ORIGINAL

23-5770

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM 2023

NO. _____

VICTOR M. BARAHONA,

Petitioner,

-against-

ADMINISTRATOR NEW JERSEY STATE PRISON, ET AL.

Respondents.

**PETITIONER FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

VICTOR M. BARAHONA
SBI#124715E
New Jersey State Prison
P.O. Box 861
Trenton, New Jersey 08625

QUESTION(S) PRESENTED

1. When Detective Lopez told Petitioner that his statement could be used in his favor, did Detective Lopez subverted the Miranda warning, thus, rendered the statement in voluntary and violating his Fifth Amendment right against self-incrimination?

2. Did the Third Circuit erred in deferring to the state court's finding that Petitioner was not prejudiced by trial counsel's failure to supply the courts with additional critical information at the suppression hearing; which could of have changed the outcome at suppression hearing such as fear of police, neurological conditions (mental health)?

LIST OF PARTIES

The petitioner is VICTOR M. BARAHONA a prisoner at New Jersey State Prison, P.O. Box 861, Trenton, New Jersey. The Respondents are the New Jersey Attorney General at Richard J. Hughes Justice Complex, P.O. Box 112, Trenton, New Jersey, 08625, and the Administrator of New Jersey State Prison; 3rd & Federal St./P.O. Box 861, Trenton, New Jersey 08625; and Prosecutor's Office of Union County, 32 Rahway Avenue, Elizabeth, New Jersey 07202-2115.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Petitioner, Victor M. Barahona, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Third Circuit Court of Appeal rendered in these proceedings on July 7, 2023.

OPINION BELOW

The Third Circuit Court of Appeals affirmed petitioner's conviction in its Cause No. 22-3319. The opinion is unpublished, and is reprinted in the appendix to this petition at page 4a - 5a, infra. The order of the Third Circuit Court of Appeals denying rehearing is reprinted in the appendix to this petition at page 1a - 2a, infra.

JURISDICTION

The original opinion of the Third Circuit Court of Appeals was entered on March 3, 2023. A timely motion to that court for rehearing was granted on May 8, 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

The following statutory and constitutional provisions are involved in this case.

The **V Amendment** which states, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The **VI Amendment** which states, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waived the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of the section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to , or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceeding, the court shall not hold an

evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discoverable through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such a determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given in the State court's factual determination.

(g) A copy of the official record of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under the this section and any subsequent proceedings on review, the court may appoint counsel for an applicant who is

or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner was a resident of Honduras from his birth in 1955 until he came to United States in 2001. According to Petitioner, in Honduras, the police are brutal and it was his experience that police would routinely torture people to get them to admit guilt.

Based on his past experience, once the police screamed at him and said they had evidence against him, he willing provided a confession out of fear, as he was predisposed to believe.

At the time of his arrest in 2008, he did not speak or understand English, although he did read and write in Spanish. It was Petitioner's background from Honduras and his inexperience with Criminal Justice system, coupled with his not understanding English that also made him feel especially vulnerable and fearful when he was taken into custody by law enforcement.

Moreover, at the Petitioner's sentencing on March 5, 2010, the defense counsel submitted a pre-sentence report. The report "which was very telling. The drawing tests that were conducted, [on Petitioner], conversations between him and these experts, suggested the possibility of a 'neurological impairment and/or a psychological disorder,' and that he "exhibited thinking patterns different from the 'norm.'" Also, "Petitioner was 'nervous' and 'uncomfortable' during the interrogation.

Combination of these facts, the interrogation was not reliable as the waiver was done elicited in the cloak of fear and confusion." (T-14, page 6-7).[1] This information was not presented at the suppression hearing, but rather it was presented at sentencing, nor did appellate counsel raised or made it available to Appellate Division on direct appeal.

