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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 199

ANTHONY V. PAVONE,

Respondent.

20 Eagle Street
Albany, New York 12207
November 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 199, People v. Pavone.

3 Counselor. You want any rebuttal time,
4 counsel?

5 MR. CONNOLLY: Yes, thank you, Your Honor.
6 I'd like one minute for rebuttal.

7 CHIEF JUDGE LIPPMAN: One minute, you have
8 it. Go ahead; you're on.

9 MR. CONNOLLY: Good afternoon, Your Honors.
10 Our position is that in this case, the prosecution
11 and the court committed reversible error by the
12 prosecution questioning defendant - - -

13 CHIEF JUDGE LIPPMAN: What did they ask - -
14 - what did they ask him and at what point?

15 MR. CONNOLLY: In cross-examination of the
16 defendant, he was asked - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. CONNOLLY: - - - whether when he was
19 taken into custody he had anything to say at that
20 time.

21 CHIEF JUDGE LIPPMAN: What's the
22 significance of that, his silence?

23 MR. CONNOLLY: What's significant is that
24 the - - - in essence, the prosecution was asking the
25 jury to infer from his silence on that subject that

1 his EED defense, which was the only issue at trial,
2 was a concoction.

3 CHIEF JUDGE LIPPMAN: Did you object? Did
4 you object to that question?

5 MR. CONNOLLY: Yes, that question was - - -

6 CHIEF JUDGE LIPPMAN: That's the one that
7 was - - -

8 MR. CONNOLLY: - - - objected to.

9 CHIEF JUDGE LIPPMAN: - - - objected to?

10 MR. CONNOLLY: That's the one that was
11 objected to and - - -

12 CHIEF JUDGE LIPPMAN: And how did that - -
13 - how did that prejudice the defendant?

14 MR. CONNOLLY: Well, it prejudiced
15 defendant in the most basic way because it asked, in
16 - - - in essence, the jury to infer from it, from
17 that silence at that time, after Miranda warnings,
18 that the reason he was silent is that, in fact, the
19 extreme emotional disturbance defense was a
20 concoction that he came up with later. The
21 prosecution - - -

22 CHIEF JUDGE LIPPMAN: So what kind of error
23 is it, is it a Constitutional error?

24 MR. CONNOLLY: A Constitutional error, we
25 submit. But we also submit that even if it's not a

1 Constitutional error, it still would be reversible
2 error, because in this case, the evidence was not
3 overwhelming and specifically, we're talking, of
4 course, about the evidence against the extreme
5 emotional disturbance defense which, from the very
6 start of the trial, was the only issue that the jury
7 had to decide.

8 CHIEF JUDGE LIPPMAN: You don't think that
9 defense was disproven?

10 MR. CONNOLLY: We submit that it was not
11 disproven. We argued at the Appellate Division that
12 the jury's verdict rejecting that defense was against
13 the weight of the evidence. But - - -

14 JUDGE RIVERA: Well, the burden is yours,
15 right?

16 MR. CONNOLLY: The burden is ours, yes.
17 But - - - but it's only a preponderance of the
18 evidence.

19 JUDGE RIVERA: Um-hum.

20 MR. CONNOLLY: We certainly don't have to
21 prove beyond a reasonable doubt that we were
22 operating under an extreme emotional disturbance.
23 The Appellate Division judges all concluded that
24 there was in fact an error, but the majority
25 concluded that the evidence against the extreme

1 emotional disturbance defense was strong enough to be
2 characterized as overwhelming.

3 JUDGE PIGOTT: What was that evidence, in -
4 - - in the Appellate Division's view?

5 MR. CONNOLLY: What - - - what was the
6 evidence against the defense; is that what you're
7 asking?

8 JUDGE PIGOTT: Yeah, what - - - what makes
9 - - - what makes this harmless in the - - - in the
10 view of the Appellate Division and - - - and I'm sure
11 of your - - - your opponent?

