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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 208

JAMES MILLER,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2016

Before:

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

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on
2 this afternoon's calendar is appeal number 208, the
3 People of the State of New York v. James Miller.

4 Good afternoon, counsel.

5 MS. MAIN: Good afternoon, Your Honors.
6 May it please the court, Daniella Main of Alston and
7 Bird, in conjunction with the Office of the Appellate
8 Defender, for the Appellant Mr. James Miller.

9 We request two minutes for rebuttal,
10 please.

11 CHIEF JUDGE DIFIORE: You may have two
12 minutes.

13 MS. MAIN: Your Honors, the Constitutional
14 right to a jury trial means nothing without a fair
15 and impartial jury.

16 The trial court here deprived Mr. Miller of that
17 right when it shut down his one and only opportunity to
18 ensure that the jurors in his case could apply an
19 incredibly difficult law on the single, most
20 incriminating, and powerful piece of evidence against him.

21 JUDGE GARCIA: But what would the question
22 have been?

23 MS. MAIN: The question that counsel asked
24 the court to pose was, can you instruct the jurors,
25 or I could do it, that there are rules that relate to

1 the use of a defendant's statements.

2 And he specifically wanted to wean out any
3 jurors who could not or would not accept the
4 proposition that you would have to disregard an
5 involuntary confession under New York Law.

6 JUDGE PIGOTT: I couldn't tell, was there a
7 suppression hearing in this case?

8 MS. MAIN: No, Your Honor, there was a
9 Huntley hearing beforehand. But - - - where defense,
10 you know, did reference the voluntariness, that it
11 would challenge the voluntariness of these
12 statements, if they were to come in at trial.

13 JUDGE PIGOTT: You moved to suppress the
14 statement, as to being involuntary?

15 MS. MAIN: We did challenge the
16 voluntariness of this, yes.

17 JUDGE PIGOTT: And you lost.

18 MS. MAIN: Well, there was enough
19 reasonable doubt - - - I mean, the statements were
20 voluntary enough beyond a reasonable doubt to come in
21 and be an issue for the jury at trial.

22 JUDGE PIGOTT: All right.

23 MS. MAIN: So - - -

24 JUDGE GARCIA: But going back to the
25 question. I read then that the judge's ultimate

1 charge on that issue to the jury, and it's pretty
2 extensive on what "involuntary" means. So I'm trying
3 - - - I'm having some trouble envisioning, you know,
4 voir dire, which is relatively short process, but
5 what would the articulation of a question be that
6 could it capture what is a pretty lengthy and
7 technical legal instruction?

8 MS. MAIN: Your Honor, the judge could have
9 said, I don't know what evidence is going to come in
10 at trial, and I don't want you to speculate about
11 this, but there are rules under the laws of New York
12 for how you can consider a statement that is made by
13 a defendant. Could you apply the principle that, you
14 know, under our laws, a statement that is coerced
15 cannot be considered as evidence for any reason.

16 JUDGE PIGOTT: Where do you draw that line
17 though? I mean, is it just confessions or statements
18 of a defendant, or could you say, you know, there's
19 going to be evidence brought in by the People here,
20 but the main complainant has psychological problems.
21 And would you keep an open mind, you know, when I
22 question him or her about the fact that they've seen
23 a psychiatrist for six months; can you - - - can you
24 - - - or is that going to make it unable for you to
25 sit as a juror? Can you address that?

1 MS. MAIN: Well, if the mental fitness of
2 the defendant is an issue at trial, then presumably
3 this would apply to that too. You know, we're not
4 arguing - - -

5 JUDGE PIGOTT: Complainant. I'm saying,
6 you're attacking the People's case of - - -

7 MS. MAIN: Well, I mean, if the - - - if
8 the complainant does have some mental issues, and
9 that is an anticipated defense, to challenge that,
10 then arguably, yes. But, you know, when you have - -
11 -

12 JUDGE PIGOTT: And if - - - and if they
13 have a person who is a claimed eyewitness, but you're
14 going to have testimony that that eyewitness did not
15 have the point of view, and did not have the time to
16 make a good ID, can you bring that up in jury
17 selection?

