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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 103

JAMES E. GUILFORD,

Appellant.

20 Eagle Street
Albany, New York 12207
April 25, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 103, People v.
2 Guilford.

3 Counselor, would you like any rebuttal
4 time?

5 MR. BANASIAK: Yes, three minutes, please.

6 CHIEF JUDGE LIPPMAN: Three minutes, sure.
7 Go ahead.

8 MR. BANASIAK: Good afternoon, Your Honors.
9 My name is Piotr Banasiak, appearing on behalf of Mr.
10 James Guilford.

11 The central dispute in this case is the
12 significance of the lawyer when he first enters the
13 picture after a suspect has been aggressively
14 interrogated for nearly fifty hours, has been
15 deprived of sleep, and is mentally and emotionally
16 defeated.

17 CHIEF JUDGE LIPPMAN: Your - - - your
18 contention is that the lawyer can't change the game
19 at that point, because of the condition of the
20 defendant?

21 MR. BANASIAK: That's precisely right, Your
22 Honor. Our main point is that a lawyer is not a
23 panacea. He does not possess any sort of powers to -
24 - -

25 CHIEF JUDGE LIPPMAN: What does it mean

1 when the lawyer comes onto the scene in that kind of
2 situation?

3 MR. BANASIAK: In this sort of - - -

4 CHIEF JUDGE LIPPMAN: Is there any benefit
5 to the defendant, or it's just, at that point - - -

6 MR. BANASIAK: Well, I mean, he - - -

7 CHIEF JUDGE LIPPMAN: - - - it doesn't
8 serve as a - - - a milestone event? It's so far
9 gone? I mean, is that - - -

10 MR. BANASIAK: It is so far gone. I mean,
11 the lawyer was helpful in this case insofar as he
12 helped Mr. Guilford stop this fifty hours of more or
13 less torture. But he did not - - - he was not
14 sufficient to insulate the taint of those fifty hours
15 without more.

16 CHIEF JUDGE LIPPMAN: What would have
17 insulated the taint of the fifty hours?

18 MR. BANASIAK: Two things, or I guess I
19 should say three things. One is a showing that Mr.
20 Guilford actually slept before he made statements
21 that morning, that he actually ate before he made
22 statements that morning - - -

23 JUDGE GRAFFEO: What was the time break
24 there?

25 MR. BANASIAK: The time break was - - - it

1 was approximately eight hours. The evidence shows
2 that Mr. Guilford was brought to booking at 1:30 in
3 the morning and that he was arraigned at
4 approximately 9:30. There's a black hole as far as
5 what happened - - - happens during that eight hours.

6 JUDGE GRAFFEO: Does the record tell us
7 where they - - - where he was put after the booking?

8 MR. BANASIAK: No, Your Honor, and that - -
9 - that's the precise problem. We don't know how long
10 booking even took. We don't know what time he was
11 placed in a - - -

12 JUDGE SMITH: It's probably a fair
13 inference that he got some sleep for a change,
14 though?

15 MR. BANASIAK: I'm not sure it is, Your
16 Honor. I think the People had the burden, they have
17 - - - they had a heavy burden here. It was beyond a
18 reasonable doubt.

19 JUDGE SMITH: What do you say is the issue
20 we're deciding? Is it - - - is it attenuation?

21 MR. BANASIAK: That's one of the issues
22 insofar as attenuation is a necessary step in the
23 final determination of whether Mr. Guilford's
24 statements were - - - were voluntary. So this court
25 would have to find - - -

1 JUDGE SMITH: Doesn't it - - - I mean, what
2 all - - - what else turns - - - I mean, it seems to
3 be agreed that the statements made previously were
4 involuntary and that there was a coercive - - -
5 there's a finding below that - - - that there was
6 coercion that rendered the statements involuntary
7 during the fifty hours. Doesn't the whole case turn
8 on whether what happened the next morning was
9 attenuated from the fifty hours?

10 MR. BANASIAK: It does. But - - - and
11 that's the final question. And the precise problem
12 here is that the People have the burden to prove
13 attenuation beyond a reasonable doubt.

14 JUDGE SMITH: Is that a - - - is it a - - -
15 is that a question of law or a question of fact or a
16 mixed question, attenuation?

17 MR. BANASIAK: In this case it's a question
18 of law, because our position is that without any
19 showing of sleep, food, or that this attorney was
20 giving - - - given enough information about the
21 fifty-hour interrogation, this court cannot find or
22 the People failed to meet their minimum burden.