Because of these shortcomings, Petitioner failed to appreciate the true essence of the Miranda and signed his rights and life away; not intelligently knowing what he just relinquished. As it is evident that Petitioner did not even know the meanings of two important words "pressure" and "coercion" contained in the Miranda card. (2-T; page 69) The Detectives had to explain to him. He didn't even know how to invoke or apply the right to counsel, nor did he know how that right worked. He wanted to call a friend, instead of calling an attorney who

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[1] 1T refers to motion transcript dated December 15, 2008
2T refers to motion transcript dated December 23, 2008
3T refers to motion transcript dated January 2, 2009
4T refers to motion transcript dated February 11, 2009
5T refers to motion transcript dated May 21, 2009
6T refers to motion Pre-Trial conference dated October 5, 2009
7T refers to trial transcript dated October 6, 2009 (a.m.)
8T refers to trial transcript dated October 6, 2009 (p.m.)
9T refers to trial transcript dated October 7, 2009
10T refers to trial transcript dated October 8, 2009
11T refers to trial transcript dated October 9, 2009
12T refers to trial transcript dated October 13, 2009
13T refers to trial transcript dated October 14, 2009
14T refers to trial transcript dated October 15, 2009
15T refers to sentencing transcript dated March 5, 2010
16T refers to Post-Convicion Relief dated May 22, 2015
T17 refers to State's Exihibits (Ra1, "Defendant's Video-taped interview" 24a-81a) dated June 18,2019

could assist him with the serious charges he was facing. Lynumn, id. 534.

On top of the mentioned inadequacies, Detectives pressured and coerced him into providing the statement. Since, the Petitioner was disposed to believe that if the police believed he was guilty, then they would threaten and possibly torture him to validate their belief. The police made Petitioner thought he was guilty. They screamed at him prior to taping the confession, an overt act which led him to feel threaten.

After that they told him that his statement could be used in his 'favor,' (T-15, Page 5), and lied to him into thinking that they already had the evidence (video). They told him "we watch that video." (T-15, Page 25). They told him to "[V]ent already, say it, get it out, you look nervous, you look uncomfortable." (T-15; Page 26) They told him that "we want to help you." (T-15; Page 44) Sometimes, they would inject things that Petitioner had not responded to. i.e. Santos: "Right. Lopez: And he was pulling up her shirt, right? Santos: Uh-huh (T-15, Page 24) Most importantly, they pressured and coerced him into admitting that there was penetration, even though Petitioner kept saying no. (T-15; Page 23) Using tactics and trickery, the police produced a confession which was neither rational nor product of an essentially free and unconstrained choice.

This feeling of fear and vulnerability was exasperated by the Detective Lopez and Detective Santos's shouting at Petitioner and telling him that he had to admit guilt which led him to confess to crimes that emphatically insists he is not guilty of.

REASON FOR GRANTING THE WRIT

I. PETITION'S WAIVER OF HIS RIGHT TO REMAIN SILENT WAS NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY.

In the State courts, Petitioner argued that he did not voluntarily or knowingly waive his right to be silence with regards to the interrogation performed by Detective Lopez and Santos. To be valid, a waiver of his right to remain silent must be made "voluntarily, knowingly, and intelligently". Miranda v. Arizona, 384 U.S. 436, 444 (1966).

In Lynumn, id at 534, the court stated "[T]here was no friend or advisor to whom she might turn, and she had no previous experience with the criminal law, and had no reason not to believe that police had ample power to carry out their threats, a confession made under such circumstances must be deemed not voluntary, but coerced. We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases." Circumstances under which Petitioner relinquished his right to counsel and other rights are similar to Lynumn v. Illinois, 73 S.Ct 917, 9 L.Ed.2d. 922, 372 U.S. 528 (1963). Petitioner had fear of police and that he had no previous experience with criminal law.

On certiorari, the Supreme Court of the United State set aside judgment below and remanded the case to the Supreme Court

of Illinois for further proceeding. It was held that (1) defendant's confession was coerced and hence the admission of the confession violated due process; (2) the conviction could not stand even though there might have been sufficient evidence, apart from the coerced confession, to support the judgment.

