
4 Farrell held that the - - - the defendant's rights  
5 under People - - - under Miranda were - - - were  
6 violated, and in that regard, the issue was  
7 compliance with Miranda, not - - - not compliance  
8 with - - - with this court's indelible right to  
9 counsel case law.

10 JUDGE PIGOTT: Do you - - - do you want a  
11 bright-line rule that says anytime the police are  
12 going to talk to anyone, that they should run - - -  
13 give them the Miranda warnings even in - - - in the  
14 presence of counsel?

15 MR. BANASIAK: I - - - I - - - our position  
16 is that there should be a bright-line rule that there  
17 should be affirmative proof that a defendant was  
18 aware of his right to remain silent - - -

19 JUDGE READ: And that would have required  
20 what here, again? To put - - -

21 MR. BANASIAK: It would either require the  
22 police advising Mr. Graham that he - - - that he had  
23 this right, the police confirming with counsel that  
24 he had advised Mr. Graham of this right, or - - -

25 CHIEF JUDGE LIPPMAN: And your - - - your -

1           - - your rule adds to it that - - - the subtext is  
2 presence of counsel, in and of itself, is not enough.

3           MR. BANASIAK: Yes.

4           CHIEF JUDGE LIPPMAN: Okay.

5           MR. BANASIAK: And - - - and if - - - if  
6 that's - - -

7           JUDGE RIVERA: Even - - - even when the  
8 meeting is requested by the defendant?

9           MR. BANASIAK: I think so. I - - - you  
10 know, there - - - there might be cases where the  
11 court holds that a defendant isn't in custody where  
12 he - - - he arrives with his attorney, but - - - but  
13 that's not what we're have here.

14           CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
15 hear from your adversary, and then you'll have your  
16 rebuttal time.

17           MR. MAXWELL: Good afternoon. James  
18 Maxwell for the People, may it please the court.

19           CHIEF JUDGE LIPPMAN: Counsel, can there  
20 ever be a - a - a- - - an equivalent of Miranda?  
21 What's - - - what is - - - what is an equi - - - is  
22 there an equivalent and if there is, what is it?

23           MR. MAXWELL: What happened here is, for  
24 example. If you read - - -

25           CHIEF JUDGE LIPPMAN: The presence of

1 counsel?

2 MR. MAXWELL: Yes.

3 CHIEF JUDGE LIPPMAN: That's enough in and  
4 of itself.

5 MR. MAXWELL: Yes, and I'd - - -

6 CHIEF JUDGE LIPPMAN: Why? Go ahead.

7 MR. MAXWELL: Well, I'd ask you if you'd  
8 look at page 466 of the Miranda decision, it talks  
9 about that if counsel had been present in any of the  
10 four cases in front of the court when Miranda was  
11 decided, counsel's presence would have been adequate.  
12 It goes on to say that the presence of an attorney -  
13 - -

14 CHIEF JUDGE LIPPMAN: What about Dickerson?  
15 What does that case do?

16 MR. MAXWELL: Dickerson had to do with a  
17 specific federal statute that tried to limit the  
18 voluntariness inquiry, and on that score, I - - - I  
19 can't explain it as well as the case from  
20 Massachusetts, the Simon case, cited in the brief,  
21 where it talks about - - - about Dickerson and it  
22 says that - - -

23 CHIEF JUDGE LIPPMAN: Yeah, isn't Dickerson  
24 raising certainly red flags about equivalents to  
25 Miranda?

1 MR. MAXWELL: It does, but it - - -

2 CHIEF JUDGE LIPPMAN: It - - -

3 MR. MAXWELL: - - - also says - - - if you  
4 look at footnote 6 of that case, it says that we're  
5 not - - - we're not looking at - - - that there's  
6 only way one to do it. And here it was done  
7 properly.

8 And you asked earlier to my opponent  
9 whether your court had dealt with this, and I believe  
10 you have. And I rely on People v. Beam, B-A-M (ph.)  
11 - - -

12 CHIEF JUDGE LIPPMAN: Did that deal with -  
13 - -

14 MR. MAXWELL: - - - B-E-A-M.

15 CHIEF JUDGE LIPPMAN: - - - this issue?  
16 Was that about Miranda right or the attachment to the  
17 right to counsel?