23 JUDGE SMITH: Well, even - - - even - - -

24 JUDGE GRAFFEO: Why isn't it a mixed
25 question? Tell me why it's different in this case?

1 MR. BANASIAK: I think this court has said
2 that if we're talking about involunt - - -
3 involuntariness as a matter of law, in the sense of
4 whether People met their minimum burden of presenting
5 enough proof from which a court can draw a rational
6 inference that there's attenuation - - -

7 CHIEF JUDGE LIPPMAN: So your - - - your
8 position is that the - - - the prosecution did not
9 prove - - - meet their burden, and as a matter of
10 law, this is not voluntary - - -

11 MR. BANASIAK: That's correct, Your Honor.

12 CHIEF JUDGE LIPPMAN: - - - or - - -

13 MR. BANASIAK: That's one of the reasons.
14 The other problem here is that our position is - - -

15 CHIEF JUDGE LIPPMAN: Could it be
16 voluntary, though? What - - - what is it that's
17 wrong here? How could there have been - - - how
18 could they prove that it was voluntary? To - - -

19 MR. BANASIAK: They could - - -

20 CHIEF JUDGE LIPPMAN: - - - to prove that
21 he ate, slept, had time to be with his counsel? What
22 did - - - what would have made it okay in this - - -
23 after - - - let's assume, which is what they found,
24 that the forty-nine hours was not voluntary, that all
25 those statements are suppressed, what has to happen

1 now to allow his later confession to come in?

2 MR. BANASIAK: I think it's very simple,
3 Your Honor. The People could have called jail
4 deputies. They could have - - - they could have put
5 forth video of Mr. Guilford actually sleeping between
6 X and Y hours.

7 JUDGE SMITH: Would that - - - would that
8 do it? Suppose we had video of him sleeping for
9 seven hours, beautifully and peacefully, and eating a
10 fine breakfast. Wouldn't - - - I mean, isn't there
11 still kind of a close connection between what
12 happened the night before, he says I'll make a deal
13 with you, the next morning he keeps the deal?

14 MR. BANASIAK: All I'm saying is, the
15 People would at least have to show that for a court
16 to make a determination that would - - - that this
17 court would then might - - - that this court might
18 have to give deference to.

19 CHIEF JUDGE LIPPMAN: But if he was -- but
20 - - - I think this is where the judge is going. If
21 he was so coerced, if what happened in the forty-nine
22 hours was coercion, can it be attenuated by a good
23 night's sleep and a meal or does there have to be
24 something more?

25 MR. BANASIAK: There should be something

1 more. I think we're asking this court for the
2 absolute - - -

3 CHIEF JUDGE LIPPMAN: In order to prove
4 voluntary, what's the something more? Or is it only
5 - - - or in answer to the judge's question, if you
6 had the video of him eating a nice meal, sleeping the
7 seven hours, that could be enough, is your position?

8 MR. BANASIAK: I don't think it would be
9 enough. I think it might - - - might turn this
10 question - - - I think it might turn this case into a
11 mixed question. But that's the very - - -

12 CHIEF JUDGE LIPPMAN: Then it would be a
13 mixed question. What about the role of the lawyer?
14 What would have to have changed in relation to what -
15 - - what the lawyer did or didn't do or should have
16 done in this situation?

17 MR. BANASIAK: Well, the primary problem
18 with the lawyer not being sufficient is that after
19 fifty hours, you're necessarily impaired cognitively.

20 JUDGE PIGOTT: Are you making the argument,
21 then, that there - - - that - - - forget attenuation.
22 You just - - - you just can't keep people under
23 interrogation in this society for two straight days,
24 and then put him in a cell, tell him to get a good
25 night's sleep, and then expect that everything's

1 going to be okay in the morning?

2 MR. BANASIAK: I think ultimately that's
3 what this court should say, that - - -

4 JUDGE PIGOTT: Such that if we kept him up
5 for eight straight days and gave him a full day of
6 sleep we could say that's attenuated, too?

7 MR. BANASIAK: No, I'm saying that that
8 wouldn't be sufficient.

9 JUDGE SMITH: What - - - what does
10 "attenuation" mean? Is it the same - - - is it the
11 opposite of proximate cause?

12 MR. BANASIAK: You know, it's - - - it's
13 hard to say. I think it's the same sort of a legal
14 determination whether the treatment that a defendant
15 has been subjected to - - -

16 JUDGE SMITH: I mean in theo - - -
17 presumably, if he had this fifty-hour experience and
18 then he goes home, and three weeks later he comes in
19 and says I'd like to talk to you, that would be
20 attenuation or at least it sounds like attenuation?

