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COURT OF APPEALS  
STATE OF NEW YORK

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TORRES,

Appellant,

-against-

No. 21

JONES, et al.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
January 14, 2016

Before:

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

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 JUDGE PIGOTT: Case number 21, Torres v.  
2 Jones.

3 Mr. [Pe-rek'-man], am I pronouncing your  
4 name correctly?

5 MR. PERECMAN: C is soft, Your Honor,  
6 Perecman.

7 JUDGE PIGOTT: Perecman, there we go.  
8 Thank you. I apologize.

9 MR. PERECMAN: I'm from another country.

10 JUDGE PIGOTT: Okay.

11 MR. PERECMAN: Good morning, Your Honors.  
12 Good afternoon, rather. I'm David Perecman, and I'm  
13 from the Perecman firm, and I, along with my son and  
14 associate, Zachary Perecman, are here to represent  
15 the plaintiff-appellant, Maria De Lourdes Torres.

16 JUDGE PIGOTT: Would you like rebuttal  
17 time?

18 MR. PERECMAN: I would, Your Honor. Three  
19 minutes, please.

20 JUDGE PIGOTT: That's okay.

21 MR. PERECMAN: I didn't think I would find  
22 this, but in looking at the cases, I saw, recently, a  
23 2014 Supreme Court case that actually spoke about the  
24 issue in this case, in the summary judgment context  
25 and in the context of a civil rights case, a case

1 called Tolan v. Wain (sic), where Judge Alito, in his  
2 concurring opinion, stated that "a substantial  
3 percentage of civil appeals heard each year by the  
4 Courts of Appeals present the question of whether the  
5 evidence in summary judgment record is just enough or  
6 not quite enough to support a grant of summary  
7 judgment".

8 The per curiam opinion stated what we all  
9 know to be true, that the nonmovant is to be  
10 believed, that all justifiable inferences are to be  
11 drawn in his favor; in this case, her favor.

12 And the court stated the fundamental  
13 principle that at summary judgment stage, reasonable  
14 inferences should be drawn in favor of the nonmoving  
15 party and to credit the evidence of the nonmoving  
16 party. And then they said it is, in part, for that  
17 reason, that genuine disputes are generally resolved  
18 by juries in our adversarial system. And it is  
19 exactly that.

20 JUDGE PIGOTT: It looked to me that what  
21 the Appellate Division seemed to go on, and you can  
22 correct me if I'm wrong, is when you look at the way  
23 the detectives went about investigating this murder,  
24 and they seemed to ask all the right questions, and  
25 your client seemed to give all the wrong answers and

1           then have an explanation for them later, you know, I  
2           - - - I didn't use the phone; well, I used the phone  
3           but I didn't want to - - - didn't want to tell you  
4           that in front of the landlord because I'd get in  
5           trouble. I was never at the apartment; well, I was  
6           at the apartment. And - - - and where is it, in your  
7           view, that - - - that a question of fact arises that  
8           says they did not properly investigate this and as a  
9           result, she was - - - she was incarcerated for four  
10          years?

11                       MR. PERECMAN: Well, if you're speaking, I  
12           assume, about the false arrest claim, Your Honor?

13                       JUDGE PIGOTT: Right.

14                       MR. PERECMAN: On the false arrest side, I  
15           think, first of all, the moment she gave that  
16           confession, if that's the confession that she gave as  
17           opposed to what we believe is the case, which is that  
18           it was completely fabricated by the police, the  
19           confession is a completely different set of facts  
20           than the crime scene. I mean, completely different.

21                       Second of all, all the facts that they  
22           gleaned from her were relatively innocuous: that she  
23           left her crucifix there; she had a relationship with  
24           him.

25                       JUDGE PIGOTT: But originally she didn't -

1           - - she didn't tell them that, right?

2                   MR. PERECMAN: No, on - - - there's nothing  
3 about that, her not telling them that. The only  
4 thing she did not do is when - - - say is when they  
5 first came to her with a picture of him without a  
6 beard, she didn't recognize him. The second time  
7 they came with a beard and she said, in front of her  
8 landlord, she didn't recognize, understandably, and  
9 even Officer - - - Detective Santiago said apparently  
10 she was uncomfortable in front of her landlord, as  
11 anyone would be. And fifteen minutes after she got  
12 down to the station, she had admitted that she knew  
13 him and she admitted making the phone calls. But  
14 leaving your crucifix at someone's apartment and  
15 making phone calls to their apartment, that's a great  
16 leap into twenty-one plunged wounds into somebody and  
17 murdering them.

