No. _____

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

v.

JERMAINE DUNBAR,

Respondent.

On Petition For A Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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January 26, 2015

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QUESTION PRESENTED

Whether certiorari should be granted to correct the New York Court of Appeals' unprecedented expansion of *Miranda v. Arizona*'s automatic exclusionary rule, and its fundamental misunderstanding of this Court's decision in *Missouri v. Seibert,* as requiring automatic suppression of defendant's incriminating statement, made only after full advisement and waiver of *Miranda* warnings, solely because, just prior to the warnings, investigators read defendant a brief, standardized introduction -- which asked no questions and elicited no responses -- and which all parties agreed did not impair the voluntariness of the waiver or statement.

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The opinion of the New York Court of Appeals affirming the Appellate Division's decision is published at *People v. Dunbar*, __ N.Y.3d __; 2014 N.Y.Slip.Op. 07293 (2014). The decision is reprinted in the appendix of this petition at 1a-20a.

The decision of the Appellate Division reversing defendant's judgment of conviction is reported at *People v. Dunbar*, 104 A.D.3d 198; 958 N.Y.S.2d 764 (2d Dept. 2013). The decision is reprinted in the appendix of this petition at 21a-50a.

The decision of the New York State Supreme Court denying defendant's suppression motion is unreported. It is reprinted in the appendix of this petition at 51a-62a.

JURISDICTION

This petition for certiorari is filed within 90 days of the decision of the New York Court of Appeals, and is therefore timely. Sup.Ct.R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

The New York Court of Appeals based its decision solely on federal constitutional law, as determined by this Court. It did not cite or invoke *any* state constitutional provisions or state cases. Thus, this case squarely and solely presents a federal constitutional question. *See Florida v. Powell*, 559 U.S. 50 (2010).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself....

STATEMENT OF THE CASE

On April 23, 2009, defendant, a persistent violent felony offender, entered Rapid Multi Service, approached the cashier's plexiglass enclosure, and then pulled out a gun, saying, "Damn, Bitch, give me the money or I'll kill you." The cashier threw herself to the ground, called 911, and frantically pressed the office's distress button to signal for help, as defendant kicked and pounded on the plexiglass door.

Unable to get into the office, defendant ultimately fled in a black livery car that was waiting outside for him. He was apprehended less than five minutes later, when police spotted the getaway car, and was subsequently identified by the cashier in a show-up almost immediately thereafter. From the floor in the backseat of the car, police recovered the hat and striped shirt that defendant wore during the crime, and the imitation pistol he had wielded. Subsequently, police recovered the video surveillance tapes from Rapid Multi Service, which showed defendant and the cashier during the crime.

Defendant was arrested and brought to Central Booking, Queens ("CBQ") for processing. While there, prior to the filing of the felony complaint and before attachment of his Sixth Amendment right to counsel, defendant, who was not represented by counsel, was brought into an interview room to meet with an Assistant District Attorney and a Detective pursuant to a pre-arraignment interview program used by the Queens County District Attorney's Office since 2007 in thousands of cases. The entire interaction, from the moment defendant entered the room until he left, was videotaped;[1] and defendant was so informed.

As shown on the video, defendant was read a very brief, standardized, introductory statement -- containing no questions, and eliciting no responses -- which was immediately followed by a complete reading of his *Miranda* rights, which defendant acknowledged and waived.

Specifically, the interviewers began by seating defendant in the room, telling him that he was in the Queens District Attorney's interview room in Central Booking, and introducing themselves as a Detective and an Assistant District Attorney (86a). They then informed defendant of the charges he would be facing when he went to court, the date and time of the incident at issue, and that he would be read his rights

[1]A DVD of the videotaped interview, which was admitted into evidence at the suppression hearing and trial, will be furnished to the Court upon request, as it could not be annexed to this petition as per the instructions of the Clerk's Office. A full transcription of the interview is attached, for this Court's convenience, at 85a-103a.

in a few minutes, after which he "will be given an opportunity to explain what [he] did and what happened at that date, time, and place" (87a). The interviewers specified the type of information they would want him to provide if he decided to speak with them, and again highlighted that he did not have to decide if he wanted to speak with them until after he heard his rights:

> If you have an alibi, give me as much information as you can, including the names of any people you were with.
>
> If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.
>
> If there is something you need us to investigate about this case, you have to tell us now so we can look into it.
>
> Even if you have already spoken to someone else, you do not have to talk to us.
>
> This will be your only opportunity to speak with us before you go to court on these charges.

> This entire interview is being recorded with both video and sound.
>
> I am going to read you your rights now, and then you can decide if you want to speak with us, okay.

(87a-88a). Defendant was then immediately advised of his *Miranda* rights, as well as his right to a prompt arraignment, at which he would have an attorney appointed, was asked if he understood each right individually, and replied that he did. He was also asked if, having heard his rights, he wished to answer questions, and he replied that he did:

> DETECTIVE: You have the right to be arraigned without undue delay. That is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for you, and to have the question of bail decided by the court. Do you understand?
>
> DEFENDANT: Yes.
>
> DETECTIVE: You have the right to remain silent and refuse to answer questions. Do you understand?

DEFENDANT: Yup.

DETECTIVE: Anything you do say may be used against you in a court of law. Do you understand?

DEFENDANT: Yes.

DETECTIVE: You have the right to consult an attorney before speaking to me or to the police and have an attorney present during any questioning now or in the future. Do you understand?

DEFENDANT: Yes.

DETECTIVE: If you cannot afford an attorney, one will be provided to you without cost. Do you understand?

DEFENDANT: Yes.

DETECTIVE: If you do not have an attorney available, you have the right to remain silent until you have had an opportunity to consult with one. Do you understand?

DEFENDANT: Yes.

> DETECTIVE: Now that I have advised you of your rights are you willing to answer questions?
>
> DEFENDANT: Yes.

(88a-89a).

During the eight-minute interview that followed, defendant admitted that he had attempted to rob the Rapid Multi Services store by threatening the cashier with an imitation pistol, but claimed that he was acting with others, including the getaway driver, and that he felt he had been forced to do it by his accomplices. Several times throughout the interview, defendant indicated that he was speaking to the interviewers because he wanted to work out a deal, or cooperation agreement, whereby he would offer the State evidence implicating others in this and unrelated crimes (94a-95a, 101a, 103a). But the interviewers repeatedly rejected his attempts to do this, telling him that he could broach this subject with his attorney after arraignment, and that this was not the purpose of the interview (95a). Frustrated by this rebuff, defendant asked how, then, the interview was helping him, and was told that it could be beneficial to him if he had an alibi or something he wanted the interviewers to investigate (98a). Defendant acknowledged that he could not say it wasn't him, and then continued answering questions (99a). As the interview began to wrap up, defendant, apparently still pressing the attempt to arrange a deal as a cooperator, asked if he would be talking to "the DA" after he was

done with the interview, but was told that the next person he would be speaking to was his lawyer (100a).

Defendant was subsequently charged with Attempted Robbery in the Second Degree and related offenses.

The Suppression Hearing

Prior to trial, defendant moved to suppress his videotaped CBQ statement on the grounds, *inter alia*, that the investigators' standardized pre-*Miranda* remarks invalidated his waiver. A hearing was held, at which defendant did not testify.

On February 23, 2010, New York Supreme Court denied defendant's motion to suppress his CBQ statement (51a-62a). The court rejected, as unsupported by the record, defendant's contention that the phrase "if there is anything you want us to investigate you must tell us now" misled defendant into believing "that this would be his only opportunity to tell his story and that he had no choice but to do it now" (60a). Specifically, the court highlighted that many times during the interview, defendant was told that certain subjects would be properly addressed at a later time (*id.*). The court also noted that even if that statement was untrue, because, "while not frequent, there are occasions where the District Attorney investigates claims by the defendant while an indictment is pending" (61a), this would not rise to the level of "deception ... so fundamentally unfair as to deny due process" under the totality of the circumstances, where defendant was informed that the

entire interview would be videotaped, the length of the interview -- including the standardized remarks and *Miranda* warnings -- was a mere eleven minutes, defendant was informed why he was being questioned at that time, and defendant clearly understood the warnings and questions put to him by the interviewers. Thus, under all of the facts and circumstances of this case, the court concluded that defendant had been properly apprised of his *Miranda* rights, knowingly and voluntarily waived them prior to custodial interrogation, and that his statement was voluntary (61a). Thus, the court denied defendant's motion to suppress his videotaped statement (62a).

The Trial and Sentence

Defendant proceeded to a jury trial, at which the videotaped CBQ interview was admitted into evidence and played for the jury. At the conclusion of the trial, defendant was found guilty of attempted robbery and criminal mischief. He was sentenced as a persistent violent felony offender to an indeterminate prison term of from seventeen years to life imprisonment. Defendant is currently incarcerated pursuant to this judgment.

The Appeal to the Appellate Division

Defendant appealed from his judgment of conviction, arguing, *inter alia*, that the prosecutor's standardized remarks just prior to the reading of the *Miranda* rights contradicted the warnings, invalidating the waiver and rendering defendant's statement involuntary. The State filed an opposing brief, arguing

that defendant was properly advised of, and validly waived, his *Miranda* rights prior to custodial interrogation and before making any statements, and that, under the totality of the circumstances, his waiver and statement were uncoerced and completely voluntary, as clearly apparent from the videotape admitted into evidence at the suppression hearing and trial.

On January 30, 2013, the Appellate Division reversed defendant's judgment of conviction, holding that the brief remarks made by interviewers prior to administering *Miranda* warnings "muddled" *Miranda* and, thus, rendered the warnings ineffective as a matter of law, requiring automatic suppression (34a). In this regard, the court rejected the State's contentions that the impact of the pre-*Miranda* remarks was, at most, related to the voluntariness of the waiver, and had to be assessed on a case-by-case basis, taking into account the individual experience of each suspect and the totality of the circumstances. According to the court, such case-by-case determination, while relevant to the voluntariness of the waiver, was not relevant to the threshold question of whether *Miranda* warnings were properly administered in the first place (38a-39a).

The Appeal to the Court of Appeals

The State subsequently sought and obtained leave to appeal to the New York Court of Appeals, arguing that *Miranda* had been complied with where the rights were fully administered and waived prior to any interrogation. With respect to the impact of the

interviewers' standardized pre-*Miranda* remarks, the State argued that the Appellate Division had erred in deeming them to have impacted the "effective conveyance" of *Miranda*, and, thus, requiring automatic suppression as a matter of law. Instead, the State argued, the impact of these remarks could, at most, bear on the separate question of whether the waiver was knowing and voluntary under the totality of the circumstances; and, even taking defendant's extreme view of their impact, the remarks could not rise to the level of coercion or deception so severe as to violate due process under the facts of this case.

In response, defendant countered that the voluntariness of the waiver and statement were irrelevant, as was defendant's lengthy criminal background and likely understanding of his rights; for the preamble was the "anti-*Miranda,*" which contravened the warnings, vitiated their effective conveyance, and, thus, would require automatic suppression in every case in which they had been given, regardless of individual circumstances.

A divided Court of Appeals affirmed the order of the Appellate Division, holding that "the scripted preface or 'preamble' to the *Miranda* warnings that, among other things, informed the suspect that 'this is your opportunity to tell us your story,' and 'your only opportunity' to do so before going before a judge ... undermined the subsequently-communicated *Miranda* warnings to the extent that [defendant was] not '"adequately and effectively' advised of the choice [the Fifth Amendment] guarantees'" against self-incrimination." *Dunbar* at 2a-3a, *quoting Missouri v.*

Seibert, 542 U.S. 600, 611 (2004) and *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).[2] Thus, the majority held that it was irrelevant that the suspect's waiver may have been valid and his statement knowing, intelligent, and voluntary; for "the issue ... is not whether, under the totality of the circumstances, these defendants' waivers were valid, but rather whether or not they were ever 'clearly informed' of their *Miranda* rights in the first place, as is constitutionally required." *Dunbar* at 15a, *quoting Miranda,* 384 U.S. at 467. Purportedly finding authority for its holding in this Court's decision in *Seibert*, the majority concluded that the preamble rendered the *Miranda* warnings ineffective because "a reasonable person in these defendants' shoes might well have concluded, after having listened to the preamble, that it was in his best interest to get out his side of the story -- fast" (15a).

In a dissenting opinion, Judge Robert S. Smith reasoned that the majority had misconstrued *Miranda*; for, "[t]he purpose of *Miranda* is to be sure that suspects are informed of their rights and understand them. That purpose is not undermined when police or prosecutors persuade a properly-informed suspect to waive his or her rights" (16a). Highlighting that it was "undisputed that ... defendant[] received proper *Miranda* warnings and agreed to answer questions," Judge Smith concluded that the preamble did not contradict *Miranda*, and, when it was considered with the warnings, "viewed as a whole, what was said to ...

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[2] The case was decided together with *People v. Lloyd Douglas,* __N.Y.3d __; 2014 N.Y.Slip.Op. 07293 (2014), from which the State also seeks certiorari in a separate petition.

defendant[] before questioning began 'reasonably conveyed ... his rights as required by *Miranda*.'" *Dunbar* at 17a-18a, *quoting Florida v. Powell*, 559 U.S. at 60. Pointedly, Judge Smith noted that even under the majority's view of the impact of the preamble, there would be no *Miranda* violation:

> The majority's real complaint with the preamble is not that it is likely to confuse a suspect about what his rights are, but that it might persuade him to waive them. As the majority says, 'a reasonable person in these defendants' shoes might well have concluded, after having listened to the preamble, that it was in his best interest to get out his side of the story – fast' (majority op at 15). Indeed he might, but why should that distress us? .... The preamble seeks to exploit the natural impulse of any guilty defendant to think he can talk his way out of trouble, by persuading police or prosecutors either that he is innocent or that he deserves leniency. But *Miranda* does not require law enforcement officials to repress, or forbid them to encourage, the tendency of criminals to talk too much. That tendency greatly contributes to the efficiency of law enforcement; many more crimes would go unpunished if it did not exist.

(18a-19a). Thus, Judge Smith found no basis for suppression, and voted to reverse the Appellate Division's decision.

REASONS FOR GRANTING THE WRIT

Where *Miranda* warnings are fully administered and waived prior to any custodial interrogation, and where, taking all surrounding circumstances into account, a suspect's waiver and statement is knowing and voluntary, there can be no basis for suppression.

Here, it is undisputed that *Miranda* warnings were administered, acknowledged, and waived prior to any interrogation and prior to defendant making any statement. Here, it is undisputed that the *Miranda* warnings, read to defendant from a standard form were complete, fully apprising him of all of his rights. Thus, under these facts, the New York Court of Appeals was bound to conclude that, as a matter of federal constitutional law, *Miranda* was properly and effectively conveyed. And, as the voluntariness of defendant's waiver and statement were not in issue, suppression was not just unwarranted, but prohibited.

Nevertheless, because just prior to administering *Miranda* warnings, investigators read the suspect a short set of standardized, non-interrogatory remarks, which, according to the Court of Appeals' majority, operated to advise the suspect that if he chose to invoke his rights, he might forgo the benefit of speaking to investigators and having his case investigated by them prior to arraignment, the

majority concluded that *Miranda* warnings were not effectively conveyed.

In so holding, the New York Court of Appeals contravened this Court's precedent, and misconstrued *Miranda* as affirmatively preventing law enforcement, as a matter of law, from apprising a suspect of the benefits that he might garner from speaking to them, as well as the risks. Contrary to the majority's view, however, and as correctly reasoned by the dissent, *Miranda* only requires the State to *advise* a suspect of his rights; it does not *prevent* law enforcement from attempting, by means that do not implicate due process by rising to the level of coercion, to try to convince him to waive those rights. Thus, *Miranda* was not violated in this case, and the Court of Appeals erred as a matter of law in holding otherwise. Certiorari should be granted to correct New York State's highest court's misunderstanding of the basic core of *Miranda*'s purpose, and, thus, to prevent the misapplication of this fundamental and far-reaching principle in innumerable cases to follow.

I. THE NEW YORK COURT OF APPEALS FUNDAMENTALLY MISCONSTRUED AND IMPERMISSIBLY REDEFINED *MIRANDA*'S REQUIREMENT THAT A SUSPECT BE 'EFFECTIVELY APPRISED' OF HIS RIGHTS, RESULTING IN A VAST AND UNDESIRABLE EXPANSION OF *MIRANDA*'S AUTOMATIC EXCLUSIONARY RULE.

Nearly fifty years ago, this Court held in *Miranda v. Arizona* that "without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights." 384 U.S. at 467. While this Court did not require that any particular litany be used, it mandated that, at minimum, a suspect must be advised, prior to custodial interrogation, (1) of his right to remain silent, (2) that anything he says may be used against him, (3) that he has the right to the presence of an attorney, and (4) that an attorney will be provided if he cannot afford one. *Id. at* 467-73.

The fundamental requirement that suspects be apprised of their rights, *Miranda* explained, was not subject to the traditional totality-of-the-circumstances analysis previously used to ascertain whether a statement was voluntarily made. It was, rather, a

bright-line rule; a constitutional minimum, derived largely from the Fifth Amendment rather than the Due Process Clause, that did not depend on a suspect's individual circumstances or actual understanding. *See Miranda*, 384 U.S. at 444, 446 ("The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given"); *see also Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming the Fifth Amendment as the constitutional basis for *Miranda*).

