Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

ADRIAN THOMAS,
Defendant-Appellant;

&

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

- against -

PAUL AVENI,
Defendant-Respondent.

BRIEF FOR THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS AMICUS CURIAE

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BRIEF FOR AMICUS CURIAE
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

Pursuant to Rule 500.23 of the Rules of this Court, the District Attorneys Association of the State of New York ("DAASNY") submits this brief as amicus curiae in the above-captioned appeals.

By permission of the Honorable Robert S. Smith, granted on October 23, 2012, defendant Adrian Thomas appeals from a March 22, 2012 order of the Appellate Division, Third Department (*People v. Thomas*, 93 A.D.3d 1019), which affirmed a November 12, 2009 judgment of the Rensselaer County Court (Andrew G. Ceresia, J.). By that judgment, Thomas was convicted, after a jury trial, of Murder in the Second Degree, and sentenced to an indeterminate state prison term of 25 years to life.

By permission of the Honorable Eugene F. Pigott, Jr., granted on February 20, 2013, the People appeal from an October 17, 2012 order of the Appellate Division, Second Department (*People v. Aveni*, 100 A.D.3d 228), which modified a September 7, 2010 judgment of the Westchester County Supreme Court (Richard Molea, J., on suppression proceedings; Susan Cacace, J., at trial and sentencing), convicting defendant Paul Aveni of Burglary in the Second Degree, Criminally Negligent Homicide, Criminal Injection of a Narcotic Drug, Criminal Contempt in the First Degree and Criminal Possession of a Controlled Substance in the Seventh Degree, by suppressing defendant Paul Aveni's statements made to law enforcement officials and vacating his convictions on all but the contempt count.

INTEREST OF AMICUS CURIAE

DAASNY is a statewide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. In their capacity as public officers charged with enforcing the laws of New York State, DAASNY members are agents of the Executive branch of government and are expected to work proactively with other law enforcement agencies, most notably police departments, in investigating crimes and prosecuting criminal offenders. One very significant aspect of investigation is the questioning of witnesses and suspected offenders in pursuit of truthful information that will assist in solving crimes and bringing offenders to justice – and naturally, the interrogation of suspects has led to a robust body of law governing when an

admission obtained as a result may be admitted at trial against the suspect. DAASNY members' experience on issues relating to the conduct of interrogations and the litigation of claims concerning those interrogations places DAASNY in a position to assist this Court's resolution of an issue of statewide concern raised by these appeals, not only in the parties' express arguments but also by implication: whether and when the use of deception in questioning a suspect about a crime renders a statement flowing from that questioning involuntary and therefore inadmissible.

INTRODUCTION

Both of the captioned appeals present the question of whether and to what extent the police may use deception as a tool to encourage an admission from a suspect who has voluntarily waived his Fifth Amendment right to remain silent and has agreed to speak to the police.

In *People v. Thomas*, defendant Thomas was convicted of depraved murder of a child for killing his four-month-old son, whose death was caused primarily by "subdural hematomas on both sides of his brain consistent with severe head trauma resulting from rapid acceleration and then sudden deceleration of the head" (93 A.D.3d at 1020). The statement at issue was Thomas's admission to the police that he had thrown his son forcefully downward in a manner that could have caused those injuries. The police obtained this statement from Thomas, after he voluntarily waived his right to remain silent and agreed to speak with them, in the course of an interrogation during which they lied to Thomas about the likelihood of his infant

son's survival. Specifically, although the police truthfully informed Thomas that his son was likely to die, they lied by suggesting that doctors might still be able to save the baby if Thomas explained how he was injured; the doctors in fact expected that the baby would not survive under any circumstances.

The trial court denied suppression of Thomas's admission, finding it voluntary. The Appellate Division, Third Department affirmed the trial court's denial of suppression. That ruling was correct. The United States Supreme Court, this Court and the courts of every state have long recognized that the voluntariness of statements is best determined by considering the "totality of the circumstances," and that deception used by the police during an interrogation is just one of those circumstances to be weighed among them all. In affirming the order denying suppression, the Appellate Division did no more than recognize those well-settled principles. Nonetheless, Thomas maintains on this appeal that suppression was required, arguing among other things that this is so "without regard to the totality of the circumstances" (TB: 163).

In *People v. Aveni*, defendant Aveni was convicted of criminally negligent homicide for injecting his girlfriend with heroin, leading to her death by overdose. The statement at issue was Aveni's admission to the police that he had injected her with heroin. As in Thomas's case, the police had obtained this statement from Aveni after he voluntarily waived his right to remain silent and agreed to speak to them. During Aveni's interrogation, the police lied to Aveni by telling him that his girlfriend

– who had already died – was still alive, and might be harmed by the doctors who were treating her if Aveni misinformed the police about what she had ingested.

The trial court found Aveni's admission voluntary and denied suppression. However, the Appellate Division, Second Department, found the use of deception impermissible on the ground that it was coupled with the police "implicitly threatening [Aveni] with a homicide charge if he remained silent" (100 A.D.3d 228), and it reversed the hearing court's denial of suppression. The Appellate Division reversal was incorrect. By rejecting the trial court's denial of suppression, the Appellate Division effectively found the use of deception during the course of the interview retroactively fatal to Aveni's ability to waive his rights in the first place – and to make what was, in fact, a voluntary statement. Such an absolute rule runs afoul of the standing principle that the totality of the circumstances must be considered, the result in each case turning on its own merits.

Amicus thus joins in the Rensselaer County District Attorney's request for an order affirming the Appellate Division, Third Department's decision in *People v. Thomas*, and in the Westchester County District Attorney's request for an order reversing the Appellate Division, Second Department's decision in *People v. Aveni*. In particular, Amicus urges the Court not to depart from the current standard, under which deception used by law enforcement during questioning is simply one factor among the totality of circumstances that must inform a trial court's determination of the voluntariness of a statement.

QUESTION PRESENTED

When a police officer lies to a suspect in custody who is being questioned about a crime, does that deception automatically render any ensuing statement inadmissible, or should courts in New York continue to apply the "totality of the circumstances" standard that has prevailed in every state and federal court for decades? The answer is crucially important to law enforcement: the use of deception as an investigative tool is sometimes desirable and rarely fatal to a finding of voluntariness of a statement made with the benefit of *Miranda* warnings. Thus, deception must continue to be considered simply as one factor among many that are relevant to the totality of the circumstances from which voluntariness is determined.

POINT

DURING AN INTERROGATION AFTER A VALID *MIRANDA* WAIVER, SOME POLICE DECEPTION CAN BE AN APPROPRIATE INVESTIGATIVE TOOL. COURTS SHOULD CONTINUE TO LOOK TO THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE WHETHER A STATEMENT IS VOLUNTARY, AND A STATEMENT SHOULD NOT BE "DEEMED" INVOLUNTARY ON THE BASIS OF DECEPTIVE POLICE CONDUCT THAT DID NOT COERCE IT.

The two captioned cases share a common concern, the resolution of which is of paramount importance to law enforcement: where a suspect who has been informed of his *Miranda* rights waives those rights and agrees to talk to the police, how should the use of deception by police officers during the ensuing questioning affect the admissibility of a statement that the suspect chooses to make? The two trial judges in these cases recognized and applied the established principle that such deception is merely one factor among the totality of circumstances affecting the voluntariness of the statement, and both judges concluded – consistently with precedent from this state and every other – that the admissions at issue were voluntary. Yet even though both trial judges applied the same universal test and reached the same uncontroversial result, the ruling in *People v. Thomas* was affirmed by the Appellate Division, while the ruling in *People v. Aveni* was reversed. Because both trial judges were correct, this Court should affirm in *People v. Thomas* and reverse in *People v. Aveni*. This Court should also take the opportunity to reaffirm the universal

principle that the voluntariness of admissions should continue to be governed by the totality of circumstances test, and that the use of deception by the police is but one factor in the voluntariness calculus.

A.

