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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 61

ROQUE SILVAGNOLI,

Respondent.

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20 Eagle Street  
Albany, New York  
April 25, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 61, the People of the State of  
3 New York v. Roque Silvagnoli.

4 Good afternoon, counsel.

5 MR. KRESS: Good afternoon, Your Honor. I'd like  
6 to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may have two minutes.  
8 And, counsel, can we answer a purposefully exploitive  
9 analysis question under Cohen as a matter of law?

10 MR. KRESS: Yes, Your Honor, you may, and for two  
11 reasons in this case. One, similar to Cohen, the Appellate  
12 Division here did not apply the standard that this court  
13 articulated first in Ermo and later reaffirmed in Cohen.  
14 And that is a question of law that this court can - - - can  
15 resolve. Secondly, this court has also held in Mims and in  
16 Ferro, which are cases we cite in our reply, that when you  
17 have undisputed facts and also that there's only one  
18 reasonable inference to be drawn from those facts, that's  
19 also an issue that this court can decide.

20 And we would submit certainly with respect to  
21 whether or not the questioning in this case constituted a  
22 crucial element or in any way influenced the ultimate  
23 confession, there is only one reasonable conclusion or  
24 inference to be drawn here, and that's that it - - - it did  
25 not influence this confession. So that's the second reason



1 why I think this can be decided as a matter of law.

2 And in fact, in *People v. White*, which was a case  
3 we cited in our reply, in an analogous context, the  
4 attenuation context, this court did exactly that. It  
5 decided the issue as a matter of law, and the analogous  
6 issue was whether or not improper questioning, in that case  
7 a Miranda violation, had influenced subsequent statements  
8 that the defendant made. On very similar facts this court  
9 decided as a matter of law that those subsequent statements  
10 were admissible. Specifically, those facts were that there  
11 was only five minutes of improper questioning in *White*,  
12 very similar to here.

13 It's a very - - - as the Appellate Division  
14 concluded, a brief reference to a represented case. There  
15 was a fifteen-to-twenty-minute break in *White* between the  
16 improper questioning and when the statement is ultimately  
17 made. Similiarly here, there's an even longer period.  
18 It's at the very least twenty to thirty minutes, and that's  
19 if we assume that this improper questioning came up at the  
20 very, very end of the second part of the interview before  
21 the defendant ultimately makes any inculpatory statements.  
22 In *White*, the defendant's given soda and cigarettes. Here  
23 the defendant has a meal before he ultimately confesses.

24 The defendant initially in *White* gives an  
25 exculpatory statement just like the defendant here when



1 he's - - - you know, this reference comes up and he says,  
2 well, that's about drugs. I didn't have anything to do  
3 with this murder. He specifically exculpates himself in  
4 the murder. And finally, the - - - the fifth way this case  
5 is - - - the fifth way in which this case is similar to  
6 White is that in White he only - - - the defendant only  
7 confessed after his exculpatory statement, his alibi, was  
8 blown up by the police. Judge Stein, I - - -

9 JUDGE STEIN: Well, no, I'm just - - - I'm just  
10 thinking about what you said about only one reasonable  
11 inference. I - - - I think for me it's a closer question  
12 on whether the - - - you know, the questioning is discrete  
13 and fairly separable, whether - - - whether that's a  
14 factual question or not or - - - or one in which you have  
15 to draw inferences. But when you - - - when we talk about  
16 intent and the second part of that test is exploitive  
17 intent - - -

18 MR. KRESS: Right.

19 JUDGE STEIN: - - - we generally say that's a  
20 factual question. And - - - and I'm having a hard time  
21 getting to - - - under the facts of this case in  
22 particular, but in general, how - - - how that cannot be at  
23 least partially a mixed question.

24 MR. KRESS: Right, so let - - - let me say two  
25 things. So one, you're absolutely right. Purposeful



1 exploitation is what is prohibited. That's what Ermo talks  
2 about. And there's sort of two components to that. One,  
3 there's an intent aspect which is what was the detective  
4 thinking? Was he trying to use this questioning in order  
5 to elicit a confession on the unrepresented case? Then  
6 there's a separate aspect to it which is did that  
7 questioning actually matter? You know, did it affect the  
8 ultimate confession? This is what - - - excuse me, what  
9 Ermo says was, "Was it a crucial element in eliciting the  
10 confession?" That's a direct quote from Ermo and one that  
11 Cohen picks up on as well. Cohen phrases it also  
12 differently at the end of the opinion where they talk about  
13 did this - - - was the confession influenced by the taint -  
14 - -

15 JUDGE STEIN: Well, that may have been something  
16 that they analyzed, but I - - - I don't read Cohen as  
17 saying that's a part of the test.