Miranda did not, however, wholly supplant traditional voluntariness analysis; instead, that analysis remained applicable to determine the separate question of whether, notwithstanding proper *Miranda* warnings, law enforcement procured a suspect's waiver or statement by the use of violence, coercion, intimidation, or deception so severe as to overbear the suspect's will and, effectively, render his waiver invalid and his statement involuntary. *See Colorado v. Spring*, 479 U.S. 564 (1987) ("In order to be valid, a suspect's waiver of his *Miranda* rights must be both voluntary, in the sense that it is "the product of free and deliberate choice" and knowing, in that it is made with "full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it"); *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979) (The defendant was "not worn down by improper interrogation tactics or lengthy questioning or by

trickery or deceit. . . . The officers did not intimidate or threaten respondent in any way"). Questions relating to whether the waiver and statement were knowing, intelligent, and voluntary -- unlike the threshold determination of whether *Miranda* warnings were properly and effectively conveyed as a matter of law -- depend on an evaluation of the totality of the circumstances, including the length of the interrogation, the use of any threats or physical force, the interviewer's tone, the suspect's experience with the criminal justice system, the suspect's emotional state, any intoxication or drug addiction, and any language or communication problems. *Id.* at 707 (courts must look to the "totality of the circumstances surrounding the interrogation to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have counsel").

Here, as discussed below, it is undisputed that defendant was read his *Miranda* rights, acknowledged, and waived them prior to any custodial interrogation. And -- as was conceded by defendant, compelled by the record, and recognized by the state courts at every level -- the totality of the circumstances demonstrated that defendant's waiver and statement were knowing and voluntary. Thus, under these circumstances, there can be no basis for suppression.

Troubled by what it perceived as the use of an unfair, systematic tactic designed to encourage suspects to speak, rather than to affirmatively dissuade them from doing so, but clearly unable to suppress on traditional voluntariness grounds, the Court of Appeals held that the District Attorney's

standardized pre-*Miranda* remarks -- used in thousands of cases over the course of several years -- were contrary to the *Miranda* rights themselves, and, thus, prevented "effective conveyance" of the warnings. Thus, the majority reasoned, case-by-case analysis was not needed; the totality of the circumstances confronting the suspect were inapplicable; and the suspect's actual -- and demonstrated -- understanding of his rights and voluntary decision to waive them was irrelevant. For, if the basic *Miranda* rights were not conveyed, then suppression would be automatically mandated as a matter of law in each and every case in which these standardized remarks were read.

To reach this result, the Court of Appeals fundamentally, dangerously, and dramatically misconstrued *Miranda*'s core holding as a *prohibitive* rule, forbidding law enforcement from seeking to encourage a suspect to voluntarily choose to speak, rather than a *prophylactic* rule, concerned only with ensuring that the suspect knows and understands his rights before he decides whether to exercise them. In so doing, it directly contravened this Court's precedent repeatedly explaining *Miranda*'s purpose. It failed to properly apply this Court's case law defining the elements required for effective conveyance of the warnings and explaining how to gauge this. And it vastly expanded the reach of *Miranda*'s rule of automatic exclusion in a manner that is neither supported, permitted, nor desired according to this Court's clear precedent. Certiorari should be granted to clarify *Miranda*'s core holding and to properly limit its reach.

A. The Court of Appeals' Finding of a Lack of Effective Advisement of *Miranda Rights* is Contrary to Supreme Court Precedent Where Defendant Was Fully Apprised of His *Miranda* Rights Prior to Custodial Interrogation and Before Making Any Statements to Law Enforcement.

Fundamentally, the Court of Appeals' central justification for applying an automatic suppression rule founded on the lack of "effective advisement" of *Miranda* is flawed because, unlike in the cases it cited, where there was some omission or deviation from the four basic advisements that *Miranda* requires, here there is no question that defendant *did* receive a complete and clear advisement of *all* his rights before any interrogation commenced[3] and any statements were made: he was read the standard *Miranda* rights used in New York City for decades, and repeatedly approved by the courts, from a pre-printed form, *verbatim*, with no deviation whatsoever, and he expressly acknowledged and waived each of those

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[3]The pre-*Miranda* remarks read to defendant in Central Booking do not, themselves, constitute interrogation or its functional equivalent as they ask no questions, invite no response, and focus the suspect only on exculpatory information, such as alibis or mitigating information. *See Rhode Island v. Innis*, 446 U.S. 291 (1980) (explaining that *Miranda* safeguards "come into play whenever a person is subjected to either interrogation or its functional equivalent" and defining "interrogation" as "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect"). Indeed, the Appellate Division correctly refused to adopt defendant's argument on this point, and defendant abandoned that argument in the Court of Appeals.

rights. *Cf., Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (where there is deviation from *Miranda*, courts must inquire "whether the warnings reasonably 'conve[yed] to [a suspect] his rights'"), *quoting California v. Prysock*, 453 U.S. 355, 361 (1981); *Florida v. Powell*, 559 U.S. at 60 (since suspect was not told that he had the right to the presence of a lawyer during questioning, it was necessary to determine whether, as a whole, this right was nonetheless effectively conveyed).

Contrary to the Court of Appeals' decision, the automatic suppression required for a *failure* to give some or all of the *Miranda* warnings, is simply not applicable -- and has never before been applied -- to a circumstance like this one, where the warnings *were* completely, carefully, and clearly read to defendant while he listened attentively, and *were* fully acknowledged and waived by defendant before he was asked any questions and before he decided to make any statements at all.

In this regard, the Court of Appeals' attempt to derive support for its unprecedented analysis in this Court's condemnation of the "question first" procedures at issue in *Missouri v. Seibert*, 542 U.S. at 600 (*see Dunbar* at 12a-13a), is to grossly misconstrue the central points of the plurality opinion and the decisive concurring opinion of Justice Kennedy. To Justice Souter, writing for the plurality, what made the warnings ineffective "[b]y, any objective measure" when given only after the defendant has made an incriminating statement, was that "[u]pon hearing warnings only in the aftermath of interrogation and

just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.* at 613-614. In particular, this Court stressed that before the warnings were given, the first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid." *Id.*[4]

Here, of course, defendant did not say *anything* before the warnings were given; let alone give a full confession. The extreme attempt to end-run *Miranda* at issue in *Missouri v. Seibert* -- where law enforcement interrogated a suspect without *Miranda* warnings, elicited a full confession, and then administered warnings and had the suspect repeat himself -- bears no similarity whatsoever to the facts of the case at bar, where nothing was asked and no statements were made by defendant prior to a complete and accurate recitation, acknowledgment, and waiver of *Miranda* rights. Thus, contrary to the Court of Appeals' reasoning, there is nothing in this Court's decision in *Seibert* -- either in the plurality, concurrence, or dissent -- that would support, or even

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[4] In his concurring opinion, Justice Kennedy would not even categorically bar the question first procedure if there is "a substantial break in time and circumstances between the pre-warning statement" such that "the *Miranda* warning may suffice," or "an additional warning that explains the likely inadmissibility of the pre-warning custodial statement." *Id.* at 621-622 (Kennedy, J., concurring). Of course, Justice Kennedy's opinion, too, is founded on the premise that the suspect actually *made a statement* prior to *Miranda*. The Court of Appeals seems to have missed this critical point.

permit, suppression here. *See, e.g., Bobby v. Dixon*, __U.S.__; 132 S. Ct. 26, 31 (2011)("there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat").

This, alone, should end the inquiry here and require reversal of the Court of Appeals' decision. For, whatever the impact of any additional remarks or conduct by law enforcement that might have encouraged defendant to waive his rights, *it would not, and could not, go to the question of effective advisement* -- which is the only basis for the Court of Appeals' holding that *Miranda* was violated, and, thus, the only issue now before this Court. Instead, under a proper analysis, the impact of the interviewers' standardized pre-*Miranda* remarks on defendant's decision of whether to waive his rights would be but one factor among many bearing on the determination of voluntariness, which, as discussed below (*see, infra*, section D), and recognized by all parties and every court here, was clearly not a concern in this case under the totality of the circumstances. *See New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring), *citing Miranda v. Arizona*, 384 U.S. at 475 ("[a]s to the statements elicited after the *Miranda* warnings were administered, admission should turn solely on whether the answers received were voluntary.")

Thus, certiorari should be granted to clarify that *Seibert's* expansion of the exclusionary rule to require suppression of post-*Miranda* statements in a "question first" setting, does not reach, and should not be

expanded, to the facts at bar. In so doing, this Court should reaffirm and clarify that as long as *Miranda* rights are fully administered, acknowledged, and waived prior to custodial interrogation and the elicitation of any statement from the suspect, the fundamental requirement of effective advisement is necessarily satisfied, and all other circumstances should be considered only for their impact on the knowing and voluntary nature of the waiver and statement -- which is a due process inquiry, properly considered under the totality of the circumstances.

B. The Standardized Pre-*Miranda* Remarks, Which, at Worst, Implied to Defendant that there Might be a Benefit to Speaking to Investigators, did not Contradict the Warnings or Undermine Them so as to Prevent Adequate and Effective Advisement.

Even assuming, as the Court of Appeals posits, that one could conceive of words preceding a complete recitation of *Miranda* warnings that might impact the threshold question of whether *Miranda* rights were effectively conveyed, rather than the separate question of voluntariness, the standardized pre-*Miranda* remarks at issue here are clearly not such words. Initially, these remarks were unlikely to confuse a suspect's understanding of his *Miranda* rights, for they were distinct and separate from the *Miranda* warnings, and explicitly noted as such by the interviewers (*see* 87a: "in a few minutes, I'm going to read you your rights;" 88a: "I am going to read you your rights now, and then you can decide if you want to speak with us, okay"). But, more importantly, fairly read in the

context in which they were uttered, rather than selectively excerpted, and properly considered in conjunction with the clear and forceful *Miranda* warnings that immediately followed, rather than in isolation, it is clear that defendant's rights were effectively conveyed prior to any interrogation. *See Florida v. Powell*, 559 U.S. at 60 (requiring that the advisement of rights be "viewed as a whole" to determine whether it "reasonably conve[yed] ... [the] rights required by *Miranda*").

Specifically, the Court of Appeals' majority held that the interviewers' request that defendant "'give as much information as you can,' that 'this is your opportunity to tell us your story,' and that you 'have to tell us now,' directly contradicted the later warning that [he] had the right to remain silent" (14a). But contrary to the majority's characterization, defendant was not given blanket instructions that he had to speak or provide information; rather, each of these excerpts were part of sentences beginning with the words "*if* you have an alibi ..." or "*if* your version ... is different" or "*if* there is something *you need* us to investigate ..." (87a), which properly highlighted that the defendant had a *choice* and *personally controlled* the decision about whether he wished to speak or not. And this is precisely what effective conveyance of *Miranda* requires.

Indeed, the characterization of the interview as an "opportunity" to speak to investigators did not diminish or undermine the advisements of the rights to remain silent or to have an attorney appointed, as the majority opined; to the contrary, an "opportunity" is a

choice that can be exercised or not. Far from contradicting the *Miranda* rights that followed, this word operated only to highlight to the defendant that speaking to the investigators was *not* a mandatory or compelled course of action, but, rather, a voluntary choice that was within his personal control. Advising a defendant that he is going to be given an *opportunity* to speak, if he so *chooses*, and that he can *decide* if he wants to avail himself of that opportunity only after hearing and acknowledging his rights, is completely proper and fully consonant with the *Miranda* warnings advising him that he also has the right to refuse to speak. *See Missouri v. Seibert*, 542 U.S. at 609 (explaining that *Miranda* requires that the suspect be given "a real choice between talking and remaining silent").

While the Court of Appeals' majority takes a paternalistic view of *Miranda's* purpose, seeming to prefer that interrogators *only* advise defendants that they do not have to speak to investigators, there is nothing wrong with *also* informing them that they *can* choose to speak to investigators, and suggesting possible topics of discussion. Indeed, any waiver decision is best made when a defendant is apprised of, and can consider, all available options, choices, consequences, and opportunities.

Similarly misplaced is the majority's conclusion that in explaining that "speaking would facilitate an investigation, the interrogators implied that [defendant's] words would be used to help [him], thus undoing the heart of the warning that anything [he] said could and would be used against [him]" (14a).

Contrary to the majority's selective extrapolation, the interviewers *never* told defendant nor implied in any way that his words would be used to *help* him -- only that they would "look into" any information concerning the incident that defendant might ask them to investigate (87a). And then defendant was clearly and forcefully apprised that "anything you do say may be used against you in a court of law" (88a). Thus, far from contradicting the heart of the critical warning that anything he said would be used against him, the pre-*Miranda* remarks were in perfect harmony with that warning; apprising defendant only that his version of events would be listened to, if he chose to provide it, and that his request for an investigation would be honored.

Likewise far-fetched was the majority's conclusion that telling defendant that "the pre-arraignment interrogation was [his] 'only opportunity' to speak falsely suggested that requesting counsel would cause [him] to lose the chance to talk to an assistant district attorney" (14a). In fact, defendant was actually told, "Even if you have already spoken to someone else, you do not have to talk to us. This will be your only opportunity to speak to us before you go to court on these charges" -- a statement that was followed almost immediately by an advisement that defendant "ha[d] the right to be arraigned without undue delay" and a definition of the process: "that is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for you, and to have the question of bail decided by the court" (87a-88a). Contrary to the majority's conclusion, there is *nothing* in these pre-

Miranda remarks that states, suggests, or even hints at the possibility that by exercising his right to counsel, defendant would forever forgo the chance to speak with the district attorneys. To the contrary, the remarks clearly and accurately apprised defendant that the interview was his only opportunity to speak with them "*before you go to court on these charges*" -- and he was clearly told, immediately thereafter, that this will occur imminently.

Moreover, as defendant's ability to speak to prosecutors is not a right guaranteed under *Miranda* or requiring any advisement, the majority's concern about defendants being potentially misled on this point has no place whatsoever in its analysis of whether *Miranda* rights were clearly and effectively conveyed. Rather, if this is construed as some form of falsehood or deception (which, viewed in context, it is not), it clearly falls under the penumbra of a due process concern bearing on voluntariness, which must be analyzed under the totality of the circumstances (*see infra*, Point D).

But, most saliently, and as the dissent cogently reasoned, even if the pre-*Miranda* remarks are interpreted according to the majority's view, and "a reasonable person in these defendants' shoes might well have concluded, after having listened to the preamble, that it was in his best interest to get out his side of the story -- fast" (15a), this would *still* not furnish any basis whatsoever to find that *Miranda* was not effectively conveyed. Nor, indeed, would it furnish any grounds for concern or distress; for "if the suspect happened to be innocent -- if he had nothing whatever to do with the crime -- that conclusion would probably

be correct. It is usually in the interest of an innocent person to give investigators the true facts as soon as possible, before the evidentiary trail has grown cold and before an alibi can be tainted by the suspicion of contrivance" (Smith, J., dissenting at 18a), *citing* William J. Stuntz, *Miranda's Mistake*, 99 Mich. L. Rev. 975, 996-97 (2001).

And, conversely, if the suspect is guilty, and if the preamble nevertheless persuades him to decide to speak by exploiting "the natural impulse of any guilty defendant to think that he can talk his way out of trouble, by persuading police or prosecutors either that he is innocent, or that he deserves leniency" (19a), that, too, is completely permissible. For, as this Court has repeatedly recognized, the latitude afforded law enforcement to seek and obtain a suspect's voluntary confession prior to arraignment, before the right to counsel indelibly attaches and bars further interrogation, is not a necessary evil, as the tenor of the majority's opinion suggests, but, rather, "an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *See Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (internal quotations omitted).

The key to the threshold inquiry of effective advisement of *Miranda* -- the only issue implicated here -- is simply whether defendant understood that he had a choice; irrespective of whether he wisely exercised it under the circumstances.[5] As the dissent

[5] The state courts' discomfort with the interview program on the (continued...)

correctly explained, and the majority clearly misunderstood, "*Miranda* does not require law enforcement officials to repress, or forbid them to encourage, the tendency of criminals to talk too much. That tendency greatly contributes to the efficiency of law enforcement; many more crimes would go unpunished if it did not exist" (19a).

Certiorari should be granted to correct the Court of Appeals' misapprehension of this crucial point, and to nip at the bud its incorrect and unprecedented expansion of *Miranda*'s exclusionary rule to permit automatic suppression of voluntary statements made after a complete and clear advisement of *Miranda* rights, expressly acknowledged and waived. Exclusion of highly probative and voluntary statements is not, as

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[5](...continued)
grounds that it rarely, if ever, actually enures to a defendant's benefit to waive his rights and speak to the investigators, is wholly irrelevant to the analysis. The requirement that a waiver be knowing, "intelligent," and voluntary does not require that the decision be wise or, ultimately, beneficial to the defendant. As courts have explained, the modifier "intelligent" does not mean that a waiver must be wise, shrewd or prudent, but only that it occur with an appreciation of the right being abandoned and the consequences of abandoning it. *See Colorado v. Spring*, 479 U.S. at 564 (a valid waiver must be "voluntary in the sense that it was the product of free and deliberate choice;" and "knowing" or "intelligent" in that it was "made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it"); *see also Collins v. Brierly*, 492 F.2d 735, 739 (3d Cir. 1974) (in the context of an intelligent waiver of *Miranda*, "intelligence is not equated with wisdom"). Indeed, if the validity of a waiver could be judged based on the ultimate wisdom of the defendant's choice, then no incriminating statement could ever be received into evidence against a defendant.

the Court of Appeals' majority suggests, a societal goal to which we should aspire, so as to justify a broad rule that automatically achieves this result in as many cases as possible; rather, as this Court has repeatedly recognized, "society would be the loser" of a rule barring admission of voluntary confessions, because this would only frustrate the ultimate truth-seeking function of a trial. *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). Society has clearly lost in this case -- and will lose thousands of times over -- unless and until this Court corrects the decision of New York's highest court on this far-reaching, and seminal question of federal constitutional law.

