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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 29

RAFAEL PEREZ,

Appellant.

20 Eagle Street
Albany, New York
February 13, 2018

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The first appeal on today's
2 calendar is appeal number 29, the People of the State of
3 New York v. Rafael Perez.

4 Counsel?

5 MR. MIRAGLIA: Good afternoon. And it may please
6 the court, I'm Steve Miraglia for Appellant Rafael Perez.
7 I would like to reserve two minutes for rebuttal, please?

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. MIRAGLIA: Thank you, Your Honor.

10 This case presents two separate questions. One
11 is a De Bour issue involving a search, and the other is a
12 Miranda issue, and I'll start with the De Bour issue first.

13 In this case, the Appellate Division erred by
14 essentially conflating the levels under the De Bour
15 analysis.

16 JUDGE GARCIA: And counsel, which level are you
17 challenging here? Is it the initial approach? It is level
18 three? What are your specific challenges under the De Bour
19 framework?

20 MR. MIRAGLIA: Your Honor, there's a - - - a
21 couple of them - - - two of them actually. First the - - -
22 the first challenge is to the initial approach and
23 questioning. And the - - -

24 JUDGE STEIN: That being - - - I'm sorry - - - on
25 the ninth floor?



1 MR. MIRAGLIA: On the - - - on the seventh floor,
2 when the elevator - - -

3 JUDGE STEIN: On the seventh floor? When the - -
4 - okay.

5 MR. MIRAGLIA: When the - - - the elevator door -
6 - - doors open and my client walks out with some others,
7 and then, according to the testimony, the police officer
8 sees him and he retreats back into the elevator, and then
9 the police ask him to hold the door, and he keeps pushing
10 the door-close button.

11 JUDGE GARCIA: So that contact, right there,
12 you're saying violated level one?

13 MR. MIRAGLIA: I'm - - - I'm saying that that - -
14 - that that contact could not provide an additional degree
15 of suspicion when they - - - once again, come in on the
16 ninth floor.

17 JUDGE FAHEY: But it doesn't really need an
18 additional degree. What they need is an objectively
19 reasonable degree for the initial inquiry, right?

20 MR. MIRAGLIA: Yes.

21 JUDGE FAHEY: So is the question, then, for us,
22 the - - - not holding the elevator, but when you ask
23 somebody to hold the elevator for you, and they're trying
24 to close the door on you, which is the way I think the
25 People are arguing it, is that an objectively reasonable



1 basis for the approach?

2 MR. MIRAGLIA: Your Honor - - -

3 JUDGE FAHEY: Would you agree that's a - - -
4 that's the - - - the - - - that's the initial question for
5 us?

6 MR. MIRAGLIA: Yes, I would probably have to
7 agree that that there - - - that could provide the
8 additional circumstance, you know, in addition to, you
9 know, the Barksdale kind of situation, where you had the
10 presence and the secure building and the TAP program.

11 JUDGE FAHEY: I see.

12 MR. MIRAGLIA: Here, there - - - there - - -
13 there was the initial request - - -

14 JUDGE FAHEY: But I don't know if the TAP program
15 is relevant, because he lived there. So, you know, it's -
16 - - it's - - - I don't know if the TAP program is
17 particularly relevant.

18 MR. MIRAGLIA: Yes, but - - - right. But when
19 the - - - when the encounter again commences on the ninth
20 floor, the police at that time, at - - - at the very most,
21 had an objective credible reason to approach. And my
22 client had the right to - - -

23 JUDGE RIVERA: So you're saying on the ninth
24 floor - - -

25 MR. MIRAGLIA: On the night floor - - -



1 JUDGE RIVERA: - - - it's a level one?

2 MR. MIRAGLIA: Yes, by the time that they get
3 there, it - - - it - - - it - - - at the most, it's a level
4 one right to ask a, you know, informational question.

5 JUDGE RIVERA: So at what point does it escalate?
6 Does it go to level two, or is it your position it goes to
7 level three?

