

People v Rackover

2018 NY Slip Op 34581(U)

April 23, 2018

Supreme Court, New York County

Docket Number: Ind. No. 1616/2017

Judge: James M. Burke

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 81

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THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DECISION AND ORDER

JAMES RACKOVER, LAWRENCE DILIONE AND
MAX GEMMA,

Ind. No. 1616/2017

Defendants.

----- X
JAMES M. BURKE, J.:

Defendants James Rackover and Lawrence Dilione are charged by indictment with Murder in the Second Degree and Concealment of a Corpse, and are also charged with defendant Max Gemma, with Hindering Prosecution in the First Degree and Tampering with Physical Evidence. All charges relate to the investigation and murder of Joseph Comunale.

The People have served notice to use certain statements of the defendants on their direct case which they contend were either voluntarily made, not the product of custodial interrogation, or not in violation of a defendant's right to counsel. The People have also indicated their intention to use, not on their direct case, certain statements they contend were either volunteered or spontaneously made by the defendants. The defendants oppose the use of the statements and move to suppress on the grounds that they were the product of custodial interrogation or in violation of right to counsel.

Dilione specifically seeks to suppress the statement wherein he told the police where Joseph Comunale's body could be found, and also seeks to suppress the body itself and any evidence flowing from it as the "fruit of the poisonous tree," contending that he made that statement after his right to counsel had attached and after he told the police

that he did not wish to answer questions without his attorney present.

The People oppose suppression of that statement and the evidence flowing from it, but should the Court find that Dilione's indelible right to counsel had attached prior to making such statement, urge the Court to apply the "emergency exception" or the "inevitable discovery doctrine" and find Dilione's statement, and evidence flowing from it including Joey Comunale's body, as admissible evidence.

A Huntley hearing was held before this Court from March 5, 2018 through March 13, 2018, during which the People presented nine witnesses and defendant Dilione presented seven witnesses, including his own testimony. All parties filed written submissions. The statements are numbered as provided by the People in their March 13, 2016, memorandum.¹

The defendants also requested a Rodriguez hearing regarding the identification of the defendants by certain witnesses. On March 9, 2018, after oral arguments, this Court found that all the identifications made by these witnesses were confirmatory because the People established that the witnesses and the defendants were familiar with one another and that, as a matter of law, there was little or no risk that police suggestions could have led to a misidentification. (See March 9, 2018, Tr: 686). The Court found that based on its review of the Grand Jury testimony, no hearing was required and that these witnesses, if they testified at trial, would be permitted to make in-court identifications. See People v. Tas, 51 NY2d 915 (1980).

All three defendants have requested separate trials from one another. The People concede that the trials of all three defendants must be held separately.

¹Numbers in parentheses refer to the hearing transcript page.

The following constitutes the Findings of Facts and Conclusions of Law

INTRODUCTION

This case results from a highly-publicized incident involving the murder of Joseph Comunale, known as Joey.

As is typical of people his age, on the evening of Saturday, November 12, 2016, 26-year old Joey and his friends traveled from Connecticut to New York City to visit clubs and enjoy the excitement of a Saturday night in the city.

Joey and his friends partied at different clubs, including the "Gilded Lily," into the early morning hours of Sunday, November 13, 2016, and while at that club met defendants Lawrence Dilione and Max Gemma for the first time. Dilione and Gemma suggested that Joey, and three women who were at the club but unknown to any of these men, continue their partying at their friend's apartment, Apartment 4C at The Grand Sutton apartment building located at 418 East 59th Street. Dilione called his friend and the group continued their partying at the apartment of the defendant James Rackover.

The Grand Sutton was the last place that Joey Comunale was seen alive. On Wednesday, November 16, 2016, at about 1:30 am, less than 42 hours after Joey had been reported missing to the New York City Police Department, his burned and stabbed body was found in a shallow grave in a field in Oceanport, New Jersey.

FINDINGS OF FACT

The People's Witnesses

Series of events after Saturday, November 12, 2016

Sunday, November 13, 2016

On the late afternoon of Sunday, November 13, 2016, Joey's father Pat Comunale ("Pat"), who also lived in Connecticut, became concerned because Joey had not returned from the city from the previous night and because numerous calls to Joey's phone went to voicemail with no return call. Joey's phone was eventually answered by his friend Steven, and Pat learned that Steven had borrowed Joey's phone while in the city but he had not been able to get it back to Joey before Steven returned to Connecticut early Sunday morning. Steven brought Joey's phone to Pat and through numerous conversations with Steven and other contacts, Pat learned that the last place that Joey had been seen was at Rackover's apartment with Dilione and other people. Pat was able to obtain the cell phone numbers of these two men, and with this information, Pat had hopes that his worst fears would be allayed.

Pat called his brother, Sergeant Joseph Comunale ("Joseph"), who was not only Joey's uncle but a sergeant with the Bedford Police Department in New York, and who had 23 years of experience in various police departments. Pat asked Joseph what steps he should take and Joseph told him to contact the local Stamford Police Department in Connecticut to report his son missing.

Investigation by Sergeant Sean McGowan, Stamford, CT Police Department

On that Sunday evening, November 13, Pat went to the Stamford and met Sergeant Sean McGowan, a 19-year member of the Stamford Police Department, to possibly file a missing person's report. Pat gave Sergeant McGowan all the information that he had, including the names and cell phone numbers of Dilione and Rackover. Sergeant McGowan called Dilione at approximately 6:00 pm, said he was investigating a missing person named Joey, and asked if Dilione had any information about Joey, to which he responded:

"We met at a club called the Gilded Lily and at the end of the evening we all went back to an apartment with three girls we had met at the bar. We partied through the night. (34). At about 7:30 in the morning, the girls wanted to leave and I left the apartment with them and Joey. We walked downstairs and the girls got into an Uber and they left to go home to New Jersey. Joey left and I went back up to the apartment myself. I assumed Joey was going home, he just walked off." (33-35)." (Statement #1, Dilione)

Dilione told Sergeant McGowan that the apartment address was 418 East 59th Street and it belonged to James Rackover.

Sergeant McGowan next called Rackover at about 8:15 pm, said he was looking for a possible missing person named Joey who had been at Rackover's apartment the night before, and did Rackover know anything about it, to which he replied:

"I didn't bring these people to my apartment, I was home already. Larry brought three girls and Joey, they stayed up all night and partied. The girls and Joey left in the morning and Larry and Joey and the three girls walked downstairs. Larry returned to

the apartment alone. I assume Joey went home and Larry returned alone.” (38-39).

(Statement #2, Rackover)

Sergeant McGowan checked New York City hospitals near 59th Street to see if Joey had been admitted, and contacted the 17th Precinct to coordinate the efforts on the missing person’s report, since the apartment was, at that point, the last place that Joey had apparently been seen.

Investigation by Sergeant Joseph Comunale

On that same Sunday evening, November 13, at about 10:10 pm, Joseph Comunale called Rackover’s cell phone, which was answered by him. Joseph identified himself as a police officer and Joey’s uncle, and asked Rackover if he knew Joey where was, to which Rackover responded:

“I never met or saw Joey, and I was not with Larry or Joey that night but that I was out watching a UFC fight. I went home and went right to bed. I don’t know who came in or out of my apartment and he never met Joey. The neighborhood was safe and I don’t know if there are cameras in the building. I go in and out and I don’t look for cameras. I live in apartment 4C. My father has lived in the building for a long time.”

(61-62)(70-72). (Statement #3, Rackover)

Joseph asked Rackover if he could contact him or come talk to him. Rackover said:

“I work from 8-5. I’m not home now but will be home in my apartment after five.” (63).

Joseph's next call that Sunday evening was to Dilione at 10:20 pm. Joseph again identified himself as both a detective and Joey's uncle and asked Dilione if he knew anything about Joey. Dilione stated:

"We were out with Joey at a club, we left the club at about 3:30 am and they took an Uber to James' apartment. Everything was fine there, we were getting along and having a good time, there were no problems. We were all buzzed, including Joey, but no one was out of control. At about 7:00 am I called an Uber from my account, me and Joey walked the girls to the car and they got in the car to go back to New Jersey. Joey said he was going to buy cigarettes and never saw him again. I went back inside the apartment and went to sleep. I woke up in the afternoon and went back to New Jersey." (63-64).

(Statement #4, Dilione)

Joseph asked Dilione for his New Jersey address which Dilione provided, and also asked Dilione if he could call him again to which Dilione replied he could.

Monday, November 14, 2016

Investigation by Detective Yeoman Castro, 17th Precinct, Detective Squad

On Monday morning, November 14, at about 9:00 am, Pat and Joseph Comunale went to the 17th Precinct in New York City, and met Detective Castro, a 12-year member of the New York City Police Department in order to file a missing person's report. (92). Detective Castro went over the information regarding Joey's activities from Saturday night into Sunday morning, including the telephone numbers of Rackover and Dilione, and the address of The Grand Sutton, the last place that Joey had been seen.

At about 10:06 am, while still at the precinct, Detective Castro made his first call to

Dilione, and told him that he was investigating the missing person's report of Joey Comunale and believed he might have been with Dilione at an apartment in the city.

