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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 18

ADRIAN P. THOMAS,

Appellant.

PEOPLE,

Appellant,

-against-

No. 19

PAUL AVENI,

Respondent.

20 Eagle Street
Albany, New York 12207
January 14, 2014

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

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Thomas and
2 People v. Aveni.

3 Counsel, would you like any rebuttal time?

4 MR. FROST: One minute, Your Honor.

5 CHIEF JUDGE LIPPMAN: One minute? Okay.

6 MR. FROST: Chief Judge Lippman, Judges,
7 good afternoon. I'm Jerome K. Frost. I am the
8 attorney for Adrian Thomas, the appellant.

9 To my left is Ingrid Effman - - -

10 MS. EFFMAN: Good morning.

11 MR. FROST: - - - a colleague and friend
12 who has participated in Mr. Thomas' case in the
13 beginning. She tried it and she's going to spend
14 three of the allotted fifteen minutes arguing the
15 Dunaway point.

16 CHIEF JUDGE LIPPMAN: Okay, go ahead.

17 MR. FROST: I quote the world's leading
18 authority on Criminal Interrogations and Confessions,
19 describing a situation, "If you don't tell me about
20 the sexual contact you had with your daughter, your
21 kids will be taken away, and you will never see them
22 again."

23 One of the guidelines co - - - governing
24 confession admissibility is that the confession must
25 be essentially the product of the suspect's freewill.

1 When the impetus for confessing is to avoid a jail
2 cell or to be able to see one's children, the
3 statement is clearly the result of compulsion.

4 JUDGE SMITH: Well, wait a minute. You say
5 - - - almost everyone who confesses is hoping either
6 to avoid or to minimize his time in a jail cell. Are
7 you saying that renders it involuntary?

8 MR. FROST: I'm saying, Your Honor, that
9 the author of that statement, John Reid, the coauthor
10 of Criminal Interrogations and Confessions, states
11 that this type of conduct is unacceptable and is
12 clearly compulsory.

13 JUDGE GRAFFEO: What is it - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what - - -
15 what was at risk here? What - - - what - - - what
16 was it, in a nutshell - - - what's the most egregious
17 part of - - - of this lack of freewill that - - -
18 that was imposed upon your client? What - - - what's
19 the - - - the particularly - - - the most egregious
20 thing that they said, that resulted in - - - in what
21 he admitted to?

22 MR. FROST: Mr. Reid and I would agree on
23 this, Your Honor. About an hour into Mr. Thomas'
24 first interrogation, the police threatened four times
25 to arrest his wife, prosecute her, if he did not

1 implicate himself. It was a credible threat. Six
2 hours before, the same two policemen accompanied
3 Child Protective Service workers to Mr. Thomas' home,
4 and removed his crying children from his presence.

5 JUDGE SMITH: Well, also, wasn't there - -
6 - wasn't there a - - - didn't they, in effect, tell
7 him that his child - - - knowing his child was
8 already dead, that - - - that he needed to confess to
9 save the child's life?

10 MR. FROST: That's probably the worst thing
11 they said to him, Your Honor. That was a combined
12 threat, deception and promise. It was a cruel hoax
13 in which Sergeant Mason offered in exchange for Mr.
14 Thomas' buying into his hoax that Matthew was still
15 alive, and if only he would agree with Sergeant
16 Mason's supposed - - -

17 JUDGE RIVERA: So how - - - how is this
18 deception any different from other deceptive tactics
19 that the police are able to use?

20 MR. FROST: It's a threat, Your Honor.
21 Your son is going to die if you don't buy into what I
22 say. It's a promise. If you buy into what I say,
23 these doctors, who were feverishly working on your
24 dead son, might be able to save him.

25 CHIEF JUDGE LIPPMAN: So is there a rule as

1 to where you draw the line in - - - in interrogations
2 like this? Where - - - where do they step over line?
3 Are you able to - - - to put it into some kind of a
4 rule?

5 MR. FROST: There's a bright line rule,
6 Your Honor.

7 CHIEF JUDGE LIPPMAN: What's the bright
8 line rule?

9 MR. FROST: The bright line rule - - -
10 Constitutional rule - - - it's a state case law rule,
11 and it's a rule under CPL 60.45(2)(a). In Lynumn
12 against Illinois, the police threatened Beatrice
13 Lynumn, if she did not confess, she'll go to prison
14 for ten years - - -

15 JUDGE PIGOTT: Wait, wait, what - - -

16 MR. FROST: - - - and we'll take your kids.

17 JUDGE PIGOTT: What's the rule we're
18 looking for?

19 MR. FROST: You don't - - - let me put it,
20 if I may answer you indirectly, Your Honor. I don't
21 believe that there's a person in this courtroom who
22 doesn't cherish someone so much - - -

23 JUDGE PIGOTT: But what's the rule? I - -
24 - I - - -

25 MR. FROST: The rule is you don't threaten

1 a person's vital interests, such as the freedom of
2 his spouse, taking away his children - - -

3 JUDGE PIGOTT: Well, how about if - - - if
4 he says, you know, unless you confess here, unless
5 you tell us what's going on, we're going - - - we're
6 ultimately going to find out and you're doing life in
7 jail, is that - - - is that coercive?

8 MR. FROST: The threat of doing life in
9 jail, I would suggest, is coercive, Your Honor. Now,
10 if you confess - - - it implies that if you confess,
11 you're not going to do life in jail - - -

12 JUDGE PIGOTT: All right. If he says he -
13 - -

14 MR. FROST: - - - we'll do something better
15 for you.

16 JUDGE GRAFFEO: If - - - if the - - - if
17 the wife - - - say we have a hypothetical situation
18 that's similar to this, Mr. Frost. If the wife says
19 he did it, and then the police go in and say - - - or
20 she doesn't say that, but the police go in and tell
21 him that your spouse has thrown you in.

22 MR. FROST: Well, actually she didn't. And
23 we want - - -

24 JUDGE GRAFFEO: No, but what - - - what
25 we're trying to figure out is we've - - - we've got

1 precedent that says the police can use deception. So
2 what we're trying to figure out is when do you go - -
3 - when do you enter - - -

4 MR. FROST: There's - - -

5 JUDGE GRAFFEO: - - - this area of
6 inappropriate interrogation, because they can use
7 some tactics. So we're - - - I'm trying to
8 distinguish what would be acceptable or what would
9 not be acceptable.

10 MR. FROST: There's a limit, and there's a
11 clear limit, Your Honor. You don't - - -

12 JUDGE READ: Are you saying you have to
13 look at the whole thing? You have to - - -

14 MR. FROST: No, absolutely not.

15 JUDGE READ: So you're asking us to change
16 our rule.

17 MR. FROST: I'm asking the court to - - -
18 I'm not asking the court to change rules. I'm asking
19 the court to apply the bright line rules that already
20 exist about - - -

21 JUDGE SMITH: I'm still - - - I thought
22 this was about - - -

23 JUDGE GRAFFEO: I thought - - - I thought -
24 - -

25 MR. FROST: - - - threats and deceptions.

1 JUDGE GRAFFEO: I thought our rule was that
2 involuntariness is determined by the totality of
3 circumstances.

4 MR. FROST: I respectfully submit that it's
5 not, Your Honor. In Anderson - - -

6 JUDGE READ: That's not our rule?

7 MR. FROST: - - - the court says - - -

8 JUDGE READ: That that's not our rule? You
9 - - - you - - -

10 MR. FROST: I think the judges have - - -
11 the trial judges have seized upon this rule so they
12 can find what circumstances they want to support what
13 they want to accomplish.

14 JUDGE ABDUS-SALAAM: So what do you say is
15 the rule, counsel? That's where we started.

16 MR. FROST: I say you threat - - - don't
17 threaten to arrest people's wives, whom you know are
18 innocent, so that you can implicate - - - by
19 implicating yourself, whom you also know to be
20 innocent.

21 JUDGE PIGOTT: Well, that's a narrow rule
22 and - - - and - - - and I don't think you'd want to
23 go that - - - I mean, let's as - - - let's assume for
24 a moment that they're not married.

25 MR. FROST: It makes no difference, Your

1 Honor.

2 JUDGE PIGOTT: So your rule's a little
3 broader. It's not just spouses.

4 MR. FROST: My - - - my rule is you don't
5 threaten a person's vital interest.

6 JUDGE ABDUS-SALAAM: But it's okay to do
7 some of the other things?

8 MR. FROST: Touch the other children. You
9 - - - the freedom of their spouse.

10 JUDGE SMITH: You - - - you - - - well, you
11 say you can't even - - - you can't even threaten the
12 suspect's own freedom, but of - - - but they do that
13 all the time, don't they? I mean, isn't - - - it's
14 almost - - - isn't that almost inherent in the - - -
15 in the process of saying, look, tell us the truth - -
16 -

17 MR. FROST: That is also improper, Your
18 Honor.

19 JUDGE SMITH: - - - and we really will go
20 easier on you?

21 MR. FROST: If you - - - if you read Inbau
22 and Reid, which I spent almost all of last week
23 reading, promises of immunity, promises of leniency,
24 threats to prison - - -

25 JUDGE PIGOTT: So what can they do? I

1 mean, the police have somebody and they - - - and
2 they - - - they suspect that they're the ones the
3 held up the First National Bank down the road, and
4 they want to ask him if, in fact, he did it. Now - -
5 -

6 MR. FROST: They can ask him that.

7 JUDGE PIGOTT: And he's going to say, I
8 don't know what you're talking about.

9 MR. FROST: And he can say that.

10 CHIEF JUDGE LIPPMAN: What if - - - what if
11 they - - -

12 MR. FROST: But - - - but they can't
13 threaten - - -

14 CHIEF JUDGE LIPPMAN: What if they say - -
15 -

16 MR. FROST: - - - to arrest his wife.

17 CHIEF JUDGE LIPPMAN: What if they said, we
18 know this is an accident, so don't worry about it;
19 you're not going to get arrested. Is that okay?

20 MR. FROST: Absolutely not. And - - -

21 CHIEF JUDGE LIPPMAN: Is that what happened
22 here in your view?

23 MR. FROST: Your Honor, it happened here
24 sixty-seven times.

25 CHIEF JUDGE LIPPMAN: Yes - - -

1 MR. FROST: I counted them.

2 CHIEF JUDGE LIPPMAN: - - - that's what I'm
3 asking you.

4 MR. FROST: Well, it - - -

5 CHIEF JUDGE LIPPMAN: So that's one of the
6 most egregious things that they did to say - - -

7 MR. FROST: Absolutely, absolutely.

8 CHIEF JUDGE LIPPMAN: - - - we know this is
9 an accident - - -

10 MR. FROST: No matter - - -

11 CHIEF JUDGE LIPPMAN: - - - you're not
12 going to be arrested. Just tell us the truth.

13 MR. FROST: No matter what you did - - - no
14 matter what you did, it's an accident. It's more
15 than a promise of leniency. It's - - -

16 CHIEF JUDGE LIPPMAN: That's a destroy - -
17 - that - - - what's the - - - what's wrong - - -

18 MR. FROST: It's absolvo te - - - I absolve
19 you.

20 CHIEF JUDGE LIPPMAN: What's wrong with
21 that? That's a lie; that's what wrong with it? It's
22 a falsehood?

23 MR. FROST: What's wrong with it? It's a
24 promise of leniency. It's a promise of - - -

25 JUDGE PIGOTT: Well, let - - - let me - - -

1 MR. FROST: - - - absolution.

2 JUDGE PIGOTT: Mr. Frost, I get your point
3 that - - - that, you know, sometimes people who are
4 under arrest, you know, want to play the hero, in the
5 sense that the police say, we're going to arrest your
6 parents; we're going to arrest your spouse; we're
7 going to arrest your kids, or whatever. And they
8 say, well, you know, I'm going to be the hero. I'm
9 going to falsely confess to what I know my wife did
10 with respect to this child.