12 MR. CONNOLLY: Well, according to the
13 Appellate Division, I would rather leave this to my
14 opponent, but this - - - my understanding is the way
15 the majority felt about it is that because the
16 defendant, before the crime - - - and we admit it was
17 a crime - - - the defendant before the crime was seen
18 by a couple of witnesses residing at the same
19 building where one of the victims resided. He seemed
20 to be calm at that time. The Appellate Division
21 thought that was - - - was - - - was very
22 significant.

23 JUDGE PIGOTT: Was there - - - was there
24 expert testimony on the - - - on the side of the
25 People that said that he was not suffering from EED

1 at the time of the crime?

2 MR. CONNOLLY: Yes, there was. But of
3 course there was also expert testimony on behalf of
4 the defendant, a very qualified expert. I believe he
5 was a Harvard undergraduate, Yale residency.

6 JUDGE RIVERA: He had not heard the
7 auditory evidence, correct, and he admitted that that
8 evidence was important and significant and would have
9 been helpful; did he not?

10 MR. CONNOLLY: I'm sorry, you're asking
11 whether the - - -

12 JUDGE RIVERA: Defendant's expert, correct.

13 MR. CONNOLLY: Defense counsel did admit
14 that he didn't listen to that, and that it would have
15 been helpful and - - -

16 JUDGE RIVERA: The expert?

17 MR. CONNOLLY: Yes.

18 JUDGE FAHEY: So - - - so that's part of
19 your ineffective assistance claim; isn't that
20 correct?

21 MR. CONNOLLY: That's part of the
22 ineffective assistance claim, that there was no - - -

23 JUDGE FAHEY: What I'm wondering there is -
24 - - is there really a 440 motion, is that really
25 outside the record entirely?

1 MR. CONNOLLY: Well, we don't think that it
2 is outside the record. I mean, there's no - - - no
3 reason - - - no legitimate strategic reason can be
4 proffered to explain why defense counsel wouldn't
5 have provided the expert with those recordings. And
6 - - -

7 JUDGE FAHEY: The way I understand your
8 theory is that the audio recordings themselves would
9 have shown the emotional state of the defendant and
10 so they were essential to listen to, not just look at
11 a transcript.

12 MR. CONNOLLY: Yes, I - - - I didn't hear
13 the last part of your question but - - -

14 JUDGE FAHEY: If they were essential to
15 listen to because you - - - you couldn't tell - - -
16 you can tell somebody's emotional state by listening
17 to them.

18 MR. CONNOLLY: Yes, they were essential to
19 listen to.

20 JUDGE FAHEY: Right.

21 MR. CONNOLLY: Now, I don't think that, in
22 and of itself, makes the defense expert unworthy of
23 belief, but it was something that the jury could
24 consider and the jury might have considered that to
25 be very significant.

1 CHIEF JUDGE LIPPMAN: Counsel, but what
2 about - - - what about the defendant's own conduct in
3 terms of what seemed liked sort of a controlled act
4 on his part, coming back, doing what he did in a very
5 deliberative or looked like a deliberative fashion,
6 knowing exactly what he was doing? Does that have
7 any effect in terms of disproving the EED defense?

8 MR. CONNOLLY: Are you referring to his
9 having left the - - -

10 CHIEF JUDGE LIPPMAN: Yeah.

11 MR. CONNOLLY: - - - the apartment and then
12 returning?

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. CONNOLLY: The jury could certainly
15 take that into consideration, but - - - but evidence
16 like that really cuts both ways. For example, the
17 prosecut - - - the Appellate Division seemed to
18 suggest that this was - - - this might have been
19 planned by the defendant, but if it had been planned,
20 then why didn't he do it when he got there? What was
21 he - - - the evidence was that he was talking - - -

22 CHIEF JUDGE LIPPMAN: Well, again, up to
23 the - - - up to the jury in the end.

24 MR. CONNOLLY: That's something that the
25 jury could decide. It doesn't make the evidence

1 overwhelming. In fact, it seems that he was - - - in
2 - - - in his own mind, he was undecided about what to
3 do and he was so - - -

