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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 21

MICHAEL JOHNSON,

Appellant.

20 Eagle Street
Albany, New York
February 6, 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

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1 CHIEF JUDGE DIFIORE: Next on the calendar is
2 appeal number 21, The People of the State of New York v.
3 Michael Johnson.

4 MS. POWELL: Good afternoon, Your Honors, my name
5 is De Nice Powell from the Appellate Advocates,
6 representing Michael Johnson in this appeal.

7 The courts and scholars have long rec - - -

8 CHIEF JUDGE DIFIORE: Ms. Powell, would you like
9 to reserve any rebuttal time?

10 MS. POWELL: Yes, Your Honor. Two minutes,
11 please.

12 CHIEF JUDGE DIFIORE: You may.

13 MS. POWELL: Thank you. Courts and scholars have
14 long recognized that long post-arrest detention in a
15 precinct, particularly when coupled with a series of
16 interrogations and the deprivation of human sustenance - -
17 -

18 JUDGE RIVERA: Counsel, I'm just - - -

19 JUDGE FEINMAN: In this particular case, you
20 know, when you say "a series of interrogations", what do we
21 actually know about how many and how long the
22 interrogations were? What does the factual record show?

23 MS. POWELL: The factual record - - - the
24 undisputed factual record shows that at least three
25 different interrogations occurred involving the Secret



1 Service, Port Authority Police, and Suffolk County, and
2 possibly Auto Crimes.

3 JUDGE FEINMAN: All right, so when you have - - -

4 MS. POWELL: All of - - -

5 JUDGE FEINMAN: - - - a set of facts that
6 involves all these different agencies, including federal
7 agencies, agencies from a nearby but, you know, not exactly
8 next-door jurisdiction, how long do they have to actually
9 do that before it becomes too long?

10 MS. POWELL: Well, the - - - the question is not
11 - - - as to the interrogations - - - not too long. The
12 question is what are the undisputed facts in this case; and
13 they are that Mr. Johnson was arrested on May the 14th. He
14 was held, post-arrest, in the precinct for approximately
15 thirty hours, and within those thirty hours, he was
16 interrogated by these three - - -

17 JUDGE STEIN: What if - - - what if there was
18 testimony that during those thirty hours he was given, you
19 know, three meals, bathroom breaks, a cot? Maybe he was -
20 - - it's hard to tell, but maybe they - - - they brought
21 him in one afternoon and - - - and the first interrogation
22 didn't even occur till sometime the next day, so he had
23 plenty of time to rest and - - - and so on and so forth?

24 Given the same period of time, would that be
25 enough to meet the - - - the People's burden of proof to



1 show that - - - that it was - - - that it was a voluntary
2 confession?

3 MS. POWELL: I - - - I have to make it absolutely
4 clear, that this case is not a Cheng Lin. This is not a
5 case where we are arguing that the proof showed that Mr.
6 Johnson's statements were, in fact, involuntary. The - - -
7 the question that this case presents to this Court is what
8 is the minimum showing that the People must prove or come
9 forward with when defense counsel raises a due process
10 claim as to his statement.

11 So when you have undisputed facts that my - - -
12 that a defendant is arrested - - -

13 JUDGE FEINMAN: So - - - so your view, then, is
14 that this is not a mixed question of law and fact, and that
15 it's - - - it's really just about the sufficiency of - - -
16 of whether or not they met their burden?

17 MS. POWELL: It's - - - it's a question of what
18 is the minimum showing?

19 JUDGE GARCIA: So what would you rule be? I
20 mean, if he had one meal, would that be enough? Should we
21 have like a one-meal rule?

22 MS. POWELL: No, it's not a question, Your Honor,
23 about the number of meals or - - - the question is - - -

24 JUDGE GARCIA: So how isn't that a mixed question
25 at that point?



1 MS. POWELL: It's not a mixed - - -

2 JUDGE GARCIA: It's because there was no showing?

3 MS. POWELL: There was no showing, Judge. That's
4 the - - - that is the - - -

5 JUDGE GARCIA: So the People have to come forward
6 with what minimal showing?

7 MS. POWELL: When the - - - when the undisputed
8 facts show, again, in the context of a - - -

9 JUDGE GARCIA: No, I know what the undisputed
10 facts - - - you're going to say - - - show. But what would
11 the People have to come forward with? I mean, because it's
12 not going to be only in this case. So what would the
13 People have to come forward and show?

