APL-2012-00306

Court of Appeals

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

Against

ADRIAN THOMAS,

Defendant-Appellant.

BRIEF AMICUS CURIAE FOR DEFENDANT-APPELLANT

on behalf of the New York City Bar Association

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INTEREST OF AMICUS CURIAE

The New York City Bar Association (the "Association"), established in 1870, is a professional organization of more than 23,000 attorneys that seeks to promote integrity in, and public respect for, the justice system. The Association, by its Criminal Law Committee and Criminal Advocacy Committee, submits this amicus brief to further the Association's advocacy toward reforming procedures in criminal trials with a view to reducing the number of wrongful convictions in this state.

The Association has long recognized that false confessions are a troubling cause of convictions of the innocent. Recognizing that certain types of interrogation techniques may greatly increase the risk of false confessions, the Association has supported electronic recording of interrogations. The Association has previously stated, "recording of custodial interrogations not only protects the innocent by guarding against false confessions, but increases the likelihood of conviction of guilty persons. . . ." New York City Bar Association Report on Legislation A.4721, S.1267, Reissued February 2013. (Attached as Appendix A).

The Association's support for electronic recording of interrogations reflects the belief that recordings will enhance the reliability and fairness of

interrogations and minimize groundless litigation regarding "unfair trickery." *Id.* To ensure reliability and fairness, however, courts must review recorded interrogations for tactics that run afoul of constitutional due process requirements. Where recordings demonstrate promises, threats, and tactics that offend notions of fundamental fairness, such confessions must be excluded. Otherwise law enforcement may be encouraged to adopt similar overbearing techniques to obtain confessions. To allow coercive conduct in interrogations undercuts a primary purpose of recording confessions: assuring the voluntariness, reliability, and the constitutionality of evidence submitted to the jury. It also increases the very real risk of wrongful conviction. The risk is highest in cases like this one, where the physical evidence of wrong-doing is weak. The tactics used in the recorded interrogation in this case are not consistent with either New York or Federal Constitutional law and undermine the truth-seeking function of our adversarial system. Moreover our adversarial system relies on the ability of both parties in a criminal case to present relevant evidence. Where a defendant asserts that a confession is false and proffers a qualified expert to explain relevant research relating to false confessions, the right to present a defense requires admission of such relevant testimony.

PRELIMINARY STATEMENT

> *"False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system."*[1]

The Association is committed to the integrity and accuracy of the criminal justice system. In the instant matter, a ruling that sets the imprimatur of the Court of Appeals of the State of New York on overbearing police tactics would contravene the requirements of due process and undermine the accuracy and integrity of evidence received and verdicts rendered by our criminal justice system. Such a ruling has implications far beyond this case and would render efforts to reduce false confessions by recording interrogations futile.

Under existing jurisprudence, there can be no doubt that threats to loved ones, promises of immediate release, promises to help the suspect, and misrepresentations of the legal consequences of police-proposed "accident scenarios" render the statements elicited involuntary. Under the totality of the circumstances, it cannot be said that the statements in this case were the product of "free and rational choice." *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968).

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1 *People v. Bedessie*, 19 N.Y.3d 147, 161 (2012) (emphasis added).

Furthermore, due process does not permit the use of strategies that are offensive to a civilized system of justice. Fabricating conversations with doctors and falsely telling a person that someone may die if they do not confess is such a strategy. This is particularly so where, as in this case, a parent is told that his child will die if he does not speak and is accused of not wanting to save his child if he does not provide an explanation that satisfies the interrogator.

The tactics used in the interrogation of Mr. Thomas do not just violate due process, they also increase the risk of a false confession. False confessions cannot be entirely remedied by suppression of involuntary statements. As the instant matter demonstrates, an involuntary statement may affect the analysis of other evidence. Here, the medical examiner ("M.E.") relied, in part, on the written statements that were the product of the coercive interrogation to conclude that trauma was the cause of death and that sepsis was secondary to that trauma. The M.E., however, was unaware of the account provided by the child's mother or that the initial statements of Mr. Thomas were the same as the mother's. Indeed, the M.E. was unaware that the confession was the product of hours of interrogation during which threats and promises were made. Clear judicial guidance that

reins in overbearing interrogation techniques will improve the quality and objectivity of the evidence before our courts.

Finally, the accuracy of outcomes in our adversarial system rests on the right of the parties to call relevant witnesses and present relevant evidence. In this case, a central issue was the truth or falsity of the statements taken during the interrogation of Mr. Thomas. The defense proffered a qualified expert to offer relevant evidence to assist the jury in identifying tactics that are associated with false confessions. Exclusion of relevant and admissible testimony on a central issue strikes at the very heart of the adversarial system and deprives the jury of necessary information from which to reach an accurate and fair determination of the evidence at trial.[2]

STATEMENT OF FACTS

During the first hour of the nine-hour interrogation of Adrian Thomas, the officers gave Mr. Thomas a narrative complete with motivation to explain the existence of a non-existent fracture: "I'm frustrated, I've got kids crying all day, I haven't worked in seven months, this baby won't stop crying. . . . And accidentally, oh shit, throwing the baby on the bed because

2 The Association takes no position on any aspect of the instant case other than those expressly addressed in this brief.

the baby won't stop crying." A2890. Mr. Thomas' reply to the police-generated narrative was "That sounds like a good court case but I didn't do it." *Id.* During the following interrogation the officers interrogating Mr. Thomas:

- threatened to arrest Mr. Thomas' wife, the mother of his six children, if he did not explain how he caused the injuries to his son Matthew; A2907-09.
- promised Mr. Thomas over 30 times that he would be released if he admitted to "accidentally" injuring his son; *See* Appendix B.
- suggested to Mr. Thomas that if he admitted throwing down the child in frustration they would consider that "accidental" and would help him and his family and get him treatment; *See* Appendix C.
- told Mr. Thomas the matter was not criminal, not manslaughter, and not "criminally homicide"; *See* Appendix D.
- threatened Mr. Thomas that if he did not explain how this was an accident then someone else would go after him criminally; A2887-88.
- fabricated conversations with doctors, and claimed that the confession could help doctors treat Matthew although the infant was brain dead at the time; *See* Appendix E.
- falsely told Mr. Thomas that his wife had accused him of injuring Matthew and signed paperwork against him; A2878, A2882, A3045.
- suggested and demonstrated how the "accident" must have happened. *People v. Thomas*, 93 A.D.3d 1019, 1024 (3d Dep't 2012).

Approximately twenty-five hours[3] after the police gave Mr. Thomas the narrative of how he had thrown his son down unintentionally, Mr. Thomas adopted that narrative, repeated it to the police, acted out a demonstration of

3 After the first two-hours of interrogation, Mr. Thomas was taken to a hospital by the police for commitment for psychiatric observation from about 2 a.m. to 5:45 p.m. According to hospital records, he slept for approximately one hour and forty-five minutes after being admitted. A1814.

throwing his child onto a bed, and signed a confession asking for the help they had promised him. Instead, he was arrested and charged with murder.

Despite the promises, threats, medical necessity ruse, and choreographed narrative and demonstration that led to the statement that Adrian Thomas signed in the early hours of the morning on September 23, 2008, the trial judge denied the defense motion to suppress the statement as involuntary. This decision was wrong as a matter of law. Permitting the admission of statements obtained by the overbearing tactics used in this case is inconsistent with the principles of an accusatorial system and creates a precedent that may increase the number of false confessions elicited in New York State.

During the trial, Mr. Thomas proffered an expert, Dr. Richard Ofshe, to explain factors that create a risk of false confessions. The trial judge denied this motion and the jurors were left without guidance on an issue that frequently confounds jurors: how could one possibly confess to a crime one did not commit? The testimony was admissible, relevant, and beyond the ken of the jury, and denying the defendant the assistance of an expert to explain factors creating a risk of false confession denied him of his right to present his defense.

Mr. Thomas was convicted of murder in the second degree and sentenced to twenty-five years to life. The Appellate Division upheld the trial court's decisions admitting the statements as voluntary and refusing to permit the defense to present expert testimony on the phenomenon of false confessions.

ARGUMENT

POINT I

THE COMBINATION OF THREATS, PROMISES, AND LIES USED TO PERSUADE MR. THOMAS TO ADOPT THE POLICE-GENERATED CONFESSION NARRATIVE RENDERS THE "CONFESSION" INVOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Because "'ours is an accusatorial and not an inquisitorial system . . . the State must establish guilt by evidence independently and freely secured and not by coercion prove its charge against an accused out of his own mouth.'" *People v. Anderson*, 42 N.Y.2d 35, 37 (1977) (*quoting Rogers v. Richmond*, 365 U.S. 534, 541 (1961)). For a statement to be admissible the State must prove a statement was voluntary beyond a reasonable doubt. *Id.* at 38. A statement is involuntary if it is not "the product of . . . free and rational choice." *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968). Statements obtained by promises, threats, and lies that overbear the will are

involuntary as a matter of law. *See Haynes v. Washington*, 373 U.S. 503, 519 (1963); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963); *Spano v. New York*, 360 U.S. 315, 323 (1959).

These precedents reflect the central premise of our adversarial system – that the state must prove charges and cannot force a suspect to provide evidence against himself. *Anderson*, 42 N.Y.2d at 37. The treatment of involuntary confessions embodies our commitment to the Fifth Amendment prohibition of compelled self-incrimination and a rejection of tactics that run afoul of due process and offend notions of fundamental fairness. *Id.* at 38. Overbearing interrogation techniques also undermine the reliability of confessions. *Id.* Interrogation tactics that overbear the will are both "hazardous to the truth and an anathema to any truly adversarial system of justice." *People v. Guilford*, 21 N.Y.3d 205, 215 (2013). Thus, the assessment of the voluntariness of statements goes to the heart of both our adversarial system and the accuracy of outcomes.

