COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 117

SPARKLE DANIEL,

Respondent.

PEOPLE,

Respondent,

-against-

No. 118

NADINE PANTON,

Appellant.

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20 Eagle Street
Albany, New York 12207
June 02, 2016

Before:

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

Appearances:

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Meir Sabbah
Official Court Transcriber

CHIEF JUDGE DIFIORE: Next on the calendar

is number 117, People v. Sparkle Daniel.

MR. STROMES: Good afternoon, may it please the court.

David Stromes for the Manhattan DA, assigned as special prosecutor for the People.

Your Honor, may I reserve two minutes for rebuttal.

CHIEF JUDGE DIFIORE: You may.

MR. STROMES: Thank you.

The Appellate Division in this case erred as a matter of law when it found itself bound by this court's precedent that this court's precedent left it with no alternative but to suppress the statement at issue. And that finding was incorrect.

In fact, this court's decision in People v. White, which the Appellate Division did not analyze, provides a compelling basis to permit that statement in.

JUDGE STEIN: Aren't - - - aren't all of these questions mixed questions of law and fact?

MR. STROMES: These are not. To be sure, most are. The very existence of this court's decisions in White, and Paulman, and Chapple prove that there can be the case that makes it as a question of law. And the reason that this case rises to that level is because the Appellate Division

didn't traditionally, as happened in - - - in the companion case, Panton, cite a bunch of factors, balance, and say, therefore we find this way. It felt that it was stuck. It said, we have no alternative based on People v. Paulman but to reverse.

JUDGE STEIN: But doesn't - - -

MR. STROMES: We are compelled to reverse. And it even - - - it noted explicitly - - -

JUDGE STEIN: Can't - - - can't we infer that - - - that the court felt that looking at all the factors, it led to that inevitable conclusion?

MR. STROMES: That may well be the case if it had - - - if there was actually evidence that it had looked at all the factors. But the factors that White established, which Paulman did not address, or Paulman did not develop, are dispositive in this case, weighs strongly in favor of permitting the statement, when you look in particular at the facts of White, White prevents an even better case for suppression then this one does.

And what White emphasized in particular was the facts that in that case, as here, the extent and duration of the unwarranted exchange was very brief, was de minimis, that the statement that the defendant

made before warnings was innocuous, that the first statements that the defendant gave after receiving and waving Miranda warnings was actually exculpatory, and that there was a change in tenor from before the warnings to after the warnings.

When after the warnings were given, you had your typical structured interrogatory question and answer session, which was not the case before the warnings.

And the Appellate Division, just ticking off a few factors that Paulman delved into, listed those same interrogator, same place, not a lot of time, and said, we're stuck; there is nothing we can do, we have no alternative but to reverse. Had the Appellate Division explored White to the depth that - - - that really the case required, the outcome - - -

JUDGE ABDUS-SALAAM: Couldn't - - - why couldn't we read what the Appellate Division did as looking at the facts as you've stated them, counsel, and as the court - - - the Supreme Court stated them, and just drawn different inferences about whether those - - - these statements that the police officer made initially was designed to elicit incriminating statements, and the other inferences that follow from the rest of the statements. Why couldn't we look at

the Appellate Division decision in that way?

MR. STROMES: Your Honor, I don't have to dispute any of those inferences that the Appellate Division drew. Based on the - - - based on the face of its decision, I think, again, contrasting it to something like the companion case Panton, or look at any of the hundreds of cases that over the years had been the routine application of the Paulman-Chapple standard, those cases all look the same.

This case looks different. It is rare, I'm not sure I've ever seen the Appellate Division say, Court of Appeals precedent leaves us with no alternative but to reverse.

JUDGE FAHEY: Well, but that could be a rhetorical device rather than an analysis of the Paulman factors.

MR. STROMES: It might be if it were isolated, but it happened three times in this case. They said that - - -

JUDGE PIGOTT: So you think, what were they saying, that they disagreed with our decision?

MR. STROMES: That they disagreed with Paulman? I am not sure they expressed an opinion as to the merit of Paulman, but they certainly felt that Paulman constrained them to rule a certain way.

JUDGE PIGOTT: Well, didn't it?

MR. STROMES: I - - -

JUDGE PIGOTT: I mean, isn't that the question that you're - - - if we say under Paulman that's what you do, and they do it, what's the problem?

MR. STROMES: Because Paulman is not the only - - - the only case to analyze.

JUDGE PIGOTT: True - - -

MR. STROMES: White is a more recent case, and if - - -

JUDGE PIGOTT: But - - - but - - -

MR. STROMES: I'm sorry.

