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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 141

SCOTT F. DOLL,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 03, 2013

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 141, People v. Doll.

2 MR. MURPHY: Good afternoon - - -

3 CHIEF JUDGE LIPPMAN: Counsel?

4 MR. MURPHY: - - - Your Honors. Two  
5 minutes for rebuttal, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes for  
7 rebuttal, sure. Go ahead.

8 MR. MURPHY: May it please the court. Your  
9 Honors, we're asking the court today to address the  
10 boundaries of the emergency doctrine as applied to  
11 the state version of the Fourth - - -

12 CHIEF JUDGE LIPPMAN: Counsel, what would  
13 you view, had the state to do here or the police  
14 officers to do in this situation?

15 MR. MURPHY: Well, we're - - - well, we - -  
16 -

17 CHIEF JUDGE LIPPMAN: What would you have  
18 them to have done, confronted with this quite unusual  
19 situation? What should they have done that would  
20 have been different?

21 MR. MURPHY: Well, there's nothing wrong  
22 with them actually questioning my client; it just  
23 can't be in custody. That's our concern; custodial  
24 interrogation. And what we're asking the court to do  
25 is find as a matter of State Constitutional law, that

1 when you place someone in custody, hold him for  
2 hours, transport him to the station, perform  
3 custodial interrogation, that there has to be a known  
4 person in danger in those circumstances.

5 CHIEF JUDGE LIPPMAN: Why - - - why does  
6 there have to be a known - - - what if they - - - if  
7 the - - - the thinking is that someone is in danger  
8 and they don't know who it is. Why is that not good  
9 enough?

10 MR. MURPHY: Well, the - - - the problem  
11 is, Judge, if you look at all the case law in this  
12 area, whenever you have an emergency, ninety-nine  
13 percent of the time you have - - - at least you know  
14 for a fact that there's a person in danger - - -

15 CHIEF JUDGE LIPPMAN: But doesn't it - - -

16 MR. MURPHY: - - - and - - -

17 CHIEF JUDGE LIPPMAN: I'm not being  
18 argumentative; I'm just making the other case.  
19 Doesn't it stand to reason that when you have someone  
20 who's soaked in blood, some new, some old, and  
21 walking down the highway in that situation, that  
22 someone might be in terrible trouble that would  
23 justify, under our precedents, the police reaction  
24 that it's an emergency situation? Or does there  
25 always have to be, even in the most bizarre, unusual



1 apartment, did they?

2 MR. MURPHY: No, they didn't. And - - -

3 JUDGE GRAFFEO: So there wasn't a known  
4 victim in that case.

5 MR. MURPHY: That's right. There wasn't.  
6 They knew just enough. They acted upon what they  
7 knew and it was in proportion. And that's our  
8 problem here. Without having the requirement of a  
9 known person in danger, the state right to counsel,  
10 which we jealously guard, is endangered.

11 JUDGE GRAFFEO: Why? Just because he said  
12 he butchered a deer? Is that what you're basing that  
13 on?

14 MR. MURPHY: No. The police had no idea  
15 whether this was a person or an animal. They did not  
16 know that it was even a person at the time. And that  
17 - - -

18 JUDGE SMITH: Could - - - couldn't - - -

19 JUDGE GRAFFEO: But he had - - - he had a  
20 lug wrench. That's not exactly what you use to  
21 butcher a deer, is it?

22 MR. MURPHY: No. But it also didn't have  
23 any blood on it, so they had no indication that that  
24 would have been a weapon, either.

25 JUDGE RIVERA: But isn't just - - - more

1 than just the blood, it's the entire circumstances  
2 that the officers came - - - came upon? The time;  
3 the way he conducted himself; the statements he made  
4 voluntarily; the way he conducted himself once they  
5 got to the van; why isn't that enough?

6 MR. MURPHY: Well, the reason it's not  
7 enough, a good part of these statements were also  
8 subjected to custodial interrogation, as well. And  
9 not all the statements that we're talking about were  
10 voluntarily given as - - - as Your Honor had  
11 indicated.

12 We do acknowledge that this is a level-two  
13 DeBour at least, until he's placed in custody.  
14 That's when he's placed - - - his hands - - - his  
15 hands are behind his back and placed behind in the  
16 caged patrol vehicle - - -

17 JUDGE PIGOTT: You - - -

18 MR. MURPHY: - - - at that point we say  
19 he's in custody.

20 JUDGE PIGOTT: - - - you draw that  
21 distinction. Are you saying that when he's not in  
22 custody, they can ask all the emergency questions  
23 they want?

24 MR. MURPHY: When he's not in custody, and  
25 there's - - - it's sufficient pursuant to DeBour,

1           yes, Judge.

2                         JUDGE PIGOTT:  So - - - so in this  
3           particular case, when they found him in the condition  
4           that he was, one of the things that may have been  
5           going through their mind is, let's say, domestic  
6           violence, or something like - - - but he's not in  
7           custody; they can ask those questions as far as - - -  
8           as you see it.  It's when they make a determination  
9           that - - - that he has to be placed in custody that  
10          then all this type of question, particularly when  
11          he's asked for a lawyer, stops?

12                        MR. MURPHY:  That's right, Judge.

13                        JUDGE PIGOTT:  But what if they haven't  
14          gotten an answer that satisfies them, but they're  
15          still a little - - -

16                        MR. MURPHY:  The problem is custodial  
17          interrogation, Your Honor.  That's the problem.  And  
18          this reasonable standard that we have has to have at  
19          least a floor to stand on.  Almost all emergencies  
20          anyway have these circumstances, not just a known  
21          person, but this indicia connecting the person who's  
22          being questioned with the person who is missing.

23                        You see that in Krom; you see that in Boyd.  
24          Even in - - - with Mr. Krom's case, he calls the  
25          family of the person that he's kidnapped and says he

1 wants ransom. They hang up the phone and they said  
2 that sounds like the son of our - - -

3 JUDGE SMITH: Well, here he had - - - he  
4 had blood on him, which the - - - surely the deputies  
5 in this case were reasonably - - - could reasonably  
6 have inferred it was human blood. Isn't that a  
7 pretty good connection with somebody?