The United States Supreme Court has long held that due process, as applied to the states under the Fourteenth Amendment, restricts the evidentiary use of admissions obtained by police interrogation to those statements that are "voluntary." *Culombe v. Connecticut*, 367 U.S. 568, 587 (1961); *see Arizona v. Fulminante*, 499 U.S. 279 (1991). The determination of voluntariness "is drawn from the totality of the relevant circumstances of a particular situation" surrounding the making of the statement. *Culombe v. Connecticut*, 367 U.S. at 606. Some relevant circumstances include the declarant's age, his education, his intelligence, whether he was informed of and waived his Fifth Amendment right not to incriminate himself, the length of detention, the nature of the questioning, and physical concerns such as the deprivation of food or sleep. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). No involuntariness should be found simply because the police by one means or another manage to persuade a guilty defendant to make "a declaration naturally born of remorse, or relief, or desperation, or calculation." *Culombe v. Connecticut*, 367 U.S. at 576. A defendant's statement will be deemed involuntary only if, considering all the relevant

circumstances, "his will has been overborne and his capacity for self-determination critically impaired." *Culombe v. Connecticut*, 367 U.S. at 602.[1]

In particular, the provision of what have come to be called the "*Miranda* warnings" explaining the Fifth Amendment right to remain silent is highly relevant to a voluntariness inquiry. *See Dickerson v. United States*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 386 U.S. 436 (1966).[2] The Supreme Court's very intent in implementing the

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[1] Similarly to the federal Constitution, New York's Constitution guarantees that "[n]o person shall be … compelled in any criminal case to be a witness against himself or herself." N.Y. Const. Art. I, § 6. To pass federal muster, for a statement to be admissible at a defendant's criminal trial, the prosecution must prove the statement's voluntary nature at a pre-trial hearing only by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489 (1972). States are of course free to require a more exacting standard of admissibility, but most states follow *Lego v. Twomey*'s example and require only a preponderance of the evidence. *See*, *e.g.*, *State v. Johnson*, 304 N.C. 680, 684-685 (1982) (embracing the preponderance standard and collecting cases from sister states). New York, however, requires much more: here, the voluntariness of a statement must be proved beyond a reasonable doubt, and not only to the judge at a pre-trial suppression hearing, *see People v. Huntley*, 15 N.Y.2d 72, 78 (1965), but, upon a defendant's request, also to his trial jury, CPL 710.70(3).

[2] *Miranda* warnings are required by the Fifth Amendment right not to incriminate oneself, not by the Fourteenth Amendment's due process mandate, and therefore the question of whether the warnings were validly given is not dispositive of a voluntariness inquiry. Indeed, a failure to warn when required is not even always dispositive under the Fifth Amendment, provided that there is an adequate excuse for the failure and that the statement is voluntary. *See*, *e.g.*, *New York v. Quarles*, 467 U.S. 649, 655 (1984) ("We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence"). And, even without proper warnings or a valid excuse for failing to provide them, a statement may still be admissible for cross-examination so long as it is voluntary. *Harris v. New York*, 401 U.S. 222, 224 (1971) ("*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards"). In other words, the giving of *Miranda* warnings, required

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Miranda requirements was to reduce the potentially coercive effect of custodial interrogations. *Miranda v. Arizona*, 384 U.S. at 467-473. Specifically, the Court found it imperative that an individual in police custody be advised, before being interrogated, of his right to remain silent, of the fact that anything he says can and will be used against him, of his right to an attorney, and of his right to have an attorney provided to him free of charge if he cannot afford one. As the Supreme Court explained, when such warnings are given, a suspect will know that he is not required to speak at all and that the police know it, too. He will know that what he says may be used as evidence against him, and that the police do not have his best interests at heart. He will know that he will not be badgered until he talks, that he can stop talking at any time, and that he can have access to a lawyer if he wants one, even if he cannot afford one. *Id.* Thus, the provision of *Miranda* warnings and the obtaining of a valid waiver of the *Miranda* rights are very strong indicators of voluntariness. *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20 (1984) ("cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare").

In accord with federal law, New York prohibits by statute the evidentiary use of any statement that is "involuntarily made." CPL 60.45(1). A statement to the

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by the Fifth Amendment and *Miranda v. Arizona* for the admissibility of most custodial statements, also just happens to be one of the more important circumstances underlying due process voluntariness.

police is "involuntarily made" when it is obtained by a "promise or statement" that "creates a substantial risk that the defendant might falsely incriminate himself," CPL 60.45(2)(b)(i), or "in violation of such rights as the defendant may derive from the constitution of this state or of the United States," CPL 60.45(2)(b)(ii).[3]

This Court, citing federal precedent in considering the voluntariness of a statement made to law enforcement, has held that the federal "totality of circumstances" standard governs New York's codification of the due process voluntariness requirement. *People v. Anderson*, 42 N.Y.2d 35, 37-38 (1977); *see* CPL 60.45(2); *see also People v. McQueen*, 18 N.Y.2d 337, 344 (1966) ("We have endeavored to adapt our State procedures in such matters as nearly as may be to the Federal practice"). Every other state espouses the "totality of circumstances" standard as well.[4]

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[3] In addition, a statement to *anyone* is "involuntarily made" if extracted by physical coercion or "any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement." CPL 60.45(2)(a). Of course, this latter requirement contemplates conduct even more coercive than what would already be enough to amount to coercion by law enforcement under subdivision (b)'s codification of the federal standard, and applies even to statements obtained by private citizens – a protection not afforded by federal law, *see Colorado v. Connelly*, 479 U.S. 157, 166-167 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause").

[4] *See*, *e.g.*, *Ex parte Jackson*, 836 So. 2d 979, 982-983 (Ala. 2002); *Sovalik v. State*, 612 P.2d 1003, 1007 (Alaska 1980); *State v. Boggs*, 180 P.3d 392, 404 (Ariz. 2008); *Grillot v. State*, 107 S.W.3d 136, 144-145 (Ark. 2003); *People v. Smith*, 150 P.3d 1224, 1241-1242 (Cal. 2007); *State v. Klinck*, 259 P.3d 489, 495 (Colo. 2011); *State v. Lawrence*, 920 A.2d 236, 246, 259 (Conn. 2007); *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986); *In*
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In applying that universal standard, the United States Supreme Court has characterized the use of deception as a "relevant" but not dispositive factor in a voluntariness determination. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented" the strength of the evidence "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible").[5] After all,

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re D. A. S., 391 A.2d 255, 258-259 (D.C. 1978); *Martin v. State*, 107 So. 3d 281, 298 (Fla. 2012); *Riley v. State*, 226 S.E.2d 922, 926 (Ga. 1976); *State v. Kelekolio*, 849 P.2d 58, 69-70 (Haw. 1993); *State v. Bentley*, 975 P.2d 785, 788 (Idaho 1999); *People v. Melock*, 599 N.E.2d 941, 952-953 (Ill. 1992); *Luckhart v. State*, 736 N.E.2d 227, 229-230 (Ind. 2000); *State v. Oliver*, 341 N.W.2d 25, 28-29 (Iowa 1983); *State v. Randolph*, 301 P.3d 300, 309-310 (Kan. 2013); *Springer v. Commonwealth*, 998 S.W.2d 439, 447 (Ky. 1999); *State v. Holmes*, 5 So. 3d 42, 73-74 (La. 2008); *State v. Nightingale*, 58 A.3d 1057, 1068-1070 (Me. 2012); *State v. Tolbert*, 850 A.2d 1192, 1203 (Md. 2004); *Commonwealth v. Selby*, 651 N.E.2d 843, 848-849 (Mass. 1995); *People v. Cipriano*, 429 N.W.2d 781, 790 (Mich. 1988); *State v. Thaggard*, 527 N.W.2d 804, 808 (Minn. 1995); *Davis v. State*, 551 So. 2d 165, 169 (Miss. 1989); *State v. Flowers*, 592 S.W.2d 167, 168-169 (Mo. 1979); *State v. Davison*, 614 P.2d 489, 493 (Mont. 1980); *State v. Prim*, 267 N.W.2d 193, 195 (Neb. 1978); *Sheriff, Washoe County v. Bessey*, 914 P.2d 618, 619-622 (Nev. 1996); *State v. Portigue*, 481 A.2d 534, 541-542 (N.H. 1984); *State v. Cooper*, 700 A.2d 306, 319-320 (N.J. 1997); *State v. Evans*, 210 P.3d 216, 224-226 (N.M. 2009); *People v. Anderson*, 42 N.Y.2d 35, 37-38 (1977); *State v. Jackson*, 304 S.E.2d 134, 148 (N.C. 1983); *State v. Murray*, 510 N.W.2d 107, 111 (N.D. 1994); *State v. Wiles*, 571 N.E.2d 97, 112 (Ohio 1991); *Johnson v. State*, 272 P.3d 720, 727 (Okla. Crim. App. 2012); *State v. Foster*, 739 P.2d 1032, 1038-1039 (Or. 1987); *Commonwealth v. Jones*, 322 A.2d 119, 124-126 (Pa. 1974); *State v. Marini*, 638 A.2d 507, 513 (R.I. 1994); *State v. Von Dohlen*, 471 S.E.2d 689, 694-695 (S.C. 1996); *State v. Wright*, 679 N.W.2d 466, 468-469 (S.D. 2004); *State v. Climer*, 400 S.W.3d 537 (Tenn. 2013); *Green v. State*, 934 S.W.2d 92, 99-101 (Tex. Crim. App. 1996); *State v. Galli*, 967 P.2d 930, 936 (Utah 1998); *State v. Bacon*, 658 A.2d 54 (Vt. 1995); *Jackson v. Commonwealth*, 590 S.E.2d 520, 527 (Va. 2004); *State v. Braun*, 509 P.2d 742, 745-746 (Wash. 1973); *State v. Jones*, 640 S.E.2d 564 (W. Va. 2006); *State v. Ward*, 767 N.W.2d 236, 246 (Wis. 2009); *Siler v. State*, 115 P.3d 14, 26 (Wyo. 2005).