JUDGE PIGOTT: They may factual determinations. How do - - - you know, we're not going to change those, obviously.

MR. STROMES: Certainly, and as long as I don't challenge those factual determinations, I don't think I'm in trouble on the mixed-question question.

JUDGE PIGOTT: You're right. So you want us to say, based on these facts, but applying White instead of Paulman, the decision should be the Supreme Court should be affirmed.

MR. STROMES: It's not - - - it's not about White instead of Paulman; it's about considering

White in addition to Paulman. Because I think what the Appellate Division didn't do - - - White and Paulman together, you have got about eight factors. Four squared in Pullman, four squared in White.

The Appellate Division stuck to the Paulman factors without looking at the White factors, but what it didn't do, what it was required to do, as a matter of law, was look at all eight.

JUDGE PIGOTT: Should we send it back then?

MR. STROMES: I don't think you need to send it back; once that court has jurisdiction, it can decide that question, just as it did in White.

JUDGE GARCIA: Counsel.

MR. STROMES: Yes.

JUDGE GARCIA: On - - - on the White question, which I agree is closer here, if you line up the factors in White with your case. The one thing that seems to me to be missing, and maybe I'm missing something in the record is, there was this break, which timing-wise I think is similar, but there is kind of this activity during the break where they have a soda, he smokes a cigarette; it kind of takes the temperature down, I guess, really.

And I think in White, because the factors are, maybe let's say White is out here, but that

seems to me fairly important in the White analysis. And what is there in this case that's analogous to that type of break in that temperature, or the tenor of what's going on in the same room with the same people?

MR. STROMES: Certainly there is about the same time break as in White. White was fifteen minutes, this was about fifteen minutes. Now, you're - - - you're absolutely correct that in White there was this get me the cigarettes and the soda, that's one factor to be balanced among the rest, and what you had in White was the pre-warning exchanges before the defendant said that, the defendant was - - - was actually interrogated.

The officers asked him, do you want to - - - how about you tell your side of the story, after showing a crime - - - after showing a photograph of the victim and saying he was either murdered in cold blood, or there was a reason for it. And then, the defendant said, I'll tell you everything, just get me the cigarettes and soda.

Here, it was so much more de minimis than that. That, you know, the - - - the time alone really is sufficient to know that - - - that the defendant was able to reset herself, and in fact,

when they came back in, the way she started volunteering that statement, he said something totally innocuous, he came back in as almost a, where was I, I know you know what I'm talking about, and she just starts talking. To volunteer like that, she had fought over the break, she had reset herself, and she had determined that she was going to say something.

JUDGE STEIN: But that's his point. You know, you read it as sort of as an innocuous, so, where was I, and then on the other hand, it can be read as, okay, you know what I'm talking about.

MR. STROMES: Well, I think - - - I think the best answer to that is People v. Huffman. If it is not the functional equivalent of an interrogation for an officer to tell a defendant, after he had denied guilt, and then been picked out of a photo array by the burglary complainant, to come back and say, you're a liar. And, you know, he says, you're right, you got me.

If that's not interrogation, certainly neither is, and, you know, you know what I'm talking about.

JUDGE ABDUS-SALAAM: Well, counsel, on the issue of the timing, I'm wondering how you're

calculating the break. You said it's fifteen minutes, but I'm not sure about that as I look at this record.

MR. STROMES: It's - - - I think it's about fifteen minutes. The facts are that the detective, when he first came into the room, it was 6:55, that was a finding of fact by the - - - by the trial court. He said, literally a sentence-and-a-half to her before he was pulled out. So if you wanted generously give that a minute, we can, but it can't take very long.

And then there was the finding of fact that Miranda warnings were administered at 7:10, very, very quickly after he came back in. So based on those trial courts findings, which the Appellate Division did not disturb, that's where we are.

And whether it was fifteen minutes, fourteen minutes, I would submit it doesn't matter at that point.

CHIEF JUDGE DIFIORE: Thank you, Mr. Stromes.

MR. STROMES: Thank you.

CHIEF JUDGE DIFIORE: Counsel.

MS. REA: I'm Natalie Rea for Ms. Daniels.

Of course we disagree. I'll go over facts

first. First - - -

CHIEF JUDGE DIFIORE: Take us straightaway to White.

MS. REA: To White. This is so much more egregious than White.

First, I would say it's a mixed question. The People are trying to reargue White. In White, the court said, they're saying that the - - - the brevity of the questioning and the lack of - - - because it's not a confession, then that's the end of the analysis.