8 MR. MIRAGLIA: It starts - - - it goes - - - the
9 police act in - - - in - - - in their level of intrusion,
10 and they escalate the intrusion without a corresponding
11 increase in the level of suspicion, and my contention is
12 that the conduct and the remaining silent on the part of my
13 client is not a circumstance which can elevate the level of
14 suspicion.

15 JUDGE RIVERA: Well, why doesn't observation of
16 the bulge do it?

17 MR. MIRAGLIA: Your Honor, the observation of the
18 bulge here - - - the - - - the - - - it was a nondescript
19 bulge in the sleeve, and it wasn't the kind of classic
20 outline of a weapon or waistband bulge.

21 JUDGE STEIN: Well, how about together with the
22 fact that he had his arm stiff and straight down? Where -
23 - - well - - -

24 MR. MIRAGLIA: Yeah, that - - - I think - - -

25 JUDGE STEIN: - - - just based on that, does that



1 add anything to it?

2 MR. MIRAGLIA: It doesn't really add anything to
3 the whether it was the classic example of a - - - of a
4 concealed weapon, like a - - - a - - - gun or something.

5 JUDGE STEIN: But what if - - - what if there had
6 been testimony, which I don't think there was here - - -
7 what if there had been testimony that in this officer's
8 experience, based on other arrests or other inquiries or
9 whatever, that that - - - that bulge in that particular
10 area with the arm straight down was indicative of a
11 machete?

12 MR. MIRAGLIA: Right, but we don't - - - we
13 don't, in this record, have that. I suppose in - - -

14 JUDGE STEIN: But would that - - - would that be
15 enough?

16 MR. MIRAGLIA: I suppose in a case where the
17 officer testifies that, you know, based upon the particular
18 outline and his experience, he was drawing the objectively
19 reasonable conclusion that a weapon was concealed.

20 JUDGE RIVERA: But in - - - in this case, the
21 officer had - - - did not know about robberies with a
22 machete, correct?

23 MR. MIRAGLIA: No, no. In fact, when - - - when
24 the - - - when the elevator doors open on the seventh
25 floor, and my client walks out and walks back in, that's



1 the first time they've ever seen him. They have no - - -

2 JUDGE RIVERA: Does it say what - - - what hand?

3 MR. MIRAGLIA: The right arm.

4 JUDGE RIVERA: Is - - - is there - - - a stiff
5 arm, does it say what hand is being used to keep the door
6 closed? Doesn't he say he's pressing the button to keep it
7 closed?

8 MR. MIRAGLIA: Yes, I'm not sure that that's in
9 the record, repeatedly pressing the - - - the door button.

10 JUDGE RIVERA: So clarify for me, then, what's
11 the record? The police just assume that he stepped back
12 and didn't do anything, as opposed to he affirmatively
13 tried to immediately have the door closed by pressing the
14 button?

15 MR. MIRAGLIA: Yeah, well, the Appellate Division
16 below characterized it as the apparent panicked attempt to
17 leave the presence of the police. I would suggest that
18 there's no support in the record for concluding that it was
19 a panicked attempt other than, you know, the evident desire
20 to be on his way, I mean, you know. There's nothing to - -
21 - from which you can conclude that it was a panicked
22 attempt to leave. It could be rudeness, for example.

23 So that's why, you know, it's part of the - - -
24 it's consistent with his right to not interact with the
25 police, to decline to have that interaction altogether.



1 And of course, that's consistent with both levels one and
2 two.

3 JUDGE RIVERA: So - - - so what would have been
4 necessary, other than what Judge Stein has already
5 mentioned regarding the bulge? What - - - what would have
6 been necessary - - -

7 MR. MIRAGLIA: It - - -

8 JUDGE RIVERA: - - - to - - - to allow this to
9 escalate to the appropriate level to support the actual
10 touching of the defendant, eventually arresting him?

11 MR. MIRAGLIA: Right. There would have to be
12 testimony that the officer saw an object or an item that he
13 concluded was a weapon. Here, he just says he felt for his
14 safety, and he, at that point, immediately reached in and
15 grabbed the arm without articulating why it was that he can
16 reach that conclusion. There's nothing descriptive about
17 it other than it was one arm larger than the other, being
18 held at the - - - at his sides.