8 MR. MURPHY: No, it's - - -

9 JUDGE SMITH: You have somebody else's  
10 blood on you?

11 MR. MURPHY: Not because they had - - -  
12 they had - - - they also had reason to believe that  
13 this could have been an animal, as well. It could  
14 have been - - -

15 JUDGE SMITH: Well, but he - - - he - - -  
16 the explanation he gave was apparent - - - he - - -  
17 what was obviously false. He said it was old - - - I  
18 butchered deer, but I just threw on these old  
19 overalls. And the - - - the officer was looking at  
20 it and it's fresh blood. Can't - - - can't - - -  
21 isn't it reasonable to suspect at that point that it  
22 isn't deer blood?

23 MR. MURPHY: But he's in - - - but again,  
24 he's in custody, though. If they - - - if they were  
25 to suspect - - - and I would say no, because - - -

1 JUDGE SMITH: But you say - - - you say  
2 they should have - - - what are they supposed to do,  
3 let him go and then question him?

4 MR. MURPHY: He shouldn't have been in  
5 custody to begin with, Judge, we argue.

6 JUDGE ABDUS-SALAAM: When do you say - - -

7 JUDGE GRAFFEO: But isn't - - -

8 JUDGE ABDUS-SALAAM: - - - he became in  
9 custody, counsel? Because at one point, he asked the  
10 deputy to take him back to the van. Is that - - -

11 MR. MURPHY: That's not why he was in  
12 custody. He asked for - - -

13 JUDGE ABDUS-SALAAM: But when do you say he  
14 was in custody?

15 MR. MURPHY: I'm sorry. I didn't mean to  
16 interrupt, Judge.

17 The reason why he was in custody is because  
18 the - - - the person drove by who made the initial  
19 call and then he was taken out of the car, patted  
20 down, and at that point - - - from that point on he's  
21 placed in custody.

22 Now, I know I - - - I ask the court to also  
23 consider the - - -

24 CHIEF JUDGE LIPPMAN: Should they have let  
25 him leave?

1 MR. MURPHY: There's - - - there's no  
2 reason to think he was going to leave, Judge. He was  
3 walking towards - - -

4 CHIEF JUDGE LIPPMAN: In that circumstance,  
5 would it have been appropriate to let him leave?

6 MR. MURPHY: He should never have been in  
7 custody, is - - -

8 CHIEF JUDGE LIPPMAN: Huh-uh. I'm not  
9 asking that. Should it - - - would it have been  
10 appropriate - - - that's why I asked you - - - my  
11 opening question was, what should the police have  
12 done?

13 MR. MURPHY: They could - - -

14 CHIEF JUDGE LIPPMAN: Should they - - -  
15 given that circumstance, that visual, should they  
16 have let him leave?

17 MR. MURPHY: Yes - - - Judge, if he wanted  
18 to leave, yes, they could still continue to - - -

19 CHIEF JUDGE LIPPMAN: And would they be  
20 doing their duty, and you don't think that's an  
21 emergency situation, given the answers he was giving,  
22 the blood that was all over him, the - - - as Judge  
23 Smith said, the inappropriate answer or an answer  
24 that doesn't make too much sense; what should they  
25 have done?

1 MR. MURPHY: There's nothing stopping them  
2 from continuing to investigate. They don't have to  
3 keep - - -

4 JUDGE READ: But why - - - why isn't this -  
5 - -

6 MR. MURPHY: - - - him in custody to do  
7 this.

8 JUDGE READ: - - - why isn't this just a  
9 mixed question?

10 MR. MURPHY: Well, we're asking - - -

11 JUDGE READ: Why isn't it just a mixed  
12 question? I mean, I think all the questions to you  
13 show that, don't they? I mean, that it's - - - the  
14 lower courts applied the emergency doctrine. And  
15 maybe they might have applied it differently. But  
16 why isn't it just a mixed question of law and fact?

17 MR. MURPHY: There's - - - well, first  
18 there's no support in the record for the Appellate  
19 Division finding that there's ironclad proof that  
20 there was a known person in danger. That's first.  
21 But we're asking the court to decide this as a matter  
22 of Constitutional law, not - - -

23 JUDGE SMITH: Is that the standard,  
24 ironclad proof?

25 MR. MURPHY: No, that - - - that came from

1 the Supreme Court decision that - - -

2 JUDGE SMITH: I understand. But there  
3 doesn't have to be - - - what do you say the standard  
4 is?

5 MR. MURPHY: The standard is, if you have  
6 someone in custody - - - custodial interrogation,  
7 there has to be a known person. That's how it - - -

8 JUDGE SMITH: Why - - - why is it okay to  
9 let a person die if you don't know his name?

10 MR. MURPHY: No, it's not just knowing the  
11 name. When you look at all of these missing person  
12 cases, they don't just have the missing person's  
13 name. When you report to the police that someone's  
14 missing, you give the - - - obviously where they were  
15 seen last, what they were wearing, who they were seen  
16 - - - who they were supposed to be seen with. And it  
17 gives the police an extra indicia of reliability when  
18 they approach the person. They - - - you don't - - -  
19 you're not - - -

20 JUDGE SMITH: So when you - - - when you  
21 have no person who's known to be missing, even though  
22 it's perfectly obvious that someone has either been  
23 hurt or killed, if you have no clue as to who the  
24 someone is, there's no emergency?

25 MR. MURPHY: No. It's not - - - based on

1 this record here, that was not obvious that it was -  
2 - - that it was - - - this was a person.

3 JUDGE SMITH: Suppose it had been? Suppose  
4 - - - suppose it were obvious that some unknown  
5 person had - - - was the source of the blood.  
6 Suppose he said oh, that's human blood, but I'm not  
7 telling you whose.