[5] Of course, deception should not be used to dupe a suspect into waiving his right to remain silent in the first place; that would clearly amount to a Fifth Amendment violation, (Continued…)

apart from the fact that the totality of the circumstances may indicate that a statement is voluntary notwithstanding the possible negative effect of a deceptive police stratagem, some deception does not even implicate coercion in the first place. *See*, *e.g.*, *Illinois v. Perkins*, 496 U.S. 292, 297-298 (1990) (noting that "mere strategic deception" or "[p]loys to mislead a suspect or lull him into a false sense of security" do not necessarily "rise to the level of compulsion or coercion to speak").

Courts in every state – more often than not citing *Frazier v. Cupp* – have likewise declined to hold that the use of deception, trickery or ruses during interrogations will automatically render any ensuing statements involuntary.[6] In other

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regardless of whether any later statements were voluntarily made. *See*, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("the relinquishment of the right [to remain silent] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception").

[6] *Ex parte Jackson*, 836 So. 2d 979, 982-983 (Ala. 2002); *Sovalik v. State*, 612 P.2d 1003, 1007 (Alaska 1980); *State v. Carrillo*, 750 P.2d 883, 893-894 (Ariz. 1988); *Goodwin v. State*, 281 S.W.3d 258, 265-267 (Ark. 2008); *People v. Smith*, 150 P.3d 1224, 1241-1242 (Cal. 2007); *State v. Klinck*, 259 P.3d 489, 495 (Colo. 2011); *State v. Lawrence*, 920 A.2d 236, 259 (2007); *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986); *In re D. A. S.*, 391 A.2d 255, 258-259 (D.C. 1978); *Martin v. State*, 107 So. 3d 281, 298 (Fla. 2012); *Moore v. State*, 199 S.E.2d 243, 244 (Ga. 1973); *State v. Kelekolio*, 849 P.2d 58, 69-70 (Haw. 1993); *State v. Bentley*, 975 P.2d 785, 788 (Idaho 1999); *People v. Melock*, 599 N.E.2d 941, 952-953 (Ill. 1992); *Luckhart v. State*, 736 N.E.2d 227, 229-230 (Ind. 2000); *State v. Oliver*, 341 N.W.2d 25, 28-29 (Iowa 1983); *State v. Randolph*, 301 P.3d 300, 309-310 (Kan. 2013); *Springer v. Commonwealth*, 998 S.W.2d 439, 447 (Ky. 1999); *State v. Holmes*, 5 So. 3d 42, 73-74 (La. 2008); *State v. Nightingale*, 58 A.3d 1057, 1068-1070 (Me. 2012); *Lewis v. State*, 404 A.2d 1073, 1081-1082 (Md. 1979) (*dicta*); *Commonwealth v. Selby*, 651 N.E.2d 843, 848-849 (Mass. 1995); *People v. Fundaro*, 2012 Mich. App. LEXIS 186, 9-13 (Ct. App.), *lv. denied*, 815 N.W.2d 445 (Mich. 2012); *State v. Thaggard*, 527 N.W.2d 804, 810 (Minn. 1995); *Davis v. State*, 551 So. 2d 165, 169
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words, courts universally consider police deception as just one of the many circumstances relevant to the voluntariness inquiry. Indeed, as this Court noted in describing the standard, it would be "undesirable to prescribe inflexible and all-inclusive limitations in advance to guide interrogating law enforcement officers on all occasions." *Anderson*, 42 N.Y.2d at 38. Thus, it would be wrong to conclude that a statement should be excluded on the basis of one aspect of the interrogation where the totality of the circumstances indicates that the statement was voluntarily made.

Indeed, there may be times when deception is a desirable investigative tool. After all, it is a legitimate and laudable goal of law enforcement to interrogate suspects and to persuade the guilty ones to confess. *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) ("Voluntary confessions are not merely a proper element in law enforcement,

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(Miss. 1989); *State v. Flowers*, 592 S.W.2d 167, 168-169 (Mo. 1979); *State v. Phelps*, 696 P.2d 447, 452 (Mont. 1985); *State v. Nissen*, 560 N.W.2d 157, 169-170 (Neb. 1997); *Sheriff, Washoe County v. Bessey*, 914 P.2d 618, 619-622 (Nev. 1996); *State v. Wood*, 519 A.2d 277, 279 (N.H. 1986); *State v. Cooper*, 700 A.2d 306, 319-320 (N.J. 1997); *State v. Evans*, 210 P.3d 216, 224-226 (N.M. 2009); *State v. Jackson*, 304 S.E.2d 134, 148 (N.C. 1983); *State v. Murray*, 510 N.W.2d 107, 113-114 (N.D. 1994); *State v. Wiles*, 571 N.E.2d 97, 112 (Ohio 1991); *Pierce v. State*, 878 P.2d 369, 372 (Okla. Crim. App. 1994); *State v. Quinn*, 623 P.2d 630, 639 (Or. 1981); *Commonwealth v. Jones*, 322 A.2d 119, 126 (Pa. 1974); *State v. Marini*, 638 A.2d 507, 513 (R.I. 1994); *State v. Von Dohlen*, 471 S.E.2d 689, 694-695 (S.C. 1996); *State v. Wright*, 679 N.W.2d 466, 468-469 (S.D. 2004); *McGee v. State*, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969); *Wilson v. State*, 311 S.W.3d 452, 461-463 (Tex. Crim. App. 2010); *State v. Galli*, 967 P.2d 930, 936 (Utah 1998); *State v. Bacon*, 658 A.2d 54 (Vt. 1995); *Rodgers v. Commonwealth*, 318 S.E.2d 298, 304 (Va. 1984); *State v. Braun*, 509 P.2d 742, 745-746 (Wash. 1973); *State v. Worley*, 369 S.E.2d 706, 717 (W. Va. 1988); *State v. Ward*, 767 N.W.2d 236, 246 (Wis. 2009); *Garcia v. State*, 777 P.2d 603, 606 (Wyo. 1989).

they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law) (internal citations and quotations omitted); *Moran v. Burbine*, 475 U.S. 412, 426 (1986) ("Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law") (internal citations and quotations omitted); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable") (internal citations and quotations omitted); *United States v. Washington*, 431 U.S. 181, 187 (1977) (same).

