No. _____

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

v.

COLLIN LLOYD-DOUGLAS,

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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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. Lloyd-Douglas*, __ N.Y.3d __; 2014 N.Y. Slip.Op. 07293 (2014). The decision is reprinted in the appendix of this petition at pp. 1a-20a.

The decision of the Appellate Division reversing defendant's judgment of conviction is reported at *People v. Lloyd-Douglas*, 958 N.Y.S.2d 744; 102 A.D.3d 986 (2d Dept. 2013). The decision is reprinted in the appendix of this petition at pp. 21a-23a.

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 pp. 24a-34a.

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 the morning of September 7, 2005, defendant hit Pamela Daniels repeatedly in the head with a hammer, fracturing her skull and penetrating her brain. After she fell to the floor, defendant got on top of her, put her in a choke hold, and told her he would kill her. For the next couple of hours, defendant kept Pamela on the floor as she bled, leaked cerebrospinal fluid from her head injury, and passed in and out of consciousness. She begged defendant to call an ambulance, but he did not; and when she tried to use her cell phone, he took it from her. Eventually, defendant left the apartment, leaving Pamela on the floor bleeding and unable to walk, and taking her cell phone, money, and identification with him. After defendant left, Pamela crawled to her bedroom and called 911.

Defendant was apprehended three years later, on June 12, 2008, 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 (38a-41a; 59a). The entire interaction, from the moment defendant entered the room until he left, was videotaped;[1] and defendant was so informed (60a).

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 *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 with the Queens District Attorney's Office and an Assistant District Attorney (59a). 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 in a few moments, after which he "will be given an opportunity

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[1]A DVD of the videotaped interview, which was admitted into evidence at the suppression hearing and trial, will be furnished to this 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 58a-110a.

to explain what [he] did and what happened at that date, time, and place" (59a-60a). 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 us as much information as you can, including the names of any people you were with.
>
> If your version of the events of that day is different from what we've heard, this is your opportunity to tell us your story.
>
> If there is something you'd like us to investigate about this incident, you have to tell us now so we can look into it.
>
> Even if you've already spoken to someone else you do not have to talk to me.
>
> This will be the only opportunity you do have to talk to me before your arraignment on these charges.
>
> This entire interview is being recorded with both video and sound.

> I'm going to read you your rights now, and then you can talk to me if you'd like, okay?

(60a). 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 that?
>
> DEFENDANT: Um Hm.
>
> DETECTIVE: You have the right to remain silent and refuse to answer questions. Do you understand?
>
> DEFENDANT: Yes.
>
> DETECTIVE: Anything you do say may be used against you in a

court of law. Do you understand?
...
DEFENDANT: Yeah.

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

DEFENDANT: Yeah.

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

DEFENDANT: Yup.

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: Yeah.

DETECTIVE: Now that I have advised you of your rights, are you willing to answer questions?

> DEFENDANT: Yeah. I'll answer a few questions.

(60a-62a).

During the thirty-minute interview that followed, defendant acknowledged that he fought with Pamela on the day of the incident, but claimed that she had attacked him with the hammer and that her injuries were self-inflicted during the struggle. Defendant also acknowledged that he stayed with her after the incident and refused to call an ambulance, but he denied taking her wallet or cell phone (63a-110a).

Defendant was subsequently charged with Attempted Murder and related offenses.

The Suppression Hearing

Prior to trial, defendant moved to suppress his videotaped CBQ statement on the grounds that he had not been properly advised of his *Miranda* rights, and that his waiver and statement were not knowing and voluntary. A hearing was held, at which defendant did not testify.

On September 17, 2009, New York State Supreme Court denied defendant's suppression motion, holding that "the People have proved, beyond a reasonable doubt, that defendant's statements were made pursuant to his knowing, intelligent, and voluntary waiver of his constitutional rights" (32a). Specifically, the court found that there was "nothing in

the record to indicate that defendant was threatened to make a statement or that his will was overborne" and that "no evidence was adduced to indicate that defendant was irrational or in any way incapable of appreciating the consequences of his statements, nor that he was subjected to 'overbearing interrogation'" (32a).[2]

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 Murder and lesser offenses. He was sentenced to an aggregate term of fifteen years' imprisonment, followed by five years' post-release supervision. 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

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[2]After deeming defendant's statement voluntary and admissible, the court opined in *dicta* that the "preferable procedure in questioning defendants would be to first advise them of their *Miranda* rights, *then* advise them that if they wanted something investigated, they should let the authorities know about it" (33a). The court mused that this procedure would eliminate any danger of the pre-*Miranda* remarks being construed as the "functional equivalent of questioning." But the court did not so construe the pre-*Miranda* remarks, which contained no questions, elicited no responses, and were "very brief" (33a).

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, for the reasons stated in the companion case of *People v. Dunbar*, 104 A.D.3d 198 (2d Dept. 2013) -- and without any regard to the facts of defendant's particular case or his individual circumstances -- that the pre-*Miranda* remarks made by the interviewers in CBQ deprived defendant of an adequate advisement of *Miranda* warnings as a matter of law, and rendered the warnings "[in]effective to secure the defendant's constitutional privilege against self-incrimination and right to counsel" (22a).

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 fully 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." *Lloyd-Douglas* at 2a-3a, *quoting Missouri v. Seibert*, 542 U.S. 600, 611 (2004) and

Miranda v. Arizona, 384 U.S. 436, 467 (1966).[3] 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." *Lloyd-Douglas* 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

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

the warnings, "viewed as a whole, what was said to ... defendant[] before questioning began 'reasonably conveyed ... his rights as required by *Miranda.*'" *Lloyd-Douglas* 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"); *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (same); *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[4] 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

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[4]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.

expressly acknowledged and waived each of those 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 Lloyd-Douglas* 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.*[5]

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,

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[5] 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 there is "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.

concurrence, or dissent -- that would support, or even 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 conveyance 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* 60a: "in a few minutes, I am going to read you your rights;"..."I'm going to read you your rights now, and then you can talk with me if you'd like; 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'd like* us to investigate ..." (*see* 60a), 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 also 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 (60a). And then defendant was clearly and forcefully apprised that "anything you do say may be used against you in a court of law" (61a). 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" (60a-61a). 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.[6]

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

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[6] Of course, under such analysis, this would never rise to the level of impairing voluntariness, especially since this particular defendant – who had prior contacts with the criminal justice system, and was familiar both with the arrest and arraignment process, and with the various opportunities he would thereafter be afforded to approach the district attorney though his lawyer – was surely not confused or misled by this wholly accurate statement (*see infra*, pt D, for full discussion).

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.[7] As the dissent 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

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[7] The state courts' discomfort with the interview program, on the 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.

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 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 the 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 People v. Dunbar,* 104 A.D.3d at 213, 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 (rejecting inquiry into subjective intent of officer in crafting public safety exception to *Miranda* because, *inter alia*, officers' motives will be "largely unverifiable"); *Whren v. United States*, 517 U.S. 806, 813-14 (1996) ("the evidentiary difficulty of establishing subjective intent" was one of the reasons for refusing to consider intent in Fourth Amendment challenges generally).

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 (*see Lloyd-Douglas at* 15a, "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. The record here showed that defendant was 50 years old at the time of his arrest, with a history of prior felony arrests, and several prior misdemeanor convictions. Based on his background, he was intimately familiar with both the role of a District Attorney in a criminal prosecution, and with the fact that he would have opportunities after arraignment to speak to his attorney, tell his story, and have his case investigated by his own lawyer. He spoke and understood English well, and, at the time of his interview, he was lucid and coherent, having had food, water, and sleep during his less-than-24-hour detention in Central Booking. As shown on the videotape, he listened attentively during the *Miranda* warnings, and unequivocally indicated that he understood each one, and was willing to speak to investigators. He had not been subjected to any period of lengthy interrogation -- nor, indeed, any interrogation at all about this incident -- prior to his 30-minute interview in Central Booking.

And, in addition to showing defendant's acknowledgment that he understood the meaning of each individual *Miranda* right read to him, the DVD also showed defendant's clear understanding that *he* controlled the scope and extent of the questioning; for immediately after the *Miranda* warnings, when he was asked if he wanted to talk to the investigators, he said

"I'll answer a few questions" (62a). Similarly, the video showed that defendant was clearly eager to talk. And it showed his strategic motivation for wanting to make a statement: he used it as a means to try and attack both the victim's and her daughter's credibility, informing the interviewers that the victim was an illegal alien, and that there were rumors that her daughter was involved in a murder and had multiple social security cards (63a, 64a). Likewise, throughout the video, defendant repeatedly demonstrated his comfort level and even affirmatively took control of the interview; on one occasion, standing up to show what happened (91a). And, most significantly, at the suppression hearing, defendant did not testify that he was misled, that he misunderstood the District Attorney's role, or that he felt compelled to speak; indeed, such testimony would have strained credulity in view of defendant's prior contacts with the criminal justice system and his conduct during the interview, as clearly captured on the video.[8]

Thus, under these circumstances, this experienced defendant's calculated decision to waive his rights -- in an attempt to claim self-defense and try to attack the credibility of the victim and her daughter as illegal aliens involved in criminal activity -- is the 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

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[8] Nor did defendant testify to any confusion or misapprehension about his *Miranda* rights when he testified at trial, although he was questioned about the statements he made in CBQ and voluntariness was, of course, an issue before the jury.

