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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 32

ROY GRAY,

Appellant.

20 Eagle Street
Albany, New York 12207
February 11, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Okay. Number 32 on
2 the calendar, People v. Roy Gray.

3 Rebuttal time, counsel?

4 MS. GURWITCH: Your Honor, I'd like three
5 minutes for rebuttal.

6 CHIEF JUDGE DIFIORE: You have three
7 minutes.

8 MS. GURWITCH: Thank you. Sara Gurwitch,
9 Office of the Appellate Defender for Roy Gray.

10 Your Honors, by failing to move to reopen
11 the suppression hearing, what defense counsel did
12 here was he just forfeited the possibility of a
13 dismissal with no benefit to his client. Now, I know
14 that my adversary has argued in various forms that
15 there was some strategy here; but that just doesn't
16 make sense.

17 JUDGE RIVERA: It's not true that - - -
18 that there was a risk that that actual second verbal
19 substantive statements that were damaging would have
20 gotten in? There's no risk that that might be the
21 outcome?

22 MS. GURWITCH: That - - - that was
23 certainly a possibility; but it wouldn't have harmed
24 Mr. Gray. Let's look at the two different - - -

25 JUDGE RIVERA: How not? Doesn't - - -

1 doesn't the whole strategy depend on his argument
2 that I've got that one statement up front that he
3 really just did this to protect his brother?

4 MS. GURWITCH: Well, Your Honor, that - - -
5 assuming that they had lost and that the written
6 statement is in the case - - -

7 JUDGE RIVERA: Uh-huh.

8 MS. GURWITCH: - - - defense counsel's
9 strategy with the written statement in the case is
10 he's going to use the initial statement, the kind of
11 ambiguous statement, I'm going to take the heat for
12 my brother; and then he takes the heat for his
13 brother and makes a false admission. If he makes a
14 false admission, orally and then written, it's still
15 false. That --

16 JUDGE RIVERA: What's - - - what - - -

17 MS. GURWITCH: Orally, written, and video,
18 still false.

19 JUDGE RIVERA: What - - -

20 MS. GURWITCH: That same argument is
21 available.

22 JUDGE RIVERA: What - - - what are the
23 contents of that second oral statement?

24 MS. GURWITCH: The second oral statement is
25 a confession. It's the same as the written

1 statement.

2 JUDGE RIVERA: Nothing additional, nothing
3 more?

4 MS. GURWITCH: The - - - actually the oral
5 statement is just a little bit shorter; but it's an
6 admission, and it's consistently referred to the
7 written statement as reducing the oral confession to
8 a writing. So it's the same statement. So - - -

9 JUDGE ABDUS-SALAAM: Counsel - - - I'm
10 sorry.

11 MS. GURWITCH: Yes.

12 JUDGE ABDUS-SALAAM: I - - - I want you to
13 finish your answer to Judge Rivera's question; if you
14 will.

15 MS. GURWITCH: Right, so I mean - - - it's
16 - - - there's no greater harm - - - this strategy
17 could have been the same, but what have - - - really
18 would have benefited Mr. Gray, is if the statement
19 was not - - - the written statement, the admission,
20 was not in the case and there was a substantial
21 argument in favor of that.

22 Yes, Your Honor.

23 JUDGE ABDUS-SALAAM: No, I - - - I was just
24 thinking through what you said about there being no
25 risk to having the oral- - - the additional oral

1 statement come in, because the strategy would be the
2 same with the oral statement and the written
3 statement. So that - - - that sort of suggested to
4 me that even - - - there was no - - - there was a
5 strategy, there was no reason to reopen the
6 suppression hearing, because the strategy would be
7 the same.

8 MS. GURWITCH: Well, no, the reason, Your
9 Honor, was because there was a subs - - - very strong
10 argument in favor of no attenuation. And if they had
11 won at the suppression hearing, as they initially
12 did, and then it was reversed - - -

13 JUDGE ABDUS-SALAAM: But what - - - what if
14 - - - I'm sorry, what if the detective testified,
15 maybe - - - maybe there - - - I'm not sure why the
16 Supreme Court or the trial court thought that the
17 oral Miranda warnings were incomplete, but what if
18 the detective had gotten on the stand and from memory
19 just stated each Miranda warning, and they all
20 matched up to the Miranda warnings that would be - -
21 - have been considered complete. Then the whole
22 original statement would've come in, right?