The advent of videotaped confessions, which this Amicus has supported, provides the court with the opportunity to scrutinize the tactics used to induce confessions and draw lines of demarcation between permissible and impermissible tactics. A decision that upholds the trial and appellate courts' decisions in this case will render New York precedents

prohibiting coercive interrogations virtually meaningless. *See, e.g., People v. Holland*, 48 N.Y. 2d 861, 863 (1979); *People v. Helstrom*, 50 A.D.2d 685, 685 (3d Dep't 1975), *aff'd* 40 N.Y.2d 914 (1976).

If upheld, there is a danger that the Thomas interrogation will become a blueprint for conducting coercive interrogations. The Thomas case will stand indelibly for the proposition that the police can use a cohort of tactics including: threats to a family member, promises of immediate release, promises of leniency, misrepresentation of legal consequences, and cruel medical ruses that lead suspects to believe that the life of a loved one depends upon their statements. Many of the techniques used are not different from those allegedly used in exoneration cases such as the Central Park Five, and other notorious cases in which DNA has exonerated convicts who provided detailed confessions. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 897 n.19 (2004) (referring to testimony indicating that Central Park Five defendants believed they would be released if they confessed). Here, however, because it is quite likely that no crime was committed at all, there can be no DNA exoneration or investigation of other suspects.

The totality of the threats, promises, and medical ruses used to induce Adrian Thomas to adopt the narrative provided to him by the police clearly

renders the statements involuntary. In this brief, Amicus will provide a legal analysis of the impact of the threat to arrest his wife, the promises of release, the promises of leniency and misrepresentation of legal consequences, and the medical ruse.

A. The Threats to "Pick Up," "Grab" and "Scoop Out" Mr. Thomas' Wife Render the Subsequent Statements Involuntary.

Threatened prosecution of a loved one or friend is clearly coercive and renders a subsequent confession involuntary. *People v. Helstrom*, 50 A.D.2d 685, 685 (1975), *aff'd* 40 N.Y.2d 914 (1976) (threat to search apartment and arrest girlfriend if defendant did not confess to burglaries); *People v. Keene*, 148 A.D.2d 977, 978-79 (4th Dep't 1989) (promise to give wife misdemeanor and appearance ticket rather than arrest rendered confession involuntary); *People v. Ortiz*, 2001 WL 1359090 (Sup. Ct. Bx. Co. July 24, 2001) (Tallmer, J.) (threat to remove baby rendered confession involuntary). Indeed, threats to the well-being of a friend are similarly coercive and have the effect of overbearing the will. *Spano v. New York,* 360 U.S. 315, 323 (1959) (claim that childhood friend's position with law enforcement was in jeopardy was coercive).

There are few tactics that are more coercive than the power of a threat to a loved one or friend. The power of the threat to arrest a family member

to produce a false confession is evident in the case of *Harris v. South Carolina*, 338 U.S. 68, 71 (1949) (holding statement involuntary under Due Process Clause). In that case, a storekeeper and his wife were shot and killed. *See id.* at 70. The storekeeper's last words were that "[a] big negro shot and robbed me." *Id.* at 69. After a two-and-a-half-month fruitless investigation, Mr. Harris, "a slightly built Negro," was arrested and transported from Tennessee to South Carolina. *Id.* at 69-70. After being held in custody for five days, and interrogated for three days, Mr. Harris "finally broke" only when the sheriff threatened to arrest his mother. *Id.* at 70, 73. What custody, use of physical force, and threats to one's own safety may not achieve in terms of overbearing one's will, threats to loved ones may accomplish. *See Spano*, 360 U.S. at 323 (suppressing statements as involuntary when, after refusing to speak to a number of officers and the District Attorney, defendant offered a statement to his friend who falsely claimed his job was at risk and that his children and pregnant wife would suffer).

In this case, the impact of threats to pick up Mr. Thomas' wife is clear from the video and transcripts of his interrogation. Mr. Thomas was brought to the precinct at about midnight and questioned for approximately two hours. During the first two-thirds of the questioning he repeatedly told the

officers that he had not harmed the child, and would remember if the child had any accident under his care. He also told them that his wife would never harm a baby either. He did not attempt to lay the blame on his wife even when the police lied to him, claiming that she had signed paperwork saying that he caused the injuries.[4] A2878. Nor did he accept "accident scenarios" suggested by the police and accompanied by explicit promises that if he told them he accidentally hurt the baby that they would not arrest him. A2924, A2925.

The threats to Mr. Thomas' wife transformed the dynamics of the interrogation. When Sgt. Mason made it clear that Mr. Thomas' wife would be the next suspect, Mr. Thomas immediately agreed to take responsibility to protect his wife and the mother of his children.

> SGT MASON: What it comes down to man, is if you didn't accidentally harm your child then your right [sic] did.
>
> MR. THOMAS: I'll tell you what, my wife is a good wife, I have a good wife, I'm not going to lie to you. I don't believe my wife did that.. . . But if it comes down to it, I'll take the blame for it because – listen, I didn't do it, but if it comes down, I take the rap for my wife so she won't go to jail.

A2907. To reinforce the threat, Officer Fountain then went on to link Mr. Thomas' failure to explain the alleged injuries to "pick[ing] up" his wife, not once but three times in quick succession. When the officers asked Mr.

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4 Officer Fountain testified at trial that these were false statements. A0984.

Thomas what happened and he said he did not know what happened, Officer Fountain said, "Then you can't take the fall for your wife. We got to go pick your wife up." A2908. Officer Fountain followed up by saying, "I'm going to go grab your wife from the hospital." A2909. As if this were not clear enough, he then linked Mr. Thomas' statements that he did nothing to the detention of his wife. "We're probably going to scoop your wife out [sic] because you're saying you didn't do nothing." *Id.* Mr. Thomas responded, "I didn't do nothing but what I'm saying is I'm going to take the fall for my wife because I know my wife is a good wife." *Id.* In order to avoid the arrest of his wife and the mother of his children, Mr. Thomas tried to take responsibility for the injuries. He said, "maybe it could have happened in my care possibly." A2910. This was a crucial turning point in the first interrogation. In the remaining portion of the interview (after receiving the assurances that he would not be arrested, *see infra,* Point IIB), Mr. Thomas eventually adopted the police suggestion that he accidentally hit Matthew's head on the crib. A2926.

The Appellate Division points to the fact that Mr. Thomas was told he could not just take the fall but needed to "instead tell what he knew" in concluding that the threats to pick up his wife did not coerce his confession. *Thomas*, 93 A.D.3d at 1028. This conclusion ignores the very nature of the

coercion that underlies a threat to a family member. In order to save a threatened loved one, a person is likely to confess whether truthfully or falsely, sacrificing the right against compelled self-incrimination.

B. Promises Not to Arrest, Like Threats to a Spouse, Render a Confession Involuntary as a Matter of Law.

> *"[C]ertain promises, if not kept are so attractive that they render a resulting confession involuntary . . . . A promise of immediate release ... is such a promise."*[5]

Promises not to arrest made to elicit incriminating statements are impermissible and coercive. *People v. Holland*, 48 N.Y. 2d 861, 863 (1979); *People v. Hilliard*, 117 A.D.2d 969, 970 (4th Dep't 1986) (promise not to arrest today); *People v. Urowsky*, 89 A.D.2d 520, 521 (1st Dep't 1982) (promise to let defendant go if he showed the police where drugs were concealed).

Promises not to arrest need not assure a suspect that there will be no consequence whatsoever to an incriminating statement. *Holland*, 48 N.Y.2d at 863; *Hilliard*, 117 A.D.2d at 970. Thus in *Holland*, a promise to assign the suspect to a mental facility rendered his confession involuntary. *Holland*, 48 N.Y.2d at 863. Similarly, in *Keene*, the promise not to arrest the defendant's wife but instead to give her a misdemeanor (a promise that

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5 *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987) (citing *United States v. Shears*, 762 F. 2d 397, 402 (4th Cir. 1985)) (emphasis added).

was kept) was sufficient to render statements involuntary. *Keene*, 148 A.D.2d at 979.

Nor are disclaimers or caveats, such as that the officers will not arrest the suspect "now," "today," or "at this time," sufficient to ameliorate the extreme coercive power of promises not to arrest. *Hilliard*, 117 A.D.2d at 970; *United States v. McFarland*, 424 F. Supp. 2d 427 (N.D.N.Y. 2006) (deception as to purpose of interview and statements including "[y]ou're not being arrested for anything right now" rendered admissions involuntary despite *Miranda* waiver). In *Hilliard*, the defendant met with law enforcement agents twice, admitting involvement in one robbery in the earlier interview and five robberies in a later interview after executing a rights card and being told he was free to leave. *Hilliard*, 117 A.D.2d at 969-70. Prior to the first meeting, the agent advised defendant "that if they got together that morning, defendant would not be placed under arrest and that after the meeting defendant would be free to go home and would sleep in his own bed *that night*." *Id.* at 969 (emphasis added). At the second meeting, the defendant was told that he might eventually be arrested but the agent would see that he would not be arrested at home but instead be permitted to turn himself in. *Id.* at 970. The Appellate Division found that the promise of immediate release, even if it is limited and does not communicate that

there will never be an arrest, is a promise that can provide a powerful and explicit inducement to make statements. *Id.* at 970 (holding that it was unnecessary to determine whether New York follows the prohibition on all promises, however slight, of *Bram v. United States*, 168 U.S. 532 (1897), because the promise not to arrest renders statements involuntary).

Adrian Thomas was told at least *30 times* that he would not be arrested or that he would go home the same night if he explained that he caused Matthew's injuries by accident. (*See* Appendix B for the text of each promise to Mr. Thomas that he will not be arrested or will go home).[6] While some of these promises referred to "tonight," others were not explicitly limited. The following exchange is illustrative:

> SGT MASON: But what I'm saying do you think that if you accidentally caused this injury that we're going to arrest you? Yes or no?
>
> MR. THOMAS: Yes.
>
> SGT MASON: I'm telling you that we're not going to.
>
> OFFICER: We can't lie to you about something like that. If we lie to you then you can use it against us.

