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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 169

JERMAINE DUNBAR,

Respondent.

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PEOPLE,

Appellant,

-against-

No. 170

COLLIN F. LLOYD-DOUGLAS,

Respondent.

-----

PEOPLE,

Appellant,

-against-

No. 171

EUGENE POLHILL,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 18, 2014

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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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 169, 170, and 171.

3 Counselor? Would you like any rebuttal  
4 time, counselor?

5 MS. ALDEA: Yes, Your Honor, five minutes,  
6 please.

7 CHIEF JUDGE LIPPMAN: Five minutes, you  
8 have it. Go ahead.

9 MS. ALDEA: Thank you. May it please the  
10 court, my name is Donna Aldea from Barket, Marion,  
11 Epstein & Kearon, and I represent the People on this  
12 appeal pro bono. Your Honors, there is a vast  
13 difference between the question of whether Miranda  
14 warnings were given, effectively given, and the  
15 entirely separate question of whether the waiver that  
16 afterwards occurs is the product of a knowing,  
17 intelligent - - -

18 CHIEF JUDGE LIPPMAN: Counselor, how - - -  
19 let's - - - let's cut to the chase. How does that  
20 preliminary process that goes on in the Queens  
21 District Attorney's office before you get to Miranda  
22 - - - how does that impact on our precedents, on  
23 national precedents, in relation to this seminal  
24 right that defendants have to remain silent and not  
25 incriminate themselves?

1 MS. ALDEA: The way that it impacts, it is  
2 one factor that gets considered under the totality of  
3 the circumstances, with respect to the individual  
4 circumstances of each suspect.

5 JUDGE PIGOTT: Yeah, but that's an argument  
6 you're making, it - - - it seems to me, to say don't  
7 throw out all however thousands of people who've gone  
8 over this process with one decision, right?

9 MS. ALDEA: Well, Your Honor, that's not  
10 the only reason I'm making. I mean certainly that's  
11 true, but the reason that I'm making it is because  
12 the question of how that impacts an individual  
13 suspect has to be gauged based on the circumstances  
14 of the suspect.

15 CHIEF JUDGE LIPPMAN: Counselor, but can  
16 you - - -

17 MS. ALDEA: It will be evaluated  
18 differently.

19 CHIEF JUDGE LIPPMAN: Can you have an  
20 effective warning of one's rights given these  
21 preliminary discussion that is invited in - - - in  
22 Queens County, too?

23 MS. ALDEA: Yes, Your Honor, I think you  
24 can. And it - - -

25 CHIEF JUDGE LIPPMAN: Why? Let's - - -

1 let's get into the details.

2 MS. ALDEA: Sure, there's a - - -

3 CHIEF JUDGE LIPPMAN: You don't think it  
4 dilutes or - - - a - - - a Miranda or confuses the  
5 defendant? That's the - - - the issue of contention.

6 JUDGE ABDUS-SALAAM: Now - - -

7 CHIEF JUDGE LIPPMAN: Tell us why not.

8 JUDGE ABDUS-SALAAM: - - - could I also add  
9 is - - - isn't that the thresho - - - threshold  
10 question that you have to ask whether it's effective  
11 rather than getting into the totality of the  
12 circumstances initially?

13 MS. ALDEA: If I might, if I can answer - -  
14 -

15 CHIEF JUDGE LIPPMAN: Answer both in  
16 whatever order you want.

17 MS. ALDEA: - - - your question first and  
18 then - - - and I'll come back. So yes, that is the  
19 threshold question. And I think that the key to the  
20 difference, to the distinction - - - which is not  
21 just one of form, it goes to whether it's a per se  
22 violation or whether you do it under totality - - -  
23 is to be effective as Miranda dictated means that the  
24 suspect understands that he has a right to remain  
25 silent, a right to counsel, a right to have counsel

1 appointed.

2 JUDGE GRAFFEO: Then coun - - - counsel,  
3 why not give the Miranda warnings first and then do  
4 whatever script or - - -

5 MS. ALDEA: Well, that's a third question.

6 JUDGE GRAFFEO: - - - recitation you - - -  
7 you want to do?

8 MS. ALDEA: That's a third question. So  
9 the answer to that is it has never been done that  
10 way. I mean, you're seeing it on videotape now but  
11 the reality is if you start with - - -

12 JUDGE GRAFFEO: Right, and - - - and I - -  
13 - and I'm asking - - -

14 MS. ALDEA: - - - you have a right - - -

15 JUDGE GRAFFEO: - - - isn't there some  
16 inference that we gather from that that you want to  
17 do those preliminary questions first rather than  
18 after the Miranda warnings, because it raises the  
19 possibility of being able to get more confessions,  
20 which ties into the Chief's questions - - -

21 MS. ALDEA: Well, Your Honor - - -

22 JUDGE GRAFFEO: - - - that I should let you  
23 answer?

24 MS. ALDEA: Yes, I - - - I still haven't  
25 finished answering Judge Abdus-Salaam's - - -

1 CHIEF JUDGE LIPPMAN: Well, can you - - -

2 MS. ALDEA: - - - question.

3 CHIEF JUDGE LIPPMAN: - - - start now and  
4 go backwards?

5 MS. ALDEA: Go back. Now I go back.

6 CHIEF JUDGE LIPPMAN: Start with the - - -  
7 with Judge Graffeo's.

8 MS. ALDEA: So - - - so it's not to get  
9 more confessions, but it certainly does pres - - -  
10 pres - - - preser - - - present, rather, a context to  
11 the warnings that follow.

12 JUDGE SMITH: Well, isn't - - - isn't - - -  
13 wait a minute. Surely you are trying to get them to  
14 - - - to waive, aren't you? That's the whole point.

15 MS. ALDEA: You're trying to provide a  
16 context. So - - -

17 JUDGE SMITH: A context, you - - - you - - -  
18 - you're giving them reasons not to exercise their  
19 rights?

20 MS. ALDEA: You're telling them - - - you  
21 know, look, it needs to be a knowing, intelligent,  
22 and voluntary decision. And the point is that the  
23 best way to do that is to let suspects understand you  
24 have the right to remain silent, but you also have  
25 the right to talk to me.

1 CHIEF JUDGE LIPPMAN: Your answer then to  
2 Judge Smith's question now is yes?

3 MS. ALDEA: My answer is yes.

4 CHIEF JUDGE LIPPMAN: Is it yes?

5 MS. ALDEA: It provides context. It  
6 certainly does - - -

7 CHIEF JUDGE LIPPMAN: No, it gives them  
8 reasons - - -

9 MS. ALDEA: - - - prime suspect - - -

10 CHIEF JUDGE LIPPMAN: - - - not to, right?

11 MS. ALDEA: It gives them reasons to want  
12 to choose to exercise that right. Look I'm going to  
13 do all three now.

14 JUDGE RIVERA: And - - - and - - - and it  
15 gives them - - -

16 MS. ALDEA: To exercise that right - - -

17 CHIEF JUDGE LIPPMAN: You're never going to  
18 get back to it.

19 JUDGE RIVERA: But it gives them - - -

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 JUDGE RIVERA: But it gives them reason - -  
22 - but it gives them reasons to do that without the  
23 benefit of a conversation with a lawyer to  
24 counterweigh the benefits that you allege in the  
25 script are available to them if they talk?



1 MS. ALDEA: Well, Your Honor, that would  
2 always be the case. My point is - - -

3 JUDGE RIVERA: That's not always the case.  
4 Let's talk about the preamble. What in the preamble  
5 - - - they - - - they claim that there are statements  
6 in the preamble that are, "generously categorized as  
7 misleading, perhaps not so generously categorized as  
8 false." What's your response to that?

9 MS. ALDEA: None of them are misleading.  
10 None of them are false.

11 JUDGE RIVERA: None of them are misleading  
12 and none of them are false? "This is your  
13 opportunity to tell us your story. If there's  
14 something you need us to investigate about this case,  
15 you have to tell us now so we can look into it."

16 MS. ALDEA: Absolutely, and that - - -

17 JUDGE RIVERA: Okay, well, you have to tell  
18 us now?

19 MS. ALDEA: Absolutely.

20 JUDGE RIVERA: If they told you later you  
21 would not look into it?

22 MS. ALDEA: Because, Your Honor, you can't  
23 - - - you can't cherry-pick an individual comment,  
24 and that's never been the analysis.

25 JUDGE RIVERA: But that was not my

1 question.

2 MS. ALDEA: No, I am answering - - -

3 JUDGE RIVERA: No, but I - - - no, I need  
4 answer to my question.

5 MS. ALDEA: That - - -

6 JUDGE RIVERA: How is this not misleading  
7 or untrue?

8 MS. ALDEA: Because what that says - - -  
9 the way that I read that and the way it would be  
10 interpreted and the way it should be interpreted  
11 based on what it says - - - you're about to go get  
12 arraigned. If you want your case investigated before  
13 you get charged with a crime, then this is - - -

14 JUDGE RIVERA: Where does it say that?

15 MS. ALDEA: - - - the time to do it.

16 JUDGE RIVERA: Where does it say that?

17 MS. ALDEA: It says that this will be the  
18 only opportunity you will have to talk to me prior to  
19 your arraignment on these - - -

20 JUDGE RIVERA: No, that's not - - -

21 MS. ALDEA: - - - charges.

22 JUDGE RIVERA: - - - what I see. "This is  
23 your opportunity to tell us your story. If there's  
24 something you need us to investigate about this case"  
25 - - - about this case. It doesn't say before

1 arraignment.

2 MS. ALDEA: "You have to tell us now."

3 JUDGE RIVERA: - - - "you have to tell us  
4 now so we can look into it."

5 MS. ALDEA: If you want the District  
6 Attorney's office to investigate this case before  
7 you're charged then - - -

8 JUDGE RIVERA: That's not what it says.

9 MS. ALDEA: But, Your Honor, what I'm  
10 saying is that to glean the meaning from it you need  
11 to look at the context as a whole.

12 JUDGE SMITH: But would you - - - would you  
13 - - - would you concede that if it's taken literally  
14 it's not - - - it's incorrect?

15 MS. ALDEA: Okay, so let's assume that.  
16 Then the standard would be - - - the question would  
17 be if it was a deception - - -

18 JUDGE SMITH: You - - - you - - - you - - -  
19 you - - - you - - - you say don't take it literally.  
20 In context it's just the same. If you changed "you  
21 have to tell us" to "please tell us" it wouldn't make  
22 the slightest difference?