What this court precisely said in White, is no, it's one factor. The Appellate Division did exactly what it was supposed to do in this case. It identified the controlling authority, Paulman and it cited to White, it looked at all the factors, and it decided, yes, it had no alternative. It wasn't a legal question; it had no alternatives because of the facts.

Because the facts here unlike White, they were all - - - the entire - - - it was all set up and designed to get a confession. Let's start with the arrest. The detectives didn't get a warrant and go to her house to arrest her, they waited for her to show up on the street. Then they arrest her, in what even the detectives have to agree, was not exac - - - was agitated. There is - - - you know, there's - - - a crowd comes around, she's

handcuffed, she's put in the detective car, she drives to the Bronx for four - - -

CHIEF JUDGE DIFIORE: There's no issue of custody here.

MS. REA: No, but these - - - but I think it goes directly to separate the - - - the - - - the isolation, and the pressure, and the length on the - - - on - - - the impact on the defendant. Obviously, that's important to the impact of the unmirandized questioning. It doesn't - - - in White, there wasn't - - -

JUDGE ABDUS-SALAAM: So what do you say about the - - - the timing of?

MS. REA: Well, the timing, I'm afraid to say, I have to correct. Because the timing is not between the notes of the police officer when he came to the room, and after she had been in for - - - in cust - - - in handcuffs and custody forever, where - - - the question is, the timing between the unmirandized questioning and answer, and Miranda.

So here, and I'm going to read from the record, he stepped out for couple of minutes. We actually don't know what happened in the fifteen minutes between the 6:55, when she came - - - when he put her in the room, and a 7:10. All we know is

police officer says, he was, you know, you know why you're here, she says, no. I'm reading at the appendix of the People, page 100, line 3. "I asked her if she knew why she was here, she said, no. I told her, I said we are investigating the murder of an old lady. At this point in time I'm interrupted, I step out", and later on he says he'll be a couple of minutes.

Comes back in, "When I come back in, is - - - when I said to Ms. Daniels, do you know what I'm talking about now?" And he goes further on page 101 and says, "As I recollect, I asked her, do you know, I believe I said, I know you know what I'm talking about now." In other words, he said, there is no - - - and then he says, then she answers, she says yes, she said "I went on to say her and Nadine went to her aunt's house, saw the victim, I believe, and asked - - - ."

And only then, when she made that incriminatory statement, then he said, then I stopped her and Mirandized her. There is no stop, in general, these cases come up where they're - - - they're different cops, they're different places, they're different questionings, and we try - - - the courts try to figure out whether in the totality it's

a single event.

In this case, there is no question that it's a single event. What they are trying to say is make it a non-single event by saying that the statement - - - that the questioning wasn't enough.

So comparing White, I go back, she is arrested in this case. She is never told - - - she doesn't know why she's going to the station. In White, he did. It was a DV case, right. So he's brought to the station by one officer. In my - - - in - - - Ms. Daniel is arrested, she is put in the car, she is with these two officers for the next seven hours, right.

So Mr. White apparently was somewhat intoxicated, and he sleeps for seventeen hours. Fine. Then he's put in a lineup. This is - - - there is a break here. But he is put in a lineup. He's the one who asks, why am I in the lineup.

Ms. Daniel showed no willingness to speak, which is a very important part of the Paulman standard. Not - - - she didn't even want to give them her name when she was arrested. And then when he asked the question first, then - - - there's no change in venue, there's no change in detective, there's no change in questioning, there - - - and there is no willingness to speak.

And under Paulman, you look at the circumstances of the arrest, of the Miranda violation, which comes after this arrest, and the custody, and the drive to the Bronx, and she has no idea where she's going. And then, White adds the nature of the statement, but again, said, it's one factor.

Now, for the People, the People and the dissent in this case, want to say that this was not incriminating. I would beg to disagree. Where she is being asked about the murder of an old lady, four-and-a-half years earlier, she put herself at the scene, with the codefendant, and identifies the crime; of course it's incriminating. I don't know what more you need to do.

And then there is seamless transition for mister - - - for detective Ciuffi, I Mirandize her, and then I ask her.

Now, in White, again, he was willing to talk. And he says, why am I in the lineup. They show him a picture of the victim, he says, you know, what's with him, what about him. I mean, the attitude is completely different. Then, when they ask, okay - - - whatever the question was, he then says, I'll tell you everything.