14 MS. POWELL: The standard - - - first we talk - -
15 - we must go - - - at least acknowledge that it's the
16 People's burden of proof beyond a reasonable doubt. And
17 the standard is clear. It is based on a totality of the
18 circumstances. It is not the ones that the People cherry-
19 pick from the - - -

20 JUDGE GARCIA: But this - - - again, that sounds
21 like a mixed question to me, because we have the facts
22 here. You argue - - - the key is voluntariness. So based
23 on the facts that were presented in this hearing, the court
24 found the statements were voluntary.

25 So in order for us to undo that, there has to be



1 an error of law. And if there's an error of law, we have
2 to give guidance as to what would be the minimal showing
3 the People would have to come forward with. And I - - -
4 I'm still having trouble understanding what your rule would
5 be.

6 MS. POWELL: The minimum showing, again, when the
7 - - - and when the undisputed facts show that the police
8 arrest someone and detain that person post-arrest in a
9 precinct, and it's - - - and there's a showing that he is -
10 - - is subject to multiple sessions of interrogation, the
11 People must, at a minimum, show the details of the
12 defendant's confinement which would include - - -

13 JUDGE FEINMAN: So if it had been one
14 interrogation, just the - - - the detectives on this, and -
15 - - would that have been sufficient showing? I mean, I'm
16 not sure why the number of interrogators matters - - -

17 MS. POWELL: It - - - it - - - it - - -

18 JUDGE FEINMAN: - - - or the number of agencies.

19 MS. POWELL: Well, it just so happens that in
20 this case there were three.

21 JUDGE RIVERA: Well, I thought - - - counsel,
22 going back to Jin - - - I thought the point in your briefs
23 was that there's already, based on the evidence at the
24 suppression hearing, something that suggests the conditions
25 that would render any statement involuntary: the multiple



1 interrogations, being held for over twenty-four hours
2 between arrest and arraignment, that it went from night to
3 night, so you're going overnight; in addition to the fact
4 that the People failed - - - so they've got that evidence.
5 They've failed - - -

6 MS. POWELL: That's what we have - - -

7 JUDGE RIVERA: - - - I thought this was your
8 point.

9 MS. POWELL: - - - here as well. Um-hum.

10 JUDGE RIVERA: But then they failed, though, to
11 put forward evidence - - - because the officer either
12 couldn't remember or didn't give the - - - didn't clarify
13 in his statements during the suppression hearing - - -
14 evidence that would tilt the other way, which we have
15 recognized as evidence that would support that indeed the -
16 - - the defendant's will was not overborne under those
17 conditions - - -

18 MS. POWELL: Correct.

19 JUDGE RIVERA: - - - like eating, drinking,
20 sleeping, going to the bathroom. I thought that was the
21 nature of your argument, not - - - not that this is a mixed
22 question and we need to engage in a - - -

23 MS. POWELL: It is not.

24 JUDGE RIVERA: - - - fact analysis.

25 MS. POWELL: Exactly, Your Honor. I am - - -



1 JUDGE FAHEY: Let me ask this. You're - - -
2 you're claiming, in essence, as Judge Rivera outlined, a
3 deprivation of necessities claim, right? You're - - - am I
4 correct in that?

5 MS. POWELL: And - - - and there is no proof that
6 - - -

7 JUDGE FAHEY: No, that's - - -

8 MS. POWELL: - - - he was - - -

9 JUDGE FAHEY: - - - my question is, is your claim
10 that he was deprived of his necessities - - - the basic
11 necessities and therefore it wasn't a voluntary confession
12 - - -

13 MS. POWELL: That's one - - -

14 JUDGE FAHEY: - - - statement?

15 MS. POWELL: - - - that is one prong of the
16 analysis.

17 JUDGE FAHEY: So let's - - - let's - - - I
18 understand that. But that is a prong of your analysis?

19 MS. POWELL: That is a prong of the analysis.

20 JUDGE FAHEY: So doesn't - - - let's just assume
21 we agree on that. So then let's take the next step.
22 Doesn't a deprivation-of-necessities claim, in essence,
23 involve a weighing of factual matters? In other words, you
24 wouldn't have a deprivation-of-necessities claim if the guy
25 made a statement after four hours. It's because you have

1 twenty-five to thirty hours, right?