11 MR. FROST: Do I know what my wife did not
12 do in this case, Your Honor?

13 JUDGE PIGOTT: You're not - - - you're not
14 listening. I - - - I - - -

15 MR. FROST: I understand. Is that okay
16 with you? Is that all right with you, Your Honor?

17 JUDGE PIGOTT: Okay.

18 MR. FROST: Heaven help us.

19 JUDGE PIGOTT: No, I'm trying to - - - I'm
20 agreeing with you that there are situations like that
21 where someone wants to play the hero that will
22 testify falsely. You don't want people to testify
23 falsely. The police don't want people to testify
24 falsely.

25 MR. FROST: Yes, they do. Yes, they do.

1 JUDGE PIGOTT: Okay.

2 MR. FROST: They absolutely do, Your Honor.

3 JUDGE READ: You want to talk a little bit
4 about the expert testimony?

5 MR. FROST: Certainly. The prosecutor in
6 the Appellate Division stated no, no; I concede that
7 the case would not be legally sufficient without the
8 defendant's confession. The facts prove him right.
9 So that puts us, first of all, in the LeGrand
10 context. There is no - - - without that confession,
11 there is no evidence in any way - - -

12 JUDGE SMITH: So why - - - why - - - why
13 does that - - - why does that make the expert
14 testimony that you proffered admissible?

15 MR. FROST: Besides, Your Honor, for the
16 indication - - - there'd be no other evidence
17 implicating Mr. Thomas, or even - - - as far as I'm
18 concerned - - - that a crime was committed, that is a
19 powerful consideration in governing the trial court's
20 exercise of its - - -

21 CHIEF JUDGE LIPPMAN: What did - - -

22 MR. FROST: - - - discretion.

23 CHIEF JUDGE LIPPMAN: What would the expert
24 - - - let's focus in, and quickly, because you'll
25 have your short rebuttal time. What - - - what would

1 the experts' testimony have done for the fact finder?
2 What - - - what context would it have put him into
3 that would have been helpful to the fact finder?

4 MR. FROST: Well, our use of excerpts from
5 the actual interrogation, the expert would first
6 state, Your Honor, that false confessions do exist.
7 And they do exist; it's been demonstrated by the
8 exoneration cases - - -

9 JUDGE SMITH: Well, not only they do exist,
10 but they're - - - as he put it - - - more common than
11 you might think. I mean, I - - - no one would say
12 they're totally nonexistent.

13 MR. FROST: I can say, Your Honor, based
14 upon my experience - - - I'm going to put Mr. Thomas'
15 case aside - - - I disagree with Dr. Cassell. I
16 tried two cases in the 1980s involving false
17 confessions, and my client was acquitted in both. So
18 I guess that would tell us that the rate of false
19 confessions is a hundred percent.

20 JUDGE SMITH: But - - - but - - - but I
21 think it's agreed in this record that nobody can
22 prove the rate. In fact, there's - - - no one - - -
23 you don't claim that you can prove to scientific
24 certainty what the rate is at - - - what the rate is
25 - - -

1 MR. FROST: How could - - - how could you
2 possibly prove it?

3 JUDGE SMITH: Okay, but - - - but you can -
4 - -

5 MR. FROST: You have to know how many false
6 confessions there are.

7 JUDGE SMITH: Is it - - - is it - - - what
8 my question really is, is - - - is it enough - - - is
9 it - - - is there scientific quality, because
10 obviously not precision, to putting an expert on the
11 stand saying, you know, I don't know what the rate
12 is, but there's a lot more of these than you would
13 ever have any idea.

14 MR. FROST: Your Honor, I would venture to
15 say there are tens of - - -

16 JUDGE SMITH: No, I'm not - - - I'm asking
17 you of the fact. I'm asking whether if that - - -
18 that is proper expert testimony.

19 MR. FROST: It - - - when you're dealing
20 with social psychology, which deals with human
21 behavior and human nature, and not with a hard
22 science like physics or chemistry - - -

23 JUDGE PIGOTT: No, but if you've got a
24 situation - - - let's say you got a murder/suicide,
25 and the - - - one person is - - - the murdered person

1 is dead on the floor and the suicide missed, and he
2 came in and he says, yeah, I did it; I - - - you
3 know, I killed her, and I intended to kill myself,
4 but I didn't. You don't need an expert to come in to
5 say that may be a false confession.

6 MR. FROST: Uh - - -

7 JUDGE PIGOTT: So they're not - - -

8 MR. FROST: Not if he said it when the cops
9 arrived at the door obviously, Your Honor.

10 JUDGE PIGOTT: Well, you're making - - -

11 MR. FROST: But you're saying the
12 circumstances - - -

13 JUDGE PIGOTT: You were suggesting that all
14 of - - - all confessions are false - - -

15 MR. FROST: Well, maybe she tried to shoot
16 him, and he took the gun away and shot her.

17 JUDGE PIGOTT: I'm almost done.

18 MR. FROST: Who knows?

19 JUDGE PIGOTT: Okay.

20 MR. FROST: It could be. It depends on the
21 context. It depends on the circumstances in which it
22 happened. You know, let me say this.

23 CHIEF JUDGE LIPPMAN: Counsel, finish up;
24 your light is on; go ahead.

25 MR. FROST: All right.

1 CHIEF JUDGE LIPPMAN: Finish your thought;
2 go ahead.

3 MR. FROST: About time my light went on,
4 Your Honor.

5 The testimony of Dr. Ofshe was obviously
6 relevant. Without it, there's no other - - - without
7 the confession, there's no other evidence. He is
8 obviously qualified in the field; he's practicing for
9 over twenty-five years. He's testified on 316
10 occasions, federal court, state court, Daubert
11 jurisdiction, Frye jurisdiction, military court.

12 JUDGE PIGOTT: But the point - - - the
13 point, I think, is that in un - - - in LeGrand there
14 were reasons to suspect that the eyewitness
15 identification may be shaky. And so - - -

16 MR. FROST: There's no reason to suspect
17 that here, Your Honor?

18 JUDGE PIGOTT: No, I - - - I'm coming
19 around to your side; you just - - - you got to let me
20 - - -

21 MR. FROST: Thank you.

22 JUDGE PIGOTT: - - - get there.

23 MR. FROST: Keep that light on.

24 JUDGE PIGOTT: So your point is, that if
25 this - - - if there are questions as - - - as to the

1 validity of this thing, that there ought to be expert
2 testimony to say why he would have done what he did
3 and why it may be false. And a jury ought to hear
4 that.

5 MR. FROST: Yeah, right. He would testify
6 that there are false confessions, that there are
7 certain types of conduct that are police techniques
8 that are common to false confessions, and that these
9 - - - this type of a improper conduct is present
10 here.

11 CHIEF JUDGE LIPPMAN: Okay, counsel, good.
12 You'll have your rebuttal. Let's hear from your - -
13 -

14 MR. FROST: Thank you.

15 CHIEF JUDGE LIPPMAN: - - - from Ms.
16 Effman.

17 MS. EFFMAN: May it please the court - - -

18 CHIEF JUDGE LIPPMAN: Counsel, do you want
19 any rebuttal time of your three minutes?

20 MS. EFFMAN: No, Your Honor.

21 CHIEF JUDGE LIPPMAN: Okay.

22 MS. EFFMAN: No, Your Honor.

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MS. EFFMAN: I'll be sho - - - I'll be
25 short and brief. All the statements made by Mr.

1 Thomas, during the first interrogation and his second
2 interrogation, which was preceded by sixteen hours at
3 Samaritan Hospital, committed to a secure mental
4 facility, must be suppressed as fruits of an unlawful
5 arrest, detention without probable cause, starting
6 from the first moment Mr. Thomas was taken in a
7 police car from his residence, after his children had
8 been removed from his care Sunday evening to the Troy
9 Police Department.

10 And after being there for two hours,
11 subject to accusatory questioning, things such as
12 Mason and Fountain told him, the officers said,
13 someone murdered this baby; someone slammed this baby
14 into a hard object. One of the two of you did it,
15 referring to him and his wife.

16 JUDGE GRAFFEO: But - - - is it the two
17 hours that you're focusing on or what the police
18 officer said?

19 MS. EFFMAN: Focusing on both, Your Honor.
20 The two hours - - -

21 JUDGE GRAFFEO: Because we've got cases
22 with nineteen hours, forty-eight hours of
23 interrogation. Two hours is a relatively short time
24 frame in light of other cases that our court has
25 examined.

1 MS. EFFMAN: When you take into account the
2 fact that the accusatory nature of the questioning
3 was such that an innocent person, free of any
4 wrongdoing, would not feel that they were free to
5 leave. And even if he you assume he came to the
6 station voluntarily for this initial interrogation,
7 by the end of the initial interrogation, after being
8 confronted with evidence that the police thought he
9 was guilty, by telling him that they're going to come
10 after him criminally - - -

11 JUDGE SMITH: I'm a little - - - I'm - - -
12 I'm - - - maybe I'm confused. What are you arguing,
13 other - - - Mr. Frost already argued that the
14 confession's involuntary. Are you arguing the same
15 point, or is there - - - is there a different one
16 here?

17 MS. EFFMAN: People - - - that the police
18 lacked cause to detain him. This was - - - he was in
19 custody. And it - - -

20 CHIEF JUDGE LIPPMAN: And it does - - - and
21 it doesn't matter what they said to him as to what
22 his status was. You're saying, in effect, he
23 couldn't leave?

24 MS. EFFMAN: He - - - he - - -

25 CHIEF JUDGE LIPPMAN: He was in custody?

1 MS. EFFMAN: He was in custody, an innocent
2 person free of wrongdoing, which is a standard - - -

3 JUDGE SMITH: So - - - so - - - so the
4 relevancy - - -

5 MS. EFFMAN: - - - particularly - - -

6 JUDGE SMITH: - - - the relevance, if I
7 understand it, the accusatory nature of the
8 questioning is relevant to show that it was a
9 custodial interrogation?

10 MS. EFFMAN: He was being interrogated in
11 custody; he was not free to leave.

12 JUDGE SMITH: Okay, you got through, okay.

13 MS. EFFMAN: And the end of the first
14 interrogation, he was taken into custody - - -
15 clearly, by the execution of the - - - Officer
16 Fountain on the Mental Hygiene form under 941, it
17 clearly states, Officer Fountain says, I'm taking
18 Adrian Thomas into custody, and asked, in fact, to be
19 notified of his release from the hospital. And after
20 Mr. Thomas spent sixteen hours in Samaritan Hospital,
21 placed - - - he didn't consent to go there. He was
22 told he was going there to get help.