Dilione said:

"I don't know where he is. I met him at a club and I invited him and three girls back for an after party at James' apartment. We were hanging out, we did drugs and alcohol. The next thing I remember I walked the girls down with Joey, I'm not sure if Joey got in the car with the girls or he just walked away on his own. Then I went back up to the apartment." (96-97). **(Statement #5, Dilione)**

Detective Castro asked if he could call him again and Dilione said "yes".

Detective Castro, Pat and Joseph Comunale left the precinct and went to The Grand Sutton, arriving at about 11:00 am, to see if there were any building security videos. Knowing that Joey had last used his credit card at 4:30 am that Sunday morning, November 13, they saw on the video shortly after his credit card use that Joey came into the building with two men.

At about 12:28 pm, Detective Castro made his first call to Rackover, identifying himself and telling Rackover that someone named Joey had been at the apartment and did he know where he might be. Rackover replied:

"I don't know where he is, he was a stranger. I was laying in bed with a girl and about 5:00 am. Max and Larry came to my apartment with three girls and two guys. I don't know who they were. We hung out and then Joey's friend left first and Larry and Joey walked the three girls downstairs. Larry came up by himself and I went to bed." (106-107). **(Statement #6, Rackover)**

Detective Castro asked if he could call him again with follow-up questions and Rackover said "no problem." Detective Castro continued to review the security video and he saw a man in an elevator and hallway, wearing sweatpants but no shirt, shoes or socks, and who had large tattoo on the back of the neck. Building staff told Detective Castro that this was Rackover.

At about 12:58 pm, Detective Castro made another call to Rackover and asked if he had tattoos on his shoulders, to which Rackover replied:

"Yes, I have two wings that go from my neck to my back and have tattoos on my arms. I remember checking on my father because he likes to party, but he doesn't party with me. I just went to check on him. Joey was a stranger and I don't know where he went." (108-109). **(Statement #7, Rackover)**

Detective Castro asked if he could call back with follow up questions to which Rackover again replied "no problem."

As Detective Castro, Pat and Joseph reviewed the security video on Monday afternoon in the lobby of The Grand Sutton, they saw that at about 7:30 am on Sunday morning, November 13, Dilione and Joey were walking back together into the building. Upon seeing this, Detective Castro realized that Dilione's statement, that he had returned to the apartment alone and that Joey had either gone off with the girls or had gone off by himself, was contradicted by the video. Detective Castro called Dilione back at about 1:40 pm and asked him to go over what happened the night before. Dilione basically repeated the same account he had given to Det. Castro earlier (See Statement #5, Dilione). Detective Castro pressed him and said, "Are you sure, because I'm watching

the building video and you're walking back in with Joey." Dilione, according to Detective Castro, became "flustered," and said:

"I can't remember because I was drunk and on drugs. It was a crazy night."
(112-113). **(Statement #8, Dilione)**

Dilione then abruptly hung up the phone.

At 2:28 pm, while still in the lobby of The Grand Sutton, Detective Castro called defendant Gemma, whose name and number he had previously gotten from Dilione, identified himself, asked Gemma about the party and where Joey might have gone, and Gemma stated:

"I came back from the Gilded Lily and went to the apartment with Joey, and a couple of girls. I passed out on the couch. I recall getting up and Larry left with Joey and the girls, and Larry came back up by himself and went to lay in bed with James. I remember getting up around 9 in the morning, and everyone was gone. I changed into a pink t-shirt and left I didn't wait for Larry, I just wanted to go home, so I went home. I don't know where Joey went." (114-116). **(Statement #9, Gemma)**

Detective Castro also now realized that Gemma's statement that Dilione had come back to the apartment by himself was contradicted by what appeared on the building video, which showed Joey returning with Dilione, just as the video had contradicted Dilione's statement. (208-209).

Detective Castro continued to view the video and observed Rackover and an unknown person, who was wearing a grey hooded sweatshirt, leaving the building on Sunday evening, November 13. This prompted Detective Castro, at about 4:40 pm on Monday, to make another call to Rackover, asking him who he was leaving the building

with. Rackover replied:

"It's none of your fucking business who I'm leaving with. I come and go as I please. It was Larry [Dilione]. If you have further questions, you contact my lawyer."

(117). **(Statement #10, Rackover)**

Rackover abruptly ended the call but about 30 seconds to a minute later, called Detective Castro back apologizing and said in substance:

"I don't know why you keep on asking me questions, I already told you, I don't know who he is, he's a stranger. I don't know where he went." (118). **(Statement #11,**

Rackover)

Detective Castro remained in the lobby of The Grand Sutton and contacted the TARU division of the police department for assistance in retrieving the video from the building's system.

At about 5:30 pm that Monday, November 14, while Detective Castro was in the lobby reviewing the videos, Rackover came into The Grand Sutton and Detective Castro heard him say:

"Good luck getting the video." (120). **(Statement #12, Rackover)**

About a half an hour later, at 6:00 pm, Rackover walked through the lobby again, this time coming from inside the building, and, without being asked a question, said to Detective Castro:

"Good thing my girlfriend will say that I never left the apartment." (121).

(Statement #13, Rackover)

Detective Castro asked for the girlfriend's name and telephone number, to which Rackover responded, "Larissa," and then Rackover left the building.

At about 7:00 pm that same night, Rackover entered the building again. As he passed the lobby desk, without being asked a question by any law enforcement personnel, Rackover stated:

"Good luck getting two copies."(123). **(Statement #14, Rackover)**

Detective Castro said that Rackover laughed and walked towards the elevators.

At about 9:30 pm, trash bags from the building that had been left in front of The Grand Sutton for garbage pick up were brought back into the building by detectives and searched one at a time. Found inside several bags was a comforter package with Rackover's name and address on it, bloody towels, bloody clothing, and Joey's drivers license.

Two police dogs from the NYPD Canine Unit were separately brought to the building sometime between Monday evening, November 14 and Tuesday morning, November 15. The first dog, named Angel, was given some of Joey's clothes from his home in Connecticut to attempt to detect human scent. Angel first went toward the front of the building and to the street, and then returned to the building and to the elevator, eventually following Joey's scent to the door of Apartment 4C.

A few hours later, a dog named Timoshenko, who was capable of detecting blood and human remains, was brought to the building. Timoshenko detected the scent of blood or human remains at a Mercedes in the garage, which had at that point been identified as having been driven by Rackover on Sunday evening. Timoshenko then detected blood at the door of Apartment 4C, the luggage cart, and the garbage area.

Detective Castro remained at The Grand Sutton until Tuesday morning, November 15, for over twenty hours, to continue the missing person's investigation.

During this time, other members of law enforcement were notified and assigned tasks in an attempt to locate Joey, either at The Grand Sutton or at other locations.

Monday, November 14 -- Tuesday, November 15 - Wednesday, November 16, 2016

Detective Robert Hahn, Manhattan South Homicide Squad

Detective Hahn, a 24-year member of the New York City Police Department, arrived at work on Monday, November 14, 2016, and was sent to The Grand Sutton. Detective Hahn saw Rackover for the first time on the fourth floor and without Detective Hahn saying anything, Rackover said:

"Are you guys still here?" (421).

Detective Hahn did not respond but proceeded to the I-Park garage next to The Grand Sutton, to obtain and view a video of a black Mercedes with license plate NY DRU 7080, which was registered to Jeffrey Rackover, the father of defendant Rackover.

Detective Hahn located the I-Park garage video of the car and also accessed the License Plate Reader (LPR) database which tracked the movements of the car by photographing the license plate. The video from the lobby and the garage, and the LPR, provided images and created a time line of some of the car's movements between Sunday night and Monday morning: at approximately 8:10 pm Sunday evening, November 13, Rackover loaded duffel bags onto a luggage cart and into the black Mercedes. The Mercedes left the garage at 9:45 pm and went on the FDR Drive South to Liberty and West Street and entered the Holland Tunnel outbound to New Jersey. Several hours later, on Monday, November 14, at 2:59 am, the Mercedes entered the Holland Tunnel from New Jersey coming inbound to Manhattan, went on the FDR drive northbound at

3:09 am, and returned to the garage at The Grand Sutton at 3:15 am.

Detective Jeffrey Ford, Manhattan South Detective Squad

Detective Ford, a 23-year member of the NYPD, arrived at work on Tuesday, November 15, 2016, at 9:00 am and was assigned to assist in a missing person's case involving Joey Comunale. Detective Ford first went to The Grand Sutton and learned some details about the case, including that bloody clothes had been found in the trash, but he did not know whose blood was on them. After getting a photograph of Max Gemma, he and his partner, Sergeant Wall, went to 255 Warren Street, Jersey City, to interview Gemma. They knocked on the door of Apartment 1603, which they believed belonged to defendant Gemma, but after getting no response, they waited in the lobby.

At about 10:30 pm, Gordon Gemma ("Mr. Gemma"), defendant Gemma's father, approached Detective Ford and identified himself, and asked the detective if he was there to speak to Larry Dilione. Detective Ford said he did not know who Larry Dilione was but was there to speak to Max Gemma about a missing person. Mr. Gemma said that Max was his son and was asleep in Mr. Gemma's apartment, a different apartment than the one belonging to defendant Gemma.

