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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 206

VICTOR SOTO,

Respondent.

20 Eagle Street
Albany, New York 12207
November 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 206, People v. Soto.
2 Counsel, you want any rebuttal time?

3 MS. SARVER: Yes, can I request two
4 minutes, Your Honor?

5 CHIEF JUDGE LIPPMAN: Two minutes; go
6 ahead.

7 MS. SARVER: Good afternoon, Your Honors.
8 May it please the court, Melanie Sarver for the Bronx
9 District Attorney's Office. Absent some indication
10 that the declarant was fully and contemporaneously
11 aware of her exposure to criminal lia - - -

12 CHIEF JUDGE LIPPMAN: Counsel, but she was
13 talking about being in trouble and, you know, what's
14 going to happen, and what - - - what more do you
15 want?

16 MS. SARVER: There were two problems with
17 respect to the awareness factor of the - - - of the
18 elements of a declaration against penal interest.

19 CHIEF JUDGE LIPPMAN: Her parents knowing -
20 - - what - - - what do - - - what does that signify
21 to you?

22 MS. SARVER: The declarant went through her
23 entire colloquy about what happened on the night in
24 question before expressing any concern regarding
25 either parental disappointment or a very vague

1 general concern about, could I get in trouble for
2 this. And so that goes to two problems with respect
3 to awareness. The first - - -

4 JUDGE STEIN: But she - - - she raised it
5 in the same conversation, whether - - - it's not
6 clear, I don't think, from the record whether it was
7 before - - - before - - - or before the written
8 statement or short - - - or simultaneously with that,
9 but if - - - if she blurts this out at that time when
10 she's being asked to sign this thing, or - - - you
11 know, and she realizes this is really serious, how
12 can - - - how can we not infer that those same
13 concerns were going on in her head two minutes before
14 that when she was talking about it? And why - - -
15 why aren't the same indicia of reliability present in
16 - - - in that circumstance?

17 MS. SARVER: The record actually is quite
18 clear, and the majority decision in the Appellate
19 Division actually acknowledged that she did not
20 express any concerns, what - - - whatever they may
21 be, until after she had gone through the whole
22 conversation with the investigator. While admittedly
23 I don't - - - I don't recall and I'm not sure if the
24 record reflects how long that conversation was, it
25 does appear that she sat down in the investigator's

1 office and it hadn't occurred to her that she could
2 get into any kind of trouble for what she was about
3 to do. It almost seemed as if - - -

4 JUDGE RIVERA: How is that? How is that?
5 He's under criminal prosecution and now she's going
6 to say she's the driver. How is that?

7 MS. SARVER: She's a nineteen-year-old with
8 - - - with only a learner's permit. I don't even
9 believe she - - -

10 JUDGE RIVERA: Then why doesn't that make
11 it even more likely that - - - that this concern is
12 front and center?

13 MS. SARVER: Because she had absolutely no
14 experience with the criminal justice system. She had
15 no - - -

16 CHIEF JUDGE LIPPMAN: So she's totally just
17 devoid of having a mind at nineteen years old, who
18 has a learner's permit, that none of this - - - and
19 she - - - and the - - - as Judge Stein indicates, in
20 the same conversation, she's talking about this? How
21 do you read all that away?

22 MS. SARVER: She's - - -

23 CHIEF JUDGE LIPPMAN: Because she's
24 nineteen years old?

25 MS. SARVER: She certainly - - - she

1 certainly had a mind at nineteen years old but
2 perhaps her concern was preoccupied with what her
3 parents would think about the whole incident. That
4 seems to be - - -

5 JUDGE STEIN: Well, then why did she keep
6 asking about whether she needed a lawyer? How - - -
7 how can that be - - - I mean, certainly if her
8 parents were upset with her, she wouldn't need a
9 lawyer?

10 MS. SARVER: That could have come into play
11 - - - two - - - two points in response. First, that
12 that could have come into play later on in the
13 conversation with the investigator, and it's our
14 position that that is not a contemporaneous awareness
15 of exposure to criminal liability because at the time
16 that she was actually uttering the words and - - -
17 and putting forth the statements, it was not
18 necessarily going through her head that she could
19 need a lawyer.