23 MS. ALDEA: Well, Your Honor, if I take it  
24 completely literally it's actually completely true.  
25 I'm not doing that because I'm trying to be fair.

1 But really, the investigator's sitting in the room.  
2 If this suspect wants them, me, to investigate this  
3 case right, the - - - me, the investigator, he must -  
4 - -

5 JUDGE SMITH: You - - - you - - - you - - -  
6 you - - - you're making the point that - - - that - -  
7 - that - - -

8 MS. ALDEA: - - - tell me now, otherwise I  
9 can't. Right, I'm just saying - - -

10 JUDGE SMITH: - - - tota - - - taking  
11 things totally literally can just be silly.

12 MS. ALDEA: Exactly, right.

13 CHIEF JUDGE LIPPMAN: All right, counselor,  
14 but - - -

15 JUDGE SMITH: But words you have to tell us  
16 are - - - anybody reading them - - - yeah - - - yeah  
17 - - - you - - - you - - - you have to tell us. It  
18 doesn't on its - - - on its face sort of takes you  
19 aback if you're talking to somebody who has a right  
20 to remain silent.

21 MS. ALDEA: So then my point is this  
22 doesn't contradict the knowledge that you have a  
23 right to remain silent. So it doesn't eviscerate the  
24 effectiveness of Miranda.

25 CHIEF JUDGE LIPPMAN: Well, counselor, but

1 now - - - but now - - -

2 MS. ALDEA: But it does lead into - - -

3 CHIEF JUDGE LIPPMAN: Counselor, but - - -

4 but that leads us - - -

5 MS. ALDEA: - - - a factor that can

6 eviscerate the - - -

7 CHIEF JUDGE LIPPMAN: - - - back to the  
8 question that I'm asking you. Does that preliminary  
9 script dilute Miranda or confuse the defendant who  
10 doesn't have their rights yet? So when you say that  
11 it doesn't change the fact that you have your rights  
12 so it doesn't interfere with it, you don't know you  
13 have your right yet. And yet you're being told these  
14 things or cajoled into talk to us now when you don't  
15 know yet that you have a right not to talk to them.  
16 So my question is, back to where we started, tell me  
17 why it does or does not dilute Miranda or, at the  
18 very least, confuse the defendant so they're not sure  
19 quite what their rights are even when eventually they  
20 - - - they're - - - they're told what they are.

21 MS. ALDEA: Because significantly, they  
22 don't speak at all until after they are clearly  
23 apprised of their rights. And so the impact of what  
24 is said before - - - and this is different, by the  
25 way, than all of this court's jurisprudence and all

1 federal jurisprudence - - -

2 JUDGE READ: So that's - - - that's the - -  
3 - that's - - - that's the key - - -

4 MS. ALDEA: - - - that has preceded it.

5 JUDGE READ: - - - thing? There's the  
6 preamble and then there's the warning?

7 MS. ALDEA: Correct, and that - - -

8 JUDGE READ: That means the pre - - - and  
9 that because of the order that - - - that - - - that  
10 nobody speaks until after the warning then we should  
11 find the preamble doesn't negate the warning or  
12 dilute it in the Chief's words?

13 MS. ALDEA: Well, Your Honor, you can't  
14 find that it's part of the interrogation. So I'm  
15 reading now from People v. Paulman. It says, "Our  
16 rule is applied whenever a Mirandized statement  
17 follows an unwarned statement." In other words, the  
18 suspect needs to speak as a result of what's being  
19 said before for that to - - -

20 JUDGE PIGOTT: But what's the - - -

21 MS. ALDEA: - - - constitute interrogation,  
22 coming back to Judge Graffeo's question, that needs  
23 to be preceded by Miranda.

24 JUDGE PIGOTT: What's the failing in the -  
25 - - in the police department and in the District

1 Attorney's Office that they're not prepared to - - -  
2 to arraign somebody on the day of the arraignment,  
3 such that they have to go through this dog-and-pony  
4 show with the court standing by next door?

5 MS. ALDEA: Well, actually, Your Honor,  
6 Queens has the fastest arrest to arraignment time - -  
7 -

8 JUDGE PIGOTT: But they're screwing up.

9 MS. ALDEA: - - - of any - - -

10 JUDGE PIGOTT: I mean some - - - somebody  
11 in the DA's office says we don't think the police did  
12 a good enough investigation here. And in their own  
13 office saying and we don't think we've done a good  
14 enough investigation here. We're about to arraign  
15 somebody on a case that we could be flat-out wrong  
16 about.

17 MS. ALDEA: But - - -

18 JUDGE PIGOTT: And not only do we think it  
19 in this case, we think about it in every single case  
20 we have. That's how bad we are, and that's how  
21 little faith we have in the police. And I'm  
22 wondering how do we fix that so you poor people don't  
23 have to go through this preamble every time you have  
24 a - - - an arraignment coming.

25 MS. ALDEA: I would say the only way to fix

1 that would be to have no wrongful convictions because  
2 this program was started as a response to that and as  
3 a response to the call to videotaped interrogations.  
4 It was one of the first in the state.

5 And honestly, Your Honor, I wouldn't  
6 characterize it as you people are so bad it's a  
7 failing. I would prefer to characterize it as we're  
8 so careful because the prosecutor has a dual ro - - -  
9 role. You know, we've been accused as usurping the  
10 role of defense attorneys in this case by doing the  
11 investigation at all before a lawyer - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but counselor,  
13 doesn't it - - -

14 MS. ALDEA: - - - comes into the case, but  
15 - - -

16 CHIEF JUDGE LIPPMAN: - - - doesn't it run  
17 - - -

18 MS. ALDEA: - - - it's the prosecutor's  
19 role.

20 CHIEF JUDGE LIPPMAN: Does it run counter  
21 to the spirit of Miranda, which gives the, here,  
22 which - - - which we know says that look, don't  
23 confuse the roles, exactly what you're talking about.  
24 Don't - - - don't tell him - - - her - - - or her  
25 that the prosecutor is your friend; we want to help



1           you.  It's kind of counterintuitive to what Miran - -  
2           - Miranda's supposed to be telling them.  Hey, this  
3           is an adversarial proceeding.

4                        So how do you - - - how do you counter  
5           that?  That it - - - that it's - - - it's clearly  
6           implying we could help you.  We're your friends.  And  
7           doesn't it kind of confuse the roles, and if it  
8           confuses the roles - - - confuse the roles, doesn't  
9           it confuse the defendant?  Or does it?

10                      MS. ALDEA:  Well, Your - - - Your Honor,  
11           the suspect is never told we are here to help you.  
12           Saying that we will investigate what you tell us, if  
13           you choose to speak to us - - -

14                      CHIEF JUDGE LIPPMAN:  It - - - it certainly  
15           - - -

16                      MS. ALDEA:  - - - does not mean we will  
17           help you.

18                      CHIEF JUDGE LIPPMAN:  Counselor, counselor,  
19           common sense.  You tell me that that script isn't  
20           saying look, we can help you.  You just have to - - -  
21           you have an alibi?  Tell us now.  You have something  
22           you want to look at?  Tell us now.  That doesn't - -  
23           - and all the different thing - - - it doesn't say to  
24           the defendant listen, tell us now and you're going to  
25           be better off.  We're going to help you.  When again,

1 the whole purpose of Miranda - - - that's what I want  
2 to get you to focus on.

3 MS. ALDEA: Well, the purp - - - so the  
4 purpose of Miranda - - -

5 CHIEF JUDGE LIPPMAN: Where - - - is it  
6 consistent with what Miranda's supposed to be doing?

7 MS. ALDEA: Yes, yes, Your Honor.

8 JUDGE PIGOTT: Tell me why.

9 MS. ALDEA: The purpose of Miranda - - -  
10 Miranda is neutral. Miranda was never designed to  
11 tell a suspect you should not exercise your choice to  
12 speak to us. It was never meant to do that. Miranda  
13 said the Constitutional minimum - - -

14 CHIEF JUDGE LIPPMAN: But Miranda - - - but  
15 Miranda does say things along the line that I'm  
16 saying. That - - -

17 MS. ALDEA: No - - - no, Your Honor. It  
18 says you - - -

19 CHIEF JUDGE LIPPMAN: No, it doesn't - - -  
20 it doesn't say that it's an adversarial proceeding  
21 and that - - - and that, you know, there are  
22 different roles here, and that you shouldn't cajole,  
23 in effect, a defendant into saying the prosecutor,  
24 we're your friends. You know, when the defense  
25 attorney's supposed to be representing them. How do

1           you kind of make all that fit together?

2                   MS. ALDEA: Well, let me try to answer it  
3           in two stages.

4                   CHIEF JUDGE LIPPMAN: Sure.

5                   MS. ALDEA: And at some point I'm going to  
6           try to get back to the original question, as well.  
7           The first part is - - -

8                   CHIEF JUDGE LIPPMAN: You're not leaving  
9           until you answer your original question.

10                  MS. ALDEA: Good, good.

11                  CHIEF JUDGE LIPPMAN: Go ahead.

12                  MS. ALDEA: I'm glad to hear that. I'm  
13           glad to hear that. The first part of it is with  
14           respect to Miranda's purpose and what Miranda says.

15                  CHIEF JUDGE LIPPMAN: Yes.

16                  MS. ALDEA: Miranda provided a  
17           Constitutional minimum saying we're not going to  
18           microanalyze each case and individual circumstances  
19           of each defendant. We say across the board, whether  
20           it's Justice Scalia in central booking - - - he  
21           frequents Queens, so that's the only reason I use him  
22           as an example - - - or whether it's some defendant  
23           who is completely naïve, this is the minimum. You  
24           have to tell them you have the right to remain  
25           silent. You have the right to an attorney.

1                   Now getting to Your Honor's question about  
2                   whether the script actually countermands that, the  
3                   script does not countermand that in any way, because  
4                   it still tells them, with respect to effectiveness,  
5                   the effective conveyance, they do have a right. At  
6                   most what defendant is arguing is that it - - - and  
7                   as Your Honor has said it it - - - yourself - - - it  
8                   is a factor that may coerce them, looking at the  
9                   worst-case scenario - - -

10                   CHIEF JUDGE LIPPMAN: Right.

11                   MS. ALDEA: - - - to exercise that right  
12                   that they know they have in a particular way.