8 MR. MURPHY: Now, if he gives the  
9 statement, that's human blood, I'm not telling you  
10 who it is, then I think that the emergency doctrine  
11 applies. I would say so in that - - -

12 JUDGE SMITH: But it's still - - - but it's  
13 still an unknown person.

14 MR. MURPHY: But he's giving you the  
15 information that it is a known person. Or he's - - -

16 CHIEF JUDGE LIPPMAN: But what if he - - -

17 MR. MURPHY: - - - giving you information  
18 that it is in fact, a person.

19 CHIEF JUDGE LIPPMAN: Counselor, but what  
20 if the facts, in effect, give that answer? What if -  
21 - - what if the questions that - - - that are being  
22 asked, the answers that are being given, tell you  
23 that that's what's happened?

24 MR. MURPHY: He's walking down the street  
25 with a human arm, and he's - - - something like that.

1 JUDGE PIGOTT: Well, let's take - - - I  
2 mean - - -

3 MR. MURPHY: I don't mean to make a joke  
4 about it, but something like that, but then, yes, I  
5 would say, then we'd have a known person - - -

6 JUDGE PIGOTT: In this - - - in this case,  
7 where obviously they were not satisfied with his  
8 answers, and - - - and they put him in custody - - -  
9 that's the only time the emergency doctrine kicks in,  
10 right, you have to be in custody, because otherwise  
11 you don't have to worry about it. So he's in  
12 custody, the emergency doctrine will or will not kick  
13 in, and there's human blood at the scene, at least  
14 they make that judgment. Can't they question him?

15 MR. MURPHY: Judge, the problem is we have  
16 custodial interrogation under - - -

17 JUDGE PIGOTT: Right.

18 MR. MURPHY: - - - these circumstances.  
19 That's the problem. And there's no limit to this if  
20 we don't at least have some sort of starting point  
21 that we can agree on.

22 JUDGE PIGOTT: Well, I was thinking more of  
23 a stopping point. In other words, he's in custody,  
24 there's an emergency. At what point does the  
25 emergency end where now he has invoked his right to



1 custody.

2 JUDGE RIVERA: - - - that support the  
3 emergency exception?

4 MR. MURPHY: No. Not to the level that  
5 he'd have to be placed, then, in custody. They're  
6 enough to ask him what's going on. That's it.

7 JUDGE RIVERA: Right, but if he said I'm  
8 out walking to lower my cholesterol?

9 MR. MURPHY: But they can still  
10 investigate, and they can still question him. The  
11 point is that they're placing him in custody and  
12 interrogating him. That's the problem that we have  
13 with it.

14 Judge, I would ask that - - - the court to  
15 also consider his transport to the station. There's  
16 no connection - - - even if you find that this is a  
17 purported emergency, there's no connection to  
18 resolving the emergency and bringing him to the  
19 station.

20 JUDGE SMITH: You say there was an arrest  
21 at that point?

22 MR. MURPHY: Judge, the arrest was later in  
23 the morning. And if you look at the record, it's not  
24 clear exactly the time that the arrest takes place.

25 JUDGE SMITH: Well, what do you say was the

1           arrest?

2                       MR. MURPHY:   The arrest is when he's  
3 brought to the station and has his clothes taken from  
4 him.  It's a de facto arrest.

5                       JUDGE SMITH:   Okay.  Which is sometime  
6 between 11:30 and 1, roughly?

7                       MR. MURPHY:   Roughly, Your Honor.

8                       JUDGE SMITH:   You say - - - you say that at  
9 that point there was an arrest and everything else is  
10 tainted, even if - - - even if you lose on the other  
11 points?

12                      MR. MURPHY:   That's correct, Your Honor.

13                      JUDGE SMITH:   Did you - - - was that  
14 argument made in County Court?

15                      MR. MURPHY:   Judge, they did cite to  
16 Dunaway, and the County Court - - - I think it was  
17 around page 807 or 805 - - - they do address the  
18 elements of Dunaway.  So I - - - it could have been  
19 made sharper, but I think it's properly before this  
20 court.

21                      I'm asking this court to address those  
22 questions at 3:30 as well.  The Appellate Division  
23 got the standard wrong about agency.  They cite to  
24 page 286 of the Ray decision.  This court, at 287 of  
25 Ray, indicates the critical determination is when the

1 Police get involved in the inducement of the  
2 statements. And the court says, for example, "When  
3 the police have actively participated in the  
4 apprehension, when they" - - - Judge, may I just  
5 finish my point?

6 CHIEF JUDGE LIPPMAN: Yes, quickly,  
7 counsel.

8 MR. MURPHY: "When they exert official  
9 power to restrain the defendant, escort the defendant  
10 to the site, and await the outcome in close proximity  
11 to the questioning" - - -

12 JUDGE SMITH: I can - - - I can see - - - I  
13 mean, I can see the difference between this and a  
14 case like Ray. But wha - - - but isn't this - - -  
15 isn't the question here whether there was interro - -  
16 - not whether there was state action; I can see why  
17 you say there was state action - - - but was there  
18 interrogation by the police?

19 MR. MURPHY: There is. And the Appellate  
20 Division got that standard wrong, as well.  
21 Interrogation means that the police reasonably should  
22 know that their statements or actions are going to  
23 reasonably elicit an incriminating response; we have  
24 Investigator Kautz at 3:30 with pen and paper in hand  
25 knowing what's coming. He places this unknowing

1 woman into the mindset of the police on Lake Road.  
2 He gives her all the information about the  
3 investigation - - -

4 JUDGE SMITH: You say - - - you say it was  
5 a ploy?

6 MR. MURPHY: - - - except for the body.  
7 I'm sorry, Judge?

8 JUDGE SMITH: You're saying it was a ploy?

9 MR. MURPHY: Yes, Judge.

10 JUDGE SMITH: Didn't the courts below find  
11 otherwise?

12 MR. MURPHY: Well, Judge, they - - - they  
13 applied the wrong standard. The Appellate Division  
14 applied the wrong standard as a matter of law. The  
15 Appellate Division says that they're just - - - there  
16 was no inducement by any government entities. That's  
17 not the standard for interrogation in our state,  
18 which is a broad - - -

19 CHIEF JUDGE LIPPMAN: Okay, counselor.

20 MR. MURPHY: Thank you very much, Judge.

21 CHIEF JUDGE LIPPMAN: You'll have your  
22 rebuttal. Thank you.

23 MR. MURPHY: I appreciate it.

24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 MR. ZICKL: Good afternoon. May it please

1 the court. The first thing I'd like to point - - -

2 CHIEF JUDGE LIPPMAN: Counsel, let me - - -  
3 let me ask you, do you - - - I gather you don't agree  
4 that you need to have a known person in danger?