20 JUDGE STEIN: What if it's contemporaneous
21 with her being asked to sign a statement?

22 MS. SARVER: But that doesn't go to the
23 reliability of the words that she actually uttered -
24 - -

25 JUDGE STEIN: No?

1 MS. SARVER: - - - at the time that she's -
2 - -

3 JUDGE STEIN: Why not? Because if she - -
4 - if she said something that, you know, wasn't
5 exactly true but now she's being asked to sign as to
6 those words, doesn't that - - - doesn't that solve
7 the problem?

8 MS. SARVER: Your Honor, for all we know,
9 she could have been asking for a lawyer in case she
10 was concerned that she was signing her name to a lie
11 and she might have been interested in - - -

12 JUDGE FAHEY: But that's - - - you don't
13 have to prove it here, you just have to show some
14 sense of awareness. It seems - - - you know, there
15 isn't much case law on this particular hearsay
16 exception, but it seems that you're saying that a
17 person has to be aware of the legal ramifications of
18 their statement before they make it rather than be
19 aware that it could cause some problems for them,
20 some legal trouble, but they have to know almost the
21 penalty. It - - - it seems you're setting a bar
22 that's unreasonable for a layperson to meet.

23 MS. SARVER: They don't have to know the
24 specific crime or the specific statute.

25 JUDGE FAHEY: Um-hum.

1 MS. SARVER: There's no requirement.
2 Though the trial court did - - -

3 JUDGE FAHEY: So tell - - - tell me this.
4 Point me to a case that - - - that says that - - -
5 that articulates your standard.

6 MS. SARVER: Settles says when the
7 statement - - - when the statement was made "the
8 declarant must be aware that it was adverse to penal
9 interest." And here - - -

10 JUDGE FAHEY: So what if - - - what if she
11 becomes aware while she's talking?

12 MS. SARVER: If she had backtracked or
13 changed her statement or refused to sign without
14 talking to a lawyer, all of those would have
15 indicated some awareness or development of an
16 awareness to adversity to her penal interest.

17 JUDGE FAHEY: Could also indicate that she
18 wanted to help him and that even though she was aware
19 that it might cause problems with her parents and she
20 might need a lawyer, she was doing the right thing in
21 her mind.

22 JUDGE STEIN: Well, to me if she refused to
23 sign, that would indicate that she wasn't telling the
24 truth.

25 MS. SARVER: Or it could acknowledge that

1 she felt that she needed to talk to a lawyer to
2 understand her penal interest, because, as the trial
3 court admitted, this was - - - Vehicle and Traffic
4 Law 600(1)(a) was not necessarily a common crime to
5 be aware of, but - - -

6 CHIEF JUDGE LIPPMAN: Counsel, but aren't
7 you reading too much into her mind? You're just
8 writing off half the things that she said because by
9 fiat, you're making the contention that ah, she
10 didn't really mean it, she's really not aware of it.
11 Again, is it only because of her age? In other
12 words, you're just writing off half the things that
13 she said.

14 MS. SARVER: Absolutely not, Your Honor,
15 but that just goes to show - - -

16 CHIEF JUDGE LIPPMAN: What do you mean,
17 absolutely not? You are.

18 MS. SARVER: I don't mean to be writing off
19 what she's saying. I - - -

20 CHIEF JUDGE LIPPMAN: Well, what are you
21 doing with what she says?

22 MS. SARVER: Just pointing out the need for
23 cross-examination of this witness. This is an
24 unreliable statement without an opportunity to cross-
25 examine the witness as to her frame of mind at the

1 time of the conversation with the investigator, in
2 addition to her frame of mind at the time that she
3 was confronted by the defendant on the bus
4 approximately two weeks after the crime.