18                   JUDGE PIGOTT: I get that. Well, all  
19 right, I'll let you continue. Go ahead.

20                   MR. PERECMAN: That's what I wanted to say.  
21 Go ahead, Your Honor.

22                   JUDGE PIGOTT: Well, I was going to say, I  
23 looked at it from the point of view of the  
24 investigation, not necessarily the conviction that  
25 resulted. But in terms of what they seem to have

1 done, seemed to - - - it seemed appropriate. And  
2 where did they - - - where did they go off the rails  
3 in terms of their investigation and her arrest?

4 MR. PERECMAN: I think where they went off  
5 the rails is when they fabricated a confession. I  
6 think the main issue in this case is the malicious  
7 prosecution case. And once they - - - they took a  
8 false confession which, by the way, was taken with  
9 sixteen-and-a-half hours, without given - - - being  
10 given Miranda rights. She was, no question, with  
11 them at 7 in the morning, polygraphed at 12 - - -  
12 which is interrogation, interrogation that they used  
13 towards arresting her; at least that's what counsel  
14 writes in their brief. And they only gave her  
15 Mirandas at 11:30 at night. And that - - -

16 JUDGE STEIN: Well, what, if any, impact  
17 does the court's - - - the criminal court's  
18 suppression ruling have on the question of the  
19 involuntariness of the statement and - - -

20 MR. PERECMAN: This court covered it in  
21 Warney. And the court in Warney said that because  
22 there are different facts before the court, and  
23 because now we know she's innocent, it has to be  
24 viewed in light of her innocence, it is of no binding  
25 effect on this court, none.

1                   JUDGE FAHEY: So on malicious prosecution,  
2 you're saying that the actual malice that's necessary  
3 to show in here is - - - is you're saying that the  
4 allegation of - - - of a coerced confession is  
5 sufficient for you to meet your initial burden, a  
6 prima facie burden for actual malice.

7                   MR. PERECMAN: Malice is - - - comes from a  
8 lack of probable cause. There are many cases that  
9 talk about that.

10                  JUDGE FAHEY: Just tell me in the record  
11 where there's actual malice. Who in - - - who in the  
12 - - -

13                  MR. PERECMAN: You mean the lack of  
14 probable cause or what I think is malicious in - - -

15                  JUDGE FAHEY: Well, I think you have a  
16 harder time with the lack of probable cause when the  
17 grand jury acts, but I want to just stay on the  
18 malicious prosecution, on the last prong of the test,  
19 actual malice. Tell me in the record where there's  
20 actual malice.

21                  MR. PERECMAN: Fabricating a confession.

22                  JUDGE FAHEY: So it's the allegation of a  
23 fabrication of a confession that you say establishes  
24 actual malice?

25                  MR. PERECMAN: Well, in terms of the

1 evidence before this court, because it is a motion  
2 for summary judgment - - -

3 JUDGE FAHEY: Right.

4 MR. PERECMAN: - - - we have the  
5 defendant's evidence, we have their admissions, and  
6 we have the plaintiff's. The plaintiff lays out  
7 nothing but the hallmarks of a coerced confession:  
8 no Miranda until sixteen-and-a-half hours in,  
9 polygraph before, vulnerable plaintiff; I listed all  
10 the hallmarks in my brief. That's her side of the  
11 case. Now, on a summary judgment motion she's to be  
12 believed.

13 The admitted-to evidence is that in fact  
14 Miranda wasn't given until sixteen-and-a-half hours,  
15 and the interrogation was indeed twenty-two hours,  
16 which this court has acknowledged is a long time. We  
17 do know that most false confessions - - - I - - - I  
18 know you were talking about it just the other day - -  
19 -

20 JUDGE FAHEY: In fairness - - -

21 MR. PERECMAN: - - - in the Lin case.

22 JUDGE FAHEY: In fair - - - yeah, we were.  
23 In fairness to you - - - but that doesn't get you to  
24 actual malice. Tell me in the record where do I look  
25 to and say that's - - - that's actual malice. Some

1 police officer did something - - - let me give you an  
2 example - - - because he didn't like this lady  
3 because she was an undocumented alien. And there's  
4 some proof of that. Where is the actual malice?

5 MR. PERECMAN: I - - - first of all, Your  
6 Honor, I believe that the cases are quite clear that  
7 malice is proven by a lack of probable cause, number  
8 one. Number two, if what we say is - - - my client  
9 says is true, that they turned to her and they said,  
10 no, you did this - - - they had DNA tests pending;  
11 they didn't wait for them to come back - - - you did  
12 this. You've got to say you did this. You've got to  
13 tell us that this was done and you did it because you  
14 were jealous and you did it in self-defense. And if  
15 you write it down and say it's self-defense, we'll  
16 help you; we'll let you go home. They said it to - -  
17 - she testified to it three times. That is  
18 malicious. If you take someone's - - -

19 JUDGE STEIN: Is malice - - - I think what  
20 you're saying is is that if you show probable cause,  
21 that is malice. But can - - - can it - - - I don't  
22 know; I look at it a little bit differently, that - -  
23 - I thought that our case law said that if there's  
24 probable cause, that could be an indication of  
25 malice, but - - - but I think what Judge Fahey's

1 asking about is don't you have to go that next step  
2 to show that there was some kind of malice and - - -  
3 and that's evidenced by the fact that they arrested  
4 her without probable cause or they prosecuted her  
5 without probable cause.