21 MR. BANASIAK: I think it would be
22 certainly a closer case than - - - than this one is.
23 I think there would be a - - - a better possibility
24 of assuming that this person got some rest and the
25 effects of sleep deprivation - - -

1 JUDGE RIVERA: Well, counsel, the problem
2 I'm having with what I see as the logical conclusion
3 of this argument is that it's not about the denial of
4 counsel during the fifty hours, it's about the
5 ability of your - - - of the - - - of your client to
6 be able to really think about the offer on the table,
7 really think about this confession. I don't see how
8 merely showing he has slept, I think is the point
9 other members have already made, or had a sandwich,
10 shows his cognitive rehabilitation, if you want to
11 call it that. There has to be some other way to show
12 that, and I'm - - - I'm really having difficulty
13 seeing how you would do that, given the state of our
14 law.

15 What - - - what is it - - - do you need a
16 medical exam?

17 MR. BANASIAK: You - - - you don't need a
18 medical exam. I think, at the very least, the People
19 would have to show that he actually slept and that he
20 actually ate.

21 JUDGE RIVERA: Yeah, but he may have slept
22 - - - I think that's the point we were - - - he may
23 have slept, but that doesn't mean his cognitive
24 abilities have recuperated, which I think is the
25 heart and soul of your argument, unless I have

1 misunderstood you, which is, it can't be voluntary,
2 because he's - - - doesn't have the cognitive ability
3 to make a decision here about what to say and what
4 not to say.

5 MR. BANASIAK: That's - - - that's correct.
6 But I mean as far as what we can accept as a matter
7 of law - - -

8 JUDGE RIVERA: Um-hum.

9 MR. BANASIAK: - - - I think it's - - - it
10 makes common sense to assume if somebody has been
11 deprived of basic necessities, then at the least,
12 they should be restored with those basic necessities.

13 CHIEF JUDGE LIPPMAN: Counsel, is it the
14 unprecedented nature of this length of this
15 interrogation with the teams of people coming in and
16 out from the prosecutorial side, is that what makes
17 this so different to find attenuation? Is it - - -
18 where do you draw the line? Is it - - - would
19 anybody say fifty hours is just totally beyond the
20 pale and puts this in a different category than - - -
21 than any of the normal cases that we might see about
22 interrogation and attenuation and was there a line
23 drawn? Is it - - - is it that that fifty hours is so
24 clearly above and beyond, or - - - or is there any
25 particular time that makes it that?

1 MR. BANASIAK: I think this case is
2 unprecedented. And I think this - - - it's certainly
3 within the province of this court to say that this is
4 ext - - - this is coercion in the extreme. There's
5 abs - - - there's no case in this state, as far as I
6 can tell, and there's really even no Supreme Court
7 case where somebody has been continuously interro - -
8 - interrogated for this amount of time. The longest
9 time is, I think, in Ashcraft v. Tennessee, where it
10 was thirty-six hours of essentially continuous
11 interrogation. This - - -

12 CHIEF JUDGE LIPPMAN: In practice, do you
13 know of this happening? I mean, does this happen,
14 it's just not in cases that we can find?

15 MR. BANASIAK: I know this. I know in this
16 case, there was a - - - there was a previous
17 interrogation where it was nineteen hours. There's
18 also a case pending before the Fourth Department
19 currently where there was actually a seventy-six-hour
20 interrogation. It wasn't quite the same as this
21 case. There - - - there were, I guess, more extended
22 breaks. But unfortunately, the Syracuse Police
23 Department has done this on more than one occasion.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. BANASIAK: And I think this court

1 should hold, as Your Honors are suggesting, that this
2 is so beyond the pale of what is permitted, this day
3 and age, such that it should never happen again. And
4 the rule this court lays down should, in no uncertain
5 terms, tell police that this is simply not - - - not
6 appropriate behavior.

7 CHIEF JUDGE LIPPMAN: Okay. Thank you,
8 counsel.

9 MR. BANASIAK: Thank you.

10 MR. MAXWELL: Good afternoon, may it please
11 the court. Your Honor, there - - -

12 CHIEF JUDGE LIPPMAN: Counsel, how could
13 fifty hours - - - how could there be any kind of an
14 attenuation when you have a - - - a defendant who's
15 just totally coerced, beaten down? You know, can you
16 just put him to bed or say that you put him to bed,
17 even with no proof, and say in the morning, he's
18 okay, great, let's - - - let's go and confess to this
19 thing and - - -

20 MR. MAXWELL: Well, Your Honor - - -

21 CHIEF JUDGE LIPPMAN: - - - arraign him and
22 whatever? Could that ever be?

23 MR. MAXWELL: It not only it could be; it
24 is. And we know that because when he testified at
25 trial he pretty much admitted he made this - - - this

1 post-arraignment statement voluntarily.