23 JUDGE PIGOTT: He states - - -

24 MS. EFFMAN: He never consented.

25 JUDGE PIGOTT: I think the People say it's

1 a mixed question as to, you know, whether this arrest
2 was unlawful or not. They had facts in which they
3 believed that there was reasonable cause to believe
4 that he may have done something.

5 MS. EFFMAN: It's not - - -

6 JUDGE PIGOTT: How do - - - how do we get
7 out of the mixed question issue?

8 MS. EFFMAN: It's - - - it's not a mixed
9 question, Your Honor. First of all, the court
10 applied the wrong standard. They mixed up the
11 standard for voluntariness with the - - - with the
12 standard for custody. Was a person reasonably
13 innocent of a crime - - - free to leave at that point
14 in time?

15 They also didn't have a base in the record
16 for finding Mr. Thomas consented. Under Gonzalez,
17 this court set forth four factors, amongst other
18 factors, which the court has to look at to determine
19 whether or not Mr. Thomas consented. Did he
20 voluntarily and fully consent to being in police
21 custody during this whole period of time or did he -
22 - - was he subject to overbearing, official coercion
23 or submission to a lawful authority?

24 You have to look at the background of the
25 consenter. Mr. Thomas has a 10th-grade education.

1 Never been convicted at a crime. You have to look at
2 that. You have to look at the circumstances as to
3 whether he was in custody under arrest. You have to
4 also look at the circumstances of - - -

5 JUDGE ABDUS-SALAAM: Can I - - - can I just
6 - - -

7 MS. EFFMAN: - - - whether he was ever told
8 he was free to leave.

9 JUDGE ABDUS-SALAAM: Yeah, can I just ask,
10 are you saying that while he was in the facility
11 under observation about whether he might be insane
12 or, you know, going insane, he was in custody then?
13 Or was that voluntary?

14 MS. EFFMAN: He was in custody then,
15 absolutely, without his consent, beyond - - -

16 JUDGE ABDUS-SALAAM: Didn't he ask to get
17 some help?

18 MS. EFFMAN: It's - - - the scope of his
19 consent was to talk to someone.

20 CHIEF JUDGE LIPPMAN: Okay.

21 MS. EFFMAN: Going to talk to someone does
22 not amount to being involuntarily committed.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
24 you, counsel.

25 MS. EFFMAN: Thank you.

1 CHIEF JUDGE LIPPMAN: Okay, Ms. Kelly Egan.
2 Go ahead, counsel.

3 MS. EGAN: Yes, may it please the court,
4 counsel, my name is Kelly Egan arguing on behalf of
5 the respondent.

6 There is ample - - -

7 CHIEF JUDGE LIPPMAN: Counsel?

8 MS. EGAN: Yes, Judge?

9 CHIEF JUDGE LIPPMAN: What about the - - -
10 the law - - - the officers saying 67 times that we
11 know what happened was an accident, and 140-some-odd
12 times that he wouldn't be arrested? How do you
13 square that with - - - with a voluntary statement on
14 his part?

15 MS. EGAN: We need to look at the totality
16 of the circumstances, Judge. And here - - -

17 CHIEF JUDGE LIPPMAN: But - - - but those
18 are a lot of instances of creating a totality of - - -
19 - of what this questioning, this interrogation - - -

20 MS. EGAN: Yes, if - - -

21 CHIEF JUDGE LIPPMAN: - - - was all about?

22 MS. EGAN: If we want to pick out
23 individual statements made by the officers - - -

24 CHIEF JUDGE LIPPMAN: But what with those
25 particular statements - - -

1 MS. EGAN: With those particular
2 statements?

3 CHIEF JUDGE LIPPMAN: - - - that you're not
4 going to be arrested? We know this is an accident,
5 so just tell us, so you can go home.

6 MS. EGAN: He was told he was not going to
7 be arrested at this time; he was not going to be
8 arrested tonight. They were very clear with him that
9 he was not immune from criminal prosecution.

10 CHIEF JUDGE LIPPMAN: They were not trying
11 to deceive him? Or lure him into - - -

12 MS. EGAN: They were certainly applying
13 pressure to him, and they wanted to - - - him to
14 speak with them.

15 CHIEF JUDGE LIPPMAN: What is - - - what is
16 acceptable pressure? We asked your adversary the
17 same thing. What's okay and what's not okay in terms
18 of deception, when you're interrogating a defendant?

19 MS. EGAN: Deception is permissible so long
20 as it does not overbear the subject's will as to
21 whether he feels free to make a statement. And it is
22 permissible so long as it doesn't create a
23 substantial risk of a false confession.

24 CHIEF JUDGE LIPPMAN: What about - - - what
25 about what your adversary highlighted, threatening

1 towards people who are very close to you and saying
2 things that aren't true about - - - that you're going
3 to put them in great - - - at great risk or in great
4 harm. Is that okay, or can you get a rule - - -

5 MS. EGAN: We can't draw - - -

6 CHIEF JUDGE LIPPMAN: - - - around that
7 kind of situation?

8 MS. EGAN: Judge Lippman, we can't draw a
9 bright line rule. There's a grey area as to even
10 what constitutes a threat. Cases have held that
11 telling him - - -

12 CHIEF JUDGE LIPPMAN: In this case, was
13 there a threat to - - -

14 MS. EGAN: No - - -

15 CHIEF JUDGE LIPPMAN: - - - his wife?

16 MS. EGAN: - - - there was not, Judge.

17 CHIEF JUDGE LIPPMAN: No?

18 MS. EGAN: They told him they were going to
19 speak - - -

20 CHIEF JUDGE LIPPMAN: There was no - - -
21 there was no - - -

22 MS. EGAN: - - - to his wife.

23 CHIEF JUDGE LIPPMAN: What were they going
24 to - - - just say?

25 MS. EGAN: They said they would speak to

1 his wife. They were going to scoop his wife up.
2 They did not threaten to arrest his wife.

3 JUDGE SMITH: But you - - - you say that
4 we're going to scoop your wife up is not a threat?

5 MS. EGAN: No, it's not a threat in the
6 sense that it's not - - -

7 JUDGE SMITH: Okay, they wanted to - - -

8 MS. EGAN: - - - an improper statement.
9 Certainly, it's designed - - -

10 JUDGE SMITH: If they were going to scoop
11 my wife up - - -

12 JUDGE RIVERA: They took him out of his
13 home - - -

14 JUDGE SMITH: - - - I'd think it was a
15 threat.

16 JUDGE RIVERA: They - - - they took him out
17 his home. What - - - doesn't scoop imply the same
18 kind of physical - - -

19 MS. EGAN: They didn't - - -

20 JUDGE RIVERA: - - - treatment of his wife?
21 I'm not understanding.

22 MS. EGAN: They didn't take the defendant
23 out of his home. They went back and asked the
24 defendant to accompany them, and he went with them
25 willingly.

1 CHIEF JUDGE LIPPMAN: No, no, but the
2 statement about the wife, in the context of this
3 situation and what was happening, isn't that really
4 something that would, to you, be traumatic if you
5 were in that situation?

6 MS. EGAN: Well, Judge, we're looking at
7 the defendant in this situation, and no - - -

8 CHIEF JUDGE LIPPMAN: Yes, I mean the
9 defendant.

10 MS. EGAN: - - - I - - - this was not an
11 improper tactic. Yes, it was designed to apply
12 pressure, but you can see from his reaction.
13 Initially they spoke for nearly an hour with him
14 saying they were going to need to talk to his wife,
15 before he even made a statement, yeah, I'll take the
16 fall for my wife, and then he - - - he did not follow
17 that with a confession. They explained you can't
18 just take the fall. You have to tell us what
19 happened. It was not an improper - - -

20 JUDGE SMITH: What about - - - what about -
21 - -

22 MS. EGAN: - - - amount of pressure.

23 JUDGE SMITH: What about your child will
24 die - - - telling someone falsely your child will die
25 if you don't talk to us? If any - - - is there

1 anything that could possibly overbear the will more
2 than that?

3 MS. EGAN: The detectives were clear that
4 the child was almost definitely going to die from the
5 outset, and that if he did live, he would never lead
6 a normal life.

7 JUDGE SMITH: Yeah, so you - - - so - - -

8 MS. EGAN: They told him - - -

9 JUDGE SMITH: Yeah, but so, what - - - what
10 - - - what were they trying to accomplish when they -
11 - - when they told him the child was still alive and
12 the doctors needed something to save him?

13 MS. EGAN: They were hoping he would tell
14 them what had - - - he would tell them what had
15 happened.

16 JUDGE SMITH: And is it - - - and can - - -
17 and isn't that an awfully powerful inducement?

18 MS. EGAN: It's an inducement. Is it an
19 improper inducement? Did it overbear his will to not
20 make an incriminating statement - - -

21 JUDGE SMITH: I mean, if you - - - I mean,
22 how - - - how - - - can you - - -

23 MS. EGAN: - - - I would say no.

24 JUDGE SMITH: How could it not overbear - -
25 - overbear your will if you think your child's life

1 even - - - my - - - even if - - - if there's even a
2 small chance of saving your child's life? How can -
3 - - how can you say - - -

4 MS. EGAN: We - - -

5 JUDGE SMITH: - - - oh, well, it's okay;
6 yeah, let the kid go, I'll - - - I'll stick to my
7 story.

8 MS. EGAN: We need to look at the
9 defendant's reaction, and he - - - that was not
10 followed by - - -

11 JUDGE PIGOTT: Maybe - - - maybe - - -

12 JUDGE SMITH: Are you talking causation?

13 JUDGE PIGOTT: - - - an expert could
14 straighten that out. Because if - - - if Judge Smith
15 is thinking one thing, and you're thinking another
16 thing, that it overbears or it doesn't overbear,
17 isn't there expert testimony that would assist the
18 jury in determining whether or not some of these
19 threats might intimidate a person into confessing to
20 something he or she did not do?

21 MS. EGAN: There is not. There is no
22 expert - - - no expert testimony was proffered that
23 demonstrated any reliable link between police tactics
24 and - - -

25 CHIEF JUDGE LIPPMAN: You don't think that

1 the - - -

2 MS. EGAN: - - - whether someone would
3 falsely confess.

4 CHIEF JUDGE LIPPMAN: - - - that the doctor
5 would have offered any kind of testimony to explain
6 what happens to somebody in this situation using the
7 kind of tactics we're talking about? You don't think
8 today, given everything that we know, that there's a
9 science that's formed around this whole dynamic? Is
10 that totally something that just doesn't make any
11 sense or has no credibility in terms of what's
12 happened over the last decade and more in this whole
13 area of false confessions?

14 MS. EGAN: In terms of determining whether
15 police tactics effect false confessions? No, there
16 is no reliable agreed-upon principles or science that
17 show that police tactics, which everybody claims are
18 used - - -

19 CHIEF JUDGE LIPPMAN: There's no - - -
20 there's no science that shows that there's some link
21 if you threaten your family, if you say your child is
22 going to die, if you - - - that kind of thing, there
23 - - - there is no science that - - - that you can put
24 your arms around - - -

25 MS. EGAN: None that would - - -

1 CHIEF JUDGE LIPPMAN: - - - that - - - that
2 should give some context to the fact finder about
3 what a confession might be all about?

4 MS. EGAN: None that was proffered by Dr.
5 Ofshe. And the manner in which you're phrasing that
6 question indicates that it's - - - the way you're
7 phrasing it, it's an intuitive question, which
8 doesn't even require expert testimony.