6 MR. PERECMAN: Your Honor, maybe I didn't  
7 get it right when I've been reading all of these  
8 cases, but I could swear I've read, in case after  
9 case, that a lack of probable cause is proof of  
10 malice. It's enough. This is a summary judgment  
11 motion, after all. The question here, you have to  
12 accept what my client testified to as true. Even the  
13 Supreme Court spoke about this concept. It's not  
14 about judging it now and thinking, well, did the  
15 police have a case or not. And then you get to a  
16 whole other problem: they had DNA. And after the  
17 DNA, they marched into court and testified that this  
18 confession took place between 11:30 p.m. and 1  
19 o'clock a.m., two hours instead of twenty-two hours.

20 JUDGE FAHEY: All right. So let's take it  
21 to the next level then. I - - - let's assume you're  
22 correct. Now - - - now there's a grand jury  
23 indictment. Now - - - now we have the  
24 post-indictment evidence problem. So do we have to  
25 overrule Colon to get to where you want to go?

1 MR. PERECMAN: No.

2 JUDGE FAHEY: How come?

3 MR. PERECMAN: Because the first question  
4 is did we overcome the presumption of probab - - - of  
5 probable cause brought on by the inda - - -  
6 indictment. The confession does that. That is the  
7 bad-faith conduct on the part of the police that  
8 overcomes it, along with any prior failure to  
9 investigate, where reasonable persons would do so, if  
10 it's deemed to be egregious.

11 Once the presumption is overcome, then  
12 everything is open before the court to view and make  
13 a determination whether the proceedings are either  
14 the commencement or the continuation of the  
15 prosecution. And it can't be a coincidence that  
16 every time the courts discuss malicious prosecution,  
17 it says commencement or continuation. It doesn't say  
18 one without the other; it says them both. And when  
19 you look at what happened here, this woman is an  
20 innocent. She did nothing. And she got dragged into  
21 this because she tried to make ends meet in her life.

22 JUDGE PIGOTT: Well, that's a summation.  
23 But what I was saying before was a lot of the - - -

24 MR. PERECMAN: I'm hoping to get there,  
25 Judge.

1 JUDGE PIGOTT: A lot of it seemed to  
2 follow, you know, in a logical investigatory fashion.  
3 But your - - - what you're saying is they focused too  
4 early and then - - - and then they forced a  
5 confession.

6 MR. PERECMAN: In the - - - in the first  
7 instance, they went, they spoke to her. We're not  
8 saying it wasn't logical that she was a suspect.  
9 That's not the question here. But anyone who's close  
10 to them - - - that's what they refer to as the usual  
11 suspects; they go to someone that's close to you.

12 JUDGE PIGOTT: And usually they're the  
13 usual - - -

14 MR. PERECMAN: Exactly, except in this  
15 case, considering the DNA, we know one thing: they  
16 were wrong.

17 JUDGE PIGOTT: That was later, though.

18 JUDGE ABDUS-SALAAM: Did they - - - yeah, I  
19 was going to - - - did the officers or detectives  
20 know about the DNA before - - -

21 MR. PERECMAN: No, they found that out  
22 afterwards.

23 JUDGE ABDUS-SALAAM: That was later, yeah.

24 MR. PERECMAN: I tell you one thing they  
25 knew.

1 JUDGE RIVERA: So it's at what point? At  
2 what point is it no longer a proper investigation and  
3 it's now this maliciousness?

4 MR. PERECMAN: When they extracted a  
5 confession from her that she - - - no one - - -

6 JUDGE RIVERA: Because they know - - -

7 MR. PERECMAN: What they took - - -

8 JUDGE RIVERA: - - - at that point I'm  
9 extracting it from someone who did not commit this  
10 crime?

11 MR. PERECMAN: I believe so. She stood - -  
12 - she sat there for twenty-two hours - - - look at  
13 her testimony - - - and all she says is, no, no, no,  
14 I didn't do it, I didn't do it. They say, but you've  
15 got to sign it. And she says, no, I didn't do it,  
16 no. How many hours does a meek little lady like  
17 this, with a lack of understanding of the judicial  
18 process, with a fifth-grade education, have to tell  
19 them I didn't do it? How long do they get to work  
20 you until they get what they want? They had seven  
21 weeks or six weeks. They had no suspects in this  
22 case. They left her alone, knowing the same  
23 information that you spoke about a moment ago, Judge  
24 Pigott, and they left her alone. Why? Because they  
25 had evidence of footsteps on the roof at the time of

1 the - - - of the incident, blood going down the fifth  
2 - - - on the fifth floor, when her confession - - -

3 JUDGE STEIN: So you're - - -

4 MR. PERECMAN: - - - by the way, has her  
5 taking the elevator?

6 JUDGE STEIN: But you're - - - what you're  
7 saying is is that there's enough here, if we believe  
8 her allegations, to create a question of fact to get  
9 this all to a jury.