18 MR. KRESS: I - - - I think it - - - it's  
19 definitely - - - I mean that's part of the analysis. I  
20 think the discrete and fairly separable inquiry is how you  
21 determine whether or not the questioning was both  
22 purposefully exploitive, was it meant to exploit the  
23 improper questioning - - - or excuse me, yeah, was meant to  
24 exploit the improper questioning and also what - - -

25 JUDGE STEIN: You're kind of merging those two



1 together then.

2 MR. KRESS: No, I - - - I think they're - - -  
3 it's all part of the question of whether or not it's  
4 purposefully exploitive, and I think we determine that by  
5 looking at whether or not the questioning was discrete or  
6 fairly separable. That's the objective way that we look  
7 and try to answer the ultimate question which is  
8 purposefully exploitation.

9 JUDGE FAHEY: Well, I - - - I think we start with  
10 the premise that all police questioning is to get exploited  
11 answers to be used against the person that's being  
12 questioned. That's a given, right?

13 MR. KRESS: Yeah, I - - - yes.

14 JUDGE FAHEY: So - - - so we're really talking  
15 about here, here you got the question designed about - - -  
16 about the drug deal and - - - which the court refers to as  
17 a single flippant remark. The defendant then responds to  
18 that, says, well, yeah, maybe I got arrested for that, but  
19 I didn't - - - I didn't do what I'm being questioned about  
20 here. So that - - - that did elicit a statement on an  
21 unrelated matter. That seems pretty clear. So then it  
22 comes down to what Judge Stein is talking about which is  
23 the purposely analysis, and so is purposely - - - is it a  
24 flippant statement, or is it a purposeful statement I  
25 guess, right? Isn't that what we're left with?



1 MR. KRESS: That - - - that's part of the  
2 analysis. You have to interpret - - -

3 JUDGE FAHEY: So if that's part of the analysis,  
4 I - - - it's difficult how - - - for me to see how that's a  
5 matter of law. That's what I'm struggling with.

6 MR. KRESS: So I - - - I think, again, the only  
7 reasonable conclusion to be drawn here is that it wasn't  
8 purposeful, and I think you have to look at the fact that  
9 it's one statement that comes up during the course of a  
10 three-plus hour interrogation.

11 JUDGE FEINMAN: Well, both - - - and both the  
12 majority and the dissent agree that it's flippant.

13 MR. KRESS: That's absolutely correct.

14 JUDGE FEINMAN: They both use that  
15 characterization, and so I guess the question then is is  
16 there any record support for - - - for finding that it's  
17 purposeful?

18 MR. KRESS: So I - - - I entirely agree, Your  
19 Honor. Not only did all five justices in the Appellate  
20 Division agree that it was flippant, that was an  
21 observation that was made by the suppression court which of  
22 course had an opportunity to view Detective Ocasio as he  
23 was testifying. And there - - - I think there is record  
24 support simply from the fact that it comes up one time  
25 during the course of this interrogation. And that's - - -

1 JUDGE FEINMAN: Well, that can support that it's  
2 flippant.

3 MR. KRESS: Yes.

4 JUDGE FEINMAN: But what I'm saying - - - asking  
5 is is there any support for the majority's later  
6 characterization of it as purposeful?

7 MR. KRESS: There is not, and the reason why is I  
8 think if you view it in context, it only comes up one time.

9 JUDGE STEIN: Yeah, but the context of it was - -  
10 - was to show how much they knew about his drug-related  
11 activities. So I think that one could infer that that was  
12 another notch in the - - - in the link - - - I think I'm  
13 mixing my metaphors but - - -

14 MR. KRESS: I - - - I think then to - - - to the  
15 other point that was raised earlier, I - - - to a certain  
16 extent, everything - - - you could characterize everything  
17 that's said during an interrogation as - - - as in some way  
18 being designed to ultimately get the detective further down  
19 the road of getting a confession. If that were the test,  
20 then virtually everything that was said - - - like any  
21 reference whatsoever to - - -

22 JUDGE FAHEY: No, it's - - - I think you're right  
23 about that. Of course, that's a given. That's what  
24 they're there for. That's their job. No, the question is  
25 in engaging in impermissible questioning was it purposeful.