A2925. Mr. Thomas was then given the interrogating officer's "Solomon [sic] promise" that "when we're done here we are bringing you home." *Id.*

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6 Amicus used the redacted interrogation transcripts and is unaware whether or how many times promises of release were included in redacted segments of the interrogation transcripts.

He was also told:

> If you say to us, you know what officer, I tried to kill my son then damn we would have no choice but to arrest you. If you say you know what officer, when he was in my care the other day I did this to him and that's probably what caused this but it was an accident then we are not going to arrest you tonight.

A2928. Not surprisingly, at the end of the evening the officers had elicited essentially the same statement that they attached to the promise that he would not be arrested.

On the second day of interrogation, the promise not to arrest was repeated at least 16 times, *both before and during* the Miranda warnings. A2954, A2956; *see also* Appendix B. Sgt. Mason used the fact that Mr. Thomas was not arrested the previous night to prove that Mason was a "man of [his] word" and that Mr. Thomas should not be afraid to tell him how he was responsible for Matthew's injuries. A3174-75.

Sgt. Mason returned to this promise repeatedly and before each instance when Mr. Thomas gave in and adopted a more damning explanation for the injuries. For example, before the final confessions another Sergeant came in and yelled at Mr. Thomas, claimed to be a marine and to have seen the injuries and X-rays, which were, according to him, similar to war trauma, and said that Mr. Thomas was a liar. A3170-72. Immediately after the Sergeant left the interrogation room, Sgt. Mason stressed his promises

not to arrest Mr. Thomas and implied that Mason was the only person standing between Mr. Thomas and arrest by the Chief and the angry sergeant:

> ... I went to the Chief today because I had to give the Chief an update and I went to him and he said you need to make an arrest today on this case. I said hold on a minute. I dealt with this guy last night and I think he's telling the truth. I put my ass on the line for you man. He wanted me to arrest you and I said I'm not going to arrest him. I'm still not – I'm a man of my word I'm not a liar. *When I told you I'm not arresting you tonight I'm holding [sic] that. I'm not going to arrest you tonight, all right. You admitted some stuff tonight. If I wanted to arrest you on [this] I could. I don't want to arrest you on this. I want to get you help, all right.* I'm embarrassed that you got another Detective walking in here and telling me that you're lying to me and embarrassing me you know.

A3174-75 (emphasis added). This speech, juxtaposing officers who wanted to arrest Mr. Thomas with Sgt. Mason, who had repeatedly promised that he would not arrest Mr. Thomas, increased the pressure to offer statements that would satisfy Sgt. Mason and result in release. Shortly thereafter, Mr. Thomas adopted the frustration/depression narrative that Sgt. Mason had described to him as non-intentional "if you are suffering depression and your mind is not in a stable frame." A3177-79.

While ambiguous statements regarding leniency, tricks, and deception must be analyzed under a totality of the circumstances rubric, explicit promises of immediate release "are so attractive that they render a

resulting confession involuntary." *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987) (citing *United States v. Shears*, 762 F. 2d 397, 402 (4th Cir. 1985)). It is immaterial whether the promise to release is made in good faith, as they were in *Hilliard*, for a suspect is highly likely to give in to the inducement of immediate release. *Hilliard* also demonstrates that it is immaterial if *Miranda* rights are read and the suspect is informed he is not in custody. *Hilliard*, 117 A.D.2d at 970. For a statement to be involuntary under the Due Process Clause, custody is not required.

Nor can the argument that the police lacked probable cause and therefore the promise not to arrest was made in good faith avail the State. Under such a rule, officers lacking probable cause would be able to repeatedly promise not to arrest a suspect until a confession provides them sufficient evidence from the suspect's own mouth to make an arrest. Our adversarial system, and our state and federal constitutions, prohibit such inquisitorial approaches. Moreover, where investigators lack probable cause that a particular suspect committed a crime the risk is high that a false confession could lead to a wrongful conviction.

C. Promises to Help Mr. Thomas and Misrepresentations of Criminal Consequences Impaired Mr. Thomas' Ability to Make a Free and Rational Choice.

Promises of leniency, both express and implied, must also be considered in determining whether, under the totality of the circumstances, statements are involuntary under a due process analysis. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Under *Schneckloth*,

> 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.

Id. at 225-26 (internal citations omitted).

Promises of leniency that suggest that a family will be able to stay together if a suspect "cooperates" are certainly coercive for a suspect who has no criminal history. *Lynunm v. Illinois*, 372 U.S. 528, 534 (1963). The promise need not be false or definite to unduly influence the decision to confess. *Id.* at 533. In *Lynunm*, a woman gave a statement because police officers advised her that if she cooperated they "would go light with her,"

but if she were arrested her public assistance benefits might be terminated and her children might be removed by social services. *Id.* All this information was true. Nevertheless, the threats to her income and family, together with the police promise to recommend leniency on her behalf rendered her confession involuntary under the totality of the circumstances. *See id.* at 534.

Here, the officers made many statements that gave rise to a reasonable belief that confessing to them would result in leniency. First, they repeatedly made explicit statements that they wanted to "help" Mr. Thomas and his family. *See* Appendix C for promises to help. Second, the officers told Mr. Thomas that they were not proceeding criminally, and offered scenarios they suggested did not give rise to criminal responsibility. *See* Appendix D for statements indicating that the officers were not proceeding criminally and that the accident and depression scenarios they suggested were either not criminal or did not give rise to criminal responsibility. In isolation, some of these statements might be made without offending due process. However, under the totality of the circumstances these tactics must be considered in light of the specificity and number of assertions made to Mr. Thomas.

Turning first to the promises of help, such tactics are not accepted law

enforcement strategies. Even the Inbau and Reid manual on criminal interrogation specifically instructs interrogators to "avoid interrogations" centered on "helping the suspect." Fred E. Inbau, John E. Reid, Joseph P. Buckley, Brian C. Jayne, *Criminal Interrogation and Confessions* 331 (5th ed. 2013). Here the promises of help took two forms: promises to keep the family together and promises to get treatment for Mr. Thomas. At the beginning of the interrogation, the officers told Mr. Thomas that their purpose was to keep the family together and to help the family. A2904, A2964.

> SGT MASON: We think the person that did it is afraid to tell us because they're afraid of what's going to happen to them if they tell us. You know what we're here to tell you that whoever that person is if they talk to us about it, we are going to work with them to be sure that this doesn't get out of hand, you know. We don't want this to get out of hand. We don't want this thing to go somewhere where it doesn't need to go, you know?
>
> OFFICER: We want to keep this family together.
>
> SGT MASON: That's what we're trying to say. We ain't trying to hurt somebody man. We [sic] trying to help your family, your family is in a bad situation.

A2904. The stated goal to "keep this family together" paired with the statement "[w]e don't want this thing to go somewhere where it doesn't have to go" suggests that these officers are there to help avoid serious consequences and to provide assistance to keep the family together. They

followed these statements with representations that they were "here to help" Mr. Thomas, and would advocate to get him treatment. Finally, Sgt. Mason indicated to Mr. Thomas that he would advocate with the District Attorney should he try to press criminal charges and would recommend instead that Mr. Thomas get help:

> You need to be honest with me because I'm the one that's going to talk to the District Attorney and say this is what he told me, okay. I'm the one that's going to talk to the District Attorney for you, all right? You ain't got nobody left to talk to the District Attorney for you, all right? All right?
>
> . . .
>
> [y]ou've got to worry about somebody being on your side because if the D.A. wants to try and press criminal charges against you you're going to need a police officer that you dealt with to say this guy is all right and he's got some problems and he's trying to do it right and I think we can help him out. That's what you need man.

A3187, A3189.

Such promises of help for his family and for Mr. Thomas were paired with representations that the purpose of the interrogation was not criminal. The officers said repeatedly that they were not trying to get anyone in trouble but that "someone else might go after you criminally." A2887-88. As is apparent from Appendix D, Mr. Thomas was told that nobody would get in trouble, that the matter was neither manslaughter nor criminal homicide. He was also told over and over throughout the nine hours of interrogation that throwing a child down in frustration was "an accident,"

and not intentional. The message was clear: Mr. Thomas could either adopt the "frustration scenario" proffered by the police, and thereby "keep this thing from going where it doesn't have to go," or continue to refuse to adopt it, in which case "someone else will come after him criminally." In other words, even though the frustration scenario was incriminating, the officers repeatedly sold it to Mr. Thomas as the path to getting out of there and going home.

> Officer: It's not criminally homicide. Here's our deal. I'm telling you right now you're going home. You're going home within the next hour. You're going home.

A2923. When Mr. Thomas responded to a "throwing the baby down in frustration" scenario saying, "[t]hat's like manslaughter," Sgt. Mason responded, "[i]t's not manslaughter, it's an accident man, it's an accident. Don't you know what an accident is; it's an accident." A2869. When Mr. Thomas pointed out that throwing the baby on the bed in frustration was intentional, Sgt. Mason provided additional minimization rationales that suggested a mental health defense. A3177-78. These tactics, along with the promises to advocate for help and treatment for Mr. Thomas, which continued to the end of the interview, misrepresented the legal and practical consequences of adopting the police officers' suggested scenario. Reliance on the statements is evidenced in the written statement itself in which Mr.

Thomas requests counseling.