10 MR. PERECMAN: That, and I think the  
11 twenty-two hours, and no Miranda until sixteen-and-a-  
12 half. Miranda's sacrosanct.

13 JUDGE PIGOTT: Well, look - - -

14 MR. PERECMAN: Are we to believe - - - is  
15 this court going to believe, as a matter of law, that  
16 they didn't ask this woman a single question for the  
17 first sixteen-and-a-half hours? We're going to  
18 believe Detective Santiago's testimony from the  
19 Mapp/Huntley hearing, which was that they took her  
20 out to a three-hour lunch and they were sitting and  
21 reading a magazine? That's really what they did?  
22 And then she says later that she wrote the statement,  
23 at the behest of my client, where she summarized  
24 everything my client said during the day. Well,  
25 that's really hard because she didn't say anything

1 during the day because you didn't ask her any  
2 questions. So where'd you get the summary from?

3 JUDGE PIGOTT: Okay, Mr. Perecman, I think  
4 we have your argument. You had some rebuttal time,  
5 right? You have three minutes.

6 MR. PERECMAN: Thank you, Your Honor.

7 JUDGE PIGOTT: Let's hear from Mr. Slack.

8 Mr. Slack, good afternoon.

9 MR. SLACK: Good afternoon, Your Honor.  
10 May it please the court, Devin Slack on behalf of  
11 respondents.

12 No one disputes the summary judgment  
13 standard, but it has to be considered within the  
14 legal standard, the substantive standard here of  
15 probable cause. And that turns on what officers knew  
16 at the time that the plaintiff was arrested and  
17 indicted. And everything they knew pointed to  
18 plaintiff and to no one else. She had no alibi. The  
19 crime scene suggested that the victim - - -

20 JUDGE STEIN: But that assumes that they  
21 didn't coerce her confession or fabricate her  
22 confession, does - - - doesn't it?

23 MR. SLACK: I don't believe it does, Your  
24 Honor. I don't believe there's evidence that she did  
25 - - - that there is - - - that she's met the burden

1 of showing that the - - - not only that the - - - her  
2 statement was coerced, but that it was so obviously  
3 fundamentally unreliable that an officer at the time  
4 could not have considered it as just one factor  
5 adding to or contributing to the overall mix of  
6 probable cause.

7 JUDGE STEIN: Well, certainly the officer  
8 that - - - that produced the confession, if she knew  
9 that she had done it improperly, she would know right  
10 then and there, wouldn't she?

11 MR. SLACK: If there was anything to  
12 support counsel's description of plaintiff's  
13 testimony that it was wholesale fabricated, sure. I  
14 implore the court to read the - - - the plaintiff's  
15 testimony. Footnote 1 of plaintiff's reply basically  
16 concedes how little her testimony says. And if she  
17 had more to say about how her statement came to be,  
18 she could have submitted an affidavit - - -

19 JUDGE PIGOTT: Well, where - - -

20 MR. SLACK: - - - in opposition to summary  
21 judgment.

22 JUDGE PIGOTT: Where's the burden of proof?

23 MR. SLACK: Well, it depends - - - well,  
24 once we came forward and showed all the circumstances  
25 that gave probable cause for the arrest and

1 indictment - - - the no alibi; that the crime scene  
2 suggested that the victim was killed by someone who  
3 he knew shortly after sex; that plaintiff was the  
4 only person who was identified to be in an intimate  
5 relationship; that her necklace was found at the  
6 scene; that phone records linked her to the victim -  
7 - -

8 JUDGE PIGOTT: But - - -

9 MR. SLACK: - - - that she had lied to the  
10 police twice.

11 JUDGE PIGOTT: But if we now know that the  
12 - - - the confession was false - - - and we know  
13 that, right?

14 MR. SLACK: We know that it's not the full  
15 story. We know that it wasn't accurate.

16 JUDGE PIGOTT: You think she committed this  
17 crime?

18 MR. SLACK: I don't know, Your Honor. And  
19 I don't - - - but - - - but that's not the question.  
20 The question is what could officers at the time have  
21 reasonably believed.