2 JUDGE PIGOTT: Yeah, why did it take ten
3 different shifts? What - - - you're not going to
4 suggest that the officers got tired, are you?

5 MR. MAXWELL: Your Honor, they didn't do a
6 good job of monitoring when he slept and when he
7 didn't sleep.

8 JUDGE PIGOTT: Did they videotape it?

9 MR. MAXWELL: They didn't videotape; they
10 do now. They did not then. But there are a series
11 of factors - - - if you're going to look at the
12 totality of the circumstances - - - and you're - - -

13 JUDGE SMITH: Really just - - - are you
14 really saying it's just a monitoring problem? Or
15 weren't they a little over-aggressive in the
16 interrogation?

17 MR. MAXWELL: The interrogation itself
18 didn't strike me as particularly aggressive.

19 THE COURT: I don't - - - but I don't mean
20 - - - I don't mean the content of the interrogation.
21 But keeping a guy for fifty hours in a roo - - - on
22 the theory that he can sleep on the floor if he's
23 tired, seems a little tough.

24 MR. MAXWELL: I'm not saying that's a good
25 idea. What I'm saying is that they - - - they should

1 have done a better job with it; but when you look - -
2 - the issue - - - and they suppressed - - - the judge
3 suppressed what happened during that period. But the
4 - - -

5 JUDGE SMITH: Well, I guess - - - I guess
6 my real question is, assuming - - - I could imagine
7 that there could be a confession that's attenuated
8 from that. But the end of the fifty hours was I'll
9 make a deal with you; I'll tell you where the body is
10 if I get A and B. They give him A and B, and the
11 next morning he tells them where the body is. How
12 can that possibly be attenuated? Why isn't that
13 direct continuation of the course of events?

14 MR. MAXWELL: Because a number of things.
15 At ninth - - - 9:20 the night before, he says bring
16 the assistant DA back; bring me a lawyer. They do
17 that. He meets with the lawyer for approximately two
18 hours.

19 JUDGE PIGOTT: Yeah, but this was - - -

20 JUDGE RIVERA: Did he know it was a lawyer?
21 Was he sure it was a lawyer?

22 MR. MAXWELL: He said that initially the
23 person wasn't dressed in a tie, and he was - - - he
24 thought maybe it wasn't a lawyer.

25 JUDGE RIVERA: I mean, it had been many

1 hours, and - - -

2 MR. MAXWELL: But - - -

3 JUDGE RIVERA: - - - and he wasn't thinking
4 straight, yes?

5 MR. MAXWELL: - - - but, Your Honor, again,
6 what we're looking at is, was what was done the next
7 day admissible.

8 CHIEF JUDGE LIPPMAN: Counselor, but then
9 the next day, following up on Judge Smith's question,
10 you put him in the same room, in the same, you know,
11 situation that they were in - - - that he was in
12 before. Does that say to you that - - - that after
13 fifty hours, there's a break, when you - - - when you
14 do - - - what he indicates at the time at the end of
15 the fifty hours, and then he comes back and he goes
16 and shows them the body, and you're saying that - - -
17 that - - - put him in the same room and he says okay,
18 here's - - - we'll go to the dumpster or whatever it
19 is?

20 MR. MAXWELL: Your Honor, it's the same
21 room. It's not the same situation. He's in that
22 room with his lawyer. To think that he had gone to
23 court and have the lawyer - - -

24 CHIEF JUDGE LIPPMAN: All the lawyer in
25 this case seem to be is to be a witness to the

1 confession. How could the lawyer in this - - - this
2 guy's cognitive state, be of any help to him?

3 MR. MAXWELL: The lawyer and the defendant
4 had to deal with the situation - - -

5 CHIEF JUDGE LIPPMAN: The lawyer was of
6 help to the prosecution. I'm not sure he was of help
7 to the defendant.

8 MR. MAXWELL: Well, he was - - - he was
9 tremendous help to the defendant, because - - -

10 CHIEF JUDGE LIPPMAN: How was he - - -

11 MR. MAXWELL: - - - he got - - -

12 CHIEF JUDGE LIPPMAN: - - - of tremendous
13 help?

14 MR. MAXWELL: - - - he got - - - he got him
15 an opportunity - - -

16 CHIEF JUDGE LIPPMAN: He made sure that the
17 confession was just right and got it, you know, taken
18 down and then went over the dumpster? That's how the
19 lawyer was helpful to him?