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.[9] 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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[9] 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.

2010-03736 OPINION & ORDER

The People etc. respondent,
v Collin F. Lloyd-Douglas, appellant.

(Ind. No. 2490/08)

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

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Gary Fidel 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).

Appeal by the defendant from a judgment of Supreme Court, Queens County (Buchter, J.), rendered April 6, 2010, convicting him of attempted murder in the second degree, assault in the first degree, unlawful imprisonment in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress a videotaped statement made by him to law enforcement authorities.

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.

The defendant moved to suppress a videotaped statement made by him to an assistant district attorney during the course of an interview conducted prior to the defendant's arraignment, pursuant to a program instituted by the Queens County District Attorney's office. In accordance with that program, a script formulated by the Queens County District Attorney's office was read to the defendant prior to administering *Miranda* warnings (*see Miranda v Arizona*, 384 US 436 [1966]), and obtaining a waiver of the defendant's rights. Because this procedure was not effective to secure the defendant's fundamental constitutional privilege against self-incrimination and right to counsel, the defendant's videotaped statement should have been suppressed (*see People v Dunbar*, __

AD3d __, 2013 NY Slip Op 00505 [2013] [decided herewith]).

Further, this error was not harmless beyond a reasonable doubt. Other than the improperly admitted inculpatory statements of the defendant, the People's evidence that the defendant committed the acts of which he was accused was limited to the testimony of the complainant, the defendant's ex-girlfriend. The defendant's confession provided highly probative and damaging evidence against him, and served to corroborate the complainant's testimony. Under these circumstances, the evidence of the defendant's guilt, without reference to the error, was not overwhelming, and there was a reasonable possibility that the error might have contributed to the defendant's conviction (*see People v Schaeffer*, 56 NY2d 448, 454 [1982]; *People v Dunbar*, __ AD3d __, 2013 NY Slip Op 00505 [2013] [decided herewith]; *People v Harris*, 93 AD3d 58, 71 [2012], *affd* 20 NY3d 912 [2012]). Accordingly, we reverse the conviction, grant that branch of the defendant's omnibus motion which was to suppress a videotaped statement made by him to law enforcement authorities, and order a new trial.

In light of our determination, we need not reach the defendant's remaining contentions.

SKELOS, J.P., BALKIN, LEVENTHAL and COHEN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

_____x

The People of the State of New York

-against-

By:William M. Erlbaum, J.

COLLIN F. LLOYD DOUGLAS,

Date: Sept. 17, 2009

Defendant.

Ind. No. 2490/2008

_____x

On or about June 16, 2009, the above-captioned matter was referred to Honorable Joan O'Dwyer, Judicial Hearing Officer, to hear and report, following a hearing on defendant's motion to suppress statement evidence.

After reviewing the transcript of the hearing and the recommended findings of fact and conclusion of law made by said Judicial Hearing Officer in her report dated September 16, 2009, annexed hereto, those findings and conclusions are adopted by the court.

Accordingly, defendant's suppression motion is denied.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorneys for each of the parties in the case.

_____

WILLIAM M. ERLBAUM, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: JHO

The People of the State of New York	REPORT
-against-	By: Joan O'Dwyer, J.H.O.
COLLIN LLOYD DOUGLAS,	
	Date: Sept. 16, 2009
Defendant.	
	Ind. No. 2490/2008

MOTION: To suppress statements
(*Huntley/Dunaway*)

FOR DEFENDANT: Jeff Cohen, Esq.
FOR PEOPLE: Keisha Espinal, Esq. A.D.A.

The defendant is charged with, *inter alia*, Attempted Murder in the Second Degree. He has moved for an order suppression statements, contending that they were taken in derogation of his constitutional rights. A hearing to report on the admissibility of this evidence was held before me on July 1, July 16, and July 29, 2009. At this hearing, the People called Detective Christopher Bollerman, Sergeant Mary Picone, and Detective Vincent Santangelo, whose uncontroverted testimony I find credible.

Detective Bollerman testified that he became involved in the investigation of a crime involving Pamela Austin, who was the victim of an assault which occurred on September 7, 2005 in the vicinity of 107-01 Liverpool Street, Queens. He said that he was not initially assigned to the investigation, which focused on one suspect, Collin Douglas, who could not be located in 2005. However, in June of 2008 he was informed that the subject, who had not yet been apprehended, was "going to be present in a courtroom in Kings County on an unrelated charge" (Suppression hearing minutes p 7). The detective stated that Detective Santangelo, who had actually interviewed Ms. Austin about the crime and verified it via a computer check, was unavailable when the defendant was brought in to the precinct, so he processed the arrest.

According to Detective Bollerman, he contacted Ms. Austin prior to officially placing the defendant under arrest. He said that Ms. Austin told him that she had been living with the defendant, who on the day of the incident repeatedly struck her in the head with a hammer, then left with her cell phone to prevent her from calling for help. She also advised him that she thereafter needed brain surgery and extensive physical therapy. Detective Bollerman stated that after speaking with Ms. Austin, he placed the defendant under arrest.

On cross-examination, Detective Bollerman testified that Ms. Austin had provided Detective Santangelo with information about the case. She also told him that the defendant was going to be in court in Kings County the following day. The detective said

that he did not know who apprehended the defendant, for whom there was an active "wanted card."

Sergeant Picone testified that she interviewed the defendant on June 13, 2008 from 12:10 P.M. to 12:47 P.M. She said that she advised him of his *Miranda* rights, which he indicated he understood and was willing to waive. The defendant thereafter made a statement relative to the incident.

On cross-examination, Sergeant Picone testified that the defendant was arrested on June 12, 2008 at about 2:00 P.M., twenty-two to twenty-three hours prior to her questioning of him. She said that she did not ask the defendant if he needed to use a bathroom or if he wanted anything to eat or drink. However, she indicated that there is a bathroom in each cell at Central Booking, where all inmates are offered three meals a day. The sergeant stated that she did not ask the defendant if he had been drinking or taking any medication.

On re-direct examination, Sergeant Picone testified that the defendant never asked for anything to eat or drink.

Detective Santangelo testified that on June 1, 2008 he met Pamela Austin, who came to the precinct to see why Collin Douglas, the man who had assaulted her, had not been arrested in connection with the case. The detective said that he went to the computer and saw that Collin Douglas had been arrested in both Nassau County and Kings County and that he had a court date in Brooklyn in June 12, 2008. He then

typed out a wanted card in connection with the assault on Ms. Austin, noting that the original card had been closed some time earlier. Detective Santangelo stated that he also contacted the Queens Warrant Apprehension Team and asked them to apprehend the defendant in court the following day. Thereafter, on June 13, 2008, he learned from Detective Adams that he had apprehended the defendant. At this time he "reached out" to Detective Bollerman to process the arrest.

On cross-examination, Detective Santangelo testified that he first spoke with Ms. Austin on June 1, 2008, at which time she told him that Collin Douglas had assaulted her with a hammer. He said that he saw from the precinct log that an investigation card had been drawn up in connection with this matter, but indicated that he was unsuccessful in his attempt to retrieve the original file notes.

According to Detective Santangelo, Detective Adams apprehended the defendant and brought him to the precinct.

On re-direct examination, Detective Santangelo testified that he was unable to find the original detective's case file, but he did retrieve the original complaint report, generated in September 2005, naming Pamela Austin as the complainant and the defendant as the perpetrator.

The defendant now moves for the suppression of statements.

CONCLUSIONS OF LAW

The sole issue before the Court is the admissibility of the defendant's statement to Sergeant Picone. In making this determination, the court must first address the lawfulness of the defendant's arrest, then must consider the circumstances surrounding the taking of the statement itself.

With respect to the arrest, the court finds that it was clearly valid upon the complainant's accusation that the defendant had assaulted her for as a general rule, "[i]nformation provided by a citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest" (*People v. Jean-Charles*, 226 AD2d 395 [2d Dept. 1996]), *appeal denied*, 88 NY2d 987 [1996]); *see also, People v. Williams*, 236 AD2d 642 [2d Dept. 1992], *appeal denied* 90 NY2d 866 [1997]). Accordingly, the defendant was lawfully arrested.

The court notes that the testimony of Detectives Santangelo and Bollerman was sufficient to justify the defendant's arrest irrespective of whether or not Detective Adams, who actually apprehended him in Kings County, personally possessed probable cause for the arrest, for the law is settled that aggregate knowledge may be considered, even despite the lack of express communication (*People v. Gittens*, 211 AD2d 242 [2d Dept. 1995], *appeal denied* 87 NY2d 847 [1995]).