22 JUDGE PIGOTT: But that was my question,  
23 because you're saying that even though she confessed  
24 to it, and - - - and we now know the confession is  
25 false, that does not mean that she didn't commit the

1 crime.

2 MR. SLACK: Well, I don't know. It's  
3 possible she didn't. It's also possible - - - people  
4 give inaccurate confessions all the time. We knew -  
5 - -

6 JUDGE PIGOTT: People - - -

7 MR. SLACK: - - - at the time that it  
8 wasn't - - -

9 JUDGE PIGOTT: It's not unusual for the - -  
10 - the type of description that has - - - that - - -  
11 that's in this case to show up in false arrest cases,  
12 in false - - - in unjust conviction cases where the  
13 police, because they have - - - they have forty  
14 percent or sixty percent of the case and want the  
15 rest of it, end up getting a confession out of a - -  
16 - out of a suspect that's false.

17 MR. SLACK: It's also not unusual for  
18 suspects who are guilty to give inaccurate  
19 confessions, either to minimize their guilt - - -

20 JUDGE PIGOTT: Well, you see - - -

21 MR. SLACK: - - - to protect others - - -

22 JUDGE PIGOTT: - - - that's why I asked you  
23 that. This is confusing me because, as I understand  
24 it, you - - - you went to the court with the DNA and  
25 said she didn't commit this crime.

1 MR. SLACK: No, that's inaccurate, Your  
2 Honor. Actually, the DA - - - the DNA testing was  
3 overseen by the Queen's DA's office, and they brought  
4 it.

5 JUDGE PIGOTT: Oh, well, I - - -

6 MR. SLACK: There's - - -

7 JUDGE PIGOTT: I assumed you were the DA; I  
8 apologize. You're right; you're on the civil side.

9 MR. SLACK: There's actually no evi - - -  
10 it's actually an important point because there's no  
11 evidence in the record that any of the individual  
12 defendants knew about the DNA at any time during the  
13 criminal prosecution. But in any event, it was  
14 available to the DA; it was available to plaintiff's  
15 defense attorney.

16 JUDGE PIGOTT: I guess I'm getting off the  
17 rails here, but here's what I look at. If you took -  
18 - - look at the Warney case - - - are you familiar  
19 with that one?

20 MR. SLACK: I am.

21 JUDGE PIGOTT: Okay. In Warney, there's a  
22 false confession. And it was a stabbing and it was -  
23 - - and - - - and when - - - when he got convicted,  
24 the DA's summation was who but the murderer knew.  
25 Who but the murderer knew that it happened in the

1 bedroom, that it was a seven-inch knife, that it was  
2 found in the kitchen - - - I forget what all of the -  
3 - - and of course he gets convicted because obviously  
4 the only one that would know that was the murderer.  
5 Except it wasn't him. And the DNA showed that it was  
6 not him. And in fact, they - - - they actually  
7 caught the other guy who - - - who confessed. So  
8 these confessions get really troubling when they're -  
9 - - they're so - - - they - - - they weigh so heavily  
10 on a jury. And if - - - and if the police use the  
11 false confession, isn't that some evidence of false  
12 arrest and malicious prosecution?

13 MR. SLACK: I think it's - - - it's  
14 tempting, with hindsight, to look at what we know  
15 today. But the question isn't whether her statement  
16 would have been inadmissible in a criminal case. I  
17 don't even know if she's met that standard. She is  
18 nowhere near the facts of Thomas - - -

19 JUDGE PIGOTT: You have the burden. I - -  
20 - I worry about your commenting about standards  
21 because you have to show that you're entitled to  
22 judgment as a matter of law. There is nothing else.  
23 Matter of law; this case has got to go. And what  
24 she's arguing is they coerced a confession - - - and  
25 I don't want to go through everything Mr. Perecman

1           said, but as - - - as the record indicates, they  
2           think they've got enough to say that let's let a jury  
3           decide what happened here, not you have not  
4           established you're entitled to judgment as a matter  
5           of law.

6                     MR. SLACK:   Several ways to look at it,  
7           Your Honor.   First is the confession is not the  
8           be-all end-all in this case.   It doesn't need to be  
9           everything.

10                    JUDGE PIGOTT:   Right.

11                    MR. SLACK:   It is one thing that added and  
12           contributed to a broader mosaic of evidence that was  
13           available to the officers at the time of the arrest  
14           and the indictment.   It just had to add to it.   And  
15           she has to come forward, particularly with the  
16           presumption of probable cause, which counsel concedes  
17           applies.   She has to come forward and show that the  
18           circumstances that led to her confession were so  
19           extreme that a reasonable officer, in that moment,  
20           would be compelled to disregard it as contributing to  
21           probable cause.

