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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 63

TYRONE WORTHAM,

Appellant.

20 Eagle Street
Albany, New York
October 7, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 63, The People of the
2 State of New York versus Tyrone Wortham.

3 Counsel?

4 MS. LOUIE: May it please the Court, my name is
5 Angie Louie for the appellant, Tyrone Wortham.

6 May I have two minutes for rebuttal, please?

7 CHIEF JUDGE DIFIORE: You may.

8 MS. LOUIE: Your Honors, under this Court's
9 precedent in Williams and Foster-Bey, the conviction must
10 be reversed and a new trial ordered since the court below
11 erred in the presentation of the FST evidence without a
12 Frye hearing. The error was not harmless, as there was
13 only circumstantial evidence that Mr. Wortham possessed the
14 contraband, and this Court must remand for a new trial.

15 At the --

16 JUDGE RIVERA: Counsel, if we agree with you --
17 Counsel, if we agree with you, do we have to answer any of
18 the other claims raised?

19 MS. LOUIE: Yes, Your Honor. At the new trial,
20 the Court must also suppress the un-Mirandized statements
21 that Mr. Wortham gave the officer during the execution of
22 the search warrant, essentially stating that his children's
23 mother allowed him to live in the apartment.

24 Although the prosecution claims that these
25 officer's questions were booking questions that are an



1 exception to Miranda, first of all, they were not booking
2 questions under Rodney or Muniz because this was not
3 done --

4 JUDGE FAHEY: Well, tell -- tell me why you say
5 that. Why -- why wouldn't Rodney apply here?

6 MS. LOUIE: Rodney -- Rodney would not -- Rodney
7 does apply and it doesn't apply for two reasons. It does
8 apply because the officer should've known that the
9 question, where do you live, on -- when they were executing
10 the search --

11 JUDGE FAHEY: Well, that's clearly an
12 administrative question, where you live. It's a standard
13 question they give to everybody. And they hadn't searched
14 the apartment yet.

15 So the -- there -- certainly we wouldn't have to
16 look to any subject of intent of the officer, but
17 objectively, they hadn't done any searches. It seems -- it
18 seems that while the question itself is covered by Miranda,
19 I agree with you about that, and that's what I think the
20 law says, the exception here because of the administrative
21 concerns that the officer was dealing with, and it was
22 before the search, I'm wondering why the exception wouldn't
23 apply.

24 MS. LOUIE: Well, this would be an expansion of
25 what Muniz and Rodney allows, which is for booking



1 questions in the precinct for the administration of court
2 purposes.

3 Here, this was basically done for the convenience
4 of the police officers.

5 JUDGE GARCIA: So Counsel, would your rule then
6 be any question in this setting is no good? Doesn't matter
7 what the question is really, because it's custodial, and
8 you haven't been Mirandized.

9 MS. LOUIE: No, Your Honor. But here, where
10 there is a reasonable expectation that there's --
11 sorry -- there -- where there's -- it was reasonably likely
12 for the appellant to make an incriminating response because
13 of the circumstances of this case. These questions were
14 definitely improper.

15 JUDGE GARCIA: It -- it -- it seems --

16 MS. LOUIE: But there --

17 JUDGE GARCIA: -- to me though you're confusing
18 two things, that there's a question of whether this is a
19 proper place and time to do this type of process. That's
20 one. And if the answer to that is yes, then I think we
21 treat it the same as we would booking.

22 If the answer to that is no, then none of these
23 questions are any good, right? Because once it's really an
24 administrative process that we've accepted, can have
25 certain pedigree questions, then I think, you know, the



1 questions are the same -- questions are the same. Because
2 what if, in this setting, you think this defendant may be
3 using a name or an alias, but you're going to ask everyone
4 their names. They're in the apartment. You're going to
5 ask them names.

6 You ask the name. The defendant gives a name,
7 and it turns out, yes, you can use that name and get other
8 evidence.

9 Is that good or not good?

10 MS. LOUIE: No, Your Honor. That's not good
11 because under Rodney and under Muniz, and eight circuits
12 agree that the standard is to look objectively, not whether
13 the question was designed to elicit an incriminating
14 response, but under the circumstances.