In *People v. Bouton* (50 NY2d 130 [1980]), the Court of Appeals held that "officers who ma[k]e an

arrest need not personally . . . possess reasonable grounds to believe the defendant had committed a crime; it would suffice that someone, somewhere in the investigative hierarchy did. One way or the other, however, it was incumbent upon the prosecutor to point out the basis for this belief."

In *People v. Davis* (237 AD2d 456 [2d Dept. 1997], *appeal denied* 89 NY2d 1091 [1997]), the Second Department held that even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful provided that the police *as a whole* were in possession of information sufficient to constitute probable cause to arrest (emphasis supplied).

In *People v. Ramirez* (234 AD2d 398 [2d Dept. 1996], *appeal denied* 89 NY2d 988, citing *People v. Ramirez-Portoreal*, 88 NY2d 99 [1996]), the Second Department held that under the "fellow officer" rule, even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest will be lawful 'provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest'".

In *People v. Starr* (221 AD2d 488 [2d Dept. 1995], *appeal denied* 87 NY2d 1025 [1996]), the Second Department upheld the detention of the defendant by officers other than the one who saw him exit a sixth floor window, holding that "this court has adopted a circumscribed version of the 'fellow officer' rule which permits the imputation of knowledge from one officer to another, among officers working in a joint

assignment, despite the lack of an express communication of information or direction to take action."

In the case at bar, the police "as a whole" had probable cause to arrest the defendant and the court finds that through the testimony of Detectives Santangelo and Bollerman, the People adequately "point[ed] out that "someone in the investigative hierarchy" had such level of information. Accordingly, "[b]ecause the investigating officer had probable cause to arrest defendant, the arresting officer is deemed to have had probable cause" to do so as well (*People v. Miller*, 242 AD2d 896 [4th Dept. 1997], *appeal denied* 91 NY2d 876).

As to the circumstances surrounding the taking of the defendant's statement itself, the court finds 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. The court credits the testimony of Sergeant Picone that the defendant was advised of his *Miranda* rights, which he indicted that he understood and was willing to waive. There is nothing in the record to indicate that the defendant was threatened to make a statement or that his will was overborne (*see, People v. Tarsia*, 50 NY2d 1 [1980]). Furthermore, no evidence was adduced to indicate that the defendant was irrational or in any way incapable of appreciating the consequences of his statement, nor that he was subjected to "overbearing interrogation" (*see, People v Abreu,* 184 AD2d 707 [2d Dept. 1992], *appeal denied* 80 NY2d 972 [1992]). The questioning

by the detective was relatively brief and the court finds that the defendant's statements were given "freely and voluntarily without any compelling influence", and so are admissible in evidence (*People v. Jackson*, 41 NY2d 146 [1976]).

The court notes that the preferable procedure in questioning defendants would be to first advise them of their *Miranda* rights, *then* advise them that if they wanted something investigated, they should let the authorities know about it. As the Court of Appeals has noted, the police should administer *Miranda* warnings prior to questioning or conduct which may be construed as the functional equivalent of questioning, for the "question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted" (*People v White*, 10 NY3d 286 [2008], *cert. denied* 129 SCt 221 [2008], *citing Missouri v. Seibert*, 542 US 600 [2004]). However, in view of the "very brief" pre-*Miranda* exchange, the court finds the defendant's statements to be admissible.

The court further notes that the 22-23 hour delay in interrogating the defendant does not mandate the suppression of statements.

In *People v Bryan* (43 AD3d 447 [2d Dept. 2007], *appeal denied* 10 NY3d 956 [2008]), the defendant made several statements, the last of which was given almost 28 hours after his arrest. In finding the statements admissible, the Second Department held that there was nothing in the record to indicate that the purpose for the delay was to deprive the

defendant of his right to counsel. They also noted that there were breaks in the interrogation, so that the extended questioning did not undermine the voluntariness of the statements (*see, People v. Ramos*, 99 NY2d 27, 35 [2002], which held that "a delay in arraignment, even if prompted by a desire for further police questioning, does not warrant suppression").

In *People v Towndrow*, 236 AD2d 821 (4th Dept. 1997), *appeal denied* 89 NY2d 1016 (1997), the Appellate Division held that "the length of an interrogation, without more, does not render the statements obtained during that period inadmissible." (*See, People v Bryan*, 43 AD3d 447 [2d Dept. 2007], *appeal denied* 10 NY3d 956 [2008]).

In *People v. Williams* (222 AD2d 468 [2d Dept. 1995], *appeal denied* 88 NY2d 887 [1996]), the Second Department held that the fact that the defendant "was arrested on Friday and the interrogation did not occur until Sunday afternoon does not render the confession inadmissible".

Accordingly, the defendant's statement need not be suppressed.

Based upon the foregoing, the defendant's motion to suppress statements evidence should be denied.

_____

JOAN O'DWYER, J.H.O.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: JHO

_____x

The People of the State of New York,

Ind. No.

-against- 2490-08

COLLIN LLOYD-DOUGLAS, *DUNAWAY/ HUNTLEY*

Defendant. Hearing

_____x

July 1, 2009

Criminal Court Building
125-01 Queens Boulevard
Kew Gardens, New York 11415

B E F O R E :

THE HONORABLE JOAN O'DWYER
Judicial Hearing Officer

A P P E A R A N C E S:

For the People:

THE HONORABLE RICHARD A. BROWN
District Attorney, Queens County
BY: KESHIA ESPINAL, ESQ.
Assistant District Attorney

For the Defendant:

JEFF COHEN, ESQ.
125-10 Queens Boulevard
Kew Gardens, New York 11415

MICHAEL BERMAN, RPR
Official Court Reporter

MS. ESPINAL: People call Sergeant Mary Picone to the stand.

MARY PICONE, Sergeant Queens District Attorney Office, called as a witness on behalf of the People, after having been first duly sworn, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MS. ESPINAL:

Q. Good morning, sergeant?

A. Good morning.

Q. By whom are you employed?

A. The Queens District Attorney's office.

Q. What is your position at the Queens County District Attorney's office?

A. I conduct interviews in Central Booking in Queens.

Q. How long have you been employed by the District Attorney's Office?

A. Fourteen years.

Q. Were you always in charge of doing the statements.

A. No.

Q. What did you do before?

A. I was an investigator in the Career Criminal Bureau.

Q. How long have you been taking these videos?

A. Approximately, two years.

Q. And can you explain to me what it is that you do when you do these video interviews?

A. I receive a folder, usually in the morning from our intake bureau. I familiarized myself with the case. I usually work with another person, an ADA. After I set-up all our equipment for the film, I get the defendant from the cells that they are being kept in, in Central Booking. My office is also in Central Booking. I bring them to my office, explain why they are there, and one of us explains to them why we are there. We given them the Miranda Warnings and ask if they want to speak with us and then we take a statement.

Q. Is this interview memorialized in anway?

A. It's recorded on a DVD.

Q. And I'm going to talk to you about June 13th, 2008.

Do you remember that date?

A. Yes.

Q. Do you remember interviewing an individual by the name of Collin Lloyd Douglas?

A. Yes.

Q. Do you see him in the courtroom?

A. He is sitting at defense counsel table wearing a gray suit.

THE COURT: Indicating the defendant.

Q. Can you explain the procedure when you interviewed the defendant?

A. It was the exact one we always used. I received his folder, read it, went to get him from the cell, brought him to my office, explained why he was there, administered Miranda Warnings and he agreed to speak with us.

MS. ESPINAL: Now if I may, I'd like to show the witness People's 1 for identification.

(Whereupon, People's Exhibit Number 1 was deemed marked for identification).

Q. Now, Sergeant Picone, do you recognize what that is?

A. Yes.

Q. What is it?

A. This is the DVD that was generated as a result of that interview on June 13th, 2008.

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

A. It has the defendant's name, arrest number, the date of the interview. Then it has my initials and the date I reviewed the interview.

Q. You said you received it. What date did you review it?

A. I actually reviewed it twice. Once on June 1, 2009 and once briefly this morning.

Q. Does that DVD contain the entire interview of the defendant?

A. Yes.

Q. Now, do you know what time this interview started on the 13th?

A. Not exactly, noon. At some point, twelve something I believe.

MS. ESPINAL: Your Honor, at this time I ask that People's 1 be admitted into evidence.

MR. COHEN: No, objection.

(Whereupon, People's Exhibit Number 1 was deemed marked in evidence)

MS. ESPINAL: Your Honor, I would ask that the DVD be played for the Court.

(Whereupon, People's Exhibit Number 1 in evidence was played in open court).

Q. Sergeant Picone?

A. Yes.

Q. So we've just finished watching the DVD interview of the defendant. Was that the entire interview?

A. Yes.

Q. After that was there any conversations that you had with the defendant after that?

A. No.

Q. What happened with the defendant after that?

A. I escorted him back to the cell.

Q. And do you remember now what time this interview started and what time it ended?

A. No, I don't 1210. I'm not sure. It's on the video, the exact time. I don't recall.

Q. I'm going to have you look at this.

A. Okay I have that it commenced at 12:10 and concluded at 12:47.

Q. That was on June?

A. June 13th, 2008.

MS. ESPINAL: No further questions.