Even that statement, he wasn't tied to anything. I'm not - - - you know, in other words, she was much more - - - she put herself, Ms. Daniel put herself at the

scene, at the time, with the victim, and with the codefendant. It's very different than what - - - what White said, right. And then White - - -

JUDGE GARCIA: Did she - - - I'm sorry, did she put herself with the codefendant? I didn't see that.

MS. REA: Yes.

JUDGE GARCIA: I thought she put herself at her aunt's house.

MS. REA: No, she - - - no, no, no.

JUDGE GARCIA: And at Miss Nellie, I saw - - - so - - -

MS. REA: If I go - - - if you go to 105, actually, that's where he says it. I have that one in front of me.

JUDGE GARCIA: Okay.

MS. REA: So it's 101 of the record, and 105 of the hearing. "I said, yes, you know, I know", so this is the second question, when he comes back in the two minutes. There's - - - there's - - - I'll go back, there is no fifteen-minute break. What's more disturbing here is, there's fifteen minutes with time - - - the time - - - between the time he came in and the Miranda, and all we know, is that he asked two questions.

I don't think he asked only two questions during those fifteen minutes - - - those fifteen minutes. And there is no break after the incriminating statement.

So I'm going to read the statement, Your Honor, at 101.

JUDGE GARCIA: Yeah, okay.

MS. REA: Right. He says, "As I recollect, I asked her do you know, I believe I said I know you know what I am talking about, and she said, yes. And then she went on to say her and Nadine went to her aunt's house." She saw Ms. Nellie, and I believe is the way she described her, and asked her if she could use her phone.

Now, the - - - the People also are suggesting that this was not interrogation. This is interrogation. I mean, first of all, if you - - - interrogation, you go back to the idea that, I mean, as the court said - - - the court said in the footnote, the question is whether it was - - - the police thought - - - it was reasonably likely to elicit an incriminating statement.

Well, all the way back to the isolation, which are all from the arrest, which are very relevant to whether it's an interrogation for Miranda

purposes. When he comes back and he says, I know you know what I'm talking about, he's saying to her, don't give me that "no" answer again. I mean, of course it's interrogation, of course it's elicit - - - he wanted to elicit an incriminating statement.

And he said, when he said, I hope so, you know, that was just a confirmation that he had done exactly what he intended to do, which is elicit this statement.

CHIEF JUDGE DIFIORE: Ms. Rea, would you like to address the subsequent statement, the video?

MS. REA: The - - - the post Miranda. So post Miranda, she - - - there she is, she's placed herself, unlike White, where he just said, I wasn't there, I was somewhere else; I was in Queens at 7:30 or something.

She again - - - she had said something. So she is there, she clearly minimized her - - - her involvement, but she - - - even in the first statement, I would suggest that the court should look at both, number one and number two statements, that were just seven minutes apart. And if I may say, all this time, he could have given her Miranda warnings. Right. And so then he could - - -

JUDGE ABDUS-SALAAM: What - - - what lens

are we to look at it through? Is it one of this is a mixed question of law in fact, or is it just a pure question of laws your adversary argues in the brief?

MS. REA: I think this is a mixed question, this court has - - - there is nothing in the language of the court that - - - the Appellate Division that says - - - that suggests it's a question of law.

When it said, we have no choice, it had no choice because unfortunately it recognized your authority, and when at the end, the court says, we're compelled to suppress all the statements, what it was adding is, the videotape also comes out, because the People never - - - clearly never even thought they had an argument to challenge the fact that it was part of a single event.

Therefore, we would ask the court to dismiss.

CHIEF JUDGE DIFIORE: Thank you.

Counsel.

MR. STROMES: I'm - - - I'm going to pick up right there, with that video, because the proper remedy here, if this court believes that this is a mixed question, would be to send it back to the suppression court for determination on that video.

The Appellate, the - - - I'm sorry, the

prosecutor at the suppression hearing absolutely argued that the video was even further attenuated from the statements that we've been talking about; the written statement. It's pages 291 to 292 of the hearing transcripts.

The prosecutor has just finished talking about the second statement ending at 8:27, and the prosecutor said then, at 11:15, she has the video statement, and in the interim, she is left alone, she is not continually in Ciuffi's custody, she has - - - is given food, is given drink, is given bathroom breaks, is then brought to the prosecutor's office, and the prosecutor, in that different location, reads her Miranda rights, she waives Miranda rights, and gives another statement.

That was - - - that could not have been anything but an argument that the video statement is even further attenuated. And the trial court didn't rule on it because it didn't think it had to. It found that the written statements were sufficient.