13                   CHIEF JUDGE LIPPMAN: Let - - - let me ask  
14                   you a question. Take the script and just what - - -  
15                   what are you trying - - - what is the prosecutor  
16                   trying to convey? In the simplest of terms, is it  
17                   that if you talk to us now we'll help you? That's my  
18                   words. What is it that - - - that - - -

19                   MS. ALDEA: It is.

20                   CHIEF JUDGE LIPPMAN: - - - you would say  
21                   it's conveying, coun - - -

22                   MS. ALDEA: If you have something that will  
23                   show us that you should not be charged, this is your  
24                   last opportunity to tell us because we even add a  
25                   right - - -

1 CHIEF JUDGE LIPPMAN: Then we can help you  
2 if you tell us?

3 MS. ALDEA: It - - - it's not a we can help  
4 you, it's we will investigate it because - - -

5 CHIEF JUDGE LIPPMAN: It's not we can help  
6 you, you're saying if you tell me the truth, you  
7 know, and you have - - -

8 MS. ALDEA: And if you're actually  
9 innocent.

10 CHIEF JUDGE LIPPMAN: - - - and you have  
11 something that we don't know, you know, you're going  
12 to get off?

13 MS. ALDEA: Well, we're not saying you're  
14 going to get off.

15 CHIEF JUDGE LIPPMAN: I know you're not  
16 saying it, but I'm asking you to put what the script  
17 means - - -

18 MS. ALDEA: Well, what I'm saying - - -

19 CHIEF JUDGE LIPPMAN: - - - to a - - - to a  
20 defendant who sits there, doesn't know from anything,  
21 is in a foreign environment. What does it say to him  
22 or her?

23 MS. ALDEA: It says if you have something  
24 to tell us that will show that you are actually  
25 innocent, that you didn't do this, an alibi - - -

1 CHIEF JUDGE LIPPMAN: Then we'll help you?

2 MS. ALDEA: No, not then we'll help you.

3 Then we will look into now before you're charged.

4 Because we tell them - - -

5 CHIEF JUDGE LIPPMAN: Because we don't have

6 - - - because we don't - - - in relation to what

7 Judge Pigott said before, because we haven't fully

8 investigated up until now or we don't - - -

9 MS. ALDEA: None of these - - - yes, they

10 haven't. And in fact, I have to say, none of these

11 three defendants were questioned by the police at

12 all. How does a prosecutor arraign someone, say what

13 charges are appr - - - what charges are appropriate,

14 say what bail should be recommended, when nobody has

15 ever tried to get the story - - -

16 JUDGE PIGOTT: Well, then you shouldn't be

17 - - -

18 MS. ALDEA: - - - from the defendant.

19 JUDGE PIGOTT: - - - arraigning them yet.

20 I mean aren't you - - - aren't you - - -

21 MS. ALDEA: That - - - and we're not.

22 JUDGE PIGOTT: Aren't you supposed to

23 prepare your case a little bit before you're at the

24 courthouse saying in a minute you're going to get

25 arraigned on a charge?

1 MS. ALDEA: Well, Your Honor, they've been  
2 arrested and brought to central booking based on  
3 probable cause. So - - - by the police department,  
4 right?

5 CHIEF JUDGE LIPPMAN: Um-hum.

6 MS. ALDEA: Central booking is the police  
7 department. We are doing exactly what Your Honor  
8 suggests. We cannot arraign them until we get some  
9 facts. We're hoping to get facts not just from the  
10 complainant - - -

11 JUDGE PIGOTT: So if they - - - if they - -  
12 -

13 MS. ALDEA: - - - but also from the  
14 suspect.

15 JUDGE PIGOTT: - - - if they did not speak  
16 to you you would then say I'm sorry, but your  
17 arraignment's going to have to be postponed, and  
18 we're going put you back in the jai - - - in the - -  
19 -

20 MS. ALDEA: No, Your Honor, because we have  
21 probable cause based on what the complainant gave.  
22 But to do a full investigation to make sure that the  
23 charges are appropriate we try to get a statement  
24 from the suspect.

25 JUDGE RIVERA: So - - - so - - - so - - -

1                   JUDGE PIGOTT: Can't you - - - can't you do  
2 that post-arraignment?

3                   MS. ALDEA: If they choose to waive.

4                   JUDGE PIGOTT: Can't you do that  
5 post-arraignment?

6                   MS. ALDEA: No, Your Honor, because  
7 post-arraignment the right to counsel indelibly  
8 attaches. They're - - -

9                   JUDGE PIGOTT: Exactly, why can't you do it  
10 after that? I mean you're making sound like once the  
11 attorney gets involved that, you know, all - - - all  
12 - - - all is lost?

13                   MS. ALDEA: Well, for some defendants it  
14 is. So for one defendant, for instance, who had  
15 surveillance video and told us at the twenty-four  
16 hour mark I was in McDonald's; I didn't commit this  
17 crime. If he had waited - - - you can see on the  
18 videotape the ADA picks up the phone in central  
19 booking and says save that tape and sends a detective  
20 to get it. And sure enough, there he is. That would  
21 have been lost forever, because it's erased after  
22 twenty-four hours.

23                   CHIEF JUDGE LIPPMAN: So you're going to  
24 take the role that - - - earlier that the defense  
25 attorney would take later, and you'll do better by





1 counsel?

2 MS. ALDEA: Out of a total of, to date,  
3 15,000 people - - -

4 JUDGE RIVERA: Over how many years?

5 MS. ALDEA: - - - that came in, some of  
6 them who invoked so they weren't questioned.

7 JUDGE RIVERA: Over how many years? Over  
8 how many years, counsel?

9 MS. ALDEA: From 2007.

10 CHIEF JUDGE LIPPMAN: Counselor - - -

11 MS. ALDEA: But, Your Honor, one innocent  
12 man is enough.

13 CHIEF JUDGE LIPPMAN: Counselor - - -

14 MS. ALDEA: And so the point is the system  
15 benefits even if you get a confession that's  
16 reliable. What I wanted to say from before - - -

17 CHIEF JUDGE LIPPMAN: Counselor, why don't  
18 you answer - - - you're going to have rebuttal.  
19 Answer Judge Pigott's question and then Judge  
20 Abdus-Salaam, and then you'll have rebuttal. Judge  
21 Pigott?

22 JUDGE PIGOTT: I'll wait. I don't mind  
23 waiting. I - - -

24 CHIEF JUDGE LIPPMAN: Okay, then Judge  
25 Abdus - - - if you remember.

1 MS. ALDEA: That - - -

2 CHIEF JUDGE LIPPMAN: What Abdus - - -

3 MS. ALDEA: That's what I want.

4 CHIEF JUDGE LIPPMAN: - - - Judge

5 Abdus-Salaam's question was.

6 MS. ALDEA: I remember that one, because  
7 that is the key.

8 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

9 MS. ALDEA: Look, what I'm asking this  
10 court to do is I'm not saying that none of these  
11 statements should ever be suppressed because  
12 everything that was said will never impact the  
13 decision to waive. What I'm saying, which is  
14 directly relevant to Judge Abdus-Salaam's question,  
15 is that the determination of whether there was an  
16 effective Miranda conveyance is made by looking at  
17 the Miranda warnings, whether they were acknowledged,  
18 whether they were waived, which they were.

19 If ultimately, under totality - - - even  
20 looking at the preamble, the court knows that all  
21 three of these suspects - - - that every suspect  
22 understands at the conclusion of this that they have  
23 a right to remain silent, a right to an attorney, a  
24 right to have one appointed. If they understand  
25 that, then at that point Miranda was effectively

1 conveyed. And that ends the per se inquiry, and the  
2 Appellate Division was wrong.

3 JUDGE RIVERA: Could I - - - could I - - -

4 MS. ALDEA: The next question is whether  
5 the - - - the stuff that surrounded that, including  
6 this preamble - - - which may be as draconian as  
7 Judge Rivera reads it.

8 JUDGE SMITH: Well, let - - - let me - - -

9 MS. ALDEA: Even this preamble, did that  
10 eviscerate the knowing, intelligent, and voluntary  
11 waiver? And all I'm asking this court to do is send  
12 - - -

13 JUDGE SMITH: Okay, if I could - - -

14 MS. ALDEA: - - - it back so I can make  
15 that argument.

16 CHIEF JUDGE LIPPMAN: Judge - - - Judge  
17 Smith - - -

18 JUDGE SMITH: If I could - - -

19 CHIEF JUDGE LIPPMAN: Judge Smith.

20 MS. ALDEA: Yes, Your Honor.

21 JUDGE SMITH: Yeah, if - - - you - - - you  
22 - - - you had a - - - you discussed earlier whether  
23 there - - - whether there was anything wrong or  
24 inaccurate or misleading in that preamble.

25 MS. ALDEA: Yes.

1                   JUDGE SMITH:  And you said it's all fine.  
2                   Suppose we disagree with you.  Suppose we think there  
3                   are things in there that are inaccurate or are  
4                   misleading.  Does that end the - - - the discussion?  
5                   Is that - - - do you lose the case?

6                   MS. ALDEA:  Not at all.  And in fact - - -

7                   JUDGE SMITH:  Why not?

8                   MS. ALDEA:  - - - the most inaccurate thing  
9                   - - - I was going to use the example from Judge  
10                  Lippman's own writing in *People v. Thomas*.  That was  
11                  an example where you had something incredibly  
12                  deceptive, completely untrue.  Your baby is dead.  
13                  Your baby's going to die if you don't speak to us.  
14                  That would be deceptive.  I think that would compel a  
15                  person to speak in virtually a hundred percent of the  
16                  cases.  But Judge Lippman wrote we analyze that under  
17                  totality.  And this particular suspect here was a  
18                  suspect who was not well versed with the criminal  
19                  justice system.

20                  JUDGE SMITH:  And so your - - - your - - -  
21                  your - - - your point really is that - - - that - - -  
22                  that the totality analysis doesn't change whether the  
23                  statement is made before or after the warning is  
24                  given?

25                  MS. ALDEA:  Correct, and actually - - -

1                   JUDGE SMITH:  As long - - - as long as it -  
2                   - - I mean, you would admit, I suppose, that the - -  
3                   - the - - - the - - - the - - - the - - - the police  
4                   couldn't say I'm about to read you some stupid  
5                   warnings; I want you to pay no attention because they  
6                   don't mean a thing?