C. The Analysis is No Different as a Result of the Pre-*Miranda* Comments Being Standardized Rather than *Ad Hoc*

In reaching its conclusion, the Court of Appeals highlighted, as did the Appellate Division before it, that the statement in this case was obtained as part of a "structured" or "standardized" pre-arraignment interview program used by the District Attorney's office since 2007 in thousands of cases, and that the pre-*Miranda* remarks at issue were "scripted" rather than *ad hoc* (1a). The Court of Appeals used these facts to try to further bolster its tenuous analogy to *Seibert*, stating that "[t[he issue, as in *Seibert*, is whether a standardized procedure ... effectively vitiated or at least neutralized the effect of the subsequently-delivered *Miranda* warnings" (14a). Contrary to the Court of Appeals' insinuation, it is wholly irrelevant to the effective-advisement analysis whether the interviewer's pre-*Miranda* comments were

standardized or *ad hoc*, or delivered for the first or thousandth time. For, while a court is certainly free to evaluate the tone and manner in which an interview is conducted as one of many circumstances that might impact the voluntariness of an individual suspect's waiver under due process totality-of-the-circumstances analysis, such consideration has no place in the question decided by the Court of Appeals, and now before this Court, about whether *Miranda* was effectively conveyed.

Indeed, the number of times that the pre-*Miranda* remarks were used by the investigator in cases past, and whether it was uttered *ad hoc* or was carefully crafted, is irrelevant to either analysis because none of this is known to the defendant, and, thus, cannot impact his understanding or waiver. *See. e.g., Fare v. Michael C.*, 442 U.S. at 707 (validity of the waiver must be gauged by reference to totality of the circumstances confronting the suspect at that time). Relatedly, whether the District Attorney's intention in reading a brief pre-*Miranda* statement is to orient a defendant, elicit exculpatory information, or put a suspect at ease so that he is more likely to talk to the interviewers and confess (*see Dunbar* at 43a-44a, questioning the DA's purpose), this consideration, too, is entirely irrelevant; for the subjective intent of the interviewer -- which is also not known to the suspect -- similarly cannot possibly impact his understanding of his rights or the voluntariness of his waiver. *Id.*

While defendant challenged this proposition below, claiming that it was rejected by the majority of this Court in *Seibert*, and that it merely restates the

concerns of the *Seibert* dissent, which, according to defendant, "is not the law" (Defendant's Court of Appeals Brief at 42-43, *citing Missouri v. Seibert*, 542 U.S. at 600), this characterization of *Seibert*'s holding was simply wrong. Contrary to defendant's contentions, the *Seibert* plurality did *not* hold that the subjective intent of the interrogator was relevant to the *Miranda* inquiry; only Justice Kennedy so opined. Rather, in accordance with settled law, the plurality "correctly decline[d] to focus its analysis on the subjective intent of the interrogating officer," (*Id.* at 624), and the four-Justice dissent agreed with that assessment:

> The plurality's rejection of an intent-based test is also, in my view, correct. Freedom from compulsion lies at the heart of the Fifth Amendment and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we focus our analysis on the way in which suspects experience interrogation. ... '[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights.'

Missouri v. Seibert, 542 U.S. at 624-625, *citing Moran v. Burbine*, 475 U.S. at 423; *Stansbury v. California,* 511 U.S. 318, 324-25 (1994) (*per curiam*) ("one cannot

expect the person under interrogation to probe the officer's innermost thoughts").

Indeed, as the *Seibert* dissent wrote, in agreement with the plurality, analysis of the subjective state of mind of the interrogator is not only contrary to established law and the crux of the inquiry regarding the voluntariness of a *Miranda* waiver, but it is also "an unattractive proposition that we all but uniformly avoid," as the subjective intent of the interrogator is "unverifiable," and "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources," and inconsistent results. *Seibert* at 625-26, *citing United States v. Leon*, 468 U.S. 897, 922 n. 23 (1984). For these reasons, this Court has rejected an intent-based test in other criminal procedure contexts as well. *See, e.g., New York v. Quarles*, 467 U.S. at 656; *Whren v. United States*, 517 U.S. 806, 813-14 (1996).

Therefore, contrary to the Court of Appeals' understanding, and as previously discussed, *Seibert*, a very extreme continuous-interrogation case, did nothing more than adopt a common-sense rule barring law enforcement from effecting an end-run around *Miranda* by obtaining a full pre-*Miranda* confession, and then giving warnings and having the suspect repeat the confession. It is not directly applicable to this case, and cannot be used to justify -- let alone compel -- suppression here.

D. The Due Process Question of Whether the Standardized Pre-*Miranda* Remarks Vitiated the Knowing and Voluntary Nature of Defendant's Waiver and Statement was Conceded Below, and is, in any Event, Not a Concern Under the Facts of This Case.

In this case, defendant ultimately conceded -- and all of the state courts have agreed -- that due process voluntariness concerns are not implicated (*Dunbar* at15a, "the issue ... is not whether, under the totality of the circumstances, these defendants' waivers were valid, but rather whether or not they were ever 'clearly informed' of their *Miranda* rights in the first place, as is constitutionally required"). Indeed, however negatively the Court chooses to construe the interviewers' pre-*Miranda* remarks, they can hardly be characterized as amounting to the "coercion of a confession by physical violence or other deliberate means calculated to break [defendant's] will." *Oregon v. Elstad*, 470 U.S. 298, 312 (1985); *see also Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (even "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns").

And this conclusion is only bolstered here by the totality of the other circumstances attendant to the case. In this case, defendant was subjected to a *total* of only eleven minutes of interrogation -- including the standardized pre-*Miranda* remarks and advisement of *Miranda* rights, which consumed nearly three minutes of this time. He was never threatened, deprived of food, drink, or sleep, nor subjected to any physical

force. Indeed, he was specifically told the interview would be videotaped, providing further assurance. Defendant was calm during the interview, and appeared lucid and clear-headed. He spoke English without any problem, and was visibly eager to speak to the interviewers. And his decision to do so was clearly a strategic one.

Defendant was a persistent violent felony offender, 35 years old at the time of this crime, with a history of prior robbery convictions. At the time that he chose to waive his *Miranda* rights and speak to investigators in Central Booking, he already knew that he had been identified by the victim in a show-up conducted less than five minutes after the crime, and that both the gun he had wielded, and the distinctive blue-striped shirt and Yankee hat he had worn during the robbery, had been recovered from the floor of the seat in front of him in the getaway car. He also knew that the getaway driver, with whom he had planned the robbery, had been arrested by police. Under these circumstances, defendant knew, as he candidly admitted during his interview, that he "couldn't say it wasn't [him]" -- that defense would never work under the facts of this case. Instead, he believed that his last best hope was to try to work out a cooperation agreement, where the DA would offer him some leniency in exchange for his testimony against others. And that is precisely what he kept trying to negotiate throughout his interview.

Defendant's calculated decision to waive his rights and attempt to broker a deal is the very epitome of a knowing and voluntary waiver. Whatever the

wisdom of that choice, it is not one that was thrust upon him, and certainly not one that was suggested by any of the brief pre-*Miranda* remarks. Thus, even if, as the Court of Appeals described them, the pre-*Miranda* statements were "at best confusing and at worst misleading" (14a), there is no "evidence that [defendant's] 'will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct." *Colorado v. Spring*, 479 U.S. at 575, *quoting Colorado v. Connelly*, 479 U.S. 157, 163-164 (1986). Accordingly, in addition to being properly preceded by a full and effective advisement of *Miranda* rights, defendant's "waiver of his Fifth Amendment privilege was voluntary under this Court's decision in *Miranda*." *Id.*

In sum, on this record, and based squarely on this Court's precedent, suppression was simply not permitted in this case. Certiorari should be granted because the Court of Appeals' decision exposes its fundamental misapprehension of both *Miranda*'s core purpose and the scope of its breadth, and because such grave misapprehension of so important a right by New York's highest court -- in a decision based *entirely and solely on federal constitutional grounds* -- will have far-reaching consequences implicating thousands upon thousands of cases involving the effective administration of *Miranda* rights and the

constitutional grounds for automatic suppression of voluntary and reliable statements.[6] The right is too important, the reach too broad, and the magnitude of the error too great to permit this decision to stand.

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[6] The impact of the Court of Appeals' decision is definitely *not* narrowly limited to cases involving this particular interview program, which may, in any event, be quite numerous in themselves. For under the Court of Appeals' holding, *any statement* uttered to a suspect prior to *Miranda* can be characterized as impacting effective advisement of the warnings that follow. Thus, other than non-verbal conduct preceding *Miranda* -- like actual physical deprivations or violence -- any commonplace pre-*Miranda* comment by law enforcement can easily be couched by a clever defense attorney as seeking to convince the suspect to speak (and, thus, contradicting the right to remain silent) or leading him to believe that he might benefit from speaking (and, thus, contradicting the advisement that anything he says could be used against him). And, under the Court of Appeals' precedent, it would then be deemed to require *automatic* suppression, without any need for a hearing or a case-by-case evaluation of the impact on an individual suspect under the circumstances of his individual case. The impact of this case is, thus, staggering. Rather than keeping with this Court's persistent attempts to limit the reach of the exclusionary rule to prevent suppression of voluntary and reliable statements, the Court of Appeals has expanded that reach to an area never previously conceived by any court.

CONCLUSION

For the reasons stated above, this Court should grant the State's petition for a Writ of Certiorari.

Respectfully submitted,

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January 26, 2015

APPENDIX

No. 169
The People & c.,

Appellant,

v.

Jermaine Dunbar,

Respondent.

No. 170
The People &c.,

Appellant,

v.

Collin F. Lloyd-Douglas,

Respondent.

Case No. 169:

Donna Aldea, for appellant.

Allegra Glashausser and Leila Hull, for respondent.

The Legal Aid Society; New York Civil Liberties Union; Legal Ethics Bureau at New York University School of Law; District Attorneys Association of the State of New York, *amici curiae*.

Case No. 170:

Donna Aldea, for appellant.

Allegra Glashausser and Leila Hull, for respondent.

New York Civil Liberties Union et al.; Legal Ethics Bureau at New York University School of Law; District Attorneys Association of the State of New York, *amici curiae*.

READ, J.:

Beginning in 2007, the Queens County District Attorney implemented a central booking pre-arraignment interview program, launched in conjunction with the initiative to videotape interrogations. The program consisted of a structured, videotaped interview conducted by two members of the District Attorney's staff (an assistant district attorney and a detective investigator [DI]) with a suspect immediately prior to arraignment. During this interview, the DI delivered a scripted preface or "preamble" to the *Miranda* warnings that, among other things, informed the suspect that "this is your opportunity to tell us your story," and "your only opportunity" to do so before going before a judge. After being so cautioned, defendants Jermaine Dunbar (Dunbar) and Collin F. Lloyd-Douglas (Lloyd-Douglas) made statements in their respective interviews, which they later sought to suppress. We hold that the preamble undermined the subsequently-communicated

Miranda warnings to the extent that Dunbar and Lloyd-Douglas were not "'adequately and effectively' advised of the choice [the Fifth Amendment] guarantees" against self-incrimination (*Missouri v Seibert*, 542 US 600, 611 [2004], *quoting Miranda v Arizona*, 384 US 436, 467 [1966]) before they agreed to speak with law enforcement authorities.

I.

Dunbar

On April 23, 2009, at 12:40 p.m., Dunbar entered a money wiring and office services store in Queens where a lone cashier was working at the time. He threatened the cashier with what appeared to be a gun and demanded that she turn over money. Locked in a plexiglass enclosure, the cashier threw herself to the floor, called 911 and pressed the distress button. Thus thwarted, Dunbar fled in a waiting black livery car with New Jersey license plates. He was apprehended less than five minutes later when police officers patrolling in the area spotted the car. The cashier identified Dunbar as the would-be robber in a show-up soon after. She had told the police that the perpetrator was a thin black man who wore a blue and white striped shirt and a hat, and the police discovered these items and an imitation pistol on the floor of the getaway car. Dunbar was arrested at 12:59 p.m. and brought to central booking in Queens.

About 23 hours after he was taken into custody, at 12:03 p.m. on April 24, 2009, Dunbar was interviewed by a DI and an assistant district attorney.

The Assistant District Attorney described for Dunbar the charges he would be facing when he went to court, including the date, time and place of the crimes alleged. The DI then informed Dunbar that "in a few minutes I am going to read you your rights. After that, you will be given an opportunity to explain what you did and what happened at that date, time and place." She then delivered the preamble, advising Dunbar as follows:

> "If you have an alibi, give me as much information as you can, including the names of any people you were with.
>
> "If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.
>
> "If there is something you need us to investigate about this case you have to tell us now so we can look into it.
>
> "Even if you have already spoken to someone else you do not have to talk to us.
>
> "This will be your only opportunity to speak with us before you go to court on these charges."

The DI continued without a break, following a script, next informing Dunbar that "[t]his entire interview is being recorded with both video and sound"; and "I'm going to read you your rights now, and then you can decide if you want to speak with us, O.K.?"

She then advised "You have the right to be arraigned without undue delay; that is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for you, and to have the question of bail decided by the court"; gave the *Miranda* warnings; and, finally, asked "Now that I have advised you of your rights, are you willing to answer questions?" Dunbar indicated his understanding of each warning as it was given, and his willingness to continue the interview.

When the DI asked Dunbar "what happened," he related that a man named Pete had told him about "robbing this place." Dunbar twice interrupted the questioning to express puzzlement as to how the interview was helping him. He remarked that he "want[ed] to work around this," and asked if he would be talking to "the D.A." next. Dunbar was told that the next person he would be speaking to was his lawyer. The Assistant District Attorney and DI explained that it was their job to determine if there was anything Dunbar needed them to investigate, and to find out his side of the story. Dunbar responded that his side of the story was that he was forced by Pete and "Ralphy" (the driver of the livery cab) to rob the store.

After Dunbar was indicted for second-degree attempted robbery (Penal Law §§ 160.10 [1]; 110.00), fourth-degree criminal mischief (Penal Law § 145.00 [1]) and other crimes, he made a motion to suppress. As relevant to this appeal, he argued that his videotaped statement was not voluntary and that he had not been adequately advised of his *Miranda* rights. After a hearing, the suppression court denied the

motion, reasoning that, in view of the totality of the circumstances, Dunbar's statement was voluntarily made after a valid *Miranda* waiver and before his right to counsel attached under New York law.

At Dunbar's jury trial, the cashier identified him as the perpetrator and police testimony established that he had been arrested within minutes of the robbery. Additionally, the jurors were shown both surveillance video depicting Dunbar at the store and the videotaped interview. Dunbar was convicted of attempted robbery and criminal mischief, the two remaining counts of the indictment. On May 20, 2010, Supreme Court sentenced him as a persistent violent felony offender to an indeterminate prison term of from 17 years to life. Dunbar appealed.

On January 30, 2013, the Appellate Division unanimously reversed, concluding that the preamble "add[ed] information and suggestion . . . which prevent[ed the *Miranda* warnings] from effectively conveying to suspects their rights," creating a "muddled and ambiguous" message (104 AD3d 198, 207 [2d Dept 2013]). In this regard, the court rejected the argument, advanced by the People, that the effect of the preamble had to be assessed on a case-by-case basis, taking into account the individual experience and circumstances of each suspect. In the Appellate Division's view, such case-by-case determination, while relevant to the voluntariness of a waiver, was irrelevant to the question of whether *Miranda* warnings were properly administered in the first place (*id.* at 210). The court further determined that the error in admitting the videotaped statement was not

harmless beyond a reasonable doubt in light of the facts and circumstances of the case, and so ordered a new trial. A Judge of this Court granted the People's application for leave to appeal (21 NY3d 942 [2013]), and we now affirm.

Lloyd-Douglas

On the evening of September 6, 2005, Lloyd-Douglas got into an argument with P.D. with whom he was romantically involved. P.D. testified that the next morning, Lloyd-Douglas attacked her with a hammer as she left for work from the apartment she and Lloyd-Douglas shared. P.D. suffered grievous injuries, including a fractured skull. Ignoring P.D.'s pleas to call an ambulance, Lloyd-Douglas waited around in the apartment for three or four hours before leaving and, according to P.D., he took her phone, money, and identification with him. She managed to crawl to her bedroom and call 911. After being transported to the hospital, P.D. underwent emergency surgery to remove bone fragments and damaged parts of her brain; P.D.'s injuries left her with difficulty talking, understanding, balancing, standing and walking, and required additional surgery and extensive physical therapy.

Lloyd-Douglas was apprehended about three years after this incident, on June 12, 2008. While at central booking in Queens, he was interviewed by an assistant district attorney and a DI. The DI introduced herself and the Assistant District Attorney, told Lloyd-Douglas the charges he would be facing and that he would be read his rights "in a few minutes," after which he would have "an opportunity to explain what

you did and what happened at that date, time, and place." The DI then delivered the preamble; told Lloyd-Douglas that the interview was being recorded with both video and sound; that she was going to "read him his rights" and then he could "talk with [her] if he like[d];" advised him of his right to be arraigned without undue delay; gave the *Miranda* warnings and concluded by asking "Now that I have advised you of your rights, are you willing to answer questions?" Like Dunbar, Lloyd-Douglas indicated his understanding of each warning as it was given, and agreed to participate in an interview.

Lloyd-Douglas acknowledged that he had fought with P.D. the day of the incident, but claimed that she had attacked him with the hammer and somehow injured herself during the ensuing struggle as he sought to protect himself. He acknowledged remaining in the apartment with her for several hours afterwards, as well as his refusal to call an ambulance; he denied taking P.D.'s wallet or cell phone. Lloyd-Douglas insisted that P.D. did not appear to him to be seriously hurt, and that he had made sure before he left that she had access to a telephone so that she might call an ambulance if she wished to do so.

After Lloyd-Douglas was indicted for attempted murder in the second degree (Penal Law §§ 110.00; 125.25 [1]), first-degree assault (Penal Law § 120.10 [1]), first-degree robbery (Penal Law § 160.15), unlawful imprisonment in the first degree (Penal Law § 135.10), criminal possession of a weapon in the third-degree (Penal Law § 265.02 [1]), and other crimes, he moved to suppress his videotaped statement. He

argued that the statement was involuntary because he had been held in central booking for about 22 hours and had not been specifically asked by the DI if he wanted food or water, if he needed to use the bathroom or was on any medication. The People responded that the statement was voluntarily made after a valid *Miranda* waiver, that Lloyd-Douglas was arraigned in less than 24 hours, that he had access to the bathroom, food, and water and that he was questioned for less than 30 minutes. The People further argued that the voluntariness of the waiver and statement was established by the video itself, which showed that Lloyd-Douglas took control of the interview.