9 CHIEF JUDGE LIPPMAN: Then why is he
10 testifying - - - the same doctor, in so many cases,
11 on this same issue?

12 MS. EGAN: He has not testified
13 specifically as to the effect of police tactics. The
14 vast majority of that testimony was very general
15 about individuals - - -

16 CHIEF JUDGE LIPPMAN: Do you think police
17 tactics do not affect whether there's going to be a
18 false confession or not? And you're saying there's
19 no science that backs that up?

20 MS. EGAN: No, if police tactics - - - the
21 same tactics - - - are used in every interrogation,
22 we would expect - - -

23 JUDGE SMITH: Did he - - - did he
24 distinguish between - - -

25 MS. EGAN: - - - to see a large number of

1 false confessions.

2 JUDGE SMITH: In his testimony, did he
3 distinguish between tactics that would lead to false
4 confessions and tactics that would lead to
5 confessions generally?

6 MS. EGAN: He did. He believed that what
7 he termed "coercive motivators" increased the risk of
8 obtaining a false confession.

9 JUDGE SMITH: I - - - I - - - I mean, I
10 read him as saying they increase the risk of a
11 confession, and I can't tell you whether it's true or
12 false.

13 MS. EGAN: Well, he had only looked at
14 cases that involved suspected false confessions, so I
15 don't know that any opinion he gave on that was even
16 clear as to what tactics increased the risk of false
17 confessions.

18 JUDGE SMITH: I mean, because of some of
19 what he says is not beyond the ken - - - I assume you
20 say that you don't really need an expert to tell you
21 that if you offer a guy leniency, he's more likely to
22 confess.

23 MS. EGAN: I don't believe you need an
24 expert testimony for that.

25 JUDGE SMITH: What about - - - what about -

1 - - what about the - - - his testimony on the more
2 specific technique that was used here of feeding the
3 details to the - - - I mean, in all those hours of
4 questioning, the defendant here basically never came
5 up with anything the police didn't feed him first.
6 Isn't that troubling and couldn't an expert say - - -
7 shed some light on that?

8 MS. EGAN: Dr. Ofshe didn't proffer any
9 evidence or testimony in terms of what they call
10 contamination or whether the details were provided to
11 the defendant. And when you watch the video - - -

12 JUDGE SMITH: No, he said - - - he said the
13 right to do it is first you get him to confess, and
14 then, once you've - - - then you try to get out of
15 him details that will nail him to the confession that
16 you can't feed him. These guys didn't do that.

17 MS. EGAN: They offered many suggestions
18 that the defendant vehemently denied; in particular,
19 there's a period - - -

20 JUDGE SMITH: Yeah, but that - - - yeah,
21 but - - - but that - - - that's - - - yeah, the fact
22 that they - - - he didn't take every suggestion is
23 not exactly powerful corroboration that the ones he
24 took are - - - are truthful.

25 MS. EGAN: But, Judge, this wasn't a fact-

1 specific case where they had a smoking gun that they
2 fed him. They were hypothesizing what could have
3 happened to the child.

4 CHIEF JUDGE LIPPMAN: What about the sixty
5 mile per hour? That - - - that we know - - - that we
6 know scientifically, medically, that this had to be
7 with the force of sixty miles per hour. Show us what
8 you did that that sixty miles per hour - - - that's
9 not suggestive in a way that - - - that, you know - -
10 - that would lead him to say something that - - -
11 that maybe is not the truth?

12 MS. EGAN: No, not in this case. Not when
13 you view this defendant's reaction to other
14 suggestions.

15 JUDGE PIGOTT: Do you think we decided
16 LeGrand wrong?

17 MS. EGAN: I believe LeGrand was a very
18 different case, in that in LeGrand, the eyewitness
19 testimony of an eyewitness who made an ID seven years
20 after the fact was truly the only evidence linking
21 LeGrand to the victim. It was a stabbing in the New
22 York City streets of a cab driver.

23 Here, there's ample other evidence to
24 corroborate - - -

25 JUDGE PIGOTT: So you think the court was

1 wrong not to - - - not - - -

2 MS. EGAN: - - - the reliability of his
3 confession.

4 JUDGE PIGOTT: Do you think the trial court
5 was wrong not to have expert testimony in LeGrand?

6 MS. EGAN: Have - - - not having the
7 benefit of reading the Frye transcript and seeing the
8 state of the science, I would hesitate to answer that
9 question. But here - - -

10 JUDGE GRAFFEO: But - - -

11 MS. EGAN: - - - there is ample
12 corroboration of the defendant's confession, which he
13 repeated the exact same confession twenty-four hours
14 later to the CPS worker.

15 JUDGE PIGOTT: Well, as Mr. Frost pointed
16 out, I guess he's had a couple where there have been
17 false confessions, and I'm sure you'll concede that
18 there are, sometimes when they, you know what - - -
19 I'll go back to my bank, and they say, how did you
20 get to the bank? And he said I took a bus. And they
21 said, you did not; you drove a 1992 Ford Fairlane.
22 He says, yeah, that's right; I drove the 1992 - - -
23 and pretty soon they have the nicest, neatest, typed-
24 up confession that all came from the interrogators.

25 And experts testify to that. I don't know

1 if this particular one would have, but I mean, the
2 fact of the matter is that there - - - there are
3 those techniques that are very good. I mean, the
4 police are very good at solving crimes. Sometimes,
5 in solving them, they may get the wrong person
6 because they used tactics that shouldn't have used.
7 Would you agree?

8 MS. EGAN: I'm sorry. I lost track of the
9 question, Judge - - -

10 JUDGE PIGOTT: Well, what I'm saying is - -
11 -

12 MS. EGAN: - - - but certainly if you have
13 a - - -

14 JUDGE PIGOTT: - - - you're - - - you're
15 convinced that this guy was not overborne in any way
16 whatsoever. We've had some conversations that if you
17 threaten to lock up somebody's spouse or say that
18 their child will die unless they tell you something,
19 that that may overbear. You disagree.

20 Would an expert disagree with you, maybe,
21 and say, au contraire, this is exactly when the hero
22 thing comes in and - - - and a person like this
23 defendant will say, I'm going to save my wife; I'm
24 going to save my child; I'm going to falsely confess
25 and they can hang me from the highest rafter, but, by

1 God, I will have done the right thing by lying.

2 MS. EGAN: And expert may disagree with me,
3 but the science that was proffered doesn't establish
4 the link. And as I was saying before, if the same
5 tactics are used in all interrogations, how are we to
6 know whether they create a risk of false confession?

7 JUDGE PIGOTT: They're not - - - they're
8 not - - - they're not - - - these aren't - - -

9 JUDGE GRAFFEO: There's - - - there's a bit
10 a different wrinkle in this case, because it's
11 contested as to what the actual cause of death of the
12 child is. The defendant's claiming that it was
13 infection, correct?

14 MS. EGAN: The defendant claims that.

15 JUDGE GRAFFEO: And your doctors are
16 claiming that it was from trauma. So - - -

17 MS. EGAN: Correct, Judge, as to any - - -

18 JUDGE GRAFFEO: So wouldn't - - - wouldn't
19 - - - under LeGrand, wouldn't that expert testimony
20 about false confessions take on an even greater
21 importance, in light of the fact that there are some
22 competing medical explanations here for what
23 happened?

24 MS. EGAN: Given the facts of this case, I
25 don't believe there is a legitimate argument that the

1 child died from septic shock. His organs were
2 donated to another child afterwards. Even one of the
3 defendant's experts conceded that had this child died
4 of an overwhelming septic infection that caused organ
5 death, toxins to be released in his bloodstream, that
6 he would later go on to be an organ donor.

7 Any argument as to the sufficiency of that
8 evidence wasn't preserved, and we need to look at the
9 evidence in the light most favorable to the People,
10 if we're addressing that.

11 JUDGE SMITH: But even - - - even if - - -
12 even if you have a compelling case that the child
13 died of head trauma, and obviously that makes you
14 suspect that this guy - - - you can't - - - you can't
15 convict this guy without his confession. I mean, you
16 don't know how the child got the head trauma.

17 MS. EGAN: The confession was strong
18 evidence for the People, but there is legally
19 sufficient evidence outside of the confession.

20 JUDGE SMITH: So you're - - - so you're - -
21 - so you're saying that even if we were to suppress
22 the confession, you did not - - - we - - - we should
23 not dismiss; you want to retry the case?

24 MS. EGAN: Correct, Judge, the child died
25 in the defendant's care. It was his son. The child

1 died of an injury that was established had to have
2 been caused by an adult. The evidence showed that
3 only two adults had access to the child during the
4 requisite time frame when he sustained this injury.
5 That the nature of the injury was such that no
6 reasonable person would believe - - -

7 JUDGE ABDUS-SALAAM: Isn't - - - counsel -
8 - -

9 MS. EGAN: - - - an infant can be handled
10 this way.

11 JUDGE ABDUS-SALAAM: - - - wasn't that the
12 same doctor who thought that the rash on the child's
13 face had something to do - - - not with the soap, but
14 something else? Is that the expert you're talking
15 about, Dr. Edge, who said that there was a skull
16 fracture when apparently there was not?

17 MS. EGAN: If we're talking about the error
18 in terms of a diagnosis of the skull fracture on an
19 X-ray, correct, that was Dr. Edge. And in reading
20 the X-ray what happened is there's a shadow in an
21 infant's skull where the plate - - -

22 JUDGE ABDUS-SALAAM: But isn't it Dr. Edge
23 who also said the child was murdered?

24 MS. EGAN: Dr. Edge said that, but Dr.
25 Jenny also established that the child's cause of

1 death was from head trauma.

2 JUDGE ABDUS-SALAAM: Because - - - because
3 the defendant - - - because she relied in part on the
4 defendant's confession that he shook his baby or
5 threw the baby hard onto the bed. Didn't Dr. Jenny
6 also concede that, that she took into account this
7 confession?

8 MS. EGAN: Look, she considered the
9 confession, but in her diagnosis, she based it on
10 what she had seen in Matthew and the autopsy, and Dr.
11 Sikirica also testified as to the injuries sustained
12 by Matthew. Matthew's injuries were consistent with
13 a death from head trauma. The fact that he donated
14 his organs is completely inconsistent with a death
15 from an overwhelming bacterial infection.

16 JUDGE SMITH: And one of the - - - one of
17 the defense experts more or less conceded there was
18 head trauma, didn't he?

19 MS. EGAN: Yes.

20 JUDGE SMITH: The other - - - but the other
21 one says no.

22 MS. EGAN: Moreover, back to the question
23 on whether the expert testimony should have been
24 admissible. It simply didn't pass the Frye standard
25 here.

1 JUDGE ABDUS-SALAAM: Wait, wait. On that
2 point, is Dr. - - - is Cassell a doctor?

3 MS. EGAN: He is a professor of law. I
4 believe Dr. Leo is also a professor of law, and there
5 was a Dr. White (ph.), who also taught at a law
6 school within the scientific community. It's not
7 self-limited to social scientists. Even considering
8 the experts that were discussed by Dr. Ofshe, Dr.
9 Kassin, there was a JP Blair (ph.), they don't agree
10 as to which of these tactics, if any, are dangerous.