18 MS. MAIN: Well, Your Honor, that wouldn't
19 be, you know, a law that has to apply to that; that's
20 just basically the jury deciding whether they believe
21 the testimony of that eyewitness.

22 JUDGE PIGOTT: We have some case law that
23 says that, you know, that eyewitness testimony has to
24 be scrutinized very, very carefully, because - - -
25 particularly if it's a one eyewitness.

1 MS. MAIN: Sure. And so, you know, whether
2 they could apply, you know, the law to evaluate
3 witness's testimony, yes. But when you're talking
4 about getting into the specifics of the facts of the
5 evidence that's going to come out on trial, you know,
6 that's where - - - that's not appropriate for voir
7 dire, but that's not what defense counsel here was
8 trying to do. He was not trying to - - -

9 JUDGE ABDUS-SALAAM: But my understanding
10 of what was happening here is that the People had not
11 decided whether to present our submit this statement
12 to the jury - - -

13 MS. MAIN: The pro - - - I'm sorry.

14 JUDGE ABDUS-SALAAM: - - - at the point
15 where this voir dire was going to have to happen, and
16 the judge apparently made a ruling that he didn't
17 want to taint the jury because the statement may
18 never come in.

19 So if that had not been the case, it was
20 clear that this statement was going to come in, would
21 you be able to - - - or ask, or would defense counsel
22 be able to ask the questions that your client wanted
23 - - - defense wanted the jury to hear?

24 MS. MAIN: Well, Your Honor, the scope of
25 voir dire and, you know, what is appropriate on voir

1 dire is not determined by the prosecution, and it's
2 not determined based on the prosecution's stated
3 level of certainty.

4 And it's important to note that the
5 prosecution merely said that it was not definite that
6 these statements were going to come in. That could
7 mean anything from probably to almost certainly will.
8 And here - - -

9 CHIEF JUDGE DIFIORE: Well, the prosecutor
10 didn't mention it, right, in her opening, correct?

11 MS. MAIN: Did not mention the statement?

12 CHIEF JUDGE DIFIORE: That it was going to
13 be - - - she didn't - - - we know that prosecutors
14 have obligations in opening statements, right, you
15 have to mention - - - talk about the nature of the
16 charges, the facts that you expect to prove, the
17 evidence to support that, and here, the prosecutor
18 didn't mention that this might - - - there might be -
19 - - there was going to be a confession here; we're
20 going to admit this - - - this man's confession,
21 correct - - -

22 MS. MAIN: Right. And - - -

23 CHIEF JUDGE DIFIORE: - - - in her opening
24 statement. So doesn't that support that the People
25 we're intending to proceed on a theory that this was

1 an eyewitness case, it wasn't a confession case.

2 MS. MAIN: Well, the sincerity of the
3 prosecution's statement that she was not definite is
4 not in dispute here. And it doesn't - - - she
5 doesn't have to be insincere about it for this rule.

6 CHIEF JUDGE DIFIORE: Then why - - - why
7 would she do that up front? I'm not following what
8 your argument is.

9 MS. MAIN: Well, I - - - I think that maybe
10 the prosecution wanted to keep, you know, their
11 options open, which is entirely fine. But the
12 defense is entitled to do the same thing too. If
13 there is at least a reasonable possibility that this
14 will come in at trial, and it is relevant to the
15 case, then voir dire should be allowed.

16 And it's important to note that this is a
17 defendant's full confession to murder. It's the top
18 count of the indictment, to murder two. And the
19 voluntariness of that statement was - - - was the
20 defense; it was absolutely critical to the defense.

21 And this is not some law that is easy to
22 follow; this is, can you disregard this incredibly
23 powerful and uniquely overwhelming piece of evidence,
24 if you find it to be coerced.

25 This is something that we know from - - -

1 CHIEF JUDGE DIFIORE: Is there anything
2 exculpatory in that statement?

3 MS. MAIN: Your Honor, it's our position
4 that there is not, and to the extent that there is
5 anything, it is of de minimis value because the
6 statement admits to shooting the victim in the back
7 multiple times as he ran away.