20 JUDGE RIVERA: I'm going to go further. It
21 sounds like he sanitized the whole process. Because
22 you're coming in and saying well, he had a lawyer.

23 MR. MAXWELL: Your Honor, in fairness to
24 this lawyer, and he's a good lawyer - - - he was a
25 good lawyer - - - he is dealing with a situation

1 where - - - and the defendant is dealing with a
2 situation where we don't know where the body is. The
3 offer has been extended that he could cap his
4 exposure to eighteen years to life. The longer he
5 waits, the longer there's a risk that we'll either
6 find the body or withdraw that offer.

7 JUDGE PIGOTT: All that's true. But there
8 just - - - there just came to be so many questions
9 when you - - - it was the - - - if I understand this
10 right, it was an assistant district attorney who went
11 to court to get a lawyer for him.

12 MR. MAXWELL: He made - - - he made some
13 calls to the city court judge on call to get an
14 assignment of counsel.

15 JUDGE PIGOTT: At least one of the police
16 who did this interrogation was a lawyer. He - - -
17 the defendant thought that the lawyer that came was
18 one of the police. There - - - there are just so
19 many questions, I - - - this shouldn't have happened,
20 I think you agree, and of course the court agreed.
21 And the question is, we're going to fence over the
22 definition of attenuation when we probably shouldn't.
23 We probably should say enough. We just can't do
24 this.

25 And we can't have the police putting courts

1 in a position where they're trying to define
2 attenuation after nineteen hours in Georgia, forty-
3 eight hours in Syracuse, and then a lawyer being
4 chosen by - - - and I know this isn't exactly
5 accurate - - - with the help of the District
6 Attorney, who then comes to the same place and they
7 get all the information they want.

8 MR. MAXWELL: Your Honor, if you're
9 implying that we picked the lawyer, that is not the
10 case.

11 JUDGE PIGOTT: No, what I'm saying is that
12 - - - that the defendant gets a lawyer because the
13 District Attorney goes to court and brings one back.
14 Now, what's he supposed to think?

15 MR. MAXWELL: The def - - - well, the
16 defendant got a lawyer because he said to the police
17 officer, I want a lawyer.

18 JUDGE PIGOTT: Right. But he didn't say, I
19 want Mr. Harris, or whatever is the lawyer's - - -

20 MR. MAXWELL: Oh, he didn't have a lawyer,
21 didn't name a lawyer.

22 JUDGE PIGOTT: Right. But you guys picked
23 him.

24 MR. MAXWELL: No, Your Honor, we didn't.

25 JUDGE PIGOTT: You can't prove that.

1 That's - - - do you see my point?

2 MR. MAXWELL: No, the - - - no, I - - -
3 Your Honor, I - - - I don't mean to be quarrelsome,
4 but there's a procedure. And you call - - - you try
5 and - - - you get a city court judge to make an
6 assignment.

7 JUDGE PIGOTT: I've got a better proce - -
8 - arraign him. Take him out, get him in front of the
9 judge then, and then have the judge say you're
10 entitled to an attorney, can you afford one. He says
11 no, and then he watches as the judge says I'm going
12 to appoint this - - -

13 MR. MAXWELL: Right.

14 JUDGE PIGOTT: - - - lawyer, in court.
15 Instead, that didn't happen.

16 MR. MAXWELL: It's exactly what happened.

17 JUDGE PIGOTT: No, you got a - - - you got
18 a DA, that got a lawyer for him that brought him
19 back.

20 MR. MAXWELL: What I mean by "exactly what
21 happened", Your Honor, is that the next time he was
22 questioned - - - that's why I meant a different
23 situation - - - he had been to court. There had been
24 an arraignment. And as this court wrote in People v.
25 Anderson, where they criticized the procedure because

1 the person was kept without interruption and without
2 arraignment, here, the - - - the - - -

3 JUDGE PIGOTT: Well, maybe I misunderstood.
4 Did - - - did - - - when the DA went to the city
5 court judge to get a lawyer, the defendant was with
6 him?

7 MR. MAXWELL: The defendant was at - - - at
8 the CID.

9 JUDGE PIGOTT: No, no, was at the
10 courthouse?

11 MR. MAXWELL: I believe he was in CID when
12 he said to Investigator - - - Sergeant Hilton, you
13 get the DA back here, you get me a lawyer - - -

14 JUDGE PIGOTT: Right.

15 MR. MAXWELL: - - - give you what you want.

16 JUDGE PIGOTT: Right.

17 MR. MAXWELL: The lawyer then came to CID
18 that night and met with him two hours and said he's
19 not saying anything further.