11 Dr. Ofshe flat out stated that evidence
12 ploys and the length of an interrogation are not
13 inherently dangerous factors. Dr. Kassin, in the
14 literature that was admitted at the Frye hearing,
15 indicated that false evidence ploys present a great
16 danger. And JP Blair indicated that the length of
17 the interrogation is the tactic that presents the
18 danger.

19 JUDGE PIGOTT: Well, then why - - - why is
20 this not beyond the ken of the average juror?

21 MS. EGAN: Because what was offered was not
22 beyond the ken of the average juror.

23 JUDGE PIGOTT: You've got three experts to
24 say three different things, and you're saying, yeah,
25 but juries already know.

1 MS. EGAN: Juries know false confessions
2 exist, but they don't - - - the experts don't agree
3 as to whether or what increases the risk of a false
4 confession. They think police tactics do, but
5 there's, in fact, no empirical evidence to show - - -

6 JUDGE SMITH: Well, show as to what - - -

7 MS. EGAN: - - - that they do.

8 JUDGE SMITH: - - - Professor Cassell was
9 saying was that there's no - - - that the Frye test
10 isn't met. There's no acceptance in the scientific
11 community of - - - that these particular techniques
12 lead to false confessions. You mean - - - he seemed
13 to assume that Ofshe said it. You seem to concede -
14 - - concede that he said it. I'm not sure he said
15 it. But - - - but there's also an issue as to
16 whether it's - - - whether there's acceptance in the
17 relevant community.

18 MS. EGAN: Yes, absolutely. There's also a
19 question as to whether what Ofshe suggested to do,
20 which was show one or two sentences pulled out of
21 various points of the transcript and say, this is
22 where they - - -

23 JUDGE SMITH: It's more - - - more than one
24 or two.

25 MS. EGAN: - - - used this tactic.

1 JUDGE SMITH: I mean, you got a couple of
2 hundred, you're going home tonight, and - - - and if
3 it's just an accident, it's not a problem.

4 MS. EGAN: Correct, but there's no
5 consensus in the scientific community that that
6 indicates that the confession was false or true based
7 upon those statements.

8 CHIEF JUDGE LIPPMAN: Okay, counsel,
9 thanks.

10 MS. EGAN: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. FROST: Just to correct, Judge Smith,
13 neither - - - both defense doctors testified that
14 trauma had nothing to do with this child's death.

15 Your Honor, John Reid boasted - - -

16 JUDGE SMITH: Is it, well - - -

17 MR. FROST: Your Honor?

18 JUDGE SMITH: I - - - maybe we're - - -
19 yeah, I think - - - I think we're saying the same
20 thing. The first expert said trauma had nothing to
21 do with the death, but he didn't say there wasn't any
22 trauma. When he was asked, he said maybe there was.

23 MR. FROST: I - - - I disagree, Your Honor.
24 But John Reid boasts that a survey of 112
25 interrogators over 2 years, 3,162 confessions, only

1 18 were suppressed. That's the - - - kind of like an
2 Ivory soap commercial, Your Honor. He says 99 and
3 44/100th percent pure confession. That doesn't float
4 like Ivory soap, Your Honor. It is balderdash. That
5 statistic is the result of secrecy, police perjury
6 and the court's misapplication - - -

7 JUDGE SMITH: Isn't - - - isn't - - -

8 MR. FROST: - - - of the totality of
9 circumstances rule - - -

10 JUDGE SMITH: Isn't - - - isn't there - - -
11 isn't there a less sinister - - - isn't there a less
12 sinister explanation? I know you don't seem to be
13 terribly - - - a terribly trusting man, but isn't - -
14 - isn't it also - - - let's - - - let's assume that
15 the police do an excellent job, and that most of the
16 people they question are guilty. And from those
17 people you can't get a false confession - - -

18 MR. FROST: Your Honor - - -

19 JUDGE SMITH: - - - if they're guilty. Dr.
20 Ofshe said, and this was one of the more interesting
21 things I thought he said, is if you want to do - - -
22 you want to do it, do it right. Find out how many
23 innocent people were questioned and find out how many
24 of them confessed and what percentage you get.

25 MR. FROST: Guilty has nothing to do with

1 the question of coercion, Your Honor. The court's
2 misapplication - - -

3 JUDGE SMITH: Unless it's something to do
4 with - - - it has something to do with the question
5 of false confessions, which was what your expert was
6 supposed to be talking about.

7 MR. FROST: And coercion, Your Honor. The
8 totality of the circumstances rule is a rule that
9 should be held in reserve and the blight - - - the
10 bright line rule should be applied because courts
11 have a way of finding, just as they did in the 99.4
12 percent of true, supposedly, noncoerced confessions,
13 those circumstances that suit them. And in fact, the
14 Appellate Division in this case created five
15 circumstances that don't exist.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. FROST: Thank you.

18 CHIEF JUDGE LIPPMAN: Thank you.

19 All right, Aveni.

20 Counsel, do you want any rebuttal time?

21 MS. GIANFRANCESCO: Yes, Your Honor, three
22 minutes, please.

23 CHIEF JUDGE LIPPMAN: Three minutes, sure,
24 you're on. Go ahead.

25 MS. GIANFRANCESCO: Thank you very much.

1 May it please the court, Raffaolina Gianfrancesco, on
2 behalf of the Westchester County District Attorney's
3 Office.

4 Your Honors, this case presents a legal
5 question as of whether the Appellate Division's
6 ruling that the deceptive practice used during the
7 custodial interrogation and in particular, lying to
8 the defendant that his girlfriend was still alive and
9 in need of information for her proper medical care,
10 were per se coercive tactics.

11 JUDGE SMITH: Did they say "per se"?

12 MS. GIANFRANCESCO: Well, Your Honor, they
13 did not use the words "per se", however - - -

14 JUDGE SMITH: Well, why - - - why isn't
15 this a mixed question is really what I'm getting at?

16 MS. GIANFRANCESCO: It isn't a mixed
17 question, because what the Appellate Division did in
18 this case is, in fact, conflate the legal question of
19 Miranda and the voluntariness of the confession.

20 CHIEF JUDGE LIPPMAN: Why wasn't Miranda
21 undermined by what happened here?

22 MS. GIANFRANCESCO: Miranda was not
23 undermined, because as this court said in - - - in
24 Jimmy D., once the defendant is given his Miranda
25 rights, and he voluntary (sic) relinquished them - -

1 - and in this case, he did it not once, but twice,
2 three times - - - the issue is the voluntariness of
3 the confession, not Miranda.

4 CHIEF JUDGE LIPPMAN: How can Miranda
5 survive, given the kind of tactic that was used?

6 MS. GIANFRANCESCO: Well, Your Honor - - -

7 CHIEF JUDGE LIPPMAN: No matter what he
8 said.

9 MS. GIANFRANCESCO: Miranda can survive and
10 it did survive in this case, Your Honor, because the
11 defendant was brought in. At the time of his arrest,
12 he's initially given his Miranda rights - - -

13 CHIEF JUDGE LIPPMAN: But what about the
14 threat that was implicit in what they said to him?

15 MS. GIANFRANCESCO: They told him it could
16 be a problem. It could be a problem. We're - - -

17 CHIEF JUDGE LIPPMAN: What were they really
18 saying to him? What was the import of what they said
19 to him - - -

20 MS. GIANFRANCESCO: Yeah.

21 CHIEF JUDGE LIPPMAN: - - - if he didn't
22 admit to whatever they wanted him to admit to?

23 MS. GIANFRANCESCO: The import was part of
24 a deceptive tactic. The deception was your
25 girlfriend is still alive and she's in need of

1 medical care. The doctors need to know what drugs
2 she took.

3 CHIEF JUDGE LIPPMAN: And what would be the
4 consequence to him if he didn't say it?

5 MS. GIANFRANCESCO: Could be a moral
6 consequence. It's his girlfriend. You're going to -
7 - - your girlfriend's going to die if you don't tell
8 us what drugs she took. Could be a possible legal
9 consequence. It's how - - -

10 CHIEF JUDGE LIPPMAN: But here - - -

11 MS. GIANFRANCESCO: Correct.

12 CHIEF JUDGE LIPPMAN: Yeah.

13 MS. GIANFRANCESCO: Correct, Your Honor.

14 But what I think it is critical in this case is the
15 Appellate Division found without any support that
16 this was a gentleman who was fearing the face of
17 homicide charges, of life imprisonment. And it's
18 clear, and I'm sure this court has reviewed these
19 videotapes, this defendant's will was far from being
20 overborne in this case.

21 JUDGE SMITH: I mean, if we - - - if we
22 disagree with the Appellate Division's view of what
23 the videotapes show, can we reverse? Don't they have
24 - - - I thought that they have fact-finding power; we
25 don't.

1 MS. GIANFRANCESCO: They do. You - - -
2 this court - - - we're presenting this court with two
3 possible ways to reverse this case. And number 1,
4 that the Appellate Division applied the wrong legal
5 standard. They conflated Miranda and the
6 voluntariness question. They never looked at the
7 totality of circumstances.

8 And we've also illustrated to this court
9 that in fact - - -

10 JUDGE GRAFFEO: Would that result in a
11 remittal as to apply the correct standard? Is that
12 what you're asking for?

13 MS. GIANFRANCESCO: No, the re - - - the
14 remittal would be merely to the legal sufficiency
15 question. The court never applied a weight to the
16 evidence. They never reviewed the sufficiency of the
17 evidence, including the defendant's confession - - -

18 JUDGE SMITH: Are you - - - are you - - -

19 MS. GIANFRANCESCO: - - - because they had
20 suppressed it.

21 JUDGE SMITH: If you don't - - - if you
22 don't want us to remit, you must be saying that this
23 was voluntary as a matter of law.

24 MS. GIANFRANCESCO: That this confession
25 was voluntary and that the deceptive practices used

1 as a matter of the law did not fall under
2 circumstances which - - -

3 JUDGE SMITH: Have we ev - - - have we ever
4 - - -

5 MS. GIANFRANCESCO: - - - would have
6 suppressed it.

7 JUDGE SMITH: Have we ever made the rule
8 that there are some deceptive practices that are
9 always okay?

10 MS. GIANFRANCESCO: No, absolutely not.

11 JUDGE SMITH: Aren't you - - - isn't that
12 what you're asking us to do - - -

13 MS. GIANFRANCESCO: No.

14 JUDGE SMITH: - - - to say you can - - -
15 you can always threaten to - - - threaten to arrest
16 his girlfriend?

17 MS. GIANFRANCESCO: No. What we're saying
18 is, is that this court said in People v. Tarsia in
19 1980, that deception can only be - - - is - - - is a
20 factor in the totality of the circumstances, and
21 would only undermine the defendant's will if it is so
22 fundamentally unfair or is accompanied by a threat or
23 a promise to induce a false confession.

24 Clearly, this is not a false confession
25 case. We don't have a threat or a promise which

1 would have induced the defendant to - - -

2 CHIEF JUDGE LIPPMAN: There's - - - there's
3 no threat that would have - - - that would make him
4 make a false confession here?