Strategic deception can have some persuasive value, and most courts agree that deception should not be categorically banned as an investigative tool. *See*, *e.g.*, *Sherman v. United States*, 356 U.S. 369, 372 (1958) ("criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer"); *United States v. Byram*, 145 F.3d 405, 408 (1st Cir. 1998) ("some types of police trickery can entail coercion" but "trickery is not automatically coercion"); *United States v. Khoury*, 901 F.2d 948, 970 (11th Cir. 1990) ("falsifications, in certain circumstances, may be a necessary investigative method"), *modified on other grounds*, 910 F.2d 713 (11th Cir. 1990); *State v. Tapia*, 767 P.2d 5, 11 (Ariz. 1988) ("because of the nature of law enforcement, courts will tolerate some form of police gamesmanship"); *State v. Carrillo*, 750 P.2d 883, 894 (Ariz. 1988) ("The very nature of law enforcement encourages police to use some artifice and trickery in their work. … The police are not forbidden to outsmart – they

are forbidden to compel"); *People v. Matheny*, 46 P.3d 453, 467-468 (Colo. 2002) ("persuasion is not coercion"); *State v. Lapointe*, 678 A.2d 942, 961 (Conn. 1996) ("statements by the police designed to lead a suspect to believe that the case against him is strong are common investigative techniques and would rarely, if ever" render confession involuntary); *State v. Ritter*, 485 S.E.2d 492, 494-495 (Ga. 1997) (recognizing that in some circumstances "artifice, tricks or deception may be utilized in interrogating individuals"); *State v. Kelekolio*, 849 P.2d 58, 73 (1993) (articulating "a rule by which to measure the legitimacy of the use of 'deception' by the police in eliciting confessions"); *State v. Bentley*, 975 P.2d 785, 788 (Idaho 1999) ("the use of trickery and subterfuge by police has been approved in a number of circumstances"); *State v. Randolph*, 301 P.3d 300, 309-310 (Kan. 2013) ("this court has repeatedly declined to find it to be an inherently impermissible interrogation technique for a law enforcement officer to make a false claim that there was evidence implicating a suspect in a crime"); *State v. Carey*, 417 A.2d 979, 981 (Me. 1980) (recognizing "the practical necessity for the use of deception in criminal investigations"); *Lewis v. State*, 404 A.2d 1073, 1082 (Md. 1979) ("A degree of police deception to obtain a confession is tolerated"); *Sheriff, Washoe County v. Bessey*, 914 P.2d 618, 621-622 (Nev. 1996) ("many common police tactics" properly "involve deception"); *Darity v. State*, 220 P.3d 731, 735 (Okla. Crim. App. 2009) ("nothing in the Oklahoma Statutes or Constitution requires that police always deal truthfully with the targets of criminal investigations"); *Commonwealth v. Baity*, 237 A.2d 172, 177 (Pa. 1968) ("a trick which

has no tendency to produce a false confession is a permissible weapon in the interrogator's arsenal"); *State v. Marini*, 638 A.2d 507, 513 (R.I. 1994) ("law enforcement officers may inform a suspect, truthfully or otherwise, of the evidence against him"); *State v. Von Dohlen*, 471 S.E.2d 689, 695 (S. Car. 1996) ("It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect"); *State v. Stanga*, 617 N.W.2d 486, 491 (S. Dak. 2000 ("trickery is sometimes a legitimate interrogation technique."); *State v. Owens*, 643 N.W.2d 735, 750 (S. Dak. 2002) ("the police may use psychological tactics in interrogating a suspect").

All of this is not to say that courts must endorse the use of deception. But the typical deceptive interrogation stratagem should not be presumed to be coercive. The identification of a deceptive stratagem should be seen as the starting point of an inquiry into the totality of the circumstances, not the end of it – not all deception is coercive, and even the inappropriate use of deception comprises only one coercive circumstance among the many that relate to voluntariness. Trial judges are well equipped to make these inquiries, to find those police practices that are inappropriately deceptive to be a negative component in the weighing of the totality of the circumstances, and to make rulings that the appellate courts can review.

In accord with all the above principles, this Court has approved admission of statements because they were voluntary under all the circumstances even though obtained in part through the use of police deception. *People v. Tarsia*, 50 N.Y.2d 1, 11 (1980) ("there was at least some measure of guile employed by the police," but "such

stratagems need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process"); *People v. Pereira*, 26 N.Y.2d 265, 268-269 (1970) ("the law is well settled that in the absence of [a promise or threat] mere deception is not enough" to establish involuntariness); *People v. Boone*, 22 N.Y.2d 476, 483 (1968) ("deception alone, in the absence of any threat or promise of immunity, is not enough to render a confession involuntary"); *McQueen*, 18 N.Y.2d at 346 ("mere deception is not enough").

A brief review of these precedents is helpful. In *People v. McQueen*, McQueen stabbed a man outside a bar and then returned to her home. The man died, and within three hours, detectives questioned McQueen. A detective told McQueen "that she might as well admit what she had done inasmuch as otherwise the victim, who she had not been told had died, would be likely to identify her." McQueen admitted the stabbing and was convicted of murder. This Court found the confession voluntary; no promise or threat had been made to compel McQueen to talk, and "in the absence of such factors mere deception is not enough." 18 N.Y.2d at 346.

In *People v. Boone*, Boone and Brandon had committed a murder together. "Brandon was falsely told that Boone had confessed and had accused Brandon of being the killer. But, deception alone, in the absence of any threat or promise of immunity, is not enough to render a confession involuntary." 22 N.Y.2d at 483. This Court recognized that deception coupled with other factors might have permitted an inference of voluntariness or involuntariness, but it held that where such competing

inferences might be supported by the record, "the choice of inferences was for the Trial Judge." Thus, the Court affirmed the trial judge's denial of suppression. *Id.*

In *People v. Tarsia*, detectives were investigating Tarsia for attempted murder for shooting his wife. The detectives read him *Miranda* warnings, and Tarsia waived his rights and agreed to speak to them. During the ensuing interview, detectives told Tarsia that they were interested in the less serious transgression of a "possible violation of shooting." 50 N.Y.2d 1, 11. Although this deliberate understatement involved "at least some measure of guile" by the police, this Court explained that "such stratagems need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process." *Id.* The police also obtained Tarsia's consent to take a "voice stress test" which they said would aid in assessing his honesty. Upon obtaining the results, an investigator remarked "provocatively" that it "looks like you have a serious problem here; it doesn't look good from this particular test" and "it makes me have my doubts." *Id.* at 12. This, too was an acceptable stratagem, because the police did not go so far as to tell Tarsia that the test was infallible or that its results could be used against him in court. *Id.*

Thus, while considering the deception at issue in *Tarsia*, this Court recognized that courts must examine the circumstances with "a discerning eye to tell those that are fundamentally unfair from those which are no more than permissible instances in which the police have played the role of 'midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation.'" *Tarsia*, 50 N.Y.2d at 10 (quoting

Culombe v. Connecticut, 367 U.S. at 576). In this way, courts should seek to honor "the spirit of the constitutional protections, tempered always by the particular circumstances of each case." *Tarsia*, 50 N.Y.2d at 10.

With regard to respecting the "spirit" of the constitutional right not to have one's involuntary statements used against him, the most significant circumstance weighing in favor of voluntariness – identified in *Anderson* and applied in *Tarsia* – is whether a suspect was given *Miranda* warnings, and if so, whether he still chose to speak to the police. *Anderson*, 42 N.Y.2d at 37-38 (listing voluntariness factors); *Tarsia*, 50 N.Y.2d at 12 (noting that *Miranda* warnings were given). Where a suspect has adequately been informed of his rights and agrees nonetheless to be interrogated, as noted, it will be "rare" for a resulting statement to be involuntary, *Berkemer v. McCarty*, 468 U.S. at 433 n. 20. This makes sense, because a statement given with full knowledge of one's constitutional right not to make it is precisely the sort that will be "naturally born of remorse, or relief, or desperation, or calculation" as opposed to coercion. *Tarsia*, 50 N.Y.2d at 10.

In the end, although it is rarely in a suspect's penal interest to confess, society recognizes the need for the police to try to obtain confessions. As noted, it should not disturb the collective conscience that courts condone "some measure of guile" by the police in conducting interrogations, given that the criminals being interrogated are often themselves employing deception to further their own ends. But the greater lesson to be drawn from the Supreme Court's holdings, this Court's own precedent,

and the persuasive power of all the other states, is that police deception – regardless of whether it is approved or discouraged as a matter of policy or in a single case – should not be the basis of a new exclusionary rule. Instead, as with any circumstance affecting the voluntariness calculus, trial courts should consider any deceptive conduct as just one circumstance among the totality of circumstances that determine whether a defendant's will was so overborne that his statement was coerced.

B.

In both *Thomas* and *Aveni*, the trial judges made factual findings and applied the correct law and concluded that the statements at issue were voluntary. Both those determinations were correct and should have been affirmed by the respective Appellate Divisions. The record is detailed more fully in the parties' briefs. Here, for the Court's convenience, we briefly summarize the record pertaining to Thomas's and Aveni's statements. We then explain why, giving due consideration to the legal principles discussed above, both trial judges correctly denied suppression. Accordingly, the Appellate Division decision upholding the denial of suppression in *Thomas* should be affirmed, and the decision reversing the denial of suppression in *Aveni* should be reversed.