19 And - - - and it - - - and then - - - and as the
20 court note - - - as the court noted, at that point, they
21 had no idea, the - - - those police officers, during the -
22 - -

23 JUDGE FAHEY: Hadn't he asked him if he lived in
24 the building a number of times and not gotten a response?

25 MR. MIRAGLIA: Yes, he - - - he asked a number of



1 times, and again, that would be consistent with his right
2 to decline interaction with the police at that point.

3 JUDGE FAHEY: That - - - that may be true, but
4 the bulge in the sleeve combined with not answering,
5 combined with trying to avoid the police in the elevator,
6 doesn't that get us to level two?

7 MR. MIRAGLIA: It - - - no, Your - - - I would
8 suggest to Your Honor that it doesn't, because the conduct
9 of declining interaction remains consistent with the right
10 to be - - -

11 JUDGE FEINMAN: What - - - what about the fact
12 that it's not - - -

13 CHIEF JUDGE DIFIORE: So Counsel, your position
14 is that the police officer's belief that there was a weapon
15 under the sleeve was unreasonable under the circumstances
16 presented on this record? Is that your - - -

17 MR. MIRAGLIA: Yes, that is objectively - - -
18 that the record doesn't support the - - - what - - - that
19 it was not - - - objectively not reasonable to conclude
20 that he was in possession of a weapon.

21 JUDGE FEINMAN: So - - - so if there are
22 different inferences that could be drawn from the evidence
23 that's in this record, why is this not a mixed question of
24 law and fact, and beyond our review?

25 MR. MIRAGLIA: Yes, Your Honor. I contend that



1 there - - - that there are no competing inferences and that
2 the - - - that it was objectively unreasonable, as I
3 mentioned before, to conclude that it was a weapon
4 precisely because - - -

5 JUDGE FEINMAN: Well, what - - - what about the
6 fact that his hand isn't showing? It's not just that he
7 has the bulge. He's hand is inside the sleeve and he won't
8 show the hand. What about that?

9 MR. MIRAGLIA: I - - - that could be a way that
10 somebody wears clothing. I'm not sure that is necessarily
11 indicative of criminality or - - - or possession of a
12 weapon. They have no reason to believe that he was
13 involved in a crime at that point, because they had
14 knowledge of what was going on outside of the building that
15 - - - where they were doing the vertical, namely the
16 reports of a recent robbery nearby.

17 JUDGE FEINMAN: Right, if they had all that, we
18 wouldn't be here.

19 MR. MIRAGLIA: Exactly.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel. We'll
21 get to your second issue on rebuttal.

22 MR. MIRAGLIA: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MS. KNIGHT: May it please the court, Shera
25 Knight for the People of Bronx County. Your Honors, this



1 is a totality of the circumstances analysis, and when we
2 look at all the attendant circumstances, there's numerous
3 indicia of suspicious activity on the part of this
4 defendant, and that's from the - - -

5 JUDGE RIVERA: So - - - so, Counsel, what - - -
6 how - - - how can an individual who's in - - - well, here
7 it's a NYCHA building - - - what - - - what - - - when can
8 they refuse or not want to speak to the police when
9 approached without it escalating to one, two, three, you
10 name it?

11 MS. KNIGHT: Well, an individual has the right to
12 refuse to interact with officers in a level-one and level-
13 two situation. However, the police are permitted to follow
14 that individual or pursue it further for clarification.

15 JUDGE STEIN: So - - -

16 JUDGE RIVERA: So when he got off at the ninth
17 floor, if they hadn't seen the bulge - - - take this out of
18 the equation for one moment. Then he turns around and
19 faces the wall, refuses to speak to them. What - - - what
20 would they have been able to do, or do they now have to
21 walk away or just stand there until he moves?