Mr. Gemma gave the Detective his business card, said he was a real estate lawyer (350) and said to Detective Ford, "all this over a missing?" and then Mr. Gemma said either "I was representing Larry Dilione but I guess I have to represent my son now," (348) or "I was representing Larry but I can't because I have to look out for my son." (393). Mr. Gemma proceeded to call Larry Dilione at about 10:56 pm and Detective Ford overheard Mr. Gemma say, "Larry, there are two detectives here that want to speak

to Max. I have a conflict of interest, I cannot represent you. Do not talk to anybody, do not go to any police station until I find you a lawyer.” (349). Detective Ford could not hear the other side of that phone conversation.

Detective Ford told Mr. Gemma that he wanted to take Gemma back to New York to speak to him but Mr. Gemma said he would not allow that as his lawyer, but he would allow Detective Ford to speak to him at the apartment with Mr. Gemma present and “controlling the interview.” (350). Mr. Gemma, Max Gemma, and the Detectives went to Mr. Gemma’s apartment, and Gemma stated:

“I went to Manhattan with my friend Larry for a party at a club, left to go to another club and met three females and two males in front and started talking. I asked if they wanted to go to a friend’s apartment, and Larry made a phone call to his friend James. At the apartment, we were drinking and playing drinking games. It was late and I began to get tired, I was uncomfortable in the clothes I was wearing and borrowed some sweat pants and a shirt, and a blanket, and laid on the couch and fell asleep for about an hour and a half or two. When I woke up, the apartment was dark, I didn’t see anyone, and grabbed my wallet and keys and left the apartment and went home on the Path train to Jersey City. I washed the clothes, gave them back to Larry to give to James. I don’t know the names of the girls, and didn’t know Joey’s name at the time of the party. I got a phone call from Detective Castro, that is how I knew of Joey’s name. I saw nothing out of the ordinary when I left the apartment. I didn’t see Larry but spoke to him twice about a furniture delivery.” (352-356). (Statement #15, Gemma)

At about 11:45 pm, when Detective Ford said to defendant Gemma that he believed something bad had happened in the apartment, Mr. Gemma ended the 45

minute interview. However, before Detective Ford left, he saw Mr. Gemma place another call, and although Detective Ford was not sure who he had called or whether there had been a conversation, Mr. Gemma said after the call, "I hope Larry does not go to the police, he can't shut his mouth." (357). The detectives then left Jersey City.

"I need to talk, I haven't slept in days." (370)

Detective Raymond Reuther (retired), Manhattan South Homicide Squad

Detective Reuther, who at the time had been a member of the NYPD for 25 years, arrived at work on Tuesday, November 15, and was asked to assist in a missing person's case. Detective Reuther did not know a lot of details at that point, but his first assignment was to use the LPR data tracking system to track the route of the black Mercedes which had been seen on the garage video being taken out by Rackover on Sunday evening, November 13. Consistent with what Detective Hahn had found, Detective Reuther obtained data that the car had been in Monmouth County, New Jersey, from late Sunday evening, November 13 until Monday morning, November 14, when the car returned to The Grand Sutton at approximately 3:00 am. Detective Reuther went to New Jersey to see if he could find other videos of the Mercedes in various Monmouth County locations.

Detective Reuther, who now had Dilione's name and address, went to Oceanport, New Jersey at about 9:00 pm to try to locate him. He did not find him, but met Dilione's father, Lawrence Dilione, Jr. ("Mr. Dilione"). Detective Reuther told Mr. Dilione that he needed to speak to his son regarding a missing person, and gave Mr. Dilione his card with a phone number. (313). Detective Reuther told Mr. Dilione that although he was from the Homicide Squad, that it was still a missing person's case. (313). Shortly

thereafter, at about Mr. Dilione called Detective Reuther back and gave the Detective his son's cell phone number which Reuther called. At about 10:25 pm, Dilione answered, said he was in Manhattan, and agreed to meet Reuther. They met in midtown Manhattan, and as Dilione got into the Detective's car, he said,

"I need to talk, I haven't slept in days." (270).

Dilione also asked Detective Reuther whether he needed a lawyer and Detective Reuther replied that if he wanted one he could have one. (321).

While Detective Reuther drove with his partner who was in the front passenger seat to the 13th Precinct, Dilione sat in the back of the car, neither handcuffed nor restrained in any way. Detective Reuther did not see nor hear Dilione speak on his cell phone. At about 10:45 pm, Detective Reuther said he heard Dilione ask where they were going, to which Detective Reuther replied that they were going to the 13th Precinct.

Detective Reuther went into the precinct with Dilione and past the desk sergeant, telling the sergeant that he had a witness and was going to the interview room. He did not log in Dilione or provide the sergeant with Dilione's name, which Detective Reuther said was his practice when interviewing a witness. (274). Before going into the interview room, at about 11:00 pm, Detective Reuther took Dilione's phone and gave it to Detective Martin Chen, who stayed outside the interview room. Detective Reuther said that it was his practice to take cell phones from everyone, including witnesses, when conducting interviews. (284). Detective Reuther said he did not see Dilione on his phone prior to it being taken from him. (337).

A few minutes after 11:00 pm, Detective Reuther began speaking to Dilione, and said he was not going to ask him what happened, but just wanted to find out if Joey was

alive or dead (283), and asked what was bothering Dilione and why he could not sleep. Detective Reuther told Dilione there were parents looking for their kid and they don't know if he is alive or dead (275). Dilione said he needed to talk, but did not want to get in trouble (275) (332). At about 11:10 pm, Detective Reuther called Mr. Dilione and spoke first to Mr. Dilione, telling him that his son was there with him. Detective Reuther said that Mr. Dilione stated, "if my son knows anything, 'I'll tell him to tell you,' and Detective Reuther handed his phone to Dilione. Dilione spoke to his father for awhile and the call ended at approximately 11:19 pm. Immediately after the call ended, Detective Reuther asked Dilione where they could find Joey, whether he was alive or dead, so they could return Joey to his family.

At about 11:22 pm, Dilione began to cry, and Detective Reuther asked him if Joey was in New Jersey, behind his father's house, or at another location. Dilione stated:

"He's not far from my father's house, he's behind the florist in Oceanport in the lot." (After Reuther showed him a map on his phone, Dilione pointed out a location which was Foggia Florist). "He's in the empty lot behind the florist, there is high grass, there is a trail through the grass pushed down and we buried him in the middle of the trail." (278-279). (Statement #16, Dilione)

Detective Reuther left the room and told members of the detective squads, including Chief William Aubrey, what Dilione had told him. Many police cars, special units, tools and personnel were organized, and New Jersey police departments were notified.

Detective Reuther did not go to Oceanport but instead stayed at the precinct with Dilione. After the caravan left for New Jersey, Detective Reuther went to the first floor

at about 12:00 am and met Joseph Evans, who identified himself as Dilione's attorney, and said that he was going to represent him. Detective Reuther took Mr. Evans to the interview room, and remained outside the room while Mr. Evans spoke to Dilione. When Mr. Evans came out, he asked Detective Reuther if Dilione had said anything, to which Detective Reuther replied that he had told him where the body was. Mr. Evans told Detective Reuther not to speak to Dilione anymore as he was, at the moment, representing him. Detective Reuther did not ask Dilione any more questions. Detective Reuther said that Mr. Evans told the detective that he had previously called Dilione on his cell and told Dilione not to speak to the police, but Mr. Evans did not know if Dilione repeated these directions.

Detective Reuther said that at no time while Dilione was either in the police car or in the interview room did he say he wanted to leave, that he wanted an attorney or that he had an attorney, or that he no longer wanted to speak to the Detective. (284). Dilione was not restrained in any way, nor was there any videotaping of the ensuing conversation. Detective Reuther also said that Dilione's father never told him during the cell phone conversation in the interview room that his son had an attorney. Detective Reuther also said that he never told Mr. Dilione that the District Attorney told him that he had to keep Dilione at the precinct if he did not speak to the detective. (338).

A caravan of police vehicles sped from New York to New Jersey, and arrived in Oceanport at about 1:30 am on Wednesday morning, November 16, 2016, less than two hours after Dilione's statement to Detective Reuther. After a brief search of a dark and weeded area behind Foggia Florist, the burned and stabbed body of Joey Comunale was found in a shallow grave.

Other witnesses called by the People

Lieutenant Michael Fagliarone, Oceanport, New Jersey, Police Department

Lieutenant Fagliarone described Oceanport in Monmouth County, New Jersey, as a peninsula of about 3.6 miles, surrounded by waterways. He was familiar with the area behind Foggia Florist, located at 196 Monmouth Boulevard. He described the area as “pretty desolate,” where there are woods, old boats, cars and tools such as shovels, axes and rakes, and as a “dumping area.” (695). Lieutenant Fagliarone also said there would be “juvenile parties” with barn fires, and the police would have to respond there frequently. He stated that if he had received information from the New York City Police Department that they were looking for a body, he would have directed them to look at the rear of Foggia Florist. (699-700). The Lieutenant also said a logical place to search would be the Atlantic Ocean, but if a body was dumped in a waterway, the ability to find it would depend on the tide. (707) (709).