Also, with regards to Petitioner's mental state, in Preston, the en banc court concluded that defendant's will was overborne and his statement voluntary, considering various factors: the defendant's sever intellectual impairment, the police's repetitive questioning and the threats without end, the pressure placed on the defendant to adopt certain responses, the use of alternative questions that assumed his culpability, the officers' multiple deceptions about how the statement would be used, the suggestive questioning that provided details of the alleged crime, and false promises of leniency and confidentiality. United States v. Preston, 751 F.3d 1008, 2014 Lexis 8825 (En Banc)

Reversing a conviction and remanding for new trial, the en banc court held that under the totality of the circumstances, including the eighteen-year-old defendant's intellectual disability, defendant's confession that resulted from police questioning was involuntarily given and should not have been admitted at trial for abusive sexual conduct.

Because of Petitioner's neurological impairment and/or psychological disorder, and his thinking pattern different from 'norm' his statement should have been suppressed. The Supreme Court has so recognized, noting that "mental condition is surely relevant to an individual's susceptibility to police coercion." Connelly, 479 U.S. at 165. It is well-settled that an involuntary confession may not be admitted into evidence for any purpose. Thus, to be admissible, it must be shown to have been voluntary, i.e., "that it was the product of a rational intellect and free will." Blackburn v. Alabama, 361 U.S. 199 (1960).

The Court stated that in evaluating the voluntariness of a confession under the totality of the circumstances, a court is not trying to determine whether the suspect told the truth when he confessed. "[C]onviction following the admission into the evidence of confession which are involuntary, i.e. the product of coercion, either physical or psychological, are tenuous not simply because such confession are unlikely to be true. Rogers v. Richmond, 365 U.S. 534, 540-41, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) "As important as it is that person who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence." Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 4L.Ed.2d 242 (1960) The court [we] exclude coerced confession "because the methods used to extract

them offend an underlying principle in enforcement of our criminal law." Rogers, 365 U.S. at 540-41. That basic principle is that ours is the accusatorial as opposed to the inquisitorial system. Watts v. Indiana, 338 U.S. 49,54,69 S.Ct. 1347, 93 L.Ed. 1801 (149).

In Preston, the officers made false promises to defendant. As was the case here. Detectives misled Petitioner when they told him that his statement could be used in 'favor'. They mislead into believing that they already had the evidence. They told him that "we want to help you."

Interrogating officer can make false representations concerning the crime of the investigation during the questioning without always rendering an ensuing confession coerced. See, e.g., Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). But false promises stand on a different footing. In particular, the U.S. Supreme Court has observed that "the test of voluntariness" is "whether the confession was extracted by any sort of threats or violence, or obtained by direct or implied promises, however slight, or by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 26, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976) (per curiam)(quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

But because of Petitioner's neurological/psychological disorder and thinking pattern different from 'norm', the Detectives extracted confession by implied promises and by exertion of improper influence. It simply "takes less" in terms of sophisticated police interrogation techniques to interfere with the deliberative processes of one whose capacity for rational choice is limited that it takes to affect the deliberative processes of one whose capacity is not so limited. Smith v. Duckworth, 910 F.2d at 1497. (Trial Trans. Cir. 1990)

"Because the police tactics and trickery produced a confession which was neither rational nor product of an essentially free and unconstrained choice." Henry, 197 F.3d at 1028. the confession was rendered involuntary. The panel erred in evaluating in admission of Petitioner's confession at trial, and they erred when the State court held that Barahona had not demonstrated prejudice from the failure to present additional factors. The court suggested the evidence against Barahona was "overwhelming" and therefore it would not have made no difference. This conclusion is likewise unreasonable. In Lynmn, the court stated that "Even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of a coerced confession vitiates the judgment because it violates the due process clause of the Fourteenth

Amendment. The court also said that "This is an impermissible doctrine." Therefore, Petitioner did not voluntarily, knowingly and intelligently waived his right to remain silent.