22 MS. KNIGHT: Well, they absolutely do not have to
23 walk away. They have the right to inquire - - -

24 JUDGE RIVERA: They can just stand there? So
25 what - - - what - - - what does that mean for the person's



1 right not to have to speak to the police? Isn't that an
2 intimidating environment, to just stand there, when a
3 person is obviously invoking, as you acknowledge, their
4 right not to speak to the police, to be left alone?

5 MS. KNIGHT: Well, I think what's important to
6 note here is that it's not just that he's not speaking.
7 This is not about this defendant being silent.

8 JUDGE RIVERA: Okay, what are the other things
9 that are going on?

10 MS. KNIGHT: As soon as the officer gets onto the
11 ninth floor - - -

12 JUDGE RIVERA: Yeah.

13 MS. KNIGHT: - - - he says, "Do you live in the
14 building?" The defendant turned to the side; he has his
15 hoodie on. He's hiding his face, so he cannot be
16 identified.

17 JUDGE RIVERA: He doesn't want to talk to him.

18 MS. KNIGHT: Okay, but the police have a right to
19 inquire further to clarify what's going on.

20 JUDGE RIVERA: Right, but that's what I'm saying.

21 MS. KNIGHT: And - - -

22 JUDGE RIVERA: What - - - I understand that.
23 He's - - - and they made their inquiry. This is the
24 question left open after Barksdale. He now has invoked his
25 right. I don't want to respond; I don't want to talk to



1 you. And he turns around, which is, of course, putting
2 himself in a vulnerable position, and making it very clear
3 he doesn't want to have any conversation.

4 MS. KNIGHT: Right, but what - - -

5 JUDGE RIVERA: So at what point can an individual
6 in that position truly be exercising their right, if your
7 position is, well, the cops can just stand there and keep -
8 - - either say nothing but stand there, or follow him
9 around, or continue to ask him the same questions?

10 MS. KNIGHT: Well, I think when - - - as soon as
11 this officer sees the bulge, that obviously - - -

12 JUDGE RIVERA: I understand. I - - -

13 MS. KNIGHT: - - - escalates the situation.

14 JUDGE RIVERA: I got - - - I understand that
15 argument.

16 MS. KNIGHT: Can he stay silent? Yes, he can
17 stay silent, but the officers can also proceed and take
18 safety precautions if necessary.

19 JUDGE RIVERA: But my hypothetical was, you don't
20 see the bulge - - - there is no bulge. I just want to know
21 - - - I understand your point about the bulge there. Case
22 - - - we have case law about the bulge. I understand your
23 position there. I'm just trying to understand the People's
24 position with respect to the right to be left alone and not
25 to respond to an officer.



1 MS. KNIGHT: I think in this situation, what's
2 unique about it is that it is in a NYCHA building. And
3 part of that officer's responsibility, they have a dual
4 function. So one function is, as part of their contracts
5 with NYCHA, and also as part of the trespass affidavit
6 program, they are - - - they are there to protect the law-
7 abiding citizens of that - - -

8 JUDGE RIVERA: No, no, I understand that, but
9 let's say it's a tenant in the elevator, doesn't want to
10 speak to the police. Gets off at the ninth floor - - -
11 sees him on the seventh floor. Goes up to the ninth floor,
12 gets out, turns their back, puts the hoodie over, what - -
13 - where do we go after that?

14 MS. KNIGHT: Right, but he hasn't communicated
15 that he's a tenant.

16 JUDGE RIVERA: But why should he? Isn't the
17 point that he doesn't have to speak to the police, is my
18 question?

19 MS. KNIGHT: In a level one - - -

20 JUDGE RIVERA: Isn't that where this rubber hits
21 the road?

22 MS. KNIGHT: Right, he doesn't have to, but
23 that's not - - - the officer did not do a pat-and-frisk
24 based on him not speaking.

25 JUDGE WILSON: Why is this different - - -



1 MS. KNIGHT: That was not the basis.

2 JUDGE WILSON: Why is this different from Holmes
3 where the officer sees an unidentified bulge, calls the
4 defendant over, and the defendant takes off down the street
5 running and the evidence is suppressed?