In finding Mr. Thomas's confession voluntary, the Appellate Division relied heavily on a single statement made by Sgt. Mason in which, in response to Mr. Thomas' question about whether he could be prosecuted, Sgt. Mason replied by saying that he did not know and could not make promises. *Thomas*, 93 A.D.3d at 1028; A3170. However, in a totality of circumstances analysis, a single disclaimer that an officer cannot make promises regarding prosecution cannot undo the coerciveness of nine hours of interrogation dominated by 18 statements suggesting leniency[7] – that the officers would help the family, Mr. Thomas, proceed non-criminally, etc. – and 31 promises that Mr. Thomas would be released if he acquiesced in the explanations being posited to him by the officers. As in *Lynumn*, where the promises were to recommend leniency, not to guarantee non-prosecution, a full analysis shows that the interrogation was dominated by threats, and express and implied promises.[8] Once again, if stratagems are permitted that allow pervasive promises and threats to be negated by the occasional

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7 These statements do not include the repeated assertions that the officers believed this to be an accident if the statement was not linked to rejecting or minimizing legal consequences.

8 It also bears noting that immediately after this question and answer, a second sergeant, who had been watching from the other room, barged into the room and began yelling at Mr. Thomas, calling him a liar. A3170. The barrage both prevented Mr. Thomas from following up on his question and undoubtedly distracted him from the import of the disclaimer.

accurate statement, the Thomas interrogations will provide a model demonstrating how to insulate overbearing methods from review.

In determining his susceptibility to the promises and suggestions of Sgt. Mason and his colleagues, Mr. Thomas' particular characteristics and circumstances must be considered as well, keeping in mind that "[t]hough the retarded, mentally ill or very young are disproportionately represented among false confessors, the majority are normal and suffer no discernible mental defect." Deborah Davis, Richard A. Leo, & Michael J. Williams, *Disputed Interrogation Techniques in America: True and False Confessions and the Estimation and Valuation of Type I and II Errors*, Univ. of S.F. Law Research Paper No. 2013-27, chapter prepared for S. Cooper, *Controversies in Innocence Cases in America*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288207. While certain classes of individuals are more susceptible to coercive interrogation tactics, normal adults account for most false confession cases. During the 40 hours prior to his final confession, Mr. Thomas had woken to a non-responsive son and learned that Matthew likely would not survive, cared for his other six children for 10 hours until they were removed by CPS, spent nine hours being interrogated at the precinct, and another 16 hours under psychiatric surveillance for suicidal ideation during which he slept for less than two

hours. He also was deceived into believing that his wife had signed papers accusing him of throwing Matthew, thus further contributing to his sense of isolation. Even worse, he was told the police would pick up his wife if he did not accept responsibility for his son's injuries. Considering the events of the 40 hours before his final statement, i.e., the threats to his wife, the 30 promises to release him, the 18 promises of leniency and help, and the threat that someone other than Sgt. Mason would pursue him criminally, there can be little doubt that even a normal, rational individual might succumb to the promises of help and the hope of release.

D. Signatures on Waiver of Rights Cards Do Not Insulate Interrogations from Involuntariness Challenges Based on the Due Process Clause.

The lower courts also erroneously relied on the fact that Mr. Thomas was read his *Miranda* rights and signed a waiver as counteracting the coercive influence of threats to Mr. Thomas' wife, threats of criminal prosecution, promises not to arrest, promises to help, and promises not to treat the matter criminally. Neither the *Miranda* rights themselves, nor having a person sign a paper indicating that the person understands these rights, creates *carte blanche* to employ coercive techniques. The innocent, in particular, are most likely to waive *Miranda* rights believing that if they

have nothing to hide then they have nothing to fear from answering questions and doing so without a lawyer. *See* Saul M. Kassin, et al., *Police Induced Confessions: Risk Factors for Recommendations*, 34(1) Law & Human Behav. 3, 22-23 (2010) (reviewing laboratory studies inducing normal adults to falsely confess to offenses as serious as academic cheating by use of interrogation tactics).

The Court firmly rejected the notion that once *Miranda* rights are read and waived, tactics that are likely to overbear the will do not offend due process in *People v. Guilford*, 21 N.Y.3d 205, 213-14 (2013). In *Guilford*, this Court held that neither initial waiver of *Miranda* rights nor subsequent appointment of counsel remedied the due process violation associated with involuntary statements. *Id.*

In any event, the *Miranda* warnings issued to Mr. Thomas were legally defective. In particular, Mr. Thomas' *Miranda* waiver on the second day of his interrogation was clearly involuntary as Sgt. Mason explicitly interrupted the reading and waiver process with the promise not to arrest:

> No promise or threats have made to me and no pressure or coercion of any kind has been used against me. All right. *Like I said, you ain't getting arrested. This ain't about that, okay, it's about finding out what happened, just talking to you and straightening some stuff out. So just like you did last night,*

read it to yourself, initial on the periods and sign at the bottom line.[9]

A2956 (emphasis added). Promising a defendant that he will not be arrested and that the conversation is just about "straightening some stuff out", contradicts and undermines the content of the *Miranda* warnings and communicates – as Sgt Mason did in so many other ways – that statements will not be used criminally against a defendant. Such a preamble negates a knowing and voluntary waiver. Saying, "Like I said, you ain't getting arrested . . . so just like you did last night, read it to yourself, initial on the periods and sign at the bottom line," clearly negates the warning that what is said can be used against the person. It also diminishes or potentially eliminates the sense that an attorney would be helpful to avoid the likelihood of arrest and prosecution. The statement communicates temporary immunity and the irrelevance of *Miranda* warnings to the current interrogation session.

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9 Although Mr. Thomas was issued *Miranda* warnings at the commencement of his first day of interrogation that did not contain a similar preamble, those warnings were twenty-five hours old by the time of his alleged confession. *See, e.g., People v. Zappula*, 282 A.D.2d 696, 698 (2d Dep't 2001) (24-hour gap between issuance of *Miranda* warnings and second interrogation was unreasonable). Not only were the initial *Miranda* warnings stale by the time of the alleged confession, they had by then been undermined by the defects in the second *Miranda* warnings.

POINT II

DECEPTION REGARDING THE MEDICAL NECESSITY OF INFORMATION TO SAVE THE LIFE OF A LOVED ONE IS "OFFENSIVE TO A CIVILIZED SYSTEM OF JUSTICE" AND VIOLATES DUE PROCESS.

In addition to threats and promises, the Supreme Court has recognized that some tactics are "offensive to a civilized system of justice." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). Such tactics are not limited to physical force but also may be psychological. *Id.*; *Haynes v. Washington*, 373 U.S. 503, 519 (1963). The medical ruse used in the interrogation of Adrian Thomas is such a tactic. Although, by his own admission, Sgt. Mason knew Matthew Thomas was brain-dead and could not be saved, the officer lied to Mr. Thomas, claiming that Mr. Thomas needed to explain what had happened so the doctors could save Matthew's life. The pressure such deception places on a suspect with no goal other than to induce an incriminating statement is repugnant to our system of justice. The tactic has no medical purpose but rather is designed to overbear the will of a suspect.

Recently, the Second Department found a statement obtained by the use of a similar medical ruse to have been involuntary. *People v. Aveni*, 100 A.D.3d 228, 239 (2d Dep't 2012), *lv granted*, 20 N.Y.3d 1059 (2013). In that case, the Appellate Division found that the implied threat of a homicide

prosecution, should the victim die, was coercive. *Id.* The threat of a homicide prosecution would certainly be present whenever such a tactic is used. The interrogation tactics used in *Aveni*, which was decided after the Third Department affirmed Mr. Thomas' conviction, were similar to those used in this case.

The medical ruse is particularly dangerous when, as here, a grieving parent or caretaker is told that failure to explain a child's illness demonstrates that he does not want to save his child. The cruelty of such an assertion offends a civilized system of justice. An innocent caretaker will rack his brains to recall any bump, brush, or jostle, however slight, when confronted with an unresponsive infant. These statements may later be admitted as "admissions" or "partial confessions" and used to show that the caretaker admitted to, but minimized, his conduct. Second, an isolated suspect faced with an accusation from a sympathetic interrogator that failure to explain injuries shows that he does not care about his child, may offer an explanation to prove his concern for his child.

This tactic was employed on the second day of Mr. Thomas' interrogation with the claim made over a dozen times that the doctors needed information to save Matthew's life. *See* Appendix E for examples. Mr. Thomas was asked if he wanted to save his son's life and if he wanted to

hold and kiss Matthew's head again. A2991. When he could not offer an explanation for the alleged head trauma, Sgt. Mason confronted him:

> SGT MASON: The doctors need to know this. ... Do you want to save your baby's life or do you want your baby to die tonight?
>
> MR. THOMAS: No, I want to save his life.
>
> SGT MASON: Are you sure about that? Because you don't seem like you want to save your baby's life right now. You seem like you're beating around the bush with me.
>
> MR. THOMAS: I'm not lying.
>
> SGT MASON: You better find that memory right now Adrian, you've got to find that memory. This is important to your son's life man. You know what happens when you find that memory? Maybe if we get this information, okay, maybe he's able to save your son's life. ... It's a miracle that your baby is alive right now still.

A3010-11.

When Mr. Thomas repeated over and over that his wife had woken him because his son was unresponsive and that they first noticed breathing problems around 8 or 9 a.m. (which is precisely what his wife said, A775, A793-95), the officer made up fake conversations with the doctor and test results that purportedly contradicted Mr. Thomas. A3059-60; A3063-65, A3088-90. He also accused Mr. Thomas of not wanting to save his son's life. A3010. There was no medical purpose to these questions, nor were these statements supported by any medical tests or analysis. The deception

and the fabricated medical information had one purpose and one purpose only, to push Mr. Thomas to admit to some conduct that would cause a head injury. The tactic was successful.