23 MS. GURWITCH: Yes, but, Your Honor, again,
24 Mr. Gray wouldn't have been in a worse situation.
25 That of course was a possibility that if defense

1 counsel had done what he was supposed to do, and what
2 the CPL directs, that if something new comes out, you
3 make a motion to reopen the suppression hearing, you
4 go back to the suppression - - - suppression court.
5 If he had done that, and it turns out that Judge
6 Marvin, the hearing judge had said, there's actually
7 no Miranda violation here, and therefore the oral
8 admission and the written admission, they're both in
9 the case.

10 CHIEF JUDGE DIFIORE: Does defense - - -

11 MS. GURWITCH: Mr. Gray is not in a worse
12 case.

13 CHIEF JUDGE DIFIORE: Does defense
14 counsel's considered strategy trump that?

15 MS. GURWITCH: Defense counsel's reasonable
16 strategy is what this court needs to look at. If def
17 - - - it's - - - the standard of this court and the
18 federal courts is not did defense counsel have a
19 reason; it's was there a reasonable strategy. This
20 was not a reasonable strategy.

21 JUDGE GARCIA: But wasn't there a DNA
22 strategy here? Or maybe I'm misunderstanding. So
23 the - - - the allegation is of - - - of failing to
24 meet the standard is, when this comes out during
25 trial, he doesn't move to reopen the hearing, right?

1 MS. GURWITCH: Correct.

2 JUDGE GARCIA: That's the allegation.

3 MS. GURWITCH: Uh-huh.

4 JUDGE GARCIA: At that point, he knows they
5 have this hat with DNA in it, right?

6 MS. GURWITCH: Correct.

7 JUDGE GARCIA: So I understood the strategy
8 to be: I want the statement because at least it
9 explains away my DNA being found in the apartment,
10 but it gets me off a first-degree murder charge,
11 which is a life sentence.

12 MS. GURWITCH: Your Honor - - -

13 JUDGE GARCIA: Which is in fact what
14 happened, right?

15 MS. GURWITCH: Yes, he was acquitted of the
16 first degree. But I - - - I don't think that that is
17 what defense counsel said his strategy was.

18 JUDGE GARCIA: But it doesn't matter,
19 right, what he says his strategy is? You just told
20 me - - - told the court, didn't you, that it's is
21 there a reasonable strategy.

22 MS. GURWITCH: Right, and that wouldn't be
23 a reasonable strategy that the - - - the additional
24 DNA evidence that comes out that - - - it's conceded
25 by the government that the DNA evidence is not enough

1 to convict Mr. Gray, that this case turns on the
2 statement; that it's conceded at page 63 footnote 19
3 of my adversary's brief that without the statement,
4 this case is legally insufficient. So here, to
5 pursue a strategy for - - - to deal with weak
6 evidence, which there's no suggestion that's what
7 happened here, we're - - - the other alternative is
8 that the evidence in the case, the admission, it
9 could have been out of the case, and then there is no
10 dispute that without the statement in the case, the
11 case would have had to have been dismissed.

12 JUDGE STEIN: What - - - what about the
13 Appellate Division's statement which sounds to me
14 like they're saying that - - - that - - - he would've
15 - - - he would have lost anyway on the suppression.
16 Does that- - - does that make a difference here?

17 MS. GURWITCH: Well, there - - - the
18 problem is the Appellate Division used the wrong
19 standard. And I know the court is - - -

20 JUDGE STEIN: Well they may have, but it
21 can also be interpreted as saying, this would not
22 have been suppressed.

23 MS. GURWITCH: Well Your Hon - - -

24 JUDGE STEIN: Not - - - not just that it's
25 a high burden, but that in no way could the burden

1 have been met.

2 MS. GURWITCH: Your Honor, I think that
3 there are two answers to that. One is, the court
4 looked to whether it would have been a winning
5 argument and found that it would not have been a
6 winning argument. Now, winning argument is not the
7 proper standard when it's the failure to do
8 something. It's the Clermont standard, was there a
9 substantial argument; and if you were successful with
10 suppression, would the suppression result in a
11 significant change in the outcome? Here, that
12 standard's met.

13 So to say, well, they - - - they made this
14 decision using the wrong standard, is something this
15 court shouldn't defer to. But also, what did they
16 look at? They looked at this small amount of
17 evidence that came out at the trial, when what we
18 needed was to go back to the suppression court. I
19 mean, this is the situation where we have one account
20 that goes - - - comes out in the suppression hearing
21 - - -

22 JUDGE STEIN: So - - - so you're saying if
23 they had the suppression hearing, there would have
24 been - - - similar to the last case we heard - - -
25 there would have been possibly more evidence that

1 would have come out and then - - - and we don't know
2 what the outcome would've been.