20 JUDGE PIGOTT: Yeah - - - no. I don't - -
21 -

22 MR. MAXWELL: And then we moved - - -

23 JUDGE PIGOTT: - - - we're spending too
24 much time on this.

25 MR. MAXWELL: - - - to the next day.

1 JUDGE PIGOTT: But I - - - but my point was
2 that when he said get me a lawyer, you could have
3 arraigned him that night. He could have gotten a
4 lawyer that night - - -

5 MR. MAXWELL: Um-hum.

6 JUDGE PIGOTT: - - - and then things would
7 have been that way. As it was, he sat in the Blue
8 Room and a lawyer shows up.

9 MR. MAXWELL: And talks to him and says
10 he'll say nothing further.

11 JUDGE PIGOTT: Right. But my point is - -
12 -

13 JUDGE RIVERA: What - - -

14 JUDGE PIGOTT: - - - the lawyer that shows
15 up is a lawyer that the police got for him, as far as
16 he knew?

17 MR. MAXWELL: Well - - -

18 JUDGE RIVERA: And someone he thinks isn't
19 a lawyer.

20 MR. MAXWELL: Initially.

21 JUDGE RIVERA: So what - - - when did the
22 lawyer know about these multiple days that he was
23 being interrogated? When did the lawyer appreciate
24 that that's the condition his - - - his client was
25 under?

1 MR. MAXWELL: I don't know precisely, Your
2 Honor.

3 JUDGE RIVERA: Um-hum.

4 MR. MAXWELL: He had to deal with - - -

5 JUDGE RIVERA: Could it have been after he
6 confessed?

7 MR. MAXWELL: He probably - - - he probably
8 knew more about the case the further it went along.

9 JUDGE SMITH: But on the other hand, maybe
10 - - -

11 JUDGE RIVERA: Like, it could have been
12 after - - -

13 MR. MAXWELL: It could have been after that
14 he knew - - -

15 JUDGE RIVERA: - - - he confessed?

16 MR. MAXWELL: - - - how long - - -

17 JUDGE RIVERA: After he confessed?

18 MR. MAXWELL: - - - it was. But again, he
19 was - - - he and the defendant were in a time-
20 pressured situation. And as the defendant testified
21 at trial, I - - - I figured I had to give something
22 to get something. He understood that. That is a - -
23 -

24 CHIEF JUDGE LIPPMAN: Did he understand - -
25 - could he understand anything at that point?

1 MR. MAXWELL: Well, at that point, being
2 the next day. And he was - - - he had been - - -
3 there'd been at least an eight-hour break.

4 CHIEF JUDGE LIPPMAN: Let me ask you a
5 question. Is there ever a point that you would say,
6 from the People's side, that that interrogation was
7 too long and this is just not right and that this is
8 misconduct; this is - - - cannot be that the - - -
9 that the individual defendant could agree to
10 anything?

11 If this had been eighty-two instead of
12 forty-nine, would you say, you know what, even though
13 eight hours later, it can't be? Or is it the same?
14 Even after 82 or 102, would you say given exactly
15 what happened, if there's additional - - - does a
16 point come where you would say, as the People are as
17 interested as everybody else in justice - - -

18 MR. MAXWELL: Um-hum.

19 CHIEF JUDGE LIPPMAN: - - - that this is
20 unacceptable?

21 MR. MAXWELL: Okay. What I would say, Your
22 Honor, is that no matter of the length, I think you
23 should never set a time limit. You should look, as
24 you - - - as the court talked - - - as this court
25 talks about in Anderson - - - all the circumstances,

1 and that's how you arrive at it.

2 JUDGE PIGOTT: How do you define
3 attenuation? We were asking that earlier.

4 MR. MAXWELL: Well, I think it goes to - -
5 - one of the difficulties is that it goes into the
6 state of mind of the person.

7 JUDGE PIGOTT: Of the defendant?

8 MR. MAXWELL: Of the defendant.

9 JUDGE PIGOTT: Okay.

10 MR. MAXWELL: And one of the things, when
11 you look at that, I'd ask you to look at People v.
12 Tanner, which was your case from 30 NY2d, at 102,
13 where the defendant never testified that he was
14 committed to his later statement by his earlier
15 statement. And this court found that significant.