Under pressure to change his story to prove that he wanted to save his son, Mr. Thomas said that he had bumped Matthew's head both the morning that Matthew was hospitalized (A3016-A3022) and the night prior to the hospitalization. A3194. Faced with Sgt. Mason's insistence that Matthew must have breathing problems the night before, Mr. Thomas also adopted the suggestion that the baby began wheezing after he bumped his head at 9:30 p.m. and had breathing problems during the night. A3109-11. This statement was later relied upon by prosecution expert witnesses to posit that the incident that caused the head trauma caused aspiration which caused an infection and that sepsis was secondary to the head trauma. A1445, A1511-12, A1545-46. These experts were unaware that this account contradicted Mr. Thomas' earlier statements or that the mother said that Matthew had no breathing problems during the night. A775, A793-75.

Telling a parent of a brain-dead child that there is something he could do to save the child and equating silence to indifference is cruel. The interrogation tactic serves no purpose but to induce a confession. No

information can save the patient.[10] While the compulsion, "If you want to save your child, you need to explain his injuries," should theoretically result in accurate information, if police reject any account that is inconsistent with a preconceived abuse narrative, a vulnerable and grieving caretaker may simply give in and confess either accurately or inaccurately.

The Appellate Division did not apply a due process analysis to this medical ruse disregarding the element of compulsion and the question of whether such a cruel manipulative tactic has any place in a civilized system of justice. Instead the court simply considered the likelihood that the tactic would give rise to inaccurate information. The Appellate Division reasoned that "[t]he officers' repeated misrepresentation that defendant's truthfulness might enable doctors to effectively treat Matthew did not render his statement involuntary, because appealing to his parental concerns did not create a substantial risk that he might falsely incriminate himself. Indeed, common sense dictates the opposite conclusion, i.e., that parents, aware of their child's life-threatening predicament, would *accurately* disclose information that might enable doctors to save their child." *Thomas*, 93

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10 If the patient were alive and the doctors actually needed information to save a life, an emergency exception might apply. As a practical matter, situations where doctors suspect blunt force trauma and need to know the instrumentality or timing in order to treat a patient effectively would seem to be quite rare. The *Aveni* fact pattern suggests that such a scenario might arise in cases of poisoning or overdose.

A.D.3d at 1027 (emphasis in original) (internal citation omitted). However, the question of voluntariness turns not on whether a tactic will elicit a truthful or false statement, but whether it would overbear the suspect's will.

A ruling on voluntariness under the Due Process Clause that takes into account the truth or falsity of statements is wrong as a matter of law. *Rogers v. Richmond*, 365 U.S. 534, 543 (1965).

> The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

Id. at 544.[11] There are many methods that might produce accurate statements (threatening children or withholding medical care might be particularly effective tactics) but both the Due Process Clause and our state constitution prohibit such tactics whether they elicit accurate or inaccurate information. The pressure generated by suggesting that a parent can save his

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11 *People v. Tarsia*, 50 N.Y.2d 1, 11 (1998) does not hold differently. *Tarsia* holds that deceptive "stratagems need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process *or* that a promise or threat was made that could induce a false confession." *Id.* at 11 (emphasis added, citations omitted). This sentence does nothing more than state both the constitutional and statutory tests of voluntariness that are relevant to police stratagems. First, a confession obtained in a manner that violates due process is involuntary without regard to truth or falsity. Second, a statement that is elicited in violation of C.P.L. § 60.45(b)(i), "by means of a promise or statement that creates a substantial risk of false incrimination," is involuntary.

child by speaking and equating failure to explain injuries to not wanting to save one's child must be evaluated independent of assumptions about the quality of information it might garner. Like any threat to a family member, the tactic is highly coercive and should be prohibited when it has no legitimate medical purpose. Further, the tactic is offensive to a civilized system of justice and undermines respect for law enforcement and the criminal justice system. *See Anderson*, 42 N.Y.2d at 38 (citing *Spano v. New York*, 360 U.S. 315 (1959) as an example of police methods that evoke societal disapproval because they offend our notion of fundamental fairness). As the Supreme Court stated in a case where the police refused to let the suspect call his wife until he cooperated:

> Whether there is involved the brutal 'third degree,' or the more subtle, but no less offensive, methods here obtaining, official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement.

Haynes v. Washington, 373 U.S. 503, 519 (1963). This type of medical ruse with caretakers of sick infants for no purpose but to apply psychological pressure can only breed disrespect for the law.

POINT III

THE ADVERSARIAL SYSTEM RELIES UPON THE ABILITY OF THE PARTIES TO PRESENT WITNESSES ON CRITICAL ISSUES AT TRIAL TO ACHIEVE ACCURATE OUTCOMES; THE DENIAL OF AN EXPERT ON FALSE CONFESSIONS UNDERMINES THIS PRINCIPLE.

The position of the New York City Bar Association is in lockstep with this Court: "False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system." *People v. Bedessie*, 19 N.Y.3d 147, 161 (2012). In *Bedessie*, this Court held for the first time that "in a proper case expert testimony on the phenomenon of false confessions should be admitted." *Id.* at 149.[12]

Mr. Thomas' was a "proper case" for the admission of expert testimony. While this conclusion follows directly from the facts of the case, Amicus also believes it is the proper result in light of the important principles governing our adversarial system. The trial court's error in precluding the expert undermined the integrity of the truth-seeking function of the trial, which is brought to bear when both sides vigorously present their case.

[12] This decision, issued during the pendency of this appeal, is controlling. *See People v. Pepper*, 53 N.Y.2d 213, 221-22 (1981) (new decisions apply to cases pending on direct appeal).

In *Bedessie*, this Court analyzed the well-established limits of the trial court's discretion to admit or preclude expert testimony. *Id.* It recognized that, although expert testimony necessarily "invades the province of the jury" to some extent, when a false confession is at issue, the invasion, in a proper case, is benign, and indeed may be beneficial. *Id.* at 157. This is because, even though the average juror may recognize from news media and entertainment that false confessions may occur, he or she lacks an understanding of the psychological and sociological reasons why this is so. *Id.* at 161. The Court found: "there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions." *Id.*

Bedessie was not a "proper" case for the introduction of an expert because the expert's proffered testimony did not directly relate to the facts of that defendant's interrogation or confession. *Id.* at 157. This concern is not present here. To the contrary, Dr. Ofshe's proffered testimony in Mr. Thomas' case directly tracked both the law enforcement interrogation methods and the defendant's "confession." Specifically, Dr. Ofshe explained several interrogation methods that can produce false confessions,

including "evidence ploys," (A2154-55), "low-end" and "high-end" motivators, such as threats to loved ones, (A2158-59, 2198-99, 2200-2206), promises of leniency (A2202-03), and the conduct of the interrogation in a closed area cut off from the outside world. A2205-06. Each of these factors was present in Mr. Thomas' interrogation. Thus, the concern of the Court in *Bedessie*, that the proffered testimony was not relevant to the specific case, is not present here.[13]

The reversal of Mr. Thomas' conviction on the grounds that he was denied his right to present an expert is not just required under the now-controlling *Bedessie* decision, it also follows directly from the principles governing our adversarial system and the structuring of trials as a search for the truth.

Whenever a court excludes an expert, it necessarily denies the jury information that it could use in reaching its verdict. Sometimes, of course, exclusion is necessary. In its role as a gatekeeper, the trial court must

[13] We also note that, under *Frye*, Dr. Ofshe's research needs to be "generally accepted" and he needs to be properly credentialed as an expert. Other jurisdictions have found that Dr. Ofshe's research on false confessions met this test. *Boyer v. State*, 825 So. 2d 418, 419 (Fla. Dist. Ct. App. 2002); *State v. Sawyer*, 561 So. 2d 268, 287-90 (Fla. Dist. Ct. App. 1990) (discussing Dr. Ofshe's testimony). *See also*, *United States v. Hall*, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997) (admitting testimony under *Daubert* standard); *Morris v. Crosby,* 2005 WL 3468689 3 (M.D. Fla. Dec. 19, 2005) (same); *State v. Tapke,* 2007 WL 2812310 (Ohio Ct. App. Sept. 28, 2007) (same); *United States v. McGinnis,* 2010 WL 3931494 8 n.6 (U.S. Army Court of Crim. App. Aug. 19, 2010) (noting that Dr. Ofshe had been qualified as an expert on false confessions in three court matials); *State v. Perea,*-- P.3d --, 2013 WL 6038827 10 (Utah Nov. 15, 2013) (admitting Dr. Ofshe's testimony under Utah standard).

protect the jury from extraneous and irrelevant information that improperly "invade the jury's province." *People v. Lee*, 96 N.Y.2d 157, 162 (2001). But, as this Court has repeatedly recognized, such an encroachment on the jury's province is "authorized" where it will assist the jury in performing its role of "draw[ing] conclusions from the facts." *Id.* at 162 (citing and quoting *People v. Jones*, 73 N.Y.2d 427, 430-31 (1989); *People v. Cronin*, 60 N.Y.2d 430, 432 (1983)).

This is especially true in cases, like Mr. Thomas', where the jury is tasked with reviewing voluminous evidentiary material, in addition to the trial testimony, in order to determine whether a confession was truthful. Here, the jury was presented with a videotape of about nine hours. (Not to mention the other documentary evidence, including copious medical records.) With the current and positive trend toward videotaping interrogations, many more juries likely will be faced with the challenge of analyzing lengthy videotapes. Such raw, unedited videotaped examinations, which can include "small talk," down time, and extraneous conversation, along with critical questions, answers and statements, are not unlike raw medical or other forensic data. In both situations, the jury is presented with a large amount of information in bulk. Without an expert, the jury is left to sort through the material without any assistance in determining the portions

relevant to the issues at hand. A forensic expert can act as an annotator to such voluminous evidence, assisting the jury in forming its own conclusions by pointing to the most significant parts of the evidentiary material.

Using this case as an example, both sides used treating physicians and medical experts to point to specific parts of Matthew Thomas' medical records in order to support their theory of the case. A731, A735, A853-54, A875-76, A1363-64. Without these experts, the jury would have been tasked with analyzing hundreds of pages of evidence to determine which pages were most significant. They may overlook the importance of a notation on an intake form, the results of a blood test, or the presence of certain markings on an x-ray. Of course, this would have seriously hindered both the prosecution and the defense in presenting their cases, which is why both sides were permitted to introduce medical experts.