5 MR. ZICKL: I certainly do not agree with  
6 that - - -

7 CHIEF JUDGE LIPPMAN: Did any of the case  
8 law indicate that, that it doesn't have to be a known  
9 person?

10 MR. ZICKL: In my research, I found no case  
11 that held that the identity has to be known prior to  
12 or as a condition precedent to the finding of an  
13 emergency.

14 JUDGE PIGOTT: Where would you draw the  
15 line, Mr. Zickl? Conceding custody at some point and  
16 you've got an emergency at some point, where - - -  
17 where do the police know they can go no further? In  
18 other words, if we're going to say it's an unknown  
19 person, does that mean it's an unknown crime? It's  
20 not always murder. Is it an unknown crime, and there  
21 - - - and they can invoke the emergency doctrine and  
22 determine exactly what happened, what went on? How  
23 are the police going to be able to operate the  
24 emergency doctrine under your - - - under your  
25 standard?

1                   MR. ZICKL:  It doesn't have to be a murder,  
2                   certainly.  The circumstances have to reasonably  
3                   indicate that an emergency is at hand.  And certainly  
4                   - - -

5                   JUDGE SMITH:  Does human life have to be -  
6                   - -

7                   MR. ZICKL:  - - - they didn't - - -

8                   JUDGE SMITH:  - - - in danger?

9                   MR. ZICKL:  I'm sorry, sir?

10                  JUDGE SMITH:  Does it have to be a danger  
11                  to human life?

12                  MR. ZICKL:  Some cases have said life or  
13                  property.  But that's certainly not the case here.  
14                  The case here is a clear danger to human life or  
15                  lives, as the Fourth Department thought.

16                  And I did want to get back to this issue of  
17                  custody, because the Fourth Department found that  
18                  custody occurred at a time much later than is alleged  
19                  by the defendant.

20                  CHIEF JUDGE LIPPMAN:  Well, when - - - what  
21                  happens when they - - - when they put someone with  
22                  their hands in back of them.  Is that anything else  
23                  but custody?

24                  MR. ZICKL:  Oh, yes.  There are many, many  
25                  cases which hold that the application of handcuffs by

1           itself does not - - -

2                   CHIEF JUDGE LIPPMAN:   So he wasn't in  
3           custody - - -

4                   MR. ZICKL:   - - - lead to custody.

5                   CHIEF JUDGE LIPPMAN:   - - - when they - - -  
6           when they - - - so why did they do that?

7                   MR. ZICKL:   He was not in custody, in fact.  
8           And the Fourth Department found that custody occurred  
9           much later.

10                   CHIEF JUDGE LIPPMAN:   I know that.   But  
11           didn't - - - didn't they do that - - - isn't it  
12           logical that you do that to prevent someone from  
13           leaving?

14                   MR. ZICKL:   Yes.   And the context in which  
15           that occurred is after the conversation with Deputy  
16           Diehl where the defendant - - - and if I didn't say  
17           so already, I would like to reserve two minutes  
18           myself.

19                   CHIEF JUDGE LIPPMAN:   No, no.   You don't  
20           get that.   Sorry, sir.   You get the full fifteen  
21           minutes, but you don't get rebuttal.   Only the  
22           appellant does.   Go ahead.

23                   MR. ZICKL:   The context was he was talking  
24           with Deputy Diehl, and he presented in the - - -

25                   CHIEF JUDGE LIPPMAN:   Right.

1                   MR. ZICKL: - - - suspicious way that he  
2                   did. And Deputy Diehl agreed to give him, at the  
3                   defendant's instance (sic), a ride back to the repair  
4                   shop. The two civilian witnesses who initially  
5                   reported his suspicious behavior, came back. They  
6                   were - - - they were alarmed enough to come back to  
7                   Deputy Diehl and say that's the guy that we saw back  
8                   at the repair shop. He was trying to avoid being  
9                   seen. He turned around. He ducked down between two  
10                  cars. And that's when Deputy Diehl went back to the  
11                  car and said would you please get out, sir; and he  
12                  put the handcuffs on - - -

13                 CHIEF JUDGE LIPPMAN: Yeah, but - - -

14                 MR. ZICKL: - - - and he said - - -

15                 CHIEF JUDGE LIPPMAN: - - - but why - - -  
16                 what's wrong with that? You're putting him in  
17                 custody because if that's - - - if there's an issue  
18                 as to whether that was the guy and there's some  
19                 terrible thing happening, what's wrong with them  
20                 putting him in custody at that point?

21                 MR. ZICKL: There might not be anything  
22                 wrong with it. But he, in fact, was not in custody  
23                 at that point.

24                 JUDGE SMITH: Well, you - - - you - - - I  
25                 mean, I can understand if you're saying that this was

1 just a Terry stop, or a Hicks stop and not an arrest,  
2 I can understand that. But isn't that still custody  
3 for Miranda purposes?

4 MR. ZICKL: No, it's not.

5 JUDGE SMITH: You have cases - - -

6 MR. ZICKL: Custody occurs when a  
7 reasonable, innocent - - -

8 JUDGE SMITH: You have a case that says - -  
9 -

10 MR. ZICKL: - - - person would believe that  
11 - - -

12 JUDGE SMITH: - - - you have a case that  
13 says you can put somebody in handcuffs and not give  
14 Miranda warnings and question him?