18 MR. MAXWELL: Well, I - - - I think it was  
19 about both, and I'd refer to you to page - - - it's  
20 at 57 NY2d 241, and the key page is page 254, where  
21 your court wrote that "When a person has the benefit  
22 of counsel and they choose to waive" one of his - - -  
23 "one of his rights, the police are not required to  
24 question the validity of that decision as long as  
25 they are assured" - - -

1 CHIEF JUDGE LIPPMAN: How do we know what -  
2 - - in these kinds of cases, how do we know what the  
3 advice of counsel is?

4 MR. MAXWELL: We don't with great  
5 precision, although - - -

6 CHIEF JUDGE LIPPMAN: I mean, I guess we  
7 place a great premium - - -

8 MR. MAXWELL: Right.

9 CHIEF JUDGE LIPPMAN: - - - on the, you  
10 know, confidentiality privilege - - -

11 MR. MAXWELL: Right.

12 CHIEF JUDGE LIPPMAN: - - - between the  
13 attorney and client. So we didn't even know what the  
14 advice is, so how could say that presence of counsel  
15 itself is sufficient?

16 MR. MAXWELL: Because if there is an issue,  
17 it's a - - - it's ineffective assistance of counsel  
18 issue, and in a case like this, where the attorney  
19 who represented him, who set up the meeting,  
20 testified at the hearing, the defendant could have  
21 asked him any of this, could have said, didn't you  
22 sell me down the river? Didn't you tell me I had to  
23 talk to the police?

24 JUDGE ABDUS-SALAAM: Counsel, I - - -

25 MR. MAXWELL: But instead he asked no - - -



1 JUDGE ABDUS-SALAAM: I'm sorry, counsel.

2 MR. MAXWELL: - - - I'm sorry.

3 JUDGE ABDUS-SALAAM: You mentioned Beam,  
4 but didn't the defendant in Beam receive Miranda  
5 warnings, even though he had counsel present, and  
6 that's not what we have here, is it?

7 MR. MAXWELL: Well, here's what we had in  
8 Beam. The defendant spoke to his attorney, knowing  
9 the police wanted to speak to him. He then - - - the  
10 attorney says, go ahead and talk to them. He goes  
11 down and speaks to the Binghamton Police. They give  
12 him a Miranda form, and before he signs it, the - - -  
13 the attorney's on the phone. The attorney tells the  
14 police, it's okay for him to sign it. He just can't  
15 sign a statement. It's okay for him to talk. And so  
16 the attorney in that case had much less involvement  
17 in - - - than - - - than here, and still, that was  
18 sufficient as a - - - as a waiver.

19 JUDGE ABDUS-SALAAM: Well, I'm not talking  
20 about the attorney's involvement. I'm talking about  
21 the police giving this defendant Miranda warnings,  
22 and that didn't happen here, at least the September  
23 11th - - -

24 MR. MAXWELL: Right.

25 JUDGE ABDUS-SALAAM: - - - session.

1 MR. MAXWELL: But what happened here is  
2 they gave him Miranda warnings, which he waived on  
3 August 22nd, and the last word was, you know, if you  
4 change your mind, and you want to help us, you know,  
5 figure out who's distributing this counterfeit money,  
6 go through your attorney. And that's exactly what he  
7 did.

8 And so the police did nothing wrong at all  
9 in when the - - - the - - - twenty days later the  
10 attorney arranges to have this meeting - - -

11 JUDGE STEIN: What - - - what if he never  
12 got those original Miranda warnings?

13 MR. MAXWELL: I think the - - -

14 JUDGE STEIN: Would it be a different  
15 story?

16 MR. MAXWELL: I think there would be - - -  
17 I think we would still have a compelling argument to  
18 affirm in that - - -

19 JUDGE STEIN: But you think it makes a  
20 difference that he got the - - - the warnings three  
21 weeks earlier.

22 MR. MAXWELL: I think it's something that  
23 shouldn't be ignored. It's certainly is tremendously  
24 in the People's favor.

25 CHIEF JUDGE LIPPMAN: Are there any cases

1           that think that that's reasonable, three weeks?