Continuing the example, just as the medical expert pointed the jury to the important parts of the medical records in this case, the false confession expert could point the jury to the critical parts of the interrogation and confession. Also, just as the medical expert could provide context and explanation for otherwise esoteric medical reports, the false confession expert could explain the significance of certain questions or other conduct of the interrogator, or characteristics of the defendant the significance of which

may not otherwise be apparent. Meanwhile, in the proper case it may be the prosecution that wishes to call a false confession expert to challenge a defendant's claims that his confession was not truthful. As with the medical expert, the use of a false confession expert in this manner would enhance the adversarial nature of the proceedings by providing the jury with information that assists it to evaluate the interrogation.

The analogy to a medical expert can be further extended: although average jurors may be aware that certain medical conditions occur, they likely do not have personal experience with suffering from them. Similarly, although average jurors may be aware that false confessions occur, they likely do not have experience with actually making or accepting one. By comparison, most people have had the experience with being misidentified ("Sorry, I thought you were a lawyer I met on another case."), or misidentifying someone else ("I thought that person at the restaurant was Tom Hanks!"). Misidentification is not only a phenomenon about which the average juror has read or heard, he or she likely *personally* experienced it. False confessions, on the other hand, are in many ways counter-intuitive. The expert is needed to assist the jury in answering the question, recognized by the Supreme Court, of "why did [the innocent defendant] previously admit his guilt?" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

The counter-intuitive nature of false confessions extends even further: recent studies have revealed that jurors presented with a subject-focused videotaped confession (like Mr. Thomas') are more likely to find it voluntary and truthful than those presented with an interrogator-focused videotape, *or even a transcript alone*. In a series of studies, social scientists found that the camera angle of a videotaped interrogation and confession had a profound impact on juries evaluating the credibility of the statements. They recommended that juries be presented not just with a video of the "accused" which can "lead jurors to underestimate the amount of pressure actually exerted by the 'hidden' detective," but also with recordings of the interviewer him- or herself. G. Daniel Lassiter, et al., *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy, in Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations*, 143-160 (G. Daniel Lassiter and Christian A. Meissner eds., 2010). While the angle of the video here cannot be changed, an expert can assist jurors to focus on the interrogation techniques that are commonly associated with false confessions.

Finally, as a group of prosecutors, judges, and criminal defense attorneys alike, Amicus submits that although our system is adversarial, the defendant's right to present a defense is to be treated with special care. The

Supreme Court has long-recognized that "the right to present a defense . . . is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). In the context of confessions, the Supreme Court already recognized that part and parcel of a defendant's right to present a defense is his right to assert that a prior confession was not truthful. *See Crane*, 476 U.S. at 690. There, the Court found that, even where the trial court made a pre-trial determination of voluntariness, the defendant nevertheless had a right to challenge the *truthfulness* of his statements at trial. *Id.* The Court reasoned: "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Id.* (internal quotations omitted). Permitting a defendant to introduce expert testimony explaining how the methods of interrogation used by law enforcement could have contributed to a false confession follows directly from these principles. In the absence of expert testimony, the defense is left with the nearly insurmountable task of answering *Crane's* question of why an innocent person would admit to a crime without anything but the defendant's inherently-contradicted

testimony. Denying an expert witness, particularly in circumstances like those in the case at bar, denies the defendant his "right to a fair opportunity to defend against the State's accusations." *People v. Carroll*, 95 N.Y.2d 375, 385 (2000) (citation omitted). It also undermines the truth-finding served by the adversarial process.

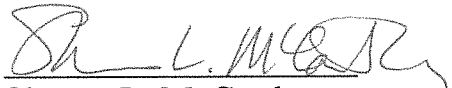
CONCLUSION

The coercive tactics that were used during the interrogation of Adrian Thomas violate due process. A ruling excluding these statements as involuntary will serve to increase the accuracy and integrity of evidence received by New York courts and to reduce the risk of wrongful convictions based on false confessions. Additionally, expert testimony on false confessions enhances the adversarial truth-finding function of criminal trials and must be permitted where the testimony meets the *Frye* standard.

Dated: New York, New York
November 21, 2013

Respectfully submitted,

Criminal Law Committee
Criminal Advocacy Committee
The Association of the Bar of the
City of New York

By: 

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APPENDICES

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REPORT ON LEGISLATION

A.4721 **M. of A. Lentol**
S.1267 **Senator Perkins**

AN ACT to amend the criminal procedure law, in relation to the electronic recording of interrogations

THIS LEGISLATION IS APPROVED[1]

The New York City Bar Association is an organization of nearly 24,000 lawyers and judges dedicated to improving the administration of justice. We support A.4721/S.1267, which would require law-enforcement personnel to electronically record custodial interrogations in felony cases.

Electronic Recording of Custodial Interrogations

Electronic recording of custodial interrogations not only protects the innocent by guarding against false confessions, but increases the likelihood of conviction of guilty persons by developing the strongest and most reliable evidence possible. It aids investigators, prosecutors, judges, and juries by creating a permanent and objective record of a critical phase in the investigation of a crime that can be reviewed for inconsistencies and to evaluate the suspect's demeanor.[2] Recording entire custodial interrogations significantly reinforces or enhances cases by creating powerful incriminating evidence, which leads to stronger prosecutorial positions in plea bargaining and a higher proportion of guilty pleas and verdicts.[3] It has a concomitant effect of reducing the number of motions filed to suppress statements by defendants and the consequent sparing of prosecutors from the need to refute allegations that interrogators engaged in physical abuse, perjury, coercion, or unfair trickery.[4]

[1] Although we approve the bill, we have one recommendation concerning the effective date (currently 90 days after enactment). Depending on when the bill becomes law, police and prosecutorial agencies will likely require much more lead-in time in order to equip their offices and train personnel to comply with the statute. Therefore, we recommend a longer lead-in time than that which is provided in the bill.

[2] Thomas P. Sullivan, "Police Experiences with Recording Custodial Interrogation," Northwestern University School of Law, Center on Wrongful Convictions, Number 1 (2004), at 6.

[3] Id. at 12.

[4] Id. at 8.

Recording interrogations often improves the overall quality of investigations.[5] For example, when detectives record interrogations they are able to focus on the suspects rather than taking handwritten notes. Former United States Attorney Thomas P. Sullivan determined in 2004 that, in 238 law enforcement agencies surveyed that recorded custodial interrogations – including those in Chicago, Denver, Washington, D.C., Los Angeles, San Jose, and Prince George's County, Maryland – "[v]irtually every officer … was enthusiastically in favor of the practice."[6]

The costs of recording custodial interrogations have proven to be manageable for law enforcement agencies in other jurisdictions. The costs in this jurisdiction would include training of law enforcement personnel, purchase and maintenance of recording equipment, and storage of electronic media. Most of these costs, while not insignificant, are at the front end and diminish once equipment is in place and personnel are trained. Indeed, in many police departments, keeping pace with advances in recording technology has historically posed little difficulty. For example, videotaping sobriety tests of suspected drunk drivers in the field and at station houses is a routine matter for countless police agencies throughout the nation.

Experience has shown that the presence or absence of recording equipment almost never affects suspects' decisions whether to talk to interrogators.[7] Should interrogators nevertheless be concerned that suspects, knowing they will be videotaped, will refuse to speak to them, they need not necessarily disclose that an interrogation will be recorded. For example, Wisconsin's recording statute provides that "[a] law enforcement officer or agent of a law enforcement agency conducting a custodial interrogation is not required to inform the subject of the interrogation that the officer or agent is making an audio or audio and visual recording of the interrogation." Despite the evidence that suspects are not inhibited from speaking to interrogators by the presence of recording equipment, agencies may prefer the ability to record interrogations inconspicuously.[8]

Current Practice

To date, Connecticut, Illinois, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Wisconsin, and the District of Columbia have enacted legislation requiring the recording of custodial interrogations. State supreme courts have taken action in Alaska, Iowa, Massachusetts, Minnesota, New Hampshire and New Jersey. Approximately 840 jurisdictions have voluntarily adopted recording policies.[9]

In December 2010, the NYS Division of Criminal Justice Services issued "New York State Guidelines for Recording Custodial Interrogations of Suspects" which stated that "[v]ideo

[5] Id.

[6] Id. at 6.

[7] Id. at 10.

[8] While taking no position on whether inconspicuous recording would be preferable to conspicuous recording, we have no reason to conclude that inconspicuously recording interrogations would be objectionable or improper.

[9] See http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php. (Last visited February 14, 2013).

recordings of interrogations are currently being conducted in over 30 counties in New York State, with more counties soon to join in. . . . It is expected that electronically recording custodial suspect interrogations will enhance the investigative process and assist in the investigation and prosecution of criminal cases. Critical evidence can be captured through the recording of interrogations. The recording will also preserve information needed regarding a person's right to counsel and the right against self-incrimination and it can be used to resolve a person's claim of innocence. Similarly, the electronic recording of custodial interrogations will assist in defending against civil litigation and allegations of officer misconduct."[10]

And, in September 2012, New York City Police Commissioner Raymond Kelly reported that the city will begin video recording criminal interrogations. As an expansion of the NYPD's 2010 pilot program, every precinct in the city will now record entire interrogations in murder, assault and sexual assault cases.[11]

The Proposed Statute

The bill provides that an oral, written or sign language statement of an accused made as a result of a custodial interrogation at a place of detention will be presumed inadmissible as evidence against the accused in any proceeding charging a felony ***unless***: (i) an electronic video or audio recording was made of the custodial interrogation in its entirety, including any administration and waiver, or invocation of rights; (ii) the recording is substantially accurate and has not been intentionally altered; and (iii) all voices on the recording are identifiable. The bill provides that, under certain circumstances, the State may rebut this presumption of inadmissibility by clear and convincing evidence. The bill also provides that, based upon a showing of good cause by the State, the court may admit a statement if it believes that suppression of the statement is too harsh a remedy, in which case an appropriate jury instruction may be given.