CROSS-EXAMINATION
BY MR. COHEN:

Q. My name is Jeff Cohen. I represent Mr. Douglas. Obviously, I'm going to ask you questions. If there is anything you need me to repeat just ask.

At the time do you remember what day he was arrested?

A. The day before?

Q. He was arrested on the 12?

A. Yes.

Q. Do you recall what time he was arrested?

A. About two p.m.

Q. Do you recall who arrested my client?

A. No.

Q. It's fair to say my client was arrested and brought to the precinct, the 103rd?

MS. ESPINAL: Objection.

THE COURT: Overruled.

THE WITNESS: I don't have any acknowledge of what occurred before I met the defendant.

Q. But as you testified it's clear. You know what, I'd like the witness to be shown this document.

Detective, do you recognize what you are looking at?

A. Yes, it's an arrest report.

Q. It is fair to say that my client was arrested on June 12th; correct?

A. Yes.

Q. It's fair to say the arrest time was at two p.m.; correct?

A. Yes.

Q. And it's fair to say from your testimony that my client was brought to the District Attorney's office the following day; correct?

A. I don't know what time he wasn't brought to the District Attorney's office.

MS. ESPINAL: Objection.

THE WITNESS: He was brought to Central Booking.

Q. And that was the following day; correct?

A. I don't know what time he got there.

Q. Well eventually he got there?

A. He did eventually get there.

Q. You interviewed him?

A. Yes.

Q. When?

A. I interviewed him the following day.

Q. That's June 13th?

A. Yes.

Q. And it was from the tape that's in evidence. He was interviewed and it happened somewhere at, approximately, 12:10?

A. Correct.

Q. And that was 22:40 hours after his arrest; correct?

A. Correct.

Q. Now prior to Mr. Douglas being interviewed on the video, did you speak with my client?

A. No.

Q. Do you know if anybody spoke with him?

A. No.

Q. Now when you interviewed my client I see on the video that you read him his Miranda Rights?

A. Correct.

Q. Did you memorialize those?

A. On the video?

Q. Do you have a copy of them with you?

A. No.

Q. Did you write them down. Did you read from something?

A. Yes.

Q. Okay. Do you have that with you?

A. No.

Q. Do you have them at all as part of the file for the arrest of my client, or the interview?

A. The interview only.

Q. I'm not sure I understand?

A. In other words, I have a copy of the Miranda Warnings that I read to each person that I interview. They are not put into the file folder. I keep that to use each time I interview someone and then memoralize on the video.

Q. Do you recall who escorted Mr. Douglas into the interview room?

A. I did.

Q. So you went to get Mr. Douglas?

A. Yes.

Q. When you went to get Mr. Douglas, where was Mr. Douglas?

A. In a cell in Central Booking.

Q. And when you went to get Mr. Douglas in the cell, did you speak with Mr. Douglas at that point?

A. No.

Q. Well, you told him to come with you; correct?

A. I might have said that much, but usually a corrections officer opens the cells and tells him to come out and then I meet him in the hall and walk with him down the hall. The most I'll say is please come with me.

Q. Did you tell him why he was to come with you?

A. No.

Q. Did you tell him anything other than to come with you?

A. No.

Q. And how long did it take you to get from the cell to the interview room?

A. A matter of seconds.

Q. When you took him out of the cell, did you ask Mr. Douglas if he needed to go to the bathroom?

A. No.

Q. Did you ask him if needed any food?

A. No.

Q. Did you ask him if he needed anything to drink?

A. No.

Q. Did you ask him if he had anything to drink prior to going into the interview with you?

A. Central Booking has a cell with a bathroom in each cell and they are offered three meals a day. I don't know if he accepted it.

Q. I want to know?

MS. ESPINAL: Let her ask.

MR. COHEN: I would ask that the answer be stricken as not responsive.

Q. Did you ask him whether in fact he had eaten?

A. No.

Q. Did you ask him if he had anything to drink prior to going down there?

A. No.

Q. Now, there came to a point where he was brought into the interview room?

A. Yes.

Q. He was obviously brought into the interview room by you?

A. Yes.

Q. When he was brought into the interview room as you testified earlier it's now some 22:00 hours after his initial arrest?

A. Yes.

Q. Did you ask him whether he wanted anything to eat?

A. No.

Q. Did you ask him if he wanted anything to drink?

A. No.

Q. Whether Mr. Douglas needed to go to the bathroom again?

A. No.

Q. Now prior to Mr. Douglas entering the interview room, did you advise Mr. Douglas what was going to happen when he entered the room?

A. No.

Q. So it's your testimony that you did was bring him into the interview?

A. Correct.

Q. And when you actually brought Mr. Douglas into the interview room and prior to turning on the video, did you say anything to Mr. Douglas?

A. No, the video was on as I walked in.

Q. And obviously there came a point where you interviewed my client; correct?

A. Correct.

Q. And during this interview, as we can see, you never asked him if he wanted anything to drink?

A. Correct.

Q. Whether he wanted anything to eat?

A. Correct.

Q. Or if he needed to go to the bathroom; correct?

A. Correct.

Q. Prior to my client coming into the interview room, did you speak with any of the officers at Central Booking in regards to my client?

A. No.

Q. So it's your testimony that the first time you came into contact with my client was when he was in the Central Booking cell?

A. Yes.

Q. Was anyone else with you at the time that you went into the Central Booking cell to get my client?

MS. ESPINAL: Objection.

THE WITNESS: I don't understand your question. I don't believe that she went into the cell.

MR. COHEN: It's semantics.

Q. Was there anyone with you when you went to get my client?

A. Such as whom there are corrections officers.

Q. A correction officer?

A. Well, the correction officer opens the cell and removes the defendant.

Q. Other than the corrections officer is there anybody that came with you?

A. Nobody comes with me, no.

Q. Now the interview, the interrogation started at 12:10; correct?

A. Yes.

Q. It's fair to say the interrogation ended at 12:47; correct?

A. Yes.

Q. That's, approximately, thirty minutes or so that my client was interrogated; correct?

A. Yes.

Q. Now after you were done with the interrogation, did you memorialize anything, any statement that my client made?

A. Yes, it was recorded on the DVD.

Q. Now did you memorialize -- did you write anything down?

A. No nothing is written down.

Q. Do you recall where my client went after he was interrogated?

A. I brought him to a cell that's known as the feeder cell, which his where the defendant's go prior to there appearance in Court.

Q. When my client was interrogated, did you ask my client whether he was under any medication at that time?

MS. ESPINAL: Objection, Judge, it's all on the video.

THE COURT: You may answer.

THE WITNESS: Well, he's spoken to by EMS personnel when he comes into Central Booking so that all would have been part of his file and attached to his movement slip. If it wasn't there I don't know.

Q. You didn't ask him?

A. No.

Q. You didn't ask whether he had been drinking at all?

A. No.

Q. Prior to his arrest?

A. Prior to his arrest, no.

Q. Didn't ask him if he was under any medication prior to his arrest?

A. No.

Q. Didn't ask him any questions as to whether in fact anything may impede his judgment during this interrogation; correct?

MS. ESPINAL: Objection.

THE COURT: Are you talking about before tape?

MR. COHEN: Correct.

THE COURT: All right.

THE WITNESS: No.

Q. Detective, how many interrogations have you done in your time as an interviewer?

A. I'm not sure exactly. We've done, approximately, 3500 and I have done about seventy-five percent of them.

Q. And during the interview, during the interrogation it's fair to say one of the reasons is to enhance the District Attorney's case; correct?

MS. ESPINAL: Objection.

THE WITNESS: That's one.

THE COURT: Sustained.

Q. Other than you being the person who asked the question, how many have you been a part of in regards?

A. I don't understand that question.

Q. Well, in this case you are the one that read his Miranda Rights?

A. Correct.

Q. Other than you as the person who took place in Miranda Rights?

A. The same number. I don't differentiate reading Miranda if I'm part of the interview, I consider myself doing it.

Q. And you indicated there are some 3500?

A. Approximately, I don't have an exact number.

Q. It's 3500 statements that you've obtained from people?

A. The program has done --

MS. ESPINAL: Objection, relevance to this hearing.

THE WITNESS: It's 3500 interviews. Whether or not a statement came about, I don't know.

Q. How many would you say, if you can recall, interviews that you have made where you've obtained a statement from a defendant?

A. Me personally?

Q. Yes, or one that you've participated in?

A. I don't know. I can't do the math that quickly.

Q. Well, how many you said 3500 you participated in seventy-five percent?

MS. ESPINAL: Objection.

THE WITNESS: Approximately.

Q. So it's fair to say that over a thousand you have participated in; correct?

A. Yes.

Q. And of those thousand, its it fair to say that when you've obtained a statement, if you recall or if you know, whether in fact you obtained a statement in over fifty percent of those?

A. Yes.

Q. Is it fair to say it has been over seventy-five percent, if you know?

MS. ESPINAL: Objection.