8 Given the duty to retreat, that would not
9 justify a self-defense charge, and it didn't justify
10 one here. Instead, the jury was - - - defense
11 counsel was precluded from asking any and all
12 questioning as to whether this jury could apply this
13 incredibly difficult law on this determinative piece
14 of evidence against the client.

15 JUDGE GARCIA: Would the judge ever have
16 the discretion then to say no to a request to ask the
17 jury if they could follow a particular legal
18 instruction?

19 MS. MAIN: If - - - if there is - - - if
20 it's an issue or, you know, an area of law that is
21 critical to the defense, that is likely to come in at
22 trial, and particularly where a jury might struggle
23 with applying this law, it should be allowed.

24 JUDGE GARCIA: Right.

25 MS. MAIN: And this court had said in

1 Boulware, in Stewart, that, you know, the - - - a
2 court's discretion is not boundless. And you have to
3 - - -

4 JUDGE GARCIA: Understood. I'm just trying
5 to think of how would we apply this in the future. I
6 mean, critical to the defense, and - - - these all
7 seem fairly subjective calls to be made, or
8 discretionary calls, better, by a trial judge. So -
9 - -

10 MS. MAIN: Well, this was an anticipated
11 legal defense. He was challenging the voluntariness
12 of the statement. And in Stewart, this court said
13 that when a court determines the scope of voir dire,
14 it needs to take into account certain factors such as
15 anticipated legal defenses, how much of the voir dire
16 the court is going to engage into, and the nature and
17 seriousness of these charges.

18 JUDGE GARCIA: Right. So I think what I'm
19 struggling with a bit though is, are we going to have
20 a bucket of potential legal charges that we say, if
21 you ask, you get this question, or are we going to
22 have ones you always do, and then some you might, and
23 some you don't. It would be, it seems to me, a hard
24 application, going forward, other than discretionary
25 call based on the facts, and anticipated evidence,

1 and legal issues in the case that's more properly
2 made by a trial court judge conducting voir dire.

3 MS. MAIN: Well, Your Honor, if this is
4 going to whether the jury can apply the law in a case
5 that is critical to the defense, relevant to the
6 defense, is likely to come in, this court has already
7 held in Boulware, in Stewart, that those are
8 precisely the types of questions that are appropriate
9 on voir dire. Counsel should always be entitled to
10 ask questions - - -

11 JUDGE STEIN: Well, what about the - - - a
12 justification defense? What if the defense was
13 justification, does the court then have to grant a
14 request by the defense counsel to voir dire jurors on
15 their ability to follow that?

16 Even if somebody, you know, did a terrible
17 thing and - - - but the judge is going to instruct
18 you that there may be circumstances under which that,
19 you know, that's justified. Can you follow that
20 instruction? Why wouldn't that apply to literally
21 every defensive instruction in the case?

22 MS. MAIN: Well, ironically, Your Honor,
23 the court did allow that question in here. Even
24 though the purported self defense wouldn't have
25 justified the charge, the defense was willing to take

1 that risk that those statements wouldn't come in,
2 because it was so likely that they would, that
3 counsel wanted to make sure that anticipated legal
4 defenses were given to the jury.

5 And here, this is not some, you know,
6 tangential piece of evidence on some, you know,
7 something that has a remote possibility of coming in.
8 This is a defendant's murder - - - a confession to
9 murder in his murder trial, and this is an incredibly
10 difficult law for juries to follow.

11 And to instruct jurors, at the end of the
12 case, after they have heard and seen the defendant
13 tell them how he shot the victim in the back, and
14 then ask them to apply this law, is an abuse of
15 discretion. It infringed on the constitutional right
16 to ensure that your verdict is given by a fair and
17 impartial jury, and based on a fair application of
18 the law.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. MAIN: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MS. FARRINGTON: May it please the court.

23 Lori Farrington for the Office of the Bronx County
24 District Attorney.

25 Your Honors, the trial - - -

1 JUDGE RIVERA: Counsel, if a - - - if a
2 prosecutor does not mention a confession during the
3 opening, does that preclude the prosecutor from
4 submitting that evidence in his case in chief?