7                   MS. ALDEA:  Absolutely, but that, too,  
8                   would, at that point - - - the warnings would  
9                   effectively - - - well, actually, in that case maybe  
10                  they wouldn't be effectively conveyed, right.  
11                  Because maybe in that case he would not - - -

12                  JUDGE SMITH:  And there - - - there is - -  
13                  - you can imagine a - - -

14                  MS. ALDEA:  - - - not understand he has a  
15                  right.

16                  JUDGE SMITH:  - - - preamble that would  
17                  vitiating Miranda.

18                  MS. ALDEA:  I can.

19                  JUDGE SMITH:  You're saying this isn't it,  
20                  okay.

21                  MS. ALDEA:  I can.  This is not it.

22                  CHIEF JUDGE LIPPMAN:  Okay.  Okay - - -  
23                  okay, counselor - - -

24                  MS. ALDEA:  In totality - - -

25                  CHIEF JUDGE LIPPMAN:  Good.  You're going

1 to have rebuttal. Let's hear from your adversary.

2 MS. ALDEA: Okay.

3 MS. GLASHAUSSER: Good afternoon, Your  
4 Honors. Before the defendant - - -

5 CHIEF JUDGE LIPPMAN: Counsel, is the  
6 totality, is that - - - is that what we're looking at  
7 here, the totality of when and what went on? Can you  
8 have the script, can you have Miranda, and then you  
9 look at the totality? Or, in Judge Smith's words,  
10 does the - - - the script, the - - - whatever you  
11 want to call it, vitiate Miranda or at least  
12 undermine it?

13 MS. GLASHAUSSER: Judge Smith is exactly  
14 right. Here it was as if Miranda was never read  
15 because before the defendants heard Miranda, they  
16 already heard the anti-Miranda. They were presented  
17 with a false choice. They were told give us as much  
18 information as you can or you have the right to  
19 remain silent.

20 JUDGE SMITH: Is it - - - is it - - - is it  
21 okay - - - would it be okay to read the Miranda  
22 warnings and say I've now read you Miranda warnings,  
23 confirm that you understand them. I want to - - -  
24 now I'm going to tell you why I think you should  
25 waive your right and talk to us. It's your choice.

1 But I'm going to tell you why you should waive.

2 Would that be okay?

3 MS. GLASHAUSSER: Well, the difference is  
4 whether we're pre - - -

5 JUDGE SMITH: What - - - what's the answer?

6 MS. GLASHAUSSER: Well, it's whether we're  
7 pre-waiver - - -

8 JUDGE SMITH: No, no.

9 MS. GLASHAUSSER: - - - or post-waiver.

10 JUDGE SMITH: Is it okay or not okay?

11 MS. GLASHAUSSER: If we're pre-waiver - - -

12 JUDGE SMITH: Is it okay or not okay?

13 That's a yes or no question.

14 MS. GLASHAUSSER: Your Honor, are we in a  
15 pre-waiver universe after Miranda?

16 JUDGE SMITH: Oh, I'm sorry. As I recited,  
17 if you - - - you - - - you asked the questions. Then  
18 before he answ - - - before he says that he's going  
19 to talk to you, you - - - you make him a speech. You  
20 say that's not okay?

21 MS. GLASHAUSSER: That's not okay. That's  
22 the same scenario.

23 JUDGE SMITH: Why - - - why - - - why not?  
24 Why - - - why - - - where does it say that the only  
25 thing the defend - - - the - - - the suspect can hear



1 before he decides whether to talk or not are Miranda  
2 warnings?

3 MS. GLASHAUSSER: That - - - that's not  
4 what I'm saying, Your Honor. But the suspect can't  
5 hear something that misleads him about what his  
6 rights are. And that's what's important here. He's  
7 misled about the content of those rights so that no  
8 person could - - -

9 JUDGE SMITH: What's - - - I mean, I can  
10 understand why you - - - you might say some of those  
11 things are misleading about the rights, where it  
12 says, for example, you have to talk. But did - - -  
13 let's - - - let's take another one, the one that says  
14 if you have alibi evidence, please tell us right now.  
15 How does that mislead him about his rights?

16 MS. GLASHAUSSER: He doesn't need to tell  
17 them right now. A suspect can talk to the distr - - -  
18 -

19 JUDGE SMITH: I - - - I don't think it says  
20 he needs to - - - the - - - that one doesn't say you  
21 need to. It just says tell us.

22 MS. GLASHAUSSER: It - - - it says if you  
23 have an alibi, this is your opportunity to speak to  
24 us. And it suggests to the defendant that there is a  
25 cost to exercising his rights. That if he - - -

1                   JUDGE SMITH: Some - - - occasionally  
2                   that's true, isn't it? What about Ms. Aldea's  
3                   example of the innocent guy who was able to prove his  
4                   innocence only because he spoke up?

5                   MS. GLASHAUSSER: His defense attorney  
6                   would have been able to prove his innocence  
7                   immediately - - -

8                   JUDGE SMITH: May - - - maybe - - - maybe  
9                   after - - - after the - - -

10                  JUDGE GRAFFEO: But there is - - - there is  
11                  a benefit - - -

12                  JUDGE SMITH: - - - tape had been erased?

13                  JUDGE GRAFFEO: - - - be - - - of being  
14                  able to walk out of the police station before being  
15                  charged?

16                  MS. GLASHAUSSER: Sure, I - - - I know  
17                  nothing about this particular case that Ms. Aldea  
18                  presents. But it's - - -

19                  JUDGE SMITH: I mean, I guess but you - - -  
20                  but you admit that you - - - well, you admit that  
21                  there can be a case. It is poss - - - there - - -  
22                  every now and then there's a case of somebody who  
23                  really is innocent and it's really to his advantage  
24                  to tell the facts to the cops just as soon as he  
25                  possibly can so that his - - - it - - - it can be

1 confirmed?

2 MS. GLASHAUSSER: No, Your Honor. With his  
3 attorney - - -

4 JUDGE SMITH: No such person ever existed  
5 in a police station?

6 MS. GLASHAUSSER: With his attorney he will  
7 better be able to ex - - -

8 JUDGE SMITH: Are you - - - you're really -  
9 - - you're really saying that that's impossible? Not  
10 - - - not just rare but impossible? There's no one  
11 in the world who could ever ben - - - no innocent  
12 person would ever benefit from communicating quickly  
13 with the police?

14 MS. GLASHAUSSER: I'm not saying that they  
15 couldn't benefit, but that they would be equally able  
16 to benefit a few minutes - - -

17 JUDGE SMITH: Well, what - - -

18 MS. GLASHAUSSER: - - - later and a few - -  
19 -

20 JUDGE SMITH: - - - what - - - what - - -  
21 what about - - - what about the case? I mean I don't  
22 - - - I don't know whether it's true or hypothetical.  
23 But if it's not true make it hypothetical. There's a  
24 - - - there's a video that proves his innocence that  
25 will be erased in the ordinary course if - - - if

1 someone doesn't call McDonald's right away. Isn't  
2 that a - - - a - - - an example of a case where it  
3 might be good for the guy to talk?

4 MS. GLASHAUSSER: But here the District  
5 Attorney is delaying - - -

6 JUDGE SMITH: And not - - - not - - - not  
7 but here. We're - - - we're discussing whether - - -

8 MS. GLASHAUSSER: In that case.

9 JUDGE SMITH: - - - it's possible.

10 MS. GLASHAUSSER: Yes, Your Honor. In that  
11 case the District Attorney is delaying the moment  
12 when that individual can meet counsel. And counsel  
13 will be able to do the same investigation that the  
14 District Attorney - - -

15 JUDGE SMITH: After the tape has been  
16 erased?

17 MS. GLASHAUSSER: There wouldn't have been  
18 the delay for the interrogation so the time is the  
19 same. This person is sitting a few feet and a few  
20 steps from the court.

21 JUDGE ABDUS-SALAAM: I don't know what you  
22 mean. Are you saying that - - - that there are  
23 lawyers ready to represent defendants? When they say  
24 I'd like to speak to a lawyer they immediately get a  
25 lawyer? And, you know, it may not be - - - it may be

1 hours not a day or so?

2 MS. GLASHAUSSER: Your Honor, I'm not sure  
3 how quickly the lawyer is appointed other than that  
4 they are a few steps and a few minutes away from the  
5 courthouse where they will be arraigned and appointed  
6 counsel. So the timing here shows that the person is  
7 being misled about their rights at a moment in time  
8 when they're about to get their attorney.

9 CHIEF JUDGE LIPPMAN: Counselor, is there -  
10 - - is there a - - - I asked your adversary about is  
11 there a confusion of roles here?

12 MS. GLASHAUSSER: Yes.

13 CHIEF JUDGE LIPPMAN: Does the - - - does,  
14 in effect - - - do you feel that the prosecutor is,  
15 in effect, taking on the - - - the defense counsel  
16 role or - - - or implying to the defendant that - - -  
17 that that's a role that they can take on and - - -  
18 and help you and - - - and be your friend or whatever  
19 - - - however you want to describe it? What's the -  
20 - - I guess what I'm saying is, and I asked your  
21 adversary the same thing, in common sense terms, what  
22 is it saying? What is this preamble, this script - -  
23 - what is it saying to the defendant? You either - -  
24 - that I can be a defense counsel or what?

25 MS. GLASHAUSSER: It - - - it's telling the

1           defendant that it's good for you to talk. That you  
2           better talk now. And if you don't, you're not going  
3           to be able to. That's presenting a real cost to the  
4           person in exercising their rights.

5                        JUDGE ABDUS-SALAAM: Is there any preamble  
6           that could be stated by either the Queens DA's office  
7           or any DA's office that might make - - - well, might  
8           pass muster, in your view?

9                        MS. GLASHAUSSER: Any preamble that  
10          misleads the person about their rights would be  
11          unconstitutional.

12                      JUDGE PIGOTT: Well, of course, but that's  
13          not the question. I'm sorry.

14                      JUDGE ABDUS-SALAAM: No, that's - - -

15                      MS. GLASHAUSSER: It's not that the - - -  
16          the District Attorney could still say hello, how - -  
17          - you know, have formal pleasantries.

18                      JUDGE PIGOTT: Suppose he reversed it.  
19          Suppose - - - suppose the way it went - - - and  
20          suppose instead of doing that they said now, before  
21          we get started here, and they give them their Miranda  
22          warnings. Now this is your last chance to talk to us  
23          before you're going in there and get arraigned so if  
24          you've got something, let us know. Would you be - -  
25          - would that be okay?

1 MS. GLASHAUSSER: Well, that's essentially  
2 what we have here.

3 JUDGE PIGOTT: Well, no, they say we're - -  
4 - in a few minutes we're going to give you your  
5 Miranda warnings and it's going to be your last  
6 chance to talk to us and - - - and - - - in other  
7 words, they're - - - they're - - - they're priming  
8 them to talk and then saying by the way, you know, we  
9 got to - - - we got to go through this formality.