5 MS. GIANFRANCESCO: Not in this case, Your
6 Honor, no. There - - - it's clear when you look at
7 this video - - -

8 CHIEF JUDGE LIPPMAN: What was the purpose
9 of the deception other than a threat to him?

10 MS. GIANFRANCESCO: The purpose of a
11 deception here was quite clear. We have a defendant
12 who was brought in - - -

13 CHIEF JUDGE LIPPMAN: The purpose has got
14 to be to get the truth.

15 MS. GIANFRANCESCO: Correct, absolutely.
16 And - - - and - - - and it's illustrated in the fact
17 that this defendant, when he first waived his Miranda
18 hours earlier and is told what happened, provides a
19 completely false statement. Now, at the time, the
20 police didn't know that statement was false. But
21 within the ensuing hours when they're conducting
22 their investigation, they've spoken to his mother,
23 his brother, and the friend that's in the home - - -

24 JUDGE PIGOTT: Let me - - - let me re-ask
25 what Judge Graffeo, I think, asked. Let's assume

1 you're right, that the totality of the circumstances
2 are such that - - - that the - - - the - - - well,
3 that the Appellate Division did not apply the
4 totality of the circumstances. We can't, right? We
5 can't apply the totality of circumstances and make
6 findings of fact.

7 So it would seem to me that we would have
8 to remit it and say, apply the totality of
9 circumstances, right?

10 MS. GIANFRANCESCO: If - - - if this court
11 believes that that's the case; however, what we would
12 be asking this court is to, number 1, recognize that
13 the totality of circumstances was not applied, but
14 that - - - and the facts as they stand, that this
15 case would therefore - - - would be reversed and that
16 the defendant's confession, in fact, was admissible
17 and should not have been suppressed in this case.

18 Moreover, the - - - when police deception -
19 - - in order for it to reach a fundamental
20 unfairness, it necessitates the consideration not
21 only of that quality of the deception, but the
22 individual characteristics of the suspect, the nature
23 of that interrogation, and the other factors
24 identified by this court as being relevant in
25 determining if a suspect's will - - -

1 JUDGE SMITH: Then how - - - how - - - how
2 do we know that the Appellate Division did not
3 consider those factors?

4 MS. GIANFRANCESCO: Because what the
5 Appellate Division did, Your Honors - - - number 1,
6 they came out and said that this case presents us
7 with an opportunity to decide whether or not the
8 police deception exceeded - - - whether the police
9 tactics exceeded permissible deception. Deception is
10 but one factor to consider in the totality of the
11 circumstances.

12 JUDGE READ: So that's what you rely on to
13 say they applied the wrong standard?

14 MS. GIANFRANCESCO: Correct, Your Honor.
15 They did apply the wrong standard.

16 JUDGE SMITH: You're - - - you're saying
17 there's no such thing as exceeding permissible
18 deception in itself?

19 MS. GIANFRANCESCO: No, I'm not saying
20 that, Your Honor. What I am saying is that there can
21 be deception which is fundamentally unfair. There
22 can - - -

23 CHIEF JUDGE LIPPMAN: Like what? Like - -
24 -

25 MS. GIANFRANCESCO: - - - be. That - - -

1 that - - -

2 CHIEF JUDGE LIPPMAN: Like what? What's
3 fundamentally unfair? If this isn't fundamentally
4 unfair, what is?

5 MS. GIANFRANCESCO: Well, in my research -
6 - -

7 CHIEF JUDGE LIPPMAN: Give us - - - give us
8 an example.

9 MS. GIANFRANCESCO: In my research, Your
10 Honor, the only time that this court has declared
11 something being fundamentally unfair based on
12 deception is People v. Leyra, in that case. Other
13 courts that have viewed deception - - -

14 JUDGE SMITH: What - - - I mean, what - - -
15 remind us what happened there?

16 MS. GIANFRANCESCO: In Leyra, it was a
17 psychiatrist that was brought in by the police, and
18 asked to interview the defendant. The defendant is
19 not told that this is a psychiatrist. He's told this
20 is someone who could help you; I'm going to seek help
21 for you. He's never told in his custodial
22 interrogation the actual ruse of - - - of the police,
23 and - - - and in this court found that under those
24 circumstances, that that deception was fundamentally
25 unfair, the use of that.

1 And, you know, moreover, what I - - -

2 JUDGE RIVERA: I'm sorry; what's your
3 position if - - - if - - - if the AD finds that the
4 deception is fundamental - - - fundamentally unfair,
5 but there are other factors that they didn't
6 consider, that they should have considered them to
7 see if it outweighs the unfairness?

8 MS. GIANFRANCESCO: Well - - -

9 JUDGE RIVERA: What's your - - - what's
10 your position?

11 MS. GIANFRANCESCO: Your Honor, what I'd
12 like to point out is in referring to the decision of
13 the Appellate Division, because I don't think it's
14 even clear what the Appellate Division - - -

15 CHIEF JUDGE LIPPMAN: But you're saying - -
16 -

17 MS. GIANFRANCESCO: - - - was trying to - -
18 -

19 CHIEF JUDGE LIPPMAN: But you're saying
20 it's almost never that there could be tactics that
21 are fundamentally unfair. Is that what you're
22 saying?

23 MS. GIANFRANCESCO: I'm saying, to date,
24 there have been very few tactics that have been found
25 fundamentally unfair - - -

1 CHIEF JUDGE LIPPMAN: And you can't - - -

2 MS. GIANFRANCESCO: - - - however - - -

3 CHIEF JUDGE LIPPMAN: But you can't think
4 of others that that - - -

5 MS. GIANFRANCESCO: No.

6 CHIEF JUDGE LIPPMAN: - - - might be
7 fundamentally unfair. Despite some of the extreme
8 situations that sometimes, you know, we see in - - -
9 in these kind of interrogations.

10 MS. GIANFRANCESCO: Right.

11 JUDGE PIGOTT: Well, wasn't one of the
12 problems that you guys - - - I apologize - - - you
13 guys - - - the People can't appeal acquittals. I
14 mean, there could be acquittals all over the place
15 where - - - based on false confessions that - - -

16 MS. GIANFRANCESCO: Correct, correct.

17 JUDGE PIGOTT: - - - they're done.

18 MS. GIANFRANCESCO: And going back to Chief
19 Judge Lippman's thing, deception is viewed as one
20 factor in the totality of the circumstance case. So
21 I think when courts are viewing - - -

22 CHIEF JUDGE LIPPMAN: So is that - - - in
23 your answer to Judge Rivera's question, you're saying
24 that you could be fundamentally unfair, but then you
25 look at other things that might outweigh it? That's

1 not what you're saying.

2 MS. GIANFRANCESCO: No, no, no, absolutely
3 not. I'm saying it's sort of like, you know it when
4 you see it. If it were fundamentally unfair, I think
5 a court would come out and say, it's fundamentally
6 unfair. These circumstances aren't. The deception
7 in this case, as what the Appellate Division - - -

8 CHIEF JUDGE LIPPMAN: What would you
9 describe it if you had to put it into a - - - a rule
10 of some kind? What's fundamentally unfair, beyond
11 those two words?

12 MS. GIANFRANCESCO: It - - - I think that
13 would be difficult to say, Your Honor, what's
14 fundamentally unfair.

15 CHIEF JUDGE LIPPMAN: The only thing - - -

16 MS. GIANFRANCESCO: I think - - -

17 CHIEF JUDGE LIPPMAN: The only thing is we
18 know it if we see it.

19 MS. GIANFRANCESCO: Yeah, and I - - - and I
20 think what - - - this court has said it in Tarsia.
21 It's a standard that's being continually used. I
22 think that - - - and the Supreme Court itself - - -
23 the United States Supreme Court, it says deception is
24 but one factor to view.

25 JUDGE GRAFFEO: So looking at the facts of

1 this case under what you're arguing is the proper
2 standard, what's the analysis? Why is this not
3 fundamentally unfair?

4 MS. GIANFRANCESCO: It's not fundamentally
5 unfair, Your Honor, because the defendant's will was
6 not overborne. He's given his Miranda; he waives his
7 Miranda. He's asked a noninculpatory statement, what
8 drugs did this young lady take? And he provides
9 that. He is sitting in an interview room, provided
10 food, opportunity to sleep, cigarettes. He's got his
11 feet up on a chair.

12 There's absolutely nothing in this
13 videotape that can demonstrate that this defendant
14 operated under the fear that he was going to face
15 life imprisonment if he didn't tell the detectives
16 what they wanted to hear. And in fact, the
17 detectives had no information with regard to the
18 evidence in this case. There was nothing to feed
19 him.

20 JUDGE ABDUS-SALAAM: So you're - - - you're
21 saying - - -

22 JUDGE RIVERA: So you have to some - - -

23 JUDGE ABDUS-SALAAM: - - - that just
24 because the detectives said it might be a problem for
25 you, that's not enough for him - - - for the

1 defendant to say, oh, they mean I'm going to be
2 spending the rest of my life in jail if I don't tell
3 them what happened.

4 MS. GIANFRANCESCO: I wouldn't necessarily
5 say that's not enough. What I would say is this
6 defendant didn't believe that that statement meant he
7 was going to face life imprisonment. I think, even
8 when the detectives asked that question on cross-
9 examination, defense counsel says to him, so you
10 meant it could be - - - he could face consequences -
11 - - consequences. The detective's response was
12 something to that effect.

13 There's nothing in this record to point
14 that the fear - - -

15 JUDGE ABDUS-SALAAM: But that's - - -
16 that's the detective after being prepped to testify
17 on direct or cross-examination, but it's not what the
18 detective meant; it's what the defendant understands
19 what the detective said to mean, isn't that - - -

20 MS. GIANFRANCESCO: Yes.

21 JUDGE ABDUS-SALAAM: - - - what we have to
22 look at?

23 MS. GIANFRANCESCO: Absolutely, Your Honor.
24 I would not disagree with that. And - - - and, you
25 know, I hope I answered you properly in the

1 beginning. The defendant in this case, there's no
2 indicia in this videotape.

3 When the defendant himself questions, could
4 I be possibly charged with something, or I know I'm
5 in trouble, never once did the detective or the
6 defendant himself raise the possibility of a homicide
7 charge, of a murder charge. He was concerned with
8 the violation of the order of protection, because he
9 knew he was under arrest for that.

10 JUDGE RIVERA: So do you also - - - going
11 back to something else you said before about what he
12 looked like on the videotape. Are you saying you
13 need a phys - - - physical manifestation of the
14 stress to indicate that that the will is overborne?

15 MS. GIANFRANCESCO: I think that's one - -
16 - one thing to consider, Your Honor. And I - - - and
17 I think - - -

18 JUDGE RIVERA: Could someone like this,
19 who's a long term drug user, you would say that's
20 true? You need that?

21 MS. GIANFRANCESCO: I think that - - - I
22 think yes. Taking into consideration that he's also
23 a long time drug user; I think you have to take into
24 consideration all the other circumstances that this
25 court has recognized under People v. Anderson to

1 represent the totality of the circumstances.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MS. GIANFRANCESCO: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks, counselor.

5 Counsel?

6 MR. WEISFUSE: May it please the court,
7 David Weisfuse for Paul Aveni. This is a case where
8 the Appellate Division specifically stated in its
9 decision that it considered the totality of the
10 circumstances.

11 JUDGE READ: So they didn't change - - -
12 they didn't apply the wrong rule? That - - - in your
13 view, they applied the correct rule?