4 JUDGE FAHEY: You know, Judge Lippman - - -
5 Judge - - -

6 JUDGE RIVERA: But it does - - -

7 JUDGE FAHEY: I'm sorry, Judge.

8 JUDGE RIVERA: I'm sorry.

9 JUDGE FAHEY: You go ahead.

10 JUDGE RIVERA: But it - - - but it does
11 suggest that there is - - - it's - - - it's not that
12 the record is bereft with evidence that the - - -
13 that the jury could have relied on. There really was
14 a reservoir the jury could rely on to decide that you
15 didn't carry your burden. You - - - you may want to
16 argue it the other way, but it's not that there's - -
17 - that - - - that there's not enough or that it's
18 lacking. You've got - - - you've got that he left,
19 you've got that he shoots when people are already
20 down.

21 MR. CONNOLLY: Um-hum.

22 JUDGE RIVERA: You've got that he steps on
23 her - - - he steps over her as he's going back and
24 forth, right. So you've got lots of things that
25 suggest that there's - - - there's evidence there

1 that a jury could look to and say I'm - - - I'm not
2 persuaded that he snapped at this time, that this is
3 really an EED.

4 MR. CONNOLLY: Well, that may be, Your
5 Honor, but in this context, the issue is whether the
6 evidence was overwhelming.

7 JUDGE STEIN: Does - - - does Williams - -
8 - does the Williams case have any impact on your
9 argument about whether it was overwhelming and
10 whether it was inconsistent with sending - - -
11 sending the defense to the jury?

12 MR. CONNOLLY: Well, I submit, based on the
13 - - - on the Williams case, if you're referring to
14 the case that the - - - the prosecutor brought to
15 you, I submit that that suggests that there's a - - -
16 a very high burden that has to be met to establish
17 that an evident - - - an evidentiary error like this
18 is harmless. That - - - it was - - - in my view, in
19 the Williams case, there was very strong evidence of
20 the defendant's guilt, and the issue there was - - -
21 also was not a Constitutional issue, it was a non-
22 constitutional issue, so that you had the significant
23 probability standard, and yet this court found that
24 nevertheless the - - - the error was not harmless.
25 And I'd submit applying that standard here, we'd have

1 to reach the same conclusion. It's not harmless
2 error.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 You'll have your rebuttal. Let's hear from your
5 adversary.

6 Let me make clear to everybody that Judge
7 Abdus-Salaam will be participating in this case. She
8 is watching it by video but unable to be here with
9 us.

10 Counsel.

11 MR. EVANOVICH: Thank you, Your Honor; good
12 afternoon and may it please the court, Nick Evanovich
13 for the People. Your Honors are being asked to
14 reverse this conviction and - - -

15 CHIEF JUDGE LIPPMAN: It was error, wasn't
16 it, the question that was asked that really related
17 to the silence of the defendant?

18 MR. EVANOVICH: Well, let's talk about
19 directly where in the record you're referring to,
20 Judge. Are you talking about the cross-examination
21 question?

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. EVANOVICH: I don't think we need to
24 submit that was absolutely an error. I think that
25 when - - - what appellant is not raising is a very

1 important part of the record, A-304, where it is on
2 direct examination, he is - - - the defendant - - -
3 the defendant himself who is testifying is asked, did
4 you take these two shots, and the defendant says
5 something very particular. He says "everything was
6 so slow. I can remember some of it, it is burnt in
7 my mind. You can't forget something like that."
8 It's over a bit of a - - - a couple of sentences but
9 he says that and that is very near the end of his
10 direct and the beginning of the People's cross, which
11 is when that question is asked, Your Honor.

12 JUDGE RIVERA: That's - - - that's
13 different from his point about the silence equals
14 that EED is concocted, right. The - - - the series
15 of events can be quite - - - quite memorable, right.