15 And here, under the circumstances, the officers
16 should've known that the question, where do you live, while
17 they were executing a search warrant, would reasonably and
18 likely elicit an incriminating response.

19 JUDGE GARCIA: But that would be the same in my
20 hypothetical, right, with the name?

21 MS. LOUIE: Yes, Your Honor.

22 JUDGE GARCIA: So anything that comes from
23 that -- asking that person a name, who is in that setting
24 that we just described, the setting in this case, would be
25 suppressed.



1 MS. LOUIE: Yes, Your Honor. Actually, under
2 Rodney and under this Court's precedent. And it actually
3 makes sense --

4 JUDGE SINGAS: Do you think that's what Rodney
5 says?

6 MS. LOUIE: Yes, Your Honor. It does. I mean, I
7 think Rodney purports to two things. First is that this
8 must be a true booking situation. And here, I would argue
9 that this was not a booking situation. This was -- I mean,
10 the NYPD was --

11 JUDGE SINGAS: Only because it was at the home?
12 If it was at the stationhouse, it would've been?

13 MS. LOUIE: Well, even if it had been at the
14 stationhouse, and -- and if pressed, I would answer, even
15 at the stationhouse, this question would've been improper
16 because they had already found the contraband, and the
17 question, where do you live, actually goes towards an
18 element, you know, constructive possession.

19 JUDGE FAHEY: Do -- does that change the -- the
20 nature of it -- the question was before any search had
21 taken place. We -- we agree on that, right?

22 MS. LOUIE: Yes.

23 JUDGE FAHEY: Okay. So doesn't that change the
24 nature of the question and -- and the effect of the
25 pedigree question?



1 MS. LOUIE: No, actually, Your Honor, it kind of
2 makes it worse because, you know, the search warrant and
3 the police officers knew that they were going in for a
4 search warrant.

5 JUDGE FAHEY: Uh-huh.

6 MS. LOUIE: And they knew that they were probably
7 likely to find contraband.

8 JUDGE FAHEY: So your theory is that this allows
9 them to establish who's connected to the contraband by
10 asking this question under the guise -- I put in
11 question -- put in quotation marks of a -- a pedigree
12 question?

13 MS. LOUIE: Yes, Your Honor.

14 JUDGE FAHEY: Of course, that's -- these five
15 questions that were asked, they're the same questions asked
16 of everybody and the same questions that are always asked.

17 MS. LOUIE: And it's improper under a search
18 warrant at -- because you have to look at the circumstances
19 of the situation. And furthermore --

20 JUDGE FAHEY: I -- I'm not sure I agree with you.
21 I do understand it. I understand what you're saying. I'm
22 not sure I agree with it, but I do understand what you're
23 saying.

24 JUDGE GARCIA: What would the police -- what
25 would the officer do in my hypothetical? So then he just



1 doesn't ask your name?

2 MS. LOUIE: Your Honor, you know, under those
3 circumstances -- you know, if -- if they knew that, for
4 example, the search warrant was for identity fraud and they
5 were looking for identify fraud, in that instance, you
6 know, I would -- I would argue that, no, the officer
7 couldn't ask the name.

8 But here, where they were looking for
9 contraband --

10 JUDGE GARCIA: And that would even be true at
11 booking, you couldn't ask the name?

12 MS. LOUIE: Well, that's not the situation here
13 because they weren't at --

14 JUDGE GARCIA: No, I know it's not, but --

15 MS. LOUIE: -- the precinct.

16 JUDGE GARCIA: -- hypothetically.

17 MS. LOUIE: Hypothetically, if pressed, yes, Your
18 Honor. They would not be able to do that unless they had
19 Mirandized --

20 JUDGE GARCIA: So you just book them under John
21 Doe or something?

22 MS. LOUIE: Or they could have Mirandized the
23 defendant when they started --

24 JUDGE GARCIA: And what if they say, I'm not
25 talking?



1 MS. LOUIE: Then they have the right to invoke
2 their Fifth Amendment right against self-incrimination.
3 And so that's also why under these circumstances,
4 especially because this was not a booking and the -- the
5 police were using the -- these forms as a -- a guise to do
6 investigation, the -- the questions were improper and the
7 statements must be --

8 JUDGE WILSON: You keep saying - I'm sorry -- you
9 keep saying, under the circumstances. And one of the
10 circumstances that seem to me to be important is the
11 warrant itself. But I've looked through -- and you've made
12 some characterizations about what the warrant was for, but
13 I've looked through the record and I can't find it. I
14 can't find the warrant or the supporting affidavit.