5 JUDGE PIGOTT: Why wasn't she questioned?

6 MS. SARVER: Why wasn't she questioned - -

7 -

8 JUDGE PIGOTT: Yeah, I mean, I - - - I get
9 the statement against pen - - - penal interest being,
10 you know, with the big fight over - - - over immunity
11 or something, but why couldn't you put her on the
12 stand and ask her what she said and what was said?
13 And I thought everything that Amelkin said was
14 hearsay. I - - - I - - - I didn't know why we - - -
15 that was even getting into the record. She's saying
16 - - - she's saying this - - - this witness is saying.
17 Well, that's hearsay, and - - - and - - - and it's
18 going to the truth of the matter stated. It
19 shouldn't have gotten in, and yet everyone's talking
20 about well, she said this, she said that. I get the
21 point where she - - - you know, if - - - if she's
22 going to say I was driving, that that may be a
23 statement against penal interest, but everything else
24 isn't. And - - - and she could have gotten on the
25 stand and talked about coming to the office and

1 realizing that maybe she was putting herself in
2 jeopardy but nevertheless, you know, felt that she
3 had to tell the truth, whatever it was, and none of
4 that happened.

5 MS. SARVER: Your Honor, my understanding
6 is that she - - - she pled the Fifth because she
7 didn't want to incriminate herself and she - - -

8 JUDGE PIGOTT: You understand my question?

9 MS. SARVER: I understand why she didn't
10 test - - - I - - - I understand you're asking me why
11 she didn't testify up until the point of saying she
12 was driving.

13 JUDGE PIGOTT: Yeah.

14 MS. SARVER: Your Honor, I - - - I honestly
15 don't know the answer to that question. However, the
16 whole case falls - - - rises and falls on the fact
17 that there was no reliability and no trustworthiness
18 in her statement. And she needed to be cross-
19 examined by the People in order to put before the
20 jury fair evidence that they could understand the - -
21 - the veracity and reliability of, and especially in
22 a case like this where it appears that her motive,
23 whether it was true or not, in coming forward was to
24 help out the defendant, the jury was certainly
25 entitled to understand exactly what was going through

1 her mind at every point in the process, including her
2 conversation with the investigator.

3 JUDGE STEIN: What motive is there for her
4 to lie und - - - under the circumstances of this
5 case, where we're talking about reliability? What
6 possible motive would she have had? She only knew
7 this guy for a few hours, as far as the record shows.

8 MS. SARVER: I don't - - - I'm not
9 personally familiar with the witness or her
10 relationship with the gentleman, with the defendant,
11 but - - -

12 JUDGE STEIN: Well, I'm talking about
13 what's in the record. What's in the record is she
14 met him on a bus a few hours before she then went out
15 with him, and then she didn't see him again until she
16 ran into him two weeks later on a bus, I guess, and
17 he - - - he asked her to help him. Why - - - why
18 would she have a motive to help him?

19 MS. SARVER: If she liked him; if she felt
20 pressured by him; if she felt threatened that he was
21 going to keep harassing her if she didn't come
22 forward; if she was trying to impress him. There are
23 a number of reasons that she could have decided two
24 weeks later to - - - to reinsert herself into this
25 investigation.

1 JUDGE STEIN: And - - - and - - - under
2 your argument, and she didn't think anything would
3 happen to her if she did help him.

4 MS. SARVER: She - - - she was not aware of
5 any consequences.

6 JUDGE RIVERA: Because otherwise why would
7 you do this, even if you're interested in him, right?

8 JUDGE PIGOTT: Her - - - her - - - her
9 jeopardy, if there was any, was not what his was. He
10 - - - he was facing DWI. There was never any claim
11 that she was - - -

12 MS. SARVER: No.

13 JUDGE PIGOTT: - - - drinking and driving
14 or anything.

15 MS. SARVER: She would have - - - she would
16 have only been facing leaving the scene of an
17 incident without reporting and potentially driving
18 without a license, though if he was a licensed driver
19 in the car with her, that might have been okay.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MS. SARVER: Thank you.