II. THE POLICE SUBVERTED THE SUBSTANCE AND PURPOSE OF THE MIRANDA WARNING WHEN THEY TOLD DEFENDANT NOT ONLY THAT HIS STATEMENT COULD BE USED AGAINST HIM BUT ALSO COULD BE USED IN HIS "FAVOR."

The transcript of the petitioner's statement to police indicates that, when police read petitioner his rights, and said, "Anything you say can and will be used against you in a court of law. Anything you say to us here may be used against you in court." petitioner responded by saying (or asking), "Or also in favor." (T-15) This caused Detective Santos to say, "Huh?" but then Detective Lopez responded, "Or in favor, yes," to which petitioner said, "Right." (T-15) He was then asked, "Do you understand this right? and he replied, "Yes, yes." (T-15) Thereafter, he agreed to speak to police, and gave a statement which ultimately was highly incriminating. Petitioner moved to suppress the statement as a violation of his right under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), and at that motion hearing, Detective Lopez admitted that it is not a part of the standard Miranda warning to tell a defendant that what he says could be used in his favor. (2T 75-12 to 76-4), but the motion was nevertheless denied by the judge, who reasoned only that petitioner "understood" the warning as given. (2T 108-7 to

13) On appeal, petitioner urged that he was subject to an interrogation only after being actively misinformed of his Miranda rights in a manner which subverted the meaning and purpose of those rights in violation of this state-law privilege against self-incrimination as well as his corresponding Fifth Amendment right to as applied to the states through the Fourteenth Amendment. This, the petitioner's resulting statement to police should have been suppressed.

Both State v. O'Neill, 193 N.J. 148, 176-182 (2007), as well as its federal-court corollary, Missouri v. Seibert, 542 U.S. 6000, 612-613, 124 S.Ct. 2601, 2611 (2004), make it clear that police may not engage in behavior which undermines the efficacy of Miranda warning. Both O'Neill and Seibert decry a more generalized subversion of Miranda --- a two-step interrogation where a suspect is questioned without warnings, and then, once he confesses, read his warning and re-interrogate in the same manner --- than what occurred here. The misconduct here -- an active subversion/distortion of one particular Miranda warning, in this instance the notion that one's statement will be used against one , is similarly condemned by our courts and the courts of other jurisdictions.

Indeed, this particular Miranda warning -- that anything the defendant says can be used against the defendant -- has been the subject of a number of decision. In State v. Pillar, 359

N.J. Super. 249, 262, 265-268 (App. Div. 2003), the Appellate Division held that police agreement, post-warning, to speak "off the record" with a defendant was a direct contradiction of, and thus, a distortion and subversion of, this right. The same result was reached in State v. Fletcher, 380 N.J. Super 80, 92 (App. Div. 2005). "[S]uch an agreement directly contradicts and thereby neutralizes the entire purpose of the Miranda warning." Pillar, 359 N.J. Super. at 265. Courts in other jurisdictions have not hesitated to reach similar results. See e.g., Hopkins v. Cockrell, 325 F.3d 579, 585 (5th Cir. 2003) (police statement after warning that "[t]his is for me and you. This is for me, okay. This ain't for anybody else," subverted Miranda warning regarding the use of the statement against defendant); Lee v. State, 418 Md. 136, 12 A.3d 1238 (2011)(police statement to defendant after warnings that the interrogation is "between you and me, bud," subverted the warnings); State v. Luckett, 413 Md. 360, 381, 993 A.2d 25, 37 (2010) ("Clarification" of warnings that included a police statement that seemed to indicate that rights only applied if "discussing matters of the case" was an impermissible distortion of those rights); Angulo-Gil v. State, 198 Md. App. 124, 147148, 16 A.3d 283, 296 (2011) (police statement after warning that "[e]verything we talk about is going to stay here in this room," is similarly violative of Miranda)