1 You know, the exploitation part, that goes with the  
2 territory. The purposeful part doesn't, particularly in  
3 the context of it being characterized as a flippant remark  
4 as - - - as the judge was saying.

5 MR. KRESS: Well, and, Judge Fahey, I think the  
6 reason why you can't infer that it's purposeful here is not  
7 only that it comes up one time, but there - - - there's no  
8 follow up after that. If the detective really wanted to  
9 use this in some way and exploit it you would see something  
10 like you saw in Cohen where they're bringing it up over and  
11 over again. They keep coming back to it. Or in Ermo - - -  
12 and actually both in Cohen and Ermo it's not only the  
13 frequency, it's the structure of the questioning as well.  
14 In both of those cases, the detectives started their  
15 interrogations with the represented matter, and they used  
16 questioning on that to build their confessions - - - or to  
17 build their interrogations on the unrepresented matter. In  
18 the Appellate Division decision in Ermo they referred to  
19 that as most significant. Same thing in Cohen, this court  
20 referred to it as particularly noteworthy that the  
21 structure of the questioning happened that way. We don't  
22 have that here, and so that's why I don't think it's  
23 reasonable to infer that this was purposeful in any way.

24 CHIEF JUDGE DIFIORE: Thank you, Mr. Kress.  
25 Counsel.



1 MR. CARNEY: Good afternoon. May it please the  
2 court, William Carney for respondent Roque Silvagnoli. The  
3 Appellate - - - Appellate Division reversal was based on a  
4 mixed question of law and fact. It was the application of  
5 well-settled legal principles to an established fact  
6 pattern fully supported by the record. Neither the  
7 majority or the dissent actually disagreed on a legal  
8 analysis. They both applied the Cohen legal analysis which  
9 this court is aware, there's two - - -

10 JUDGE FEINMAN: Speaking of that, doesn't the  
11 majority opinion conflate - - - or use elements of both of  
12 the Cohen sort of structure - - - you know, the Cohen test  
13 and mush them together? And haven't they erred as a matter  
14 of law then in doing that?

15 MR. CARNEY: No, I disagree. They actually use  
16 the very same analysis in Cohen. There are two separate  
17 rules of Cohen, and so there's the inextricably interwoven  
18 and transaction-related, and that wasn't actually in  
19 question in our case. But in Cohen, even deciding - - -

20 JUDGE FEINMAN: But doesn't the majority opinion  
21 actually talk about the space and the time, the fact that  
22 it's the same location? It - - - it looks to me like  
23 they're mixing up the two tests.

24 MR. CARNEY: Absolutely not. In fact - - -

25 JUDGE FEINMAN: And isn't that a legal error?



1 MR. CARNEY: It's - - - they didn't - - - they  
2 applied the very same analysis in Cohen because even in  
3 Cohen where they decided under the second aspect whether or  
4 not it was a purposeful exploitation, whether or not it was  
5 discrete or fairly separable, one way that they were able  
6 to find exploitation is to say that the detectives in Cohen  
7 linked the two incidents. They linked the Thompson Garage  
8 and Citgo even under that second analysis, and the court  
9 said that wasn't done - - - as in our case, that wasn't  
10 done innocuously. That was purposeful and showed bad  
11 intent because they joined the two subjects in the  
12 interrogation because they believed the two were related.  
13 And it implied significant knowledge of the damning  
14 connection between them and was designed to add pressure.