At about 12:30 am on Wednesday, November 16, 2016, he responded to the area behind Foggia Florist. He said he saw over fifteen officers there from multiple agencies, including the Monmouth County Prosecutor’s Office, the Oceanport Police Department, a Bergen County Canine Unit cadaver dog, and the New York City Police Department. He described the area as marshy and swampy. The dog indicated that it detected a body, and Lieutenant Fagliarone saw a partially burned body in a shallow grave. (697).

Tanya DeVulpillieres, New York County District Attorney’s Office

Ms. DeVulpillieres is a supervising cell site analyst and has been in that position

for nine years. Ms. DeVulpillieres analyzed cell site records for two phones, those belonging to defendants Rackover and Dilione. Ms. DeVulpilliers said that both these phones were used between 10:46 pm on Sunday, November 13, 2016, until 1:59 am on Monday, November 14, 2016, and the phones communicated with three cell towers in and around the vicinity of Oceanport, New Jersey, including the vicinity of Foggia Florist. She also said that her analysis showed that during this period the two phones were within the same vicinity of one other. Ms. Vulpillieres could not say what town or municipality in New Jersey any of the towers were located, nor how far those towers were from Foggia Florist.

Additional Statements of Rackover, unnoticed.

While Detective Hahn was transporting Rackover in a patrol car to Central Booking on Thursday, November 17, Rackover stated in substance: *"What are we waiting for, the press? Did you guys get the videos from my apartment, you guys didn't know about that, did you? Is it us or are there other Detectives coming?"* (422).

Additional statements of Dilione

At the Detective Squad on Thursday, November 17, Detective Hahn processed Dilione and asked the following questions: his date of birth, address, cell phone, email address, height, weight, and shoe size. Dilione gave answers to these questions.

Defense Case: Witnesses called by Dilione

Defendant Dilione presented witnesses to support his motion to suppress all his statements, particularly, Statement Number 16 made to Detective Reuther regarding the

location of Joey's body. Dilione also offered these witnesses to support his contention that the police engaged in a "systematic process" of violating Dilione's Constitutional rights against self incrimination and his indelible right to counsel.

Gordon Gemma, Esq.

Tuesday, November 15, 2016

Mr. Gemma, a real estate attorney, and father of defendant Gemma, was called by defendant Dilione. Mr. Gemma is an attorney and had also been the Mayor of Oceanport, NJ from 1987 to 2003. Mr. Gemma said that since his son's indictment he had worked closely with his son's attorney and had reviewed all of the paperwork that was provided by the prosecution.

In November 2016, in addition to having a house in Oceanport, Mr. Gemma had an apartment at 255 Warren Street, Jersey City. His son had an apartment in the same building but on another floor, with roommate defendant Dilione. Gemma and Dilione had been childhood friends and the Gemmas knew Dilione's parents, Lawrence and Susie Dilione, for about twenty years. Mr. Gemma described the relationship as the parents of a friend of their son. Their homes were a few miles apart.

Mr. Gemma said that at about 8:40 am on Tuesday, November 15, he spoke to Susie Dilione on the phone and she told him that there had been police officers at her house, that she did not know where her son was or why the police were looking for him. Mr. Gemma said he did not know where Dilione was, and Susie Dilione asked Mr. Gemma if he "could help out and represent Larry in case there was a problem." Mr. Gemma said "sure" and told Susie Dilione to have Dilione call him

“some time during the day. (521). Mr. Gemma said he was not sure she was asking him to represent Dilione at that moment. (522).

Later that evening, at about 9:30 pm, Mr. Gemma returned to his building at 255 Warren Street after being outside and saw men in suits in the lobby, but did not speak to them, but instead asked his concierge who they were. Mr. Gemma said the concierge told Mr. Gemma they were police and that they were looking for Lawrence Dilione. (489).

Mr. Gemma did not stop to speak to the detectives but instead went upstairs to his apartment and spoke to Kyle Jarmon, who was there with defendant Gemma. At about 9:40 pm, Mr. Gemma called Susie Dilione and she asked him if he could help represent her son, which Mr. Gemma agreed to do. Before going downstairs, at about 10:02 pm, Mr. Gemma called a friend named Steven Lang, who was an attorney, and asked if he had any recommendations for an attorney for Dilione, “after representing Larry initially in the first interview.” (489). The record does not indicate what the result was of that conversation.

Mr. Gemma also said that before going back downstairs, he called Dilione’s cell phone and told Dilione that there were police officers there looking for him, and Mr. Gemma told Dilione that he was going to “speak to them on your behalf to represent you, is that okay?” to which Dilione responded, “fine.” (524).

Mr. Gemma went to the lobby and introduced himself to the officers, namely Detective Ford and Sergeant Wall. Mr. Gemma stated that the Detectives said they were looking for Lawrence Dilione, to which Mr. Gemma replied that he represented Larry Dilione (520). The Detectives asked if he knew where Dilione was. Mr. Gemma handed

them his business card, which showed he was an attorney, and the officers asked if he knew Max Gemma, to which Mr. Gemma replied he was his father, and the Detectives said that they wanted to speak to Max as well. Mr. Gemma said that Detective Ford asked about that being a conflict, and Mr. Gemma replied, "that there might be but you can't speak to either of them." (494). Detective Ford went outside to make a phone call and when he returned, Mr. Gemma said to him, "I have to see about obtaining separate counsel for Lawrence Dilione, but again, you can't speak to either of them until such time we resolve this issue." (495).

Mr. Gemma went back up to his apartment and Kyle Jarmon confirmed to Mr. Gemma that Dilione had been in contact with an attorney named Joseph Evans. Mr. Gemma said he had never met Joseph Evans, nor did he remember the name of a second attorney who may have been suggested. (497).

Mr. Gemma returned to the lobby and told Detective Ford that another attorney would be going to the precinct to represent Dilione and until such time the police were not to speak to Dilione. Mr. Gemma said that Detective Ford said, "okay."

At about 10:56 pm, Mr. Gemma said he called Dilione and told him that Mr. Evans was on the way and in the meantime he should not speak to anyone. (499). Mr. Gemma said that Dilione replied that he was almost at the precinct and he would wait until Mr. Evans got there. Mr. Gemma said that he was going to speak to the two police officers on his behalf and would represent him, to which Dilione responded, "fine." Mr. Gemma said to Dilione that he would speak to the police and see what he could find out, but that Dilione should not speak to anyone. (524-525)

Mr. Gemma returned to the lobby and told Detective Ford that his son would be

willing to give a statement in the apartment. Detective Ford then conducted the interview of Max Gemma, (described above as Statement #15, Gemma), ending the interview at approximately 11:45 pm.

Immediately after the interview, Mr. Gemma said he tried to call Dilione but there was no answer on his phone. He left a voicemail asking him to return his call and to ask if Mr. Evans was at the precinct. Mr. Gemma spoke to a detective at the precinct at approximately 12:06 am and confirmed that Dilione was with a lawyer, which information he gave to Susie Dilione in a subsequent phone call. (503).

Lawrence Dilione, Jr.

Tuesday, November 15 – Wednesday, November 16, 2016

Lawrence Dilione, Jr. (Mr. Dilione), the father of defendant Lawrence Dilione, was called as a witness by defendant Dilione. Mr. Dilione, who owns a construction company, lives in Oceanport, New Jersey, with his wife Susie Dilione. His son, the defendant, lived in Jersey City as of November 2016 with defendant Gemma.

On Tuesday, November 15, 2016, at about 7:30 am, New York City detectives came to his home asking to see his son about a missing person investigation. Mr. Dilione gave the detectives Dilione's cell phone number and after they left, Mr. Dilione spoke to his son on the phone and told him that the detectives wanted to speak to him. Dilione told his father that he had already spoken to the police the day before.

Later that evening at about 9:00 pm, Detective Reuther, who had not been at the Dilione house earlier, went to look for defendant Dilione, but met his father, Mr. Dilione. Mr. Dilione asked Detective Reuther why it was a missing person case in the morning

and a homicide now, to which Mr. Dilione testified Detective Reuther responded, "well we know there has been a homicide." When Mr. Dilione asked how he knew that, Detective Reuther responded, "because of the apartment." (561). Mr. Dilione said when he asked, "what apartment?" Detective Reuther did not respond. Detective Reuther asked Mr. Dilione about a race horse he owned at Monmouth Park Racetrack. Detective Reuther told Mr. Dilione that he "needed to see Larry, and that "it would be better for him to come to me, otherwise I got to go pick him up." (567). Mr. Dilione said he would try to contact his son. The Detective gave Mr. Dilione his card and left.

Mr. Dilione called his son on the phone, telling him to call the detective. Mr. Dilione stated that his son said, "I'm waiting for an attorney." (569). When Mr. Dilione asked his son why he needed a lawyer, his son replied that he needed one "because Max and James had one." (569-601).

At approximately 11:10 pm that evening, Mr. Dilione said that Detective Reuther called him and said Dilione was at the precinct with him, and asked Mr. Dilione to speak to his son because "he was having problems with Larry, getting information. He said could I help him, could I talk to him." (570). Mr. Dilione agreed to speak to his son. Mr. Dilione got on the phone and asked his son why he wasn't speaking to the detectives, and Mr. Dilione said that his son replied, "I'm waiting for my lawyer, I'm not going to talk to him until my lawyer gets here." (570-571).