16 MR. EVANOVICH: Certainly.

17 JUDGE RIVERA: But - - - but the point
18 about the EED is a different point; is it not?

19 MR. EVANOVICH: The point about EED is
20 certainly - - - I - - - I think applies to the
21 entirety of the case, so I agree with Your Honor, but
22 I think that the - - -

23 JUDGE RIVERA: But with respect to this
24 error.

25 MR. EVANOVICH: With respect to the

1 question, which we don't concede necessarily was an
2 error, was that he - - -

3 JUDGE PIGOTT: Well, that's one of the
4 problems that I was afraid you'd raise, because if
5 you don't get the message, it seems to me, that
6 someone's right to, you know, remain silent is
7 important and Constitutional, maybe we ought to do
8 something to make it clearer.

9 MR. EVANOVICH: I - - -

10 JUDGE PIGOTT: What - - - what should we do
11 to make it clearer other than harmless error, because
12 harmless error says you can do it again, in my view.

13 MR. EVANOVICH: I couldn't - - - my
14 apologies, Judge.

15 JUDGE PIGOTT: It's all right.

16 MR. EVANOVICH: I couldn't agree with you
17 more that this court needed to be forthright and
18 forceful and clear, and you were in Williams.
19 Williams made it clear that this is against
20 evidentiary standards. There was an objection in the
21 case-in-chief, and there was an objection in the
22 opening. We, as prosecutors, get it; we understand
23 it. You were clear in that standard. I think that
24 in the country right now as you see different courts
25 dealing and grappling with the Constitutional issues

1 of silence versus self-incrimination, this court has
2 made a reasoned and appropriate and clear - - -

3 JUDGE STEIN: But what makes it okay here?

4 MR. EVANOVICH: Well, again, it's - - -
5 it's separate on - - - on the parts that are not
6 objected to. We - - - I'm not arguing - - -

7 JUDGE STEIN: Just talking about the cross-
8 examination.

9 MR. EVANOVICH: Just dealing with that,
10 Your Honors were - - - were clear in Williams that
11 there are circumstances, including what we see - - -
12 those unusual circumstances like in Rothschild and
13 Savage.

14 JUDGE STEIN: But you think that his - - -
15 his general description about what happened and what
16 he remembers, you think that that gave you license to
17 then get into his silence?

18 MR. EVANOVICH: No, I think it gives
19 license into when the answer is, "I can remember some
20 of it, it is burnt in my mind", that gives us two
21 very specifics needs at that point.

22 JUDGE PIGOTT: But Judge Garry in her - - -
23 in her dissent said "whether a defendant's silence is
24 used as part of the People's direct case for
25 impeachment purposes or, as here, to challenge a

1 defense, the implicit promise, the breach, and the -
2 - - and the consequent penalty are identical and the
3 unfairness is not altered." Do you agree with that
4 statement?

5 MR. EVANOVICH: Well, I think that that was
6 a decision that was before Williams and before we had
7 guidance.

8 JUDGE PIGOTT: Is that a yes?

9 MR. EVANOVICH: I - - - I don't
10 necessarily, because there are different rules for -
11 - -

12 JUDGE PIGOTT: Well, one of the problems I
13 think that she was raising is, as - - - as Mr.
14 Connolly pointed out, is if you're trying to imply by
15 someone exercising their Constitutional rights that
16 they were using that time to concoct a defense, I
17 think you would agree that that's not a very nice
18 thing to do.

19 MR. EVANOVICH: Well, and it's improper.

20 JUDGE PIGOTT: Right.

21 MR. EVANOVICH: And against evidentiary
22 rules.

23 JUDGE PIGOTT: And that's - - - and that's
24 the point here, right? I mean, you're - - - you're
25 making - - - you're making the point that he didn't

1 raise the EED defense, you know, when he was first
2 arrested.

3 MR. EVANOVICH: No.

4 JUDGE PIGOTT: Well, may - - - maybe he
5 didn't know he had one.

6 MR. EVANOVICH: No, no, Judge. And to - -
7 - and I think it plays right into the - - - where I
8 was saying there's two things we're getting at really
9 with that questioning. That line of questioning, if
10 Your Honors look at the totality of it, that line of
11 questioning - - - because the defendant was never
12 questioned on cross about well, you didn't tell
13 Investigator Hyman, you didn't tell Investigator
14 Weightman, those are the direct case unobjected to.
15 That question on cross is not about his exercise of
16 his right to remain silent. Those lines of
17 questioning on cross are what was burnt into your
18 mind and what wasn't.