THE COURT: Sustained.

Q. In those statements is it fair to say that when the defendant makes a statement, that it's helpful to the District Attorney case?

MS. ESPINAL: Objection.

THE COURT: Sustained.

MR. COHEN: No, further questions.

REDIRECT EXAMINATION

BY MS. ESPINAL:

Q. Detective Picone, pick did you see the cell that the defendant was in?

A. Yes.

Q. Can you describe that cell?

A. Yes, I'm bad with dimensions. Let's say it's twelve by twelve.

Q. In the cell. Is there anything in the cell?

A. Yes, a phone and a toilet.

Q. Did the defendant ever ask for some water?

A. No.

Q. Did he ask you for anything to eat?

A. No.

MS. ESPINAL: No further questions.

THE COURT: Thank you, sergeant. All right, July 23rd.

THE COURT: Same bail conditions. Officers take charge.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

_____

MICHELE LISBY-SMITH
SENIOR COURT REPORTER: :

_____x

The People of the State of New York,

Ind. No.

-against- 2490-08

COLLIN LLOYD-DOUGLAS,

Defendant.

_____x

Interview of : COLLIN LOYD DOUGLAS

Date: June 13th, 2008

Time: 12:10 p.m.

Location: CENTRAL BOOKING QUEENS

Present: DETECTIVE MARY PICONE

ASSISTANT DISTRICT ATTORNEY RYAN CLARK

DVD transcribed by: LORETTA LAPOLLO
QUEENS COUNTY
ASSOCIATE REPORTER/
STENOGRAPHER

BY MS. PICONE:

MS. PICONE: Today's date is June 13th, 2008. The time is 12:10 P.M.

We are present in the interview room of the Queens County District Attorney's office in Central Booking Queens.

COLLIN LOYD DOUGLAS, was questioned as follows:

BY MS. PICONE:

Q. You are Mr. Collin Loyd Douglas?

A. Yes.

Q. My name is Mary Picone, I'm a Detective with the DA's office. Present with me is Assistance District Attorney Ryan Clark also with the Queens District Attorney's Office.

A. Right.

Q. You have been charged with attempted Murder in the Second Degree, Robbery in the First Degree, Assault in the First Degree, Assault in the Second Degree and Unlawful Imprisonment in the First Degree which occurred on September 7th, of 2005 between 6:00 and 11:00 a.m. at 107-01 Liverpool Street, Queens County.

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.

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

If your version of the events of that day is different from what we've heard, this is your opportunity to tell us your story.

If there is something you'd like us to investigate about this incident, you have to tell us now so we can look into it.

Even if you've already spoken to someone else, you do not have to talk to me.

This will be the only opportunity you do have to talk to me before your arraignment on these charges.

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

I'm going to read you your rights now, and then you can talk with me if you'd like; 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 appointed for you, and to have the

question of bail decided by the court. Do you understand that?

A. Um Hm.

Q. You have a right to remain silent and refuse to answer questions. Do you understand?

A. Yes.

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

A. (Nod).

Q. Just answer yes or no?

A. Yeah.

Q. You have to answer yes or no.

A. Yeah.

Q. You have the right to consult with 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. Yeah.

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

A. Yup.

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

A. Yeah.

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

A. Yeah. I'll answer a few questions.

Q. Okay. All right, Collin, do you recall this date September 7th, 2005?

A. Yeah.

Q. Were you at 107-01 Liverpool Street on that day?

A. That's where I live.

Q. That's where you live. And you were living there at that time?

A. Yes.

Q. Can you tell me what happened there about 6 o'clock in the morning?

A. I came in the house, and she asked me about the candles in the bathroom.

Q. Candles?

A. That was missing.

Q. Who is she?

A. Carmela. (Phon)

Q. Carmela? (Phon)

A. Yes.

Q. What's Carmela's last name.

A. Daniel. I told her it fell down and broke and and I throw it away. She became upset. She said it couldn't fall down and break so she start attacking me. So I said listen, I keep telling you all to leave and leave the house because your daughter did something I was made to understand by a boyfriend that she committed murder. And she was in my house. I said I need you and your daughter to leave the house or I am gonna call the cops. I'm not so sure if it true but that's what I heard. She grabbed the hammer and attack me with the hammer. So we were fighting. It was a fight.

BY MR. RYAN:

Q. This is Pamelo?

A. Yeah, Pamela.

Q. Pamela?

A. Yeah. Her daughter name Sparkle Daniel and also I found the daughter that earlier she had a set

of social security numbers in Spanish names and I asked the mother where she get from. Oh, she know where she get it from. She took it from me. I don't know where she give it back. That's was before I said I do not want this girl in my house.

BY MS. PICONE:

Q. Okay now, all right, we heard a little different story. All right. The first thing I heard that's different is that you had broken up with her about two weeks before this, September 7th?

A. No.

Q. Okay, that's the first thing. The second thing is that you gave your keys back to her.

A. What keys.

Q. When you broke up. The keys to the house?

A. The lease is in my name.

Q. I'm not asking you that. I'm asking you, I'm telling you that we were told that you and your girlfriend broke up two weeks prior to this incident and at that time you gave back the keys to that residence.

A. Not so.

Q. All right the next thing I'm told that on the night before this happened that you were outside the apartment making noise. Okay, and at the time, the

time she was frightened when she saw you there and she filed a domestic incident report for this. Okay, that is what I'm told. Her children were not there that night.

A. No.

Q. Okay.

A. I slept in the house.

Q. She was home alone.

A. I slept in the house.

Q. And she has informed us that on the night when she went to bed, she locked all the doors and she put her dresser against her bedroom door so no one could get in. Now you're saying you were in there because you were living there?

A. Yeah.

Q. She has told us that you were no longer living there and that you were giving back your keys. And that she became frightened the night before because you showed up but she did not let you in the house. These are what I'm told and I'm telling you.

A. Yeah.

Q. The next morning she told us that when she woke up you were there. All right. She was going to work. She does not know how you got in the house.

A. That is a long tale story. How could I got in the house. All this is a lie.

Q. But you had the hammer?

A. She is the one. Check the prints on the hammer. I had to hold this girl down get her to lose the hammer.

MR. RYAN:

Q. Wait a second, let's go on. You're saying you were there that night?

A. Yeah, I slept there.

Q. Where did you sleep?

A. In my the daughter's room. The room that she broke open with the hammer. She beat -- if you got pictures of the house, you look at the pictures you see she beat the door down she and daughter before.

Q. We do have pictures and I will get to that later.

A. Yeah.

Q. What is this house. What's is look like?

A. It's the first floor.

BY MS. PICONE:

Q. An apartment or private house?

A. Private house.

Q. But you live on the first floor apartment?

A. Yeah. We live on the first floor.

BY MR. CLARK:

Q. Okay you were living on the first floor?

A. Yeah. How could we be fighting?

Q. And how many rooms is in the house?

A. One, two. One where I had my music set, down the end when you enter the front door there is a double bunk there where her son is, the room next door to me and her is my daughter's room.

Q. Okay, so how many bedrooms in the house?

A. Two bedrooms.

Q. Is there a living room?

A. Yeah, living room, dining room.

Q. The dining room is separate?

A. Yeah.

Q. Is there a kitchen?

A. Yeah, kitchen.

Q. How many bathrooms?

A. One bathroom.

Q. One bathroom?

A. Yeah.

Q. You're saying that when you got home you saw her with the hammer?

A. She is the one that attacked me concerning when I spoke to her.

Q. When -- the first time you see her with the hammer is when?

A. She was supposed to be out gone to work. I didn't expect to see her there.

BY MS. PICONE:

Q. What time is this?

A. That was around seven something in the morning. She leaves early to go to work.

BY MR. CLARK:

Q. She was getting ready to go to work?

A. She was already dressed.

Q. What happened next? You were at the house already?

A. Yeah, I was in the house.

Q. And had slept at the house?

A. I came at front of the house. I came from that way. She saw me. She asked me about a candle.

Q. Okay, you slept where that night?

A. In the bedroom next door.

Q. Okay, you slept in the bedroom next door which is your daughter's bedroom or her daughter's bedroom?

A. My daughter's bedroom. My daughter doesn't live there.

Q. Okay her daughter -- so now your daughter was living with you?

A. My daughter left because of her. She was over by my cousin. She was still by my cousin's.

Q. The only two people in the house that day were you and her that morning?

A. Yeah.

Q. That is about seven in the morning?

A. Yeah.

Q. And now you see her and she does have a hammer at this point or no?

A. She went and she grabbed the hammer from one of the tools in that room.

Q. Where were the tools?

A. Right by where I had the music set. I had the tools back there.

Q. Where?

A. Is the front room, come in from the kitchen when you come through the back door there's a little room right there. That's where she grabbed the hammer from

Q. Okay and the hammer was yours. It was with your tools?

A. It was in my tools. I had more than one hammer in the house.

Q. Okay and so she would -- there was an argument about her daughter?

A. Yeah, we were arguing.

Q. You didn't want her daughter staying in the house? You did want daughter in the house.

A. I told the police about it. The police have reports about that.

Q. So no that's what the argument was about?

A. Yes.

Q. She grabs a hammer?

A. She get upset because I'm gonna call the cops. I understand she was involved in a murder.

Q. Okay now so you guys were fighting she grabbed a hammer.

A. We were fighting she swings. We start fighting. The hammer was over here. I was holding her hands. She tried to get me. We were like this fighting.