22                    JUDGE PIGOTT:   I don't think she does.   I  
23           think you've got to come forward with evidence to  
24           establish that no officer, you know, would - - -  
25           would act on - - - on this confession in a malicious

1 fashion.

2 MR. SLACK: I believe our burden is to come  
3 forward with prima facie evidence of probable cause.

4 JUDGE PIGOTT: And that's it?

5 MR. SLACK: Even setting aside everything  
6 else - - -

7 JUDGE PIGOTT: That's it?

8 MR. SLACK: As an initial matter.

9 JUDGE RIVERA: Probable - - -

10 MR. SLACK: And on top of that - - -

11 JUDGE RIVERA: Probable cause to arrest?  
12 Probable cause to - - - finish the sentence.

13 MR. SLACK: To indict, which was the  
14 decision made by the DA and the grand jury. But - -  
15 -

16 JUDGE ABDUS-SALAAM: But how does that  
17 relate to the false arrest claim, counsel?

18 MR. SLACK: I don't understand, Your Honor.  
19 Could you elaborate?

20 JUDGE ABDUS-SALAAM: You're saying probable  
21 cause to indict, but how does that relate to false  
22 arrest?

23 MR. SLACK: Oh, it doesn't. It's to the  
24 malicious prosecution claim.

25 JUDGE ABDUS-SALAAM: That - - - you would

1 need a different type of probable cause for that,  
2 wouldn't you?

3 MR. SLACK: Well, no one - - - no one has  
4 argued here - - - the plaintiff certainly hasn't  
5 argued that the probable cause that existed at the  
6 time of arrest had dissipated by the time of the  
7 indictment. The DNA evidence wasn't - - - wasn't  
8 completed until, I believe, a year and six months  
9 after the indictment. Even preliminary results  
10 weren't completed until after the indictment.

11 But I - - - but I do think - - - I want to  
12 get to your question, Your Honor. I - - - I think  
13 that once we've come forward - - - and it's  
14 undisputed that that's her statement; she signed it -  
15 - - she has to come forward and show that the  
16 circumstances were so extreme that it - - - that not  
17 only was it - - - was it - - - was it such that after  
18 the fact, years later, after the full development of  
19 a criminal case - - -

20 JUDGE RIVERA: But if she says it's not  
21 true, wouldn't you then have a burden? She says  
22 that's not true. It was just not true. I didn't  
23 commit that crime. They coerced it. Don't you have  
24 to come forward with something?

25 MR. SLACK: Well, we've come forward with

1 plenty, but I think she - - -

2 JUDGE RIVERA: Because she's the one who  
3 knows if - - -

4 MR. SLACK: I think she has to do more than  
5 that.

6 JUDGE RIVERA: - - - she really said this,  
7 right?

8 MR. SLACK: No, exactly, and that's  
9 actually a great point. Nobody knows better than the  
10 plaintiff what her version of the events is that  
11 happened during that interrogation. And what has she  
12 come forward with? She - - - she does not talk about  
13 twenty-two hours. She - - - she says she was  
14 voluntarily there and felt free to leave at any time.

15 JUDGE STEIN: But we know the twenty-two  
16 hours; we don't need her to say that. We know how  
17 long she was there, right?

18 MR. SLACK: We know - - - we know that she  
19 was picked up at 7. We know she was put in a room;  
20 according to her, for two or three hours, she was  
21 asked questions. According to her, felt free to  
22 leave at any time. We know that she went to the  
23 polygraph where she was asked questions not by any of  
24 the defendants, but by the Queen's DA's office. They  
25 sat in a waiting room. Plaintiff has never come

1 forward with an affidavit or deposition testimony  
2 saying that they - - - she was not asked any  
3 questions while waiting for two to three hours in  
4 that room. She hasn't ever claimed that they didn't  
5 go to lunch for three to four hours. She hasn't  
6 claimed that any questioning happened up until 11:30.  
7 But even if she did, all she says is that she was - -  
8 - at one point, she was told that there would be - -  
9 - that - - - that she should, according to her  
10 account, say it would be in self-defense. This court  
11 has recognized, even in Thomas, that - - - that the  
12 police are permitted to - - - they have leeway to  
13 mislead, to a certain extent, to cajole, to deceive -  
14 - - all up to limits. And we are so - - -

15 JUDGE RIVERA: Can I ask of you - - -  
16 because your red light is on, and you may think it's  
17 collateral, but what - - - why is she languishing for  
18 four years?