2 MS. POWELL: Correct.

3 JUDGE FAHEY: So - - - so - - - so the facts
4 matter, then. So then, if the facts matter, don't - - -
5 aren't you obliged in your claim to say under these facts,
6 we were deprived of necessities?

7 MS. POWELL: And, Judge, as the record shows,
8 defense counsel specifically alerted the People that this
9 is my claim. He was held - - -

10 JUDGE FAHEY: In the omnibus motion, you're
11 saying that - - -

12 MS. POWELL: In the omnibus motion - - -

13 JUDGE FAHEY: Right.

14 MS. POWELL: - - - the claim was specifically
15 identified, and counsel pursued a portion of that claim
16 during the hearing.

17 In the context - - -

18 JUDGE FAHEY: It wasn't specific - - - it was - -
19 - it vaguely was mentioned in the omnibus hearing. It
20 wasn't with the specificity that we're arguing it now or in
21 the briefs. But I see what you're saying.

22 MS. POWELL: It was - - - it couldn't be, I don't
23 think, more clear. Counsel said my client was held for
24 more than twenty-six hours, and he was deprived of food,
25 water, and sleep. You - - - you can't be more clear.



1 JUDGE STEIN: I think I understand that argument
2 and the fact that because there's nothing put forward by
3 the People that we - - - there's nothing to weigh, because
4 there's nothing.

5 MS. POWELL: Nothing there.

6 JUDGE STEIN: But my - - - but - - - but that
7 just - - - that does lead me to the question of at what
8 point do they have - - - does that burden come into play?
9 In other words, if - - - if he's there for two hours, then
10 we probably would agree that they don't need to put in any
11 proof of bathroom, food, water, sleep, right? So at what
12 point - - -

13 MS. POWELL: The point - - -

14 JUDGE STEIN: - - - does that shift?

15 MS. POWELL: The point I would suggest, Your
16 Honor, is when the police violate Section 140.20 of the
17 C.P.L. That is the point.

18 JUDGE FEINMAN: But then - - -

19 MS. POWELL: And more - - - I just want - - -

20 JUDGE FEINMAN: - - - again, then you want to
21 turn that into a per se rule.

22 MS. POWELL: Well, it's a - - - it's not a per se
23 rule in terms of, you know - - -

24 JUDGE FEINMAN: And we've already said it's not.

25 MS. POWELL: - - - you don't feed and then - - -



1 pardon?

2 JUDGE FEINMAN: And we've already said it's not.

3 MS. POWELL: It's - - - that the length of time
4 is not a per se rule. It is - - - once the period is
5 exceeded, then the court must engage in a careful inquiry
6 about what occurred. But I have to emphasize that this is
7 not just about the deprivation of food and the People's
8 failure to prove that this man was fed, at the very least.
9 There's also an absence of proof of what occurred in any
10 single one of - - - it could have been just one
11 interrogation, but in this case there were three.

12 And we have no idea what occurred during those
13 interrogations. Was - - - there's no evidence of whether
14 or not he was threatened. There's no evidence - - -
15 because the People failed to come forward with proof - - -
16 as to whether or not any promises were made to him. There
17 was no evidence that - - - whether or not he talked about
18 the Queens case in those other interrogations. There's no
19 evidence, because the People failed to prove it, that he
20 was Mirandized.

21 And in fact, the - - - the testimony at the
22 suppression hearing supports the conclusion that he was not
23 Mirandized, and yet the People failed to satisfy the
24 Chapple Bethea factors.

25 CHIEF JUDGE DIFIORE: Thank you.



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Counsel?

MS. TALCOTT: Good morning, may it please - - -
good afternoon. May it please the court, Nancy Fitzpatrick
Talcott from the Office of Richard A. Brown, the District
Attorney of Queens County.

Initially, defendant did not argue below that
there was a lack of evidence in the failure of the People
to call other officers.

JUDGE RIVERA: Counsel, what - - - what was the
People's burden at that suppression hearing? If - - - if
there's no information, given the number of hours that the
defendant is held in that interrogation room, there's no
information about what Judge Fahey called the necessities,
that we have also identified in prior cases as important -
- -

MS. TALCOTT: Well, the - - -

JUDGE RIVERA: - - - to consider?

MS. TALCOTT: The burden is to prove beyond a
reasonable doubt that defendant's statement was voluntary.
Now, the People are going to put forth evidence, based in
part on what the defendant posits. The defendant never
posited - - -

JUDGE RIVERA: No, no, no. But you put in
evidence that you - - - you had him over twenty-five hours.