3 MS. GURWITCH: Yes, but also Your Honor,
4 the - - the Appellate Division was wrong on
5 attenuation; not just the standard, but also wrong on
6 attenuation. Under this court's attenuation law,
7 looking at the Paulman factors that - - - to say that
8 this was not a strong case for no attenuation, it was
9 just wrong on the law. I mean we have the initial
10 statement, the noninculpatory statement, and then we
11 have the - - - the admission, which defense counsel
12 argued was false, that that is taken by the same
13 personnel, the same detective - - - so one of the
14 Paulman factors - - - in exactly the same location,
15 without any significant time break. So to say, oh,
16 this is a clear loser - - -

17 JUDGE ABDUS-SALAAM: I'm sorry, are you
18 talking about the statement made after the New York
19 form was faxed, or another statement before that?

20 MS. GURWITCH: I'm saying that the
21 Appellate Division's determination that the written
22 confession was attenuated from the Miranda violation
23 - - -

24 JUDGE ABDUS-SALAAM: The one that was done
25 forty-five minutes after the oral statement?

1 MS. GURWITCH: After it - - -

2 JUDGE RIVERA: After the Miranda warnings.

3 MS. GURWITCH: There are two oral
4 statements.

5 JUDGE ABDUS-SALAAM: Okay.

6 MS. GURWITCH: So there was the first oral
7 statement at 7 o'clock, which is not a confession.
8 Then there's the late - - - then there's the extended
9 questioning which the suppression court did not know
10 about, the Appellate Division didn't know about in
11 the first decision; so that's about an hour and ten
12 minutes later. So from the Miranda violation to the
13 - - - the written statement that's - - - that the
14 Appellate Division found attenuated, it's more than
15 two hours.

16 JUDGE ABDUS-SALAAM: Okay.

17 MS. GURWITCH: So there's - - - just - - -

18 JUDGE FAHEY: What does - - - to narrow
19 this down, doesn't - - - doesn't your argument - - -
20 you could state it better than I do - - - but doesn't
21 your argument come down to the fact that in the
22 second Appellate Division decision, the one that - -
23 - which dealt with the consolidated trial decision
24 and in, I think the 440, don't they say at that point
25 that even if we accept that he had a stronger

1 argument to win his - - - his suppression motion but
2 he didn't have a winning argument to win the
3 suppression motion, because during that hour and ten
4 minutes there was no attenuation, he was in fact
5 questioned during the whole period, if that's the
6 case, then they have the wrong standard. It's not -
7 - - you don't have to show a winning motion; you've
8 got to show a close question, a substantial question,
9 an arguable question.

10 MS. GURWITCH: A substantial question - - -
11 the Clermont standard.

12 JUDGE FAHEY: That's - - - that's your
13 whole - - - that's the argument - - - that's what it
14 boils down to.

15 MS. GURWITCH: Yes, that it's the wrong
16 standard, and so we can't defer to the Appellate
17 Division's decision based on the wrong standard.

18 JUDGE FAHEY: Yeah.

19 MS. GURWITCH: So I mean, if there's any
20 place for the winning standard, it's certainly not in
21 a case like this, where there needed to be some
22 additional fact finding; where the suppression
23 hearing needed to be reopened. I mean, it's a real -
24 - - we don't - - - we have a very problematic record
25 here, and we don't really know why we have this

1 record. We have one thing that the detective is
2 saying at the suppression hearing; it turns out it's
3 not accurate. We have the government presenting in
4 its brief, the first brief to the Appellate Division,
5 the - - - a timeline that turns out to be totally
6 inaccurate.

7 So in terms of what defense counsel should
8 have done, I mean, it couldn't be clearer under the
9 CPL, he should of moved to reopen. If he had moved
10 to reopen and the court had again found no
11 attenuation, the statement would have been out of the
12 case, and the case would have been dismissed.

13 That was something that simply could not be
14 forfeited in favor of a reason that was not a
15 reasonable strategy. There was no benefit to Mr.
16 Gray. So this court either can look at the record
17 and say based under our Paulman analysis there was no
18 attenuation, the case should be dismissed or could
19 send it back to the suppression court for the
20 reopened suppression hearing.

21 Thank you, Your Honors.

22 CHIEF JUDGE DIFIORE: Thank you.

23 Counsel?

24 JUDGE GARCIA: Counsel, is that true there
25 is no prima facie case without the statement?

1 MR. BRAUN: Well, the statement certainly
2 weakens the case substantially, but we weren't
3 actually asked to - - - to - - - what happened was,
4 when we first came up with our People's appeal, we
5 didn't have the DNA on the hat. So we're kind of
6 looking at it in hindsight and saying well, how much
7 does the DNA on the hat matter? And, you know, it's
8 difficult - - - it's difficult to say. Certainly the
9 - - - the statement is substantial. We're not going
10 to deny that. But - - -

11 JUDGE GARCIA: If it was necessary for the
12 People's case, what could the possible strategy be
13 for not opening the suppression hearing?