1. Adrian Thomas's Statements

On the morning of September 21, 2008, Wilhelmina Hicks and defendant Adrian Thomas of Troy, New York, found their baby, four-month-old Matthew Thomas, non-responsive. They called an ambulance, and Matthew was rushed to

nearby Samaritan Hospital. He was near death when he arrived at the emergency room. That evening, Troy Police Sergeant Adam Mason and Detective Ronald Fountain went to Thomas's home with Child Protective Services to relocate Thomas's and Hicks's six other children – ranging in age from 9 years old down to Matthew's 4-month-old twin – while they investigated Matthew's injuries. They spoke to Thomas and the other children for about an hour and then took the children and left Thomas alone at home. Thomas did not make any incriminating admissions during this time (Thomas, A: 253-257).

One of several doctors who examined Matthew over the course of the day concluded – incorrectly, as it turned out – that Matthew had a skull fracture and had been brutally assaulted. The doctor's description led the officers to believe that the injury had to have been caused by an adult, because none of Matthew's older siblings would have had sufficient strength to cause it (Thomas, A: 382, 458). Around midnight, Sergeant Mason and Detective Fountain returned to Thomas's home and asked Thomas whether he would be willing to accompany them to the police station to speak with them (Thomas, A: 257). Thomas agreed, and the officers drove him to the police station in an unmarked car with no protective screen between the front and back seats. Thomas was not frisked, handcuffed or otherwise restrained (Thomas, A: 257-258).

Upon arriving at the police station, Sergeant Mason and Detective Fountain showed Thomas to an interview room on the third floor (Thomas, A: 258). The

room had a desk and three chairs, and it was equipped with a video camera; the interview was recorded (Thomas, People's Exh. 5). At the outset, although the detectives told Thomas that he was not under arrest, they read him *Miranda* warnings and Thomas signed a written waiver (Thomas, A: 259-260). The door was not locked and was at times left ajar, and there was nothing blocking Thomas's access to the door. The officers wore plain clothes, with no visible badges, police insignia, or firearms (Thomas, A: 261-262). Thomas declined offers of food, drink and a restroom break, but he asked for cigarettes and he was permitted to smoke during the interview (Thomas, A: 485). At no time did he request to leave, to stop talking to the police, or to speak with a lawyer or anyone else.

Near the beginning of the interview, Thomas was informed that Matthew's skull was fractured, that he was likely to die within hours, and that he had suffered such severe brain damage that he would never live a normal life even if he were to survive. Thomas professed ignorance of how Matthew could have been hurt in that way, and the officers repeatedly suggested that it could have been an accident but that someone had to have been there when it happened. They told Thomas that if he knew nothing about how his son was injured, then they would have to believe his wife was responsible, because she was the only other person in the house who could have injured him. They also suggested that if neither Thomas nor his wife could explain how Matthew was injured accidentally, then it might appear that one of them had

assaulted him intentionally. Thomas offered to "take the fall" for his wife, but the officers told him that he could not admit to doing something he did not do.

Thomas expressed concern that the police thought he had harmed Matthew intentionally and intended to arrest Thomas for that conduct, and although the police had not suggested specifically that Thomas had thrown Matthew down, Thomas denied having thrown him. The detectives assured Thomas that they did not yet know how Matthew was injured and did not have any reason to believe that Thomas or anyone else had intended to harm the baby. They also assured Thomas that they intended to let Thomas go home immediately after the interview, and that if Matthew had been injured accidentally, then Thomas would not be arrested. Ultimately, Thomas opined that he believed Matthew had indeed been injured on Thomas's watch, but he repeatedly insisted that he had not thrown Matthew or done anything "wrong" or "intentional." Thomas suggested that a week or more before Matthew was taken to the hospital, one of Matthew's siblings "could have" hit Matthew's head with a metal toy, and also that about 10 days before Matthew was taken to the hospital, Thomas had accidentally "smack[ed] his head on the crib." Detective Fountain took a page of notes summarizing Thomas's statement, and Thomas reviewed and signed it (Thomas, A: 14 [first written statement], 262-263).

About two hours had transpired, and Thomas said that he might kill himself if his son were to die, so the police asked him whether he wished to speak to a professional about his feelings. Thomas at first declined, but after some further

discussion, he accepted the detectives' offer to take him to a counselor. Hence, the police ended the questioning and drove Thomas to the Samaritan Hospital Mental Health Unit, where they left him, unguarded, at around 2 a.m. on September 22, 2008.[7] The officers went home for the night (Thomas, A: 263-267).

The next morning, the police continued the investigation by interviewing Matthew's mother and by obtaining updates on Matthew's condition. During this time they learned that his skull was not actually fractured (Thomas, A: 267-268, 273).

Around 5:45 p.m. on September 22nd, about 15 hours after having been taken to the hospital, Thomas was released because doctors did not fear that he was suicidal. Although free to leave, Thomas asked the hospital for permission to remain on site because he expected that the police would return to speak to him. As Thomas had predicted, Sergeant Mason and Sergeant Joseph Centanni met Thomas in the lobby outside the Mental Health Unit. Sergeant Mason asked Thomas whether he would be willing to return to the police station to continue speaking with them. Thomas agreed, and the officers again drove him to the police station unrestrained in an unmarked car (Thomas, A: 268-269).

This interview lasted some 7 hours and was again recorded on videotape (People's Exhs. 6A, 6B, 6C). Thomas was again given *Miranda* warnings, and again he

[7] The officers had reported on some paperwork that Thomas was in "custody," which they had perceived as his status only with respect to being potentially suicidal as they escorted him to the hospital; they did not believe that they had probable cause to arrest him at that point, and they did not believe that they had arrested him (Thomas, A: 492-493).

signed a written waiver. Again, Thomas had not been frisked before coming to the stationhouse, he was not handcuffed or restrained, the officers wore plain clothes and were unarmed, and Thomas had direct access to the unlocked door of the interview room. Again Thomas was offered food, drink and bathroom breaks, declined all three, and was granted his requests for cigarettes. Thomas remained coherent, alert and aware throughout the interview, and he never asked to stop the interview or to speak to a lawyer or to anyone else (Thomas, A: 271-275, 487, 495, 497-499).[8]

During the first hours of this second interview, Sergeant Mason talked with Thomas about how Matthew could have been injured. Mason wanted more information from Thomas because he did not believe that the baby's injuries could have been caused by the actions Thomas had described during the first interview (Thomas, A: 278-279). Mason lied to Thomas by telling him that truthful information about how Matthew was injured might help doctors keep Matthew alive. Matthew was technically still alive, but as Mason knew, Matthew was believed to be "brain dead" and nothing Thomas said would likely enable doctors to save him (Thomas, A: 431, 435, 450-452).

Several times during this interview, Mason told Thomas that he was not yet going to be arrested, but Mason did not offer him lenient treatment in exchange for a

[8] Defendant at one point wondered whether he might need an attorney for an upcoming family court proceeding, but he did not suggest any interest in speaking to one regarding the situation with Matthew (Thomas, A: 453-454).

confession. For example, Thomas at one point asked Mason, "So what's the next step? Will I be criminally prosecuted?"; Mason responded, "I can't promise that's never going to happen, because I don't know what's going to happen, but, you know, it's not going to happen right now." Indeed, Mason did not know from the outset that Thomas would be arrested; he reached that conclusion gradually as the interview progressed and Thomas made further admissions (Thomas, A: 285-287, 465).

After about five hours, Mason wrote out his understanding of what Thomas had told him thus far. Essentially, Thomas backtracked from his previous story about the sibling hurting Matthew with a truck by explaining that he saw the sibling near Matthew and the truck on the floor, but that Thomas then picked Matthew up and dropped Matthew "5 or 6 inches" into his crib in a way that caused Matthew to hit his head. Thomas also added that the day before Matthew was taken to the hospital, he had bumped Matthew's head with his own head by accident, and that after deciding to take Matthew to the hospital, he again dropped Matthew into the crib and caused him to hit his head. Mason then left the room so that Thomas could review the written statement without a police presence; the door to the room remained unlocked while Thomas read the proposed deposition and signed it. Thomas made no changes or corrections to the statement and initialed it at the end (Thomas, A: 16-21 [first section of second written statement], 276-279, 321).