Detective Reuther got back on the phone with Mr. Dilione and said that the detective said "the District Attorney will hold him there unless he gives some responses." Mr. Dilione asked to speak to his son again, which he did, and said to his son, "Larry, if you don't tell them what they want to know, they will hold you there. The District

Attorney said they cannot let you go,” to which Dilione said, “they are not going to let me go either way, if I tell them or don’t tell them anything.” (572). Mr. Dilione returned to speaking to Detective Reuther and said, “I cannot do nothing for you, he won’t tell me, he’s waiting for his lawyer.” This phone call ended at about 11:20 pm. Mr. Dilione said he thought his son had referred to a lawyer named “Joe,” but Mr. Dilione had no information regarding Mr. Gemma or another lawyer. (604).

Shortly thereafter, at approximately 11:22 pm, Dilione told Detective Reuther of the location of Joey’s body. (See Statement Number 16, Dilione).

At about 12:25 am, on Wednesday, November 16, Mr. Dilione received a call from Joseph Evans, whom he had never spoken to nor heard of before (607), and who told him he was his son’s attorney. Mr. Evans told Mr. Dilione that he had been at the precinct since 11:20 pm and that he had gotten a “run around” before he had seen Dilione.

Joseph Evans, Esq.

Tuesday, November 15 – Wednesday, November 16.

Joseph Evans, Esq., an attorney, was called as a witness by defendant Dilione. Mr. Evans said that on Tuesday, November 15, 2016, a friend named Kyle Jarmon contacted him and asked if Evans could speak to a friend who might need a lawyer. Mr. Evans said he got a call at 9:40 pm but he did not recognize the number so he did not pick up the call. (623). Mr. Evans said he then received a call from Kyle Jarmon, at about 10:40 pm, and Jarmon told him that the missed call had been from Dilione. Mr. Evans then called Dilione at 10:45 pm and Dilione said that he was with the police and

on his way to the precinct, and could Mr. Evans meet him. Mr. Evans said he asked Dilione where they were taking him, and he heard Dilione ask the police that question, and heard through the phone the police say "the 13th Precinct." (627). Mr. Evans said he told Dilione that he should tell the police they he was represented by counsel, that he should not answer any questions and any questions should be directed to Mr. Evans, and that Dilione should give the police his phone number. (627). During that conversation with Dilione, Mr. Evans did not speak directly to any police officers, nor did he ask Dilione to put him on speaker phone so that the detectives could hear him. Mr. Evans did not ask for the names of the detectives nor did he ask Dilione if he was under arrest. (658-659). He did not hear Dilione say to the detectives that he was represented by counsel, and he did not hear Dilione tell the detectives that he did not want to answer questions. (659).

Mr. Evans said he received a text from Dilione at 10:48 pm asking "how long until you get here," but that Mr. Evans did not read it until ten minutes later. (630). Mr. Evans said he texted Dilione back at 11:05 pm and said he was getting in the cab, and that Dilione could "tell the police officers that you are represented by counsel, that his name is Joseph Evans, and that he has advised you not to make any statements at this time" and provided his telephone number. (631). Mr. Evans did not know if Dilione got the text and Mr. Evans did not call the precinct prior to arriving there. (664).

Mr. Evans said he arrived at the precinct at 11:38 pm and spoke to a police officer outside the precinct and told him he was a lawyer that he wanted to see Dilione. (632). The officer told him he didn't know if anyone was there by that name and Mr. Evans proceeded to go inside the precinct and sat down for four or five minutes. (633). Mr.

Evans said he and another officer went to a desk and looked at a computer screen but they did not see Dilione's name on it. Mr. Evans said he waited another twenty minutes and called Dilione's phone right before midnight, did not get an answer, and then sent a text message to Dilione saying that he assumed that Dilione did not have his phone but that he was downstairs, and had been for about 20 minutes. (635).

A few minutes later, Mr. Evans met Detective Reuther, who told him that Dilione had just told him where the body was, and that the family did not know that the victim was deceased. Mr. Evans also said that Detective Reuther said that Dilione could "really benefit by continuing to speak with us...if you allow him to speak with us." (639-640). Mr. Evans said that this was the first time he had heard this information and that he would like to speak to his client. Mr. Evans went into the interview room while Detective Reuther waited outside, and spoke to Dilione. (642). Mr. Evans left the room and told Detective Reuther that he was representing him and not to question him. (643).

Detective Martin Chen, 17th Precinct Detective Squad

November 15, 2016

At about 11:00 pm on November 15, 2016, Detective Chen, a 15-year member of the NYPD, was at the 13th Precinct Detective Squad and assigned to assist Detective Reuther. He saw Detective Reuther with whom he believed was a witness, about to go into the interview room. As those two men entered the room, Detective Reuther handed Detective Chen a cell phone. Detective Chen did not know whose cell phone it was, and he did not go into the interview room, nor did Detective Reuther say what to do with the phone or why he was giving it to Detective Chen. Detective Chen placed the phone in a

desk drawer, retrieved it several hours later and vouchered it. While it was in the drawer, Detective Chen said he did not hear it ringing, or hear notification for text messages, although the record did not reflect whether Detective Chen was near the phone at all times.

Detective Geneva Eleutrice (retired), Manhattan South Homicide Squad

November 15 – 16, 2016

On November 15, 2016, Detective Eleutrice, who had been a 25-year member of the NYPD, was assigned to go to Jersey City with a partner to interview defendant Max Gemma. They went to Jersey City but were not successful and returned to New York, but were then told by their supervisor to return back to Jersey City to join the interview that was being conducted by Detective Ford at Max Gemma's apartment. The next day, November 16, at about 5:00 am, she was asked to interview an undercover police officer who had been sitting in a cell with another person. She did not know at that time why the undercover was placed in the cell or with whom.

Chief William Aubrey

Chief of Detectives, Manhattan South Detective Squad

Chief William Aubrey, a 29-year member of NYPD, was called by defendant Dilione as a witness. On Tuesday, November 15, 2016, Chief Aubrey learned that the 17th Precinct was investigating the missing person's case of Joey Comunale, part of which was being conducted at a building on East 59th Street. He learned at some point that the police had found blood in trash bags, which Chief Aubrey said gave the case

more urgency in trying to locate the missing person.

Chief Aubrey mobilized numerous divisions of the police department and several detective squads to search all areas of The Grand Sutton on that Tuesday, including the basement, the water tower, and the elevator shafts. He also had detectives knock on the door of an apartment on the fourth floor as it had been his experience in these types of cases that a person might get drunk and go into the wrong apartment and fall asleep there. Chief Aubrey assigned detectives to re-check hospital admissions, Joey's credit card and cell phone records. He also had the detectives contact the New York Transit Authority and police departments in Connecticut and New Jersey. He said this was typical of missing person's cases that he had handled in his career.

After Dilione made the statement to Detective Reuther on that Tuesday evening as to Joey's location, Chief Aubrey mobilized several NYPD detective squads and emergency services units, as well as certain New Jersey police departments, and drove from Manhattan to Oceanport at high speed, arriving there in 45 minutes to an hour. Chief Aubrey said it was "relatively quickly" that the canine found Joey. (770). Chief Aubrey said he considered it a missing person's case and it only became a murder case at 1:30 am on Wednesday morning, November 16, when Joey's body was found in Oceanport.

Chief Aubrey said he decided to place an undercover in a cell with Rackover not to collect evidence, but in the hopes that Rackover would provide information as to where Joey was, as they still did not know what had happened to him. (772) (786). Chief Aubrey also said that the undercover's instructions were to listen and not ask any questions (765), and the record shows that no questions were asked by the undercover.

Chief Aubrey said that he knew at that time, which was the evening of November 15, that Rackover was represented by counsel but he hoped that by putting the undercover in the cell there would be a better chance of getting credible information and of finding Joey alive. (771). Chief Aubrey stated that the undercover was taken out of the cell three hours after Dilione disclosed Joey's location because of the procedures involving the removal of an undercover from an incarceration situation.

During the afternoon of Thursday, November 17, Chief Aubrey said he walked through the detective squad at the 13th Precinct and saw Dilione, who was under arrest, in a cell appearing, in his opinion, agitated and nervous. Chief Aubrey did not ask him any questions and did not expect Dilione to speak to him. As he walked by, Dilione asked, "what was going on with me," and Chief Aubrey responded that he was being charged with murder and being taken downtown shortly. Chief Aubrey said that Dilione "just started talking nonstop" and that "he wanted to get his story out there," and stated in substance, "I didn't kill him. James did it. I just punched him." (759). Chief Aubrey said he stopped him and told him that he could not speak to him and that he should tell his lawyer.

Chief Aubrey stated that same afternoon he directed Detective Castro to place Dilione in the interview room, and not to ask him questions but to advise him of his rights and tell him that he has an attorney. Chief Aubrey stated that as he was responsible for Dilione's physical well-being, he told Detective Castro to observe Dilione because of his agitated state and wanted to make sure he did not harm himself.