14 MR. WEISFUSE: They applied the correct
15 rule, Your Honor, and they reviewed in the decision
16 critical facts of this case. The fact that the
17 defendant made the earlier statement where he denied
18 being with his girlfriend during the overdose and
19 that he had gotten a telephone call from his brother
20 to come to the house. And what happened - - -

21 CHIEF JUDGE LIPPMAN: So it was
22 fundamentally unfair viewed in the context of the
23 totality of the circumstances, or can it be so
24 fundamentally unfair that it's - - -

25 MR. WEISFUSE: Oh, this was a defendant who

1 did not want to confess. He was resistant. He
2 refused to - - -

3 CHIEF JUDGE LIPPMAN: So what is it that
4 they did - - - that the interrogators did that was
5 fundamentally unfair?

6 MR. WEISFUSE: Oh, they threatened, in
7 essence, that if he didn't provide the information,
8 that his girlfriend's going to die.

9 JUDGE PIGOTT: Well, that's his perception
10 - - -

11 MR. WEISFUSE: And he's going to - - -

12 JUDGE PIGOTT: You know, he - - - I mean,
13 he was lying from day one. He had a whole - - - he
14 had a whole confession there that he finally admitted
15 he was lying about.

16 MR. WEISFUSE: Right. But - - - but this
17 is what is the compulsion that, just as I gave as an
18 example, when a life is - - - what is fundamentally
19 unfair is to threaten that if you don't provide us
20 with certain information, somebody's going to die.

21 CHIEF JUDGE LIPPMAN: Is that in and of
22 itself enough?

23 MR. WEISFUSE: Yes. I gave as an example -
24 - -

25 CHIEF JUDGE LIPPMAN: No, but regardless of

1 the totality?

2 MR. WEISFUSE: Well, what the other states
3 have said is you look at the totality of the
4 circumstances, but you - - -

5 CHIEF JUDGE LIPPMAN: When you have - - -

6 MR. WEISFUSE: - - - but qualitatively - -
7 -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. WEISFUSE: - - - qualitatively, a
10 single factor in and of itself under the totality of
11 the circumstances.

12 CHIEF JUDGE LIPPMAN: It can be - - - so it
13 fits within the general rule.

14 MR. WEISFUSE: Yes. Definitely.

15 CHIEF JUDGE LIPPMAN: It's not a different
16 rule.

17 MR. WEISFUSE: Definitely.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. WEISFUSE: And I gave as an example - -
20 -

21 JUDGE SMITH: But if - - - if the Appellate
22 Division hearing had come out the other way, would we
23 - - - would we bound to reverse them as a matter of
24 law?

25 MR. WEISFUSE: Well, I - - - I would submit

1 that this is - - - they have the burden of proof
2 beyond a reasonable doubt. And when somebody says a
3 life is on the line, that does - - - you have the
4 Fulminante case.

5 JUDGE SMITH: So you're basically saying
6 yes to my question - - -

7 MR. WEISFUSE: Yes, yes.

8 JUDGE SMITH: - - - we'd have a reversible
9 error if the other - - -

10 MR. WEISFUSE: Where there's a credible
11 threat of violence in Fulminante, the United States
12 Supreme Court said, we have always said when there's
13 a - - - the majority - - - when there's a credible
14 threat of violence, the statement is coerced.

15 JUDGE RIVERA: So here - - - here you're
16 saying because of the - - - the nature of this
17 deception, suggesting there's a - - - an immediacy to
18 the emergency that involves this third party, that
19 that - - -

20 MR. WEISFUSE: Yes, yes.

21 JUDGE RIVERA: - - - overbears his will?

22 MR. WEISFUSE: A girlfriend who he cared
23 about, who's going to die.

24 JUDGE PIGOTT: But is that going to - - -
25 is that going to make him lie about something?

1 MR. WEISFUSE: It doesn't matter. It's
2 going to make him to confess.

3 JUDGE PIGOTT: I understand that - - -

4 MR. WEISFUSE: It doesn't matter. We're
5 not talking about false confessions, Your Honor.

6 JUDGE PIGOTT: I understand that.

7 JUDGE RIVERA: So in the case of an
8 emergency, we shouldn't be concerned about whether or
9 not the falsity is the consequence?

10 MR. WEISFUSE: Sure, right, exactly. It's
11 - - - everybody has the right, with the privilege
12 against self-incrimination, of not to be a witness
13 against themselves.

14 JUDGE SMITH: Well, what if the - - - what
15 if the - - - the threat had been true? What if the
16 girlfriend really was in danger because - - -

17 MR. WEISFUSE: Then there's no deception.
18 And under Quarles, you have no right to - - -

19 JUDGE SMITH: Why - - - why is he - - - why
20 is he of any - - - why is he any less coerced by the
21 true information than the false?

22 MR. WEISFUSE: It's - - - I'll - - - it
23 goes to the Miranda issue especially, Your Honor.

24 JUDGE PIGOTT: That's dodging the question,
25 because we're talking about the voluntariness, and

1 you - - -

2 MR. WEISFUSE: It's deception. This court
3 has said in - - -

4 JUDGE PIGOTT: And I guess I'll stop
5 talking now.

6 MR. WEISFUSE: - - - People - - - no, this
7 court has cited from Caserino to Tarsia, a Second
8 Circuit case called U.S. ex rel. Everett v. Murphy.
9 And in that case, this court has said that deception
10 alone is not enough; you need deception plus a threat
11 or a promise. And it is the deception that - - -
12 that convinced - - - and really what the - - -

13 JUDGE SMITH: So are you saying anything is
14 okay if it's true? That can't be true. You can say
15 if you - - - if you don't confess, I'm going to beat
16 you over the head with this club - - -

17 MR. WEISFUSE: Well, that - - - right.

18 JUDGE SMITH: - - - and that can be
19 perfectly true, but it's obviously a little coercive.

20 MR. WEISFUSE: But I'm just saying in an
21 emergency-type circumstance, you don't have a right
22 to Miranda, and under Quarles, the police can say,
23 your girlfriend's in - - - in a - - - we have an
24 emergency.

25 JUDGE PIGOTT: But that's a different

1 issue. You're - - - you're saying that - - - that if
2 they lie about that and that's the basis of not
3 giving you your Miranda warnings, that's wrong. And
4 I don't think anybody's arguing that. The question
5 is when - - - when he's being questioned, and he's -
6 - - and he's told what he was told, which was a
7 deception, it's not something that would lend him to
8 tell a falsehood. It's something that would lend him
9 to tell a truth.

10 And that's why the totality of the
11 circumstances are important in these situations,
12 where, if by telling a fib, he ends up telling the
13 truth, which is, yeah, I injected her with heroin,
14 so, you know, he's thinking he's helping her - - -
15 unfortunately, she's dead - - - but he told the
16 truth.

17 MR. WEISFUSE: The truth doesn't matter
18 when you're dealing with involuntariness or - - - in
19 terms of a defendant has that privilege against self-
20 incrimination, of not being a witness against
21 himself.

22 So what I'm saying is, you can't force
23 somebody to be this witness - - -

24 JUDGE PIGOTT: Well, let's assume for a
25 minute that he was given Miranda warnings.

1 MR. WEISFUSE: Yes?

2 JUDGE PIGOTT: All right? And that - - -
3 this - - - this scenario happens, where he says, tell
4 us the truth about what she took, because you may
5 save her life, even though she's already dead. And
6 he tells them the truth. Doesn't that help? I mean,
7 what's wrong with that?

8 MR. WEISFUSE: It - - - it - - - when the
9 Miranda was violated in this case - - -

10 JUDGE PIGOTT: I want to take that out for
11 a minute - - -

12 MR. WEISFUSE: I'm sorry.

13 JUDGE PIGOTT: - - - because - - - because
14 we're talking about the tot - - - they're arguing
15 totality of circumstances, that even if there was a
16 deception here, and even if you were to find that it
17 went over the line in your view, or the Appellate
18 Division's view, that's only one thing you - - - you
19 ask. And then asked the other - - - totality of the
20 circumstances such that the - - - the sum and
21 substance of this is, that he confessed to what he,
22 in fact, had done, and he got prosecuted for it.

23 MR. WEISFUSE: Right, but what I'm saying
24 is the Appellate Division did consider - - - they
25 listed ev - - - all these facts in their opinion,

1 including the fact that he was given the Miranda
2 warning, but they felt the coercion of the deception
3 plus the threat involved in this case - - -

4 JUDGE PIGOTT: But I think that's your
5 opponent's point, is that's all they talked about.
6 They didn't - - - they didn't go into the other
7 circumstances that determine all that.

8 MR. WEISFUSE: Well, they - - - they went
9 into the circumstances that he denied it, and then
10 what was critical about the - - - the confession was
11 he denied being there. The confession puts him
12 there, because he knows about the heroin.

13 JUDGE PIGOTT: But it was true. They found
14 him there. I mean, it - - - I mean, it's - - -

15 MR. WEISFUSE: But that got him to admit -
16 - -

17 JUDGE PIGOTT: And it got him to admit, A,
18 that he was - - - that - - - that he lied before, B,
19 that he violated the OP, C, that he ran up into the
20 attic, and that's where they found him, and - - - and
21 - - - and a host of things that what they said to
22 him, led to the truth.

23 MR. WEISFUSE: I understand that, but that
24 I - - -

25 CHIEF JUDGE LIPPMAN: Counsel - - -

1 JUDGE READ: They couldn't lead him to the
2 truth in that way.

3 MR. WEISFUSE: Yes.

4 CHIEF JUDGE LIPPMAN: You're saying - - -

5 MR. WEISFUSE: They could have confronted
6 him, you were there because we have - - - you can't
7 threaten, I submit, adverse consequences if you don't
8 make this statement.

9 JUDGE PIGOTT: Even if the adverse
10 consequences are to someone else, like, this, this -
11 - -

12 MR. WEISFUSE: Yes.

13 JUDGE PIGOTT: - - - the girlfriend who
14 died.

15 MR. WEISFUSE: And the adverse consequences
16 was to him, because they also said that he would - -
17 - it would be a problem for you and the - - - the
18 officer said, to some effect - - - he said, and you
19 would be responsible.

20 JUDGE PIGOTT: And that - - -

21 CHIEF JUDGE LIPPMAN: Counsel, so if it's
22 coerced, it doesn't matter if it's the truth? That's
23 your point?

24 MR. WEISFUSE: Yes.

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. WEISFUSE: Yes, Your Honor. The other
2 thing is - - -

3 JUDGE SMITH: Okay, but - - - but is it - -
4 - I mean, is it - - - suppose - - - suppose the
5 detective says, you know, you really - - - you're
6 going to be better - - - if you confess - - - you're
7 going to get less time than if you deny it and we
8 find you're lying. Is that coercive?

9 MR. WEISFUSE: I wouldn't say that by
10 itself, you could - - - what I wanted - - -

11 JUDGE SMITH: It's certainly a threat to
12 himself, isn't it?

13 MR. WEISFUSE: Right. But what I'd like to
14 address is the Miranda - - -

15 JUDGE SMITH: Try addressing that one
16 first.

17 MR. WEISFUSE: Sure. Less time, that's a
18 promise. Yes, that would be coercive. But I - - -

19 JUDGE SMITH: But isn't that done all the
20 time? I mean, isn't that the most normal thing in
21 the world to do - - -

22 MR. WEISFUSE: What you're really doing in
23 this case is the most extreme form of coercion, a
24 human life.

25 JUDGE PIGOTT: Well, let me give you

1 another one. You've got two defendants and you got
2 them in separate rooms, and the one cop comes in and
3 says, your buddy just confessed and said you did the
4 whole darn thing, and now you're facing a big crime.
5 And of course, they're doing exactly the other to the
6 other - - - is that - - - is that okay?