15 MR. ZICKL: Yes.

16 JUDGE SMITH: What's that?

17 MR. ZICKL: People v. Hodge. I believe  
18 it's 44 NY2d. It's cited in my brief, certainly.

19 JUDGE SMITH: Um-hum.

20 MR. ZICKL: And there have been - - - there  
21 have been many cases since then, too, which have held  
22 that the application of handcuffs or restraints by  
23 itself does not indicate custody. And the other  
24 thing that happened - - -

25 JUDGE RIVERA: Where the officer is not in

1 fear of some kind of personal injury to him or  
2 herself?

3 MR. ZICKL: I don't - - - I don't think  
4 there's anything in the record that would indicate  
5 that Deputy Diehl was afraid for his own safety at  
6 that point. He had seen the blood and he was alarmed  
7 by - - -

8 JUDGE RIVERA: I'm saying the cases - - -

9 MR. ZICKL: - - - the blood.

10 JUDGE RIVERA: - - - you're referring to?

11 MR. ZICKL: I'm sorry?

12 JUDGE RIVERA: The cases you're referring  
13 to?

14 MR. ZICKL: Yes, those cases often do talk  
15 about some - - - some element of danger to the  
16 officers.

17 CHIEF JUDGE LIPPMAN: Isn't it - - -

18 MR. ZICKL: But - - -

19 CHIEF JUDGE LIPPMAN: - - - isn't it  
20 logical that the officer might have felt an element  
21 of danger here?

22 MR. ZICKL: He - - -

23 CHIEF JUDGE LIPPMAN: I'm with this guy  
24 full of blood - - -

25 MR. ZICKL: Yes.

1 CHIEF JUDGE LIPPMAN: - - - dropping metal  
2 objects on the road?

3 MR. ZICKL: He said - - -

4 CHIEF JUDGE LIPPMAN: I would be - - - I  
5 would be - - - feel in danger.

6 MR. ZICKL: He had no metal objects at that  
7 point, though. I will concede that, that he had  
8 taken the metal objects from the defendant and placed  
9 them on the front seat of his car.

10 The point that I think is very important in  
11 this context is that the deputy said to the  
12 defendant, when he put the handcuffs on, I'm not  
13 arresting you. Okay? I'm just going to detain you  
14 for a bit until we can sort some of these - - -

15 JUDGE SMITH: Does that - - -

16 JUDGE RIVERA: But - - - I'm sorry.

17 JUDGE SMITH: Does that always work? You  
18 mean, all you have to - - - all you have to do is say  
19 don't worry, I'm not arresting you, just put your  
20 hands behind your back and - - - well, I'm giving you  
21 some nice bracelets, and then he's not in custody?

22 MR. ZICKL: I don't know what you mean by  
23 "always work", but what I'm saying is that - - -

24 JUDGE SMITH: Sounds like an easy way  
25 around Miranda to me.

1                   MR. ZICKL: - - - a reasonable, innocent  
2 person, in that situation - - - and that's the  
3 standard for custody, a reasonable - - -

4                   JUDGE SMITH: Thinks he's - - - reasonable  
5 - - - thinks he's free to go?

6                   MR. ZICKL: A reasonable, innocent person  
7 would think, well, I sure have presented in kind of a  
8 suspicious way to this deputy, and as soon as they  
9 find out that there's an innocent explanation to all  
10 this, which of course they never did, then they're  
11 going to let me go. So I'm not in custody.

12                   JUDGE SMITH: A - - -

13                   JUDGE RIVERA: But then they're going to  
14 let me go.

15                   MR. ZICKL: Exactly.

16                   JUDGE RIVERA: Then that suggests that I  
17 cannot leave now, then they're going to let me go.

18                   MR. ZICKL: But a reasonable innocent  
19 person would not believe themselves to be in custody.  
20 They might believe themselves to be temporarily  
21 detained, but not in custody.

22                   JUDGE SMITH: Okay. So - - - I accept that  
23 for the moment. Is there any case anywhere of a  
24 temporary detention that lasted five hours that was  
25 held good?

1 MR. ZICKL: There are cases where the  
2 detention - - -

3 JUDGE SMITH: Can you try - - - can you  
4 give me a yes or no to that one?

5 MR. ZICKL: I was not able to find a case  
6 where a temporary detention lasted that long.  
7 However - - -

8 JUDGE SMITH: Have you found - - -

9 MR. ZICKL: - - - most of - - -

10 JUDGE SMITH: - - - one - - - have you  
11 found one more than twenty minutes?

12 MR. ZICKL: Those cases involve  
13 circumstances other than what could be described as  
14 an emergency. And that's why they're not as  
15 instructive to our - - -

16 CHIEF JUDGE LIPPMAN: Counsel, assume we  
17 disagree with you, and that he's in custody, what's  
18 the significance of that to your case?

19 MR. ZICKL: Well, to my - - - to my case,  
20 it's - - - it is not as significant as the  
21 circumstances which gave rise to the emergency.  
22 Because as Judge Pigott pointed out, the emergency  
23 doctrine presumes custody.

24 CHIEF JUDGE LIPPMAN: What c - - - okay.  
25 So you're saying even if he's in custody, based on

1 the emergency doctrine, what took place was okay?

2 MR. ZICKL: Yes. It is justified pursuant  
3 to the emergency doctrine, because - - -

4 CHIEF JUDGE LIPPMAN: Tell us - - - tell us  
5 how.

6 MR. ZICKL: The offi - - -

7 CHIEF JUDGE LIPPMAN: In other words, what  
8 do the cases say about what they can do at that  
9 point?

10 MR. ZICKL: The - - - they say that a  
11 defendant can be questioned without Miranda, and even  
12 after invocation of the right to counsel. That's  
13 Krom and that's Kimes.

14 JUDGE PIGOTT: When did the emergency end,  
15 in your view?

16 MR. ZICKL: When the body was discovered,  
17 at - - -

18 JUDGE PIGOTT: At what - - -

19 MR. ZICKL: - - - 1:33 a.m.

20 JUDGE PIGOTT: All right. And any - - - so  
21 any questioning after that required counsel. Would  
22 you agree?

23 MR. ZICKL: I would say that the emergency  
24 doctrine no longer applies.

25 JUDGE PIGOTT: And?

1 MR. ZICKL: And any custodial interrogation  
2 after that point - - -

3 JUDGE PIGOTT: So that's - - -

4 MR. ZICKL: - - - could not be - - - could  
5 not be - - -

6 JUDGE PIGOTT: - - - that's your fight over  
7 custody. Even though they didn't let him go, that he  
8 was not in custody?