After a hearing, the Judicial Hearing Officer issued a written decision, subsequently confirmed by Supreme Court on September 17, 2009, denying Lloyd-Douglas's motion to suppress. The Hearing Officer concluded that "the People have proved, beyond a reasonable doubt, that the defendant's statements were made pursuant to his knowing, intelligent, and voluntary waiver of his constitutional rights." She credited the DI's testimony and found "nothing in the record to indicate that the defendant was threatened to make a statement or that his will was overborne," and that "no evidence was adduced to indicate that the defendant was irrational or in any way incapable of appreciating the consequences of his statements, nor that he was subjected to 'overbearing interrogation.'"

At Lloyd-Douglas's jury trial in Supreme Court, P.D. identified him as her assailant and testified about the details of the assault, medical evidence established the nature and extent of her injuries and the jurors

were shown Lloyd-Douglas's videotaped interview. Lloyd-Douglas testified on his own behalf and claimed, consistent with his videotaped statement, that he fought with P.D., but that she attacked him with the hammer and her injuries were self-inflicted; the trial judge gave a justification instruction. The jury convicted Lloyd-Douglas of all the crimes submitted to the jury except robbery, and on April 7, 2010, Supreme Court sentenced him to prison for 15 years, to be followed by 5 years of postrelease supervision. He appealed.

On January 30, 2013, the Appellate Division unanimously reversed (102 AD2d 986 [2d Dept 2013]), ordering suppression of the statement for the reasons stated in the companion case of *People v Dunbar, supra*. The court further concluded that the error was not harmless beyond a reasonable doubt in light of the facts and circumstances of the case, and so ordered a new trial. A Judge of this Court granted the People's application for leave to appeal (21 NY3d 944 [2013]), and we now affirm.

II.

An individual taken into custody by law enforcement authorities for questioning "must be adequately and effectively apprised of his rights" safeguarded by the Fifth Amendment privilege against self-incrimination (Miranda, 384 US at 467; US Const Amend V). First, the authorities must inform a suspect in "clear and unequivocal terms" of the right to remain silent (*id.* at 467-468). Second, they must make a suspect "aware not only of the privilege, but also of

the consequences of forgoing it" by explaining that "anything" he says during the interrogation "can and will be used against [him] in court" (*id.* at 469). "[T]o assure that [this] right to choose between silence and speech remains unfettered throughout the interrogation process," the authorities must also explain to the suspect that he has a right to the presence of an attorney (*id.*). And finally, so that the right to an attorney is not "hollow," the authorities must also advise the suspect "that if he is indigent a lawyer will be appointed to represent him." (*id.* at 473).

These four warnings are an "absolute prerequisite to interrogation" (*id.* at 471). Further, "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, [a court does] not pause to inquire in individual cases whether the defendant was aware of his rights *without* a warning being given" (*id.* at 468 [emphasis added]). In sum, absent a "full and effective warning of [these] rights" and a knowing, intelligent and voluntary waiver, statements made by a suspect during custodial interrogation must be suppressed (*id.* at 445, 475-476).

Although *Miranda's* bright-line rule was controversial at first, it "has become embedded in routine police practice to the point where the warnings have become part of our national culture" (*Dickerson v United States*, 530 US 428, 443 [2000]). Prior to the *Miranda* decision, courts looked at every confession individually for voluntariness, using a totality-of-the-circumstances test grounded in notions of due process

(*id.* at 432-433). This due process test took into consideration "the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation" (*id.* at 434 [internal quotation marks omitted]). While the prosecution still must prove voluntariness of a confession, "*Miranda* changed the focus of much of the inquiry" (*id.*). Indeed, "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver" (*Seibert*, 542 US at 608-609).

Since *Miranda* was handed down, the Supreme Court has declined to return to the totality-of-the-circumstances test of voluntariness, or to allow the government to meet its burden without demonstrating compliance with the *Miranda* procedure. In *Dickerson*, the Court rejected a congressional attempt to revive the former totality-of-the-circumstances test, holding that *Miranda* is "constitutionally based" and reaffirming that it governs the admissibility of statements in federal and state courts (*Dickerson*, 530 US at 432). And in *Seibert*, the Court rebuffed a creative attempt to end run *Miranda*. *Seibert* addressed the question-first-and-warn-later police protocol that called for giving a suspect no warnings of the rights to silence and counsel until after interrogation had produced a confession. At that point, the interrogator would deliver the *Miranda* warnings and, assuming the suspect waived *Miranda* rights, repeat the questioning to elicit the information already

provided in the prewarning statement. Writing for the plurality, Justice Breyer explained that, under these circumstances, the warnings could not function "effectively" as *Miranda* requires (*Seibert*, 542 US at 611).

Here, the People acknowledge that a statement made in the absence of *Miranda* warnings must be suppressed without regard to the individual circumstances of the suspect. But they argue that where no interrogation precedes a suspect's *Miranda* waiver (unlike *Seibert*) and *Miranda* rights are fully administered, acknowledged and waived, law enforcement's statements or conduct prior to the waiver bear only on the question of whether the waiver was knowing, voluntary and intelligent under the totality of the circumstances -- a factual inquiry to be made on a case-by-case basis.

But just as no "talismanic incantation [is] required to satisfy [*Miranda's*] strictures" (*California v Prysock*, 453 US 355, 359 [1981]), "it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance" (*Seibert*, 542 US at 611). "The inquiry is . . . whether the warnings reasonably 'convey to [a suspect] his rights as required by *Miranda*'" (*Duckworth v Eagan*, 492 US 195, 203 [1989] quoting *Prysock*, 453 US at 361). Thus in *Seibert*, the issue was whether, in light of the protocol employed by the police in that case, "the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement" (*Seibert*, 542 US at 612).

Here, there is no claim that the *Miranda* warnings themselves failed to apprise Dunbar and Lloyd-Douglas of their rights. The issue, as in *Seibert*, is whether a standardized procedure -- there, the question-first-and-warn-later protocol; here, the preamble -- effectively vitiated or at least neutralized the effect of the subsequently-delivered *Miranda* warnings. We agree with the Appellate Division that the preamble, which is at best confusing and at worst misleading, rendered the subsequent *Miranda* warnings inadequate and ineffective in advising Dunbar and Lloyd-Douglas of their rights.

Before they were read their *Miranda* rights, Dunbar and Lloyd-Douglas were warned, for all intents and purposes, that remaining silent or invoking the right to counsel would come at a price -- they would be giving up a valuable opportunity to speak with an assistant district attorney, to have their cases investigated or to assert alibi defenses. The statements to "give me as much information as you can," that "this is your opportunity to tell us your story" and that you "have to tell us now" directly contradicted the later warning that they had the right to remain silent. By advising them that speaking would facilitate an investigation, the interrogators implied that these defendants' words would be used to help them, thus undoing the heart of the warning that anything they said could and would be used against them. And the statement that the prearraignment interrogation was their "only opportunity" to speak falsely suggested that requesting counsel would cause them to lose the chance to talk to an assistant district attorney.

In sum, the issue in these cases is not whether, under the totality of the circumstances, these defendants' waivers were valid, but rather whether or not they were ever "clearly informed" of their *Miranda* rights in the first place, as is constitutionally required. We agree with the Appellate Division that they were not: the preamble undercut the meaning of all four *Miranda* warnings, depriving Dunbar and Lloyd-Douglas of an effective explanation of their rights. Certainly, if the *Miranda* warnings were preceded by statements that were *directly* contrary to those warnings (*e.g.*, you are required to answer our questions; your statements will be used to help you; you are not entitled to a lawyer) there would be no need to examine the totality of the circumstances to determine if a *Miranda* waiver was knowing, voluntary and intelligent. The preamble did the same thing, albeit in an indirect, more subtle way. While a lawyer would not be fooled, a reasonable person in these defendants' shoes might well have concluded, after having listened to the preamble, that it was in his best interest to get out his side of the story -- fast.

Finally, the People did not ask us to review the Appellate Division's rulings that the improper admission of the videotaped interviews were not harmless beyond a reasonable doubt. We therefore do not reach and express no opinion about this issue. Accordingly, the orders of the Appellate Division should be affirmed.

People v Jermaine Dunbar, People v Collin Lloyd-Douglas

No. 169 and 170

SMITH, J.(dissenting):

The purpose of *Miranda* is to be sure that suspects are informed of their rights and understand them. That purpose is not undermined when police or prosecutors persuade a properly-informed suspect to waive his or her rights. I think that is all that happened here, and I would hold that defendants' statements need not be suppressed.

The central holding of *Miranda* is that, before a suspect in custody is questioned, "[T]he following measures are required":

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"

(*Miranda v Arizona*, 384 US 436, 479 [1966]).

The Supreme Court also said in *Miranda*:

> "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently"

(*id.* at 444).

It is undisputed that both these defendants received proper *Miranda* warnings and agreed to answer questions. I do not argue that that ends the matter. Of course *Miranda* would be violated if the State had, as in *Missouri v Seibert* (542 US 600 [2004]), trapped defendants into telling their story before they heard their rights. And I agree with the majority that it would also be violated if the warnings were accompanied by statements that were directly or indirectly contrary to the warnings (majority op at 15). But no such statements were made here. There is nothing in the preamble that the Queens District Attorney's office affixed to the warnings that expressly or impliedly contradicts the warnings themselves. No reasonable person in the position of either of these defendants would conclude from the preamble that he did not have a right to remain silent; that anything he said could not be used against him; that he was not entitled to a lawyer; or that the State would not provide him a lawyer free of charge.

I admit that the wording of the preamble is not perfect. Its third sentence -- "If there is something you need us to investigate about this case, you have to tell us now so that we can look into it" -- is unhappily phrased; I wish the word "please" had replaced the words "you have to." But that change would not significantly alter the substance of the statement. No

reasonable person would get the impression from this sentence that he literally *had to* speak on pain of punishment, or that the police would refuse to investigate anything that came to their attention later. In the unlikely event that any suspect even considered taking "you have to" literally, his confusion would be eliminated by the plain wording of the first *Miranda* warning: "You have the right to remain silent." Viewed as a whole, what was said to each of these defendants before questioning began "reasonably conve[yed] . . . his rights as required by *Miranda*" (*Florida v Powell*, 559 US 50, 60 [2010] [internal quotation marks and citations omitted]).

The majority's real complaint with the preamble is not that it is likely to confuse a suspect about what his rights are, but that it might persuade him to waive them. As the majority says, "a reasonable person in these defendants' shoes might well have concluded, after having listened to the preamble, that it was in his best interest to get out his side of the story -- fast" (majority op at 15). Indeed he might, but why should that distress us? In fact, if the suspect happened to be innocent -- if he had nothing whatever to do with the crime -- that conclusion would probably be correct. It is usually in the interest of an innocent person to give investigators the true facts as soon as possible, before the evidentiary trail has grown cold and before an alibi can be tainted by the suspicion of contrivance (*cf.* William J. Stuntz, *Miranda's Mistake*, 99 Mich L Rev 975, 996-997 [2001] [arguing that an innocent suspect's best chance to avoid incarceration and conviction is to persuade the police of his innocence before the State decides to press charges]). There are innocent people,

though I hope not many, who are arraigned for crimes, and the preamble to the *Miranda* warnings, assuming it had any effect at all, might help some of them to avoid a period of unjust imprisonment, or even an unjust conviction.

But I do not suggest that it is the primary purpose or effect of the preamble to protect the innocent. The Queens District Attorney's office surely assumes, perhaps correctly, that the great majority of people arrested and arraigned are guilty. The main purpose of the preamble is, no doubt, to persuade guilty people to speak, in the hope that they will either admit their guilt or, in denying it, tell a story that can be proved false. The preamble seeks to exploit the natural impulse of any guilty defendant to think that he can talk his way out of trouble, by persuading police or prosecutors either that he is innocent or that he deserves leniency. But *Miranda* does not require law enforcement officials to repress, or forbid them to encourage, the tendency of criminals to talk too much. That tendency greatly contributes to the efficiency of law enforcement; many more crimes would go unpunished if it did not exist.

The records in these cases lead me to conclude that these two defendants, assuming they listened attentively to both the preamble to the *Miranda* warnings and the warnings themselves, knew their rights, and decided, freely and voluntarily, to waive them. As it turns out that was, as it often is, a foolish choice, but the privilege against self-incrimination protects suspects against government coercion, not

against their own foolishness. I would reverse the Appellate Division orders.

* * * * * * * * * * * * * * * * *

In Each Case: Order affirmed. Opinion by Judge Read. Chief Judge Lippman and Judges Graffeo, Pigott, Rivera and Abdus-Salaam concur. Judge Smith dissents in an opinion.

Decided October 28, 2014

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

___AD3d____ Argued - September 4, 2012

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2010-04786 OPINION & ORDER

The People etc. respondent,
v Jermaine Dunbar, appellant.

(Ind. No. 1217/09)

APPEAL by defendant from a judgment of the Supreme Court (Fernando Camacho, J.), rendered May 10, 2010, and entered in Queens County, convicting him of attempted robbery in the second degree and criminal mischief in the fourth degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Robert C. McCann, J.), of those branches of the defendant's omnibus motion which were to suppress a videotaped statement made by him to law enforcement authorities, physical evidence, and identification evidence.

Lynn W.L. Fahey, New York, N.Y. (Leila Hull of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Gary Fidel, Robert J. Masters, and Donna Aldea of counsel), for respondent.

Taylor Prendergrass, Susannah Carlson, and Christopher Dunn, New York, N.Y., for New York Civil Liberties Union Foundation, American Civil Liberties Union, Brennan Center for Justice, New York State Defenders Association, Pre Trial Justice Institute, New York Association of Criminal Defense Lawyers, Five Borough Defense, and Bronx Defenders, *amici curiae* (one brief filed).

SKELOS, J. P.

The office of the Queens County District Attorney (hereinafter the District Attorney's office) instituted a program (hereinafter the Program) under which arrested individuals are systematically interviewed just prior to arraignment, or, in other words, immediately before those individuals' indelible right to counsel would attach. As part of the Program, the District Attorney's office formulated a script, containing a number of statements, which is read to suspects before they are advised of their constitutional rights as required under *Miranda v Arizona* (384 US 436). The principal issue presented on this appeal is whether this procedure is effective to secure those individuals' fundamental constitutional privilege against self-incrimination and right to counsel. We hold that it is not, and, therefore, that the defendant's

videotaped statement, made to members of the District Attorney's office pursuant to the Program, should have been suppressed.

On April 23, 2009, at 12:40 p.m., the complainant was working as the only cashier at a small commercial establishment that provides money-transfer and other services. A customer entered the store, made some photocopies, and then exited the store. About five minutes later, the customer returned and knocked on the store's locked outer door. The complainant, who was sitting at a counter behind a locked door and a plexiglass barrier, opened the outer door with a button located at the counter. The customer entered, displayed what appeared to be a gun, and demanded money. The complainant got down on the floor behind the counter and called 911, after which, the perpetrator left. The complainant was still lying on the ground when the perpetrator left, and did not see whether the perpetrator fled on foot or in a car. She described the perpetrator as a thin, black man who wore a blue and white striped shirt and a hat.

According to pretrial hearing testimony, Police Office Frank Diliberto and his partners received a radio call related to this incident, which included a description of a getaway vehicle as black livery cab with New Jersey license plates. Approximately three minutes later, the police officers stopped a black livery cab, which was occupied by one passenger – the defendant – and a driver, whom a police officer described, at trial, as a dark-skinned, Hispanic man. At that time, the defendant was wearing jeans and a black t-shirt. Officer Diliberto removed the defendant

from the vehicle and placed him in handcuffs. According to Officer Diliberto, he then found a black "Yankee hat," a black "handgun," which turned out to be an air pistol, and a blue and white striped shirt, "on the floor of the black livery on the back seat." Officer Diliberto later clarified that he found these items "directly on the floor in front of the seat" or "[d]irectly behind the driver's seat, on the floor the vehicle."

Police Officer Peter Linke arrived at the location where the livery cab had been stopped when the defendant was already in handcuffs. Officer Linke saw Officer Diliberto remove the hat, gun, and blue and white striped shirt from the car. When Officer Linke was confronted at the pretrial hearing with his grand jury testimony that he saw Officer Diliberto remove the items from "under the passenger seat in the front," Officer Linke indicated: "If that's what I said, that's correct."

Shortly after the livery cab was stopped, a police officer brought the complainant to the location of the stopped vehicle, where she viewed the defendant, who was in handcuffs and surrounded by uniformed police officers. Officer Diliberto was standing next to the defendant and holding the striped shirt at the height of his waist, such that the complainant saw the shirt when viewing the defendant. The complainant identified the defendant as the perpetrator. The defendant was then taken to the police precinct. The time of the defendant's arrest was 12:59 p.m. on April 23, 2009.

About 23 hours later, on April 24, 2009, at 12:03 p.m., Sergeant Mary Picone brought the defendant from the "pens," where he was waiting to be arraigned before a judge, to an interview room to be questioned by herself and Assistant District Attorney (hereinafter ADA) Tina Grillo. As revealed by the recording of the interview, once the defendant was brought to the interview room, Sergeant Picone and ADA Grillo introduced themselves, and ADA Grillo informed the defendant that, "when [he goes] to court," he would be charged with, among other stated offenses, attempted robbery in the first degree and criminal possession of a weapon in the fourth degree, related to an incident that had occurred the previous day in Queens County at the above-referenced store. In accordance with the Program, Sergeant Picone informed the defendant that "in a few minutes" she would read him his *Miranda* rights, and that he would "be given an opportunity to explain what [he] did and what happened at that date, time, and place." Sergeant Picone then instructed the defendant as follows:

> "If you have an alibi, give me as much information as you can, including the names of any people you were with.
>
> "If your version of what happened is different from what we've been told, this is your opportunity to tell us your story. If there is something you need us to investigate about this case you have to tell us now so we can look into it.