19 MR. SLACK: I think it's collateral to this  
20 case because of a lot of - - -

21 JUDGE RIVERA: I understand your point, but  
22 answer that - - -

23 MR. SLACK: Because I think a lot of it has  
24 to do with the - - - the conduct of the Queen's DA  
25 office, plaintiff's own defense attorney, and the

1 trial court. The DNA results were completed after  
2 the indi - - - were completed a year-and-a-half - - -

3 JUDGE RIVERA: You're saying the criminal  
4 justice system failed her?

5 MR. SLACK: If - - - if - - - according to  
6 her allegations, I do think it could have worked much  
7 quicker. And I think part of that was part of her  
8 own defense attorney. I think - - -

9 JUDGE RIVERA: The question is whether or  
10 not the civil justice system now will potentially  
11 fail her or not.

12 MR. SLACK: Well, I do think that we should  
13 - - - just because the - - - the - - - this court has  
14 - - - has recently, with its concern with false  
15 confessions, has looked to the right place; it's the  
16 criminal justice system. It's suppression. And - -  
17 -

18 JUDGE PIGOTT: Well, I've got to tell you,  
19 would you line up all the confessions that have been  
20 suppressed lately? I mean, they never get  
21 suppressed. I'm - - - I'm being exag - - - I'm  
22 exaggerating, but the chances of getting a - - - a  
23 confession suppressed in this state, I think, are  
24 minimal.

25 MR. SLACK: Then all the more reason why we

1           should win, because she has to show more - - -

2                   JUDGE PIGOTT: No, because if you beat her  
3 with a rubber hose and they still let the confession  
4 in, it doesn't mean that it was a good - - - a good  
5 prosecution. And I know you didn't beat her with a  
6 rubber hose. I'm just saying - - -

7                   MR. SLACK: I think that's a great example,  
8 Your Honor. If you beat a suspect with a rubber  
9 hose, you know that you can't rely on that as a  
10 trustworthy statement.

11                  JUDGE RIVERA: Yes, but this court - - -

12                  MR. SLACK: It's got to be - - -

13                  JUDGE RIVERA: - - - has said that there is  
14 psychological pressures; you need not have physical  
15 coercion. The court has already said that.

16                  MR. SLACK: That's correct.

17                  JUDGE RIVERA: You don't need the hose.

18                  MR. SLACK: You don't need the hose, but  
19 you need some concrete evidence that there was  
20 materially extreme coercion tactics. We're nowhere  
21 near it.

22                  JUDGE PIGOTT: I think we disagree on - - -  
23 it just seems to me that you've got to show that  
24 there wasn't, because - - - because you're going to  
25 trial on it, you know, and she's going to say that it

1 was coercion; you're going to say it wasn't. And I  
2 think you've got to prove that it wasn't, as a matter  
3 of law, to get summary judgment, don't you?

4 MR. SLACK: I disagree with the premise,  
5 but - - - but let me just take it with one different  
6 way. I think if - - - even if you don't believe the  
7 statement, even if you want to put it aside, there  
8 was still enough probable cause. And then the  
9 statement, again, it doesn't have to be everything.  
10 It just had to be enough that a reasonable officer,  
11 in that moment, could believe it contributes to  
12 probable cause.

13 JUDGE PIGOTT: I know it's not this - - -

14 MR. SLACK: And there's more than enough to  
15 show that.

16 JUDGE PIGOTT: I know it's not this case,  
17 but let's assume for a minute that somebody had, you  
18 know, a - - - a lot of evidence pointing to somebody  
19 and then they coerced a confession, all right? Can't  
20 that be the malicious prosecution even though, you  
21 know, the combination says that, you know, there was  
22 probable cause?

23 MR. SLACK: If there was - - - if there was  
24 probable cause independent of the confession?

25 JUDGE PIGOTT: Right.

1 MR. SLACK: No. Probable cause is an  
2 absolute defense to a malicious prosecution claim.

3 JUDGE PIGOTT: Because you - - - because  
4 you're the one that - - - that created the bad  
5 evidence, and but for the bad evidence there would -  
6 - - there wouldn't have been a prosecution.

7 JUDGE FAHEY: That's - - -

8 MR. SLACK: No, I've got - - -

9 JUDGE FAHEY: That's the other side's  
10 argument, as I understand it, is that - - - is that  
11 the false confession vitiates the presumption of  
12 probable cause.

13 MR. SLACK: The presumption, but it doesn't  
14 - - - it doesn't satisfy the independent elements of  
15 a malicious prosecution. Probable cause is a  
16 complete defense to a malicious prosecution claim,  
17 established law. And the plaintiff hasn't argued  
18 otherwise.