10 What I'm suggesting is they take the  
11 formality, give it to them, make it - - - I - - -  
12 it's hard to find cases, it seems, where people don't  
13 willingly waive their Miranda rights because, for  
14 whatever reason, they're going to talk. But if they  
15 - - - if they - - - if they did the Miranda warnings  
16 first. Said now you've got your Miranda warnings but  
17 I want to tell you, this is the last chance you're  
18 going to get to see us, because we're the - - - we're  
19 the DA and you're going to get arraigned, and if  
20 you've something that can help let us know. Would  
21 that be okay?

22 MS. GLASHAUSSER: So it's a different  
23 question.

24 JUDGE PIGOTT: I know.

25 MS. GLASHAUSSER: If we're post-waiver - -

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JUDGE PIGOTT: Would that be okay?

MS. GLASHAUSSER: I just want to be clear about it, if we're post-waiver then we're in the totality of the circumstances - - -

JUDGE PIGOTT: Oh.

MS. GLASHAUSSER: - - - test world.

JUDGE SMITH: But no, but you're - - - but you're - - -

MS. GLASHAUSSER: Pre-waiver - - -

JUDGE SMITH: - - - say - - - say you're - - - I - - - I think this is the same question that you and I had before and we didn't understand each other. But say it's pre-waiver, your answer is - - -

MS. GLASHAUSSER: Pre-waiver is the same.

JUDGE SMITH: - - - your answer - - - it doesn't - - - doesn't matter whether it's before or after the warnings. The question is whether it's before or after the waiver?

MS. GLASHAUSSER: Exactly. Miranda is - - - is meant to convey to a suspect his rights. If you add just a little bit of poison to the Miranda medicine, that person can't understand - - -

CHIEF JUDGE LIPPMAN: So once you - - - once you decide whether you're going to waive or not,



1 then this kind of talk with him is - - - is okay?

2 MS. GLASHAUSSER: Not that it's okay.

3 We're just under the totality of the circumstances  
4 test.

5 MS. GLASHAUSSER: Yes, then you look at the  
6 totality of the circumstances.

7 MS. GLASHAUSSER: And it's still - - -

8 CHIEF JUDGE LIPPMAN: But - - - but is what  
9 you're - - - you're saying - - - and again, I asked  
10 your - - - your adversary this, is the argument that  
11 by doing it pre-waiver, you dilute the impact of the  
12 warning? That it - - - that it undermines what  
13 Miranda's supposed to be all about? Is that the  
14 thrust of - - - of your argument?

15 MS. GLASHAUSSER: Exactly, Your Honor.

16 It's as if Miranda was never read here. And - - -

17 JUDGE READ: And if we agree with you on  
18 that, are these - - - is the case over?

19 MS. GLASHAUSSER: Yes.

20 JUDGE READ: Never gets them.

21 JUDGE GRAFFEO: What - - - and what happens  
22 to all the other 15,000 cases?

23 MS. GLASHAUSSER: Your Honor, these are the  
24 only three cases that have - - -

25 JUDGE GRAFFEO: My question is what happens

1 to all the other 15,000 cases?

2 MS. GLASHAUSSER: I believe many of those  
3 defendants pled out. As a practical matter, there  
4 have not been more cases coming into court after the  
5 Appellate Division - - -

6 JUDGE SMITH: Do you have any sense as to -  
7 - -

8 JUDGE READ: Appeal waivers? There've been  
9 appeal waivers perhaps?

10 MS. GLASHAUSSER: I - - - I would sa - - -  
11 I - - -

12 JUDGE SMITH: Do - - - do you have any idea  
13 how many - - - if we rule your way, how many more of  
14 these we're going to get?

15 MS. GLASHAUSSER: As far as I know, not  
16 many. I mean, we haven't seen any more. And thi - -  
17 - you know, this is really - - - the important thing  
18 here is if we change the rule, that would be a sea  
19 change. It would - - -

20 JUDGE SMITH: Okay, let me - - - let me - -  
21 -

22 MS. GLASHAUSSER: - - - mean that in every  
23 single case - - -

24 JUDGE SMITH: - - - ask you what you say  
25 the rule is. And - - - and I now understand. I'm

1           sorry I didn't understand before. You're talking  
2           about pre - - - the - - - the - - - for you the key  
3           is the moment of waiver? Doesn't matter whe - - -  
4           the order between the warnings and it doesn't matter  
5           whether it's a preamble or a post-amble as long as  
6           it's pre - - - as long as it's pre-waiver?

7                       MS. GLASHAUSSER: Yes.

8                       JUDGE SMITH: Is it your position that  
9           pre-waiver the police can say nothing that has any  
10          bearing on the question of - - - of whether the - - -  
11          whether the defendant - - - whether the suspect  
12          exercises his rights, other than the Miranda  
13          warnings?

14                      MS. GLASHAUSSER: The police can say  
15          nothing that misleads the defendant - - -

16                      JUDGE SMITH: Oh, now - - - now - - - now -  
17          - -

18                      MS. GLASHAUSSER: - - - about his rights.

19                      JUDGE SMITH: - - - you mean - - - you mean  
20          if it's not misleading it's fine?

21                      MS. GLASHAUSSER: Miranda is a bright-line  
22          objective test, and it's there - - -

23                      JUDGE SMITH: How - - - you can - - - try  
24          yes or no to that one. Are you saying if it's not  
25          misleading it's okay?

1 MS. GLASHAUSSER: If you're not misleading  
2 somebody about your rights we'd have a different  
3 situation. Miranda is meant to be - - -

4 JUDGE SMITH: So if you - - - so if you  
5 said, for example, I - - - I - - - I just read you  
6 your - - - your rights and I meant every word of it,  
7 and those are very important rights. I want to be  
8 sure you understand them, and I'll read them again if  
9 you want me to. And they're really important rights,  
10 and I need you to know you have a choice. I also  
11 want to tell you that you'll make me much happier if  
12 you waive. Is that okay?

13 MS. GLASHAUSSER: Your Honor, I think that  
14 the test would still be the same.

15 JUDGE SMITH: You - - - you're not thinking  
16 yes or no today.

17 MS. GLASHAUSSER: Your Honor, I think that  
18 that would be okay - - - it - - - that - - - because  
19 it does not mislead the suspect about the rights  
20 they're about to hear. And that's - - - that's what  
21 we have here that's so problematic. The preamble is  
22 read in one breath and it's one event with Miranda,  
23 with the same formal tone such that no one would know  
24 whether they could get help to - - -

25 JUDGE SMITH: Does - - - does that - - -

1 does that matter - - -

2 CHIEF JUDGE LIPPMAN: Coun - - -

3 JUDGE SMITH: - - - whether it's a formal  
4 tone or an informal tone?

5 MS. GLASHAUSSER: No, it doesn't matter in  
6 the sense that it's - - - it doesn't matter to your  
7 legal analysis. But it - - - it emphasizes that this  
8 script was really - - -

9 CHIEF JUDGE LIPPMAN: Does - - - does it  
10 matter, counsel, if the motive of the preamble - - -  
11 does it matter - - - let's say for the sake of  
12 argument that the District Attorney's Office is  
13 trying to do right by these defendants and wants to  
14 genuinely see if they can, you know, help them or if  
15 they're innocent, as your adversary says, make sure  
16 that - - - that then they - - - they - - - they don't  
17 have to go through the whole process. Does that  
18 matter? Is it that it - - - it - - - is it that it  
19 could be misleading even with the best of motives?  
20 Is that - - - is that your position?

21 MS. GLASHAUSSER: Right, the - - - the  
22 motive is the - - -

23 CHIEF JUDGE LIPPMAN: Taking it at face  
24 value that that's what the DA wants. The DA, as your  
25 adversary says, wants justice. That's what we all do

1 in the - - - in the - - - in the criminal justice  
2 system. Does it matter if the goal is justice, but  
3 in the process things may get a little muddled in the  
4 defendant's head?

5 MS. GLASHAUSSER: Constitutionally, no.  
6 The error here is in the script, in being told this  
7 is your last opportunity to - - - to speak to us,  
8 have your case investigated. As a practical matter,  
9 it - - - it matters just because the - - - the  
10 District Attorney's Office, as Your Honors have  
11 pointed out, they're the only office that feels the  
12 need to do this to get it right. And their numbers  
13 don't support that that's what is happening here.  
14 It's less than one percent of people that get some  
15 sort of benefit. The Constitu - - -

16 JUDGE RIVERA: Counsel - - -

17 JUDGE SMITH: But - - - but - - - but  
18 aren't those one percent the innocent? And - - - and  
19 shouldn't be particularly worried about the innocent?

20 MS. GLASHAUSSER: The innocent, in  
21 particular, deserve the benefit of hearing their  
22 rights, getting their attorney, and having somebody  
23 on their side when they're dealing with the adversary  
24 system and talking to the District Attorney.

25 CHIEF JUDGE LIPPMAN: Can the DA be on

1 their side?

2 MS. GLASHAUSSER: In our adversarial  
3 system, the person on the defendant's side is defense  
4 counsel. And here the District Attorney - - -

5 CHIEF JUDGE LIPPMAN: By the nature of the  
6 - - - of the adversarial system?

7 MS. GLASHAUSSER: Yes.

8 JUDGE RIVERA: Counsel, I - - - I thought -  
9 - - I - - - I can't remember which of the amici  
10 suggested - - - or - - - or indicated that the Second  
11 Circuit has taken a - - - a - - - less than positive  
12 view of a similar type of pre-warning preamble used  
13 by the U.S. Attorney's office. Is that correct? I  
14 know you - - - People v. Foley I think raises this  
15 question, so I just wanted to hear from you about  
16 this issue and if you view this as the - - - similar?

17 MS. GLASHAUSSER: this is actually worse.  
18 What happened in the Second Circuit was just  
19 pre-arraignment interrogation at the moment in time  
20 right before an individual was assigned counsel.  
21 There was no misleading script. And the Second  
22 Circuit wrote cases just to say how concerned they  
23 were with that program, and it ended. Here we have,  
24 not just pre-arraignment interrogation directly  
25 before the person gets counsel, but we have

1 misleading script that prevents the person from ever  
2 understanding their rights.

3 JUDGE SMITH: Are you - - - are you really  
4 saying that it's worse to - - - to make a speech to  
5 someone than to ask them questions?