2                   MR. MAXWELL: Well, the - - -

3                   CHIEF JUDGE LIPPMAN: Any cases that  
4 support that?

5                   MR. MAXWELL: - - - the cases that talk  
6 about the time changes or time limits - - - are  
7 usually when - - -

8                   CHIEF JUDGE LIPPMAN: They got them all  
9 like twenty-four hours or something like that?

10                  MR. MAXWELL: Yes, but - - - but the  
11 difference here is, that this was - - - this was not  
12 just a change of mind. It was - - - is a - - -  
13 actually a concerted effort by the attorney to get  
14 the person a better deal. And I think that you can't  
15 ignore - - -

16                  CHIEF JUDGE LIPPMAN: The - - - the  
17 attorney didn't even stay for the whole proceeding.

18                  MR. MAXWELL: Right, and that's what we  
19 thought the issue was at the hearing. The - - - the  
20 court who handled this hearing, who - - - the judge  
21 who literally wrote the book on New York confessions  
22 would have probably loved to write about this.

23                  JUDGE PIGOTT: Does he have a pocket part?  
24 No, never mind.

25                  MR. MAXWELL: He'll do a new edition.

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. MAXWELL: But what we thought was a - -  
3 - and he kept trying to steer the defendant towards,  
4 well, let's talk about your Miranda rights, and  
5 defendant didn't go there. And he's - - - and when  
6 we came up to how long does the last - - - do the  
7 rights last that were read in August - - - August  
8 20th - - - well, they last that day, and the People  
9 may have to make a more sophisticated argument if - -  
10 - if needed, but he never got to that.

11 JUDGE ABDUS-SALAAM: So you would agree  
12 with - - - you would agree with your adversary, then,  
13 that there was no preservation problem?

14 MR. MAXWELL: Oh, there's tremendous  
15 perseveration problem, because what - - - he made a  
16 general motion for a hearing. We get to the hearing,  
17 and he raises none of this - - - this by - - -

18 CHIEF JUDGE LIPPMAN: Wasn't there an  
19 acknowledgement by the court that the warning on the  
20 first meeting is not enough?

21 MR. MAXWELL: The acknowledgement or the  
22 discussion of it was, for - - - for right now, we're  
23 going to say that that's what - - - that was a valid  
24 waiver of that day or that - - - the question was  
25 whether that was good that day. And if a - - - a

1 greater issue comes up, the People may have to make a  
2 more sophisticated argument.

3 He then proceeds to do nothing with that.  
4 He instead asks the officers things that really don't  
5 have to do with Miranda, and at the end of it, he  
6 makes a reasonable cause - - - a probable cause  
7 argument, and the judge cites Farrell. I believe he  
8 cited Farrell for the issue of the attorney leaving  
9 twenty minutes into the interview. Although, Farrell  
10 does - - - and I think correctly - - - interpret Beam  
11 as holding that it's very - - - it's completed.

12 JUDGE ABDUS-SALAAM: Well, it's obviously  
13 that the defendant handled this himself. He was pro  
14 se.

15 MR. MAXWELL: Yes.

16 JUDGE ABDUS-SALAAM: And so should he get  
17 any break because of that, or should we view this  
18 differently because he was pro se?

19 MR. MAXWELL: You should not view it  
20 differently. He made that decision. The court  
21 accepted that decision, doesn't raise that as an  
22 issue, other than I think in his reply brief now to  
23 your court, he - - - he makes some request that he be  
24 granted more slack or something. It - - - that's not  
25 appropriate. He made his decision, and he - - - he

1           decided what he wanted to argue, and his trial  
2           testimony shows that he met with the attorney and  
3           knew he didn't have to talk to them, but he - - - but  
4           he decided, after talking to the attorney, to do so.

5                        So there - - - this is not a real problem.  
6           And it's not a preserved problem. And if I may, it's  
7           also harmless. And if I may be just go on to explore  
8           that for a moment?

9                        CHIEF JUDGE LIPPMAN: Why is it - - - why  
10          is that harmless - - -

11                       MR. MAXWELL: All right.

12                       CHIEF JUDGE LIPPMAN: - - - if - - - let's  
13          do that.

14                       MR. MAXWELL: The first time you talk to  
15          him, August 22nd, he mentions all kinds of things. I  
16          got money from my family, and I got friends.