MS. TALCOTT: Yes, and that was - - -



1 JUDGE RIVERA: So during the course of twenty - -
2 -

3 MS. TALCOTT: - - - warranted.

4 JUDGE RIVERA: - - - and we have said - - -

5 MS. TALCOTT: Um-hum.

6 JUDGE RIVERA: - - - during the course of that
7 kind of time frame, one would expect that an individual has
8 to go to the bathroom, needs rest, maybe wants to drink
9 something or eat, so that their will is not overborne. Is
10 that not part of your burden?

11 MS. TALCOTT: Yes, and that's just - - -

12 JUDGE RIVERA: Okay, did you put in that
13 information?

14 MS. TALCOTT: I would argue yes.

15 JUDGE RIVERA: Okay, how did you do that?

16 MS. TALCOTT: Okay, well, first - - - initially,
17 whether the food, drink, or bathroom are relevant
18 circumstances, is certainly not indispensable to a finding
19 of voluntariness. And this Court itself has upheld a
20 voluntary statement without - - -

21 JUDGE RIVERA: No, no, no, no, no.

22 MS. TALCOTT: - - - affirmative - - -

23 JUDGE RIVERA: Counsel, counsel - - -

24 JUDGE FEINMAN: That's not what she's asking.

25 JUDGE RIVERA: - - - you can argue that you don't



1 have to do that, but I asked you a direct question related
2 to your earlier response. You said - - - you said the
3 People did put in that kind of evidence at the suppression
4 hearing. I - - - you may now wish to argue they didn't
5 have to. That's fine. That can be your second point.

6 MS. TALCOTT: Okay.

7 JUDGE RIVERA: But first tell me what they did
8 put in?

9 MS. TALCOTT: I think that Det. Roberts made
10 clear he checked on the defendant. It's reasonable to
11 infer - - - and here's where the mixed question of law and
12 fact - - - these inferences that can be drawn from the
13 evidence presented present the mixed question of law and
14 fact. Coupled - - -

15 JUDGE STEIN: It's reasonable to infer what from
16 the fact that - - -

17 MS. TALCOTT: That the defendant didn't - - -
18 that defendant was taken care of, he was checked on - - -

19 JUDGE STEIN: Wait, wait, wait. So you're saying
20 the fact that he was checked on. So in other words, the
21 officer, you know, go - - - opens the door, looks in, you
22 know, he's still alive, he's still breathing, whatever,
23 that's enough from which we can infer that he's being taken
24 care of?

25 MS. TALCOTT: Well, you also had - - - keep in



1 mind, the defendant argued, contrary to their claim, that
2 the People didn't present evidence of how the defendant was
3 treated before Det. Roberts questioned him. In fact, we
4 did submit evidence.

5 The People submitted the Suffolk County decision
6 regarding the Suffolk County interrogation. And in
7 admitting that, the People noted that Det. Roberts didn't
8 know what had occurred and whether he had been Mirandized.
9 And the People noted there was no allegation that Suffolk
10 acted improperly. And in fact, there was never an
11 allegation - - - which is why this present claim is
12 unpreserved - - - that any agency acted improperly or that
13 any of that purported conduct tainted the statement at
14 issue.

15 JUDGE WILSON: Well, there's an allegation in the
16 omnibus motion, right, that specifically says food, sleep,
17 et cetera, were deprived.

18 MS. TALCOTT: Right. I would argue that
19 particular aspect was actually abandoned by the time the
20 hearing came and after, because what they thought - - -

21 JUDGE FAHEY: Well, let's assume - - - let's - -
22 - let's assume it wasn't abandoned, because - - -

23 MS. TALCOTT: Okay.

24 JUDGE FAHEY: - - - what your burden is depends
25 on what their claim is. If they claim you were beaten



1 there's a different burden. If they claim - - - if they
2 claim he wasn't Mirandized, you have a different burden.
3 So here, your burden is necessities. How was that burden
4 met?

5 MS. TALCOTT: By Det. Roberts' statement that he
6 checked on him. And the Suffolk County decision indicates
7 that not only was he Mirandized prior to that statement,
8 but that that officer did, in fact, ask him if he needed a
9 drink or wanted anything.