I understand that I - - - I have a law of intent problem to argue to this court, please go ahead and just find the video statement attenuated, even though it's so classically attenuated, that there's really no issue.

Post Concepcion though, this court has made clear that the remedy in this kind of a situation, the People are entitled to have that determination by the suppressing - - - suppression court, based on the facts deduced at suppression hearing.

That People v. Garcia, 20 N.Y.2d 317. So at the very least, it should be sent back, because honestly, not to do so, is literally to let the defendant get away with murder. That video statement is so classically attenuated, she repeated her - - - she repeated her confession, and the jury rightly heard that, and that rendered anything about the earlier statements the jury heard to be completely harmless.

JUDGE ABDUS-SALAAM: If we don't deal with this, for the sake of the argument, attenuated statement, then the proper remedy, if we agree with the Defendant, would be dismissal; wouldn't it?

MR. STROMES: It would not be dismissal; it would be for a new trial. The People had other evidence.

JUDGE ABDUS-SALAAM: Okay.

MR. STROMES: I think I can fairly argue, as we did in the brief, that this - - - this could be viewed as harmless error for all the problems with

Larissa Kirby's testimony, that, I understand she ended up getting money out of this, I understand she had a motive to set this person up. But if she is going to set someone up for a murder, and then all of a sudden her fingerprints are at the scene of the murder, fresh prints, that doesn't mean you set them up; that means that she actually heard on the phone what she claimed to have heard, a completely - - - it made all of her testimony rock-solid credible.

And that's the same admission that defendant ended up repeating. So the fact that the jury heard it out of Larissa Kirby's mouth, was a suitable proxy, given that fingerprint.

So absolutely would have to get sent back for a new trial, unless this court finds it harmless, and in the event that this court finds there to be a mixed question, the proper remedy again, is to have that video statement examined by the suppression courts, in accordance with Garcia, and the principles of fairness and justice.

CHIEF JUDGE DIFIORE: Thank you Mr. Stromes.

MR. STROMES: Thank you.

CHIEF JUDGE DIFIORE: Next on the calendar is number 118, People v. Nadine Panton.

MS. NICHINSKY: Good afternoon, Your Honors, my name is Robin Nichinsky, may it please the court. I represent Appellant Nadine Panton.

Nadine Panton, in this case - - -

CHIEF JUDGE DIFIORE: Ms. Nichinsky, excuse me for interrupting, would you like any rebuttal time?

MS. NICHINSKY: Oh yes, thank you, Your Honor.

CHIEF JUDGE DIFIORE: Um-hum.

MS. NICHINSKY: I'd like to ask for two minutes for rebuttal time.

CHIEF JUDGE DIFIORE: Certainly.

MS. NICHINSKY: Nadine Panton was subjected to a tactic that this court has condemned. She was first deliberately interrogated without Miranda warnings until she broke down and cried.

JUDGE GARCIA: Did she challenge this - - - make a suppression motion for the statements based on that argument?

MS. NICHINSKY: Your Honor, she - - - the - - - we submit that this was preserved, that defense counsel said again and again that the officer came in at 9:12, she made a statement in that time between 9:12 and 9:20, without Miranda warnings, that it was

continuous chain of events, and that there was no attenuation here.

JUDGE STEIN: Aren't you talking about attenuation, or defense counsel talking about attenuation from the arrest; wasn't - - - wasn't that the argument?

MS. NICHINSKY: Well, I sub - - - that was part of the argument, but I believe that he also was including the fact that there were no Miranda warnings, and that there was questioning that went on during this time period. He could have been more articulate, but he did set out all the facts in his papers and in his oral argument. In the oral argument, he followed directly from the codefendant who had made that argument, and he preserved it by noting of those facts, and by saying all the right words, including the facts of what happened here, that there was no Miranda in discussion.

If this court doesn't agree with that, I would say that it's absolutely ineffective assistance of counsel.

JUDGE GARCIA: But then why wouldn't it be a 440 subject, as the Appellate Division found?

MS. NICHINSKY: Because it's obvious from the record, Your Honor, there is just absolutely no

legitimate reasonable strategy that could have justified not raising this meritorious issue. It's like the Clermont case, where he should have raised this issue, he had a substantial issue - - -

JUDGE STEIN: But here, he raised a lot of - - - he raised a lot of suppression issues. It wasn't - - - it wasn't that there was no request for suppression.