Likewise, in the instance case, Detective Lopez should not have told Petitioner that any statement he made could be used against him "[o]r in favor, yes." Obviously, a defendant's statement to police are not admissible if offered by him in his own defense. State v. Boyer, 221 N.J. Super. 387, 398 (App. Div. 1987), certify. den. 110 N.J. 299 (1988), citing State v. Ryan, 157 N.J. Super. 121, 126-127 (App. Div. 1978). Indeed, it is hard to imagine how they could ever be used in this type of case "in his favor." The purpose of this particular Miranda warning is to advise a defendant in no uncertain terms that if he inculpates himself to police, the statement will be used against him. It is a pure distortion of that warning to water it down with fraudulent talk of potential use of the statement in defendant's favor, just as it distorts the same warning to suggest that a conversation is between "you and me" or is otherwise confidential, as in Pillar or the other cited cases.

The subversion of Miranda which occurs here is no less significant than that which occurred in O'Neill, Pillar or Fletcher. Police got defendant to waive his rights by means of a distorted definition of the Miranda which addresses the future use of the defendant's statement against him, but here was made to include a use "in [his] favor." As in Pillar, the police conduct "totally undermines and eviscerates the Miranda warning, at least with respect to a statement made, as here, in immediate

and direct response to the misleading assurance." 359 N.J. Super. at 268.

Clearly, this statement should have been suppressed and, plainly, its admission cannot be deemed harmless beyond a reasonable doubt. The prosecutor relied on the Petitioner's statement heavily in summation (13T 54-24; 13T 62-13 to 64-20) and the Petitioner's statement transformed the State's case from a mere "she said" series of accusation into a "she said/he admitted" case. Petitioner's conviction should be reversed and the matter remanded for retrial without the admission of this statement to police.

III. COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY CHALLENGE THE ADMISSIBILITY OF HIS STATEMENT AND ANY EVIDENCE OBTAINED AS A RESULT THEREOF.

The court below erroneously denied petitioner's argument that he received ineffective assistance of counsel when counsel inadequately represented him on his motion to suppress evidence. The Appellate Division found that the evidence did not support defendant's contention he had a "rational fear of the police," or that if his confession were suppressed, the result would have likely been the same. Petitioner argues this reasoning is in error because it ignores the insurmountable prejudicial effect his statement had on the outcome of his trial. Had the admission been properly excluded, the result of the proceeding would have been different.

Petitioner argues that he did not voluntarily or knowingly waive his right to be silent with regards to the interrogation performed by Detectives Lopez and Santos. To be valid, a waiver of his right to remain silent must be made "voluntarily, knowingly and intelligently. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The court in Miranda held that interrogation in certain custodial circumstances is inherently coercive and that statement made under these circumstances are inadmissible unless the suspect is specifically informed if his rights and freely decided to forego those rights. Ibid. Requiring Miranda warnings before custodial interrogations provides reinforcement for the Fifth Amendment right against compulsory self-incrimination. New v. Quarels, 467 U.S. 649 (1994); Edwards v. Arizona, 451 U.S. 477 (1981)

An "interrogation" is a term which is broadly defined. An interrogation is not transformed into a mere conversation because the officer's initial statement "did not end a question mark." William v. Brewer, 375 F. Supp. 107 (S.D. Iowa, aff'd, 509 F.2d 277) (8th Cir. 1974), aff'd 430 US 387 (1977)

> Miranda safeguards come into play whenever a person in custody is subjected to either empress questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of police ... that the police should know are reasonable

> likely to elicit and incriminating response from the suspect,. The latter portion of this definition focuses primarily upon the perception of the suspect, rather the intent of police.

Rhode Island v. Innis, 466 U.S 301, 308 (1980)

The perception of the suspect is an important factor in consideration of defendant's claim. Petitioner claims he provided a false confession in this instance because of his background and that police were screaming at him prior to taking his confession. He tried to maintain his innocence but was told to say he was guilty because they already had evidence against him. Of particular note in this case is the fact Petitioner was a resident of Honduras from his birth in 1955 until he came to the United States in 2001. According to Petitioner, in Honduras the police are brutal and it was his experience police would routinely torture people to get them to admit guilt. (16T 6-16 to 6-16). Once the police the police screamed at him and said they had evidence against him, he willingly provided a false confession out of fear. It is the perception of the suspect the appellate court failed to consider in this decision to deny Petitioner relief. Id at 308.