15 Do you know what it said?

16 MS. LOUIE: Yes, Your Honor.

17 JUDGE WILSON: Do you know, for example, if any
18 of the supporting materials attached to it named Mr.
19 Wortham?

20 MS. LOUIE: Well, one of the reasons why the
21 warrant wasn't in the record was because a lot of the
22 information from the warrant was suppressed and not allowed
23 as evidence in trial.

24 But the warrant basically allowed the officers to
25 enter to look for contraband. It wasn't a specific warrant



1 for Mr. Wortham himself, but it was for a search of the
2 apartment for the contraband. And so they knew that when
3 they went in, that they were probably, likely going to find
4 contraband. And so that question of where do you live,
5 especially because it was before they found anything, and
6 it was during the chaotic moments of when they first
7 entered for the no-knock search warrant, was improper.

8 CHIEF JUDGE DIFIORE: Where in the -- in the
9 record of the suppression hearing is it demonstrated that
10 the defendant was actually under arrest?

11 MS. LOUIE: The officer testified that he was
12 not under arrest, but he was definitely in custody. He was
13 handcuffed and he was surrounded by the officers almost
14 immediately after they entered the apartment.

15 Mr. Wortham was found with his two children. He
16 did not -- he did not -- he did not -- he did not struggle
17 or anything.

18 And -- and in the suppression hearing, it wasn't
19 until they had already brought Mr. Wortham back to the
20 precinct that the officer testified he got a phone call
21 from the officer at the scene that contraband was found.

22 CHIEF JUDGE DIFIORE: And just going back to
23 something you said briefly before, that the officers cuffed
24 him for their convenience.

25 MS. LOUIE: Yes. That --



1 CHIEF JUDGE DIFIORE: What does that mean?

2 MS. LOUIE: They said that that's procedure.
3 It's -- it's for their safety and their convenience. They
4 cuff all adults found in the premises of a --

5 CHIEF JUDGE DIFIORE: And all -- is -- is the
6 process also to satisfy the importance of documenting
7 enforcement actions that actually detain people, and having
8 the police department maintain a record of those incidents?

9 MS. LOUIE: Well, yes, Your Honor. But you know,
10 the booking exception is only for the purpose of court
11 administration. I mean, the Sixth Circuit has opined that
12 very rarely will the booking exception apply outside of the
13 precinct when you actually need to book someone.

14 The NYPD is using --

15 CHIEF JUDGE DIFIORE: But we're not talking about
16 booking him though, right?

17 MS. LOUIE: No, because this was not a true
18 booking situation.

19 CHIEF JUDGE DIFIORE: Okay. Thank you, Counsel.

20 MS. LOUIE: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MR. COHN: Thank you, Chief Judge DiFiore. And
23 may it please the Court, David Cohn for the People.

24 I just wanted to start very quickly with the FST
25 issue. And -- and the first point I would like to note is



1 that if this Court agrees with the defense in this case
2 that a Frye hearing is necessary, the proper remedy would
3 not be a reversal of the conviction. It would be a
4 remittal to the lower court for a Frye hearing. And a
5 reversal would only be necessary if it's determined that
6 FST doesn't meet the Frye standard if the evidence
7 should've been excluded from the trial, so if this Court
8 does believe the hearing is necessary, remittal would be
9 the proper remedy.