19 JUDGE PIGOTT: No, no. Let's go back - - -
20 let's go back to the - - - when you said, you know,
21 you didn't say anything to the investigators and
22 you're saying that that was not objected to.

23 MR. EVANOVICH: Yes.

24 JUDGE PIGOTT: Does that, in your mind,
25 mean that it's okay?

1 MR. EVANOVICH: No. I think it - - -

2 JUDGE PIGOTT: Then why - - - then why did
3 you do it, I guess is the - - - not you personally,
4 of course, but - - -

5 MR. EVANOVICH: Well - - -

6 JUDGE PIGOTT: - - - why - - - why would
7 the People do something - - - I mean, this is so
8 fundamental it just - - - it just - - - it burns in
9 my mind sometimes that you - - - that they - - - they
10 know, the police officers knew, you - - - you can't -
11 - - you can't tell somebody that - - - or question
12 somebody without telling them they have a right to
13 remain silent, and yet the district attorney, the
14 prosecutor says, you didn't say anything to the - - -
15 to the investigators, and a proper answer from him
16 would be, nobody told me I had a right to remain
17 silent, but - - - but you're in the middle of a trial
18 and - - - and that doesn't pop up. And it just
19 seemed to me it's just so clearly improper you'd
20 never - - - you'd never dream of asking it.

21 MR. EVANOVICH: I think that the - - - it
22 came about through the selective silence, but I know
23 this court since - - - and the only reason I raise
24 that isn't to argue selective silence should be
25 treated differently, because Your Honors have made it

1 clear now, don't treat it differently, it's against
2 the evidentiary standards of the State. We get that
3 loud and clear now, and I think Williams - - -

4 JUDGE PIGOTT: Because of Williams?

5 MR. EVANOVICH: Yes.

6 JUDGE PIGOTT: Did - - - did you think
7 that's a new rule?

8 MR. EVANOVICH: It's not necessarily that
9 it's a brand-new rule, but it's when this court
10 finally has - - - has issued what I think is clear is
11 we're dealing with this under the evidence of the
12 State. And there - - - I think there were some
13 complications with the Constitutionality and what is
14 silence versus self-incrimination and other courts
15 are dealing with this.

16 CHIEF JUDGE LIPPMAN: But this wasn't
17 complicated, right? This question wasn't difficult
18 to figure out what was appropriate and not approp - -
19 - inappropriate?

20 MR. EVANOVICH: I don't disagree to some
21 extent, Judge, but I think selective silence issues
22 prior to the Williams case did raise some - - -

23 CHIEF JUDGE LIPPMAN: All right, but your
24 basic argument is, it may well be error, but in this
25 case, not dispositive?

1 MR. EVANOVICH: Absolutely correct; to look
2 at the - - - if - - -

3 CHIEF JUDGE LIPPMAN: Because - - - because
4 why?

5 MR. EVANOVICH: Well - - -

6 CHIEF JUDGE LIPPMAN: Because the evidence
7 is overwhelming?

8 MR. EVANOVICH: Certainly, Judge, but then
9 we have the - - -

10 CHIEF JUDGE LIPPMAN: How is the evidence
11 overwhelming?

12 MR. EVANOVICH: Well, first, I'd just like
13 to say that the scrutiny the court applies is
14 certainly imp - - - important, and on a
15 Constitutional question, it's very different from an
16 evidentiary question which is very different from an
17 ineffective assistance question. So assuming one of
18 those errors that the court would find - - -

19 CHIEF JUDGE LIPPMAN: Let's assume; go
20 ahead.

21 MR. EVANOVICH: - - - apply the appropriate
22 standard of scrutiny and let's look at the evidence
23 and what do we have.