6 MS. KNIGHT: Well, it's also - - - it's a street
7 encounter.

8 JUDGE WILSON: So the distinction here - - -

9 MS. KNIGHT: It's - - - it's different.

10 JUDGE WILSON: - - - is that it's NYCHA.

11 MS. KNIGHT: Absolutely. It's a big difference
12 that it's NYCHA.

13 JUDGE RIVERA: So what does that mean, the police
14 have greater rights to intrude upon the person?

15 MS. KNIGHT: Well, if we're going to go back to
16 Barksdale, and I would say even the First Department cases
17 prior to Johnson, if it's a NYCHA building or a trespass
18 affidavit building, yes, they're permitted to inquire
19 whether or not this person lives in the building or is - -
20 -

21 JUDGE RIVERA: They did. The question is, when
22 he doesn't answer, what is next? I - - - I'm not
23 disagreeing with you that they can ask.

24 MS. KNIGHT: Right.

25 JUDGE RIVERA: I'm not taking that position at



1 all. I'm asking you now what happens when the person
2 chooses not to respond?

3 MS. KNIGHT: I mean, in that kind of situation -
4 - -

5 JUDGE RIVERA: Yeah.

6 MS. KNIGHT: - - - it is - - - it could
7 potentially be a trespass.

8 JUDGE FAHEY: Well, does - - - it's been
9 characterized, I thought in your argument, that his
10 response to holding the elevator constituted some form of
11 flight. Are you still saying that here?

12 MS. KNIGHT: It was an active evasion. It was -
13 - - it was very purposeful; it was very willful. He did
14 not want the police to come into the elevator - - -

15 JUDGE FAHEY: I see.

16 MS. KNIGHT: - - - and that's because he knew he
17 had just robbed someone with a machete at the corner five
18 minutes prior.

19 JUDGE FEINMAN: Yeah, but the police don't know
20 that. Let me ask you this hypothetical. Let's say when
21 they got up to the ninth floor and they follow him up and
22 that's all okay, they follow him up, and they are asking
23 him, you know, whatever they're asking him, and he's right
24 there by his apartment door and he lets himself in, and he
25 closes the door.

1 MS. KNIGHT: That changes - - -

2 JUDGE FEINMAN: Do the police have any basis on
3 what they had seen up until that point in what they had
4 interacted with him to do anything further?

5 MS. KNIGHT: They had identified the bulge in his
6 sleeve at that point. They identified that almost
7 immediately upon - - -

8 JUDGE FEINMAN: Let's say - - - in other words,
9 he didn't quite get - - - he - - - it turns out he lives on
10 the ninth floor, right? We know that from later
11 developments. But if he had actually gotten to the - - -
12 you know, he - - - the tres - - - not the trespass - - -
13 the threshold of his door and had stepped inside of his
14 apartment, based on the information that was available to
15 the police at that point, could they have done anything?

16 MS. KNIGHT: No, I don't believe that they would
17 be able to - - -

18 JUDGE FEINMAN: So what's different if he's now
19 in the hallway?

20 MS. KNIGHT: It - - -

21 JUDGE FEINMAN: What makes it different from
22 being on one side of the door and - - -

23 MS. KNIGHT: Because in - - - in one res - - - in
24 your hypothetical, he's in his own home, and there are
25 certain protections that go along with being in your own



1 home.

2 JUDGE WILSON: But you would actually give him
3 less protection in his apartment building than you would on
4 the street?

5 MS. KNIGHT: But it's not in his apartment
6 building. He's in an open area. The officers have no
7 idea; he has not communicated to them that this is his
8 apartment building. So right now he's someone who can
9 potentially be a trespasser, be involved in a - - -

10 JUDGE RIVERA: So the default is - - - the
11 default is, whoever's in that building, he's a trespasser.
12 You've got to prove to us otherwise.

13 MS. KNIGHT: Yes, in those - - -

14 JUDGE RIVERA: And would that be true on the
15 street? Can you - - - if you don't want to talk to the
16 officer, and - - - and the officer's asked you where are
17 you going, what's your name. You don't want to talk to
18 them. And they continue to ask you. Is it the same
19 default: I assume that this person is committing some
20 crime or about to commit some crime?