10 Beyond that, we do submit that this case is
11 different from Williams and Foster-Bey in -- in several
12 important respects. To begin, in Williams and Foster-Bey,
13 there was not much of a record made by the People about the
14 science behind FST and LCN. Both of those cases dealt not
15 just with FST, but with the combination of FST and LCN low
16 copy number, DNA testing, which was also controversial at
17 the time. So there -- there was more at issue in the Frye
18 hearing in those cases.

19 And also in those cases, the People made only
20 very thin records of the scientific basis for either FST or
21 LCN testing. Here, the People made a very robust
22 scientific record of why FST was generally accepted. And
23 the defense papers did not really join issue with the
24 science that was presented by the People in -- in this
25 case.



1 What the defense papers argued was that the OCME
2 analysts exercised too much discretion in plugging the
3 numbers into the computer software. They talked about the
4 calculations, basically the counting of a -- allelic drop
5 ins and drop outs. And they -- the -- disputed whether
6 Bayesian statistics could be used in this -- the -- this
7 type of situation.

8 But those aren't questions for a Frye judge. A
9 Frye judge is someone --

10 JUDGE FAHEY: Well, I think we've already said
11 that they are.

12 MR. COHN: Oh. Well, Your Honor, I -- I submit
13 that there was a more robust scientific debate in -- in
14 Williams and in Foster-Bey. In Williams, for instance, the
15 defense --

16 JUDGE FAHEY: Right. But that -- that -- that
17 doesn't obviate the need. You may be right about that.
18 I -- I won't argue. You know better than I do, actually.

19 But it seems that it's -- you're still required
20 to hold the Frye hearing here. I -- I -- I don't think
21 that there's much of a way around that.

22 Um, I think the more compelling question is, uh,
23 uh, uh, how the pedigree exception is dealt with and
24 whether or not the question of where you live is a --
25 creates a situation where it's reasonably likely to -- to

1 evoke an -- an incriminating response in these
2 circumstances.

3 MR. COHN: Your Honor, so, to begin with the
4 pedigree issue --

5 JUDGE FAHEY: Yeah.

6 MR. COHN: -- first, we should make clear as --
7 as I believe some of the questions from this Court
8 recognized -- what happened here was a true administrative
9 questioning.

10 JUDGE FAHEY: Uh-huh.

11 MR. COHN: There's testimony in the record that
12 the police --

13 JUDGE FAHEY: Well, let me ask you -- let's take
14 a step back. What -- what's the purpose of the question?

15 MR. COHN: The purpose of the questioning is to
16 document -- and the police explained -- the police officer
17 explained this -- a detective explained this at the
18 hearing -- to document every person who was in custody
19 during a search of a premises is for the police
20 recordkeeping purposes.

21 And -- and by the way, this serves an important
22 administrative purpose, not just so the police know who
23 they have in custody, but also for the purpose of police
24 accountability that we know who the police encountered any
25 time they went into an apartment.



1 JUDGE RIVERA: But what is the question where you
2 live -- Counsel, I'm sorry. I'm on the screen. What does
3 the question where you live have to do with that?

4 MR. COHN: Sorry, Judge Rivera. So --

5 JUDGE RIVERA: That's all right.

6 MR. COHN: -- the -- the question of where you
7 live is a routine administrative question, and it allows
8 the -- the police to know who they were dealing with. If
9 you just get a -- a name, you don't necessarily -- there
10 could be a million John Does, right. So you don't --

11 JUDGE RIVERA: Well, let me ask you this.
12 What -- what would the -- what would the officers have done
13 if he says, I'm not going to speak to you. I'm not saying.
14 What would they do?

15 MR. COHN: What would they do? Well --

16 JUDGE RIVERA: Yes.

17 MR. COHN: -- under -- under the Muniz standard,
18 this is not a situation where a defendant necessarily has
19 the right to evoke their -- their right to remain silent,
20 which you would apply to most concerns of interrogation.

21 JUDGE RIVERA: Well, no, I'm not -- I'm --
22 I'm -- I'm sorry to interrupt. I understand the question
23 about the right. I'm just saying in -- in practice, I'm
24 sure there are people who say, I'm not going to talk to
25 you.