17                       CHIEF JUDGE LIPPMAN: Right, but counsel,  
18          what are the - - - what are the - - -

19                       MR. MAXWELL: And one of the people he  
20          mentions - - -

21                       CHIEF JUDGE LIPPMAN: Right, but then he  
22          goes to the meeting - - -

23                       MR. MAXWELL: - - - he mentions a character  
24          named Taz.

25                       CHIEF JUDGE LIPPMAN: Right, right.

1 MR. MAXWELL: Between the two meetings - -  
2 -

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 MR. MAXWELL: - - - the officers who work  
5 these cases figure out that Taz (ph.), Cor - - -  
6 whose actual name is Cornealis (sic) Johnson, is  
7 distributing the money with this serial number. All  
8 the twenties he was using had the same serial number.

9 CHIEF JUDGE LIPPMAN: Right, but why  
10 doesn't that go to the argument that it is - - - is  
11 harmless if you have the particular serial numbers  
12 whether it's about the first usage - - - you know,  
13 the motel or the convenience store, why - - - why  
14 isn't that show that it - - - it's just the opposite  
15 of harmless? That that's what nails this - - - this  
16 case?

17 MR. MAXWELL: Because - - -

18 CHIEF JUDGE LIPPMAN: The serial numbers,  
19 yeah.

20 MR. MAXWELL: Because two things. One,  
21 they had that information before the second  
22 interview, and the thing he said at the second  
23 interview was to say, well, yeah, I did meet with  
24 Taz, but I didn't get money from him, so exculpatory  
25 thing to add on.

1                   And more importantly, the - - - the way the  
2                   verdict was delivered. The - - - if they had  
3                   believed he had purchased the fake money and knew all  
4                   along it was fake, the jury wouldn't have acquitted  
5                   him of the - - - first, the motel incident. But  
6                   instead, they ac - - - they gave him the benefit of  
7                   the doubt on that, but in at least a little bit, to -  
8                   - -

9                   CHIEF JUDGE LIPPMAN: Yeah, but why did  
10                  they convict them on the other piece - - -

11                  MR. MAXWELL: Because - - -

12                  CHIEF JUDGE LIPPMAN: - - - the convenience  
13                  store?

14                  MR. MAXWELL: Because when the police  
15                  officers from DeWitt says, you're spending phony  
16                  money here; don't do that. And two days later, he's  
17                  down at the convenience store and he spends one  
18                  twenty, and that seems to work, so he takes out  
19                  another one to buy some toothpaste, so he can walk  
20                  away with real money.

21                  CHIEF JUDGE LIPPMAN: And that has nothing  
22                  to do with the serial numbers?

23                  MR. MAXWELL: It does not have anything - -  
24                  -

25                  CHIEF JUDGE LIPPMAN: We can pretty much be



1 assured of that?

2 MR. MAXWELL: Yes, because it shows they  
3 gave him the benefit of the doubt, and when he knew  
4 the jury would know - - - he had no excuse for not  
5 knowing the second day under all these circumstances.  
6 So they gave him the benefit of the doubt on whether  
7 he had actually purchased the money and knew right  
8 away it was fake, or whether he had obtained it not  
9 knowing it was fake, and then used after a police  
10 officer said you're spending fake money here.

11 And - - - so - - - so it was - - - it was  
12 unpreserved, without merit, and harmless. So I'd ask  
13 you to affirm.

14 CHIEF JUDGE LIPPMAN: Okay, thanks,  
15 counselor.

16 Counselor, rebuttal? Counselor, start with  
17 the harmless error.

18 MR. BANASIAK: Sure. I - - - I - - - well,  
19 first this is a Constitutional error, so it would  
20 have to be found harmless beyond a reasonable doubt,  
21 in other words, there's no reasonable possibility  
22 that this might have affected the verdict. And here  
23 we - - - we have a key piece of evidence that  
24 connects Mr. Graham directly to - - -

25 CHIEF JUDGE LIPPMAN: The serial number?

1                   MR. BANASIAK: The - - - the serial  
2                   numbers, actual contact with - - - with this  
3                   individual, so I think even if the jury didn't  
4                   believe that he actually obtained the money from him,  
5                   it would have shown that he very well had knowledge  
6                   that the money he possessed was - - - was  
7                   counterfeit.