9 MR. ZICKL: He was in custody when the  
10 Fourth Department said he was in custody. That is an  
11 established - - -

12 JUDGE PIGOTT: When was that?

13 MR. ZICKL: - - - fact.

14 JUDGE PIGOTT: Can you give us a time for  
15 that?

16 MR. ZICKL: I can't give you an exact time.  
17 I can give you - - -

18 JUDGE PIGOTT: That's kind of important,  
19 don't you think?

20 MR. ZICKL: I can give you a range. And I  
21 can - - -

22 JUDGE PIGOTT: Go ahead.

23 MR. ZICKL: - - - a context where - - -

24 JUDGE PIGOTT: We'll take the range.

25 MR. ZICKL: - - - where it occurred.

1 Deputy Reeves got to the scene, that is the location  
2 of the repair shop, at approximately 9:28. He almost  
3 immediately, after speaking with Deputy Diehl  
4 briefly, began speaking with the defendant. He left  
5 the area of the repair shop in order to canvass some  
6 of the relatives of the defendant to make sure that  
7 they were okay, trying to address this emergency.

8 So it was sometime in between 9:28 and  
9 10:01, and I submit, before Investigator Kautz  
10 arrived at the scene.

11 JUDGE PIGOTT: So from 1:30 to 9:30 he was  
12 free to go?

13 MR. ZICKL: Starting at - - - starting at  
14 9:30?

15 JUDGE PIGOTT: Emergency was over at 1:30.

16 MR. ZICKL: Yes.

17 JUDGE PIGOTT: He was not in custody, in  
18 your view - - -

19 MR. ZICKL: He was.

20 JUDGE PIGOTT: - - - until 9:30.

21 MR. ZICKL: Oh, yes. Custody occurred  
22 approximately - - -

23 JUDGE PIGOTT: So - - - so for that - - -  
24 for that, what, eight hours, if I'm doing it right,  
25 he - - - you know, he could have said nice talking

1 with you, would you get these handcuffs off me, I'm  
2 going home?

3 MR. ZICKL: Starting at 9:30, when he was  
4 being questioned by Reeves and Deputy - - -

5 JUDGE PIGOTT: I want to know what he was  
6 going to do at 3 in the morning when he's in  
7 handcuffs with the police, and you say he's not in  
8 custody?

9 MR. ZICKL: Oh, he was in custody at 3 a.m.

10 JUDGE PIGOTT: That's - - - what I thought  
11 you said he was not in custody - - -

12 MR. ZICKL: He was not - - -

13 JUDGE PIGOTT: - - - until 9:30.

14 MR. ZICKL: He was not - - - he was not in  
15 custody until 9:30.

16 JUDGE PIGOTT: So - - -

17 MR. ZICKL: After that - - -

18 JUDGE PIGOTT: - - - at 3 in the - - - so  
19 at 3 in the morning, where was he, in custody or out  
20 of custody?

21 MR. ZICKL: He was in custody at 3 in the  
22 morning. He was, in fact, arrested at that point.

23 JUDGE SMITH: You say - - -

24 JUDGE RIVERA: You mean 9:30 p.m. till 1:30  
25 in the morning.

1 MR. ZICKL: 9 - - - yes, yes, yes. 9:30  
2 p.m. to 1:30 at the time probable cause ripened. And  
3 - - -

4 JUDGE SMITH: You - - - you say - - - you  
5 say custody occurred when they found the body?

6 MR. ZICKL: No; if I did, I apologize.

7 JUDGE SMITH: Well, when - - - when - - -  
8 what was the - - -

9 MR. ZICKL: The emergency abated - - -

10 JUDGE SMITH: - - - what was the event?

11 MR. ZICKL: - - - when they found the body,  
12 certainly.

13 JUDGE SMITH: What was the event that  
14 caused him to be in custody? Transporting him to the  
15 station?

16 MR. ZICKL: It occurred, according to  
17 Fourth Department - - - and that's an established  
18 finding of fact - - - that I submit for which there  
19 is - - -

20 JUDGE SMITH: When? What's the time?

21 MR. ZICKL: The time is approximately 9:45  
22 - - - 9:40 or 9:45, when Deputy Reeves said to him,  
23 look, you're not - - - you're not telling me the  
24 source of this blood, and - - -

25 JUDGE SMITH: 9:45 p.m.?

1 MR. ZICKL: Yes, sir.

2 JUDGE SMITH: I see. So he was only - - -  
3 you say the detention only la - - - well, whatever  
4 that noncustody in handcuffs lasted, what, an hour,  
5 and then - - -

6 MR. ZICKL: Even less than that. I'm - - -

7 JUDGE SMITH: What - - - what was it that  
8 transformed this noncustody into custody at 9:45?

9 MR. ZICKL: It was Deputy Reeves saying to  
10 the defendant, look, you're not providing us the  
11 information that we need. You know, if you don't  
12 provide us that information, we're going to have to -  
13 - - we're going to have to continue to detain you - -  
14 - he was kept in handcuffs, as found by the Fourth  
15 Department - - - and we're going to have to take your  
16 van. We're going to have to continue this  
17 investigation.

18 JUDGE RIVERA: So it's the threat?

19 MR. ZICKL: And it's that - - - I'm sorry?

20 JUDGE RIVERA: It's the threat? It's  
21 threatening him?

22 MR. ZICKL: That's custody. That's when  
23 custody - - -

24 JUDGE RIVERA: That's the point of custody.

25 MR. ZICKL: - - - occurred. Arrest could

1 not occur until probable cause - - -

2 JUDGE RIVERA: Can I ask you a question?

3 You said - - -

4 MR. ZICKL: - - - had ripened at 1:33.

5 JUDGE RIVERA: - - - you said the emergency  
6 ends when the body is found.

7 MR. ZICKL: Yes.

8 JUDGE RIVERA: That may be perhaps more  
9 obvious here. Why would that have naturally been the  
10 case? What if the business partner has a wife, and  
11 they can't find her?