1 So if -- if he said, I'm not going to talk to
2 you, what would the officer have done?

3 MR. COHN: Well, I imagine at that point, the
4 officer -- and I don't know from the record exactly what
5 the officer would've done, but I imagine the officer
6 probably would've done -- handcuffed the defendant for the
7 safety purposes, like they do -- sorry -- with every person
8 they encounter while executing a search warrant, with a --
9 probably tried to explain to them that these are
10 administrative questions that they simply ask everyone.

11 I'm not sure what else they could have done
12 beyond that if somebody stands mute, then --

13 JUDGE FAHEY: But don't you start with the
14 premise that -- and this is, I think, where there's some
15 confusion in the law. In -- in researching the case, it
16 struck me that I think the analytical mistake sometimes
17 that is made here is that this is a custodial
18 interrogation. I think Judge Rivera's directly on point
19 for that. That's -- this is -- this is a custodial
20 investigation -- or interrogation. Excuse me.

21 Miranda does apply here. The only reason that
22 this question is allowed is because the Supreme Court that
23 says there's an exception to pedigree questions, and they
24 have it limited to content.

25 But otherwise, they do have a right to evoke



1 Miranda. And -- but in -- for these standard questions
2 that are necessary for purely administrative purposes, they
3 can be asked.

4 MR. COHN: Right. That is -- exactly, Your
5 Honor. That -- that is the pedigree exception to Miranda.
6 And -- and what the Supreme Court says --

7 JUDGE FAHEY: In other words, it's not a question
8 the -- I -- just to clarify. It's not a question that's
9 likely to invoke an incriminating response, period. That's
10 what -- no. No. That's only -- we start with the premise
11 that Miranda applies, and you cannot ask that question.
12 And it's only the -- that rule only applies subsequent to
13 when you look at the nature of the question, making sure
14 that it falls within that exception is -- and it -- and it
15 is directly related to an administrative --

16 MR. COHN: Right.

17 JUDGE FAHEY: -- purpose.

18 MR. COHN: Your -- Your Honor, Judge Fahey,
19 I -- I agree. And -- and I agree that there is some
20 confusion in the law on this as well, or at least some
21 confusion, perhaps in the discussion --

22 JUDGE GARCIA: Counsel, I would like to talk
23 about that, right?

24 MR. COHN: Yes.

25 JUDGE GARCIA: So there is a lot of confusion, it



1 seems to me in this law, which isn't serving anyone
2 particularly well. As a plurality, we have a few
3 decisions, the Appellate Divisions.

4 What would be the rule you would apply?

5 MR. COHN: So Your Honor, I would apply the Muniz
6 rule, which is what I believe this Court meant to adopt in
7 Rodney. And the Muniz rule is quite clear.

8 As Judge Fahey said, in -- in Muniz, the Supreme
9 Court said when there are pedigree questions asked at the
10 precinct, they could very well be custodial interrogation,
11 right? And -- and that -- and -- and the -- under Innis,
12 the standard for custodial interrogation is a question
13 that's reasonably likely to elicit an incriminating
14 response.

15 A name could be incriminating in all kinds of
16 ways. Like somebody had an alias, maybe there's just some
17 way their name connects them to a crime. Their address
18 could be incriminating in a lot of ways. There are lots of
19 cases where contraband is recovered from a person's
20 residence.

21 But the Supreme Court said that regardless of the
22 fact that these questions could be likely to elicit an
23 incriminating response, if they are reasonably related to
24 the administrative concerns of the police, they are exempt
25 from the Miranda rule as -- as an exception with one



1 caveat, which is Footnote 14 of the Muniz decision, which
2 is if they are designed to elicit an incriminating
3 response.

4 JUDGE GARCIA: But design -- so let's talk about
5 designed to elicit. I -- I think that causes confusion. I
6 mean, so -- reasonably -- likely designed to elicit --
7 designed to elicit. Like you were just saying, you know,
8 your name, your address can be incriminating, depending on
9 the case.

10 But is the question designed to elicit, is it the
11 difference between the question itself, where do you live,
12 or the design in asking the question?