> "Even if you have already spoken to someone else you do not have to talk to us.
>
> "This will be your only opportunity to speak with us before you go to court on these charges."

(These statements will be hereinafter referred to as the preamble.) Sergeant Picone explained to the defendant that the interview was being recorded, advised him of his right to be arraigned without undue delay, and then read him the *Miranda* warnings. The defendant indicated his understanding of each warning, after which, Sergeant Picone asked the defendant if he would answer questions. The defendant replied "yes," and Sergeant Picone asked the defendant "what happened."

The defendant stated that he had met a man named Pete, who had told him "about robbing this place." The defendant believed that "the money" was under the counter and indicated that he was supposed to scare the cashier by showing her the fake gun, which he had gotten from Pete. Sergeant Picone and ADA Grillo asked the defendant a number of questions about the incident, such as how the defendant got to the location of the crime and what kind of gun he used.

The defendant twice interrupted the questioning to express his confusion or concern as to how the interview was helping him. Sergeant Picone responded that the questioning was "beneficial to [him] if [he had] an alibi, [or] if there's something we need to investigate

about this." Sergeant Picone and ADA Grillo also explained that the defendant could tell them something that might benefit him, such as "it wasn't me, I wasn't there." When the defendant stated that he could not truthfully say that it was not him, Sergeant Picone immediately responded: "No, you can't say that because we have pictures of you and they found the BB gun and all that stuff." At that point, ADA Grillo began questioning the defendant about who picked him up after the incident.

The defendant then asked if he would be talking to "the D.A." after he was finished talking to ADA Grillo and Sergeant Picone, to which they responded that the next person he would be talking to was his lawyer. ADA Grillo and Sergeant Picone explained that it was their job to determine if there was anything the defendant needed them to investigate and to find out from him what his side of the story was. The defendant stated that his side of the story was that he felt that he was forced by Pete and "Ralphy" (the driver who picked him up after the incident) to rob the store. ADA Grillo and Sergeant Picone then asked a few more questions about the details of the incident before concluding the interview.

The defendant was subsequently indicted on charges of attempted robbery in the second degree, criminal mischief in the fourth degree, menacing in the third degree, and unlawful sale or possession of an imitation pistol. Prior to trial, the defendant moved, inter alia, to suppress the physical evidence taken from the cab, the showup identification, and his videotaped statement. The Supreme Court denied the motion,

concluding that the physical evidence was properly seized because it was observed by Officer Diliberto in plain view, and that the showup procedure was not unduly suggestive. With respect to the defendant's videotaped statement, the Supreme Court determined that the defendant had knowingly and voluntarily waived his constitutional rights prior to making a statement and that he made the statement voluntarily.

At trial, the People presented the complainant's testimony as to the circumstances of the attempted robbery and the showup identification. The complainant also identified the defendant in court as the perpetrator. Additionally, Police Officer Daniel Lanning, who was working with Officer Diliberto on the day of the incident, testified about the vehicle stop, and the recovery of the physical evidence, which he stated was found by Officer Diliberto in the back seat behind the driver's seat, "right where [the defendant's] feet would be." In contrast, Officer Linke testified that Officer Diliberto recovered the physical evidence from underneath the front passenger seat. The People further offered Sergeant Picone's testimony to lay the foundation for the recording of the prearraignment interview, which was played for the jury.

Based upon this evidence, the jury convicted the defendant of attempted robbery in the second degree and criminal mischief in the fourth degree. The defendant was sentenced, as a persistent violent felony offender, inter alia, to an indeterminate term of imprisonment of 17 years to life upon his conviction of attempted robbery in the second degree.

On appeal, the defendant contends, among other things, that his videotaped confession should have been suppressed because it was obtained in violation of the dictates of *Miranda*. We agree, and because this error was not harmless beyond a reasonable doubt, we reverse the judgment of conviction.

It is "an underlying principle in the enforcement of our criminal law[ ] that ours is an accusatorial and not an inquisitorial system" (*Rogers v Richmond*, 365 US 534, 541 [1961]; *see People v Anderson*, 42 NY2d 35, 37 [1977]). Under our accusatorial system, "society carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation" (*Watts v Indiana*, 338 US 49, 54 [1949]; *see People v Anderson*, 42 NY2d at 37). Embodying that principle, the Fifth Amendment to the United States Constitution guarantees that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself" (US Const Amend V; *see Miranda v Arizona*, 384 US at 460; *Brown v Walker*, 161 US 591, 597 [1896]). The same privilege is afforded under the New York Constitution (*see* NY Const, art I, § 6).

Prior to the United States Supreme Court's decision in *Miranda*, the admissibility of a suspect's confession was evaluated solely under a voluntariness test principally derived from the Due Process Clause of the Fourteenth Amendment (*see Dickerson v United States*, 530 US 428, 433-434 [2000]; *see e.g. Haynes v Washington*, 373 US 503, 513 [1963]; *Lynumn v Illinois*, 372 US 528, 534 [1963]). Under that test, courts examined whether "'a defendant's will was

overborne'" by the totality of the circumstances surrounding the giving of a confession (*Dickerson v United States*, 530 US at 434, quoting *Schneckloth v Bustamonte*, 412 US 218, 226 [1973]; *see e.g. Haynes v Washington*, 373 US at 513; *Lynumn v Illinois*, 372 US at 534; *People v Mateo*, 2 NY3d 383, 413 [2004], *cert denied* 542 US 946 [2004]; *People v Anderson*, 42 NY2d at 41; *People v Aveni*, 100 AD3d 228 [2012]; *People v Carey*, 67 AD3d 925 [2009]). Post-*Miranda*, confessions that are deemed to be involuntary under this standard are still excluded from evidence (*see Dickerson v United States*, 530 US at 434; *see e.g. People v Anderson*, 42 NY2d at 41; *People v Aveni*, 100 AD3d 228 [2012]; *cf.* CPL 60.45; *see generally People v Mateo*, 2 NY3d at 413). However, in *Miranda*, the United States Supreme Court concluded that this "'traditional totality-of-the-circumstances'" test was insufficient to adequately protect an individual's Fifth Amendment privilege in the context of custodial interrogations due to the compulsion inherent in the custodial environment (*Missouri v Seibert*, 542 US 600, 608 [2004], quoting *Dickerson v United States*, 530 US at 435-437; *see Miranda v Arizona*, 384 US at 457). In that respect, the Court determined that, "[u]nless adequate protective devices [were] employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [could] truly be the product of his free choice" (*Miranda v Arizona*, 384 US at 458). The Court, accordingly, held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards *effective to secure the*

privilege against self-incrimination" (*id.* at 444 [emphasis added]).

The *Miranda* Court rejected "the more extreme position" that the required procedural safeguard was the presence of an attorney during all custodial interrogations (*Moran v Burbine*, 475 US 412, 426 [1986]). Rather, the Court concluded that custodial interrogation could continue "in its traditional form... but only if the suspect *clearly understood*" his or her relevant constitutional rights (*Moran v Burbine*, 475 US at 426 [emphasis added]; *see Miranda v Arizona*, 384 US at 467). Thus, the procedural safeguards mandated by the Supreme Court are the now familiar "*Miranda* warnings": Prior to any questioning, suspects must be warned that they have a right to remain silent, that anything they say can and will be used against them in a court of law, that they have the right to the presence of an attorney prior to and during the course of questioning, and that if they cannot afford an attorney one will be appointed for them prior to any questioning (*see Miranda v Arizona*, 384 US at 444, 479; *People v Hutchinson*, 59 NY2d 923 [1983]; *People v Rodney P. [Anonymous]*, 21 NY2d 1, 3-4 [1967]; *see also People v Paulman*, 5 NY3d 122, 130 [2005] [the "New York courts have embraced the (*Miranda*) rule as consistent with article I, § 6 of the New York Constitution"]).

After these warnings have been given, a defendant may waive the constitutional rights identified therein (*see Moran v Burbine*, 475 US at 421; *Miranda v Arizona*, 384 US at 479; *People v Williams*, 62 NY2d 285, 287-288 [1984]). However "a

heavy burden rests on the government" to demonstrate that the defendant's waiver was knowing, intelligent, and voluntary (*Miranda v Arizona*, 384 US at 475; *see Missouri v Seibert*, 542 US at 608 n 1; *People v Davis*, 75 NY2d 517, 523 [1990]). In order to meet that burden, it must be shown, inter alia, that the waiver was made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" (*Moran v Burbine*, 475 US at 421; *see Berghuis v Thompkins* 560 US __, __, 130 S Ct 2250, 2260 [2010]).

While the courts have held that *Miranda* warnings need not "be given in the exact form described in that decision" (*Duckworth v Eagan*, 492 US 195, 202 [1989]), where there is deviation from the form prescribed in *Miranda*, courts must inquire "whether the warnings reasonably 'conve[yed] to [a suspect] his rights'" (*Duckworth v Eagan*, 492 US at 203, quoting *California v Prysock*, 453 US 355, 361 [1981]; *see Florida v Powell*, 559 US __, __, 130 S Ct 1195, 1204 [2010]; *People v Louisias*, 29 AD3d 1017 [2006]; *People v Parker*, 258 AD2d 479 [1999]; *People v Bartlett*, 191 AD2d 574 [1993]; *People v Thomches*, 172 AD2d 786 [1991]; *People v Lewis*, 163 AD2d 328 [1990]). In these cited cases, the courts held that, despite various minor deviations from the prescribed form, the suspect's rights were adequately conveyed to him or her, as required by *Miranda* (*see Florida v Powell*, 559 US at __, __, 130 S Ct at 1204-1205 [suspect told that he had "the right to talk to a lawyer before answering any . . . questions," and that he could invoke that right "at any time . . . during th(e) interview," but not explicitly that he had the right to

the presence of an attorney during questioning]; *Duckworth v Eagan*, 492 US at 197, 198 [suspect told that he could have a lawyer with him during questioning, and if he could not afford a lawyer, one would be appointed "if and when (he went) to court" (emphasis omitted)]; *California v Prysock*, 453 US at 358 [defendant told he had the right to counsel before and during questioning, and a right to appointed counsel, but not explicitly that counsel could be appointed before questioning]; *People v Bartlett*, 191 AD2d at 575 [defendant told that he had the right to "keep silent until (he had) a chance to talk with a lawyer"]; *People v Thomches*, 172 AD2d at 787 [inquiry, after full warnings, as to whether the defendant was willing to answer questions did not include the phrase "(w)ithout an attorney present"]; *People v Lewis*, 163 AD2d at 328 [same]; *cf. People v Hutchinson*, 59 NY2d 923, 924 [1983] [inculpatory statement should have been suppressed where defendant was not told that he was entitled to the assistance of counsel "during his questioning by the officer"]; *People v Bracero*, 117 AD2d 740 [1986] [same]).

In contrast to these cases, which involved minor deviations from the prescribed language of the *Miranda* warnings, the preamble formulated by the District Attorney's office adds information and suggestion to the *Miranda* warnings which prevent them from effectively conveying to suspects their rights. *Miranda* mandates that suspects be informed of their rights in "clear and unequivocal terms" (*Miranda v Arizona*, 384 US at 467-468). When the clear and unequivocal warnings devised in *Miranda* are

combined with the information and suggestion contained in the preamble, the message conveyed to suspects is muddled and ambiguous. Correspondingly, when the warnings are combined with the preamble, it cannot be said with assurance that the suspects clearly understood their rights.

More specifically, suspects interviewed pursuant to the Program are advised of their Fifth Amendment privilege against self-incrimination, but only after being told that this is their "opportunity," and then "only opportunity," to, essentially, refute what the prosecutor has been told by other individuals, to correct any misperceptions or falsehoods, and to try to help themselves.[*] Significantly, this "opportunity," with which suspects are presented, is to speak, not merely with a police detective, but with an ADA—"the one person who can [at the prearraignment] stage plausibly assert authority to grant favorable treatment to an uncounseled defendant" (*United States v Duvall*, 537 F2d 15, 24 [2d Cir 1976], *cert denied* 426 US 950 [1976], *and cert denied sub nom. Jones v United States*, 426 US 950 [1976]). This fact makes "rigorous enforcement of *Miranda* peculiarly necessary" (*id.*).

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[*]Although, as the People argue, the statement in the preamble that the interview is the suspect's only opportunity to tell his or her story "*before [going] to court on [the] charges*" (emphasis added) may be technically accurate, it is not reasonable to expect an individual with no legal training to appreciate the subtle distinction that there may be other opportunities to tell his or her story *after arraignment*.

The preamble also suggests a sense of immediacy and finality which impairs suspects' reflective consideration of their rights and the consequences of a waiver. By advising suspects: "[i]f there is something you need us to investigate about this case you have to tell us now so we can look into it," the preamble suggests that the prosecutor will not investigate their version of events if the suspects decline to speak with the prosecutor at that time. Concomitantly, this advisement suggests that the prosecutor will assist the suspects by performing such an investigation, if the suspects agree to be interviewed. Such a suggestion is contrary to the very purpose of the warning that anything a suspect says can be used against him or her, namely, to "make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest" (*Miranda v Arizona*, 384 US at 469).

In essence, although suspects interviewed pursuant to the Program are told, through the *Miranda* warnings, that they have the right to remain silent, the preamble suggests that invoking that right will bear adverse, and irrevocable, consequences. Such a suggestion conveys that suspects have a right to remain silent only in the most technical sense. While the *Miranda* warnings also advise suspects interviewed pursuant to the Program that anything they say can and will be used against them in court, the preamble essentially suggests that anything they say will also be used to help them. Therefore, the procedure followed under the Program is not "effective to secure the privilege against self-incrimination" (*id.* at 444).

Furthermore, both the United States Supreme Court and the New York Court of Appeals have acknowledged, in different factual contexts, that the conduct of an interrogation can render the *Miranda* warnings insufficient to secure a suspect's rights, and vitiate a knowing waiver of those rights (*see Missouri v Seibert*, 542 US at 611; *People v Paulman*, 5 NY3d at 130; *People v Bethea*, 67 NY2d 364, 367 [1986]; *People v Chapple*, 38 NY2d 112, 115 [1975]). Specifically, in *Missouri v Seibert*, the United States Supreme Court concluded that statements given pursuant to a police protocol under which the police would deliberately interrogate a suspect without giving *Miranda* warnings, obtain a statement, then administer the warnings and re-elicit the statement, were inadmissible (*Missouri v Seibert*, 542 US at 604). Although the *Miranda* warnings were, in fact, recited, the plurality of the Court concluded that, under that protocol, the warnings could not "function 'effectively' " as *Miranda* required (*Missouri v Seibert*, 542 US at 611-612).

The New York Court of Appeals has similarly recognized that, under the New York Constitution, "the mere fact that [*Miranda*] warnings were uttered" is not, under all circumstances, sufficient to "justify the admission of subsequent statements" (*People v Paulman*, 5 NY3d at 130; *see People v Chapple*, 38 NY2d at 115 [*Miranda* warnings given in the midst of a continuous interrogation were "insufficient to protect (the defendant's) rights"]). Thus, the Court has suppressed statements given to law enforcement authorities where "there [was] inadequate assurance that the *Miranda* warnings were effective in protecting

a defendant's rights" (*People v Paulman*, 5 NY3d at 130; *see People v Bethea*, 67 NY2d at 367; *People v Chapple*, 38 NY2d at 115).

While these New York cases, as well as *Missouri v Seibert*, involved factual circumstances not presented here – i.e. pre-warning discussions with, or statements to, police officers—they recognize the general principle that *Miranda* requires *effective* means to apprise suspects of their constitutional rights and the consequences of waiving those rights (*see Miranda v Arizona*, 384 US at 444), and that the failure to employ such effective means requires suppression of the challenged statements. Contrary to the People's contention, this general principle, clearly set forth in the *Miranda* decision (*see id.)*, is not limited to the factual circumstances presented in the continuous interrogation cases.

Accordingly, although *Miranda* warnings are read to suspects pursuant to the Program, the "mere recitation of the litany" does not suffice because, given the reading of the preamble, the warnings could not "function 'effectively' as *Miranda* requires" (*Missouri v Seibert*, 542 US at 611-612; *see generally People v Bethea*, 67 NY2d at 367; *People v Chapple*, 38 NY2d at 115; *United States v Duvall*, 537 F2d at 24 [prearraignment interrogations "are peculiarly likely to run afoul of *Miranda*"]).

Relatedly, a waiver of the privilege against self-incrimination and the right to counsel obtained pursuant to the Program's protocol cannot be knowing and intelligent. Simply put, suspects cannot knowingly

and intelligently waive their rights if they are not effectively advised as to what those rights are, and the consequences of foregoing them (*see Miranda v Arizona*, 384 US at 468-471; *see also Berghuis v Thompkins*, 560 US at __, 130 S Ct at 2264; *see generally Moran v Burbine*, 475 US at 424). Indeed, effective advice as to the nature and consequences of a suspect's constitutional rights is the very essence of the solution devised by *Miranda* to combat the compulsion inherent in custodial interrogation (*see Moran v Burbine*, 475 US at 427).