19 JUDGE PIGOTT: All right.

20 MR. SLACK: Thank you, Your Honors.

21 JUDGE PIGOTT: Thank you very much, Mr.  
22 Slack.

23 Mr. Perecman?

24 MR. PERECMAN: So much to say; so little  
25 time.

1 JUDGE RIVERA: So true on so little time.

2 MR. PERECMAN: First of all, Judge, Your  
3 Honor, Martin v. Albany, Court of Appeals, that lack  
4 of probable cause leads to an inference of malice.  
5 So it's been said by this court. I just wanted to -  
6 - - what Judge Pigott was referring to, I believe,  
7 are the holdings in Riccuiti, Richardson, Morell  
8 (ph.), and Jocks, where the court has said - - -  
9 these are federal decisions - - - in no uncertain  
10 terms, that the existence of probable cause, based on  
11 nonfabricated evidence, ceases to be a defense for  
12 the fabricator where there is a fabricated confession  
13 or other bad faith - - - some false evidence.

14 JUDGE STEIN: Does that only apply then to  
15 the investigator - - - the officer that actually  
16 coerced the confession, or does it apply to  
17 everybody?

18 MR. PERECMAN: Well, we know Santiago was  
19 involved. We know Corey was overseeing it. We know  
20 Guerra was in the room with it, throughout the time.  
21 So certainly - - -

22 JUDGE PIGOTT: Well, the theory of those,  
23 if I - - - and you can correct me if I'm wrong - - -  
24 is if you have - - - you're heading down the road of  
25 probable cause and you've got several things that

1 help you, if you get lazy, or if you get negligent,  
2 and you - - - and you say, well, we can wrap this up  
3 by - - - by getting a confession, that that vitiates  
4 the probable cause that was over here.

5 MR. PERECMAN: I believe that is the  
6 theory, Your Honor, and it's certainly well-placed  
7 because part of the reason for these lawsuits is to  
8 prevent this kind of conduct. Certainly the court  
9 does not want to give a gold star to the police for  
10 doing that. Certainly there are circumstances where  
11 the court could determine, as a matter of law, that  
12 that fabricated evidence, in this case the  
13 confession, was completely immaterial. But that's a  
14 big, big burden, because the lead detective in this  
15 case is the only single detective that gave evidence  
16 about probable cause. And he described the evidence,  
17 other than the confession, as scant. And scant ain't  
18 probable cause; it's scant.

19 And by the way, if you look through the  
20 record, you will also see that all the detectives  
21 agree that this file was open, that the DNA comes  
22 back to them, that they had the obligation to reopen  
23 the case, that they had the obligation to speak - - -

24 JUDGE ABDUS-SALAAM: When was that,  
25 counsel? When did they agree that they had gotten

1 the DNA evidence?

2 MR. PERECMAN: They don't say when; they  
3 just said they received it, presumptively, when it  
4 occurred.

5 JUDGE RIVERA: And your other point is  
6 absent the confe - - - if they had not been  
7 successful, under your theory - - - let's try - - -  
8 if they had not broken her and she hadn't confessed,  
9 they would not have had a basis to arrest her. Is  
10 this your argument about - - -

11 MR. PERECMAN: I don't think they would  
12 have - - -

13 JUDGE RIVERA: - - - the scant evidence?

14 MR. PERECMAN: I don't think they would  
15 have indicted her.

16 JUDGE RIVERA: Well, I'm just dealing with  
17 the arrest now, because we're talking about the  
18 police officers.

19 MR. PERECMAN: I don't think they should  
20 have arrested her either. They had next to nothing.  
21 But certainly not indicted her and prosecuted her.

22 JUDGE RIVERA: Well, they had that she knew  
23 him. They had that she had left her - - - that she  
24 had already lied about other things. It's not for  
25 nothing, as they say.

1                   MR. PERECMAN: She - - - she knew him, and  
2 she was afraid - - -

3                   JUDGE RIVERA: As did many other people.

4                   MR. PERECMAN: As many other people in her  
5 circumstance, when people come to you in blue, with  
6 badges and guns, and accuse you of murder. That's a  
7 pretty scary situation. This is not a person who's  
8 familiar with the criminal system.

9                   By the way, one of the things that counsel  
10 said that I want to comment on. It's not a question  
11 of whether she was involved in this crime. The DNA  
12 evidence that came out, within a matter of weeks  
13 after the indictment, showed the blood of two males,  
14 mixed and unmixed, with the decedent's blood, in  
15 various places throughout the apartment, and no  
16 female blood. How is the plaintiff then in - - - how  
17 is Maria De Lourdes Torres implicated in that?  
18 Certainly - - -

19                   JUDGE PIGOTT: Your red light is on, Mr.  
20 Perecman.

21                   MR. PERECMAN: One last thing.

22                   JUDGE PIGOTT: Okay.

23                   MR. PERECMAN: Certainly not for the crime  
24 that they indicted her for, which states specifically  
25 that she plunged a knife into his chest multiple

1 times.

2 JUDGE PIGOTT: Thank you, sir.

3 MR. PERECMAN: Thank you, Your Honors.

4 JUDGE PIGOTT: Thank you, gentlemen.

5 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Torres v. Jones, et al., No. 21, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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