13 What do you think?

14 MR. COHN: I -- I think it has to do with the
15 purpose for which the question is being asked. Now, that
16 may or may not be the officer's subjective purpose, and I'm
17 thinking at the moment, I want to get this information from
18 this defendant for incriminating purposes. There actually
19 are some federal cases that say if the officer goes in with
20 that sort of objective, then maybe the pedigree exception
21 won't apply in that situation.

22 That's not what happened here. The -- the
23 suppression court made a factual finding that there was no
24 agenda. This officer had no ulterior motive in asking this
25 question.



1 JUDGE GARCIA: It's a very hard standard though,
2 right?

3 MR. COHN: It -- it --

4 JUDGE GARCIA: I mean, why isn't it just --

5 MR. COHN: -- it is.

6 JUDGE GARCIA: -- designed in the question
7 itself? So if I ask you in a pedigree context how much
8 cash do you have, maybe I designed that question here to
9 elicit a response that's going to incriminate you. But
10 design -- I don't see how, what's your name, can ever be a
11 question designed in itself, to elicit incriminating --

12 MR. COHN: Right. And -- and -- and Your Honor,
13 certainly in this context, we submit that the question,
14 what's your address -- and it's not the only question that
15 was asked -- it -- it's asked along with name, address,
16 various general demographic pedigree information --

17 JUDGE FAHEY: Well, New -- New York -- what's the
18 population now?

19 MR. COHN: Of New York? Almost twenty million,
20 right?

21 JUDGE FAHEY: Yeah. So how many people are
22 arrested in a year? I don't know the number. But there's
23 a lot of people that have to be processed. So I'm assuming
24 that once somebody's processed, they want to get out, want
25 bail to be set on them. They want their family to be able



1 to find out where they are.

2 The -- those -- so we have to actually look at
3 the question objectively to see if it meets those
4 administrative purposes. And also, with the other
5 consequences in mind, but I don't see anything in -- in the
6 question itself that's different from any other question
7 asked in any other booking in the City of New York. The --
8 in other words, it has a specific design.

9 It's a subtle problem though, because clearly the
10 answer to this question can be incriminating.

11 MR. COHN: Right.

12 JUDGE FAHEY: I -- I recognize that.

13 MR. COHN: And that is what the Supreme Court
14 recognized in Muniz. The --

15 JUDGE RIVERA: So Counsel, I'm sorry to interrupt
16 you again, but I -- I -- I just want to drill down a little
17 bit on the way you're articulating this rule.

18 I'm going to read you from Rodney, and I'd like
19 you to explain how the way you've articulated the rule
20 is -- is demonstrated by what I'm about to quote.

21 "Similarly, the People may not rely on the pedigree
22 exception if the questions, though facially appropriate,
23 are likely to elicit incriminating admissions because of
24 the circumstances of the particular case."

25 I don't see the word design in there anywhere.



1 So I'm -- I'm a little bit confused why you are limiting
2 your rule to design, when obviously, the Court did not.

3 And by the way, this quotation is taken full
4 paragraph, explaining other circumstances under which the
5 pedigree exception will not apply.

6 MR. COHN: Right. And -- and -- and Your Honor,
7 this is the confusion in Rodney, and -- and I do think that
8 there is some confusion from Rodney because Rodney says
9 different things in different places in the opinion.

10 This particular passage that you mentioned is
11 actually from a discussion not about Miranda, but about
12 710.30, the -- the notice requirement of a statute. The
13 preceding sentence says, "Statements made in response to
14 questions, which are not directed solely to administrative
15 concerns are subject to the requirements of CPL 710.30."

16 Now, I understand why there might be a broader
17 standard under 710.30 because we're talking about when does
18 the defendant get notice of a statement. And we certainly
19 want there to be a broader disclosure rule where a
20 defendant gets more notice of statements that might be
21 suppressible.

22 But when you're talking about what Muniz --

23 JUDGE RIVERA: But -- but the sentence that I
24 read, Muniz -- you're not incorrect that at the top of the
25 paragraph, the Court cites CPL 710.30. I -- I'm not --



1 you're absolutely right about that. But what I just
2 quoted, the citation is Muniz and Innis.