At one point during this interview, Sergeant Colaneri entered the room for a few minutes and – professing to have more medical knowledge than he really did –

accused Thomas of lying because Matthew's injuries were not medically consistent with Thomas's explanation of events. After Colaneri left, Mason expressed disappointment with Thomas for being dishonest. In response to Mason's disbelief and disapproval, Thomas finally confessed that on three occasions in the days immediately preceding Matthew's trip to the hospital, Thomas had been quarreling with Matthew's mother while holding Matthew, and had thrown Matthew forcefully downward, several feet below. Thomas also demonstrated for Mason how he did this. Mason added this information to the statement Thomas had already initialed. Once the statement was complete, Mason again left Thomas alone to review it, and again Thomas read and signed the statement. This interview ended around 1 a.m., about seven hours after it began (Thomas, A: 21-25 [second section of second written statement], 274-287, 321).

Thomas moved Rensselaer County Court to suppress his statements on the ground that they were coerced and untrue, and the Honorable Andrew G. Ceresia presided over his suppression hearing. In addition to the testimony summarized above, Judge Ceresia considered both of Thomas's signed statements and the video recordings of both interviews (Thomas, A: 14-25, 264, 283-A284, 296-298; People's Exhs. 2, 5, 6A, 6B, 6C). Thomas did not testify at the hearing or otherwise offer any evidence that he felt coerced or that his admissions were not true. After the suppression hearing, the judge found the facts to be in substance as set forth above.

On the law, the suppression court held that Thomas was not in custody during either interview, in that he voluntarily accompanied the officers to the police station both times. The court further held that, even if Thomas had been in custody, he was read the *Miranda* rights and effected a valid waiver of them. Finally, the court held that no promises of leniency were made, and that the officers' lies about Matthew's condition and questioning in general were not "so fundamentally unfair as to deny [Thomas] due process" or to induce a false confession. Thus, the judge concluded, both statements were voluntary under the totality of the circumstances (Thomas, A: 622-636 [Sept. 11, 2009 Procs.: 3-17]).[9]

Thomas appealed to the Appellate Division, Third Department. That court, too, looked to the "totality of the circumstances," noting that "deceptive police strategies" alone would not render a statement involuntary unless "fundamentally unfair" or likely to elicit a false confession (93 A.D.3d at 1021-1022). Applying that standard, the court reviewed the hearing testimony and Thomas's recorded admissions and concluded that he "voluntarily confessed during noncustodial interviews in which police employed permissible strategies aimed at eliciting the truth" (*id.* at 1022).

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[9] At trial, Thomas testified that he did not throw Matthew at all and that his admissions to the contrary were coerced and false. The jury watched relevant portions of the video recording of his two statements. The jurors were instructed not to consider Thomas's statements unless they found beyond a reasonable doubt that he made those statements voluntarily (Thomas, A: 2617), and they convicted him.

In so doing, the court stated its underlying factual findings, including that despite having been told he could stop speaking to the officers at any time, Thomas wanted to talk to them (93 A.D.3d at 1022). With respect to the police deception, the court found that even though the police knew that Matthew was brain-dead, they lied to Thomas that any information he provided about how he might have injured Matthew could help in Matthew's treatment. The court further found that subsequent to this lie, Thomas signed a statement admitting that he had accidentally dropped Matthew into his crib on two occasions and bumped Matthew's head on another occasion (*id.* at 1023-1024). The Appellate Division also found that when Colaneri challenged Thomas's description of those accidents as inconsistent with Matthew's injuries, Mason expressed disapproval that Thomas had lied. Thereafter, Thomas gradually admitted and ultimately demonstrated how, in fits of rage during arguments with Hicks, he had thrice during the preceding four days lifted Matthew "above his shoulders" and "slammed" him downward "with considerable force" (*id.* at 1024).

As more fully discussed in the Rensselaer County District Attorney's Respondent's Brief (Thomas, Respondent's Brief, Point I), the Appellate Division properly concluded on this factual record that, under the totality of the circumstances, "the record fully supports County Court's finding that [Thomas]'s statements were voluntary and admissible" (93 A.D.3d at 1028). Even cursory review of the voluminous suppression proceedings leaves no doubt that the Appellate Division's finding of voluntariness was correct. Thomas was not even in custody for most of

the interview, because the detectives did not initially know whether the injuries were accidental or who caused them, and yet Thomas was read and waived his *Miranda* rights, twice. Thomas was never restrained in any way, he was told that he could end the questioning at any time but never sought to do so, and the detectives repeatedly offered him food, drink, cigarettes and bathroom breaks. Between the two-hour and seven-hour interviews, Thomas also had a 15-hour break during which he was not with the police at all and had sufficient opportunity to sleep, eat, contemplate, and consult others if he desired. He did not seem at all fatigued during either interview, and instead seemed eager to cooperate and to eliminate himself as a suspect. The police did not make an improper threat by telling Thomas that his wife would be a suspect if Thomas had no information, because that was "reasonable and did not overbear his will" (*id.* at 1028). The officers' assurances to Thomas that he was not going to be arrested based on what the officers already knew were not false promises of leniency, for the officers never suggested that he would be immune to arrest even upon making incriminating admissions (*id.* at 1027).

With regard to the deception in particular, it bears noting that neither of the two deceptive ploys used in *Thomas* was at all likely to elicit a false confession or was otherwise fundamentally unfair. Certainly Detective Mason's pleas to provide information that might save Matthew's life were not likely to elicit falsehoods. Besides the fact that Thomas had already been told that the chance of Matthew's survival was remote and that he would not make a full recovery even if he lived, a

false confession in response to this solicitation would have made no sense. If saving Matthew's life had been sufficiently important to Thomas that he would have felt compelled by the police deception to speak, any information he provided as a result of such compulsion would clearly have to have been truthful. But Thomas did not immediately come clean in response to the deceptive police stratagem (Thomas, A: 435, 450-452). Instead, he initially maintained the façade that he was trying to imagine how Matthew could possibly have been injured, offering suggestions as to how it could have happened outside his presence, or how Thomas might have accidentally dropped Matthew or bumped him in ways that plainly would not have been very serious. Only gradually did Thomas's story evolve as it appeared the police were not believing it, and this can be attributed only to Thomas's calculation – not to coercion.

Indeed, given Thomas's descriptions of the accidental conduct that he claimed must have caused Matthew's injuries, Detective Colaneri's inflation of his own medical expertise was hardly likely to influence the voluntariness of Thomas's words. Colaneri merely declared the obvious when he confronted Thomas with the fact that the conduct Thomas described could not possibly have caused such serious injuries. Colaneri's confrontation of Thomas, and not his credentials, was the core of this stratagem. By pointing out that Matthew's injuries could not have been caused as Thomas was by now insisting they had been, Colaneri showed Thomas that the story he was developing could not possibly be true. Once Thomas's lies were exposed, Mason, to whom Thomas had been lying all along, could seek to use the rapport he

had been building with Thomas to persuade Thomas to come clean. That, and not Colaneri's deception, was the stratagem at work here – and Thomas's decision to offer the truth once his lie was exposed was not the product of any deception, let alone a fundamentally unfair one. To the contrary, Thomas's ultimate admission was the epitome of a voluntary one, "naturally born of remorse, or relief, or desperation, or calculation." *Culombe v. Connecticut*, 367 U.S. at 576.

2. Paul Aveni's Statements

On January 12, 2009, around 9:15 p.m., Police Officer Michael Ciafardini of the New Rochelle Police Department responded to a 911 call from the home of defendant Paul Aveni's ("Aveni") mother, Mary Aveni ("Mary"), in New Rochelle. Mary directed the officer to a second-floor bedroom where Aveni's girlfriend, Angela Camillo, was unconscious (Aveni, A: 161-163). Two hours later, while the police were still at the scene, Aveni emerged from the third floor (Aveni, A: 164-166, 170). Officer Ciafardini knew that Mary had an order of protection directing Aveni to stay away from her, so Aveni was arrested (Aveni, A: 163-164, 166, 170-171).

Outside Mary Aveni's house, Police Officer Ted Pitzel advised Aveni of his *Miranda* rights from memory. In particular, Officer Pitzel recalled telling Aveni:

> You have [the] right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney, and to have him present before any questioning. If you cannot afford an attorney, one will be appointed by the court, for you, free of charge.

(Aveni, A: 269). Pitzel also told Aveni that he would be permitted to make three telephone calls. Aveni replied that he understood his rights and inquired why he was being arrested. Officer Pitzel told him only that the detectives wanted to speak to him (Aveni, A: 268-270).