15 And that's exactly what the detective did in this  
16 case because he knew that the drug sale, which was just - -  
17 - it was approximately within the same temporal space was -  
18 - - is four months earlier than this - than this shooting,  
19 this murder. It was in the same location, and it involved  
20 the alleged motivation. So the - - - as the Appellate  
21 Division concluded, even if that was flippant it wasn't  
22 done innocuously. It was done to advance the interrogation  
23 and - - - turning back - - -

24 JUDGE FEINMAN: Well, at no point did they say to  
25 him, in terms of the structure of the questioning and



1 coming back to it, they didn't say not only did you sell to  
2 an undercover but we - - - we know you're a regular drug  
3 dealer here and - - - and because of that and the - - - and  
4 we know you were selling to him and that he owed you this  
5 debt - - - I'm not sure how they exploit it. What - what's  
6 the evidence that they - - -

7 MR. CARNEY: Well, there's - - -

8 JUDGE FEINMAN: - - - exploited it - - -

9 MR. CARNEY: There's two answers - - -

10 JUDGE FEINMAN: - - - purposefully?

11 MR. CARNEY: - - - one going back to the mixed  
12 question. That was the Appellate Division majority  
13 determination, and that's not an unreasonable inference to  
14 draw from these facts. Just as the - - -

15 JUDGE FEINMAN: Where is the record support for  
16 saying that that was purposeful?

17 MR. CARNEY: That it was purposeful as the  
18 majority concluded because they looked at the linkage  
19 between the two incidents, just as the court did in Cohen  
20 when they said that even if it didn't meet the inextricably  
21 interwoven analysis it's - - - you could still look at the  
22 factual overlap to show their purposeful in this case bad  
23 intent, their exploitation of the counseled case in order  
24 to advance the interrogation on the uncounseled case.  
25 That's how - - - that was the analysis - - -



1 JUDGE FAHEY: You know, one - - - one of the  
2 things that - - - in looking at this case and the single  
3 remark which everyone kind of minimizes, the - - - the one  
4 remark, it seems like almost like the Appellate Division  
5 has created a per se rule here where any reference - - -  
6 because this is a very minimal reference, to a charged  
7 crime where somebody's represented is - - - requires an  
8 automatic reversal on the uncharged crime. Do you read it  
9 that way?

10 MR. CARNEY: I don't think that the court has to  
11 go that far. I think that what the court - - - I mean  
12 there's - - - so there's two components. There's the  
13 discrete and fairly separable and that can be answered in  
14 cases where - - - there's a - - - there's a whole battery  
15 of questions that is repeated - - -

16 JUDGE FAHEY: It's - - -

17 MR. CARNEY: Repeated - - -

18 JUDGE FAHEY: The reason I ask it is because of  
19 the minimal nature of the remark.

20 MR. CARNEY: And I think that's - - -

21 JUDGE FAHEY: And so that's why I'm saying well,  
22 if this gets you a reversal then pretty much anything will  
23 get you a reversal.

24 MR. CARNEY: I think in this instance because the  
25 two - - - the linkage between the two, that is what the



1 court looked to to find the purposeful exploitation and the  
2 - - - the bad intent.

3 CHIEF JUDGE DIFIORE: What is the linkage between  
4 the two? Is it - - -

5 MR. CARNEY: It has to do with the - - - the drug  
6 selling, which is the alleged motive for this - - - for  
7 this shooting.

8 CHIEF JUDGE DIFIORE: If he's a drug dealer,  
9 right? I mean that's what he does.

10 MR. CARNEY: Well, he actually doesn't say. He  
11 never said he was a drug dealer. The detectives kept  
12 saying, oh, we know you're a drug dealer, and there's no  
13 admission until he brings up this thing. And then he says,  
14 oh, that's just drugs. This is different. But even then  
15 he's gained an admission so to the extent that he didn't  
16 persist in asking illegal questions, he already  
17 accomplished his goal by getting this admission and tying  
18 him to the motive to the shooting and in - - - and in the  
19 same place.

20 So he didn't need to persist in illegal  
21 questioning. I mean the - - - the People's rule is - - -  
22 their proposed rule is that there has to be a pattern, but  
23 that really incentivizes bad behavior by the police.  
24 Because how many illegal questions do they get before they  
25 reach a pattern? Is it, like, the two comments that are in



1 this case, or is it four or six? How many before that - -  
2 - that equals bad intent under their - - - their rule.  
3 That just leads to chaos in the system. When you - - -  
4 when you have some - - - first of all, going back to the  
5 mixed question issue - - -

6 JUDGE RIVERA: So what - - - what makes it  
7 flippant if they all think it's flippant?

8 MR. CARNEY: I - - - I - - -

9 JUDGE RIVERA: Because they can use it and it's  
10 not flippant.

11 MR. CARNEY: Well, first of all, they want to  
12 characterize flippant as merely frivolous, and they do that  
13 by taking one definition and then attaching another  
14 definition to it. But flippant also means rude,  
15 disrespectful, and sarcastic. So in that sense, it was - -  
16 - it was designed to get under his skin to imply, as the  
17 court said in Cohen, the damning connection between the two  
18 - - - significant knowledge of the damning connection  
19 between the counseled case and the uncounseled case.