5 MS. FARRINGTON: No, it does not. The
6 issue here is whether the trial court's determination
7 not to allow this particular questioning on voir dire
8 was a reasonable exercise of its discretion, and it
9 clearly was.

10 Now, both Boulware and Stewart stress the broad
11 discretion that the trial court has in determining the
12 boundaries of voir dire.

13 JUDGE PIGOTT: How come you hadn't made up
14 your mind whether you're going to use a confession
15 made by the defendant by the time you are picking the
16 jury?

17 MS. FARRINGTON: Well, there were numerous
18 reasons that the prosecutor might not want to use
19 this statement. First of all, there was the issue of
20 justification and setting up a possible justification
21 defense. And second - - -

22 JUDGE PIGOTT: Well, I get that, but, you
23 know, what strikes me is that the DAs are always
24 saying, we're not here to convict the defendant;
25 we're here to see that justice is done. And the idea

1 that, while there are some favorable things in the
2 confession, therefore we're not going to use it,
3 doesn't make sense to me.

4 And I - - - I just - - - I couldn't imagine not
5 putting this on. Maybe, you know, as you said, there
6 might - - - there might be two or three reasons.

7 MS. FARRINGTON: Well, the - - -

8 JUDGE PIGOTT: Go ahead.

9 MS. FARRINGTON: I apologize. The second
10 reason was that it also brought up potentially prior
11 crimes by the victim, which the prosecutor - - - it's
12 very reasonable to not want the jury to be focusing
13 on whether or not your victim did something two years
14 ago.

15 JUDGE PIGOTT: Wouldn't you - - -

16 MS. FARRINGTON: Justice is - - -

17 JUDGE PIGOTT: Wouldn't you have exercised
18 that at the time that the suppression hearing was
19 being conducted or before you want to introduce and
20 say, Judge, there's stuff in here that shouldn't come
21 into the jury, we'd like to have this excised.

22 MS. FARRINGTON: That is a possibility.

23 JUDGE PIGOTT: Okay.

24 MS. FARRINGTON: But in this case, the
25 prosecutor wanted to potentially keep the statement

1 out in its entirety. And the First Department made
2 the factual finding that the prosecutor was unsure as
3 to whether or not she was going to use the statement.

4 JUDGE GARCIA: But even if we assume that,
5 wouldn't that really be the defendant's call then? I
6 mean, if you're going to ask the question, I mean, I
7 assume the concern, as I read the transcript, is the
8 jury is going to hear about this confession and it
9 may never come in, and they'll be thinking, oh,
10 there's a confession out there.

11 But if the defense is asking for that, who
12 cares - - -

13 MS. FARRINGTON: Well - - -

14 JUDGE GARCIA: - - - if you're going to use
15 it or not, because they are willing to take the risk
16 that you are, and they wanted to question the jury
17 about it.

18 MS. FARRINGTON: Well, the trial court also
19 had to consider a possible prejudice to the People,
20 and now forcing the People's hands to introduce
21 evidence that perhaps they were not planning on
22 doing.

23 JUDGE STEIN: But couldn't the question had
24 been asked in such a way that it didn't suggest that
25 there was or was not a statement and a confession?

1 MS. FARRINGTON: Perhaps. But again - - -

2 JUDGE STEIN: Would that have solved the
3 prejudice to the People problem - - -

4 MS. FARRINGTON: There is - - -

5 JUDGE STEIN: - - - without - - - without
6 prejudicing the defendant? In other words, wouldn't
7 that have been a better challenge - - - not a
8 challenge - - - balance?

9 MS. FARRINGTON: The trial court's concern
10 was exactly what you're saying. Getting the jurors
11 not only to speculate about the contents of the
12 statement, but whether or not voluntariness was even
13 going to be an issue.

14 JUDGE STEIN: But that's so simple. I
15 mean, there are a lot of ways that could have been
16 done.

17 MS. FARRINGTON: There is - - -

18 JUDGE STEIN: Sometimes, in these cases,
19 the People have statements by the defendant, and
20 there may or may not be such a statement here, but if
21 there is, could you, you know, follow my
22 instructions, so on, and so forth. What - - - what's
23 the problem with that?