22 CHIEF JUDGE LIPPMAN: Thanks, counsel.
23 You'll have your rebuttal.

24 MR. ZENO: Good afternoon. Mark Zeno for
25 apell - - - respondent Victor Soto.

1 CHIEF JUDGE LIPPMAN: Counsel, how do - - -
2 how do we know that the - - - that she aware of - - -
3 that this was a declaration against interest?

4 MR. ZENO: Well, I think there are a number
5 of - - - there are a number of facts from which the
6 Appellate Division appropriately drew the inference.

7 CHIEF JUDGE LIPPMAN: Well, your adversary
8 says she said it later on in the conversation, so it
9 doesn't really matter.

10 MR. ZENO: Well, I would start with the
11 accident itself, Your Honor. She fled the scene
12 because she was worried she was getting - - - going
13 to get into trouble. If - - - if a driver, whether
14 it's a nineteen-year-old driver or a fifty-four-year-
15 old driver, crashes a car and runs away, they're
16 running away because they fear the consequences of
17 the action; whether it's property damage, whether
18 they're worried they violated a traffic law, they're
19 fearing the consequences of that crash. So that's
20 the starting - - -

21 JUDGE PIGOTT: Is that the argument the
22 defense made?

23 MR. ZENO: Did they make that particular
24 argument? I don't think they made that particular
25 argument. So that's the starting point. That - - -

1 JUDGE PIGOTT: But what's the - - - what's
2 the - - - what's the declaration against penal
3 interest that - - - that is being asserted?

4 MR. ZENO: The declaration against penal
5 interest that's being asserted is that she was the
6 driver of the car, she crashed the car.

7 JUDGE PIGOTT: That's allowed. You can - -
8 - you can - - - she was a - - - she had a learner's
9 permit, she could drive.

10 MR. ZENO: I'm not saying she was driving
11 unlawfully. She may have - - -

12 JUDGE PIGOTT: Well, I'm - - - I'm looking
13 for the penal interest that - - - that - - -

14 MR. ZENO: The penal interest - - -

15 JUDGE PIGOTT: - - - she was testifying.

16 MS. SARVER: - - - was leaving the scene,
17 and - - - and it's not only a penal interest, it's a
18 pecuniary interest.

19 JUDGE PIGOTT: Was that argued? I didn't
20 see it. That's why I'm asking.

21 MR. ZENO: Well, the court did refer to it.
22 I believe it was at page 248 of the appendix. The
23 court said, it's not only a penal interest, it's a
24 pecuniary interest. I think that was the court's
25 word. So - - -

1 JUDGE STEIN: Does - - - does it matter if
2 she's aware that in fact it was adverse to her
3 interests, as opposed to, well, she wasn't really
4 sure, but maybe, and she was concerned about it? Is
5 there a distinction there in terms of whether this
6 statement should be admissible?

7 MR. ZENO: Well, it - - - I think it should
8 be admissible under either circumstance. I think the
9 question is, is it a statement, given the magnitude
10 of the interest that's - - - that's involved, that a
11 reasonable person would make unless it was true?

12 JUDGE PIGOTT: So you agree she - - - it
13 has to be - - - she has to be aware of it?

14 MR. ZENO: She has to be aware that it's an
15 adverse interest, yes.

16 JUDGE PIGOTT: And it's penal - - - against
17 penal interest, right, as a - - -

18 MR. ZENO: No, not against penal interest,
19 Judge. It's - - - the - - - this court's declaration
20 against interest exception started with proprietary
21 interest.

22 JUDGE PIGOTT: Prodder (ph.)? Okay.

23 MR. ZENO: And I think it was in Brown the
24 court talked about an interest in an Elgin watch,
25 which is an inexpensive watch, and if an El - - -

1 JUDGE PIGOTT: Used to be.

2 MR. ZENO: It used to be. Maybe it's worth
3 more now. But if an interest in an inexpensive mass-
4 produced watch is enough to trigger the declaration
5 against penal interest - - -

6 JUDGE PIGOTT: One of the - - -

7 MR. ZENO: - - - a declaration against
8 interest exception, that should be enough.

9 JUDGE PIGOTT: One of the things that
10 troubled me about this is that we talked about, you
11 know, she said should I get a lawyer, and - - - and
12 this investigator said, I have no idea.