MS. NICHINSKY: Well, Your Honor, he did obviously see, and it was true, that this confession was the crux of the case. I mean, this really was the case against Nadine Panton, even less so than with her codefendant. He saw that it needed to be suppressed; he just didn't, assuming you don't find preservation, appreciate how substantial the Miranda issue really was.

CHIEF JUDGE DIFIORE: There's no strategic reason he could have been thinking of?

MS. NICHINSKY: I don't know if he had a reason, I would - - - I can't say what it is, but I can tell you this is an argument not made in front of a jury, made in front of a judge. And he could very easily have said, I have another argument, but in the alternative, I join in the Miranda issue.

There's just no justification. There is no

downside for him not to have done that, and that is plain on the record, it's a substantial issue, and the confession is the only thing in the case.

JUDGE ABDUS-SALAAM: But wouldn't it appear - - - would it have - - - if - - - if this statement had been suppressed, would that have been a clear winner? Would that be the kind of Turner case that we say would amount to ineffective assistance of counsel, that it has to be a clearly dispositive issue?

MS. NICHINSKY: Which statement?

JUDGE ABDUS-SALAAM: The statements that you made.

MS. NICHINSKY: If all three - - - because there are three statements in this case.

JUDGE ABDUS-SALAAM: Right. So if any of the - - - what - - - what are you saying about the ineffective assistance of counsel that would require us to reverse this conviction?

MS. NICHINSKY: I'm saying that counsel should have argued that - - -

JUDGE ABDUS-SALAAM: And if so - - -

MS. NICHINSKY: - - - because of the Miranda warnings - - - because there was interrogation here, unlawful interrogation, and there

was no attenuation there, these - - - all of these three statements should have been suppressed.

And the fact that counsel, if you find this was not preserved, and he did not raise these, they should all be suppressed. Based upon the record, there is no legitimate strategy to not do that. So it would be ineffective assistance of counsel as to all - - - as to all of the arguments.

JUDGE GARCIA: As we asked your now opponent on this case, why isn't this a mixed question beyond our review?

MS. NICHINSKY: Well, Your Honor, this case is different from the codefendant's case. In the codefendant's case, the - - - the panel, the Appellate Division panel had the law right, and they had the facts, the record facts that supported the correct analysis of the law.

In this case, first of all, there was no record support for attenuation here. If you look at the factors laid out in Paulman and White, to figure out when there should be attenuation, you see that there was no pronounced break here, so there was no record support in this case. And in addition, the Appellate Division found the law incorrectly.

It found that deliberately eliciting crime,

that was used by the DA repeatedly at the hearing and trial, was not incriminating, and then it said, it relied on only that fact, and then said, attenuation. So it didn't do the White analysis. White said, whether something is incriminating is only one factor. You have to look at everything else.

It wasn't - - - it was incriminating here, the court was wrong, but even if it hadn't had been incriminating, the court should have gone on and analyzed the other factors. They didn't do that. So they didn't do - - - they weren't correct about the law, and they would not have been able, had they done the proper analysis that this court mandates be done, there is no record support for attenuation in this case. If you go to the different factors - - -

JUDGE GARCIA: Is there no record support, because - - - did the People have an opportunity to argue what the attenuation would have been, since this claim wasn't raised other than to state the facts in the suppression motion? I mean, if there had been, there is no attenuation here made as a specific argument, wouldn't the record have been more complete as to why there was attenuation?

But to say that, well, we laid the facts out, so we made the argument, I mean, was there any

counterargument by the People that there was attenuation?

MS. NICHINSKY: Well, Your Honor, they actually had quite an opportunity to argue attenuation. The defense counsel specifically said there was no break - - -

JUDGE GARCIA: But I guess my question is - - -

MS. NICHINSKY: - - - and he said there was no attenuation.

JUDGE GARCIA: I'm sorry, my question is, did they make an - - - a responsive argument that there was attenuation at the suppression hearing?

MS. NICHINSKY: At the suppression hearing, they said that it was not custodial interrogation, which it was, and they said that the Miranda warnings were given. They did not make a sufficient case for attenuation, it's true, so - - -

JUDGE GARCIA: Maybe they didn't know they had to, I guess is the point - - -

MS. NICHINSKY: I think they knew they had to, Your Honor.

JUDGE GARCIA: - - - since it wasn't specifically raised.

MS. NICHINSKY: I think they didn't. I

think that defense counsel said that there was no attenuation here, he said it was one continuous chain of events. Whether you find it was for the right reasons or not, he said all those things. And the court just ignored it.