Q. And now what happens after that?

A. She got hit with the hammer. I don't know how she got hit with the hammer because we were fighting, both of us were holding onto each other and fighting right by the bedroom.

Q. So then what happened?

A. We fight. We fight. Then I saw blood, you understand when I saw the blood, she start fighting more. If I hit somebody with a hammer come on, how would we be fighting after then.

Q. Okay, then what happened?

A. We fought. We fought. Then I hold, hold onto her. I said let go the hammer. No you're gonna hit me. I said no not going to hit you with the hammer. Just drop the hammer. Leave it alone. She even tell me she was sorry. I am the one who give her the phone. I am the one who put her in the bed. I'm the one who get the towel sop where I saw the blood was coming from.

Q. Okay?

A. I sopped the part.

Q. Okay?

A. She said I'm sorry, I'm sorry to put you through this. I didn't mean to do it like.

BY MS. PICONE:

Q. Who said?

A. She said that to me.

BY MR. CLARK:

Q. And then so what happened?

A. I put her on the bed. She kept saying Collin call the ambulance. Call the ambulance. I say no, you put me in trouble. No, I'm not gonna. You put me in trouble. I gave her the phone. She was laying on the

bed. See where the phone came from, see where the cord heading straight across there. If you got hit with hammer, you got injured, you can't get a phone and reach over, all over there. I'm the one who gave her the phone.

Q. You gave her the phone?

A. And she said if you don't want to stay you can leave. So I left.

Q. Where did you go?

A. I walked down the street. When I away I was confused. I didn't know what to do.

Q. About what time was this?

A. About ten something.

Q. Ten in the morning?

A. Yeah, about ten something.

Q. So you guys started fighting around seven?

A. Before.

Q. Before?

A. No, no, no after.

BY MS. PICONE:

Q. Between 6:00 and 7:00. And what happened for those three hours?

A. We were talking. We were, we're talking in the house. We were talking all the time.

Q. What were you talking about?

A. She kept saying I'm sorry. I said you keep doing this nonsense the last time you hit me in my head with a bottle.

Q. So you talked for about three hours while she was bleeding on the bed?

A. She was not in bed. She wasn't on the bed.

Q. I thought you said you helped her to the bed?

A. No. She was -- we were sitting on the floor. Soon as you enter the bedroom she was sitting right there, hugged me up said man I'm sorry. She's one kept saying this. I'm sorry, I'm sorry.

Q. She asked you to call the police, to call 911?

A. No she said call an ambulance.

Q. Ambulance. But you didn't want to do that?

A. I said you put me trouble. I said I'll give the phone.

Q. You called them?

A. I am the one picked her up you know, she said call ambulance. I'm weak. I said you know this thing is getting me confused so I pick her up.

BY MR. CLARK:

Q. You guys, the argument started around between 6:00 and 7:00 in the morning?

A. Yeah.

Q. When did she go grab the hammer according to you?

A. Just after I mention about the daughter and the mother.

Q. Okay, so that was the first thing.

A. Yeah.

Q. And okay, when did she get injured with the hammer, right after that?

A. Right after that.

Q. This conversation about her being sorry on the phone this happens when?

A. Long after, Long after. Because nothing happened you know she was bleeding you understand but nothing was wrong.

Q. Okay, so you are saying she was bleeding but you didn't see anything really wrong?

A. No.

Q. Then so, you leave?

A. I gave her the phone.

BY MS. PICONE:

Q. Okay.

A. She checked the phone make sure have the dial tone and everything.

BY MR. CLARK:

Q. Okay?

A. She said I'm not call then. I am going to allow you to go then before I call the ambulance.

Q. Then you left?

A. I left.

Q. Where did you go?

A. I leave the door open, walk straight down the road.

BY MS. PICONE:

Q. Did you take anything with you when you left?

A. No, nothing.

Q. Are you sure?

A. I change my clothes. I took nothing.

Q. How about a cell phone?

A. No, I didn't take no cell phone.

Q. How about her identification?

A. No, she didn't have no identification.

Q. She don't have identification?

BY MR. PICONE:

Q. Everybody has identification.

A. She lost hers. She's lying about these things. This she lost her identification because I don't know what reason she had to go to Whitestone get ID. She was supposed to go to Whitestone because she went to motor vehicle, she did some kind of thing to get her ID and they stop her when she went to renew it. They stop her from getting it. So they told her to go to Whitestone. When she got to Whitestone she called me on the phone. I said better get out of there. You know they got police in there.

Q. What?

A. She is illegal. She did some kind of phony thing. She ran away. Then she went to Long Island did again and they tell her she got to go to Whitestone. She don't have no identification. What identification is she talking about.

BY MR. CLARK:

Q. So, we're talking to you to get the full story of what goes on?

A. Yeah.

Q. And I have your story to this point you say you didn't see anything too wrong with her. She was bleeding. You left her?

A. She has blood. She even tell me to take her jacket off.

Q. You left her on the bed?

A. Yeah, I gave her the phone.

Q. You walked to the front door.

A. The back door. The same door. I left the door open and I walk away.

Q. The back door?

A. Yeah, it was open.

Q. You walked up the street?

A. Yeah.

Q. Where did you go?

A. I went down the road. I walked on the Van Wyck. I said what the hell is this. Where I'm going. I just keep walking up and down the road.

Q. Where did you go after that?

A. I went to Brooklyn.

Q. And did you ever go back to the house?

A. No, I never went back.

Q. Okay, but the house is in your name?

A. Yeah. The lease in my name me and my daughter's name.

BY MS. PICONE:

Q. But first of all --

A. The lease that me and her.

Q. I thought you had reconciled? She was hugging, you saying she was sorry?

A. Yeah.

Q. So why didn't you ever go back?

A. Yeah. Because I got calls from friends saying that cops are looking for me.

BY MR. CLARK:

Q. Okay?

A. You understand.

Q. You didn't go and explain this to the police?

A. I was afraid. I spoke to one of the cops.

Q. When?

A. And then my son called on the cell phone said I'm looking for you. When I get you, I'm going to kill you. You said because I told the cops I was gonna call him.

Q. But wouldn't she have said the same thing you did?

A. Who.

Q. Pamela?

A. The son said that.

Q. No, wouldn't she have told the police the same thing you did.

A. That I did.

Q. Yeah, she forgave you. She was hugging you. I mean would she have told you the same thing?

A. Honest God above me she did say that to me. This thing she made up about me is not so, is not so.

Q. Now, you go to Brooklyn?

A. Yeah.

Q. Is that where you began to live?

A. Yeah.

Q. Okay, you never went back to Queens?

A. No, I never went back over there.

Q. How about your stuff that was in the house, your music equipment and all that stuff.

A. I understand that my daughter, this is the other day her daughter disappear with all my things went wild. Daughter stole my music set. She took all my things. I then.

Q. So you didn't go back for anything?

A. I never been back to the house.

Q. You left that house?

A. My daughter took me things out of the house.

Q. Okay?

A. And the cops arrested my daughter and made her give it back because -- you know what that girl did to me once. When I bought my furniture and put it in the house she took the receipt and wrote her name on tope of it.

Q. Mr. Douglas, this is what I'm seeing up to this point.

A. I mean if I'm lying, tell me I'm lying.

Q. You have explained your side of the story?

A. Yeah.

Q. Okay, and it don't make sense? That is what, this is why, just to me, you start an argument with Pamela early in the morning around the 7:00 o'clock in the morning, right after that, she goes for the hammer and gets hurt by a hammer.

A. She always gets upset. She always get upset whenever I tell her, I need her daughter out of the house, whatever.

Q. Okay listen to me. So what ever the argument is about she get's hurt seven o'clock in the morning early?

A. She should have been out of the house.

Q. She was hurt.

A. I don't know why she was still there.

Q. Yeah, then you guys talk a little longer. According to you, you're talking?

A. Yeah.

Q. Eventually you took her and put her in the bedroom give her the phone, then you leave and you never come back.

A. I never came back.

Q. You said she was bloody but she wasn't too hurt?

A. No.

Q. Now the problem is Mr. Douglas that this is Pamela's head at that time. Pamela has since had two operations. One to fix the hole in the side of her head. That stems from --

A. They're saying it was just a little bruise that I saw down here where I put the --

Q. You said that was blood. Do you see this? Do you see this?

A. It wasn't like that.

Q. Do you understand Mr. Douglas that she had a dent in the side of her head?

A. A dent in the side of her head.

BY MS. PICONE:

Q. She lost part of her skull?

BY MR. CLARK:

Q. Head. That she needed surgery to fix. That she needed surgery?

A. We were talking. We were talking.

Q. What you're also telling me is that this, in losing part of her skull --

A. A little bruise. Remember I mentioned she had a little bruise. I even took the towel wet --

Q. You're saying this happened somehow and you don't know?

A. In the fighting.

Q. In the fighting and that's another --

A. This probably could be the radiator. The radiator we were fighting right next to the radiator there.

Q. What happened with the radiator?

A. When we fell on the floor we were squabbling. That's where she left the hammer right there by the radiator. Right by the radiator.