16 JUDGE SMITH: Would - - - would - - - I
17 mean, would it be - - - is attenuation just the
18 negative of proximate cause, or could you have - - -
19 if you - - - could you have something that would
20 proximately cause the confession, and yet still find
21 attenuation?

22 MR. MAXWELL: I believe so, Your Honor,
23 because the phrase we're working with is "a free and
24 rational choice". And it's rational to choose - - -

25 JUDGE SMITH: But if you have - - - I mean,

1 I - - - because we're not dealing with just a lack of
2 Miranda warnings here. We're dealing with actual
3 coercion, which was found below, right?

4 MR. MAXWELL: For the period of time - - -

5 JUDGE SMITH: Yeah. But there was a period
6 of coercion. If the coercion was the proximate cause
7 of the confession, isn't that the end of the ball
8 game?

9 MR. MAXWELL: No, Your Honor. I st - - -
10 I'm still saying you have to look at what was going
11 on at the time the statement was made that was - - -
12 that was used.

13 JUDGE SMITH: What could possibly have been
14 - - - in this situation, what could possibly have
15 been going on that made the coercion irrelevant to
16 his confession?

17 MR. MAXWELL: Well, there's a whole series
18 of things that remove the taint of the earlier
19 session from the later session. The - - - sent to
20 the jail. The chance to sleep and eat - - - yes, we
21 didn't bring in the menu from the jail, but the
22 chance to sleep and eat. The assignment of counsel.
23 The discussion with counsel, not only in that night
24 but the following morning after arraignment.

25 The fact that the defendant and counsel

1 approached the police. I mean, what are the police
2 supposed to do? He wants to come to us. He wants us
3 to give (sic) information that could help us find the
4 body.

5 JUDGE RIVERA: If he had not - - - if he
6 had not - - -

7 MR. MAXWELL: What were we supposed to say;
8 no?

9 JUDGE RIVERA: - - - slept, and he had not
10 eaten at all - - - at all. We knew for sure,
11 positively, that that had not occurred during - - -
12 during the eight hours, would that matter, as long as
13 he had the lawyer? Is it your position, as long he's
14 got the lawyer and they come back to us?

15 MR. MAXWELL: Well, it's not only the
16 lawyer. It's going to court in front of a judge,
17 getting arraigned, and having an offer on the table
18 that is to some degree a favorable offer.

19 He later changed his mind, which is his
20 right to do.

21 CHIEF JUDGE LIPPMAN: Counsel, but can you
22 come back after fifty hours, which we know is
23 coercion, and say, great, I'm going to get a good
24 night's sleep, and I'm going to go in in the morning
25 and tell everything I know; is that voluntary?

1 Could you on fifty hours say, great,
2 they're putting me now, I have my privacy. I'm going
3 to - - - I'm going to grab a sandwich. I'm going to
4 get a good - - - a good nap, and then I'm going to
5 come in and I'm going to - - - could it be, if it is
6 coercion - - - I think it's another way of asking,
7 really, what Judge Smith asked you before. If the
8 coercion really is the proximate cause of the
9 confession, how could any of that matter?

10 MR. MAXWELL: It - - -

11 CHIEF JUDGE LIPPMAN: Whether you, you
12 know, got two hours of sleep or eight hours or ate or
13 didn't eat?

14 MR. MAXWELL: Because, Your Honor, it's a -
15 - - it's a new day, it's a new circumstance. Are we
16 going to say he can never plead guilty at any time
17 during the proceeding?

18 CHIEF JUDGE LIPPMAN: No, no. But I'm
19 giving you the specifics of this case. Can you
20 really, after what's been deemed to be conversion - -
21 - coercion, say that okay, now, you know, I'm going
22 to - - - I'm going to get a good sleep so that I can
23 voluntarily confess, you know, the whole shebang and
24 tell where the body is? Could that be voluntary?
25 And could it be that as an issue of law, in this

1 particular circumstance, it's just not voluntary,
2 period?

3 MR. MAXWELL: Well, that's what - - - how
4 far we have to go to find for the defendant. Here
5 the hearing court judge who heard the witnesses,
6 heard the defendant testify, found that the later
7 statement was voluntary, did not find - - - make that
8 leap from one day to the next, gave probably what was
9 a generous ruling to the defendant to suppress
10 everything that was said - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but I'm saying
12 could it be? I guess, is that possible? Is that - -
13 - could that ruling be legally right, I guess, is my
14 question?

15 MR. MAXWELL: Oh, exactly. The judge - - -
16 Judge Fahey, our hearing court judge, got it right.
17 He made - - - he had to draw - - - we're talking a
18 lot about where do you draw lines. He had to draw
19 some lines. He drew them in a way that was favorable
20 to the defendant in that he said everything from the
21 fifty hours is out, even, you know, the very first
22 part of it.