The court said there is - - - it wasn't incriminating, and therefore, attenuation. And that is the wrong rule of law. And in fact, in this case, if you look at the factors, it was zero time inferential, all the same personnel, no change in location, no willingness to speak to the police beforehand, there was trickery and shock, I would say. She was brought in on a ruse, she was then shown a photo, she started to cry, they knew they had her, they gave her Miranda, they immediately got one statement, two hours later - - - two-and-a-half hours later they got the next statement, but they didn't even bother giving any evidence as to what occurred during that two-and-a-half hours, and that's their burden, and they did not fulfill that burden.

CHIEF JUDGE DIFIORE: Thank you, Ms. Nichinsky.

MS. NICHINSKY: Thank you.

CHIEF JUDGE DIFIORE: Mr. Stromes, at what point was Ms. Panton in custody?

MR. STROMES: I'm sorry?

CHIEF JUDGE DIFIORE: At what point was Ms. Panton in custody?

MR. STROMES: I'm sure she was in custody from the moment the police arrested her. But - - - she was in custody from the moment the police arrested her.

I think - - - I think Judge Garcia cut to the bone of this issue. To answer Your Honor's question to Ms. Nichinsky, no, the People never - - - never argued, and never had occasion to argue at the hearing that there was a definite break in the interrogation that would have insulated post-warning statements from pre-warning statements.

Because the Miranda claim that defense counsel raised in this case was totally different. He can't preserve a claim as to all Miranda issues by saying the word Miranda. Instead, he put his client on the stand. And his client told the narrative of events by which the police officers told her that if you don't - - - if you don't make a statement - - - someone else has implicated you in a homicide, if you don't make a statement, you're going to jail for the rest of your life, and you're never going to see your kids again.

And she started crying because she said she was

upset by this. And they wouldn't let her go home, so she made a statement so she - - - they could - - - she could see her kids, so to fulfill that bargain, and she was never read Miranda rights. So the argument was, actual coercion, and Miranda warnings were never read.

And then she said that she initialed a form without reading it, that she imagined may have been that. So when the People responded below, we responded to those claims. No, no, no, Detective Ciuffi was credible, here is how you know. No, no, no, of course she was read Miranda rights, actually look at the form in the way she - - - and the way that she answered the questions by writing out her responses, you know that she is credible. And you know that she was read her rights.

There was never an argument by the defense that the act of crying was any sort of acknowledgment of guilt. In fact, defendant testified to the opposite. She said - - -

JUDGE RIVERA: So why isn't that ineffective?

MR. STROMES: - - - I cried because I was scared.

JUDGE RIVERA: So why isn't that ineffective?

MR. STROMES: It's not ineffective, Your

Honor, because this was not going to win her the day. As Judge Abdus-Salaam said, this has to be clear cut and completely dispositive, under People v. Turner.

And at the end of the day, even if arguing that definite break gets suppression of the written statements, it doesn't get her home clear from the video. Because the video is way out at the other end of the tunnel, an hour-and-a-half later, different location, different interrogators, and that's going to be classically attenuated.

So just getting suppression under the Chapple-Paulman test for the written statement, it doesn't get her anywhere. On the other hand - - -

JUDGE RIVERA: You know what went on between the statements and the video?

MR. STROMES: Between the statements that she - - -

JUDGE RIVERA: The statements and the video.

MR. STROMES: She was left alone for a time they transported to the DA's office.

JUDGE RIVERA: No one was there?

MR. STROMES: I'm sorry.

JUDGE RIVERA: No one came in - - -

MR. STROMES: We don't - - -

JUDGE RIVERA: She's by herself.

MR. STROMES: Again, we don't know - - -

JUDGE RIVERA: - - - no?

MR. STROMES: - - - we don't know because this wasn't the claim that the defense attorney proceeded. This is not just the kind of preservation where they were supposed to say some magic words and they didn't. This is the type of preservation, as Judge Garcia noted, where we don't even have facts, because that's not the claim the defense attorney read - - - raised.

Defense attorney raised a claim that would get him home free. If she - - - if her testimony was found credible, and she was coerced, if you don't make a statement, you're never going to see your kids again, you're going to jail for the rest of your life, and she then makes that statement, and her testimony is - - - and they then wouldn't even let her go home, they said we have to get this on tape, you can't go home yet, we're going to talk to the DA.

She's coerced that whole time. So if the coercion claim flies, she goes home. That's his clear win, and that's the shot that he took. And I would suggest, I'm speculating here, because we haven't done a 440, but I would suggest that that was

probably his strategy of determination.