BY MS. PICONE:

Q. That's a hammer, do you see a hammer?

A. Yeah.

Q. Do you see?

A. Right by the radiator, yeah.

Q. Her skull was bashed in with the hammer. She lost part of her skull. She was in the hospital rehabilitation because she couldn't walk. She's severely injured.

BY MR. CLARK:

Q. That's how you left her?

BY MS. PICONE:

Q. No?

BY MR. CLARK:

Q. Yeah?

BY MS. PICONE:

Q. Did someone else come and bash her head after you left?

A. No. We talked. She said I'm sorry Collin, I'm sorry about that --

Q. She also said please call an ambulance.

A. She told me to call an ambulance. I said you want to put me in trouble. No Collin I'm not gonna put you in any trouble. I give her the phone.

Q. And she asked you to call an ambulance very soon after she was hurt?

A. I gave her the phone right there.

Q. You told us that you wouldn't and she waited hours before she was able to pull the other phone over to her.

A. Oh my god. That one is a lie.

Q. That her cell phone was gone.

A. That one is a lie.

BY MR. CLARK:

Q. Mr Douglas, I see you told me your side of the story and what you're telling me --

A. See where the phone was all the way over there how could she. If she was hurt, come on, how could she get a phone.

BY MS. PICONE:

Q. You know how in a lot of pain and lot of courage.

A. And if --

BY MR. CLARK:

Q. Wait a second. You just said she was hurt. Thought you said --

A. No, you're claiming she was hurt. You claiming she was hurt. She was hurt from that moment, but I'm the person give her the phone. I'm the person.

Q. This is what I see, okay. I see you blaming everybody except for your involvement. You didn't do anything wrong even though you left that house never went back. Even though you never went and talked to the police to say no, that's not how it happened. Even though you're telling me that you left her and she was that hurt, she had her skull bashed. You're saying somehow happened by accident. You didn't do it.

A. I never bashed her skull.

Q. You know Mr. Douglas, it doesn't make any sense. You can sit here, I want you to tell me the truth.

A. I'm telling you exactly what went on.

Q. If that's what happened that's fine. That's how you're gonna tell me that story?

A. Yeah.

Q. But you know what, to me and to anybody looking at this, a story is exactly what that is.

A. I'm telling you exactly what went on. And that's exactly what went on.

BY MS. PICONE:

Q. I'm gonna tell you something now, the time that you say this occurred agrees with her.

A. Yeah.

Q. She's stating that it happened around that time.

A. Yeah, we were in the house.

Q. But when something that is as upsetting and vicious as this, no one has the exact moment, but you both say about the same time.

A. Yeah. You know it went that way.

Q. I also know that no ambulance was called.

A. She didn't call the ambulance.

Q. Oh no.

A. I did not call the ambulance.

Q. Until three to four hours after this happened.

A. You understand, I did not call the ambulance.

BY MR. CLARK:

Q. Mr. Douglas, I'm looking at the injuries on these pictures and I'm thinking to myself and that anybody looking at these pictures, if I see somebody with an injury like that, I'm calling the ambulance. Especially if this is somebody that I --

A. I didn't see that. I didn't see that. I'm telling you straight up.

Q. You're telling me that you were there.

A. I didn't see that.

Q. You're telling me that you were there, you're telling me that you saw blood and so what I'm telling you is you saw blood coming from here --

A. I didn't see that you understand.

Q. It is impossible for you not to see that. What you're doing now is not being completely honest about what happened.

A. It's exactly how it went. I'm telling you exactly how it went and that's what I told you went on and what I'm telling you now is exactly how it went on.

BY MS. PICONE:

Q. Someone with injuries like these cannot sit three or four hours talking?

A. She was talking to me you understand. She was talking to me.

Q. I'm not saying she wasn't talking to you, I'm saying she wasn't choosing to have a conversation with you. She was talking to you because she wanted help and she wasn't able to get help until you finally left there between 11 and 12 o'clock.

A. I'm the one who gave her the phone. I'm the one who give her the phone.

BY MR. CLARK:

Q. Mr. Douglas --

A. If she's claims that she was hurt that badly, you understand.

BY MS. PICONE:

Q. She's not claiming it.

A. You understand.

Q. There is proof that she was hurt that badly.

A. When she called me I went in the other bedroom. I am walking up and down the house and I am saying what the hell is this. She keeps saying come on, come on Collin call the ambulance. I say you call the ambulance. I'm not calling it. I give her the phone.

BY MR. CLARK:

Q. Mr. Douglas, how did her skull get broken with that hammer, explain to me the moment when you know that that hammer --

A. Let me stand up show you exactly.

BY MS. PICONE:

Q. You have to sit down?

BY MR. CLARK:

Q. Explain it to me.

A. We fighting like this. She has the hammer over me. Both us hands on the hammer. We fighting like this between the bedroom door and the dresser right there we were fighting. The hammer, she tried to bring the hammer down I tried to guard hammer. The hammer was like this waving over our head right there

between the bed here, the door here, the dresser here. Right here we were fighting but she got hit here before. She got hit here before. The hammer was in her control,

BY MR. CLARK:

Q. So who had it in their hand?

A. I did not hit her with the hammer in the head.

Q. Whose hand was the hammer?

A. Her hands.

Q. Her hand. So okay, now you mean to tell me --

A. I begged her to let go of the hammer.

Q. You mean to tell me that her head was caved in on that side by her own self? You mean to tell me that she did it to herself?

A. The first impact when she swing that hammer -- I know self-defense. I used to be a cop. I was in the bedroom when she swing that hammer at me the first time standing in front of the mirror. When she swing that hammer, that's where the first impact and I was like this and I saw her because I always look out for her you know because she did me that once I was standing by the TV.

Q. We're talking about now. Explain to me that moment when the hammer -- explain to me the moment when the hammer --

A. She swing the hammer at me. The hammer I blocked like that. So she came through the bedroom door. I was in the bedroom standing in front of the mirror.

Q. So she swings the hammer down you block the hammer?

A. No. The hammer didn't come down, it come straight. It was coming straight at me.

Q. She swing the hammer?

A. And I hit like this.

Q. Oh, you hit the hammer?

A. I hit her hands like this, bang. After I saw her coming because I saw her from the mirror and she came to the door.

Q. Okay, what happened?

A. The hammer pushed like this, like sway in her hands. But the hammer never let go her hands. She still had the hammer when she got hit here.

Q. What part of the hammer hit her?

A. Right here. That when I know she got hit.

Q. Was it the front of the hammer or back?

A. I don't know which side what of the hammer hit her.

Q. What's the hammer look like?

A. The hammer is a regular hammer.

Q. Hammers, theres lots of hammers, there's sledge hammers, claw hammers?

A. It's a claw hammer.

Q. It's a claw hammer. Rounded back or straight?

A. Yeah, claw around there in back.

Q. So there is a rounded edge to the back of the hammer?

A. Yes.

Q. The butt in front?

A. The butt, yeah.

Q. And when she swings at you, what side of the hammer was coming at you?

A. I don't know because I just block, you understand. I just block like this.

Q. You blocked it?

A. I did block like this.

Q. And somehow she gets hit?

A. She got hit you understand she still had the hammer in her hands and I'm standing there looking at her. She's standing with the hammer. I'm looking. You know I'm looking at her like this and she then suddenly started fighting again with the hammer.

BY MS. PICONE:

Q. So she's coming at you blocking it and then she takes the hammer and hits herself in the head?

A. It went like this the hammer pitched like this, her whole hands went back like this and her whole hands swing, you understand and then she is standing like this.

Q. I'm asking you?

A. She's standing like this.

Q. You knocked the hammer back from my hand?

A. Boom.

Q. When does it get to her head?

A. It didn't have the space for her hand to go look at this. This space is very is very narrow.

Q. Do it to me. Here's the hammer. Do it to me. Stop me. Where's it gonna go?

A. She comes swinging like this with the hammer, you know.

Q. So?

A. She comes swinging like this, sorry, sorry you understand.

Q. That's all right. I don't understand how its hitting me on the side of the head.

A. It's the side of the head got hit.

Q. No, no. Her skull is crushed in here.

A. No, here is where she got hit the first time you see the top of the head. It had to be somewhere with that radiator. I don't know nothing about the top of the head you understand, I know about here. You understand what I'm saying.