14 MR. BRAUN: Yes, well, I - - - I need to
15 take issue with something counsel said a minute ago.
16 You see, here's the thing; the written statement was
17 written by the detective - - - Detective Depaulis
18 (ph.) and then just signed by the defendant. So it's
19 very different than the oral statements, unlike what
20 counsel was arguing a moment ago. So if you had the
21 oral statements coming in, where he's voluntarily
22 spewing this stuff - - -

23 JUDGE RIVERA: Is that difference or - - -
24 or are there substantive content difference?

25 MR. BRAUN: Well, I mean, it's similar - -

1 - I - - - here's the thing, it was what the - - -
2 what - - - if you go to the strategy - - - because
3 again, we're under the very narrow framework of an
4 ineffective assistance window here, and even narrower
5 because we're talking about one error, so a very,
6 very high threshold here. But if you look at the
7 strategy the - - - the attorney is saying I'm
8 bringing out the statement that I'm taking the weight
9 from my brother. Then I'm going right to the written
10 statement, which was written by the detective.
11 Therefore, I can make the argument to the jury here,
12 that the written statement is a distortion, number
13 one, and in any event, he's taking the weight for his
14 brother. It becomes a much more difficult to do that
15 when you have a series of oral statements that are
16 basically reciting what the written statement said
17 before Detective Depaulis even put his pen to paper.

18 JUDGE STEIN: They never - - - they never
19 made the argument that it was a distortion. The
20 argument all the time was that it was - - - it
21 followed from his - - - it was a false confession
22 following from the initial oral statement that this
23 was what he was going to do, he was going to - - - he
24 was going to defend - - - he was going to take it for
25 his brother.

1 MR. BRAUN: I - - - well, I - - - I am
2 sorry.

3 JUDGE STEIN: So, how - - - I don't
4 understand really how that weakens - - - how that
5 argument is weakened if - - - if the oral statement
6 comes first and the written statement is - - -
7 whoever wrote it is essentially in - - -
8 incorporating what the oral - - - the second oral
9 statement was. I just don't get it.

10 MR. BRAUN: Well, Mr. Bruno did make the
11 argument in summation at several moments. In fact,
12 he also cross-examined Dec - - - Detective Depaulis
13 extensively on why did you take the written
14 statement. And he - - - he attacked it viciously - -
15 - well, not viciously, but he - - - he zealously
16 attacked Detective Depaulis on - - - at one point he
17 couldn't remember why he was the one who wrote the
18 written statement, and then he came in and later
19 testified that he could remember why.

20 So he used this in summation to say
21 Detective Depaulis here, he's writing this statement;
22 he's trying to tie up - - - in fact he uses these
23 words in his summation - - -

24 JUDGE RIVERA: This is not what he says in
25 - - - I thought that's what he - - - I thought that's

1 what the lawyer said in his affidavit, that he
2 attacked the methodology, and - - - and he said - - -

3 MR. BRAUN: He also said in his - - -

4 JUDGE RIVERA: - - - the written statement
5 was an opportunity to embellish these facts.

6 MR. BRAUN: Correct, he also argued this in
7 summation. He said - - -

8 JUDGE STEIN: Yes, but the point is, is
9 that that's after the - - - the statement is not
10 suppressed. He's then going to make the best
11 argument he possibly can, based on the - - - on
12 what's in front of the jury. But - - - but how can
13 that possibly be better - - -

14 MR. BRAUN: Yeah, because - - -

15 JUDGE STEIN: - - - than having the whole -
16 - - everything thrown - - - all the statements thrown
17 out?

18 MR. BRAUN: Because here's the thing - - -
19 well, that's true, if all the statements would have
20 been thrown out. But number one, they wouldn't have
21 been thrown out, the Appellate Division decisions - -
22 -

23 JUDGE STEIN: Yeah, but that's the issue,
24 we don't know whether they would have been thrown out
25 or not.

1 MR. BRAUN: Well, I - - - I'll - - - I
2 understand Your Honor's point, but - - - but the
3 first thing is the - - - if he had reopened the
4 suppression hearing, it is very possible that
5 Detective Depaulis would've come in - - - and this
6 was - - - incidentally, this lawyer - - - we tried to
7 move early on to get the suppression hearing reopened
8 in order to clarify those early oral Miranda
9 statements, but the - - - Mr. Bruno at that time,
10 wisely said no, we're going to fight you on reopening
11 this hearing.