Around 11:30 p.m., Detective Carpano brought Aveni to an interview room at the New Rochelle Police Department headquarters. The room measured 8 feet by 10 feet, and it contained a table, four chairs and two windows (Aveni, A: 175-176, 223). Video equipment had recently been installed there, but Carpano did not turn it on because he had not yet learned how to use it (Aveni, A: 196-197, 227-228). Aveni's handcuffs were removed (Aveni, A: 176). Fully aware that Aveni had already been advised of his *Miranda* rights, Carpano, without resort to written forms, orally re-advised him of those rights. Carpano recalled saying to Aveni, "You know you don't have to talk to me if you don't want to. You have the right to have a lawyer and have him with you without me being present, and you have the right to make three phone calls." Aveni was "nodding in agreement" that he understood, and he affirmatively agreed to talk to Carpano (Aveni, A: 177-179, 223-224, 227).

Aveni initially supposed aloud that he was to be questioned about the order of protection (Aveni, A: 224-225), but Detective Carpano responded by asking Aveni to recount his day with Camillo (Aveni, A: 179-180, 225). Aveni described Camillo as his girlfriend, and he explained that he and Camillo had argued that day because he had tried to end their relationship (Aveni, A: 185). Aveni claimed that he had

dropped Camillo off at a gas station earlier in the day and that afterwards he had fallen asleep in his car (Aveni, A: 185, 187). Later, Aveni said, he received a phone call from his brother informing him that Camillo was in Aveni's old bedroom at Mary's house, and that Camillo was "fucked up." Aveni said that at this point he proceeded to Mary's house, despite knowing that she had an order of protection barring him from the premises. Once he arrived at Mary's house, Aveni continued, he saw that Camillo was unconscious, and he instructed Mary to call 911. Aveni reported that he then went for a walk, returned to find the house empty, and fell asleep in his brother's room on the third floor while awaiting news of Camillo's condition (Aveni, A: 185-187). Detective Carpano took contemporaneous notes, which he later gave to Detective Christopher Greco, who typed them onto a form (Aveni, A: 180).

Around 2:00 a.m., on January 13, 2009, Detective Carpano returned to the interview room and brought a copy of the written statement to Aveni, who had been left in the interview room. Aveni told the detectives that the written version of his oral statement was accurate, but he refused to sign it (Aveni, A: 188-189, 233-234, 395).

From about 2:00 a.m. to 6:30 a.m., Aveni was left alone in the interview room where he was given food, drinks and bathroom breaks. During this time, the police continued investigating. Among other things, the police learned that Camillo had died, although they were not aware of any significant external injuries and the cause of her death was not yet certain (Aveni, A: 190-191, 229).

At 6:30 a.m., Detectives Carpano and Greco questioned Aveni again in the interview room (Aveni, A: 191-192). Again, Detective Greco read the *Miranda* warnings to Aveni, this time from a preprinted form (Aveni, A: 192-193, 234, 236, 396-397). Again, Aveni waived his rights and indicated that he was willing to speak to the detectives (Aveni, A: 194). This time, Detective Carpano lied that Camillo "was at the hospital and the doctors are working on her, but it's imperative; did she use any drugs or did she take anything, because whatever medications the doctors give her now could have an adverse effect on her medical condition." Carpano continued, "she's okay now but if you lie to me and don't tell me the truth now and they give her medication, *it could be a problem*" (Aveni, A: 196) (emphasis added).[10]

In response to the detective's plea for the nature of the drugs Camillo had ingested, Aveni reported that she had taken heroin. Carpano then asked, "How much heroin? How did she use it? Did she inject herself?" Aveni volunteered that he – Aveni – was the one who had injected Camillo (Aveni, A: 196).

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[10] During cross-examination on Detective Carpano's testimony about false information potentially being "a problem," Carpano confirmed that he had told Aveni that "the doctors had to know what kind of drugs" Camillo had ingested "or else she could be further injured by their treatment" (Aveni, A: 237). Defense counsel then paraphrased Carpano's previous testimony as "you told [Aveni] if he didn't come forth with that information, *that could cause him problems*. He could be responsible for her condition"; Carpano responded, "Something to that effect" (Aveni, A: 237) (emphasis added). The detectives did not say anything at this time about criminal charges or legal "problems" for Aveni.

At this point, Detective Carpano, concerned with preserving Aveni's statements because he had refused to sign the earlier one, recalled the recently installed video recording equipment. Although Carpano remained uncertain how to use the equipment, he pushed "a whole bunch of buttons" until a light went on; his efforts succeeded in initiating a recording, albeit with a slight delay in the audio track relative to the video (Aveni, A: 197-199, 227-229).

The videotaped portion of Aveni's statement, consisting of three discs, began at 7:06:44 a.m. (Aveni, PE. 4A, 4B, 4C [discs]). Aveni, who had majored in Liberal Arts and Social Sciences at Westchester Community College and was an avid author of poetry (Aveni, PE. 4B: 10:42-10:43), appeared at ease during the first discussion on the video that lasted about 40 minutes (Aveni, PE. 4A). The video shows Aveni seated in a chair with his feet up on another chair, smoking a cigarette. His hands are loosely cuffed together in front, enabling him to use them freely for eating, drinking and smoking. Throughout the interview, Aveni appears relaxed, alert, articulate, lucid and cognizant of his surroundings (Aveni, PE. 4A, 4B, 4C).

Early on, Aveni explained that although he had injected Camillo with a bag of heroin, Camillo "wanted to do it with me" (Aveni, PE. 4A: 7:07:21).[11] For more than half an hour thereafter, the police persistently suggested that Aveni had injected

[11] At the beginning of the video, only defendant and Detective Greco were in the room; Detective Carpano had stepped out and returned a few minutes later (Aveni, PE. 4A: 7:09:01).

Camillo with more than one dose of heroin, without her permission, or for his own purposes. Aveni steadfastly insisted that he gave Camillo one 2-milligram Xanax pill and injected her with one bag of heroin, at her request, and only after she tried it herself and failed (Aveni, PE. 4A: 7:07:39, 7:09:04, 7:10:55-7:11:21, 7:11:42, 7:11:46, 7:11:52-7:12:21, 7:30:46-7:30:50, 7:36:24-7:37:35, 7:37:36-7:38:17, 7:38:40-7:39:17). At one point, the police even asked Aveni to hypothesize how he would have given Camillo the heroin if he had used force, but Aveni simply replied, "Oh. I didn't" (Aveni, PE. 4A: 7:20:43-7:21:09). In response to the false police assertion that Camillo had told the police she had not wanted to take the drugs, Aveni responded that whether or not she told the police that, she did not tell Aveni (Aveni, PE 4A: 7:39:25-7:40:07).

The police also suggested several times that Camillo had never taken heroin before, and Aveni denied that, explaining that she had done drugs with a boyfriend before Aveni (Aveni, PE. 4A: 7:12:41, 7:31:04-7:31:19). The police further hypothesized that Aveni had sex with Camillo while she was passed out. Aveni expressed such revulsion at that proposition that he drew an apology from the detective, but Aveni then conveyed his understanding that the police were just doing their job by asking (Aveni, PE. 4A: 7:17:24-55).

Aveni described his various efforts to revive Camillo, reporting that he performed "constant CPR," injected Camillo with a "salt shot," shook her, smacked her and finally told his mother to call 911. He even propped Camillo on a chair so

that "she wouldn't asphyxiate anything in her throat" (Aveni, PE. 4A: 7:18:46-7:19:56). Aveni volunteered, "I even, I hate to say this, but I even took a lighter, not while it was lit, but while it was hot. I put it to her skin to see if she would, you know, jolt from that" (Aveni, PE. 4A: 7:21:23). When the detectives suggested that some cuts on Camillo's legs and blood in the bedroom might be evidence of a violent altercation between Aveni and Camillo, Aveni insisted that these minor injuries had to have resulted from his efforts to revive Camillo (Aveni, PE. 4A: 7:22:49-7:23:43, 7:25:17-7:25:25, 7:26:00, 7:27:34-7:28:08).

Near the end of this first portion of the recorded interview, Aveni commented, "I'm going to be in a lot of trouble. I know it," and Detective Greco asked why Aveni thought he was in trouble. Aveni asked, "Isn't this a crime?" Aveni told the detectives that he did not believe he was guilty of a crime because he did not force Camillo to do anything against her will (Aveni, PE. 4A: 7:36:24-7:37:35). Nonetheless, Aveni was "afraid" that he could be charged with a crime notwithstanding his belief that he "didn't do anything wrong." In response to Detective Greco's inquiry of "what kind of crime do you think we can charge you with," however, defendant simply repeated, "I don't know" (Aveni, PE. 4A: 7:40:16-7:40:50).