24 MS. FARRINGTON: We're not saying that that
25 could not be done. What we are saying is that the

1 trial court's decision in this particular case, on
2 these particular facts, was a reasonable exercise of
3 its discretion.

4 JUDGE STEIN: Well, that is indeed the
5 question, whether it was reasonable or whether it was
6 an abuse. And what I'm getting at is, if it could
7 easily have protected the People from prejudice
8 without leaving it open to possibly substantial
9 prejudice to the defendant, doesn't - - - doesn't
10 that make it an abuse of discretion not to do it?

11 MS. FARRINGTON: No, because the trial
12 court was concerned clearly that such an instruction
13 would not alleviate the prejudice to the People and
14 would force the People's hand. So in this particular
15 case, that is the prejudice - - -

16 JUDGE STEIN: But is that a reasonable
17 concern, if it can be properly articulated, easily?

18 MS. FARRINGTON: I think it's a very
19 reasonable concern, yes. I think - - -

20 JUDGE GARCIA: You could say, I give - - -
21 I ask this question to every jurors - - - juror I,
22 you know, speak to, whether it's a confession case or
23 not.

24 Why would they think that there's anything
25 particular coming in here?

1 MS. FARRINGTON: Well, again, as the trial
2 court stated, there's not only the issue of the
3 statement, there's the issue of whether they are even
4 going to challenge the voluntariness of the
5 statement, or whether they are going to challenge the
6 statement in another way - - -

7 JUDGE PIGOTT: I wonder if part - - -

8 MS. FARRINGTON: - - - and that was another
9 one of the trial court's concerns in this particular
10 case.

11 JUDGE PIGOTT: Part of their argument is
12 that it sounds like the judge is favoring the People
13 in this case, because they're saying, well, it's up
14 to the DA to decide this, and therefore I'm going to
15 impede the defense from - - - from questioning these
16 jurors because they have made a decision that's an
17 equivocal one at this point. And it makes it sound
18 like the judge is being unbalanced.

19 MS. FARRINGTON: Well, first, we have to
20 remember that there was a very detailed instruction
21 given at the end of the case here regarding
22 voluntariness. And second - - -

23 JUDGE PIGOTT: That was at the end. That
24 was at the end, right? We're - - -

25 MS. FARRINGTON: Yes.

1 JUDGE PIGOTT: We're still picking the
2 jury.

3 MS. FARRINGTON: Second - - -

4 JUDGE STEIN: The issue is whether they
5 could follow that instruction. So instruction or
6 not, the issue is whether they could follow it. And
7 that's - - - and that's what a defendant is trying to
8 screen for.

9 MS. FARRINGTON: Yes. And that was also
10 addressed in the discussion with defense counsel,
11 when the judge specifically said, I'm not seeing any
12 jurors who are expressing any concerns with following
13 the court's instructions.

14 And again, there's no bright line rule that if
15 the People say, we're not sure, we're going to introduce
16 it, that the trial court cannot allow it. But it's based
17 on the facts of every case. And in this particular case,
18 it was a reasonable exercise of discretion. And again, we
19 point to Diaz, which is very similar to this case.

20 And the problem in Diaz was, again, that the
21 court was worried about the speculation of the jurors.
22 And sometimes, the trial court may feel that an
23 instruction not to speculate is not enough in this
24 particular case, based on these particular facts.

25 JUDGE ABDUS-SALAAM: Isn't that - - - isn't

1 that exactly the problem here, counsel? You're
2 saying that at the end, the judge gave the
3 instruction about the voluntariness or
4 involuntariness of the statement, and we'd expect the
5 jurors to follow that instruction. But in the
6 beginning, you don't want to give anything to the
7 jurors because you don't know if they're going to
8 follow the instruction, or they're going to
9 speculate, or they're going to do something else.

10 MS. FARRINGTON: Well, I think the reverse
11 could also be true. If the jurors can follow the
12 instruction not to speculate, why do we have any
13 reason to believe they cannot follow a detailed
14 instruction on the voluntariness of the statement?
15 So I think that argument can cut both ways.