23 And he said that he did not find it was
24 involuntary the next day, when you had a pronounced
25 break. I mean, the dissent at the Appellate Division

1 tries to say that eight hours isn't pronounced.

2 JUDGE SMITH: How can you say this wasn't a
3 continuous course of events when he's - - - when he's
4 essentially doing in the morning exactly what he
5 promised to do the night before?

6 MR. MAXWELL: He's doing it only after he's
7 had eight hours to think about it, consultation with
8 counsel, presence of counsel, arraignment in front of
9 a judge.

10 JUDGE SMITH: I could see how all those
11 things could lead to a break in the course of events.
12 It just looks to me from these facts, the course of
13 events wasn't broken.

14 MR. MAXWELL: So it's a mixed question.

15 JUDGE GRAFFEO: The hearing transcript
16 doesn't really show what occurred during the eight
17 hours.

18 MR. MAXWELL: Right. And perhaps we should
19 have done more with that. He's sent over to our
20 jail. The sheriff runs the jail. The police - - -
21 not in the custody of the Syracuse Police; he's moved
22 over there. Again, I just refer you back to Tanner
23 where it says when the defendant, even himself,
24 doesn't say he was influenced by the earlier
25 questioning, where are we going?

1 JUDGE SMITH: You say it's a - - - you say
2 it's a factual issue. I mean, you say attenuation's
3 a mixed question in itself.

4 MR. MAXWELL: Um-hum.

5 JUDGE SMITH: Are there any specific facts,
6 like old-fashioned facts, how long he slept, where he
7 was, how much he ate, that - - - that the judge found
8 in your favor?

9 MR. MAXWELL: He found several facts. The
10 fact of the break; the fact of the assignment of
11 counsel; the fact that - - -

12 JUDGE SMITH: Well, these are all
13 undisputed.

14 MR. MAXWELL: Well - - -

15 JUDGE SMITH: There's - - - I mean, is
16 there any - - - is there anything that turns on
17 credibility or which factual inference you draw or
18 anything like that?

19 MR. MAXWELL: Well, there would have been,
20 perhaps, if the defendant himself had testified at
21 the hearing that he felt coerced into making the
22 later statement by the earlier statement. But he
23 didn't.

24 JUDGE PIGOTT: I don't want to pin you down
25 on this. Mr. Banasiak makes the point that there are

1 other cases like this. Is this - - - is this fairly
2 standard operating procedure in Onondaga County and
3 the City of Syracuse?

4 MR. MAXWELL: I would say it's not fairly
5 standard operating procedure. There is another case
6 with a lengthy interrogation that we're going to be
7 litigating.

8 JUDGE PIGOTT: That's the only one you know
9 of?

10 MR. MAXWELL: Yeah.

11 JUDGE PIGOTT: I mean, this isn't what they
12 normally do in - - -

13 MR. MAXWELL: Yeah, but again - - - I mean,
14 we hear - - - if I may just have a moment - - -
15 torture, torture, torture. No. These peo - - - they
16 did keep him a long time. They didn't keep track of
17 when he was sleeping. They offered him food. They
18 gave him a sandwich when he didn't even want one. If
19 he stayed - - - if he stayed awake after those forty-
20 eight hours in the jail, God bless him, I don't know
21 how he would do it if he was really that tired - - -
22 but when he testifies he says I was tired during that
23 session, he says nothing - - - he just leaps over the
24 later session.

25 JUDGE PIGOTT: Well, we don't know how

1 bright he was or - - - I mean, I don't mean to pick
2 on him, either. But I mean, well, I'll leave it
3 there.

4 MR. MAXWELL: Well, again, Your Honors,
5 it's a mixed question and the judge determined it
6 correctly.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks, counselor.

9 MR. MAXWELL: Thank you. I'd ask you to
10 affirm.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. BANASIAK: I think, as long as this
13 court doesn't have any more questions, I might just
14 rely on my brief. I think - - - I guess I should add
15 that this is - - - this isn't answered by People v.
16 Tanner, and the chain of events theory does not
17 depend on a suspect's state of mind. It's a
18 consideration, but it's not the only consideration.

19 CHIEF JUDGE LIPPMAN: Okay - - -

20 MR. BANASIAK: Thank you.

21 CHIEF JUDGE LIPPMAN: - - - counselor.
22 Thanks. Appreciate it. Thank you both.

23 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. James E. Guilford, No. 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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