7 MR. WEISFUSE: Yes.

8 JUDGE PIGOTT: Okay.

9 MR. WEISFUSE: Yes, because it's - - - it's
10 deception about the evidence. This is really
11 deception about the consequences of talking to the
12 police. That's why - - -

13 JUDGE PIGOTT: But didn't you say, you're
14 going to be in trouble?

15 MR. WEISFUSE: What?

16 JUDGE PIGOTT: They said, if you don't tell
17 us the truth, you're going to be in trouble?

18 MR. WEISFUSE: No, it's the consequences
19 that somebody is going die and you're then going to
20 be responsible. It's an extreme form of a threat.

21 JUDGE PIGOTT: But it was true.

22 MR. WEISFUSE: Regardless of whether it's
23 true.

24 JUDGE PIGOTT: Okay.

25 MR. WEISFUSE: And the reason it's an ex -

1 - - Miranda, it was negated. First they give at 6:30
2 or 6:40, say, you have a right to remain silent. And
3 then they say, it's imperative you give us the
4 information. They spoke out of both sides. Miranda
5 warnings were negated. They weren't clear.

6 JUDGE PIGOTT: But aren't - - - aren't all
7 confessions - - - I was surprised that the - - - the
8 police, here, didn't have it in writing, but don't
9 all the confessions start out with a five - - - with
10 the Miranda warnings up on top, and he signs it, and
11 then he confesses all - - -

12 MR. WEISFUSE: He didn't sign anything.

13 JUDGE PIGOTT: I know. I'm using it as an
14 example.

15 MR. WEISFUSE: And they say that - - -

16 JUDGE PIGOTT: But now the whole - - -

17 MR. WEISFUSE: - - - he didn't sign the
18 Miranda card, because we don't have a place for the
19 defendant to sign it. None of the vid - - - the
20 video's a partial video. And I think that is very
21 significant in this case. It's Showtime; after you
22 get the confession, after you do the ruse, and none
23 of that is on the video, then you start the tape.
24 All of a sudden by magic, the officer's able to press
25 all the right buttons and the tape goes on.

1 why is that a Miranda warning, except in the - - - a
2 Miranda problem except in the sense that everything
3 is a Miranda problem? I mean, it's - - -

4 MR. WEISFUSE: Because Miranda applies
5 throughout the interrogation. That's what Berghius
6 said - - -

7 JUDGE SMITH: Well, the Fifth Amendment
8 applies throughout the interrogation.

9 MR. WEISFUSE: No, the United States
10 Supreme Court said in - - - in Berghius v. Thompkins
11 that Miranda applies throughout the interrogation.

12 JUDGE PIGOTT: Yeah, but I - - -

13 JUDGE SMITH: What does that mean?

14 JUDGE PIGOTT: What I was saying before,
15 you get written confessions all the time.

16 MR. WEISFUSE: Yes.

17 JUDGE PIGOTT: And on the top of them they
18 got the Miranda warnings. The guy signs it and he
19 still confesses to the whole darn thing.

20 MR. WEISFUSE: But as I pointed out in
21 various cases, like in Hurd v. Terhune, the - - -
22 they asked if - - - then he agreed to talk to the
23 police, they asked him questions, he answered them.
24 They got to a question, which he didn't answer, and
25 then they said, the jury's not going to like it. And

1 they said - - - and the court held that that was a
2 Miranda violation.

3 Well, they said - - - the government said,
4 well, we don't have a Doyle issue. The introduced
5 the refusal at the trial. So what the court said is
6 Berghius says, Miranda applies throughout the
7 interrogation and applies as to every question that
8 is asked. And - - -

9 JUDGE SMITH: Well, obviously - - - they
10 don't mean you have to repeat the warnings every
11 time. What do they mean?

12 MR. WEISFUSE: Well, what they can't do is
13 what Maryland, New Jersey, Kentucky, and all these
14 other states cited in my brief have said, they can't
15 talk out of both sides of their mouth. They can't
16 say, you have a right to remain silent, and then say,
17 this is between you and me. That's a Miranda
18 violation. That's what about five or six different
19 states have said.

20 JUDGE SMITH: And they can't - - - and if
21 you say something, they can't say, look, that's not -
22 - - that's not credible, the jury's never going to
23 believe that.

24 MR. WEISFUSE: That's different. That's
25 not going to the rights. This goes to the very right

1 in Miranda when they say, it's imperative you give us
2 this information. We got a medical emergency.
3 Doesn't that negate the right to remain silent at
4 that point?

5 JUDGE PIGOTT: But they waived it. He
6 waived his right to remain silent.

7 MR. WEISFUSE: He doesn't waive until he
8 answers the question. He doesn't know what question
9 is going to be asked.

10 JUDGE PIGOTT: Well, of course not.

11 MR. WEISFUSE: I respectfully submit those
12 new Supreme Court cases in Berghius say it applies to
13 every question.

14 JUDGE PIGOTT: But if - - - if he waives
15 his - - - if he waives his Miranda rights, and they
16 start asking him, you know, how old are you, where
17 were you born, you know, you were living in this
18 place, and isn't it true you had an order of
19 protection. So far, okay, right?

20 And then at some point you're saying that
21 they have to re-remind him that, you know, you have
22 the right to remain silent; I'm now going to ask you
23 another series of questions.

24 MR. WEISFUSE: No, they can't negate the
25 right. They can't use deception to negate the right,

1 by saying, we have a medical emergency. Just like
2 all these other states, and - - - and particularly
3 Lee v. State in Maryland said, they can't say, oh,
4 after an hour of interrogation, this is just between
5 you and me. That, they held, was a - - -

6 JUDGE SMITH: But you're - - - you're
7 giving us a number of rules about what they can and
8 can't do. Are you - - - but are you not arguing,
9 even in the alternative, that here this was just a
10 finding of fact on a mixed question; we have no power
11 to review it?

12 MR. WEISFUSE: It's definitely a mixed - -
13 - I pointed that out in my brief.

14 JUDGE SMITH: So - - - so - - - so if - - -
15 if we - - - and if we agree with you on that, then
16 we're all - - - this all an interesting, but beside
17 the point, discussion of whether - - - whether
18 they're negating - - -

19 MR. WEISFUSE: Yes, yes.

20 JUDGE SMITH: - - - Miranda or not negating
21 - - -

22 JUDGE PIGOTT: And you say the Appellate
23 Division said right in their opinion that they - - -
24 they reviewed in this in - - - under the totality of
25 circumstances?

1 MR. WEISFUSE: Yes, it's right in there.
2 They specifically express that there was no knowing,
3 intelligent, voluntary waiver of rights.

4 JUDGE PIGOTT: That's - - - okay, okay.

5 CHIEF JUDGE LIPPMAN: Okay. Thank you,
6 counsel.

7 MR. WEISFUSE: Thank you.

8 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

9 MS. GIANFRANCESCO: Yes. Your Honor, my
10 adversary's argument with regard to Miranda is
11 illustrative of how the Appellate Division applied
12 the erroneous legal standard in this case. This is
13 not a Miranda case. The defendant was given his
14 Miranda rights - - -

15 CHIEF JUDGE LIPPMAN: He's arguing that - -
16 -

17 MS. GIANFRANCESCO: He waived them - - -

18 CHIEF JUDGE LIPPMAN: - - - Miranda
19 continues throughout the questioning is his - - - is
20 his premise. You disagree with that?

21 MS. GIANFRANCESCO: The defendant - - -

22 CHIEF JUDGE LIPPMAN: Once you give - - -
23 once you - - - once you waive your rights, finished.

24 MS. GIANFRANCESCO: No, absolutely not. At
25 any point that you - - -

1 CHIEF JUDGE LIPPMAN: So then what are you
2 arguing?

3 MS. GIANFRANCESCO: At any point, the
4 defendant could have told the detectives here, I'm
5 not going to talk. When the detectives asked him how
6 did she inject herself - - - I'm not answering that
7 question.

8 CHIEF JUDGE LIPPMAN: But you can't be - -
9 - the detective can't undermine the - - - the Miranda
10 rights later by the - - - by the nature of the
11 questions that they ask.

12 MS. GIANFRANCESCO: It could be possible,
13 but that's not what was done in this case. The cases
14 that my adversary cites are cases where the
15 detectives are telling the defendant, we could talk
16 to you off the record. Well, we know that's not
17 possible under Miranda. That eviscerates - - -

18 CHIEF JUDGE LIPPMAN: Let me ask you
19 another question then - - - an answer to what we just
20 asked your adversary. Why isn't this a mixed
21 question, and just finished, end of story?

22 MS. GIANFRANCESCO: Because, as I started
23 this argument, Your Honor, the wrong legal standard
24 was applied.

25 CHIEF JUDGE LIPPMAN: But - - - but given -

1 - - did you - - - do you contest your adversary's
2 contention that the Appellate Division at the outset
3 said, we're evaluating this in terms of the totality
4 of the circumstances?

5 MS. GIANFRANCESCO: Oh, the Appellate
6 Division clearly stated in this - - - in this
7 decision that it's a totality of circumstances, but
8 I'd like to point out the reason and - - - and show
9 how it conflated the Miranda and the voluntariness
10 issue.

11 JUDGE SMITH: Could you quote - - - quote
12 the language when you say they did that.

13 MS. GIANFRANCESCO: Yes, I will, Your
14 Honor. It says that "either he would tell them what
15 he knew, or he would face the probability of life
16 imprisonment if Camillo died. In light of the
17 detective's implicit threat of a homicide charge, if
18 the defendant remained silent, we cannot conclude
19 that the defendant voluntarily waived his Fifth
20 Amendment privilege against self-incrimination."

21 JUDGE SMITH: But why can't that be read as
22 a finding of fact?

23 MS. GIANFRANCESCO: Your Honor, because
24 that's - - - that's - - - that's a legal decision
25 that the court made. The court took - - -

1 JUDGE SMITH: I mean, voluntariness can
2 always be legal, but it can also always be factual.
3 We cannot conclude that the - - - that this was a
4 voluntary confession.

5 MS. GIANFRANCESCO: But - - -

6 JUDGE SMITH: It seems factual to me.

7 MS. GIANFRANCESCO: The - - - the issue of
8 voluntariness, maybe it is a mixed question of law
9 and fact, but what the Appellate Division did in this
10 case is took those facts and applied the wrong legal
11 standard to them when it concluded that he
12 voluntarily waived his Fifth Amendment privilege.

13 It then - - - the next statement that it
14 made was, it says that "the detectives used the
15 threat to overcome the defendant's will and this was
16 so fundamentally unfair as is to deny him due
17 process", as an aside. They're calling this a
18 Miranda issue. What the Appellate Division did here,
19 Your Honor, was legally erroneous.

20 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
21 you both.

22 MS. GIANFRANCESCO: Thank you.

23 MR. WEISFUSE: Thank you.

24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Adrian P. Thomas, No. 18, and People v. Paul Aveni, No. 19 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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