12 MR. ZICKL: Well - - -

13 JUDGE RIVERA: Why doesn't the emergency  
14 continue, even on - - - when you don't know - - - I  
15 guess my point is, if you don't know the victim, when  
16 do you really know that the emergency is over, if you  
17 don't know the circumstances under which whether it's  
18 one person or several people?

19 MR. ZICKL: The answer is, you don't. And  
20 there are facts which could be woven into cases that  
21 would justify an even longer detention than we had  
22 here. These facts justify this detention.

23 JUDGE SMITH: Could it have - - - suppose  
24 the emergency goes on for days, you could hold him  
25 for days?

1 MR. ZICKL: No, sir.

2 JUDGE SMITH: When - - - when - - - how  
3 long can you hold him?

4 MR. ZICKL: You have to look at the purpose  
5 for which he was being held at that time, at 1:33,  
6 and that - - -

7 JUDGE SMITH: You could - - - you could  
8 easily imagine a missing persons investigation that  
9 went on for days.

10 MR. ZICKL: Yes. Yes.

11 JUDGE SMITH: Why - - - why - - - at what  
12 point do you have to say - - - and let's assume you  
13 have only reasonable suspicion. Assume you don't  
14 have probable cause. How long can you hold someone  
15 on suspicion, on the theory there's an emergency?

16 MR. ZICKL: There's no set time.

17 JUDGE SMITH: It could be days?

18 MR. ZICKL: No, I don't - - - I don't  
19 believe so.

20 JUDGE SMITH: Well, if it couldn't be days,  
21 there must be a set time somewhere?

22 MR. ZICKL: Well, there might be a set time  
23 somewhere, but it's dependent on the facts of the  
24 case. And I think that you have to look at what the  
25 law enforcement officers were doing. And when they

1           took him back to the station, the purpose for that -  
2           - - the purpose - - - purpose for taking the  
3           defendant, was to collect the bloody clothes; to  
4           document them and to collect them. During that  
5           process, the body was found. And the detention  
6           ripened into probable cause and he was placed under  
7           arrest.

8                         JUDGE PIGOTT: Did you want to address Mr.  
9           Murphy's other point with respect to the questioning,  
10          you know, at the police station - - - not the - - -  
11          where the other correction officer came in and was  
12          asking questions and notes were being taken; and Mr.  
13          Murphy's point is that the Appellate Division applied  
14          the wrong standard?

15                        MR. ZICKL: I submit they certainly did  
16          not. It's a mixed question of fact and law. They  
17          applied the correct standard. They went through - -  
18          -

19                        JUDGE PIGOTT: What's the correct standard,  
20          as far as you're concerned?

21                        MR. ZICKL: The correct standard is  
22          enunciated in the four-pronged test in People v. Ray.  
23          They went through them one by one. That's the  
24          standard. They weren't - - - this court wasn't  
25          speaking idly when it set up those four questions in

1 Ray. This court was saying this is how you determine  
2 whether or not a person is acting as an agent of the  
3 police. And the Fourth Department applied those four  
4 prongs and found that there was no agency in this  
5 case.

6 That makes it a mixed question of fact and  
7 law which is beyond review of this court, because  
8 there is support in this record - - - they went  
9 through one, two, three, four, and found that these  
10 facts did not give rise to an inference that she was  
11 an agent of the police.

12 JUDGE RIVERA: When - - - when you say the  
13 emergency is over, the body is found, the emergency  
14 now ends, what happened to the invocation of the  
15 right to counsel?

16 MR. ZICKL: After the emergency has abated  
17 - - -

18 JUDGE RIVERA: Yep.

19 MR. ZICKL: - - - the emergency doctrine  
20 cannot apply to overcome the invocation of counsel.  
21 So there - - -

22 JUDGE SMITH: So he - - - so he - - -

23 MR. ZICKL: - - - was not a custodial  
24 interrogation - - -

25 JUDGE RIVERA: But what - - -

1 MR. ZICKL: - - - at 3 a.m.

2 JUDGE RIVERA: - - - but why is the  
3 investigator busy sending in someone to speak with  
4 him rather than ensuring - - -

5 MR. ZICKL: She appear - - -

6 JUDGE RIVERA: - - - counsel gets to him?

7 MR. ZICKL: - - - she appeared at the  
8 station, without any provocation by - - -

9 JUDGE RIVERA: She appeared after everybody  
10 knew that they had found - - - or at least after the  
11 investigator knew that they had found the body.

12 MR. ZICKL: Yes. Yes, that's correct.

13 JUDGE RIVERA: And the emergency, now, you  
14 claim is over at that point.

15 MR. ZICKL: That's correct.

16 JUDGE RIVERA: And he had already, at least  
17 once, if not more than once, had invoked his right to  
18 counsel. What happened to that right? He does not  
19 have to rehabilitate it. He doesn't have to ask for  
20 it again.

21 MR. ZICKL: The right to counsel - - - the  
22 right to counsel means, of course, that the defendant  
23 couldn't be questioned in the absence of counsel.

24 JUDGE SMITH: You're - - -

25 MR. ZICKL: Not to subject him to a

1           custodial interrogation - - -

2                   JUDGE SMITH: - - - you're saying - - -

3                   MR. ZICKL: - - - which he wasn't.

4                   JUDGE SMITH: - - - you're saying this

5 wasn't questioning?

6                   MR. ZICKL: Yes. It was not a custodial

7 interrogation.