The video, lasting slightly less than two hours, was admitted into evidence (Defense Exhibit C) and played during the hearing. It showed Dilione being read his

Miranda warnings by Detective Castro and also being offered and accepting food and drink. The video showed Dilione asking questions about the charges and then describing what happened in the apartment, specifically how there had been a party with the girls and that they had left, and that Joey had gotten cigarettes and had returned to the apartment. Dilione said that Joey began to get "mouthy," which angered Dilione, and Dilione hit Joey, rendering him unconscious. Dilione said Rackover came over "to help" and Rackover struck Joey, who was on the floor unconscious, a few more times. Dilione told Rackover to stop, and Rackover said "we're going to get locked up." Dilione said Rackover choked and stabbed Joey and then moved him into the bathroom, where Dilione said Rackover continued to stab and mutilate Joey. Dilione said on the video he "was already involved," and that they got rid of the body. (242-252).

Lawrence Dilione, Defendant

Defendant Dilione testified on his own behalf. On his direct examination, he described the events regarding his invocation of right to counsel.

Dilione said that after speaking to Detective Castro on Monday, November 14, he "knew he was going to need a lawyer" so he met Kyle Jarmon at a bar that evening and Jarmon gave him the number for Joseph Evans. (839). Dilione said he did not contact Mr. Evans at any time that Monday, and did "nothing of significance" that day. He said that the next day, Tuesday, November, 15, he received a call from Detective Reuther about a meeting, and prior to meeting the detective he called Mr. Evans but did not get a response.

Dilione said he received a call from his father on November 15, who told him that

detectives were looking to speak with him. Dilione said he met Detective Reuther in midtown, and as he was about to get into Detective Reuther's car, he received a call from Mr. Evans. Dilione said he told Mr. Evans that he was going to the precinct whereupon Mr. Evans asked which precinct. Dilione then asked that question to the detectives, to which they replied "the 13th Precinct," which Dilione said that Mr. Evans heard through Dilione's phone. Dilione said that Mr. Evans then stated to him over the phone, "tell them you are represented by counsel and you are not to be questioned until I arrive." (794). Dilione stated that he did not give Detective Reuther his phone to speak directly to Mr. Evans, (843), and that he felt that he had no choice but to get into the police vehicle.

Dilione said that after he got off the phone with Mr. Evans, Detective Reuther said to him that "we found the bloody clothes, we saw the apartment, and there is a witness that has James putting a duffle bag into the trunk of the car," and "that it was not looking good for you. All we want to know is where the body is." Dilione responded that he "just got off the phone with my attorney, Joseph Evans, he told me not to answer any questions until he's present." (794). Dilione said that Detective Reuther kept asking the same question about the body but he did not respond.

Dilione said he and Detective Reuther went into the precinct and as he was walking down a hallway he received a phone call from Gordon Gemma, who said that he "just finished up with Jersey City with the detective there." Dilione said that Mr. Gemma said to Dilione on the phone that he was to tell the detectives at the precinct that he was represented and was not to be questioned without counsel and until counsel arrived. (796). Dilione said he repeated what Mr. Gemma said to him to Detective

Reuther. Dilione also said that while he had been in the police car, he had sent a text to Mr. Evans asking how long it would take for him to get to the precinct, but he did not get a text back. (797).

Dilione said after he had arrived at the precinct and had told Detective Reuther about being represented by an attorney, Detective Reuther asked for Dilione's cell phone, which Dilione gave him. Dilione said he was in the room only with Detective Reuther, and that he did not feel he was free to leave. (798). Dilione said that Detective Reuther kept asking him where the body was, and that "just because you know where the body is doesn't mean you killed him." (849). Dilione said that Detective Reuther said to him that "if you answer my questions I'll let you go, but if I find the body first, you are really fucked." (878).

Dilione said that after he was arrested and while in the precinct, he saw Chief Aubrey who "initiated a conversation with him, and said "if only you could go back in time, right?" and that he seemed like a "good guy" and that "if you want, I will contact the DA." (850).

Dilione also said that while he was in the interview room with Detective Reuther, he never mentioned Mr. Evans name because "everyone knew he was my attorney already," and also did not mention Gordon Gemma's name. (851).

On cross examination, Dilione essentially repeated the statements regarding the murder that he had made on video while in the interview room with Detective Castro (See Defense Exhibit C). Further, Dilione admitted that he had lied to Sergeant McGowan, Sergeant Comunale and Detective Castro during their phone conversations. Dilione said that he and Joey had come back to The Grand Sutton at 7:30 am on Sunday

morning after the girls had left, that Joey wanted to do more cocaine, that there was an argument and that Dilione punched Joey, rendering him unconscious. Dilione said that Rackover continued to punch the unconscious Joey and Rackover said that they had to "get rid of him." (808). Dilione said he told Rackover he would tell the police that "he did it all" and "take the blame for everything you just did," but Rackover said "no" and strangled Joey with a pair of jeans. Dilione said that Rackover "ordered" him and Max Gemma to take off their clothes, which they did, and then Gemma put on some of Rackover's clothes and left. (809). Dilione said that Rackover stabbed Joey in the head and then moved Joey's body, possibly with Dilione's help, into a bathtub in the apartment. Dilione said that while Joey was in bathtub, Rackover tried to sever Joey's arm, got angry when he was unable to, and then stabbed Joey multiple times. (812).

Dilione said later that evening, he and Rackover wrapped Joey's body in sheets, pushed the body out of the apartment window, and then loaded it into Rackover's Mercedes. He said Rackover wanted to bring it to Brooklyn but that Dilione thought burying him in Oceanport was a "better idea." (834). He said they went to the area behind Foggia Florist, that both of them began digging a grave, and that a gasoline can was found in the back of a nearby truck and that Rackover set the body on fire.

CONCLUSIONS OF LAW

Statements of Rackover

Numbers 2, 3, 6, 7 and 10

Numbers 11, 12, 13 and 14

The People seek to introduce Statement Numbers 2, 3, 6, 7, and 10 made by Rackover over the telephone to Sergeant McGowan, Sergeant Comunale and Detective Castro, the last one made at 4:40 pm on November 14, 2016, when Rackover invoked his right to counsel. The People contend, and Rackover does not refute, that these statements were volunteered by him and not the result of custodial interrogation.

“Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.” Miranda v. Arizona, 384 US 436, 478 (1966). Volunteered statements of any kind are not barred by the Fifth Amendment. Id. The Miranda safeguards do not come into play unless a person in custody “is subjected to express questioning or its functional equivalent.” Rhode Island v. Innis, 466 US 291, 300-301 (1980).

The Court finds that these officers were credible witnesses and that this defendant’s statements were made in a non-custodial setting and not the result of questioning or its functional equivalent. Therefore, the motion to suppress these five statements is denied and they may be used on the People’s direct case.

Regarding Statement Numbers 11, 12, 13 and 14, the record shows, and the People concede, that when Rackover stated in substance, “I come and go as I please, call my lawyer,” (Statement Number 10), that the right to counsel indelibly attached. The Court finds, however, with one exception described below, that the police abided with

Rackover's invocation of counsel, and that Statement Number 11, in which Rackover called Detective Castro back at 4:22 pm, and Statement Numbers 12, 13 and 14, which were made by Rackover while he was walking through the lobby of the building, were volunteered and not in violation of his right to counsel, and therefore admissible. The People may use these statements, with permission of the Court, when appropriate.

The one question Detective Castro asked in Statement Number 13, as to the name of Rackover's girlfriend and to which he responded, is not admissible.

The People are also seeking to offer, not on their direct case, the unnoticed statements Rackover made to Detective Hahn while he was transported to Central Booking and at the precinct, in substance, "*what are we waiting for...Did you get the video from my apartment, are other detectives coming.*" The Court finds Detective Hahn credible and that the statements were spontaneous and can be used, with the Court's permission, when appropriate.

Statements of Gemma

Numbers 9 and 15

Statement Number 9 was made by Gemma on November 14, 2016, during a phone call with Detective Castro. For the same reason as stated above regarding the credibility of Detective Castro and the legal basis of the volunteered statements of defendant Rackover, the Court finds this statement admissible as a non-custodial and volunteered statement. There have been no facts offered by Gemma or other testimony to rebut this.

Statement Number 15 was made on November 14, 2016, to Detective Ford, who

the Court finds credible, in the presence of Gordon Gemma in the apartment in Jersey City. The Court finds that such statement was volunteered and in the presence of his attorney and, therefore, admissible on the People's direct case.

Statements of Dilione

Numbers 1, 4, 5 and 8

The People seek to introduce these four statements of Dilione made by him over the telephone to Sergeant McGowan, Sergeant Comunale and Detective Castro, the last one made at 1:40 pm on November 14, 2016. The People contend, and Dilione does not refute, that these statements were made voluntarily and were not the subject of custodial interrogation. The Court finds the officers credible and, for the same reasons stated above, these statements are non-custodial volunteered statements and admissible.

The pedigree questions asked by Detective Hahn and answered by Dilione, are an exception to the hearsay rule and are admissible on the People's direct case. However, Detective Hahn's question regarding the defendant's shoe size is not admissible as there is no evidence that it was part of the booking form or that it was "reasonably related to administrative concerns." See People v. Rodney, 85 NY2d 289 (1995).