12 And so we actually wanted to get more in.
13 It may have - - - it may have clarified this whole
14 thing and we wouldn't be here. But be that as it
15 may, the fact is then to ask him to later on come and
16 say yes, I want to reopen this hearing right now and
17 possibly get an hour and ten minutes' worth of what
18 he's saying in the written statement to come in
19 orally. See, now he can't argue; he said on
20 summation, Detective Depaulis is trying to tie up the
21 loose ends here. That's why he's writing the
22 statement, that's why it's a distortion.

23 JUDGE RIVERA: Her point is - - - her point
24 is if you had lost the suppression, he's in the same
25 place. Why is he not in the exact same place?

1 MR. BRAUN: Because then if he loses the
2 suppression hearing, it's - - - it's very possible
3 that all of the oral statements come in, and now he
4 has this enormous weight. He can't argue that maybe
5 the hat was worn by someone else because maybe - - -
6 maybe he wasn't even there and maybe detective - - -

7 JUDGE RIVERA: So you mean second oral
8 statement is the one that gets in.

9 MR. BRAUN: Right.

10 JUDGE RIVERA: That - - - in addition to.

11 MR. BRAUN: Really - - - really what
12 happened here is when you have at the suppression
13 hearing - - - it wasn't clear, you know, when the - -
14 - when the taking the weight and when it goes into
15 the questioning. But what is clear, is there was
16 some sort of oral Miranda warnings at the beginning,
17 at the very beginning before everything, which takes
18 this well out of the purview of Seibert and all of
19 these other cases.

20 But I mean, here is the other point that I
21 wanted to get to - - - Judge Stein's question; not
22 only would it have not made sense, because now the
23 weight of his confession becomes so much graver and
24 so much greater with all these statements, and you
25 can't argue that Depaulis is distorting things,

1 because - - - you know, distorting things just on the
2 written, because he has all this oral stuff, but he
3 also wouldn't - - - there's no really clear-cut
4 dispositive issue here, because there's no clear-cut
5 issue that it would have been successful to begin
6 with.

7 And the Appellate Division relied on the
8 same factors in its second decision, most of which it
9 continued to rely on those same factors that it found
10 in the first decision; that there were numerous
11 warnings of this defendant: one oral Miranda
12 warning, which we don't know the stakes of at the
13 moment, but then a North Carolina Miranda warning.
14 Then a forty-five-minute break which is a substantial
15 break. Not only that, but professed willingness by
16 this defendant - - - counsel brought up the Caul --
17 the Paulman case; in the Paulman case, it makes clear
18 that a professed willingness is something that should
19 be taken into consideration to whether or not this
20 defendant is returned to the status of voluntariness
21 even if there is an issue.

22 Further, this defendant had over ten years,
23 eight arrests, or am I might be getting that
24 backwards; eight arrests over ten years, one or the
25 other. But he had extensive - - - an extensive

1 criminal history which alone also brings him back to
2 the status of somebody that's voluntarily giving a
3 statement.

4 So this is not one of these issues where
5 it's a question first, or we're trying to get him
6 around Miranda. Could it have honestly been fleshed
7 out a little bit more? Perhaps.

8 But I wanted to address - - - address Judge
9 Fahey's point from the last case, which is which
10 standard do we apply? I would argue that the
11 standard that we apply depends on the ineffective
12 assistance claim. So if it's a single claim of
13 error, that's the rarest kind of ineffective claim,
14 and that - - - for that McGee is instructive, where
15 it's clear, it's dispositive, there can be no
16 strategic impetus behind it. Those are those kinds
17 of cases - - - that's the kind of case that we have
18 here.

19 For other types of cases, where there's a
20 litany of errors, then yes, then I would argue that
21 sure, Clermont should be the standard, because in
22 those types of cases where there are a litany of
23 errors, then maybe a substantial-arguments-type
24 standard makes sense, because the prejudice is
25 greater.

1 JUDGE STEIN: Well, one second. When we
2 talk about clear and dispositive, we talk about
3 things like statute of limitations - - -

4 MR. BRAUN: Correct.

5 JUDGE STEIN: - - - and things like that.
6 How can you - - - can you compare this with the - - -
7 with a statute of limitations argument which is
8 absolutely no question, it doesn't even go to the
9 jury?