Nothing in the bill precludes the admission of statements made in open court or before the grand jury, spontaneous statements not in response to interrogation, statements made during routine questioning while processing an arrest, out-of-state statements made during custodial interrogation, statements obtained by federal law enforcement in a federal place of detention, statements given at a time when the interrogators are unaware that a felony has occurred, or statements used for impeachment purposes only.

Conclusion

Although we recommend passage and enactment of the proposed bill, our recommendation encompasses an understanding that adequate funding will be required by and provided to all agencies that would conduct custodial interrogations. While we are confident, based on the experiences of police and prosecutorial agencies that have in recent years begun videotaping custodial interrogations, either as a matter of law or individual policy, that the costs of procuring equipment, training personnel, and storing electronic media will ultimately be

[10] See http://criminaljustice.state.ny.us/pio/press_releases/video-recording-interrogation-procedures.pdf. (Last visited February 14, 2013).

[11] See http://www.innocenceproject.org/Content/NYPD_to_Video_Record_Interrogations.php. (Last visited February 14, 2013).

manageable, we are mindful that the costs associated with these matters – especially start-up costs – are not insignificant. There must, therefore, be a funding structure in place adequate to cover these associated costs.

Reissued February 2013

Appendix B - Promises of immediate release, no arrest, no jail.

	page	
1	A2923	OFFICER: I'm telling you right now you're going home.
2	A2923	OFFICER: You're going home within the next hour.
3	A2923	OFFICER: You're going home.
4	A2924	SGT MASON: Do you think that you tell us, you know Officer, last night I did this, but it was an accident that we're going to put handcuffs on you and throw you in jail? Hypothetically is that what you think is going to happen? Is that what your friends are telling you is going to happen? That's not what we're here for.
5	A2924	SGT MASON: If you tell us that accidentally you caused this injury last night or the night before, we're still going to drive you home tonight.
6	A2924	SGT MASON: We ain't arresting you tonight
7	A2924	SGT MASON: We're still going to drive you home.
8	A2924	SGT MASON: We ain't here to arrest anybody tonight, man.
9	A2924	SGT MASON: So if you're afraid to tell us what happened because you think that we're going to arrest you tonight? OFFICER: You're wrong.
10	A2925	SGT MASON: But what I'm saying do you think that if you accidentally caused this injury that we're going to arrest you? Yes or no? MR. THOMAS: Yes. SGT MASON: I'm telling you that we're not going to. OFFICER: We can't lie to you about something like that. If we lie to you then you can use it against us.
11	A2925	SGT MASON: We're not going to arrest you tonight.
12	A2925	OFFICER: My Solomon [sic] promise and I haven't lied to you yet tonight. When we're done here we are bringing you home.
13	A2927	SGT MASON: We're not trying to lock people up tonight. We're not trying to put people in jail tonight.
14	A2927	SGT MASON: We're not trying to put you in jail.
15	A2928	SGT MASON: If you say to us, you know what officer, I tried to kill my son then damn we would have no choice but to arrest you. If you say you know what officer, when he

		was in my care the other day I did this to him and that's probably what caused this but it was an accident then we are not going to arrest you tonight.
		DAY 2
16	A2954	Pre-Miranda: SGT MASON: Just like last night. … You ain't getting arrested tonight, all right.
17	A2956	Mid-Miranda (after "No promises or threats have been made …"): SGT MASON: All right. Like I said, you ain't getting arrested. This ain't about that, okay, it's about finding out what happened, just talking to you and straightening some stuff out.
18	A2961	SGT MASON: When we get done here tonight you are free to go to that house ...
19	A2989	SGT MASON: And when I tell you you ain't going to jail tonight, all right, I was straight with you last night, I told you you weren't going to jail. I told you I would go to the hospital and get you some help. I'm straight up with you right now. You ain't going to jail tonight.
20	A3006	SGT MASON: You ain't going to jail tonight you don't have to worry about that, all right? All right? That's not one of our priorities to put you in jail tonight.
21	A3014	SGT MASON: What's holding you back, Adrian? What's holding you back? You think you're getting in trouble for this? Is that what you think? You think you're getting in trouble for this? … I promise you, you're going home tonight man.
22	A3014	SGT MASON: Look [sic] it man, I promise you you're going home tonight man.
23	A3046	SGT MASON: I told you there wasn't going to be no be [sic] jail, man.
24	A3086	SGT MASON: You give me 100 percent truth when you leave tonight whether it be home or whether we can make arrangements to get you somewhere else [referring to Thomas' request for a motel room or shelter], all right, you give me 100 percent of the truth you're going to sleep peacefully tonight, you know, you [sic] going to feel that peace because you're going to know that your son is still

		alive . . .
25	A3105	SGT MASON: Listen, I want to start writing this down. I want to get this out of the way, right, because I know when we get done you can get out of here tonight…
26	A3106	SGT MASON: If you leave out details we're going to question why we're not arresting you tonight.. . . I'm choosing not to hold you criminally responsible for this tonight because you're being straight up with me..
	A3170 – A3173	**BAD COP SCENARIO – ANOTHER SGT COMES IN YELLING AND CALLS THOMAS A LIAR. Deception – marine corpsman, looked at x-rays, spoke to doctor, understands x-rays.**
27	A3174	(immediately after bad cop scenario) SGT MASON: I talked to the Chief and the Chief wanted me to arrest you. The Chief wanted me to arrest you and I convinced the Chief that I was not going to arrest you.
28 - 30	A3174-A1375	SGT MASON: ...I went to the Chief today because I had to give the Chief an update and I went to him and he said you need to make an arrest today on this case. I said hold on a minute. I dealt with this guy last night and I think he's telling the truth. I put my ass on the line for you man. He wanted me to arrest you and I said I'm not going to arrest him. I'm still not -- I'm a man of my word I'm not a liar. When I told you I'm not going to arrest you tonight I'm holding [sic] that. I'm not going to arrest you tonight, all right. You admitted to some stuff tonight. If I wanted to arrest you on [sic] I could. I don't want to arrest you on this. I want to get you help, all right. I'm embarrassed that you got another Detective walking in here and telling me that you're lying to me and embarrassing me you know.
31	A3184	SGT MASON: Have I judged you yet? Am I judging you? I put my neck on the line to keep you out of jail, all right. I think you owe that to me.

Appendix C – Promises of help.

	page	
1	A2904	SGT MASON: We think the person that did it is afraid to tell us because they're afraid of what's going to happen to them if they tell us. You know what we're here to tell you that whoever that person is if they talk to us about it, we are going to work with them to make sure that this doesn't get out of hand, you know. We don't want this to get out of hand. We don't want this thing to go somewhere where it doesn't need to go, you know? OFFICER: We want to keep this family together. SGT MASON: That's what we're trying to say. We ain't trying to hurt somebody man. We trying to help your family, your family is in a bad situation.
2	A2964	SGT MASON: Look at me man, I ain't coming after you. I'm here to help you Adrian, I'm here to help you man. MR. THOMAS: I can't go see my own baby. SGT. MASON: It's going to be all right, man. It's going to be all right, man. You need to get this off your chest, all right. I brought you to the hospital last night. I tried to get you some help. I brought you back down here to talk to me, all right. I need you to tell me how everything happened. I need to know the truth in order to get you the help that you need you hear me? You got six other kids to care about, all right.
3	A2997	SGT MASON: You ain't got to be nervous any more. I'm here to help you. You ain't got to be nervous. I want to make this better for you man.
4	A3104	SGT MASON: I'm going to tell the Court what happened, it was an accident because I don't want them holding that against you, you know. I'll tell that. This is an accident. This man came in to the police station voluntarily, he sat down like a man and talked about what happened, this is a good man. We're going to get him some help, get him some treatment and he's going to be good at life. That's what I'm going to tell the Court. I've got faith in you man. MR. THOMAS: I'll take counseling, anything man. SGT MASON: Absolutely.
5	A3175	SGT MASON: He wanted me to arrest you and I said I'm not going to arrest him. I'm still not – I'm a man of my word I'm

		not a liar. When I told you I'm not going to arrest you tonight I'm holding [sic] that. I'm not going to arrest you tonight, all right. You admitted some stuff tonight. If I wanted to arrest you on [sic] I could. I don't want to arrest you on this. I want to get you help, all right.
6	A3187	SGT MASON: You ain't got many people left on your side, man. You ain't got many people left. I'm the last hope man. You better start telling me the truth because when it comes time and people want to talk to the people involved in this case and they want somebody to stick up for you ain't nobody left but me man. I'm the guy that's going to stick up for you. I'm the guy that's going to say you know what, he's got some psychological problems, all right.
7	A3187 and A3189 (note A3188 is out of place)	SGT MASON: You need to be honest with me because I'm the one that's going to talk to the District Attorney and say this is what he told me, okay. I'm the one that's going to talk to the District Attorney for you, all right? You ain't got nobody left to talk to the District Attorney for you, all right? All right? . . . [Y]ou've got to worry about somebody being on your side because if the D.A. wants to try and press criminal charges against you you're going to need a police officer that you dealt with to say this guy is all right and he's got some problems and he's trying to do it right and I think we can help him out. That's what you need man.[1]

[1] After this speech and after about eight hours of interrogation, Mr. Thomas adopts the throwing the baby on the bed in frustration narrative after fighting with his wife suggested by the officers on Day 1.