And if the defense wants to challenge that now, a 440 hearing is the vehicle, because there is an obvious - - - that was an obvious clear winner if she had been credited, but she wasn't, whereas the claim that - - - that the Chapple-Paulman claim, was not. That wasn't going to go anywhere, because the video statement was going to be a full stop at the end.

Beyond the issue of preservation and the - - - and the kind of preservation that leaves us with an inadequate record to even decide the claim, I would argue that this is in fact a mixed-question. The reason for that is that the defense, in particular, is challenging inferences that the Appellate Division drew.

The Appellate Division obviously found the act of crime to not be incriminatory. The defense has a different view of that, and thinks it was incriminatory, that's a judgment call that the Appellate Division has the power to make, in drawing an inference from the facts. And the Appellate Division drew it one way, which makes sense given the testimony that Panton herself in fact gave at the hearing.

And the record also supports the notion that there was that eighteen minute break from when she started crying until when she eventually composed herself. And the Appellate Division found that, as a matter of fact, it's supported by the record, and at that point, there is no - - - there is no further review by this court's - - -

Your Honors would just give me a minute to scan over my notes to see if I've missed anything.

And the People did note in this case as well, the attenuation of the video statement in the context of a Payton violation. Because the other claim raised at the hearing was that there was a Payton violation, so the - - - the - - - we know that the defense attorney knew the video statement was going to be tough to overcome because it was part of that Payton analysis.

So it seems that there was a clear strategy staring that down at the other end of the tunnel, that you go for a different kind of Miranda defense. That was the issue that raised these issues that - - - the Chapple-Paulman issues in this case simply were not part of this case, have never been part of this case, are not part of this case now.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. STROMES: Thank you.

CHIEF JUDGE DIFIORE: Ms. Nichinsky.

MS. NICHINSKY: Your Honors, I just want to note in the record, starting on page A350, 351, the - - - the prosecutor does argue that - - - makes her arguments about how this is not custodial interrogation, makes the arguments about - - - that it's not attenuation, and talks about the video.

She definitely talks about the statement, and she talks about the video, and she's trying to argue that it's all attenuated. She did not fulfill her burden to establish exactly what happened during that time period, but - - - during the time period between the statement and the video statement, but she clearly was focusing on attenuation.

And if she did not discuss what happened in that time period, that was her error in this case. She took - - - we know that Sparkle Daniel ate Chinese food, and has soda, and that the officers left the room because they went in to interrogate my client. But we don't know what happened in that two-hour period, and if you look at the video, it looks like she is sitting there with a roll of toilet paper like she had just finished crying. The officer is sitting right next to her, there was clearly an influence of the officer still present before her.

So I would argue that they knew that - - - they knew that they had to establish attenuation, because the defense lawyer said, there is no attenuation, there is a continuing chain, and she was under the influence of that questioning, all the way through with no pronounced break.

JUDGE GARCIA: Wasn't the thrust of her suppression motion as it was just described that you told me I couldn't go home, you told me I'd never see my children again. There was not an emphasis on even Miranda; it was coercion, was the theory of the suppression motion. So why would the prosecutor have to explain attenuation in terms of a break in Miranda warnings?

MS. NICHINSKY: Well, they do discuss how she's given the Miranda warnings again in the video.

JUDGE GARCIA: Right.

MS. NICHINSKY: It talks about how she's calm in that video. So the defense counsel did argue that this was a continuing series of events, that there was no pronounced break, and that there was no attenuation. And the DA was responding to that; was responding to that in talking about the first post-Miranda statement, and was responding to that in talking about the video. And I - - -

JUDGE GARCIA: So your position is, there was an alternative argument made by the defense counsel that either, you never give me Miranda, you told me I would never see my kids, I didn't know what I was signing, or, you Miranda - - - you interrogated me, then you - - -

MS. NICHINSKY: Without Miranda.

JUDGE GARCIA: - - - Mirandize me too late. So there is in the record a showing that defense counsel made those two separate arguments in that suppression hearing.

MS. NICHINSKY: Yes, Your Honor. It wasn't the clearest, but the facts were set out, the - - - the statements, there are continuous series of events, the statement that there was no attenuation, that she made a statement without Miranda from 9:12 to 9:30, were all there.

And he argued orally right after, and he perhaps assumed that he was just continuing a discussion, and didn't utter the words, but if you look at the language, it's clear that that's happening, and the DA responded to some of those facts too, when she argued in her - - - in response.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. NICHINSKY: Thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sparkle Daniel, No. 117, and People v. Nadine Panton, No. 118, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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