13 MR. ZENO: Um-hum.

14 JUDGE PIGOTT: She asked whether or not she
15 could get in trouble. I have no idea. When she was
16 cross-examined about any of these, she said, I don't
17 know, and - - - and this is an investigator for a
18 criminal defense firm. And here's this lady coming
19 in and saying what's she's saying, and - - - and as
20 the court said, he said, I just don't see it. I
21 don't - - - I don't see the awareness of any - - -
22 any - - - any penal liability.

23 MR. ZENO: Well, again, doesn't have to be
24 awareness of penal liability.

25 JUDGE PIGOTT: Right.

1 MR. ZENO: I think there were three - - -

2 JUDGE PIGOTT: Liability.

3 MR. ZENO: I think there were three
4 interests that - - - three reasons she was worried
5 about making this statement. One was she was worried
6 she was getting - - - getting in trouble with her
7 parents. That's obviously a theme.

8 JUDGE PIGOTT: Does it trouble you at all,
9 though, what - - - what - - - what the defense did
10 here to this lady? I mean if - - - if she asked for
11 a lawyer, and they didn't give her one, when she
12 asked, you know, whether or not she could get in
13 trouble, and they - - - and they blow her off?

14 MR. ZENO: Well, if it were - - -

15 JUDGE PIGOTT: I mean, I'm being cruel in
16 saying blow it off, but - - -

17 MR. ZENO: If it were a lawyer - - -

18 JUDGE PIGOTT: Let me say this. Let - - -
19 it - - - I mean, it was disturbing to me that - - -
20 that they almost were taking advantage of this young
21 lady. I mean, maybe she really was in trouble and
22 maybe she should have had a lawyer and maybe somebody
23 should have told her that. And maybe she wouldn't
24 have talked at all or maybe she should have said I
25 understand all of that, but I'm telling you, this guy

1 - - I want you to agree with me eventually. You
2 know, there is - - - there is no - - - you've got no
3 liability here and you're going to help this guy out.
4 He's going to lose his job as a bus driver if - - -
5 if he gets convicted of this, so it's really, really
6 important that you say you were driving and you have
7 no worries whatsoever. That would be improper,
8 wouldn't it?

9 MR. ZENO: Well, that would be improper.
10 That's not this case.

11 JUDGE PIGOTT: I know.

12 MR. ZENO: There was no evidence - - -
13 there's no testimony in this record that the
14 investigator discouraged her.

15 CHIEF JUDGE LIPPMAN: So what was the tenor
16 of this conversation?

17 MR. ZENO: I'm sorry?

18 CHIEF JUDGE LIPPMAN: What was the tenor of
19 this conv - - - what - - - what was the investigator
20 trying to do? What was she trying to - - - to say?

21 MR. ZENO: Well, the investigator - - -

22 CHIEF JUDGE LIPPMAN: What - - - you know,
23 what was the ambiance of all of this?

24 MR. ZENO: The ambiance - - - well, it was
25 a - - - it was in a lawyer's office, so it's probably

1 not somewhere that that nineteen-year-old had been
2 before, so there was a certain level of seri - - -
3 seriousness to the conversation, but it was only a
4 conversation with an investigator who asked her to
5 tell the truth. And the - - - the woman knew that my
6 client had been arrested and was facing charges.

7 CHIEF JUDGE LIPPMAN: And how do you
8 interpret her comments?

9 MR. ZENO: How do I interpret her - - -

10 CHIEF JUDGE LIPPMAN: Trouble, the parents,
11 all that stuff.

12 MR. ZENO: She was concerned about making a
13 statement. She was worried about getting - - -

14 CHIEF JUDGE LIPPMAN: What did the
15 investigator -- in the face of that, how did the
16 investigator make her feel?

17 MR. ZENO: I think that the investigator
18 put - - - put her off, didn't really respond directly
19 to those concerns.