Appendix D: Misrepresentation of legal consequences.

	page	
1	A2854	OFFICER: If you accidentally hurt your son, it's an accident. … If your wife accidentally hurt your son, it's an accident, all right. We ain't trying to get anybody in trouble here.
2	A2869	SGT MASON: Listen you're a nice guy. I don't think you did it on purpose. I don't think your wife did it on purpose. We don't think somebody - - MR. THOMAS: That's manslaughter man. OFFICER: It's not manslaughter, the baby's alive, we got to keep our fingers crossed and hope this baby lives. MR. THOMAS: That's like manslaughter. SGT MASON: It's not manslaughter, it's an accident man, it's an accident. Don't you know what an accident is; it's an accident.
3	A2888	SGT MASON: [S]omebody other than us is going to look at this thing and they're going to say if it wasn't an accident and they're not talking to you about it, somebody is going to say you did it on purpose. . . . And somebody is going to go after you criminally, all right. Right now we're trying to settle this before it gets to that point. If this was an accident we need to know about it man.
4	A2923	OFFICER: It's not criminally homicide.
5	A3014	SGT MASON: Look it, this ain't about criminal charges, all right. This is about finding out the truth to what happened to your son so when you give the information to the doctor we'll try to save your son's life.
6	A3104	SGT MASON: I'm going to tell the Court [referring to Family Court] what happened, it was an accident because I don't want them holding that against you, you know. I'll tell that. This is an accident. This man came in to the police station voluntarily, he sat down like a man and talked about what happened, this is a good man. We're going to get him some help, get him some treatment and he's going to be good at life. That's what I'm going to tell the Court. I've got faith in you man.
7	A3106	SGT MASON: I'm choosing not to hold you criminally responsible for this tonight because you're being straight up with me. . . . I need to be able to prove to the Court that this

		was an accident.
8	A3113	SGT MASON: So when you bring this [statement] to Family Court and you tell them how this was an accident, then they know that what's on this paper is your words, it's how you hurt your son accidentally ...
9	A3151	SGT MASON: If your baby ain't responding and you shake your baby and cause an injury to your baby that's just trying to save your baby's life. That's just being panicking [sic] wanting to know why ain't my baby awake right now.
10	A3177 – A3178	SGT MASON: Look it's not intentional. Remember I told you about post pardon [sic] depression. The woman ain't the only person that can go through post pardon [sic] depression. Men can go through that too. You got seven kids and two fourth [sic] month old babies. You're feeling some severe depression right now, okay. You went to the hospital last night because you was thinking about killing yourself. They got medical records up at the hospital and you admitted to someone that you was thinking about jumping off a bridge. That's depression, all right. If you're suffering depression right now and you hurt your child because you're suffering depression then we need to know that. MR. THOMAS: That's intentional. SGT MASON: That's not intentional. all right.
11	A3186	SGT MASON: Whether it was intentional or not, you are responsible for them and you need to tell me about it because there's going to come a time when somebody is going to say is this man criminally responsible for what happened to this child? Are you criminally responsible for this or was it an accident? Did you mean to try and kill this boy?

Appendix E – Examples of medical ruse deception.[2]

	page	
1	A2990 – A2991	SGT MASON: Look it, if you did it ten days ago, you told me that yesterday. Did you get in trouble for that? If you did it yesterday morning then I need to know because the doctors are trying to save your son's life, all right, and they need to have time frames, they need to know everything possible about how this injury occurred, when it occurred, and everything is very important I mean minute by minute, by minute everything is important, okay. So if you did something to Matthew's head yesterday, similar to what you did ten days ago, I need to know that so we can let the hospital know so they can try to provide better care for your son. We're trying to keep your son alive right now, all right. Every bit of information is very important right now. We're trying to keep Matthew alive. I told you, before you answer me, think about Saturday night when you were holding your beautiful son in your arms, picture his face, do you ever want to do that again? MR. THOMAS: You know that. SGT MASON: Do you ever want to hold your son in your arms again, your beautiful innocent baby and look at him and give him a kiss on his forward (sic) again? MR. THOMAS: Yeah, I want to. SGT MASON: You do. So we need to know if this could have happened yesterday morning too, we need to know this so we can let the hospital know so they can try to save your son's life, ma'am [sic]
2	A2996	SGT MASON: Something happened before she woke you up. Last weekend when you bumped his head on the crib that his [sic] not the last time that you may have used a little bit too much force with Matthew in your arms. Something happened between last weekend and yesterday when he was brought to the hospital. I need you to tell me what happened. Do you want to save your son's life, man.
3	A2997	SGT MASON: You need to tell me. Take a minute and think. This is very important. This is very important. I need to get this information to the doctors in the hospital. This is very

[2] This table provides examples and is non-exhaustive.

		important, all right. You ain't got a lot of time, man. You ain't got a lot of time. They [sic] trying to save your son's life right now. If there's something that they need to know to try to help save your son's life, you need to tell me so I can get this message to the doctor.
4	3006	SGT MASON: Our priority tonight is to find out what happened because right now your son is still alive and we want to give the doctors every bit of information we can to make sure your son stays alive, all right?
5	A3010-A3011	SGT MASON: The doctors need to know this. Do you want to save your baby's life or do you want your baby to die tonight? MR. THOMAS: No, I want to save his life. SGT MASON: Are you sure about that? Because you don't seem like you want to save your baby's life right now. You seem like you're beating around the bush with me. MR. THOMAS: I'm not lying. SGT MASON: You better find that memory right now Adrian, you've got to find that memory. This is important to your son's life man. You know what happens when you find that memory? Maybe if we get this information, okay, maybe he's able to save your son's life. ... It's a miracle that your baby is alive right now still.
6	A3014	SGT MASON: Look it, this ain't about criminal charges, all right. This is about finding out the truth to what happened to your son so when you give the information to the doctor we'll try to save your son's life.
7	A3015	SGT MASON: I need to know what happened the morning he was brought to the hospital, okay? Because his head was bumped that morning too. I need to know what happened, okay? What's going to happen if my phone rings right now and it's the doctors from Albany Medical Center and they say Sergeant Mason, I've got bad news Matthew did not make it. What's going to happen? I'm going to say damn we were so close to finding out what happened to this child all right, and you're procrastinating, you're putting it off you're putting it off because you're afraid. You ain't got to be afraid any more man, all right. You ain't got to be afraid. Think about your four month old baby laying in the hospital.
8	A3065	SGT MASON: These doctors are geniuses man. They have

		the ability to keep your son alive, do you realize that? Do you want your son to be alive? MR. THOMAS: Yeah. SGT MASON: Are you going to help keep him alive? MR. THOMAS: Yeah.
9	A3067	SGT MASON: What the doctors need to know, all right, because they're trying to run these tests on your son and they're trying to work on your son and keep him alive, all right. So if he wasn't having problems breathing the doctors need to know that. I need to get back to him because time is very important.
10	A3069	SGT MASON: I don't want to walk around in circles with you, I just want the truth. MR. THOMAS: I'm telling you the truth man. SGT MASON: These doctors are pushing us. These doctors are pushing us. you've [sic] got to find out what's going on, you got to get back to me as soon as possible, I need this information to try and save this baby.
11	A3091 – A3092	SGT MASON: Maybe it was like affects [sic] from an injury at 9:30 at night and maybe he started having the effects the next morning? Do you think something like that is possible? Because if that's possible, then that's something I need to know. The doctors need to know that because then you could be dealing with two separate injuries here and that's something the doctors need to know about because they can't focus on one injury because there's two injuries. MR. THPMAS: I can't see myself doing something like that. SGT MASON: You know what you did something. You did something and you caused the injury to your son Matthew and he's lying in bed right now, all right with bleeding on his brain. So, if you did it the night before I need to know that because that's something the doctors need to know, all right. I know you can't see yourself doing it, but you know what you've been having a tough time at home, all right, stress, you know, caring for babies, getting mouthed by your mother-in-law, you know, it's not an abnormal thing for you to be a little bit careless sometimes you know when your son, it's going to happen you know. The important thing is that he's alive right now and every bit of information you can tell me about this is going to contribute to keeping him alive.

12	A3093 – A3094	SGT MASON: All right, I'm not trying to hurt you right now. I know there's something else you got to tell me. You've got to tell me, it's important for your son's life, man. You got to search inside your head and try to get it out. You want your son to live? MR. THOMAS: Yeah, man. I want my son to live. SGT MASON: What's easier to deal with, all right, a year from now, all right, is it going to be easy for you deal with man, last year I hurt my son real bad, but he's still alive. That's going to be difficult to deal with but you can deal with that. And a year from now when you've to tell somebody yeah man, I hurt my son real bad and I killed him; is that going to be easy to deal with? How are you going to deal with that man? MR. THOMAS: I can't deal with that. SGT MASON: So let's make sure it don't get to that point. Let's make sure it don't get to that point. Let's do what we can to keep him alive. I need to know what do you want to tell me Adrian?
13	A3107	SGT MASON: [Y]our number one concern right now is Matthew and doing what you can do, all right, providing the people with the necessary information to keep him alive. . . . Let's focus on Matthew right now and getting him better, all right.
14	A3108 - A3109	SGT MASON: I just went in there and I called the doctors again to give that updated information so hopefully they could use that to try to keep Matthew alive to save his life.

COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

-Against- APL-2012-00306

ADRIAN THOMAS, AFFIRMATION OF SERVICE

Defendant-Appellant.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CHRISTOPHER M. FERGUSON, an attorney duly admitted to practice before the Courts of New York State, hereby affirms under the penalties of perjury:

On November 21, 2013, I served the within notice of motion, motion for leave to file amicus brief, amicus brief and appendices by mail upon:

Hon. Richard F. McNally, Jr.
District Attorney, Rensselaer Co.
Rensselaer County Courthouse
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Troy, New York 12180
Attorney for Respondent

- and -

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by causing a true and correct copy of same to be deposited in a postage-paid Federal Express wrapper for overnight delivery, addressed to the person designated above, and by causing same to be deposited in an official depository under the exclusive custody and care of the Federal Express Service.

CHRISTOPHER M. FERGUSON