6 MS. GLASHAUSSER: It's worse to mislead  
7 somebody about their rights. In the Second Circuit  
8 context they were given Miranda.

9 JUDGE SMITH: Well - - - well - - - well -  
10 - - well, I mean, it's - - - it's worse to mislead  
11 someone about - - - about his rights than just to ask  
12 him questions as though he didn't have any?

13 MS. GLASHAUSSER: No, no. In the Second  
14 Circuit, Your Honor, Miranda was given effectively.  
15 There was no preamble before Miranda. The court was  
16 worried just about the timing and the course of  
17 timing of interrogating indigent defendants, which is  
18 the same here, just at the moment before they would  
19 normally go to the judge and get assigned counsel.

20 CHIEF JUDGE LIPPMAN: Okay, okay.

21 JUDGE PIGOTT: Could I - - - could I ask  
22 one more - - -

23 CHIEF JUDGE LIPPMAN: I'm sorry, Judge  
24 Pigott?

25 JUDGE PIGOTT: I - - - before you go, I'm



1 still - - - I'm still concerned about this - - - what  
2 the - - - the impact of this is going to be on the  
3 15,000 cases. Because your - - - your argument is  
4 that the - - - that it is not a totality of  
5 circumstances analysis and, therefore, ipso facto  
6 these - - - these cases should be reversed. And I  
7 don't know how you distinguish these three from Ms.  
8 Aldea's 15,000 waiting outside her door.

9 MS. GLASHAUSSER: I'm glad Your Honor asked  
10 that. So if we go with the totality of  
11 circumstances, that's what will open the floodgates.  
12 Because now in each individual case, even though the  
13 script is exactly the same, the courts would have to  
14 look at the individual, and it would take much more  
15 time than here where we have the proper objective  
16 bright-line rule that's the point of Miranda to make  
17 things easy.

18 JUDGE PIGOTT: Don't we then just release -  
19 - - don't - - - then we automatically reverse all  
20 15,000?

21 MS. GLASHAUSSER: Your Honor, those 15,000  
22 cases, they're just not in the court system. I - - -  
23 I - - - I have a hard time answering it just because  
24 we're - - -

25 JUDGE PIGOTT: Well, let's take - - - let's

1 take one of them. I forget which one that - - - that  
2 almost killed her - - - his - - - his girlfriend.  
3 It's a pretty serious case. There may be some that  
4 are as - - - as serious, that happened between 2007  
5 and now, where someone could be doing a whole lot of  
6 time as a result. And I think your argument is that  
7 if they're sitting in Attica right now doing fifteen  
8 years because they were convicted of that type of  
9 crime and this happened, that automatically that's  
10 got to get reversed.

11 MS. GLASHAUSSER: Your Honor, this is the  
12 bedrock of our justice system. It's the - - - how  
13 the adversarial system protects individuals at the  
14 moment that they're - - -

15 JUDGE SMITH: Is that - - - that's a yes?

16 JUDGE PIGOTT: That's a yes? That's a yes.

17 MS. GLASHAUSSER: The floodgates haven't  
18 opened. This case was - - - the Appellate Division  
19 case already said this is unconstitutional.

20 JUDGE SMITH: But you - - - you - - - you  
21 do - - - you do - - - you do - - - you do want that  
22 guy in Attica to get his conviction set aside? You  
23 may be right, but you do, don't you?

24 MS. GLASHAUSSER: Yes, his Constitutional  
25 rights were violated.

1 JUDGE PIGOTT: Right.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. GLASHAUSSER: Thank you.

4 CHIEF JUDGE LIPPMAN: Let's hear from your  
5 colleague.

6 MS. HULL: Good morning.

7 CHIEF JUDGE LIPPMAN: Good morning.

8 JUDGE PIGOTT: Afternoon.

9 MS. HULL: Afternoon, I'm sorry. I'm used  
10 to these in the morning.

11 CHIEF JUDGE LIPPMAN: You're close enough.  
12 Go ahead.

13 MS. HULL: Okay, so if - - - I want to get  
14 to one of the questions which had to do whe - - -  
15 whether, you know, the best of intentions here.

16 CHIEF JUDGE LIPPMAN: Yes, go ahead,  
17 counselor.

18 MS. HULL: The best of intentions that  
19 violates the Constitution still violate the  
20 Constitution, and that's the end of the - - - that's  
21 the really end of the inquiry. And that's what  
22 happened here.

23 JUDGE RIVERA: So motive is irrelevant?

24 MS. HULL: Motive is irr - - -

25 JUDGE RIVERA: Motive, purpose, irrelevant?

1 MS. HULL: It's irrelevant here because on  
2 the face of it, on the face of this script, it  
3 completely polluted the Miranda warning that  
4 followed. And whether it is before or it is after,  
5 we're talking about pre-waiver, it is still given in  
6 conjunction. So a person's understanding - - -

7 JUDGE SMITH: You - - - you would - - - you  
8 would - - - I mean, and if - - - if you're a cynical  
9 person who thinks the motive here is not just to help  
10 defendants but to - - - to - - - to take advantage of  
11 the human tendency to - - - to think you can talk  
12 your way out of a jam, or to think that you'll be - -  
13 - or - - - or the human fear that you're going to be  
14 believed guilty if you don't talk, and if the guy who  
15 wrote those scripts was thinking I'm going to get a  
16 lot more confessions when I write it, that's also  
17 irrelevant?

18 MS. HULL: That is, and certainly, I am a  
19 cynical person. I do think that was a factor was in  
20 this, and so - - - and - - - and - - -

21 JUDGE SMITH: But - - - but that is  
22 irrelevant on your theory? Motive doesn't matter.

23 MS. HULL: That is - - - that is irrelevant  
24 under the theory, because the question is does a - -  
25 - would a reasonable person misunderstand and be

1 misled about what their rights mean? And they are  
2 here. They are misled about what their rights means  
3 and the consequences of waiving them.

4 JUDGE ABDUS-SALAAM: What do you say about  
5 whether there's anything that could be said either  
6 pre- or post-amble, that would be different from  
7 Miranda, that could be said?

8 MS. HULL: Introductory remarks, statements  
9 of the charges, explaining who the people are in the  
10 room. All of those things would be completely  
11 permitted. The question is do they get at what the  
12 warnings are supposed to do? The purpose of Miranda  
13 is to convey the essential meaning of those warning -  
14 - - of those right - - - of the rights and the  
15 consequences of waiving them. So if anything said  
16 undermined that, then, yes, there would be a problem.

17 CHIEF JUDGE LIPPMAN: So if it doesn't - -  
18 - if it doesn't muddy the waters it's okay?

19 MS. HULL: If it doesn't muddy the wa - - -  
20 yes, it does - - - it would be okay. I mean - - -

21 CHIEF JUDGE LIPPMAN: If there are some  
22 preliminaries that you might want to go over, right?

23 MS. HULL: Absolutely, and - - - and this  
24 court has - - - and I believe the Appellate Division  
25 courts - - - have been very sensitive of that.

1 JUDGE ABDUS-SALAAM: What about the - - -  
2 what about the statement even if you've spoken to  
3 anyone else before, you can speak to us now?

4 MS. HULL: I think that probably would be  
5 okay. The real issue is does that - - - the fact  
6 that you can speak doesn't go to the fact - - - to -  
7 - - to that you have to, that failure to do so would  
8 come at - - - that would come at a cost. And I want  
9 to emphasize this false cost because there's been a  
10 lot of discussion about, you know, there's some  
11 people may have benefitted from this program. Now,  
12 that - - - and that's - - - and the People - - - and  
13 the People have emphasized this. The People have  
14 also conceded in their reply brief, in a footnote,  
15 that every single one of those people the outcome  
16 most likely would have been exactly the same had they  
17 - - - had they - - - had they not spoken - - -

18 JUDGE SMITH: But - - - might - - - might  
19 they - - -

20 MS. HULL: - - - had they not given that  
21 statement.

22 JUDGE SMITH: - - - might they have sat in  
23 jail for a few day - - - hours or days or weeks  
24 before that's - - - that outcome?

25 MS. HULL: Given that I don't know the

1 facts of any of those, I will not - - -

2 JUDGE SMITH: Okay, so let's go back to the  
3 much easier world - - -

4 MS. HULL: And I - - -

5 JUDGE SMITH: - - - of making up the facts.  
6 If - - - you - - - you - - - you would admit the - -  
7 - the - - - the possibility that there are people who  
8 could, by talking, walk out the door when they - - -  
9 when - - - when they - - - when that - - - that might  
10 otherwise be delayed?

11 MS. HULL: There's a - - - that - - - it's  
12 entirely possible, but Miranda is a bright-line rule  
13 for a reason. We are not going to ask that question.  
14 We are going to have the warning said.

15 JUDGE SMITH: Even if - - - it's a bright -  
16 - - it's so - - - it's so bright a line that even if  
17 its consequence is to keep an innocent person in jail  
18 overnight, well, that's a cost we're willing to pay?

19 MS. HULL: I - - - I would suspect I'm  
20 being asked about a false - - - I don't know if that  
21 cost really exists.

22 JUDGE SMITH: Yeah, but I - - - I mean, I -  
23 - - I - - - I would sugg - - - I - - - I - - - it may  
24 be quite rare. Look, I - - - I - - - I ha - - - I  
25 actually am cynical enough that there ain't all that

1 many innocent people getting arraigned, but there are  
2 some. And the one - - - and most of them, I suppose,  
3 are not going to walk out the door immediately, but I  
4 suspect there may be some. You can - - - you can  
5 certainly imagine a case of someone who's completely  
6 innocent and who can say to the cops call my  
7 girlfriend. She'll tell you I was with her and I - -  
8 - and - - - and - - - and when - - - when the cop  
9 knows that he has had no opportunity to speak to his  
10 girlfriend and they - - - they're going to get an  
11 honest answer. If you do that an hour - - - if you  
12 do that six hours later, when the - - - when the - -  
13 - the - - - when the girlfriend presumably knows what  
14 to say it might not be nearly as effective. Is that  
15 such a ridiculous scenario?