Ordinarily, the question of whether a defendant knowingly and intelligently waived his or her rights to remain silent and to an attorney is determined "upon an inquiry into the totality of the circumstances surrounding the interrogation," including an evaluation of the defendant's "age, experience, education, background, and intelligence" (*Fare v Michael C.*, 442 US 707, 725 [1979]; *see People v Williams*, 62 NY2d at 288). Here, however, we are not faced with the question of whether the defendant was a person capable of understanding his rights and making a knowing and intelligent waiver (*cf. People v Williams*, 62 NY2d at 287 [holding that "(a)n effective waiver of *Miranda* rights may be made by an accused of subnormal intelligence so long as it is established that he or she understood the immediate meaning of the warnings"]). There is no indication in this case that, had the *Miranda* warnings simply been read to the defendant, without the information and suggestion contained in the preamble, he could not have understood them. Rather, the problem is that the defendant never received a clear and unequivocal

advisement of his rights, and thus, the only element his age, experience, education, background, and intelligence could have contributed was independent knowledge of his rights. The *Miranda* decision made clear, however, that a suspect is never presumed to know his or her rights (*see Miranda v Arizona*, 384 US at 468 ["The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given"]; *People v Bracero*, 117 AD2d at 740). Having never received an effective warning describing their constitutional rights, under the dictates of *Miranda*, suspects, such as the defendant, who are subject to the Program cannot be said to have knowingly waived those rights (*see People v Bracero*, 117 AD2d at 740-741 ["While we acknowledge that there need not be a 'talismanic incantation' of preinterrogation admonitions in order to pass constitutional muster, the substance of the requisite warnings must nevertheless be clearly conveyed for a waiver to be deemed effective" (citation omitted)]).

We agree with the People's contention that *Miranda* warnings need not be "the first words uttered" by law enforcement authorities conducting an interrogation in order to permit admission of a suspect's statements. As the People correctly observe, courts have permitted admission of such statements where certain remarks were made by police prior to reading the *Miranda* warnings (*see e.g. People v Malaussena* 10 NY3d 904, 905 [2008]; *People v*

Vasquez, 90 NY2d 972 [1997]; *People v Bailey*, 24 AD3d 684 [2005]; *see also People v Rufino*, 293 AD2d 498, 498-499 [2002]). For example, this Court has held that inculpatory statements were properly admitted even though, prior to the administration of *Miranda* warnings, an investigating detective told the defendant that he was being brought to an interview room because she wanted him to "tell [her] in his own words what took place" and that she wanted him to "tell [her] what happened" (*People v Bailey*, 24 AD3d at 685).

These cases involving limited, offhand remarks by police officers do not compare to the systematic practice developed by the District Attorney's office. The formality of the interviews conducted pursuant to the Program, and, more significantly, of the preamble, as well as the fact that suspects are meeting with a prosecutor just prior to being officially charged at arraignment, lend greater weight and authority to the statements read in the preamble and, thus, stand to impress themselves upon the minds of suspects in a manner not likely to occur with a brief, offhand remark by a police officer during the course of an investigation. For these reasons, it is far more likely that the recitation of the preamble will serve to confuse, or at worst, mislead, suspects as to the nature of their rights and the consequences of waiving them, whereas offhand remarks usually will not rise to the level of obfuscating the meaning of the *Miranda* warnings. The interview conducted in this case evinces such confusion, in that the defendant twice interrupted the questioning to ask how the interview was "helping" him, and asked whether he would next be speaking to the "D.A." In contrast, where a suspect has merely

heard that a police officer investigating a crime wants him to tell the officer what happened, the *Miranda* warnings are still capable of reasonably conveying the suspect's rights and the consequences of waiving those rights. Indeed, in *Missouri v Seibert*, the plurality contrasted the official "question-first" protocol—"a police strategy adapted to undermine the *Miranda* warnings"—with a police officer's brief remarks to a suspect, which constituted a "good-faith *Miranda* mistake, not only open to correction by careful warnings . . . but posing no threat to warn-first practice generally" (542 US at 615-616; *see People v Paulman*, 5 NY3d at 134 [distinguishing *Missouri v Seibert* on the ground that the statement at issue was not elicited "through a process of systematic . . . questioning"]).[**]

[**]While some of the aforementioned cases involving pre-warning remarks analyze whether such remarks constituted the functional equivalent of interrogation (*see e.g. People v Bailey*, 24 AD3d at 684), we do not find that analysis to be applicable to the present case. Whether or not the preamble was the functional equivalent of interrogation—i.e., designed to evoke an incriminating response (*see id.*; *see also People v Ferro*, 63 NY2d 316, 322-323 [1984], *cert denied* 472 US 1007 [1985])—is not essential to our analysis. Our reasoning is more fundamental. The law requires that suspects be adequately and effectively advised of their constitutional rights, and the consequences of waiving them, prior to interrogation. The reading of the *Miranda* warnings, in light of the preamble, failed to effectively convey those rights and consequences. There is no question, of course, that after the reading of the preamble and the *Miranda* warnings, the defendant was, in fact, subjected to interrogation.

Similarly, the People's reliance upon cases in which inculpatory statements were admitted despite promises or false statements having been made by police to secure those confessions is unavailing (*see e.g. Matter of Jimmy D.*, 15 NY3d 417 [2010]; *People v McQueen*, 18 NY2d 337, 345-346 [1966]; *People v Lugo*, 60 AD3d 867, 868 [2009]; *People v D'Amico*, 296 AD2d 579, 580 [2002]; *People v Williamson*, 245 AD2d 966 [1997]; *People v Jordan*, 193 AD2d 890 [1993]; *People v Hassell*, 180 AD2d 819, 820 [1992]; *People v Taber*, 115 AD2d 126, 127 [1985]). The question in those cases was whether the inculpatory statements were inadmissible, either because the promises or false statements rendered them involuntary under CPL 60.45 (2) (b) (I) or because the deception was "so fundamentally unfair as to deny [the defendants] due process" (*People v Tarsia*, 50 NY2d 1, 11 [1980]; *see Matter of Jimmy D.*, 15 NY3d at 424 ["since (the appellant's) *Miranda* rights were validly waived and never reinvoked, the issue is voluntariness, not waiver"]; *People v McQueen*, 18 NY2d at 346; *People v Lugo*, 60 AD3d at 868; *People v D'Amico*, 296 AD2d at 580; *People v Williamson*, 245 AD2d at 968; *People v Jordan*, 193 AD2d 890 [1993]; *People v Hassell*, 180 AD2d at 820; *People v Taber*, 115 AD2d at 127; *see also* CPL 60.45 [2] [b] [I]). The question upon which we pass in the instant matter is not one of the voluntariness of the defendant's inculpatory statement as a matter of due process. Rather, *Miranda* established a bright-line rule separate and apart from the question of voluntariness (*see Dickerson v United States*, 530 US at 444; *Oregon v Elstad*, 470 US 298, 306 [1985]). The failure to adequately advise a suspect of his or her rights as required by *Miranda* requires suppression of

even voluntary statements (*see Dickerson v United States*, 530 US at 444; *Miranda v Arizona*, 384 US at 457).

In *Missouri v Seibert*, the Supreme Court pointed out that the "reason th[e] question-first [tactic was] catching on [was] as obvious as its manifest purpose, which [was] to get a confession the suspect would not make if he understood his rights at the outset" (542 US at 613). Here, the District Attorney's Program raises a similar question, namely: Why is the preamble read before giving the *Miranda* warnings and obtaining a waiver of rights, instead of after the warnings are read and a waiver obtained? If the answer is that suspects are more likely to waive their rights after having heard the preamble, that lends support to the conclusion that, like in *Missouri v Seibert*, the warnings have been rendered ineffective by the preamble. Moreover, as this Court has recognized, "[t]his phase of the constitutional process"—i.e., the stage prior to the appointment of counsel for the accused—"requires an atmosphere geared to the protection of constitutional rights rather than a concern with overcoming such rights" (*People v Campbell*, 81 AD2d 300, 306 [1981]).

While the People insist that the preamble was "designed for the primary purpose of getting *exculpatory information from the innocent*; not inculpatory statements or evidence," the conduct of the interview, in the present case at least, raises doubt about that assertion. Here, when Sergeant Picone and ADA Grillo explained that the defendant might tell them "it wasn't me, I wasn't there," and the defendant

responded that he could not truthfully make such an assertion, Sergeant Picone, without hesitation, stated: "No, you can't say that because we have pictures of you and they found the BB gun and all that stuff." This latter statement does not suggest a purpose of obtaining exculpatory evidence. Moreover, the People's claim that the primary purpose of the interview is to obtain exculpatory information is inconsistent with their insistence that the preamble does not convey to suspects that the interview will redound to their benefit. In any event, this precise justification was offered in{**104 AD3d at 214} *Miranda* in favor of unfettered police interrogation (*see Miranda v Arizona*, 384 US at 482 [it was argued that unfettered interrogation "will often redound to the benefit of the person questioned," by permitting release of innocent suspects "without (the) need for further formal procedures"]). The Court in *Miranda* rejected that reasoning, concluding that "[t]he person who has committed no offense . . . will be better able to clear himself after warnings" (*id.*; *see United States v Foley*, 735 F2d 45, 48 [2d Cir 1984] ["Most, if not all," of the "claimed advantages" of prearraignment interviews "would appear to be equally available immediately after arraignment, when a defendant would have the benefit of advice from his attorney and would be less vulnerable to psychological manipulation by the prosecutor"], *cert denied sub nom. Edler v United States*, 469 US 1161 [1985]).

In sum, *Miranda* set out to establish "concrete constitutional guidelines for law enforcement agencies and courts to follow" in the context of custodial interrogations (*Miranda v Arizona*, 384 US at 442).

"[O]ne of the principal advantages," therefore, has been "the ease and clarity of its application" and the "specificity" it provides in terms of informing police, prosecutors and courts what is permissible during a custodial interrogation (*Moran v Burbine*, 475 US at 425-426 [internal quotation marks omitted]). The reading of the preamble at issue in this case undermines the clarity achieved in *Miranda*. As a result, it cannot be said with reasonable certainty that suspects subjected to the Program understand their rights and the consequences of forgoing them. While the Program devised by the District Attorney's office may not be as extreme as certain coercive methods of interrogation that punctuate Fifth Amendment jurisprudence, the Supreme Court has long recognized that " '[i]llegitimate and unconstitutional practices get their first footing . . . by . . . slight deviations from legal modes of procedure' " (*Miranda v Arizona*, 384 US at 459, quoting *Boyd v United States*, 116 US 616, 635 [1886]). That deviation in the present case warrants suppression of the defendant's inculpatory statements so as to give full effect to the constitutional principles underlying our accusatorial system of justice.

Furthermore, we cannot deem the error in admitting the defendant's statement to be harmless. Such a constitutional error can be harmless only if the evidence of guilt, without reference to the error, is overwhelming, and there is no reasonable possibility that the error might have contributed to the defendant's conviction, such that it is harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Schaeffer*, 56 NY2d 448, 454 [1982]; *People v Harris*, 93 AD3d 58, 71 [2012], *affd* 20

NY3d 912 [2012]). As the Court of Appeals has recognized, this is "perhaps the most demanding test yet formulated," and it is the "latter consideration"—i.e, the "causal effect" that the error may have had on the verdict, quite apart from the nature and quantum of proof—that is "critical in the application" of that test (*People v Crimmins*, 36 NY2d at 240-241).

Here, there is a gap in the People's proof as to how the officers learned that the perpetrator fled in a livery cab with New Jersey license plates, since the complainant testified that she did not see the perpetrator flee. There were also inconsistencies in the testimony of the police officers regarding where in the livery cab the seized physical evidence was found. Further, although, as discussed below, we do not find the showup identification to have been so unduly suggestive as to preclude admission of the identification, the reliability, and thus weight, of the identification was lessened by the fact that Officer Diliberto was holding the striped shirt at waist height when the defendant was viewed by the complainant.

Bearing in mind these weaknesses in the People's proof, we turn to the "critical" prejudice component of the constitutional harmless-error test. As the Court of Appeals has recognized with respect to this component, "confessions of crime, supremely self-condemnatory acts, are almost sure to weigh most heavily with fact finders" (*People v Schaeffer*, 56 NY2d at 455). Therefore, in the *Schaeffer* case, even though two bare admissions by the defendant that he shot the victim were properly admitted into evidence, the Court

nonetheless held that an error in admitting the defendant's fuller confession to the murder was not harmless because the erroneously admitted confession added details and supplied motive not provided by the bare admissions. Similarly, here, we cannot conclude that there was no reasonable possibility that the admission of the defendant's confession affected the verdict. Rather, it served to corroborate the testimony of the other witnesses, most particularly the problematic identification testimony of the complainant, and provided the " 'most probative and damaging evidence' " against the defendant (*People v Harris*, 93 AD3d at 72, quoting *Bruton v United States*, 391 US 123, 139 [1968, White, J., dissenting]). Under these circumstances, even if the evidence of the defendant's guilt was overwhelming, there exists a reasonable possibility that the error contributed to the defendant's conviction, such that the error was not harmless beyond a reasonable doubt (*see People v Harris*, 93 AD3d at 72).

In light of our determination that suppression of the videotaped statement was required because the defendant was not adequately and effectively apprised of his constitutional rights and the consequences of waiving them, we need not reach the contentions of the parties and amici curiae regarding the voluntariness of the defendant's confession, including the argument that the confession was rendered involuntary, due to "improper conduct" (CPL 60.45 [2] [a]) consisting of violations of attorney-ethics rules, or in light of the totality of the circumstances surrounding the confession, including any undue delay in arraignment. We note, as to the claim of arraignment delay, that any

such undue delay would merely be one factor in determining whether the defendant's inculpatory statement was voluntary, and does not trigger the defendant's indelible right to counsel (*see People v Ramos*, 99 NY2d 27, 37 [2002]; *People v Hopkins*, 58 NY2d 1079, 1081 [1983]; *People v Holland*, 48 NY2d 861 [1979]; *People v Dairsaw*, 46 NY2d 739 [1978], *cert denied* 440 US 985 [1979]; *People v DeCampoamor*, 91 AD3d 669, 670-671 [2012]).

We now address the other issues raised by the defendant on appeal, unrelated to his videotaped statement. First, we reject the defendant's contention that the physical evidence—the striped shirt, hat, and air pistol—should have been suppressed because Officer Diliberto's testimony that he discovered these items in plain view was "incredible as a matter of law" and "patently tailored to nullify constitutional objections." While the defendant correctly observes that there were inconsistencies in the testimony of the police officers as to where the physical evidence was found in the livery cab, these inconsistencies did not rise to the level of rendering Officer Diliberto's testimony that he saw the physical evidence in plain view in the back of the cab incredible as a matter of law or demonstrate that it was a fabrication patently tailored to meet constitutional objections (*see People v Spann*, 82 AD3d 1013, 1014 [2011]; *People v Glenn*, 53 AD3d 622, 624 [2008]; *see also People v Barley*, 82 AD3d 996, 997 [2011]; *People v James*, 19 AD3d 617, 618 [2005]; cf. People v Lebron, 184 AD2d 784, 785 [1992]; *People v Rutledge*, 21 AD3d 1125 [2005]). Moreover, upon the exercise of our factual review power (*see Matter of Robert D.*, 69 AD3d 714, 716-717

[2010]), we conclude that the inconsistencies in the testimony presented a credibility question for the hearing court, which determination is entitled to great deference on appeal (*see People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Bennett*, 57 AD3d 912 [2008]), and we discern no basis on this record to disturb that determination.

Contrary to the defendant's further contention, the identification made by the complainant pursuant to the showup procedure was properly admitted. Showups conducted in close temporal and spatial proximity to the commission of the crime being investigated are generally permissible, where the procedure used is not unduly suggestive (*see People v Brisco*, 99 NY2d 596 [2003]; *People v Johnson*, 81 NY2d 828, 831 [1993]; *People v Fox*, 11 AD3d 709 [2004]). Here, the showup identification was conducted shortly after the incident, and in close proximity to the crime scene. Further, under the circumstances of this case, although the defendant was surrounded by police officers and the complainant viewed the blue and white striped shirt while she was viewing the defendant, the showup procedure was not thereby rendered unduly suggestive (*see People v Brisco*, 99 NY2d at 597; *People v Parris*, 70 AD3d 725, 726 [2010]; *People v Barksdale*, 66 AD3d 793 [2009]; *People v Gonzalez*, 57 AD3d 560, 561 [2008]; *People v Berry*, 50 AD3d 1047 [2008]; *People v Fox*, 11 AD3d 709 [2004]).

The defendant's contention that his counsel was ineffective is based upon matter dehors the record, and, therefore, cannot be reviewed on direct appeal

(*see People v Smith*, 98 AD3d 533 [2012], *lv denied* 20 NY3d 989 [2012]).

Nevertheless, because the defendant's videotaped statement should have been suppressed, and the error in that regard was not harmless beyond a reasonable doubt, the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress a videotaped statement made by him to law enforcement authorities is granted, and a new trial is ordered.

Balkin, Leventhal and Cohen, JJ., concur.

Ordered that the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress a videotaped statement made by him to law enforcement authorities is granted, and a new trial is ordered.

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART K-22 QUEENS COUNTY
125-01 Queens Boulevard Kew Gardens New York

PRESENT:

HON. ROBERT C. McGANN
Justice Supreme Court

The People of the State of New York — Ind. No. 1568/07

-against- — Motion: Huntley/ Wade Gittens

JERMAINE DUNBAR, — Submitted
Argued
Defendant. — Hearing

Michelle Armstrong, Esq.
For the motion

A.D.A. Mark Misorek
Opposed

Papers Numbered

Notice of Motion and Affidavits Annexed
Answering and Reply Affidavits
Exhibits
Grand Jury Minutes

Affirmation in Opposition

Upon the foregoing hearing and in the opinion of the Court herein, the defendant, Jermaine Dunbar's motion to suppress physical evidence and statements is granted in part and denied in part as indicated in the accompanying memorandum of this date.

GRANTED:

Date: February 23, 2010

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Robert C. McGann, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-22

The People of the State of New York,	By: Robert C. McGann,
-against-	J.S.C.
JERMAINE DUNBAR,	Dated: Feb. 23, 2010
Defendant.	Ind. No. 1568-07

The defendant, Jermaine Dunbar, moves before this Court for an order suppressing identification testimony and statements made by him to law enforcement officials. A hearing was held on these issues and the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On April 23, 2009, Police Officer Francis Dilaberto received a radio run at about 12:45 P.M. of a gunpoint robbery in progress. The radio run gave a description of the perpetrator as a male black, wearing a blue and white striped shirt, using a black gun, and in a black livery car with New Jersey plates.