10 JUDGE FAHEY: I see.

11 MS. TALCOTT: Now, there was absolutely no
12 accusation, as the People pointed out, which was not
13 refuted by the defendant in oral arguments after the
14 hearing, that there was no allegation that Suffolk had
15 acted improperly. In fact, she only submitted the decision
16 because Det. Roberts had indicated: I wasn't there, I
17 don't know if he was Mirandized.

18 Interestingly, the court - - -

19 JUDGE RIVERA: What about the rest of the time,
20 during the other two agency interrogations? What's the - -
21 - what's the information about that?

22 MS. TALCOTT: There - - - there wasn't any.

23 JUDGE RIVERA: So we don't know what else
24 happened?

25 MS. TALCOTT: No, but again - - -



1 JUDGE RIVERA: Do we know how long the Suffolk
2 official interrogated the defendant?

3 MS. TALCOTT: The Suffolk statement - - -

4 JUDGE RIVERA: Um-hum.

5 MS. TALCOTT: - - - indicates 7:30. Det. Roberts
6 went in at 8:30. So at most, an hour.

7 JUDGE RIVERA: So the last one before - - -
8 before the defendant - - -

9 MS. TALCOTT: Yes.

10 JUDGE RIVERA: - - - makes the inculpatory
11 statement?

12 MS. TALCOTT: Yes. And at the very least, also,
13 had defendant raised this specific claim in the post-
14 hearing, the People could have remedied it and sought to
15 reopen the hearing. A decision hadn't been rendered. The
16 court could have exercised its discretion.

17 JUDGE RIVERA: I'm sorry, what's the specific
18 claim? I'm sorry, what?

19 MS. TALCOTT: That something un - - - untoward or
20 deceitful happened during these earlier interrogations,
21 that then tainted - - -

22 JUDGE RIVERA: But you were aware - - -

23 MS. TALCOTT: - - - the statement.

24 JUDGE RIVERA: - - - about the - - - as Judge
25 Fahey said, the issue related to the food, drink, eat, rest

1 - - -

2 MS. TALCOTT: Yes, that - - -

3 JUDGE RIVERA: - - - and you didn't put in any
4 information then, right?

5 MS. TALCOTT: - - - that was - - - that was
6 argued summarily in the motion.

7 JUDGE RIVERA: Right.

8 MS. TALCOTT: And again - - -

9 JUDGE RIVERA: But the People didn't submit any
10 evidence on that - - -

11 MS. TALCOTT: No.

12 JUDGE RIVERA: - - - other than what you have
13 said that - - -

14 MS. TALCOTT: Right.

15 JUDGE RIVERA: - - - he goes and checks on him.
16 And - - -

17 MS. TALCOTT: Right.

18 JUDGE RIVERA: - - - we should infer from that?

19 MS. TALCOTT: And - - - and the Suffolk decision
20 makes note that that officer actually did testify that he
21 checked if he wanted drink. And I believe the defendant
22 said no.

23 JUDGE WILSON: Could you spend - - -

24 JUDGE FEINMAN: So - - -

25 JUDGE WILSON: - - - I'm sorry.



1 JUDGE FEINMAN: - - - let's say we are of the
2 view that there aren't sufficient proofs here of the, you
3 know, provision of the necessities or - - - what we're
4 calling it. What's your fallback argument in terms of the
5 totality of the circumstances? What are the other
6 circumstances that - - - that would tend to show that this
7 was voluntary?

8 MS. TALCOTT: Okay. And that's precisely what
9 the Appellate Division found, that the defendant - - - that
10 Det. Roberts' failure to make note of what happened during
11 the checks was not fatal. And again, there's record proof
12 in this mixed question of law and fact that the other
13 circumstances establish the voluntariness of his statement.

14 JUDGE FEINMAN: But what are those other
15 circumstances? That's what I'm asking you.

16 MS. TALCOTT: Okay, one - - -

17 JUDGE FEINMAN: We're talking about totality of
18 the circumstances - - -

19 MS. TALCOTT: Yes.

20 JUDGE FEINMAN: - - - deprivation of - - -

21 MS. TALCOTT: Right.

22 JUDGE FEINMAN: - - - necessities is one. Let's
23 talk about the others.

24 MS. TALCOTT: So we're going to look at both the
25 characteristics of the accused and the details of the



1 interrogation. The details of the interrogation. The
2 delay was not unnecessary. Even unnecessary delay, as in
3 Lin, the statement can still be found voluntary.