3 MR. COHN: Right. And -- and I have to say, this
4 is where some confusion does arise because they --

5 JUDGE RIVERA: Well, no. I -- there's -- what's
6 the confusion? The sentence is very clear.

7 MR. COHN: Well --

8 JUDGE RIVERA: The People cannot use the
9 exception if the question facially appropriate -- I think
10 everyone is with you asking address, name. (Audio
11 interference) to deal with an administrative situation.

12 But then it says, "are likely to elicit
13 incriminating admissions", be -- not as a general matter
14 because you would be right about that. We can't say sort
15 of anywhere writ large. No. It says, "because of the
16 circumstances of the particular case".

17 So I think this is what defendant's point is
18 about that. But given these circumstances, they are there
19 for a search warrant that has to do with possessory crimes.
20 He is there, they handcuff him, and they ask a question
21 that will connect him to what they anticipate they're going
22 to find there. I would assume that an officer anticipates
23 the warrant is good and based on a legal justification for
24 going into some house to look for drugs, guns, contraband,
25 paraphernalia, whatever they're looking for, but evidence

1 of criminal activity, right.

2 MR. COHN: Can I clarify my answer?

3 CHIEF JUDGE DIFIORE: Counsel, yes. I know what
4 you're going to ask. Because the technology was a little
5 spotty there, did you understand the full scope of that
6 question?

7 MR. COHN: Yes.

8 CHIEF JUDGE DIFIORE: Okay.

9 MR. COHN: Yeah. I believe I did. And Judge
10 Rivera, please -- please correct me if I misunderstand the
11 question.

12 So the first point of confusion that arises from
13 this -- this quote in Rodney, is that its cite is to Muniz
14 footnote 14. Well, Muniz footnote 14 does not say that.
15 Muniz footnote 14, if you read Muniz, Muniz says that yes,
16 we understand that these booking or pedigree questions
17 might be likely to elicit an incriminating response. But
18 still there's an exception to the Miranda requirement as
19 long as they're reasonably related to administrative
20 concerns, except as the Supreme Court noted in footnote 14,
21 except if they are designed to elicit an incriminating
22 response.

23 So this Court did not correctly describe the
24 footnote 14 in Muniz and the other cases that it cites.

25 Now, citing Rhode Island v. Innis also was



1 confusing to me because Rhode Island v. Innis is the
2 standard for interrogation. Interrogation, of course, is a
3 prerequisite to the Miranda rule, but Muniz says, even if
4 there is custodial interrogation, and -- and as Judge Fahey
5 mentioned, even if the Miranda rule applies, there is this
6 pedigree exception for routine administrative questions.

7 Then the other cases that are cited later on in
8 the paragraph, Doe and -- and -- and Parra -- sorry, and
9 Antonio, these are situations where either objectively or
10 subjectively, the questions were designed to elicit an
11 incriminating response.

12 So I -- I think that the only way to coherently
13 read the Rodney opinion -- and Rodney does later on in the
14 opinion mention the design to elicit incriminating response
15 language from Muniz.

16 So I think the only way to coherently read the
17 opinion is that -- that in Rodney, this Court was trying to
18 adopt the Muniz standard, but this was just a line which --
19 which not -- perhaps should not have been written that way.

20 JUDGE SINGAS: Counsel, do you think if they had
21 asked what bedroom was his, that that would've taken it out
22 of the scope of what's reasonably related to police
23 administration?

24 MR. COHN: Judge Singas, I -- I -- I do believe
25 that that question goes beyond what we normally consider



1 pedigree questions. And so very -- that could very well be
2 considered an investigatory question, as opposed to an
3 administrative question.

4 So I could see in that situation a court holding
5 that the Miranda requirement is triggered by a question
6 specifically like that, especially -- now, of course, it
7 might not be so relevant in every situation, but in this
8 situation, if for instance, the police officer knew there
9 was contraband in the bedroom and then asked the defendant
10 what bedroom do you live in, that definitely seems like an
11 investigatory question.