20 CHIEF JUDGE LIPPMAN: Didn't want to answer
21 her either way.

22 MR. ZENO: Yeah, neither told her that you
23 have nothing to worry about, nor told her that you
24 absolutely should go out and get a lawyer. She
25 didn't want to give legal advice. She's not - - -

1 JUDGE RIVERA: Is that for fear she'd clam
2 up?

3 MR. ZENO: I'm sorry?

4 JUDGE RIVERA: Is that for fear she'd clam
5 up and stop talking?

6 MR. ZENO: I think that's probably true,
7 yeah. And - - - but I don't think that makes her
8 statement any less credible. The - - - the Appellate
9 Division drew an inference from this record that she
10 knew that - - - that the declaration was against her
11 interest.

12 JUDGE PIGOTT: Well, let me - - - on cross-
13 examination.

14 "Q. She said that she was also concerned about the
15 trouble she could get into?"

16 "A. Yes."

17 "Q. Then at this point you told her you're not a
18 lawyer. You can't really tell her about what's going
19 on?"

20 "A. Yes."

21 "Q. You didn't tell her the charges that she might
22 face?"

23 "A. No, I don't know those."

24 "Q. Like the VTL 600, you didn't mention that?"

25 "A. I don't know what this."

1 "Q. Or driving without a license?"

2 "A. No."

3 "Q. You didn't tell her that she faces civil
4 investigations?"

5 "A. I wasn't aware of that. No."

6 "Q. So you didn't tell you anything about specific
7 trouble she might get into?"

8 "A. I did not know."

9 "Q. When she told you that, I mean, you couldn't
10 know - - - you couldn't know that?"

11 "A. No."

12 And it's no, no, no.

13 MR. ZENO: That's - - -

14 JUDGE PIGOTT: And it's not until - - -

15 MR. ZENO: She didn't want to give - - -

16 that - - - the investigator didn't want to - - - was
17 forbidden from giving legal advice.

18 JUDGE PIGOTT: I understand that, but what
19 I'm saying is that your - - - you want to say this
20 lady was concerned about getting in trouble and
21 you're saying, but it was the investigator's job to
22 make sure she didn't think that.

23 MR. ZENO: She was asking, should she get a
24 lawyer, and that's adequate to show she was concerned
25 that she might get in trouble. It's also common

1 sense. Everyone knows that fleeing the scene of an
2 accident - - - every driver knows that fleeing the
3 scene of an accident is an offense, whether you know
4 it's punishable as a VTL violation, a misdemeanor - -
5 -

6 JUDGE PIGOTT: Didn't know.

7 MR. ZENO: She - - - right, I didn't know
8 that it was a fifteen - - -

9 CHIEF JUDGE LIPPMAN: So your view - - -
10 your view - - -

11 MR. ZENO: I didn't know it was a fifteen-
12 day penalty. I knew it's a crime. I knew it was
13 wrong.

14 CHIEF JUDGE LIPPMAN: Your - - - your view,
15 in response to what Judge Pigott was asking you
16 before, as long as the investigator didn't falsely
17 put her in a place and say listen, don't worry about
18 it, there's absolutely nothing that's going to come
19 of this, as long as the investigator was kind of not
20 trying to pull her in either direction - - -

21 MR. ZENO: Right, and - - -

22 CHIEF JUDGE LIPPMAN: - - - that that's
23 appropriate and that - - - I'm - - - I'm just trying
24 to understand your argument, and that on its face,
25 what's she's saying evidences enough of an awareness

1 to be a statement against - - -

2 MR. ZENO: Right, exactly. And if the
3 investigator had said that you have nothing to worry
4 about, there's no crime here, just tell me what - - -
5 what I want to hear, then - - - then that - - - you
6 know, that knowledge of adversity would go away and
7 there'd be no - - -

8 JUDGE PIGOTT: If the People did this,
9 would you think it was okay?

10 MR. ZENO: If the People did this - - - I
11 think the People do this all the time. I think
12 that's what - - - I think that's what detectives are
13 - - -

14 JUDGE PIGOTT: The cynical man.

15 MR. ZENO: Well, I - - - having done this
16 job as long as I have, you can get cynical about
17 things like that. I think - - -