8                   JUDGE PIGOTT: Before - - -

9                   MR. ZICKL: He was not questioned by the  
10 police.

11                   JUDGE SMITH: Well, it was - - -

12                   JUDGE RIVERA: But it's opportunistic,  
13 though.

14                   JUDGE SMITH: - - - it was custodial.

15                   MR. ZICKL: I'm sorry.

16                   JUDGE RIVERA: I'm sorry.

17                   JUDGE SMITH: But it was custodial. But  
18 you're saying it's not an interrogation at all.

19                   MR. ZICKL: Custodial interrogation. Yes,  
20 sir, that's - - -

21                   JUDGE PIGOTT: Before you go - - - I know  
22 your red light's on, it's - - - is it usual - - - it  
23 seems to me it's almost unusual for the police to let  
24 anybody talk to one of the people that they've got in  
25 custody on a suspicion of murder that they want to

1 question. Is it unusual for them to say, well, you  
2 know, you can come in and talk to him and we're going  
3 to take notes?

4 MR. ZICKL: My opinion?

5 JUDGE PIGOTT: I respect your opinion.

6 MR. ZICKL: Well, thank you, sir. In my  
7 experience it is unusual. But I think one thing that  
8 is very important is, at first, Investigator Kautz  
9 said no, you can't see him. And she insisted. She  
10 said I want to talk to him. I want to talk to him  
11 now. I want you to take me back there so I can talk  
12 to him.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. ZICKL: It was at her insistence.

15 CHIEF JUDGE LIPPMAN: Thanks, counsel.

16 MR. ZICKL: Thank you.

17 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

18 MR. MURPHY: Your Honors - - -

19 CHIEF JUDGE LIPPMAN: What about his last  
20 point, counselor? He says that she insisted upon  
21 going in there.

22 MR. MURPHY: Investigator Kautz completely  
23 owned this situation. He told her, on page 3 - - -  
24 it's on page 334 and 335 of the record - - - he lets  
25 her know all the facts of the investigation except

1 that there's a body found. He has her in the same  
2 mindset that the police were at on Lake Road. He  
3 knows exactly what they're going to ask. I'm - - -

4 JUDGE SMITH: So, well, why - - - why is  
5 that a problem? Isn't - - - isn't the problem that -  
6 - - that Miranda and the other cases are directed at  
7 the problem of coercion by the state? This guy  
8 wasn't being coerced by the state. He was talking to  
9 his friend.

10 MR. MURPHY: No. Page 286 of Ray is what  
11 the Appellate Division cites to. 287 explains this  
12 is agency. The police own this situation.

13 JUDGE SMITH: What about - - - what about  
14 Arizona v. Morrow? Is that - - - is that case  
15 familiar to you?

16 MR. MURPHY: Sorry, Judge - - - my - - -  
17 I'm not familiar right now, Judge. I apologize.

18 But I would point - - -

19 JUDGE SMITH: That - - - that's a Supreme  
20 Court case that looks to me an awful lot like this  
21 one.

22 MR. MURPHY: Right. I recognize that,  
23 Judge. I appreciate that. I do want to point out  
24 that the Appellate Division did find custody - - - I  
25 don't have the page number when they did it - - - but

1 they rejected the People's contention that he was not  
2 in custody when he was placed in handcuffs behind his  
3 back. The Appellate Division - - - that's the  
4 finding that's binding on this court - - - they did  
5 find custody when he's handcuffed behind the back.

6 This court has to compare these statements  
7 that my client gives at 3:30, as opposed to what he  
8 says on Lake Road. Instead of - - -

9 CHIEF JUDGE LIPPMAN: Do you agree, if  
10 there's an emergency, even though he's in custody,  
11 it's okay?

12 MR. MURPHY: If it is - - - if it - - -

13 CHIEF JUDGE LIPPMAN: It is an emergency.  
14 Your argument is it isn't because they have no body,  
15 right, or they don't know a known person who's at  
16 risk.

17 MR. MURPHY: It's okay for them to  
18 investigate, whatever they want to call it, as long  
19 as - - - as long as he's not placed in custody for  
20 custodial interrogation purposes, unless they have a  
21 known person. That's what I - - -

22 JUDGE SMITH: These - - -

23 MR. MURPHY: - - - what I'm saying here.

24 JUDGE SMITH: Put aside the interrogation  
25 question. Is it - - - does the emergency doctrine

1           apply to this very - - - does it justify this  
2           unusually long detention without probable cause, or  
3           at least as the Appellate Division found, without  
4           probable cause? Is that - - - assu - - - if you  
5           assume an emergency, is that okay? Can you keep  
6           holding the guy?

7                       MR. MURPHY: Now, there has - - - the third  
8           prong of Mitchell, which is still good law, despite  
9           the Supreme Court 's decision, which only addressed  
10          the second prong, you have to have a direct  
11          connection between the emergency that they purport to  
12          take place and what the police - - -

13                      CHIEF JUDGE LIPPMAN: Does it matter  
14          whether you call it detention or custody?

15                      MR. MURPHY: It - - - it certainly matters  
16          that the Appellate Division does not describe this as  
17          a de facto arrest. Because it's - - - it's their  
18          estimation that even when his clothes were taken,  
19          he's still not subjected to a de facto arrest. We  
20          think that's important terminology because of  
21          Dunaway. Because this is a Dunaway issue.

22                      If they don't have any probable cause or  
23          any reason to bring him to the station, he doesn't do  
24          - - - they don't do anything to help resolve the  
25          emergency - - -

1 JUDGE SMITH: If - - - if you're right - -  
2 -

3 MR. MURPHY: - - - by bringing him to the  
4 station.

5 JUDGE SMITH: - - - about that - - - if  
6 you're right about that, then it would follow that  
7 his conversation with his friend, even though - - -  
8 even if it's not interrogation, even if it's not  
9 police interrogation, it's still the fruit of an  
10 unlawful arrest, and therefore it's suppressible?

11 MR. MURPHY: That's true, Judge, and it's  
12 also agency as a matter of law, and interrogation as  
13 a matter of law. No finding of fact is necessary for  
14 this.

15 CHIEF JUDGE LIPPMAN: Okay, thanks,  
16 counsel.

17 MR. MURPHY: Thank you, Your Honor.

18 CHIEF JUDGE LIPPMAN: Thank you both.  
19 Appreciate it.

20 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Scott F. Doll, No. 141 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

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