16 MS. HULL: It's - - - it's not, especially  
17 since you've given me the facts of it. But it's - -  
18 - it's that - - -

19 CHIEF JUDGE LIPPMAN: Counsel, mightn't  
20 that defendant say that anyway if he tot - - - if he  
21 was totally innocent and walked in and said hey,  
22 listen - - -

23 MS. HULL: He could have very well said  
24 that - - -

25 CHIEF JUDGE LIPPMAN: - - - call so-and-so?



1 MS. HULL: - - - with a - - - with - - -  
2 with a warning that was clear about what his rights  
3 were.

4 CHIEF JUDGE LIPPMAN: But even without  
5 anything - - -

6 MS. HULL: And with counsel.

7 CHIEF JUDGE LIPPMAN: Counselor, without  
8 anything a defendant who walks in, who is totally  
9 innocent, doesn't offer them anything. He isn't  
10 interested in anything else other than saying call  
11 the girlfriend. She'll tell you I didn't do it. If  
12 the prosecutor won't call the - - - the girlfriend or  
13 whatever, because the prosecutor didn't say listen,  
14 tell me if there's anyone I should call and I'll help  
15 you. Well, that's another story. But I would  
16 presume that an innocent person who comes in would  
17 say the same darn thing that they'd say if you ask  
18 them to say it.

19 MS. HULL: And I also think that - - - that  
20 - - -

21 CHIEF JUDGE LIPPMAN: You agree with that?

22 MS. HULL: Yes, I do. I'm sorry.

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MS. HULL: I do.

25 CHIEF JUDGE LIPPMAN: Next.

1 MS. HULL: But - - - but I also think that  
2 - - -

3 JUDGE PIGOTT: Ms. - - - Ms. Hull, before  
4 you go - - -

5 MS. HULL: Yes.

6 JUDGE PIGOTT: - - - because that's your -  
7 - - your white line's on. We talked about the  
8 totality of circumstances, and your co-counsel says  
9 that as a result of that it's very possible that  
10 14,000 people should be released tomorrow. I'm being  
11 facetious, but it - - -

12 MS. HULL: Yeah, I don't think she said  
13 that.

14 JUDGE PIGOTT: But all of these - - - all  
15 of these case are - - - are unsteady, let us say.  
16 What about harmless error? I mean, wouldn't, at a  
17 minimum, we would have to look at each of these cases  
18 in terms of a harmless error analysis? And - - -

19 MS. HULL: As - - - as you would in any  
20 case, you would prob - - - you would obviously have a  
21 harmless error - - - error analysis would be imp - -  
22 -

23 JUDGE READ: Well, some of these people may  
24 have pleaded and may have signed appeal waivers, too,  
25 right?

1 MS. HULL: Yes, and - - - which is  
2 routinely done Queens. I also - - - the - - - the  
3 point she was trying to make - - - and it - - - and  
4 it is - - - is critical, is that there - - - it took  
5 from 2007 until 2012 for three of these cases to come  
6 up on appeal. The con - - - the remaining - - - the  
7 - - - the majority of these 15,000 cases ha - - - the  
8 convictions are final. And if any - - - and - - -

9 JUDGE SMITH: Are you - - - are you  
10 suggesting that we should not - - - assuming you win  
11 this case, that we should not entertain a - - - a  
12 Dunbar argument in a 440 proceeding?

13 MS. HULL: That would depend on the facts  
14 in that 440. But I don't think you're going to be -  
15 - - you're not going to have a floodgates problem  
16 given the fact that you have the majority of the - -  
17 -

18 JUDGE GRAFFEO: You don't think we're going  
19 to see any coram applications claiming ineffective  
20 assistance for not challenging the script on  
21 Constitutional grounds?

22 MS. HULL: You could. No, I - - - I could  
23 concede that. But I do - - - I do - - - I do agree  
24 that the majority of these things would have been  
25 dealt with at pleas, and there are plea waivers in

1 place.

2 CHIEF JUDGE LIPPMAN: Isn't that the nature  
3 of the system?

4 MS. HULL: Yes.

5 CHIEF JUDGE LIPPMAN: Particularly in New  
6 York City? The overwhelming number of them are  
7 disposed of in that way?

8 MS. HULL: Yes.

9 JUDGE SMITH: Even - - - even if there's a  
10 plea and a - - - and an appeal waiver, if the law - -  
11 - if the guy's lawyer did not tell him that he had a  
12 good argument based on the script, is there an  
13 ineffective assistance claim?

14 MS. HULL: I don't know. There could be.  
15 But I also want to make one point. The fact the  
16 People decided to impose a systematic program, that's  
17 the People's decision. If four - - - if 15,000  
18 individuals' Constitutional rights were violated,  
19 that matters, too. Regardless of a floodgates  
20 problem, that matters incredibly.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.  
22 Thanks.

23 MS. HULL: Thank you.

24 CHIEF JUDGE LIPPMAN: Counselor, what do  
25 you think of the - - - the - - - in terms of the vast

1 number of these cases. Are they finished, gone?

2 MS. ALDEA: I think it's even bigger  
3 because the floodgates don't just relate to this. If  
4 this court takes the unprecedented measure of saying  
5 that words said prior to Miranda that would typically  
6 just be one factor in the knowing, intelligent, and  
7 voluntary waiver, can per se render it as though my  
8 coun - - - my opposing counsel said, as though  
9 Miranda was never read at all, then anything that is  
10 ever said pursuant to - - - to a person prior to a  
11 Miranda waiver - - - and it happens again and again  
12 and again, it happens in every interrogation - - -

13 CHIEF JUDGE LIPPMAN: You bel - - - you  
14 believe that the floodgates - - -

15 MS. ALDEA: - - - will vitiate Miranda.

16 CHIEF JUDGE LIPPMAN: - - - are going to be  
17 wide open? We're going to be deluged with cases by  
18 protecting peoples' Constitutional rights?

19 MS. ALDEA: No, Your Honor. I believe that  
20 you would be announcing an unprecedented rule that -  
21 - -

22 CHIEF JUDGE LIPPMAN: And coun - - -

23 MS. ALDEA: - - - is a per se rule.

24 CHIEF JUDGE LIPPMAN: Counsel.

25 MS. ALDEA: And that's the danger.

1 CHIEF JUDGE LIPPMAN: Counsel, apropos what  
2 your adversary just said, in the end - - - while you  
3 could argue this to death and while a practical  
4 viewpoint may say these cases were all pled out and  
5 they're not going to come back. Let's assume eith -  
6 - - either way. In - - - in your adversary's words,  
7 does it in the end matter? Is that what you decide  
8 this case on?

9 MS. ALDEA: No, Your Honor. You don't.  
10 And actually, I have three points I want to get to in  
11 rebuttal that I think are very important.

12 CHIEF JUDGE LIPPMAN: Okay, so then tell us  
13 - - -

14 MS. ALDEA: The first - - -

15 CHIEF JUDGE LIPPMAN: - - - what the three  
16 points are.

17 MS. ALDEA: The first is that my adversary  
18 has said very clearly that the key is the point of  
19 the waiver. And totality applies post-waiver, in  
20 other words, the voluntariness of the statement but  
21 not pre. It's not my rule. The Supreme Court in  
22 Fare v. Michael C. - - - and I'm going to read you a  
23 quote - - - is, "Whether the defendant, in fact,  
24 knowingly and voluntarily waived the rights  
25 delineated in Miranda is to be made on an inquiry

1           into the totality of the circumstances surrounding  
2           the interrogation to ascertain whether the accused,  
3           in fact, knowingly and voluntarily decided to forgo  
4           his rights."

5                         This court in *People v. Williams* said prior  
6           to *Miranda* to determine - - - prior to the waiver, if  
7           the waiver was knowing, intelligent, and voluntary,  
8           again, a quote, "To be valid, an accused waiver of  
9           his rights must be knowingly and intelligently made.  
10          This is essentially a factual issue that must be  
11          determined according to the circumstances of each  
12          case, which includes the individual suspect."

13                         JUDGE SMITH: Is there - - - is there any -  
14          - -

15                         MS. ALDEA: And this is not.

16                         JUDGE SMITH: Is there any case that deals  
17          directly with your adversary's theory that the  
18          totality is purely a post-waiver construct and that  
19          pre-waiver is different?

20                         MS. ALDEA: Not a single case has said so.  
21          To the contrary, every case has said otherwise.

22                         JUDGE SMITH: And - - - and is there any  
23          case that says - - - where you got a case that says  
24          the opposite?

25                         MS. ALDEA: Yes, because you know what - -

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JUDGE SMITH: Dealing specifically with the  
- - - with the - - - with that - - - the - - - the -  
- - the line - - - yeah.

MS. ALDEA: Yes, a million. Because - - -

JUDGE SMITH: Just - - - just - - - what's  
your best one?

MS. ALDEA: - - - a Mir - - - one - - - a  
Miranda - - - well - - - well, my best one would be  
Williams and this case. But a Miranda waiver is like  
any other waiver under the sun. It always has to be  
made knowing, intelligent, and voluntary, which is an  
analysis under totality. But this is a real issue.

CHIEF JUDGE LIPPMAN: Coun - - -

MS. ALDEA: It's not a theoretical one.  
Because let's point to these people, to the 15,000  
and how the results might be different. Dunbar was a  
guy who you look at his - - - you look at his  
interview according to how the Appellate Division  
interpreted it. He was relatively young. He did  
have a rap sheet a mile long. He was trying to  
broker a cooperation agreement. But the impact of  
the preamble on him might have been different, right?  
Because he's sitting there saying I don't know. Am I  
going to get to talk to the DA? That's how the AD



1 read it. In other - - - but you look at Polhill.  
2 Polhill is a fifty-year-old parolee. He knew the  
3 rights and his - - - who he was going to see and how  
4 his attorneys would help him.

5 JUDGE PIGOTT: The problem, though, as I  
6 looked at it, when you - - - when you followed the -  
7 - - the - - - the ones we had is it was so rote. It  
8 was like - - - it was like the - - - the people that  
9 were asking the questions, the - - - the assistant DA  
10 and the - - - and the investigator. They had no  
11 inter - - - I mean they - - - they knew what was  
12 going to happen. And they're reading this, not for  
13 anybody's benefit, but to get through it so that they  
14 can now get this guy to - - - to pop?

15 MS. ALDEA: Well, Your Honor, how they're  
16 read - - - I mean I think that varies depending on  
17 who the person is that's reading them. And I've seen  
18 a lot of these tapes, so it varies from case to case  
19 - - - another one of the totality of the  
20 circumstances that impacts how this operates in an  
21 individual case. So my point - - - the real point  
22 here is the way to avoid the floodgate is to not  
23 change the law.