10 MR. BRAUN: I - - - I don't know how I can
11 say it better. A - - - a statute of limitations
12 defense, that's a dead bang winner - - -

13 JUDGE STEIN: That's right.

14 MR. BRAUN: - - - versus - - - versus this
15 particular case, where if you move to reopen the
16 suppression hearing, as any good defense attorney
17 knows, and this was a very, very well experienced
18 defense attorney, you could be opening a Pandora's
19 box. When I have a defense here, and it's viable,
20 and it could persuade a jury, and in fact it did
21 persuade a jury to acquit on the top count, why am I
22 going to risk reopening that Pandora's box if it
23 could come back and bite me and make it even harder
24 for me to assert any defense for this defendant
25 whatsoever?

1 And more to the point, you know, as far as
2 the - - - the - - -

3 JUDGE ABDUS-SALAAM: I'm sorry, counsel.
4 Before you move on, are you saying that there was no
5 possibility that any of the statements could be
6 suppressed if the suppression hearing was reopened?

7 Well, I - - - the point is that if
8 Detective Depaulis came in and said yes, my initial
9 Miranda warnings were as follows, 1, 2, 3, 4, 5,
10 whatever, and they - - - they correlate exactly with
11 this New York State standard, then there's no basis
12 to suppress any of these statements, anything he
13 said. And that's the real risk - - -

14 JUDGE ABDUS-SALAAM: But if that were not
15 the case, and all the statements - - - there was an
16 atten - - - there was no - - - or the court found
17 there was no attenuation between the second oral
18 statement and the written statement, did they all go
19 - - - do all the statements go out?

20 MR. BRAUN: I'm sorry. If there was no
21 attenuation between the second - - -

22 JUDGE ABDUS-SALAAM: Right.

23 MR. BRAUN: - - - and the - - - I'm sorry,
24 could you repeat the question one more time?

25 JUDGE ABDUS-SALAAM: There were two oral

1 statements, correct?

2 MR. BRAUN: Correct, yes.

3 JUDGE ABDUS-SALAAM: And the - - - the
4 issue here is whether there was any attenuation
5 between, I guess, the second oral statement and the
6 first - - -

7 MR. BRAUN: Well, more the second statement
8 and the written statement - - -

9 JUDGE ABDUS-SALAAM: And the written
10 statement, right.

11 MR. BRAUN: - - - and the written
12 statement.

13 JUDGE ABDUS-SALAAM: So do they all, if - -
14 - if there is no attenuation, do all the statements
15 go out?

16 MR. BRAUN: I suppose that's possible if -
17 - -

18 JUDGE ABDUS-SALAAM: Right.

19 MR. BRAUN: - - - if there's no
20 attenuation, but I - - - you know, under all the
21 different factors, most of which the Appellate
22 Division continued to rely on in finding, that the
23 statement was still good under Miranda, I mean, the
24 likelihood of success here is not small. And
25 furthermore, the court showed no - - - no inclination

1 necessarily one way or the other to reopen the
2 suppression hearing. So we don't even know if even
3 if the motion had been made, whether that would have
4 been successful, and they would've reopened the
5 suppression hearing.

6 I just want to touch briefly - - - the
7 Appellate Division's standard here did not apply the
8 - - - the "winning standard", as my colleague
9 suggests. They were very specific in saying
10 reasonable probability. When they talked about
11 winning, that was clearly dicta to show that under
12 any standard this wasn't going to win. That was not:
13 we're applying a brand new standard that's never been
14 done in the state before.

15 Furthermore, the quote unquote - - - the
16 dicta of whether or not successful or winning, that
17 dicta has been used before by this court in Turner.
18 So that's - - - that's nothing new and that's - - -
19 there - - - that doesn't implicate a new standard;
20 they were very clear that they were using a
21 reasonable probability standard.

22 JUDGE STEIN: Did Turner involve a
23 suppression motion?

24 MR. BRAUN: Well, Your Honor, in this - - -
25 in this particular - - - did Turner involve a

1 suppression motion?

2 JUDGE STEIN: I guess what I'm asking is
3 have we ever used that standard in - - - in a case
4 involving a suppression issue?

5 MR. BRAUN: I don't know the answer to that
6 question. I don't - - - I honestly don't know the
7 answer. But I mean, again, we're in the narrow
8 framework of an ineffective assistance claim, so it's
9 not just - - -

10 JUDGE STEIN: I'm - - - I'm talking about
11 an ineffective assistance.

12 MR. BRAUN: Ineffective assistance for a
13 suppression?

14 JUDGE STEIN: For a suppression motion.

15 MR. BRAUN: Right, but I would - - - I
16 would even go further and say this is an ineffective
17 assistance claim on a suppression motion where
18 they're claiming one error and only one error, and
19 that being the suppression issue here.