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 MR. EVANOVICH: We have days of stalking by

1 this defendant.

2 JUDGE PIGOTT: You keep - - - you keep - -
3 - you keep bundling this thing up and - - - and as I
4 think Judge Stein mentioned, the - - - the Appellate
5 Division was unanimous that this was improper, right.
6 And yet you - - - you - - - you're not ready to
7 concede that, are you?

8 MR. EVANOVICH: No, I am - - - I am ready
9 to concede it was improper.

10 JUDGE PIGOTT: Okay.

11 MR. EVANOVICH: We are, Judge.

12 JUDGE PIGOTT: Okay.

13 MR. EVANOVICH: It's - - - we've heard this
14 court loud and clear. This is not something that
15 needs to be admitted into evidence.

16 CHIEF JUDGE LIPPMAN: So what's your
17 overwhelming evidence?

18 MR. EVANOVICH: The overwhelming evidence,
19 Judge, is over the days prior and leading up to, we
20 see this stalking behavior by the defendant, and you
21 can hear on all of the audio tapes that Your Honors
22 have been provided in the record, the very first part
23 of the record for you, you can hear the defendant's
24 voice. You can hear his manipulative tactics.

25 JUDGE RIVERA: How do we discern the

1 difference between that being part and parcel of the
2 EED and - - - and stalking?

3 MR. EVANOVICH: I - - - I'm trying to - - -
4 to - - - all of that would go to the EED defense.
5 The defendant's emotions leading up to and then very
6 close in time and then very thereafter all play into
7 this. And when Your Honors look at the evidence in
8 the days leading up, certainly the defendant's
9 emotional, that's not a question. There's almost no
10 murders that don't have any emotion in them, that's
11 almost impossible. So I concede he was emotional,
12 but he wasn't extremely emotionally disturbed.

13 Your Honors can hear in the - - - in his
14 voice, 1:36 in the morning - - - let's go right to
15 the time in murders within an - - - the closest
16 message we have from the defendant, at 1:36 in the
17 morning, he says Tim, I know you're getting these
18 messages. I'm still looking for my girlfriend.
19 That's his tone of voice. You can listen to it on
20 the recordings. This is not a man who is emotionally
21 disturbed.

22 JUDGE PIGOTT: I'm not prepared to make
23 that judgment. I - - - I know what you mean and, you
24 know, as you listen to them all. That's why when I
25 was questioning Mr. Connolly, you know, I - - - I

1 think expert testimony is rather important in this
2 case, don't you?

3 MR. EVANOVICH: I do think expert testimony
4 is important, and that's why Dr. Stuart Kirschner who
5 wrote the book on EED, really, in New York State, who
6 testified for the prosecution really focused narrow
7 in time closer to the murders, as opposed to Dr.
8 Weker who ultimately really was arguing that
9 throughout these recordings, over days, this
10 defendant - - - that was his testimony, Your Honors
11 can refer to the record - - - that over the days
12 leading up to, there was apparently this subjective
13 EED, and that's just - - - that's just not credible.
14 That just doesn't fit with the evidence of the
15 defendant who, to everyone else in the world, is
16 acting in a way that's methodical - - -

17 JUDGE RIVERA: But - - - but it's not
18 incorrect - - - but the general concept that EED is
19 not necessarily in that one moment, right. That it
20 can be prior to the one moment when the - - - when
21 the murder is committed in this particular case. You
22 don't disagree with that?

23 MR. EVANOVICH: No, no. I - - - I don't
24 disagree that A, the subjective EED - - -

25 JUDGE RIVERA: You think he just went too

1 far back in time?

2 MR. EVANOVICH: No, I think that his - - -
3 his expert opinion that it lasted this entire period
4 of time is incredible. I see my time is up. I would
5 ask that Your Honors affirm the Appellate Division's
6 decision in all respects. And thank you.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 Let's hear rebuttal, counsel.