Officer Dilaberto began to look for the car and within a few minutes saw a black livery car with New Jersey plates. He put his turret lights on and stopped the vehicle. He observed a driver and a passenger in the back seat. Over his loudspeaker, he ordered them to put their hands up and put their hands outside the vehicle. The two men complied.

The officer then got out of his car and took the driver out of the livery car. He then removed the defendant, who was in the rear seat. On the floor of the rear of the livery car, he observed and seized a black Yankee cap, a blue and white striped shirt, and a gun. All of this took place, according to Officer Dilaberto, about three minutes after the radio run, and about six blocks from the scene of the crime.

The complainant was shortly brought to the location where the car was stopped. The complainant stepped out of the car, pointed at the defendant and nodded his head.

The defendant was then brought to the precinct. At the precinct, the defendant asked for his shirt back because he was cold.

At about 2:00 P.M., the defendant was debriefed by Sergeant John Kugler, who was working as a field intelligence officer. Sgt. Kugler told the defendant that he was not going to inquire about the crime, but wanted to talk to the defendant about other matters. The defendant told him that he didn't think there was anything he could held the sergeant with. The defendant then went on to say that the cab driver was

involved. The Sergeant then went on to interrogate the defendant about how he knew the driver. No Miranda warnings had been given to the defendant.

At about 2:30 P.M., Detective John Gutierrez asked the defendant if he wanted to speak to him about the robbery, and the defendant said no. Detective Gutierrez then gave the defendant a business card and told him that if he ever wanted to talk to him he should call him.

At about 12:00 P.M., the next day, A.D.A. Tina Grillo and Sergeant Mary Picone interviewed the defendant at Central Booking. The entire conversation was video recorded.

The defendant was initially advised of his Miranda rights and then was told by Sergeant Picone that "this is an opportunity for you to give your version of events" and "if there is something you need us to investigate you have to tell us now." The defendant then proceeded to make a number of statements concerning his involvement in the robbery.

CONCLUSIONS OF LAW

With regard to the stop of the vehicle, a police officer is entitled to stop an automobile when he has reasonable suspicion that its occupants have been engaged in conduct in violation of law. *People v. May,* 81 N.Y.2d 725, 593 N.Y.S.2d 760, 609 N.E.2d 1218.

Reasonable suspicion is the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand." *People v. Cantor*, 36 N.Y.2d 106, 112-113, 365 N.Y.S.2d 509, 324 N.E.2d 872.

In this case, the officer had received a radio run that a robbery had just occurred and that a black man wearing a blue and white striped shirt fled in a black livery car with New Jersey license plates. Within three minutes and within six blocks, the officer saw two black men in a livery car bearing New Jersey licence plates. Based upon all of these facts and circumstances, Police Officer Dilaberto had reasonable suspicion which would justify his stop of the car.

During an automobile stop of this type, the police can order the occupants to keep their hands in view, *People v. Tyler*, 262 A.D.2d 136, 692 N.Y.S.2d 56, and can order them out of the car, *People v. Robinson*, 74 N.Y.2d 773, 545 N.Y.S.2d 90, 543 N.E.2d 733.

It was during this process that Officer Dilaberto observed the Blue striped shirt and the gun on the floor of the car. Therefore, these items were seized while in plain view. *People v. Harvey*, 245 A.D.2d 108, 666 N.Y.S.2d 139. The motion to suppress these items is denied.

With regard to the show up identification, after making a lawful stop, the police may detain a suspect for a brief period of time to investigate criminal

activity. *People v. Hicks*, 68 N.Y.2d 234, 508 N.Y.S.2d 163, 500 N.E.2d 861. The police may detain a suspect in order to confirm an identification. *People v. Robinson*, 282 A.D.2d 75, 728 N.Y.S.2d 421. The detention must be brief, must take place within a short period of time following the crime and not be far from the location of the crime. *Id.*

In this case, the initial stop took place a few minutes after the crime, a few blocks away from the scene of the crime, and the duration of the detention was brief. Therefore, the motion to suppress identification testimony is denied.

With regard to the statements, there are three classes of statements made by the defendant: 1) the request by the defendant for his shirt, 2) the statement to the field intelligence officer, and 3) the statements made in Central Booking.

Request for shirt. When initially at the precinct, the defendant requested that his blue striped shirt be returned to him because he was cold. This was complied with. The statement was made, not in response to any questioning whatsoever. It is in fact a classically spontaneous statement within the meaning of *People v. Bretts*, 111 A.D.2d 864, 490 N.Y.S.2d 266. The motion to suppress this statement is denied.

Field Intelligence Officer. While the defendant was in custody at the precinct, the defendant was "debriefed" by Sergeant Kugler. The sergeant told the defendant that he was not there to ask about the crime, but to inquire generally about crime in the

neighborhood. The defendant told him that he didn't live in the neighborhood but that he wanted to talk about the crime, that the cab driver was involved. The sergeant then continued to ask questions about the crime. None of this questioning was preceded by Miranda warnings.

The People have withdrawn this statement from their case in chief. The Court further rules that this statement, albeit made without Miranda warnings, was voluntarily made within the meaning of *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 1. Therefore, this statement may be used to impeach the defendant should he decide to testify at trial.

Central Booking statement. The first issue to be addressed is whether the conceded non-Mirandized statement made to Sergeant Kugler, necessarily requires suppression of the later Mirandized statement made at Central Booking.

The question is whether there was a pronounced break in the interrogation of the defendant. *People v. Chapple*, 38 N.Y.2d 112. Among the factors to be considered are 1) the time difference between the non mirandized statement and the subsequent statement, 2) whether the same police personnel were present and involved in each statement, 3) whether there was a change in location; 4) the circumstances surrounding the Miranda violation; and 5) whether prior to the Miranda violation, the defendant had indicated a willingness to speak to the police. *People v. White*, 10 N.Y.3d 286.

In this case almost 22 hours elapsed between the statement made to Sgt. Kugler and the questioning at Central Booking. Sergeant Kugler was not present at Central Booking and Sergeant Picone and A.D.A. Grillo were not at the precinct when Kugler interrogated the defendant. There was a change in location. The circumstances surrounding the Miranda violation by Sgt. Kugler did not exhibit a flagrant violation. He had informed the defendant that he was not there to discuss the crime for which the defendant was arrested, but rather wanted to talk about crime in general. It was only when the defendant himself brought up the present case that questions about the present case were asked. Throughout this process, the defendant has exhibited a willingness to talk to the police.

Therefore, the Court concludes that there was a pronounced break in interrogation between the questioning at the precinct and the questioning at Central Booking, and that the Central Booking statement need not be suppressed because of the interrogation by Sergeant Kugler.

The defendant next contends that the defendant's arraignment was delayed for the sole purpose of extracting a confession from him. The Court of Appeals has held that a delay in arraignment in and of itself is not a grounds to invalidate a waiver of Miranda warnings. *People v. Ramos*, 99 N.Y.2d 27, 750 N.Y.S.2d 821, 780 N.E.2d 506. Rather, the Court held that it was a factor to be considered in whether the waiver was voluntary.

In this case, there is absolutely no evidence that the arraignment of the defendant was delayed for the sole purpose of extracting a confession from him. In fact, the warnings at Central Booking were tailored to this effect. The defendant was told that "if there is anything you want us to investigate you must tell us now". As a result the Court concludes that the defendant's arraignment was not delayed for the sole purpose of extracting a confession from him.

Lastly, the defendant contends that the phrase, "if there is anything you want us to investigate you must tell us now", rendered his statement involuntary. Specifically, the defendant argues that "the defendant was led to believe that this would be his only opportunity to tell his story and that he had no choice but to do it now." This position is not supported by the record. Many times during the course of the interview, the defendant was told that certain subjects were properly addressed at a later time. For example, when the defendant stated that the gun wasn't a real gun, he was told that that was a subject to be addressed later. In the words of the Assistant District Attorney, "That is something you argue back against these charges."

One issue the Court wishes to address is the fact that the statement made by Sergeant Picone is not true, that is to say, that if there is anything the defendant wished the Office of the District Attorney to investigate, he had to tell them at that time. Certainly, the People cannot argue that if at anytime after the defendant was arraigned and assigned counsel, he would be precluded from bringing to their attention some aspect of the case which could, or

should be investigated by the District Attorney. While not frequent, there are occasions where the District Attorney investigates claims by the defendant while an indictment is pending. Therefore, the question is whether this deception renders the statement made by the defendant involuntary.

The test for determining when law enforcement tactics render a confession involuntary is whether "the deception [is] so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession." *People v. Tarsi*, 50 N.Y.2d 1, 11, 405 N.E.2d 188, 427 N.Y.S.2d 944. The issue is a factual one, governed by the totality of the circumstances. *People v. Anderson*, 42 N.Y.2d 35, 364 N.E.2d 1318, 396 N.Y.S.2d 625.

In this case, the statement made by Sgt. Picone was not so egregious as to deprive the defendant of due process. The defendant was informed that the entire interview would be videotaped, the length of the interview was a mere 11 minutes, the defendant was informed as to why he was being questioned at that time, and the defendant clearly understood the warnings and the questions put to him by the questioners. Therefore, under all of the facts and circumstances of this case, the Court concludes that the defendant knowingly and voluntarily waived his rights at Central Booking and made a voluntary statement.

To recapitulate, the motion to suppress physical evidence is denied. The motion to suppress identification testimony is denied. The motion to

suppress statements is denied, with the exception that the statement made to Sergeant Kugler is suppressed as far as the People's case in chief.

The application is denied in all other respects.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant.

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Robert C. McGann, J.S.C.

Supreme Court of the State of New York
County of Queens: Criminal Term: Part K-22

The People of the State of New York,

-against- Indictment No.

JERMAINE DUNBAR, 1217/09

Att. Robbery 2

Defendant.

January 5, 2010
125-01 Queens Boulevard
Kew Gardens, New York

B E F O R E:

Honorable Robert McGann,
Justice,

A P P E A R A N C E S

FOR THE PEOPLE:

RICHARD A. BROWN, Esq.
District Attorney, Queens County
BY: MARK MISOREK, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

MICHELLE ARMSTRONG, ESQ.
626 Reckson Plaza
Uniondale, NY

ROCHELLE J WRIGHT, RPR, CSR
Official Court Reporter

MR. MISOREK: People call Assistant District Attorney Tina Grillo.

TINA GRILLO, Assistant District Attorney, a witness called on behalf of the People, after having been first duly sworn, took the witness stand and testified as follows:

THE COURT: You may inquire.

MR. MISOREK: Thank you.

DIRECT EXAMINATION

BY MR. MISOREK:

Q. Good afternoon, Ms. Grillo.

A. Good afternoon.

Q. Who do you work for?

A. I work for the Queens district attorney.

Q. How long have you worked for the Queens district attorney?

A. About three years and two months.

Q. If you could, could you go through your assignments at the district attorney's office during the course of your three years?

A. Yes. For the first two years I was assigned to Criminal Court intake where I prosecuted misdemeanors and I wrote up new cases. After that I was assigned to the career criminal major crime beeper program.

Q. If you could, with that specific assignment, could you just tell the Judge briefly what the program entails?

A. For each week we were assigned a different task. One week we were assigned, we were on call for 24 hours, seven days a week where we would answer calls for line-ups, search warrants, we would go to the scene for major crimes. One week we were off. One week we are assigned to conduct interviews in central booking with a member of the district attorney squad.

Q. I'd like to direct your attention to April 24, 2009, at approximately 12:03 p.m. Queens central booking.

Were working at that date, time and place?

A. Yes.

Q. Were you working with anybody?

A. Yes, I was

Q. Who were you working with?

A. I was working with Sergeant Mary Picone.

Q. In terms of your rotation in your career, what point were you at?

Where were you assigned in the district attorney's office?

A. I was assigned to the CCMB writing program at that time.

Q. What task were you assigned on that day?

A. I was assigned to do interviews in central booking.

Q. At approximately 12:03 did you conduct an interview?

A. Yes.

Q. Do you recognize anyone here today as being a person you conducted an interview?

A. Yes.

Q. Could you just identify that individual by an article of clothing?

A. He is wearing a brown sweatshirt, I believe.

THE COURT: Indicating the defendant.

MR. MISOREK: Thank you, your Honor.

Q. Was that interview, was it recorded?

A. Yes, it was.

Q. How was it recorded?

A. It was recorded with both video and sound.

MR. MISOREK: Your Honor, I'd ask this be deemed marked People's 1 for identification.

THE COURT: Deemed one for identification.

Q. Ms. Grillo, do you recognize what's been deemed marked as People's 1?

A. Yes, I do.

Q. What do you recognize that to be?

A. This is a DVD of the interview.

Q. How do you know that's a DVD of the interview?

A. Because I watched it in your office yesterday.

Q. How do you know it's the same one you watched in my office?

A. Because I initialed it with the date.

Q. Is that a full, fair, accurate and complete copy of the interview?

A. Yes, it is.

MR. MISOREK: Your Honor, I'd ask this be moved into evidence.

THE COURT: Any objection, Counsel?

MS. ARMSTRONG: No objection.

THE COURT: It's now in evidence.

MR. MISOREK: I would just ask that it be played.

THE COURT: Deemed in evidence.

Counsel, can you see it?

MS. ARMSTRONG: Yes, your Honor, we can. Thank you.

(Whereupon, the DVD is played in open court).

MR. MISOREK: Your Honor, I have no further questions.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MS. ARMSTRONG:

Q. Good afternoon, Assistant District Attorney Grillo.

A. Good afternoon.

Q. This interview of my client was conducted at about 12:00 p.m. on August 24th; is that correct?

A. Yes, it is.

Q. And do you know what time he was arrested?

A. I don't recall.

Q. Is there anything that would refresh your memory as to the time of his arrest, perhaps some paperwork from the district attorney's office?

A. Yes.

MS. ARMSTRONG: Your Honor, I know on the last court date there was a document deemed Defense A. Do you have that?

THE COURT: It wasn't returned to you? It should have been returned to you.

MS. ARMSTRONG: Okay.

THE COURT: Do we have anything left?

COURT CLERK: There is nothing in the file.

THE COURT: Are you saying it was deemed A in evidence or for identification.

MS. ARMSTRONG: Identification.

THE COURT: Then it would have been returned to you without a doubt. It probably would have been returned to you even if it was in evidence because this is a hearing, but it certainly would have been returned to you if it was for identification only.

Q. Are you familiar with a report generated by your office called an intake bureau crime report?

A. Yes.

Q. Have you had occasion to generate those reports yourself in your capacity as an assistant district attorney?

A. Yes.

Q. Taking a look at that report help refresh your memory as to the time Mr. Dunbar was arrested?

MR. MISOREK: I am going to object.

THE COURT: To what?

MR. MISOREK: The witness never indicated she knew when he was arrested.

THE COURT: I heard her say she doesn't recall.

MR. MISOREK: I apologize.

Q. Would that assist you in refreshing your memory as to the time of his arrest?

A. Yes.

MS. ARMSTRONG: I am going to ask that this document, page four of nine, be deemed defense exhibit B for identification.

THE COURT: Deemed B for identification.

COURT OFFICER: We are up to C, Judge.

MS. ARMSTRONG: C for identification shown to the witness.

Q. Could you take a look at that document, Assistant District Attorney Grillo and tell me if that help refresh your memory as to the time of Mr. Dunbar's arrest?

A. Yes.

Q. What time was that?

A. He was arrested at 12:59 on April 23, 2009.

Q. That would have been approximately almost 24 hours before you conducted this interview, correct?

A. Almost 24 hours.

Q. When you first met Mr. Dunbar --

MS. ARMSTRONG: May have that exhibit back, please.

Q. When you first came into contact with Mr. Dunbar, he was in the Supreme Court pens downstairs?

A. No.

Q. Not Supreme Court pens. The pens downstairs before arraignment?

A. No.

Q. Where was he then?

A. He was brought into the room. I didn't have any contact with him in the pens.

Q. Do you know who brought him to the room?

A. Sergeant Picone did.

Q. Sergeant Mary Picone who is on that video?

A. Yes.

Q. Do you know where she brought him from?

A. The pens.

Q. Where were those pens located?

A. Underneath the Supreme Court building.

Q. That's the arraignment, the pens right before arraignment, correct?

A. Yes.

Q. So Mr. Dunbar then was en route to be arraigned before a judge on these charges, correct?

A. I believe so.

Q. You or your -- Sergeant Mary Picone, she works for the district attorney's office as well?

A. I am sorry.

Q. Sergeant Mary Picone who was reflected o that video, she also works for your office?

A. Yes.

Q. You all were working together in conducting this interview of my client, correct?

A. Yes.

Q. So you determined that you wanted to speak with him just before his arraignment on the charges, correct?

A. No. That's, I mean-- not the way you said that, no. We conduct interviews for all felonies.

Q. Before Sergeant Picone removed Mr. Dunbar into this room, is it fair to say he was in the custody of the New York City Police Department or Corrections?

A. Yes.

Q. Which one?

A. I believe in Corrections. I believe he was in the pens before he was brought into the room.

Q. At that time you were aware he had no attorney assigned, correct?

A. Unless they tell us they have an attorney.

Q. Did someone ask him?

A. We asked him when he was-- whether he wanted to, whether he wanted to speak with us or not. Usually they tell us if they have --

THE COURT: Not usually. That's not what you were asked.

Q. Do you recall asking him whether or not he had an attorney at the time you pulled him out for debriefing?

A. I don't recall asking him that, no.

Q. In fact, he had already spoken to someone?

THE COURT: Did you hear it on the tape you ask him that?

THE WITNESS: Did I ask him on the tape?

THE COURT: Did you here it on the tape?

THE WITNESS: He was given Miranda warnings.

THE COURT: It's a very simple question. Did you hear you ask him that question on the tape?

THE WITNESS: No.

THE COURT: Did you ever speak to him when it was not recorded?

THE WITNESS: No.

THE COURT: Is that tape a full recording of what you said to him?