12 I suppose it could be an innocuous question in
13 some circumstances. Let's say there were roommates and the
14 police just didn't want to search the room of someone who
15 wasn't a target of a search warrant, they might say, is
16 that your room, right? For an administrative reason. It
17 might just depend on the circumstances.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 Ms. Louie?

20 MR. COHN: Thank you.

21 CHIEF JUDGE DIFIORE: You're welcome.

22 MS. LOUIE: Your Honors, this was not a true
23 booking exception, and the prosecution is using the booking
24 exception as an -- and run around Miranda in this case.
25 They've taken it out of the context of what this Court



1 recognizes.

2 You know, they're saying that the police should
3 be able to go in under a search warrant and for
4 administrative purposes or rather the convenience of the
5 police, ask these questions which are booking or pedigree
6 questions. But --

7 JUDGE RIVERA: Okay. But Counsel, can you
8 address -- you heard the line of questioning of -- to -- to
9 the Assistant District Attorney regarding what Rodney
10 states, and whether or not it's by design.

11 Can you address that point about what -- what is
12 the rule that you get from Rodney?

13 MS. LOUIE: I think Rodney makes clear that it's
14 the objective standard that even if a question is facially
15 appropriate, but if it's likely to elicit an incriminating
16 admission because of the circumstance of the particular
17 case, then those questions are not appropriate and the
18 statement must be suppressed.

19 You know, the --

20 JUDGE FAHEY: But here -- here's the problem I
21 have there is even if we objectively apply that, since
22 there hadn't been any search that had taken place yet, in
23 fairness it seems that even objectively, it doesn't meet
24 that standard.

25 MS. LOUIE: Well, actually, objectively, it -- it



1 does because --

2 JUDGE FAHEY: Okay.

3 MS. LOUIE: -- when you think about it --

4 JUDGE FAHEY: Tell me how.

5 MS. LOUIE: -- right? At the point before the
6 search happened or contraband was found --

7 JUDGE FAHEY: Uh-huh.

8 MS. LOUIE: -- the police could've just waited.
9 I mean, Mr. Wortham was already handcuffed. He was
10 surrounded by officers. And if contraband had already been
11 found, then objectively, they would've known that the
12 question, where do you live, would likely elicit an
13 incriminating response.

14 JUDGE FAHEY: Uh-huh.

15 MS. LOUIE: But it contraband was not found, and
16 they needed for, as they claim, NYPD purposes for
17 accountability, find out who was in the apartment for later
18 on, right? There would be no question that would likely
19 elicit an incriminating response, which is --

20 JUDGE FAHEY: So let me -- let me ask you this.
21 Just anecdotally, just a little bit off -- off of -- off
22 the track here. My experience is these questions -- I
23 think there are five components to it, are always asked at
24 every arrest. Is -- is that your experience?

25 MS. LOUIE: I believe so, yes, Your Honor.



1 JUDGE FAHEY: And -- and I'm assuming it's the
2 DA's. I won't -- I won't ask him that, but I'm assuming
3 he's probably seen more of them than all of us. But --
4 because that -- that's my experience whenever I've seen
5 this. It's always these same questions. That's why I'm
6 having a difficult time of seeing a design here.

7 MS. LOUIE: There -- but it's -- it's -- it's
8 not -- the design is only one of the factors --

9 JUDGE FAHEY: Uh-huh.

10 MS. LOUIE: -- that this Court should look at.

11 JUDGE FAHEY: Of course.

12 MS. LOUIE: And under these circumstances, the
13 specific circumstance of this case, which was a search
14 warrant --

15 JUDGE FAHEY: Uh-huh.

16 MS. LOUIE: -- where they knew that they were
17 probably going to find contraband --

18 JUDGE FAHEY: Uh-huh.

19 MS. LOUIE: -- it was reasonably likely to elicit
20 an incriminating response by asking where do you live --

21 JUDGE FAHEY: I see.

22 MS. LOUIE: -- because that goes towards the
23 element.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 JUDGE FAHEY: Thank you.



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MS. LOUIE: Thank you.
(Court is adjourned)



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

I, Karen Schwarzlose, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Tyrone Wortham, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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