9 MR. CONNOLLY: The factors that the
10 prosecutor cited that in his view tend to disprove
11 the EED, I submit would do no more than create a
12 question of fact for a jury to resolve. For example,
13 he brings up Dr. Kirschner who admittedly wrote an
14 article that's considered to be maybe a seminal
15 article on the EED defense. We concede that. It's
16 in the record. On the other hand, ninety percent of
17 the EED examinations that he performs are performed
18 for the prosecution. So jury could reasonably find
19 that this is like a hired gun. On the other hand - -
20 -

21 JUDGE FAHEY: Well, I - - - I think all the
22 - - - all the judges here would recognize that that's
23 usually the case with expert testimony. The problem
24 is, though, is - - - well, take a step back. First
25 off, I - - - I agree with Judge Pigott on the

1 question of - - - of selective silence. I think it's
2 clear and I think we're really talking about harmless
3 error here. The Appellate Division was relatively
4 consistent and my personal view of the case seems to
5 be that it's clear.

6 So we - - - we really have to get into the
7 question of what the nature of his actions were
8 during the time that he said he was suffering from
9 EED in this particular - - - and then you've got - -
10 - then it becomes more difficult for you. You've got
11 he kinds of calculates and stalks the victims, he
12 inquires and establishes their contact numbers, he's
13 polite and - - - and seems to be aware. He's able to
14 handle machinery, create a ruse about the heat
15 problem as he's going from house to house. Of
16 course, capably use a gun and - - - and contain an
17 entrance and - - - and obtain an entrance through the
18 force - - - through the use of violence, those kind
19 of actions.

20 Then, of course, afterwards, there seems -
21 - - the Appellate Division calls it consciousness of
22 guilt. I assume they're talking about the fleeing
23 from the scene and - - - and the level of calculation
24 and his demeanor throughout it I think are the
25 phrases they use, and those become more difficult for

1 you than I think the - - - the pure question of
2 silence. So - - -

3 MR. CONNOLLY: Well - - -

4 JUDGE FAHEY: On - - - on the element of
5 control.

6 MR. CONNOLLY: You mean his controlled
7 demeanor?

8 JUDGE FAHEY: Yeah, yeah.

9 MR. CONNOLLY: There is evidence to that
10 effect, I agree. On the other hand, there's a lot of
11 evidence going the other way. His testimony - - -
12 and granted, a lot of it is his testimony and the
13 jury had an opportunity to hear that, but that's
14 something for a jury to decide whether he's credible.
15 His testimony - - -

16 JUDGE STEIN: So in the - - - in the end
17 what - - - what standard should we be using to
18 determine whether it's harmless error or not? In - -
19 - in your - - -

20 MR. CONNOLLY: Well, it's a Constitutional
21 error, so the evidence has - - -

22 JUDGE STEIN: Well, is - - - is - - -
23 that's not inconsistent with - - - with Williams?

24 MR. CONNOLLY: No, the - - - in - - - how -
25 - - how would that be inconsist - - - I - - - I don't

1 see how it would be.

2 JUDGE STEIN: Well, didn't we say it stayed
3 evidentiary question?

4 MR. CONNOLLY: No, this was a
5 Constitutional issue because the - - - the question
6 was when you were taken into custody - - - and that's
7 at post-Miranda, when he was taken into custody he
8 was given Miranda warnings immediately and therefore
9 that's a Constitutional violation. But in - - - in
10 any event, even under Williams, where there's the - -
11 - the standard is a significant probability and
12 overwhelming evidence, this court that found that
13 there was a significant probability that the error
14 could have made a difference.

15 CHIEF JUDGE LIPPMAN: Okay, counsel.
16 Appreciate it.

17 MR. CONNOLLY: Okay, thank you, Your
18 Honors.

19 CHIEF JUDGE LIPPMAN: Thank you both.

20 MR. EVANOVICH: Thank you, Your Honor.

21 (Court is adjourned)

22

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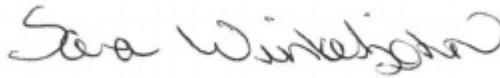
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony V. Pavone, No. 199, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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