20 Furthermore, as far as - - - as far as the
21 fact that the Appellate Division did in fact rule as
22 it did the second time around, once more, in terms of
23 the framework of an ineffective assistance claim,
24 this shows that it was reasonable for Mr. Bruno to
25 come to the decision he did. In other words,

1 although new facts came out - - - and I wouldn't
2 even call them new facts; they were clarifications,
3 because it was said at the suppression hearing - - -
4 it was understood, sort of, that there was an oral
5 statement, it just wasn't - - - the timing was a
6 little bit murky, but when things were extrapolated
7 at the trial, at that time, the primary - - - a lot
8 of the primary facts didn't change. And in fact, Mr.
9 - - - Mr. Bruno states as far as strategy goes, he
10 even states - - - and this is on supplemental
11 appendix page 425: "Because at no prior occasion
12 including the hearing, is the verbal conversation
13 fleshed out, the detective could sit there today
14 theoretically, for two hours saying that Mr. Gray
15 confessed to every unsolved murder in the world. Not
16 that I'm saying he would."

17 This was the fear, and it's right there in
18 the record, that he was worried about what could come
19 out at the suppression hearing. And once again, I
20 understand Your Honors' reluctance because, hey,
21 isn't the written statement as good as the oral
22 statements in this case? But in this case it really
23 isn't as good, because Detective Depaulis wrote it.
24 Detective Depaulis' testimony at trial was a little
25 bit all over the place as to why he wrote that - - -

1 that statement. So therefore, defense counsel
2 reasonably could have used that statement and did use
3 that statement in summation to say hey, wait a second
4 this can't be relied on; much more difficult if they
5 were oral statements.

6 Unless Your Honors have any further
7 questions as far as the second point, my opponent's
8 brief, we will rest on our brief.

9 Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, sir.

11 MS. GURWITCH: Your Honors, in response to
12 your question, Judge Stein, this court has never used
13 the Turner-Keschner standard in a case involving a
14 suppression hearing. It's only been applied in cases
15 where there was a pure legal issue. And
16 analytically, that make sense; if there's a pure
17 legal issue and all we're missing is what an attorney
18 would have argued, a review in court can - - - can
19 figure that out. But where it's suppression or some
20 other issue where there needs to be fact finding,
21 then the Turner-Keschner standard could not and has
22 never been applied by this court. It's the Clermont
23 standard that should be applied.

24 Also, just in response to the notion that
25 the Appellate Division did not use the winning

1 standard, it did use the winning standard. First it
2 said substantial reason, and then it defined it as
3 winning. It might be better in terms of attenuation,
4 but not winning; so that's clear.

5 JUDGE GARCIA: Counsel, what about the idea
6 that if you reopen the suppression hearing you reopen
7 it for all purposes?

8 MS. GURWITCH: And, yes. That it would
9 reopen it for all purposes; it could result in a
10 finding that there was no Miranda violation. It does
11 not put Mr. Gray in a worse position.

12 JUDGE PIGOTT: Well, I don't know about
13 that. In fact, didn't - - - didn't his lawyer say,
14 well, if you put these detectives back on, they're
15 just going to lie and make it worse?

16 MS. GURWITCH: Right, and so they - - -

17 JUDGE PIGOTT: I mean, they were - - - they
18 were pretty cynical about - - - about the People's
19 case and it doesn't - - - it doesn't bother me, I
20 mean, if he - - - if he says, I don't want these guys
21 back on the stand, then that sounds like a - - -

22 JUDGE GARCIA: And couldn't the oral
23 statement have come in?

24 MS. GURWITCH: But - - - but, Your Honors,
25 what - - - what's the worst-case scenario? So let's

1 say defense counsel's fear was right that they go
2 back in front of the hearing court and they clean up
3 the Miranda record, the court says, no Miranda
4 violation, and so we're back in the same place - - -

5 JUDGE GARCIA: But you're not. You have an
6 oral statement that now comes into trial.

7 MS. GURWITCH: Right, and so remembering
8 that the theory is, defense counsel is going to - - -
9 once there's an admission - - - I mean, it's not so
10 much a question of whether it's oral, written, what
11 the format is, there's a confession; defense counsel
12 is going to say first he said I'm going to take the
13 heat for my brother falsely, and then he took the
14 heat falsely for his brother. So once there's that
15 strategy, once - - - it doesn't matter - - -

16 JUDGE PIGOTT: You say that. I - - -it
17 would bother me. I'm - - - I'm not sure I'd want to
18 have more stuff laid on my client, you know, when - -
19 - when they testified than what I've got now.