Statement of Dilione to Detective Reuther

Number 16

In support of his claim that his statement to Detective Reuther was improperly obtained in violation of his indelible right to counsel, Dilione cites the following instances where counsel had "entered" the proceeding and that Dilione's right to counsel

had attached but was violated by the police: 1) when, after Mr. Evans called Dilione in the police car, Dilione himself told Detective Reuther he had an attorney and did not want to speak to him until his lawyer was present, and 2) when Gordon Gemma advised Detective Ford that he was representing Dilione and not to question him, and that Mr. Gemma did not “withdraw” from such representation and that such representation by him never “ceased.”

In further support of the claim of violation of attachment of counsel, Dilione also presented testimony to show the police employed procedures which evidenced a “systematic pattern” of violating a defendant’s indelible right to counsel, including evidence that the police had placed an undercover police officer in a cell with Rackover after he had an attorney enter the case, and also put into evidence the video of Dilione sitting in the interview room, but not being questioned, after the police were well aware that Dilione was represented by an attorney.

The People refute Dilione’s claim of a violation of his right to counsel or that there was a “pattern” of such violation. They ask the Court to not credit Dilione’s testimony when Dilione said he told Detective Reuther or any other member of law enforcement either in the car or in the interview room that he was represented by an attorney and that he did not want to speak to law enforcement. The People also argue that the record supports that Gordon Gemma had affirmatively told Detective Ford that he had “withdrawn” from his representation of Dilione, and therefore the questioning of Dilione was not in violation of his right to counsel and was in fact a non-custodial interview of a witness, not requiring the police to give Miranda warnings.

The right to counsel can attach when a person the police seek to question states he

has counsel on a matter. People v. Ellis, 58 NY2d 748 (1982). However, the defendant shoulders the burden to prove that his right to counsel had attached at the time his statement was obtained. People v. Rosa, 65 NY2d 380 (1985); People v. Cameron 6 AD3d 273 (1st Dept 2004), lv. den. 3 NY3d 672 (2004).

Dilione's contention that while he was both in the police car and the interview room, he told Detective Reuther that he was represented by an attorney and that he did not want to answer questions until his lawyer arrived, is solely supported by Dilione's own testimony. Detective Reuther, who the Court finds credible, contradicts Dilione's version completely, and Dilione asks the Court to find Detective Reuther not credible as compared to Dilione, including the argument that Dilione had no greater motive to testify falsely than did Detective Reuther. (Dilione's motion, page 6).

The Court does not credit Dilione's testimony nor does the record support that he invoked his right to counsel. By his own admission, Dilione told the Court that he lied to several law enforcement officers regarding the crimes he had committed. Starting on Sunday, November 13, Dilione had already received the two calls inquiring about Joey from Sergeants McGowan and Comunale, and several more the next day from Detective Castro, but Dilione made no effort to contact an attorney by Monday, and when asked about his activities that Monday he said he did "nothing of significance." Dilione also said that when he spoke to Kyle Jarmon on Monday, he told Jarmon that he "needed a lawyer," yet by Tuesday Dilione still had done nothing to get one. Dilione's testimony showed that he was not even sure who his attorney was on Tuesday evening prior to meeting Detective Reuther.

Further, his interaction with Detective Reuther, including consenting to meeting

him, telling Detective Reuther that he wanted to speak to him and that he hadn't slept in days, voluntarily getting into the police car, speaking to his father, "not wanting to get in trouble," all support the Court's conclusion that Dilione wanted to speak the police without an attorney. The Court also finds that Dilione's question to Detective Reuther, "should he get an attorney," and the detective's response, that "if he wanted one he could have one," does not constitute an unequivocal invocation of right to counsel. People v. Hicks, 69 NY2d 969 (1987).

Moreover, the testimony of Joseph Evans, that while Dilione was in the police car Dilione told the detectives that he had an attorney and that he did not want to answer questions, does not support Dilione's version of events. Although Mr. Evans testified that he called Dilione while Dilione was in the car, Mr. Evans testified that he did not speak to those officers on Dilione's phone or speaker phone. He testified that he did not know if Dilione was in a car, or outside of a car, and in fact, had no way of knowing if Dilione was repeating what Mr. Evans was telling him.

Similarly, there is no evidence that at 10:56 pm, when Mr. Gemma called Dilione on his cell phone prior to Dilione going into the interview room with Detective Reuther, that Dilione repeated any of Mr. Gemma's advice not to speak to the police or said anything regarding Mr. Gemma being his attorney. Detective Reuther testified that Dilione did not tell him he was represented by either by Mr. Evans or Mr. Gemma, and the Court credits the Detective's testimony over Dilione's, which the Court does not credit at all. The Court therefore finds that Dilione has not met his burden of showing that he invoked his right to counsel.

However, the right to counsel also attaches when a lawyer at the request of the

person, his family or friend, notifies the police that he represents the person and the person may not validly waive counsel in the matter without consultation of counsel, whether the person is in custody or not. People v. Grice, 100 NY2d 318 (2000); People v. Arthur, 22 NY2d 325 (1968).

Dilione claims that his indelible right to counsel attached when Mr. Gemma told Detective Ford, at their meeting in Jersey City, that Mr. Gemma was representing Dilione and that he should not be questioned. Dilione also urges the Court to reject the idea that the comment by Mr. Gemma about a “conflict” constituted a “withdrawal” of representation thereby causing such relationship to “cease.”

This Court’s analysis of this issue begins at the point when Susie Dilione asked Mr. Gemma to represent her son. Although Susie Dilione was not called as a witness, the Court finds this testimony of Mr. Gemma credible, as there was no evidence to the contrary. Although Mr. Gemma said he made attempts to locate a criminal defense attorney for Dilione prior to speaking with Detective Ford, the record is unclear as to whether any attorney had committed to represent Dilione.

The record then showed a series of calls and statements pertaining to Mr. Gemma’s representation of Dilione. The Court finds Detective Ford credible, as well as the parts of the testimony of Mr. Gemma where he became concerned about representing both Dilione and his son. When read together, their testimony, while somewhat different, essentially corroborate one another and present the following sequence of events:

- 1) Susie Dilione spoke to Mr. Gemma and he agreed to represent Dilione;
- 2) Mr. Gemma spoke to Dilione and says he would represent him (524) and then told the Detectives that he was “initially” representing Dilione, (520);

- 3) upon learning that the detectives also wanted to speak to Gemma, he or Detective Ford commented that it might create a "conflict;"
- 4) Mr. Gemma said "there might be [a conflict] but you can't speak to either of them, until this was resolved;"
- 5) Mr. Gemma told Detective Ford that another attorney would be going to the precinct to represent Dilione and until such time the police were not to speak to him, and that Detective Ford acknowledged that statement;
- 6) Mr. Gemma called Dilione and told him that there might be a conflict and that he could not represent him, but that Mr. Gemma would speak to the officers on Dilione's behalf, and
- 7) that Mr. Gemma told Dilione that Dilione should not speak to the police until Mr. Gemma found him another lawyer.

Once an attorney has appeared on a defendant's behalf, the courts refuse to allow the police to rely on "arguable ambiguities" in the attorney-client relationship in order to justify police questioning of the defendant without the attorney being present, and attach little significance to the "contractual arrangements" between the defendant and his attorney. If the police are uncertain as to the scope of the attorney's representation, the defendant should not be questioned. People v. Marrero, 51 NY2d 56, 59 (1976); People v. Coleman, 42 NY2d 500, 507 (1977). Indeed, if the prosecution is in doubt as to whether an attorney had entered the proceedings, "the burden should rest squarely on it to insure that the defendant's right to be represented by counsel is protected, and the ambiguity of the lawyer's statement or the manner in which the defendant's attorney went about representing his client cannot be seized by the prosecution as a license to play

fast and loose with this precious right.” People v. Ramos, 40 NY2d 610 (1976).

The Court finds that based upon the totality of the statements and the record before it, Dilione has met his burden of showing that Mr. Gemma sufficiently apprised the police that he represented Dilione on the matter under investigation not to question him, and that his indelible right to counsel had attached.

The People nonetheless argue that even if Dilione’s right to counsel had attached through Mr. Gemma, that representation ended with his “withdrawal” from the matter. Interestingly, while the People urge the Court to find incredible parts of Mr. Gemma’s statements regarding his initial representation of Dilione, they ask the Court to find credible the parts of his testimony where Mr. Gemma had “withdrawn” from representation, thereby “ceasing” representation. The People’s contention that based on Mr. Gemma’s own words, a “conflict” existed, causing Mr. Gemma to choose his son over Dilione. The People argue that this posture indicated that Mr. Gemma no longer represented Dilione and, consequently, the police could question him.

Once a defendant proves that the right to counsel attached at a particular point in time before a statement was obtained from the defendant, the burden shifts to the People to prove that the representation had ceased before the statement was obtained. People v. West 81 NY2d 370 (1993); People v. Cotton, 280 AD2d 188, 189 (4th Dept. 2001), lv. den., 96 NY2d 827 (2001). To hold otherwise, as the Court of Appeals said, would to substitute the term “transitory” for the term “indelible.” West at 375.