20 So, yes, it may have seemed offhand, but it  
21 definitely had a purpose and was designed to communicate to  
22 him we know you were selling drugs, and that's supposed - -  
23 - the supposed motivation for this shooting and in the very  
24 same place and in less than four months before this  
25 shooting occurred. So that is the - - - but at the very



1 least for the Appellate majority, that's a not unreasonable  
2 conclusion to draw from these facts. I mean going back to  
3 the - - - to the mixed question issue, even the dissent  
4 agreed with the legal analysis that the majority put out.  
5 They just - - - they just thought that because it wasn't a  
6 whole bunch of instances that that wasn't - - - that wasn't  
7 sufficient.

8 So they thought that - - - but the majority was  
9 able to say, well, no, it wasn't innocuous under these  
10 circumstances and in context. And whenever courts talk  
11 about in context of course that's almost always a factual  
12 determination and drawing inferences from the facts that  
13 reach context. And so that very much means that's a mixed  
14 question of law and fact. Unless there are any - - - any  
15 further questions - - -

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 Counsel.

18 MR. KRESS: Yes, there are three - - - three  
19 points that I would like to make in rebuttal. The first  
20 quote from Ermo when they say that, "The police exploited  
21 concededly impermissible questioning as to the assault for  
22 the purpose and with the effect of advancing their  
23 interrogation on the homicide." So there's a - - -

24 JUDGE STEIN: But that doesn't mean that it's  
25 required. It just means that that's what happened here,



1 and so they did - - - they did something wrong. And as a  
2 matter of fact, it succeeded.

3 MR. KRESS: Well, I - - - I think then to come  
4 back to Cohen where they say that - - -

5 JUDGE STEIN: And if it hadn't succeeded we  
6 wouldn't be here, right?

7 MR. KRESS: No. Well, no, not - - - not  
8 necessarily, Your Honor. Yes, the defendant confessed, and  
9 what we are trying to determine is whether or not this  
10 brief and flippant reference had any role whatsoever in  
11 that. And I think, (A), based on these facts, which are  
12 very similar to White where this court held similar  
13 impermissible questioning did not have that influence, I  
14 don't think you can conclude that this question had any  
15 effect on the ultimate confession.

16 But even putting that to the side, the  
17 preliminary question is did the Appellate Division address  
18 this part of the analysis at all, and it doesn't. It  
19 quotes - - - quote Cohen as saying that the police can't  
20 question the defendant in a manner designed to elicit a  
21 statement on an unrepresented matter. That's true, but  
22 that's part of the analysis. That's the intent part. It  
23 doesn't go to the ultimate taint issue, which is something  
24 that the Appellate Division just never addressed.

25 The second point that I want to make is this idea



1 that Judge Fahey was bringing up and the opposing counsel  
2 just raised that, you know, getting under this defendant's  
3 skin if that's your goal that can't be enough to be  
4 purposeful exploitation under Cohen and Ermo because if it  
5 were basically any statement that's made about a  
6 represented case would meet that standard if - - - because  
7 it's in some way designed to get the detective a little bit  
8 further down the road.

9 My final point is that along similar lines if  
10 this reference is not discrete and fairly separable I truly  
11 don't know what is. And if you look at the three cases  
12 that I think are the most factually similar to this one,  
13 which are Grant, Walker from the Third Department, and  
14 White in the analogous Miranda context, I - - - all three -  
15 - - this court in White and the Third Department in Grant  
16 and Walker all concluded that the statements at issue  
17 should not have been suppressed. I'd urge the court to  
18 look to those cases. Thank you.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 (Court is adjourned)

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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. Roque Silvagnoli, No. 61 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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