8                   JUDGE PIGOTT: Isn't Mr. Maxwell right in -  
9                   - - when he cites to Beam, where it - - - and I'm  
10                  quoting - - - it says, "The police in this case did  
11                  everything required to honor the defendant's right to  
12                  counsel. When told that he had been instructed by  
13                  his attorney to come and answer their questions, but  
14                  not sign anything, it was permissible for the police  
15                  to infer from the defendant's conduct that he agreed  
16                  with his attorney's advice. The attorney then cannot  
17                  be said to have waived the defendant's right to  
18                  counsel, but rather to have confirmed defendant's  
19                  waiver of his right to remain silent and the waiver  
20                  was made on the advice of counsel."

21                  MR. BANASIAK: I respectfully submit that  
22                  Beam is - - - is - - - it's a right to counsel case.  
23                  I think - - - you know, Mr. Maxwell mentioned it - -  
24                  -

25                  JUDGE PIGOTT: Well, that's right, but

1 they're saying it's not a waiver of the right to  
2 counsel, it's - - - the police had the right to  
3 assume if you have your counsel, that - - - that with  
4 his advice you've waived your right to remain silent  
5 and - - -

6 MR. BANASIAK: But - - - but in Beam the -  
7 - - the defendant was actually read his rights, and -  
8 - - and - - - which distinguishes it from this case.  
9 The - - -

10 JUDGE ABDUS-SALAAM: But Beam was also  
11 cited in Farrell, which you say is a Miranda case,  
12 instead of a right - - - a waiver of counsel case.

13 MR. BANASIAK: That - - - that's true and  
14 our position is that Farrell mistakenly relied on  
15 Beam, and Farrell itself was - - - was incorrectly -  
16 - - incorrectly decided, to the extent that the  
17 defendant there wasn't read his rights.

18 I think one point that maybe I did - - - I  
19 didn't address enough in - - - in my brief, was the  
20 fact that - - - what - - - what Mr. Maxwell mentioned  
21 about the People had - - - or the defendant had the  
22 opportunity to question his attorney at the  
23 suppression hearing, but it's the People who have the  
24 burden to prove a knowing and voluntary waiver of - -  
25 - of a defendant's privilege against self-

1           incrimination. They called the attorney. They were  
2           in a position to ask him whether he advised his  
3           client of his Constitutional rights. They - - -

4                        JUDGE READ: Aren't you kind of - - -  
5           aren't you kind of in a way - - - I mean, isn't this  
6           sort of redundant? Or aren't you kind of - - - kind  
7           of expanding Miranda? So you give the warning and  
8           then somebody shows up with the attorney and you ask  
9           now, is this really what you - - - you know, you - -  
10          - you do it again, in effect?

11                       MR. BANASIAK: I don't - - -

12                       JUDGE READ: Does that make any common  
13          sense, I guess, is my question?

14                       MR. BANASIAK: I - - - I respectfully  
15          disagree. I think there's - - - there's an absence  
16          of proof here that he was advised by his attorney in  
17          the first place of his rights. And I think if he - -  
18          - if he had been, the People could have easily  
19          elicited that testimony from the - - - from the  
20          attorney - - -

21                       CHIEF JUDGE LIPPMAN: Isn't that what's  
22          always hard to know, what he advised him? What I  
23          asked your adversary. Do we know what advice that  
24          counsel gave him? Can we know?

25                       MR. BANASIAK: I think as a general matter

1 we - - - we probably wouldn't because a - - -  
2 hopefully if somebody's represented by counsel, they  
3 would object at the suppression hearing based on the  
4 attorney-client privilege, but I - - - I think this  
5 case demonstrates why we shouldn't infer that an  
6 attorney advised his client. If an attorney doesn't  
7 take the basic steps of - - - of staying in an  
8 inherently coercive environment with his client, I  
9 don't think that we could infer that he took the  
10 basic step of advising him of his rights in the first  
11 place.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 Thanks, counsel.

14 MR. BANASIAK: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you both.

16 Appreciate it.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Clifford Graham, No. 63, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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