Aveni emphasized that he had by this point told the police truthfully everything he knew, but Greco told Aveni that he felt that there was still something "missing" (Aveni, PE. 4A: 7:35:22-7:36:23, 7:41:47-7:42:06). Aveni swore that nothing was

missing and that he would "cooperate in every way as long as this could help me, because I only, I didn't have any bad intentions" (Aveni, PE. 4A: 7:42:24). After exchanging some small talk about Aveni's shoes and the sandwich he had been eating during the interview, Greco left the room (Aveni, PE. 4A: 7:44:14-7:44:30).

For the next two hours or so, Aveni was left alone except to give his blood and urine samples and to answer a random question or two not inconsistent with anything he had already said (Aveni, A: 216-221; PE. 4A: 7:49:40-8:04:10, 8:30:20; PE. 4B: 9:19:39, 9:21-9:22). Then, shortly after 10 a.m., Carpano and Greco returned to review Aveni's statement once more (Aveni, PE. 4B: 10:06-10:55). During this third interview, Aveni was given water twice (Aveni, PE. 4B: 10:21, 10:55) and cigarettes (PE. 4B: 10:36) and asked if he was hungry, as he had last eaten about six hours before. Aveni stated he did not want anything to eat (Aveni, PE. 4B: 10:56:05). Aveni continued to maintain that he never pushed Camillo to do drugs, that he did not sell them to her, and that she had taken them voluntarily (Aveni, PE. 4B: 10:52:35-10:53:17).

At the hearing on his motion to suppress his statements as involuntary, Aveni did not testify. Instead, Aveni presented testimony from two toxicologists who testified that Aveni's urine and blood samples tested positive for ecstasy, depressants, opiates, and marijuana, and they contained high levels of methadone and morphine, as would be expected in a heroin addict (Aveni, A: 284-286, 291, 311-313A). The testimony also revealed that the main physiological effect of heroin in the body is

euphoria, and that a "functional drug abuser," like Aveni can – despite his drug use – engage others in articulate, lucid, and coherent conversations, and maintain a job (Aveni, A: 297).

Aveni moved Westchester Supreme Court to suppress, and the Honorable Richard Molea presided over a hearing on the motion. After the suppression hearing, the court made factual findings consistent with the hearing testimony summarized above (Aveni, A: 401-416). In addition, Justice Molea considered the video recordings of Aveni's statements (Aveni, PE. 4A, 4B, 4C), noting that Aveni was given food, drink and cigarettes, that he appeared to have opportunities to sleep and rest, and generally that Aveni was "fully aware of what was happening" (Aveni, A: 408-414, 417). The court found that Aveni was twice provided with *Miranda* warnings and voluntarily waived his rights (Aveni, A: 427, 429). With respect to the police having lied to Aveni that Camillo was still alive and that doctors wished to know what she had ingested, the suppression court noted, such deception "does not render a confession involuntary" (Aveni, A: 424). Based on the totality of the circumstances, Justice Molea concluded, Aveni's "statements were voluntarily obtained, and not the result of impermissible physical or psychological coercion" (Aveni, A: 426-427).

Aveni appealed to the Appellate Division, Second Department. In reversing the hearing court's denial of suppression, the Appellate Division stated that it was deciding "under what circumstances the police, while interrogating a suspect, exceed permissible deception, such that a suspect's statements to the police must be

suppressed because they were unconstitutionally coerced." 100 A.D.3d at 231. While the Appellate Division agreed that deception alone would not automatically render any ensuing statement involuntary, it nonetheless held that "there are boundaries the police cannot cross." 100 A.D.3d at 238. Telling Aveni that doctors might give Camillo contraindicated medications if Aveni did not reveal what she had ingested, the Appellate Division reasoned, amounted to an implicit threat to prosecute Aveni for murder and impose a life sentence on him unless he waived his right not to speak to the police. 100 A.D.3d at 238-239. In this way, the police "intentionally deceived and threatened" Aveni. 100 A.D.3d at 231, 233. "By lying to him and threatening him, the detectives eviscerated any sense [Aveni] may have had that he could safely exercise his privilege against self-incrimination." Thus, even though the police did not lie to Aveni until after he had twice waived his *Miranda* rights, the Appellate Division found Aveni's waiver invalid and his resulting statements involuntary. 100 A.D.3d at 239.

As more fully discussed in the Westchester District Attorney's brief (People v. Aveni, Appellant's Brief, Point I), the Appellate Division erred in reversing the hearing judge's denial of suppression. Aveni was informed of the *Miranda* rights three times, and he waived them at least twice before the police lied that Camillo was still

alive.[12] Thus, Aveni had undoubtedly made his decision to talk to the police before any of the purportedly coercive conduct even occurred.

Moreover, when the police ultimately did lie, they did not couple the lie with a threat, but rather with a detail of the lie that would encourage a truthful response: that if Aveni were to lie to the police (with whom he was already voluntarily speaking) about what Camillo had ingested, doctors might rely on the misinformation to Camillo's detriment. Indeed, the police said nothing to Aveni about the need for him to break any silence, which was understandable because he had already agreed to speak to them. Thus, the lie that they told had nothing to do with persuading Aveni to abandon some reasoned decision not to speak at all, and it also had nothing to do with a consideration of what crime they would charge Aveni with committing. What the detectives expressed interest in was that whatever Aveni was about to say must be true. Thus, when Detective Carpano implored Aveni "if you lie to me and don't tell me the truth now and they give her medication, it could be a problem" (Aveni, A: 196), he was using the lie to increase the chance that Aveni would not make up a false statement if he knew something. The police were counting on Aveni believing that false information about what Camillo ingested could harm her.

[12] As noted, the first time Aveni was informed of his rights, by Officer Pitzel when he was arrested, he did not make a statement.

Moreover, the notion that at this early point in the questioning Aveni might have interpreted Detective Carpano's statement as a threat to bring homicide charges is far-fetched at best. There was to that point no suggestion to Aveni that Camillo might die at all, let alone that the police thought Aveni might have been responsible for harming her. Then, when Aveni first revealed that Camillo had taken heroin, he had not yet incriminated himself as the one who had administered it. At that point the lie about Camillo being alive had been milked for all its value, and Aveni had not incriminated himself. Even at that point, the police merely followed up by asking Aveni the non-accusatory question of whether he knew how Camillo had ingested the heroin – rather than accusing him of administering it – because, in fact, they still did not know that Aveni was to blame. It was then, having already provided non-incriminating information that might have been shaped by the police deception, that Aveni – gratuitously – admitted that it was he who had administered the drugs.

If there were any remaining doubt that Aveni spoke freely without feeling any coercion at all, such doubt would be obliterated by the fact that even when the police became more aggressive in their pursuit of additional admissions, Aveni stood firm and declined their invitations. Thus, once the police learned from Aveni that he had indeed administered the drugs that the police knew had killed Camillo, they tried in vain for hours to convince Aveni to admit doing so against Camillo's will. But Aveni – educated, experienced with the criminal justice system, and plainly willing to continue talking to the police about what had happened – calmly and coolly refused to

admit more than his actual role. There was no coercion here; just conversation. And just as with Thomas's admissions, the totality of the circumstances indicated without question that Aveni's statements were voluntary, and the hearing court properly applied that test when it denied suppression. *Culombe v. Connecticut*, 367 U.S. at 576.

* * *

In short, in both cases at hand, the trial judges made factual findings and applied the correct law in concluding that the statements at issue were voluntary. In each case, the trial court correctly considered the deception used by the police to be just one of the relevant circumstances among a totality of circumstances that demonstrated voluntariness. Both those determinations were correct and should have been affirmed by the respective Appellate Divisions. Thus, in *People v. Thomas*, the Appellate Division correctly upheld the trial court's denial of suppression because Thomas's statement was voluntary under the totality of the circumstances. In *People v. Aveni*, the Appellate Division incorrectly reversed the trial court's denial of suppression, where Aveni's statement was also voluntary under the totality of the circumstances.

CONCLUSION

In *People v. Thomas*, the order of the Appellate Division should be affirmed. In *People v. Aveni*, the order of the Appellate Division should be reversed, suppression denied and the convictions reinstated.

Respectfully submitted,

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December 2, 2013