21 MS. KNIGHT: No, not at all, because these
22 buildings are private buildings. It's a private space;
23 it's not a public space. NYCHA probably has - - -

24 JUDGE RIVERA: Again - - - again, there's nothing
25 to suggest that he's not a tenant, is my point. If you



1 have nothing to suggest someone is not a tenant, and they
2 do not speak to you, where - - - what - - - what is the
3 extent of the officer's rights?

4 MS. KNIGHT: Right, but there is something to
5 suggest that he is not a tenant. And when you look at the
6 First Department cases, it's - - - you have a right to ask
7 someone if - - - whether or not they live in the building,
8 when they're acting in a manner that's inconsistent with
9 that of a resident or a guest. His behavior, on the
10 seventh floor, was inconsistent with that of a resident or
11 a guest.

12 JUDGE RIVERA: You mean, returning into the
13 elevator and not letting a police officer on?

14 MS. KNIGHT: Yes, very purposefully.

15 JUDGE RIVERA: So - - - so he - - -

16 MS. KNIGHT: Yes.

17 JUDGE RIVERA: Why - - - why is that
18 inconsistent? A tenant may not want to be in an elevator
19 with a police officer.

20 MS. KNIGHT: I don't think it would have been as
21 purposeful. He's pressing the button. He's clearly
22 avoiding them.

23 JUDGE RIVERA: So you say the record - - - the ad
24 - - - your adversary says otherwise, but you say the record
25 clearly establishes that the police testified that he was



1 pressing the button to close the door.

2 MS. KNIGHT: Oh, it's in the - - - no, no, the
3 record clearly supports - - - he says - - -

4 JUDGE RIVERA: What - - - what hand did he use?
5 What hand did he use?

6 MS. KNIGHT: I do not believe it says the hand,
7 but he says he - - - he kept pressing it. He said,
8 "Police. Hold the door." He kept pressing it. Now, it's
9 important to note that these officers are in the building -
10 - -

11 JUDGE RIVERA: But didn't they testify that it
12 might have been heard as "Please, hold the door," not
13 "police"?

14 MS. KNIGHT: There's was a little bit of debate,
15 but he said, "police." It - - -

16 JUDGE RIVERA: So it might have been that he
17 didn't realize they were police in that moment?

18 MS. KNIGHT: I don't believe so, because they had
19 - - - they had shields around - - -

20 JUDGE RIVERA: Not a nice tenant who won't let
21 someone on, but - - -

22 MS. KNIGHT: No, because he looked at them. He
23 stepped out. He looked at them. And even though they were
24 in plain clothes, they had shields around their neck.

25 JUDGE GARCIA: Counsel - - -



1 CHIEF JUDGE DIFIORE: Counsel, do you care to
2 address the statement issue?

3 JUDGE GARCIA: And specifically, how does this
4 statement fall within the line of cases on spontaneous, you
5 know, utterances by a defendant when it takes place fifteen
6 or twenty minutes after they transport him to the precinct
7 and then get him, kind of, the condition that he's given to
8 speak with him? I - - - I don't see how that fits in our
9 traditional line of cases in this area.

10 MS. KNIGHT: No, I mean, both statements were
11 spontaneous. It was conceded - - -

12 JUDGE GARCIA: Well, the first one, they concede.
13 But the second one, they don't, and it seems like that one,
14 it's a spontaneous statement - - - a conditional
15 spontaneous statement, and I don't see how that is a - - -
16 could be a spontaneous statement?

17 CHIEF JUDGE DIFIORE: I guess, is there any view
18 of that evidence that the police officer could have
19 reasonably thought that giving him the sandwich that he
20 asked for would like - - - was likely to elicit an
21 incriminating response from him?

22 MS. KNIGHT: I - - - I don't believe so, no. I
23 mean, it's something that's routinely done with - - - with
24 - - - which would - - - people in precincts, they give them
25 food.