4 But again, under 140.20, the People have to,
5 without unnecessary delay - - -

6 JUDGE STEIN: Yeah, but that doesn't - - - that
7 doesn't go to voluntariness. That goes to the reasons for
8 the delay.

9 MS. TALCOTT: Well, voluntariness. You have an
10 experienced defendant here, who's unlikely awestruck or
11 intimidated by his custody. He's unlikely to be swayed by
12 ordinary interrogation techniques. He's not subject to
13 continuous interrogation between arrest and arraignment.
14 In fact - - -

15 JUDGE STEIN: How do we know that?

16 MS. TALCOTT: Because the first eighteen hours,
17 they're looking - - - you know, they have to wait for BMW
18 to open to determine where the key fobs are linked.
19 They're putting together a photo array. There's just no
20 indication that he was. And the agent - - - the other
21 agencies don't come in until around 2 o'clock. So from 7
22 o'clock when he's arrested, until 2 o'clock. There's
23 absolutely no indication he was questioned.

24 I mean, Det. Roberts went and checked on him, but
25 he wasn't even there most of the time.



1 He's not physically restrained. Det. Roberts
2 testified to that. He made the statement after - - -

3 JUDGE FEINMAN: The Suffolk decision, does that
4 suggest otherwise, perhaps?

5 MS. TALCOTT: Suggest?

6 JUDGE FEINMAN: That maybe he was handcuffed?

7 MS. TALCOTT: Well, Det. Roberts says while he
8 was waiting he wasn't handcuffed. The Suffolk decision
9 does say - - - now keep in mind, those officers testified
10 they removed - - -

11 JUDGE FEINMAN: I mean, my point is, you can't
12 use the Suffolk decision when it helps you and then ignore
13 it when it hurts you.

14 MS. TALCOTT: No, but I - - - I think it's - - -
15 when Det. Roberts was checking on him and while he was
16 waiting, I don't think he was restrained. When officers
17 are in there, unarmed, they had checked their weapons at
18 Suffolk County, I think - - - I think he was cuffed there
19 for safety reasons. I think while he's waiting, he's not
20 handcuffed at all times, and that's what - - -

21 JUDGE STEIN: When - - -

22 MS. TALCOTT: - - - Det. Roberts was - - -

23 JUDGE STEIN: - - - wouldn't it be - - -

24 MS. TALCOTT: - - - indicating.

25 JUDGE STEIN: - - - wouldn't it help if the



1 People affirmatively indicated what his - - - the
2 circumstances of his confinement were?

3 MS. TALCOTT: Well, when Det. Roberts checked on
4 him and questioned him, he wasn't restrained.

5 JUDGE STEIN: In that moment?

6 MS. TALCOTT: At - - - right.

7 JUDGE STEIN: Right.

8 MS. TALCOTT: Or he said what - - -

9 JUDGE STEIN: How about the rest of the other
10 thirty hours?

11 MS. TALCOTT: - - - he actually said while he was
12 waiting. Well, in Suffolk, I think they did handcuff him
13 because they had removed their guns - - -

14 JUDGE STEIN: So - - - okay.

15 MS. TALCOTT: - - - apparently for safety
16 reasons.

17 JUDGE STEIN: But in other cases - - -

18 MS. TALCOTT: Yes.

19 JUDGE STEIN: - - - that - - - that we've
20 actually reviewed, there has been very detailed information
21 submitted by the People. These were the conditions in
22 which we - - - we held him. And they - - - they laid it
23 out.

24 And then, if we look at it, we can - - - some of
25 us might think that's okay and some of us might think it's



1 not, and that's clearly a mixed question. Okay?

2 Here we're asked - - - we're being asked to make
3 an awful lot of inferences.

4 MS. TALCOTT: Well, we know that he wasn't
5 questioned for the first eighteen hours. There was no
6 issue as to the propriety of the other - - -

7 JUDGE STEIN: Okay, but - - -

8 MS. TALCOTT: - - - interrogation.

9 JUDGE STEIN: - - - and then that gets - - -

10 MS. TALCOTT: But then - - -

11 JUDGE STEIN: - - - gets us back to the other
12 part, is we don't know what was going on with him for those
13 eighteen hours. We have no idea where he was, what he had
14 available to him. That's - - - that's eighteen hours.
15 That's - - - that's a pretty long time. We don't know when
16 the last time he ate before they brought him in was or the
17 last time he slept or the last time he went to the
18 bathroom.