24 CHIEF JUDGE LIPPMAN: Counselor - - - con -  
25 - - con - - -

1 JUDGE RIVERA: So counsel - - -

2 MS. ALDEA: The way to avoid the floodgate

3 - - -

4 JUDGE RIVERA: Counselor?

5 MS. ALDEA: - - - is to stick to that  
6 analysis.

7 CHIEF JUDGE LIPPMAN: Coun - - - counselor,  
8 we - - - we understand your test, we understand their  
9 test. What are your two other points you wanted to  
10 make? You said there was three.

11 MS. ALDEA: Well, so the second - - - the  
12 second other point is what they're saying, and this  
13 is a quote, "We look to the reasonable person and the  
14 impact this might have had on their decision to  
15 waive." And my answer is no, you don't. You don't  
16 look to the reasonable hypothetical defendant. You  
17 look to the three men standing before you. Because  
18 Mr. Dunbar, this is the epitome of voluntariness; he  
19 tried to broker a cooperation agreement.

20 JUDGE SMITH: Well - - - well, wait. But  
21 if - - - you - - - you would agree that there are  
22 some - - - some statements could simply vitiate  
23 Miranda warnings?

24 MS. ALDEA: Sure.

25 JUDGE SMITH: And in - - - and - - - and



1 MS. ALDEA: Systemically - - -

2 CHIEF JUDGE LIPPMAN: - - - that there  
3 can't be something that you just look at it and you  
4 say this undermines the whole purpose of Miranda? No  
5 good?

6 MS. ALDEA: No. Well, Your Honor, it has  
7 to be case by case, anyway. Unless it goes to the  
8 effectiveness of the conveyance - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MS. ALDEA: - - - of the warning, which was  
11 my initial point.

12 CHIEF JUDGE LIPPMAN: Let - - - let's - - -  
13 that's imp - - - I - - -

14 MS. ALDEA: Does it go to the question did  
15 it impact the decision to waive or - - -

16 CHIEF JUDGE LIPPMAN: But I understand  
17 you're both - - -

18 MS. ALDEA: - - - take away the decision?

19 CHIEF JUDGE LIPPMAN: - - - you're both  
20 looking at it through the prism of your different  
21 tests. Tell us your third point.

22 MS. ALDEA: Okay, so my third point is that  
23 to say this - - - this is a direct response to the  
24 fact that, overall, our program's been characterized  
25 as essentially seeking to exonerate, and that's not

1 accurate. And I don't want it to be misconstrued  
2 that way anymore. The point of this, and the role of  
3 the prosecutor - - -

4 CHIEF JUDGE LIPPMAN: You're not seeking to  
5 defend inno - - - innocent people?

6 MS. ALDEA: That, too.

7 CHIEF JUDGE LIPPMAN: Go ahead. Finish,  
8 finish, finish.

9 MS. ALDEA: But my point is it's a - - -  
10 it's a dual role.

11 CHIEF JUDGE LIPPMAN: Yes, finish, though.

12 MS. ALDEA: So a prosecutor's role, the  
13 reason we're not usurping the function of defense  
14 counsel is because, unlike defense counsel, a  
15 prosecutor's role is to, essentially, convict as many  
16 of the guilty as possible and none of the innocent.

17 CHIEF JUDGE LIPPMAN: Okay.

18 JUDGE PIGOTT: Do - - - do you have - - -

19 CHIEF JUDGE LIPPMAN: Judge Pigott?

20 MS. ALDEA: And on - - -

21 JUDGE PIGOTT: Do you have any thought on  
22 harmless error?

23 MS. ALDEA: Harmless error. I do have a  
24 thought that in - - - in Dunbar it was harmless. I  
25 do have a thought that in Lloyd-Douglas, where he

1 actually testified to the same thing as in the  
2 preamble, it was harmless. But I would urge this  
3 court to - - - aside from applying harmless error  
4 analysis or sending it back for the Appellate  
5 Division to do so appropriately in each case, I would  
6 urge this court to send it back for purposes of  
7 allowing that evaluation of totality, because it  
8 makes a difference. It's a legal fiction to say  
9 we're going to assume that the suspect is naive. And  
10 - - - and the other point on this, my final point,  
11 Your Honor - - -

12 CHIEF JUDGE LIPPMAN: Final point, you got  
13 it. Go ahead.

14 MS. ALDEA: - - - because I know my - - -  
15 my time is up. My final point on this is that the  
16 other problem with the legal fiction is when you look  
17 at what was said here - - - so we're asking for  
18 alibis. We're offering investigation, right? That  
19 could only possibly impact the suspect who says I've  
20 got an alibi. Not one of these guys did. Who said  
21 please investigate X about this case. Not one of  
22 them did.

23 CHIEF JUDGE LIPPMAN: Judge Smith? Last -  
24 - - last question, Judge Smith.

25 JUDGE RIVERA: No, Ju - - - excuse me, can

1 I - - - I'm sorry.

2 CHIEF JUDGE LIPPMAN: Excuse me, Judge  
3 Smith and Judge Rivera.

4 JUDGE RIVERA: No, no, no. Please, please.

5 MS. ALDEA: And - - - and - - - and - - -  
6 and, Your Honor, if I could just finish the one  
7 sentence. The - - -

8 JUDGE SMITH: If - - - if it's a short  
9 sentence.

10 MS. ALDEA: The way that it would impact  
11 them is, at most, if they understand they have a  
12 right to invoke, which Polhill did invoke, Dunbar did  
13 invoke. So they knew they controlled the interview.  
14 Asking for an alibi would at most say, you know what?  
15 I'm not going to tell you squat about this case but I  
16 will tell you I have an alibi. Here it is.

17 JUDGE SMITH: My - - - my - - - my - - -

18 CHIEF JUDGE LIPPMAN: Okay, Judge - - -

19 MS. ALDEA: Now I want to - - -

20 JUDGE SMITH: My question is - - -

21 CHIEF JUDGE LIPPMAN: Judge - - - counsel,  
22 Judge Smith's question and then Judge Rivera.

23 JUDGE SMITH: You can answer - - - if you  
24 answer briefly, completely different subject. Don't  
25 you have a preservation problem in Polhill and Lloyd

1 - - - Lloyd-Douglas?

2 MS. ALDEA: I don't believe I do, Your  
3 Honor. Because ultimately the question that was  
4 decided by the suppression court in both was whether  
5 Miranda was effectively communicated and effectively  
6 waived. So the Miranda waiver, the suppression court  
7 found - - -

8 JUDGE SMITH: So you - - - you - - -

9 MS. ALDEA: - - - was validly waived.

10 JUDGE SMITH: You - - - yeah, quickly. So  
11 you're saying whether or not the defense lawyer  
12 preserved it, the judge, in effect, did?

13 MS. ALDEA: Correct, the judge ruled  
14 ultimately in suppression on Miranda.

15 CHIEF JUDGE LIPPMAN: Okay, let's have  
16 Judge Rivera.

17 MS. ALDEA: Yes, Your Honor.

18 CHIEF JUDGE LIPPMAN: And then you're all  
19 free to go.

20 MS. ALDEA: The final program? The final  
21 program?

22 CHIEF JUDGE LIPPMAN: Go ahead. You're  
23 exonerated. Go ahead.

24 JUDGE RIVERA: So much pressure on now with  
25 the question. So here's my question. My question is



1           should - - - should it give us pause that, really,  
2           this protocol really only applies to the indigent?  
3           These are really the people who are subjected to  
4           this? These are really the people who are in, one  
5           way or another, having their Miranda rights put in  
6           jeopardy?

7                         MS. ALDEA: Your Honor, the way that this  
8           impacts the indigent, honestly, more than anyone  
9           else, is - - -

10                        JUDGE RIVERA: Please honestly.

11                        MS. ALDEA: - - - the - - - the indigent  
12           are the ones who are going to suffer most, if they  
13           really are innocent. And most of these people,  
14           honestly, Your Honor, they're going to prosecuted and  
15           they'll plead guilty because they, in fact, did it.  
16           But the 132 people that are indigent that were  
17           actually exonerated before being charged, those  
18           people didn't miss a day of work. Those people never  
19           had to go through the system, because they were  
20           released immediately. Those people may not have to -  
21           - -

22                        JUDGE RIVERA: Well, they had already been  
23           - - -

24                        MS. ALDEA: - - - post bail.

25                        JUDGE RIVERA: I'm sorry, counsel.

1 MS. ALDEA: Or pay bail.

2 JUDGE RIVERA: If they had already - - -  
3 no, counsel, just a moment now. When you say they  
4 didn't go through the system. They've been arrested.  
5 They've been in custody. They've been held for  
6 several hours. So please - - -

7 MS. ALDEA: It - - - but that's - - -

8 JUDGE RIVERA: - - - let's - - - let's  
9 stick with the question as asked.

10 MS. ALDEA: But - - - but, Your Honor, they  
11 haven't been charged with a crime.

12 JUDGE RIVERA: But you said they haven't  
13 gone through the system. They've already gone  
14 through a process that is - - - you cannot deny - - -

15 MS. ALDEA: Right, but - - - but - - -

16 JUDGE RIVERA: - - - part of the criminal  
17 justice system.

18 MS. ALDEA: - - - those - - - I mean, but  
19 Miranda - - - look, there are - - -

20 CHIEF JUDGE LIPPMAN: Counsel, last - - -  
21 counsel, last word.

22 MS. ALDEA: I'm not going to - - -

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MS. ALDEA: I'm not going to beat around  
25 the bush. They don't get the same - - -

1 JUDGE RIVERA: Last word.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MS. ALDEA: They - - - certainly, the  
4 indigent do not have the same access to attorneys  
5 that people who have money do. There's no question.  
6 But I think that the control in the system is a valid  
7 one. This is another stage at which a prosecutor can  
8 investigate before these people - - -

9 CHIEF JUDGE LIPPMAN: Okay, couns - - -

10 MS. ALDEA: - - - have to post bail.

11 CHIEF JUDGE LIPPMAN: Okay, everybody's - -

12 -

13 JUDGE RIVERA: Thank you.

14 CHIEF JUDGE LIPPMAN: You're all  
15 exonerated.

16 MS. ALDEA: Thank you, Your Honor.

17 CHIEF JUDGE LIPPMAN: Go, good.

18 (Court is adjourned)

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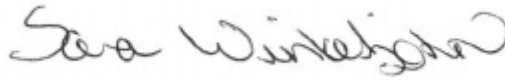
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jermaine Dunbar, No. 169, People v. Collin F. Lloyd-Douglas, No. 170, and People v. Eugene Polhill, No. 171 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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