1 JUDGE GARCIA: Would it be any different if they
2 brought him into a room, they gave him a ham sandwich, and
3 he just starts talking? But here he says, give me a ham
4 sandwich and I'll tell you what you want to know,
5 essentially, something like that; I know how this works.
6 So doesn't that change the equation, and do we then go back
7 to, they just gave him a sandwich?

8 MS. KNIGHT: Well, I don't think it was
9 conditional upon the ham sandwich. This was someone who
10 was willing to cooperate. He had basically got in a police
11 car and said I'm guilty.

12 JUDGE RIVERA: So, but what does that mean? What
13 does it mean, get me a ham sandwich and I'll tell you what
14 you want to know?

15 MS. KNIGHT: It means, I'm hungry. I want a ham
16 sandwich. So when I get to the precinct, give me a ham
17 sandwich and I'll talk to you further, but pretty much he's
18 telling them, I'm guilty.

19 JUDGE WILSON: It sounds like - - -

20 JUDGE RIVERA: Well, that - - - that sounds like
21 a very different sentence from what he said.

22 JUDGE WILSON: Sounds like offer, acceptance,
23 consideration, no?

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 Mr. Miraglia?



1 MR. MIRAGLIA: Thank you, Your Honor. I'll just
2 address the statement issue briefly.

3 CHIEF JUDGE DIFIORE: Please.

4 MR. MIRAGLIA: You know, I - - - I would suggest
5 that this is a classic example of a situation where the
6 suspect in custody tells the officer who's holding him - -
7 - if you - - -

8 JUDGE STEIN: How was it coercive? It - - -
9 isn't that what Miranda is - - - is meant to prevent is - -
10 - are - - - is a coercive environment? How - - - how was
11 this coercive? He - - -

12 MR. MIRAGLIA: Your Honor, when - - -

13 JUDGE STEIN: - - - you know, the police didn't
14 say, if I get you a ham sandwich, will you tell me, you
15 know, what I need to know?

16 MR. MIRAGLIA: I'm making absolutely no argument
17 that this was coerced in the, you know, violation of due
18 process or any sense like that. We're dealing simply with
19 the rule in Miranda which says that, when you have a
20 suspect in custody, before any kind of questioning or the
21 functional equivalent interrogation can happen - - -

22 JUDGE STEIN: Well, that's what I'm trying - - -
23 how - - - how is this - - - I - - - I don't - - - how is
24 this functional?

25 MR. MIRAGLIA: Under these circumstances, where



1 the suspect says to the officer, if you get me some food, I
2 will tell you what you want to know, meaning I will give
3 you a statement about the case you're holding me on, there
4 - - - there can be no other view. I can't imagine a case
5 that would be stronger for importing to the officer that he
6 knew or should reasonably have known, the suspect, upon
7 receiving the sandwich, was going to tell him what he
8 wanted to know; namely, make an incriminating statement
9 about his case.

10 JUDGE STEIN: But it seems to me that - - - that
11 part of the equation is, is whether the police initiate
12 that, and the police didn't initiate that.

13 MR. MIRAGLIA: Whether - - -

14 JUDGE STEIN: The defendant initiated that.

15 MR. MIRAGLIA: Whether they initiated it or not,
16 the officer now has a suspect in custody. The rule is
17 pretty clear to protect people who are in custody from the
18 coercive environment and all of that. There's a
19 prophylactic rule in Miranda. The suspect says to the
20 officer, if you get me food, I will give you a statement.
21 He's on clear notice that he is liable to provoke a
22 statement by giving the sandwich.

23 JUDGE STEIN: I suppose that if - - - if - - - if
24 they had deprived him of food, you know, for - - - for a
25 long period of time, and he said get me some food and I'll

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tell you want you want to know, to me that seems more like what Miranda is - - - is - - - is contending with.

MR. MIRAGLIA: That's in the coercion - - - that would be a coercion case. I would put that in coer - - - if suppression was sought on the grounds that the police did something that, you know, overbore the will of the individual. Here we're dealing with the violation of the rule, the clear rule in Miranda.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. MIRAGLIA: Thank you.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Rafael Perez, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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