19 MS. TALCOTT: No. And again - - -

20 JUDGE STEIN: So - - -

21 MS. TALCOTT: - - - I mean, that's just one
22 factor to consider in the totality - - -

23 CHIEF JUDGE DIFIORE: Counsel - - -

24 JUDGE FAHEY: The problem - - -

25 CHIEF JUDGE DIFIORE: - - - counsel - - -



1 JUDGE FAHEY: Go ahead, Judge.

2 CHIEF JUDGE DIFIORE: - - - let's assume for a
3 moment that the statement should have been suppressed.
4 What's your argument as to whether that would be harmless
5 error?

6 MS. TALCOTT: Oh, it was harmless. One, it was
7 largely exculpatory, which also weighs in on the
8 voluntariness. This wasn't a statement that the police put
9 the words in his mouth.

10 You have an incredibly strong - - - as the
11 Appellate Division noted - - - identification by the
12 victim. He had ample - - -

13 JUDGE FAHEY: Well, let me stop you there. This
14 is the identification - - - we have a number of cases here
15 - - - where he has a mask on and you can see his eyes,
16 right?

17 MS. TALCOTT: You could see more than his eyes.
18 He - - -

19 JUDGE FAHEY: Okay.

20 MS. TALCOTT: - - - specifically said the mask -
21 - - mask - - - it's not even a mask - - -

22 JUDGE FAHEY: Um-hum.

23 MS. TALCOTT: - - - the face covering went from
24 above his eyebrows - - -

25 JUDGE FAHEY: Okay.



1 MS. TALCOTT: - - - below his nostrils. So he's
2 actually - - -

3 JUDGE FAHEY: So it was like a ski - - -

4 MS. TALCOTT: - - - able to see - - -

5 JUDGE FAHEY: - - - so it was - - - let me stop
6 you. It's like a ski mask, right?

7 MS. TALCOTT: I would say less, but I don't ski,
8 so - - -

9 JUDGE FAHEY: All right, so the eyes were
10 visible, but the rest - - - the rest of the face wasn't.
11 That's the identification. And the victim was - - - you
12 had the victim, the wife, and two other witnesses; is that
13 right?

14 MS. TALCOTT: Yeah, but could I make one
15 correction?

16 JUDGE FAHEY: Sure.

17 MS. TALCOTT: His eyebrows, below his - - - his
18 eyebrows, nose, cheekbones, and skin tone were visible.

19 JUDGE FAHEY: I see.

20 MS. TALCOTT: Not just his eyes. It went from
21 above here to here. So you could see all of this.

22 JUDGE FAHEY: And the teeth - - -

23 MS. TALCOTT: And keep in mind, he's a retired
24 police officer, perhaps trained more in observations and
25 taking note of descriptions - - -

1 JUDGE FAHEY: You're talking about the victim?

2 MS. TALCOTT: Yes.

3 JUDGE FAHEY: Yes. I understand that.

4 MS. TALCOTT: He gave - - -

5 JUDGE FAHEY: I understand - - - I understand
6 what the identification information is. But it's not - - -
7 it's not a clear face. That's the point of the identifi -
8 - - the weakness in the identification, as you will admit,
9 is it's not a clear face.

10 The other thing is, is they got two fobs that the
11 guy had, right, not one?

12 MS. TALCOTT: Right.

13 JUDGE FAHEY: Two BMW fobs. One of them was this
14 guy's car - - - was the victim's car.

15 MS. TALCOTT: Yes.

16 JUDGE FAHEY: The other one wasn't. But of
17 course, someone could have those fobs and be guilty of the
18 robbery and not be guilty of the attempted murder.

19 MS. TALCOTT: Right. Except that the victim
20 identified him as the shooter.

21 JUDGE FAHEY: Right.

22 MS. TALCOTT: And - - -

23 JUDGE FEINMAN: I'm sorry, was the gun ultimately
24 found?

25 MS. TALCOTT: The gun? Well, the piece of the



1 gun was ultimately found in the informant's house, who was
2 a friend of the defendant.

3 JUDGE FAHEY: It goes to the harmless error.

4 MS. TALCOTT: Right.

5 JUDGE FEINMAN: Where did he get it, though?
6 Didn't he get it from the - - -

7 MS. TALCOTT: He got it from the defendant's
8 wife.

9 JUDGE FEINMAN: The defendant's wife, okay.

10 MS. TALCOTT: The defendant's wife had the - - -

11 JUDGE RIVERA: Well, that's his testimony.

12 MS. TALCOTT: Yes.

13 JUDGE WILSON: Could - - - could I ask you to
14 address the issue in the pro se brief about the late
15 production of the Rosario material and the identity of
16 Nicholls, the informant?