THE WITNESS: Yes.

Q. So you don't know then whether or not he had even been interviewed by an attorney prior to arraignment at that time that you picked him up, correct?

A. I don't know that.

Q. During your conversations with him on that tape you spoke with him about his version, this is an opportunity for him to give his version of the events, correct?

A. Yes.

Q. I believe you said if there is something you need us to investigate, you have to tell us now; is that right?

A. I don't --

MR. MISOREK: I object. The tape speaks for itself.

THE COURT: No. That doesn't mean she can't be asked about what's on the tape.

MR. MISOREK: I would object to the paraphrasing.

THE COURT: If you are indicating that's not what was said, we can have it played back. She has every right to inquire as to what was said. I don't want there to be a dispute as to what was said. You want to play it back, Counsel?

Q. Do you recall?

THE COURT: Let's start with that.

Do you recall saying what counsel just asked you?

THE WITNESS: I don't recall that, no the word having being used.

MS. ARMSTRONG: I would like it played back then, your Honor.

THE COURT: Let's get back to the first so-called litany of questions before Miranda. I believe that's what you are referring to, Counsel.

MS. ARMSTRONG: That is correct, your Honor.

(Whereupon, the DVD is played in open court).

THE COURT: Stop it.

That's not your voice, is it?

THE WITNESS: No, it is not.

THE COURT: Is it said in your presence?

THE WITNESS: Yes.

THE COURT: It is a detective from your office, correct?

THE WITNESS: Yes.

THE COURT: Are you the assistant district attorney present in that room?

THE WITNESS: Yes.

THE COURT: It was said in your presence; is that correct?

THE WITNESS: Yes.

THE COURT: Did you hear it at the time it was said?

THE WITNESS: I don't recall hearing it at the time it was said.

THE COURT: Were you listening?

THE WITNESS: Yes.

THE COURT: Were you aware that you were the assistant district attorney in a room in which rights and statements are made to a defendant?

THE WITNESS: Yes.

THE COURT: But you don't know if you heard?

THE WITNESS: As I said, I didn't recall hearing that.

THE COURT: You heard it now, didn't you?

THE WITNESS: Yes.

THE COURT: The word was have; isn't that right?

THE WITNESS: Yes.

THE COURT: It was done in your presence, correct.

THE WITNESS: Yes, it was.

THE COURT: You were the responsible assistant in the room, correct?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q. Assistant District Attorney Grillo, did you ever tell Mr. Dunbar that, not just that he had a right to have an attorney present, but that had you not removed him from the loop, an attorney would have been assigned at the time of his arraignment?

THE COURT: Sustained.

Q. Did you ever tell him that he would be assigned an attorney as soon as he went before the court for arraignment?

MS. MISOREK: Objection.

THE COURT: Sustained.

Q. Did you ever explain to Mr. Dunbar that he would have a right to provide information that you could investigate that might benefit him even after his arraignment?

MR. MISOREK: Objection.

THE COURT: No. I will allow that.

A. I am sorry. Can you repeat that.

Q. Did you ever tell Mr. Dunbar, while you were advising him of his rights, that he would also have an opportunity to tell you all, referring to the district attorney's office, information that you could investigate that would benefit him if he had any after his arraignment, do you recall telling him that?

A. No.

Q. You and or Sergeant Picone advised him that he had the right to be arraigned without undue delay, correct?

A. Yes.

Q. You as an assistant district attorney knows that mean you are referring to the 24 hour arrest to a arraignment rule, correct?

MR. MISOREK: Objection.

THE COURT: Sustained.

Q. Did you explain to Mr. Dunbar what that meant, you have the right to be arraigned without undue delay?

MR. MISOREK: Objection.

THE COURT: No. I will allow that.

A. No.

Q. At some points during this interview I believe there was a colloquy between yourself and Mr. Dunbar where you indicated it's beneficial for you if you have an alibi, is there something that we can investigate to help you, it's beneficial for you to talk to us?

THE COURT: I want to make it clear. Are you now asking her if it's a word she said or words said in her presence as the assistant district attorney in the room and the only assistant district attorney in the room, which is it?

MS. ARMSTRONG: We will start with --

THE COURT: I don't remember who is speaking. You played the tape and it's in evidence. I don't want this to bog down as to whose words it was.

MS. ARMSTRONG: That's fine.

THE COURT: The question is, did she say or if it was said, did she hear it.

Q. Let me ask you this. I will withdraw that question and I will ask this specific question.

Did you say to Mr. Dunbar, when there was this discussion about a fake gun, quote "that is something that you argue back against these charges?"

A. I did.

Q. Do you recall saying that to Mr. Dunbar?

A. Yes, I recall saying that.

Q. You were advising him at that point regarding his possible defenses?

MR. MISOREK: Objection.

A. I don't believe I was.

THE COURT: That's a word of art. The objection is sustained.

Q. Do you recall whether or not you and/or Sergeant Picone said in your presence that it would be beneficial for him to give you information if he has an alibi or if there is something that you can investigates to help him, do you recall stating that?

MR. MISOREK: I object.

THE COURT: What's the objection?

MR. MISOREK: To these quotes from something that's in evidence.

THE COURT: Absolutely not. That's overruled.

A. I recall, actually, I recall saying that in response to him asking whether what was benefitting him about this.

THE COURT: By the way, is there anything that you said that was written down before you said it?

THE WITNESS: No.

THE COURT: So none of these statements that you made were written down?

THE WITNESS: I am sorry, Judge, which statements?

THE COURT: Any of the statements.

THE WITNESS: The statements of the litany and the Miranda warnings?

THE COURT: Yes.

THE WITNESS: Those are written down.

THE COURT: Do you have a copy?

THE WITNESS: I do not have a copy with me right now.

Q. Do you know what time --

THE COURT: Let me ask you this.

No matter who read them, had you read them before you went into the room?

THE WITNESS: Prior to this interview? Do you mean have I read them conducting another interview?

THE COURT: Are you familiar with it?

THE WITNESS: Yes.

THE COURT: Were you familiar with the phrase have to?

THE WITNESS: I don't believe that's in the, what we read.

THE COURT: So then something was what you heard here on tape was not on the printed form?

THE WITNESS: I believe so. To the best of my recollection the word have is not in those questions.

THE COURT: But there is no doubt it was said?

THE WITNESS: It was said.

MS. ARMSTRONG: I have no further questions.

MS. MISOREK: I have no further questions.

THE COURT: You are excused.

CBQ INTERVIEW OF JERMAINE DUNBAR

APRIL 24, 2009

12:03 P.M.

LOCATION: CENTRAL BOOKING QUEENS

PRESENT: DETECTIVE MARY PICCONE

ADA TINA GRILLO

JERMAINE DUNBAR

DVD TRANSCRIBED BY

VANESSA PRZETAKIEWICZ.

QUEENS COUNTY REPORTER/
STENOGRAPHER

MS. PICCONE: Just have a seat on that silver chair and I'll explain to you what we do here, okay. That's all right, take your time.

Today's date is April 24th of 2009 and the time is 12:03 p.m. We are present in the interview room with the Queens County District Attorney's Office in Central Booking, Queens.

Q. You are Jermaine Dunbar?

A. Yes.

Q. My name is Mary Piccone, I'm a detective with the District Attorney's Office. Present with me is Assistant District Attorney Tina Grillo also with the Queens DA's Office.

MS. PICCONE: This is the part I need my glasses for, so just give me a second.

MS. GRILLO: I'll read it.

MS. PICCONE: All right. When you go to court.

BY MS. GRILLO:

Q. When you go to court, you're going to be -- the charges are Attempted Robbery in the First Degree, Criminal Mischief in the Third Degree, Criminal Mischief in the Fourth Degree, Criminal Possession of a Weapon in the Fourth Degree, and Possession of an Imitation Pistol.

A. So for repossession --

Q. For an incident that took place on April 23, 2009, at about 12:30 p.m. inside 40-20 108 Street, Rapid Multi Services, in the County of Queens.

BY MS. PICCONE:

Q. In a few minutes, I'm going to read you your rights. After that, you will be given an opportunity to explain what you did and what happened at that date, time, and place.

If you have an alibi, give me as much information as you can, including the names of any people you were with.

If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.

If there is something you need us to investigate about this case, you have to tell us now so we can look into it.

Even if you have already spoken to someone else, you do not have to talk to us.

This will be your only opportunity to speak with us before you go to court on these charges.

This entire interview is being recorded with both video and sound.

I am going to read you your rights now and then you can decide if you want to speak with us, okay.

You have the right to be arraigned without undue delay, that is, to be brought before a judge, to be advised of the charges against you, to have an attorney assigned to or appointed for you, and to have the question of bail decided by the court; do you understand?

A. Yes.

Q. You have the right to remain silent and refuse to answer questions; do you understand?

A. Yup.

Q. Anything you do say may be used against you in a court of law; do you understand?

A. Yes.

Q. You have the right to consult an attorney before speaking to me or the police and to have an attorney present during any questioning now or in the future; do you understand?

A. Yes.

Q. If you cannot afford an attorney, one will be provided for you without cost; do you understand?

A. Yes.

Q. If you do not have an attorney available, you have the right to remain silent until you have had an opportunity to consult with one; do you understand?

A. Yes.

Q. Now that I have advised you of your rights, are you will to answer questions?

A. Yes.

Q. All right. Do you want to tell me what happened?

A. Well -- ummm, the whole story?

Q. Sure.

A. I met this guy, you know, he actually met my older brother, right and --

Q. He met your older brother?

A. First.

Q. Okay.

A. You know, and he would tell us about his job, you can make some money and stuff, you know, that's how I got involved.

BY MS. GRILLO:

Q. Where does he work?

A. Who, me?

Q. Where does the guy work? You said he was telling you about a job and --

A. Yeah, asbestos, he down with an asbestos company, it's out here in Queens. He's been a supervisor for 16 years, but that's what put me on to it.

MS. PICCONE: Okay.

A. It was supposed to have been this place right here.

BY MS. PICCONE:

Q. This was the place you were supposed to get the job?

A. No, this is the place that had supposed to been robbed.

BY MS. GRILLO:

Q. Oh, so the guy that you met that was working for the asbestos company told you about robbing this place?

A. Yeah.

Q. And your brother?

A. No, not my brother.

Q. Just you?

A. Yeah, but he met my brother.

Q. Who's the guy, the asbestos guy, what's his name?

A. They call him Pete.

Q. They call him Pete?

A. Pete.

Q. Was Pete with you when you got arrested?

A. Mm-mm.

Q. So Pete told you about this check cashing place and what did he say?

A. I don't think it's a check cashing place, something like that.

BY MS. PICCONE:

Q. What is it?

A. I don't know.

Q. You tell me, what did it look like when you went in.

A. It looked like one of them services place where you call long distance.

Q. It probably had that service counter --

A. Yeah, it had that.

Q. They cash checks and do all the money transfers and stuff.

A. Oh, I didn't know that.

Q. All right. So, what did he tell you to do?

A. Well, basically he said just go in, the money gonna be under the counter, you know.

Q. How are you going to get the money?

A. Just by -- just getting it, you know.

Q. I mean, I could walk in and I could give the lady money, how do you get the money?

A. Well, they said that the lady -- like sometimes she come out and stuff, so that's really what I was supposed to do.

Q. Come out?

A. Yeah, from the back.

BY MS. GRILLO:

Q. Like what were you supposed to do when she came out?

A. What was I supposed to do?

Q. Yeah, were you supposed to grab her?

A. No, I wasn't to supposed grab her, I was just supposed to scare her.

BY MS. PICCONE:

Q. How?

A. By showing her the fake gun.

Q. Where did you get the gun?

A. From Pete.

Q. From Pete?

A. (Nodding.)

Q. So what was Pete getting out of this?

A. I don't know, I guess part of the proceeds.

Q. What do you mean you guess?

BY MS. GRILLO:

Q. You walk in, you're the one with like what looks like a gun, right, so why would Pete get anyting?

A. Because he one that have me doing this, he the one that have me doing this.

BY MS. PICCONE:

Q. But you don't have to do anything.

A. I know.

BY MS. GRILLO:

Q. What's going on -- what else is going on with Pete?

A. Well, a whole lot of other things, you know what I'm saying.

Q. Do you have a drug problem?

A. Who me? I smoke marijuana, I don't smoke no crack.

Q. But that's it?

A. Hmm-mm. I don't smoke no crazy drugs. But, what if I feel that I was pressured into this?

BY MS. PICCONE:

Q. We want to hear all about it.

A. But I want to work around this, like I talked to the detective at the precinct.

Q. Yeah?

A. He told me to call him when the judge is done with me.

Q. Uh-uh.

A. I called --

BY MS. GRILLO:

Q. Did you want to talk about Pete?

A. Well, not only that, they going to let me give him some information so if I got remanded, he was supposed to come get me.

BY MS. PICCONE:

Q. Well, all right. That's a whole other story. You're going to tell your attorney about that, okay.

MS. GRILLO: Yeah.

Q. That's something you're going to discuss with your attorney, your further cooperation with the police, okay?

A. Hmm-mm.

Q. Our job right here is to talk to you about this incident.

BY MS. GRILLO:

Q. All right. So yesterday you went in, you had --

A. Hold on. Other than -- so there's no way you can help me then and no way -- I mean.

BY MS. PICCONE:

Q. Me personally?

A. I don't want to go to jail.

Q. Yeah, I just told you –

BY MS. GRILLO:

Q. Are you going to answer questions, do you want to tell your story? That's what we're here for.

A. Of course, I understand that, but how could ya'll help me? Ain't no way because I already been read a crime, a charge that --

BY MS. PICCONE:

Q. That's what you're being accused of right now. If you have --

A. How can I have a weapon and a temporary weapon?

Q. What?

A. They said so far I have two weapons there, they said I --

Q. No, It's two weapons charges.

A. Two weapon's charges --

Q. One weapon.

BY MS. GRILLO:

Q. One weapon with different charges.

A. Yeah, but it's a fake weapon.

Q. And that is something that you argue back to those charges.

BY MS. PICCONE:

Q. Right. If you're telling us now it wasn't a real gun, tell us about it. What kind of gun was it?

A. It was a BB gun.

Q. A BB gun, okay.

A. It was a BB gun.

Q. Where did you get the BB gun, Pete gave it to you?

A. I got it from Pete.

Q. All right. So how did you get to this location?

A. Pete drove me out here.

Q. Pete drove you?

A. Pete drove me out here from Manhattan.

Q. What kind of car does Pete have?

A. Something like an Element, it's like a little truck.

Q. A little truck.

A. But hold on.

Q. What?

A. See, I'm not going to just be providing information and it's irrelevant --

Q. You're not providing information --

A. -- and it ain't going to be beneficial to me.

Q. Listen, it's beneficial to you if you have an alibi, if there is something we need to investigate about this.

BY MS. GRILLO:

Q. I mean, she went through the intro with you in the beginning.

A. Yeah.

Q. Part of that wasn't we're going help you if you sit and talk.

A. I understand that.

MS. PICCONE: Now certainly, if you can tell us something that is in your benefit --

MS. GRILLO: That will benefit you

MS. PICCONE: -- then it might help you.

MS. GRILLO: Meaning it wasn't me, I wasn't there or something like that.

MS. PICCONE: Right.

BY MS. GRILLO:

Q. That's not what she said, right?

A. Yeah, but I can't say this wasn't me, it wasn't me, I'm being truthful.

BY MS. PICCONE:

Q. We have pictures of you and they found the BB gun and all the stuff.

A. Hmm-mm.

Q. No, you can't -- there's very little -- unless there's something you have to explain.

BY MS. GRILLO:

Q. So did Pete just drop you off? He didn't pick you up again, right?

A. No.

Q. Somebody else picked you up?

A. Yes.

All right. After I finished talking to you, who do I talk to, the DA?

BY MS. PICCONE:

Q. You will be talking to your lawyer.

A. My lawyer.

Q. We work for the DA's office.

A. Oh, okay. You know, I'm done.

Q. Our job is to find out if there is any further information you can give us to --

MS. GRILLO: Like, do you need us to investigate anything further.

Q. Yeah, and we find out from you, your side of the story, what happened.

A. Well, I can tell you from my side of the story with the incident. If you want to further investigate, well what about situations outside of this. See, you only focus on this one.

Q. Outside of this, no. That stuff we can't talk to you about, that stuff comes later.

MS. GRILLO: That is not going to be us.

Q. Yeah, the DA's office is not going to want to hear that. It's just that right here, right this minute, all we can talk to you about is this case.

A. Well, I feel I was forced to do this, that's it.

BY MS. GRILLO:

Q. And Pete --

A. And Pete and whoever the other guy was --

Q. Do you remember his name?

BY MS. PICCONE:

Q. Whoever the other drive was?

A. I know him, Ralphy. I just met him through Pete.

BY MS. GRILLO:

Q. Ralphy is the one who picked you up?

A. Drive, that was the driver.

Q. The driver when you -- after you were done?

A. Yeah, you got his name already?

BY MS PICCONE:

Q. Yeah, actually. I think we do. So what, did Pete tell you I'm going to drop you off and there will be somebody here to pick you up or did you know him already, Ralphy?

A. He told me he would already be there waiting for me.

Q. Okay. And -- so Pete provided you with the weapon, how much were you supposed to give Pete out of his proceeds?

A. I don't even know how much was supposed to have been there.

Q. He didn't tell you?

A. I don't even know if there really was money there, but it's my first time in Queens. I'm just going off of what was being told to me.

Q. Okay.

A. Like I said, I could provide any other information. I'm trying to work around --

Q. That stuff will be asked of you if that's what you want to do.

BY MS. GRILLO:

Q. Is there anything else you want to tell us about the incident yesterday?

A. I was forced to do that.

Ms. PICCONE: Okay. All right. We will conclude this at 12:13 p.m. and want to just stand right here on this X, we're going to take your picture and we will be done.

MR. DUNBAR: Face the camera?

MS. PICCONE: Yeah, that's fine.