18 JUDGE PIGOTT: You think it's okay?

19 MR. ZENO: Do I think it's okay?

20 JUDGE PIGOTT: Well, you're saying the
21 People do this all the time and it's okay.

22 MR. ZENO: Well, I'm not sure what "this"
23 is. It's - - -

24 JUDGE PIGOTT: Well, that's what I asked
25 you. If they did this.

1 MR. ZENO: If they did this.

2 JUDGE PIGOTT: If they brought - - - if
3 they brought this young lady in and said look, you've
4 got no problems, don't worry, it's all fine, look,
5 you know, just, you know - - - -

6 MR. ZENO: Well, I think that the People
7 have a higher burden than a - - - than a defense - -
8 - defense investigator.

9 JUDGE RIVERA: Well, you're arguing the
10 investigator didn't do that.

11 MR. ZENO: Right, he - - - she - - - right,
12 I mean, I don't think that it's - - - would be
13 appropriate for a police officer to lie to a - - - to
14 a defendant to get a statement, tell them, oh, you
15 know, admit to this murder, you can go home tomorrow.

16 JUDGE PIGOTT: Yeah.

17 MR. ZENO: That's wrong. That's not what
18 happened here.

19 CHIEF JUDGE LIPPMAN: Well, we - - - we've
20 had cases along those lines. Yes.

21 JUDGE STEIN: Um-hum.

22 MR. ZENO: I - - - that's - - - that's what
23 I was referring to, Your Honor.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 MR. ZENO: Thank you.

1 CHIEF JUDGE LIPPMAN: Thanks.

2 Counsel, rebuttal.

3 JUDGE RIVERA: Counsel, what's our standard
4 of review? What are we looking for here?

5 MS. SARVER: We're - - - we're looking - -
6 - we're evaluating a question of pure law.

7 JUDGE RIVERA: It's not a mixed question of
8 law and fact?

9 MS. SARVER: No. The - - -

10 JUDGE RIVERA: Why not?

11 MS. SARVER: The fact are undisputed, even
12 the majority in the Appellate Division acknowledged
13 that up until the point where she was asked to put -
14 - - the witness was asked to put her pen to the
15 paper, there was absolutely no recognition or - - -

16 JUDGE RIVERA: Isn't the question the
17 inferences to be drawn from the totality of the
18 circumstances?

19 MS. SARVER: Excuse me?

20 JUDGE RIVERA: Isn't the question the
21 inferences that can be drawn on whether or not that
22 now spins back to a mixed question of law and fact?

23 MS. SARVER: The question is to define
24 awareness and how broadly to construe awareness - - -

25 CHIEF JUDGE LIPPMAN: Isn't there some

1 record support for the - - - what the Appellate
2 Division found? And if there is, is there really any
3 - - - any issue here?

4 MS. SARVER: The - - - the issue is whether
5 what the Appellate Division found in terms of the
6 facts is sufficient for a definition of awareness
7 that - - - that this court would set today, and our
8 position is that when a witness does not recognize or
9 acknowledge or understand anything about consequences
10 that she's facing until after making a whole
11 statement, that's not sufficient for awareness. And
12 with exculpatory statements, while there is leniency
13 accorded to a statement in terms of the fourth
14 factor, the corroborating independent evidence, no
15 leniency applies to the awareness factor. And so a
16 definition of awareness must be set that
17 appropriately construes all the facts, and here, her
18 frame of mind at the time of this - - -

19 CHIEF JUDGE LIPPMAN: Okay, so your
20 argument's it's totally a matter of law?

21 MS. SARVER: Completely a matter of law.

22 CHIEF JUDGE LIPPMAN: Okay. Thank you.

23 MS. SARVER: Thank you.

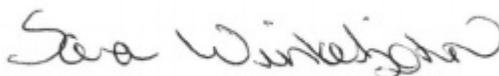
24 CHIEF JUDGE LIPPMAN: Thank you both.

25 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Victor Soto, No. 206 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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