17 MS. TALCOTT: Yes. In light of the threats and
18 the evidence presented before the Court - - -

19 JUDGE WILSON: But why wasn't that unfairly
20 prejudicial to - - - for counsel to learn Father's Day, in
21 the afternoon, I guess, to get this Rosario material, and
22 learn the Friday before about the existence of this
23 witness, after having voir dired the jury and not asked the
24 typical questions people ask about inform - - - informants?

25 MS. TALCOTT: No, under C.P.L. 240.50, the court



1 properly issued the order. And as we detail in our brief
2 with the actual days and weeks, defendant received all the
3 discovery material in ample time to use it effectively.
4 And the record reflects that he did.

5 JUDGE RIVERA: Right, no, no. Putting aside that
6 the protective order is not at issue in that way, yes,
7 let's assume the protective order had some basis and so
8 forth.

9 MS. TALCOTT: Um-hum.

10 JUDGE RIVERA: But once counsel's made aware of
11 this witness and now - - - as Judge Wilson's pointed out -
12 - - didn't have an opportunity to ask questions of the
13 jurors that counsel might have if they had been aware of
14 this witness, in addition to that, gets no extra time? Did
15 counsel get any extra time to prepare as material was being
16 turned over about this witness?

17 MS. TALCOTT: Well, I don't - - - I don't recall
18 that he asked for extra time once it was turned over. And
19 it was provided to defendant in time to investigate and use
20 at trial. It was ten days before opening, a week before -
21 - - ten days before cross, a week before Nicholls even
22 testified.

23 JUDGE RIVERA: When is the last time - - -

24 MS. TALCOTT: He was informed - - -

25 JUDGE RIVERA: - - - when is the last time that



1 the People turned over materials about that witness to
2 defense counsel? Was it ten days before?

3 MS. TALCOTT: I think three days before, the
4 prosecutor the turned over the federal plea.

5 JUDGE RIVERA: Three days before direct? Three
6 days before what?

7 MS. TALCOTT: Three days before cross.

8 JUDGE RIVERA: Thank you.

9 JUDGE WILSON: And wasn't there material being
10 turned over during the direct of the witness?

11 MS. TALCOTT: I think there was material turned
12 over before and during.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 Counsel?

15 MS. POWELL: And just a couple of things, Your
16 Honor. My adversary made reference to the Suffolk County
17 decision. That decision was rejected by the suppression
18 court as evidence, and for good reason. The - - - it - - -
19 I - - - the decision itself is made part of the appendix,
20 and the court - - - as the court noted and also as counsel
21 noted, there was no reference in the body of the decision
22 as to when that Suffolk County decision - - - statement was
23 obtained by Suffolk County.

24 So we cannot draw the conclusion or inference
25 that the - - - Suffolk County, although they may have



1 interrogated him prior to Det. Roberts' interrogation, that
2 in fact, the decision that this - - - this - - - that the
3 People turned over during the argument, it in fact makes -
4 - - is - - - is in reference to a statement that was
5 obtained before Det. Roberts actually interrogated Mr.
6 Johnson.

7 JUDGE RIVERA: So you're saying that's a
8 determination about the Suffolk interrogation. It has
9 nothing to do with whether or not the statement to Roberts
10 is voluntary. Is that what you're trying to say?

11 MS. POWELL: Cor - - -

12 JUDGE RIVERA: In addition to it's not in the
13 record because the judge didn't accept it?

14 MS. POWELL: I - - - it's - - - well, the court
15 rejected it as substantive - - - substantive evidence as to
16 what - - - as to whether or not the Suffolk County police
17 officers actually obtained a statement from my guy prior to
18 Det. Roberts. There was an encounter prior to Det.
19 Roberts.

20 JUDGE RIVERA: Um-hum.

21 MS. POWELL: But this Suffolk County decision may
22 very well be in reference to a statement that they obtained
23 after Det. Roberts. So even though it makes reference to,
24 you know, whether or not he was fed or whatever, that could
25 very well be in reference to a time period after Det.



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Roberts interrogated my client.

CHIEF JUDGE DIFIORE: Thank you, counsel.
(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Michael Johnson, No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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