16 JUDGE ABDUS-SALAAM: Well, I agree. But
17 that's why I'm saying, the judge - - - the judge's
18 concern about speculation could have been - - -

19 MS. FARRINGTON: Well - - -

20 JUDGE ABDUS-SALAAM: - - - dealt with an
21 instruction about speculation from the beginning,
22 not, you know, not wait until the end.

23 MS. FARRINGTON: Another factor that was
24 important in the trial court's decision was that the
25 issue of voluntary versus involuntary statements, and

1 I'm paraphrasing the trial court, that was an issue
2 already in the public consciousness, and that he felt
3 that the instruction and the ability of jurors to do
4 that was an issue that had been raised, and the
5 jurors do not generally have a problem following that
6 type of instruction.

7 JUDGE RIVERA: But it is not - - - it's not
8 merely educational; it's to confirm, right, that the
9 jurors will not let their understanding or
10 misunderstanding impede their ability to deliberate
11 in a way that's fair and just.

12 MS. FARRINGTON: Yes. However, again - - -

13 JUDGE RIVERA: So what I'm saying is, you
14 can know a lot of things.

15 MS. FARRINGTON: I'm sorry?

16 JUDGE RIVERA: Right. Any perspective
17 juror can know many things. Right. We can assume
18 they know a great deal of things. But that doesn't
19 mean that a judge doesn't go through the exercise of
20 asking questions and inquiring. Right?

21 MS. FARRINGTON: They do. And in many
22 cases, they do. But again, they have the discretion
23 to determine what is relevant, what the prejudice to
24 each party might be, and which - - - what outweighs -
25 - - whether the value of that question outweighs the

1 potential prejudice to one of the parties.

2 And he also mentioned potential prejudice
3 to the defendant. Would the jurors speculate that
4 this was an inculpatory statement, therefore being
5 kept out by the defense. And the trial court weighed
6 the prejudice versus the value of asking the
7 question, and in its discretion, made this
8 determination.

9 JUDGE RIVERA: Then should the judge do
10 that if the defendant has already made that
11 calculated risk?

12 MS. FARRINGTON: Yes. That is the job of
13 the trial court, and that is mentioned in, I believe,
14 Stewart and Boulware, that the trial court's function
15 is the same as it is during trial; to weigh the
16 prejudice versus probative value. And that's exactly
17 what the trial court did here.

18 And again, at the end, gave a very detailed
19 instruction about which the jurors had no questions.
20 So - - - and also in this analysis, there was no
21 prejudice to the defendant. And it is clear that you
22 need prejudice to the defendant based on Jean, and
23 Stewart, and Pepper, and there was no prejudice here.

24 CHIEF JUDGE DIFIORE: Thank you, Ms.
25 Farrington.

1 MS. FARRINGTON: Thank you.

2 CHIEF JUDGE DIFIORE: Ms. Main?

3 MS. MAIN: Your Honors, when the court said
4 he wasn't seeing any jurors that wouldn't be able to
5 follow these instructions, no questions have been
6 asked on voir dire yet. And the reason that this
7 could be in the public consciousness is because false
8 confessions are one of the leading causes of wrongful
9 convictions, which shows that jurors - - -

10 JUDGE PIGOTT: All of that can be argued.
11 And isn't Ms. Farrington right that you've got a jury
12 that - - - you started out by saying it was a very
13 difficult area of the law, and it is. So why
14 wouldn't we leave it to the judge, and - - - and let
15 the confession come in or statement come in, and then
16 that the judge handle it after - - - after it's been
17 handed at the time, before the jury deliberates?

18 MS. MAIN: Because by the time that you ask
19 the question after the statement has come in, you
20 have no idea whether that - - - in one or twelve of
21 those jurors are of the mindset that, I don't believe
22 someone under any circumstances would confess to
23 something they didn't do, or I might be able to think
24 that a statement is coerced, but if I believe that
25 it's truthful, I'm not going to be able to disregard

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MS. MAIN: Thank you, Your Honors.

(Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. James Miller, No. 208 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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