This Court finds that here, the People have failed to meet their burden that Dilione’s indelible right to counsel had ceased merely upon Mr. Gemma saying to Detective Ford that there “might be a conflict.” The Court finds that the “arguable

ambiguity” of this statement does not turn an indelible right into a transitory one, and that Mr. Gemma’s representation began when he told Detective Ford he was representing Dilione and did not end when he articulated that there “might be a conflict.” This is underscored by several of Mr. Gemma’s statements, including that the police were not to speak to either Max Gemma or Dilione, despite there being a possible conflict, and his admonition to the police that until he found another attorney, they were not to speak to Dilione.

Therefore the Court finds that Dilione’s indelible right to counsel had attached prior to Dilione speaking to Detective Reuther.

Emergency Exception

However, the Courts also recognize the doctrine of the “emergency exception” under both the Fourth and Sixth Amendment protections and have denied suppression of evidence when a search for a missing person is a genuine emergency situation, one that can supercede the rights of the accused. “Constitutional guarantees of privacy and sanctions against their transgressions do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life. People v. Quarles, 467 US 649 (1984); People v. Mitchell, 39 NY2d 173, 180 (1976).

The basic requirements necessary to qualify for the exception are 1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, 2) the search must not be primarily motivated by intent to arrest and seize evidence, and 3) there must

be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. People v. Doll, 21 NY3d 655, 670 (2013), citing People v. Molnar, 98 NY2d 328, 331-333 (2002).

Cases involving the search for missing persons feature prominently in permitting this exception, and the courts have applied this exception in situations where a defendant's right to counsel has attached, such as here. While the "primary role of the police is to prevent crime and provide emergency assistance to those whose lives may be in danger, a restriction to the police's ability to question suspects because their right to counsel had attached would create an unjustified additional risk of injury or death to a potential victim." People v. Krom, 61 NY2d 187, 198 (1984).

Significantly, the test of whether the police are responding to an emergency rather than gathering evidence turns on whether the police conduct is an objectively reasonable response to an exigent situation. Doll at 670; People v. Kimes, 27 AD3d 1 (1st Dept 2006), app. den., 8 NY3d 881 (2007). The presence of evidence that a victim may be injured is another factor in assessing the reasonableness of the existence of an emergency, and the fact that the police were unsure of all the facts at that point is not dispositive as the "emergency doctrine is premised on reasonableness, not certitude." Doll at 671.

The New York City Police Department found Joey Comunale less than 42 hours from the time they received a report from his worried father. During their search and unbeknownst to them, Joey was already dead, but such was the speed with which the police embraced the emergency. Throughout the less than two days that the police searched for Joey's whereabouts, it remained a missing person's case up until the time

his body was found in a grave in coastal New Jersey.

The record shows while Detective Castro investigated the case from Monday, November 14 through Tuesday, November 15, that all police personnel continued to consider it a missing person's case, and treated it as if Joey was still alive. Chief Aubrey's description of missing person's cases handled by the police in New York City corroborated the fact that many missing persons cases fortunately end with the person being found alive, and there was no reason for the police to believe otherwise in this case.

Even as Detective Castro began to collect statements from Rackover and Dilione, and other detectives traced the movement of the Mercedes out of New York City and to New Jersey, there was no reason for them to be certain that Joey was dead. The police reasonably sought to speak with the last people they thought Joey had last been seen with, and their purpose was, which the Court finds reasonable and credible, to find information which would lead them to find Joey, presumably alive.

To be sure, the discovery of bloody clothes and Joey's license in the trash bags of The Grand Sutton heightened the urgency of the search and gave the police more reason to believe that Joey had been injured, although at that point the police did not know whose blood it was. Not until Dilione told Detective Reuther about the burial in Oceanport, did the posture of the case change. Even so, as stated by Chief Aubrey, they were not certain that Joey was dead until they found him.

The amount of resources deployed by the police department and the extent of the search conducted by the police underscored the speed in which this missing person case progressed. The Court finds that this level of search for under two days demonstrated an attempt to find Joey as quickly as possible, and not an attempt to gather evidence.

Furthermore, the questioning of Dilione by Detective Reuther is consistent with that goal as were all the other police actions at that point. The exclusive questioning about the whereabouts of Joey demonstrated that Detective Reuther's primary purpose was to find Joey, not to create evidence against him. Dilione's inconsistent statements regarding where Joey had last been seen justified Detective Reuther in asking him more information in the hopes of finding Joey alive.

The Court therefore finds that the "emergency exception" applies to the police questioning of Dilione after his right to counsel had attached, and that Dilione's statement, Joey's body, and all other evidence flowing from it, is admissible.

Inevitable Discovery Doctrine

The plain dictionary meaning of the word "inevitable" is "certain to happen" or "unavoidable," and under the law the People are required to establish, by a very high degree of probability, that had the illegal police conduct not occurred, a lawful event or series of events would have taken place, which would have led inevitably to the discovery of the evidence.

Thus the speculative argument is made that a hypothetical investigation would have led to the evidence in question and that the challenged evidence would have been found through alternative legal investigative means. Courts have held that the doctrine of inevitable discovery is "essentially a safety valve for the exclusionary rule to be used when the constitutional violation is of a technical dimension." People v. Sciacca, 45 NY2d 122, 129 (1978). The doctrine is based on the "perception that in certain circumstances the interest of society is better served by having relevant and material

evidenced admitted in criminal cases than by deterring police misconduct through the exclusion of evidence unlawfully acquired. People v. Stith, 69 NY2d 313, 318 (1987). It is also argued that excluding evidence that inevitably would have been discovered through legal means would not deter police misconduct. On the other hand, the inevitable discovery doctrine was not intended to serve as a means to validate unlawful police activity.

This doctrine is utilized most frequently when a prosecutor can establish that the normal course of police investigation would inevitably have led to the disputed evidence. The doctrine has been invoked where the police had or would necessarily have obtained information justifying the discovery of the same evidence either because a search was being planned or already in progress that would have led to the evidence, the evidence would have been found through alternate investigatory steps, or the police possessed a source independent of the tainted evidence to support the issuance of a search warrant. See People v. Turriago, 90 NY2d 77 (1997); People v. Fitzpatrick, 32 NY2d 499 (1973) People v. Ruffin, 133 AD2d 425 (2d Dept. 1987).

This Court finds that the People have failed to meet its burden of proving, by a high degree of probability, that Joey's body would have inevitably been discovered. The testimony of both Lt. Falgiarone and Ms. DeVulpillieres is insufficient to support such a finding, as there is inadequate evidence before the Court that the police would ever have been able to pinpoint the specific location of the field behind Foggia Florist or any specific area of Oceanport. The Court declines to speculate, as the People have requested, that "normal police procedures" would have eventually resulted in finding the location of Joey's body.

Use of Dilione's testimony at trial

On cross-examination the People elicited from Dilione the underlying facts about the very crime with which he is charged. The Court permitted this inquiry solely to test Dilione's credibility after Dilione moved into evidence the videotape (Defense Exhibit C) in which he described the murder after his right to counsel had attached; and thereby opening the door by touching upon it on direct. See People v. Melendez, 55 NY2d 445, 449 (1982).

However, Dilione's testimony at the hearing may not be admitted against him at trial. See Simmons v. United States, 390 US 377, 392 (1968); People v. Plevy, 52 NY2d 58, 63 (1980). More specifically, the People may not use Dilione's testimony at the hearing regarding the underlying crime even to impeach Dilione should he testify at trial. While a defendant may open the door to inquiry about the truthfulness of his statements at a suppression hearing, normally a defendant's testimony admitting guilt may only be used against him to impeach him at trial. Here, however, since Dilione did not testify on direct at his suppression hearing to imply that he was innocent, the People are not permitted to cross-examine using this portion of his testimony. See People v. Darrett, 2 AD3d 16 (1st Dept. 2003).

Other Challenges by the Defense

Dilione also asks the Court to find that the police engaged in a "systematic pattern" of violating his right to counsel. Although the Court has already found that the indelible right to counsel had attached through Mr. Gemma, it finds that there was no "systematic pattern" of any illegal behavior by the police, and finds that the People have

sufficiently shown that such actions were efforts to obtain further information regarding Joey's location.

On the issue on whether Dilione was improperly questioned while in custody, the Court finds that Dilione was not in custody at the time he was in the interview room with Detective Reuther. The credible evidence at the hearing shows that Dilione was not restrained or threatened, and nothing Detective Reuther did or said would have made a reasonable person, innocent of any crime, believe that he was not free to leave the company of the police. People v. Yukl, 25 NY2d 585 (1969). Even when Detective Reuther advised Dilione that he wanted to speak to him and took him in the police car to the precinct, the voluntary nature of the interaction between Dilione and the police did not change. Yukl at 589.

CONCLUSION

As enumerated above, the noticed statements, with exceptions, are admissible on the People's direct case, and the unnoticed statements, also with certain noted exceptions, are admissible on the People's non-direct case upon application to the Court.

The evidence of Dilione's statement regarding the location of Joey Comunale's body, and evidence flowing from it, including his body, is admissible at trial.

The People are permitted to have the witnesses who were the subject of the Rodriguez hearing make in-court identifications.

The defendants' motion for separate trials, on the People's consent, is granted.

This shall constitute the Decision and Order of the Court.

Dated: April 23, 2018
New York, New York

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Honorable James M. Burke
Acting Justice of the Supreme Court

HON. JAMES M. BURKE