20 MS. GURWITCH: But, I mean - - -

21 JUDGE RIVERA: What about the argument
22 about the methodology though?

23 MS. GURWITCH: The - - - the - - - I think
24 it would be the same thing, that if the - - -

25 JUDGE RIVERA: How is that?

1 MS. GURWITCH: If the detective - - -

2 JUDGE RIVERA: You want to - - - you want
3 to - - - you want to say it's one thing, right - - -
4 it's one thing if my client had actually said it, but
5 here the cop wrote it, or the desk had wrote it, and
6 in fact was able to embellish the facts, or - - - or
7 change the facts, and that puts - - - that shows that
8 this is not really a voluntary statement by my
9 client.

10 MS. GURWITCH: Right, so we're saying if
11 the detective was either making an error or maybe his
12 credibility was at issue - - -

13 JUDGE RIVERA: Hey, I'm not suggesting as
14 an error, right, if yeah - - -

15 MS. GURWITCH: If - - - either of those
16 things, you can say that about the oral statement - -
17 - the oral statement comes in - - - you need the
18 detective - - - the detective is the messenger there
19 as well - - -

20 JUDGE RIVERA: Well - - -

21 MS. GURWITCH: - - - you can make the same
22 argument.

23 JUDGE RIVERA: But if - - - if they made -
24 - - if they get more - - - as Judge Garcia was
25 pointing out, if - - - if they're getting in more

1 information about the warning, doesn't that put the
2 client or the defendant in a worse position?

3 MS. GURWITCH: Your Honor, I - - -

4 JUDGE RIVERA: Make that - - - make that
5 argument that the attorney wants to make, potentially
6 a very powerful argument, less credible to the jury.

7 MS. GURWITCH: It does not. And what - - -
8 I mean, what would have been an extraordinary benefit
9 to Mr. Gray is the statement not being in the case;
10 and there was a strong argument in favor of no
11 attenuation.

12 I would just like to briefly address the
13 DNA.

14 JUDGE RIVERA: But how - - - let me - - -
15 how wrong does the lawyer have to be about that
16 particular strategy call?

17 MS. GURWITCH: There has to be a
18 substantial argument; it's the Clermont standard.
19 Here there was certainly a substantial argument, the
20 fact that we can also - - -

21 JUDGE RIVERA: I'm not asking about the
22 argument - - -

23 MS. GURWITCH: Oh, I'm sorry.

24 JUDGE RIVERA: I'm asked about that risk.

25 MS. GURWITCH: Oh, how - - -

1 JUDGE RIVERA: Where do we draw the line
2 about the risk?

3 MS. GURWITCH: It has to be reasonable.

4 JUDGE RIVERA: A lawyer could say there is
5 a really - - - he might say I've got a really
6 powerful argument, but the risk even if it's one
7 percent, is just too much for me to - - - to pursue.

8 MS. GURWITCH: Just to have a reasonable
9 strategy. I mean, let's look at hypothetical. Let's
10 say that at the end of the prosecution's case, that
11 the defense lawyer has a strong argument that the
12 evidence is legally insufficient, and says you know
13 what, I'm not going to make that argument. What I'm
14 going to do is I'm going to wait and I'm going to put
15 on my alibi witness; that's a better way to go; I
16 feel better about that. Well, that wouldn't be
17 reasonable, because if you have a strong argument in
18 favor of dismissal, you make that argument. That is
19 effective assistance of counsel.

20 JUDGE GARCIA: But nothing bad is coming
21 out of the first argument you're going to make. What
22 bad thing can possibly happen to move to dismiss?
23 You still get to put your alibi witness on later,
24 even if you lose.

25 MS. GURWITCH: And, Your Honor, I think

1 this is analytically the same, I think that this - -
2 - this is not a real risk that there's any harm - - -

3 JUDGE GARCIA: That's what you think though
4 now, but may - - - the defense lawyer didn't think at
5 that time.

6 MS. GURWITCH: There's nothing to suggest
7 that he gave a consideration to reopening as - - -

8 JUDGE GARCIA: So you're saying there's no
9 reasonable attorney at that point could have said the
10 risk outweighs the potential benefit.

11 MS. GURWITCH: Correct, Your Honor. And
12 just very briefly on the DNA that the - - - the
13 prosecution has conceded the DNA was not enough in
14 this case. It's a very weak DNA evidence, just
15 keeping in mind that initially there was no DNA
16 profile at all that could be generated, then years
17 later, a different method was used. And it's found
18 that my client, according to the new profile, is one
19 of a number of contributors. It's a very chaotic
20 scene and, you know, we don't know how they hat got
21 there. I mean, this - - - this is not very much.

22 CHIEF JUDGE DIFIORE: Okay, counsel, thank
23 you very much.

24 Thank you Your Honors.

25 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Roy Gray, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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