Q. Let me ask you something?

A. I new exactly about this.

BY MR. CLARK:

Q. Hold on a second. Is she right handed or left handed?

A. I think she is right handed.

Q. She's right handed.

A. Yeah.

Q. Okay she swings the hammer right handed at you?

A. She come to the door and she swing the hammer like this.

Q. You're blocking it away and you're saying at that point the hammer hit her in the head?

A. Yeah, she had this impact here. And for second she was standing like this with the hammer in her hand. I'm looking at her. After impact I'm looking at her like this.

Q. Mr. Douglas, have a seat. Then why is the gash on the left side of the head.

A. On the left side, I don't know. I know I blocked the hammer and she got an impact hit the hammer. I don't know how.

Q. If this is like you're saying it happened, like you're saying it happened, she swings with her right hand, you block away and it comes and hits her in the head.

A. I blocked the hammer and she got hit from the impact when I stopped like that. She still had the hammer in her hands after that impact on the side of her head.

BY MS. PICONE:

Q. Can I ask you something, how did you get into the house the night before when you came home from work?

A. I had my keys.

Q. No, where did you come in, back door?

A. That's the only way I come through.

Q. That's the only way you come through, you never use the front door?

A. We lost the key for the front door.

Q. You lost the key?

A. We lost the key for the front door.

Q. She doesn't have a key for the front door either?

A. No, she don't have a key for that front door.

Q. The only key is for the back door?

A. Yeah.

Q. So you came in the back door. Did you see her when you come home?

A. Yeah, yeah. She saw me at the door. She cursed my friends out in the yard.

Q. She cursed your friends?

A. She was cursing people out like crazy. I was about to -- these guys were coming to help me. She don't even know nothing when she leave that morning when she come from work that day we plan was to move my stuff out when she comes from work I was gone, leave her alone.

Q. So you were breaking up with her?

A. Because that we don't have no separation I just decided said to my friends listen. This is when I threw the candle away on the street. You understand because we were laughing. The night I threw the candle in the street and they were laughing.

Q. Okay you and your friends were at the house, were you in the back?

A. Yeah, we're always be at the back there everyday they come sit down we talk.

Q. When she got home from work?

A. She was in the house already.

Q. Oh she was already in the house when you guys showed up there? She was came home were you there?

A. Yeah.

Q. You were all in the back?

A. To say exactly, don't let me lie, I cannot remember if she was home or she came in but she saw us there and she start cursing them out.

Q. Because what we heard was there was noise going on out there. So you were out there and there was noise?

A. That's her, she was the one cursing out.

Q. Okay. And then --

A. And she was cursed everybody out.

BY MR. CLARK:

Q. Okay. Who is that?

A. Pamela. She even curse one woman that came before and saw that hammer before.

Q. Okay Mr. Douglas, I, when I ask you a question, I don't-- Every time I ask you a question you want to talk about Pamela and how terrible she is. Okay when I asked who was there. You said Pamela. I tried to ask you who else was there and you just

wanted to go on bashing her. I want to know who else was there. Who else was in the back yard with you?

A. Exactly something a girl around the corner was there.

Q. What is her name?

A. Um, um what's her name? What's her name? Trying to remember her name?

BY MS. PICONE:

Q. Well, tell me somebody else?

A. You had the fat boy, the regular people that normally be there with me. They come and we sit in the yard because --

BY MR. CLARK:

Q. What were you doing in the yard?

A. We just started sitting there talking.

Q. Okay, were you guys drinking, not drinking?

A. No, we wasn't drinking. We were just hanging out there. We weren't drinking. We were just hanging out there and they come and talk.

Q. When were you planning on taking things out of the house?

A. Same day. That same day.

Q. Yeah but this didn't happen.

A. The morning during the day.

Q. The day before the 6th or 7th? The 7th when you had the fight with her?

A. After the 7th when the story happened. That same day.

Q. So the night before you got your friends around you told them?

A. We plan it at another house that I'm gonna move because they keep telling me you and this girl always at it, always. Best thing to-- they say they gonna come help me move it.

Q. They were gonna come help you move but you were just hanging out that night, you were not gonna move that night.

A. No there was nothing --

BY MR. CLARK:

Q. This isn't in the backyard, this is something else that you're planning this.

A. We already planned that. I'm sitting in the back yard but she knows that we always come there and talk.

BY MS. PICONE:

Q. However this particular evening was a little noisier. Did she come out and complain this was too nosiy?

A. No, no.

Q. No?

A. No. She came out. We were talking in the yard.

Q. Yeah.

A. You understand nobody don't make noise in that yard. She's the one that make all the noise. She came through the door and she said why this man no handle his business by himself. He always got friends with him, you understand. I need you. You have to leave the yard now, and she start cursing them and one guy said. I can't remember who exactly, one of the guys said because you're always taking advantage of him. Don't think that he don't have nobody. One of the guys that said, the guy said that you know people know him all. You all can't treat him like this around here. She was cursing. I tell you curse.

BY MR. CLARK:

Q. Now who is this?

A. I had a friend, what's his name, we call him Bling. I know his name is Bling or the other one Fat

boy. His brother from Florida was here too and this girl.

Q. Then the next day you saying you went into the house after that. Did any of these people --

A. Yup, they left me. They left me. They said they don't want no story with that girl. So they went out. I went in the house.

BY MS. PICONE:

Q. Can I ask you something? When she finished yelling and getting --

A. I went in the house.

Q. When she finished yelling and getting mad. She went to bed or something?

A. She ran in the house.

Q. You guys were still hanging out, she went back in the house?

A. No, no, before she finish, the guy said they don't want no trouble with this girl. They left. They went out through the gates.

Q. What did she do?

A. She ran inside and I went in.

Q. You went in right after her?

A. Yeah.

Q. You didn't go in together?

A. No I went after but the door was still open.

Q. You didn't need to use your key to get back in?

A. No.

BY MR. CLARK:

Q. Mr. Douglas, are you right handed or left handed?

A. I'm right handed. You understand this story she made up a story. This story is a story she made up. When you put her in a box she can't come up with that story she tell you.

BY MS. PICONE:

Q. In the house did she go to her room?

A. Yeah, she went in her room.

Q. And then you didn't see her again to the next day?

A. The next day yeah, I came out. I figured she was gone.

Q. She knew you were leaving?

A. No, she don't know nothing. Never let her know.

Q. The argument that morning?

A. Was concerning the candle.

Q. The candle?

A. That was in the bathroom. She said what happened to the candle in the bathroom. And I said it fell down and broke and I threw it away. Which it did not.

Q. That's not what really happened?

A. I threw the candle away. Because whatever argument, go the house and she light up the candle whenever she get me in, I always got my head paining. I always use to get headaches. She use to have it on a table in front. I move it from there.

Q. So you don't like candles?

A. I threw the candle away.

Q. You threw it away?

A. And she was upset over that.

Q. That's what the fight started over?

A. And she get upset over that.

Q. Okay she got upset and then what happened?

A. I start talking to her. I said, I keep telling you I don't need this girl in the house. Because this girl is gonna bring the police inside here and talk like somebody up.

Q. How did it go from the candle to the girl?

A. No, but after she finished talking about the candle, I keep telling her, she told -- she's gonna move.

Q. Who exactly lived in the house?

A. Pamela, her little son, my daughter and me. The four of us.

Q. So what did this daughter have to do with anything?

A. She just move in.

BY MR. CLARK:

Q. I thought you said she wasn't living there?

A. She wasn't living there. Shed move in and every time the cops come, she keep telling the cops she doesn't live there. She lives in Bronx.

Q. Okay?

A. The girl never moved.

Q. That night you stayed over until the 7th, when you got up and talk to her that morning?

A. Yeah.

Q. Was the daughter at that house?

A. No. The daughter wasn't. The son wasn't there. My daughter wasn't their either.

BY MR. CLARK:

Q. You guys were having a conversation about her daughter that wasn't living there that night?

A. But the girl lived there because from the time she came --

Q. What room was she staying in?

A. She stays right in front of the little brother or sometimes he lay down on my couch and I tell her I don't want no one sleeping on the couch.

Q. So into the room?

A. The room is my daughter's room. The room, that is broke open with the hammer because you I put locks on all the doors.

Q. What room does her son --

A. And she and the daughter is the one that broke, I come in and saw them break the door open with the hammer. I call the cops.

Q. Mr. Douglas, can you focus, what room does your son live in?

A. He live in the front up in the front there is a double bunk. Right in front there, that's where he normally be.

Q. A bedroom?

A. No, is like a porch like in front that's why we don't use the front door.

BY MS. PICONE:

Q. An enclosed porch there?

A. Yeah, and there is a curtain right across.

Q. So, you didn't use it because you lost the key or because it's his the bedroom?

A. It's his bedroom, mail box. But sometimes we only use it to get the mails in the mail box. But, that's his bedroom.

BY MR. CLARK:

Q. Okay, Mr. Douglas.

A. I was just even I was even threatened. Even I call the cops. They were gonna call the cops. A friend.

Q. Hold on. What we're going to do is to end this interview 1247.

I'm going to ask you to stand up there is an X. 1247 p.m. there is an X on the floor right there if you could stand right there. Quick picture then we'll go back.