Petitioner argues his confession was therefore involuntary. It is well-settled that an involuntary confession may not be admitted into evidence for any purpose. Thus, to be admissible, it must be shown to have been hade voluntary, i.e., "that it was

the product of a rational intellect and free will." Blackburn v. Alabama, 361 U.S. 199 (1960) In New Jersey, the State carries the burden of proving voluntariness of a statement beyond a reasonable doubt. State v. Johnson, 116 N.J. 99 (1989); State v. Yough, 49 N.J. 587 (1967)

In this instance, to determine if Petitioner gave a voluntary statement, the court must assess the totality of all surrounding circumstances - both the characteristics of the accused and the details of the interrogation. Id. Here, the totality of the surrounding circumstances point to an involuntary statement. Petitioner was predisposed to believe that if the police believed he was guilty, then they would threaten and possibly torture him to validate their belief. They screamed at him prior to taping the confession, an overt act which led him to feel threatened. They told him they had evidence of this crime and he needed to confess, a communication which led him to believe they thought he was guilty which would lead to possible torture if he didn't do as he was told. (16T 5-16 to 6-16)

Given these facts counsel was ineffective for failing to inform Petitioner he had a right to testify at his suppression hearing. Counsel did not supply the court with the critical aforementioned claims of Petitioner in the suppression hearing. It is submitted that had Petitioner testified at his suppression

hearing, the true circumstances of the taking of the statement would have been placed on the record, and the State would have failed in its burden of proof and the suppression would have been granted.

The circumstances under which the Petitioner's statements were taken were clearly coercive in nature. It is well-settled that the coercion which vitiates a confession can be subtle as well as blunt, psychological as well as physical. Garrity v. New Jersey, 385 U.S. 493 (1967); State v. Taylor 46 N.J. 316 cert. denied, 385 U.S. 85 (1966). As former Chief Justice Warren noted in Blackburn v. Alabama, supra 361 U.S. at 206, "The efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated means if 'persuasion.'" It is, therefore, incumbent on a court in reaching a determination as to the voluntariness of the confession to weigh both the characteristics of the particular individual and the nature of the pressure brought to bear upon him. State v. Puchalski, 45 N.J. 97 (1965)

Counsel did not provide crucial factual information to the court in consideration of Petitioner's suppression motion. Counsel fell below a reasonable standard of representation and Petitioner was prejudiced by such. this illegally obtained statement was heavily relied upon in Affidavit of Detective Janet Lopez in support of the search warrant of Petitioner's

home which resulted in the seizure of said DVDs. As such, Petitioner's statement should have been suppressed, and that the DVDs obtained in this case should have also been suppressed by virtue of the exclusionary rule and the fruit of the poisonous tree doctrine. 251 U.S. 385 (1920).

Thus the derivation evidence obtained from an illegal act of the State cannot be used against the defendant. The Supreme Court continued with this clear mandate in Wong Sun v. U.S., 371 U.S. 471 (1963).

Thus, the court below erroneously denied Petitioner's ineffective assistance of counsel claim when counsel inadequately represented him on his motion to suppress evidence, and that the evidence did not support Petitioner's contention he had a "rational fear of the police," or that if his confession were suppressed, the result would have been the same. This reasoning conflicts with Lynumn id at 534 that had the admission been properly excluded, the result of the proceeding would have been different.

In light thereof, Petitioner maintains that his constitutional right to the effective assistance of counsel was violated. Thus, Petitioner contends that counsel's performance was not reasonable according to Strickland v. Washington, 466 U.S. at 688, and that deficient performance prejudice the Petitioner because both his statement and the DVDs were used by

the State, to the Petitioner's detriment, during the trial. Id. at 683.

CONCLUSION AND CERTIFICATION

The undersigned certifies that this application is made in good faith, presents substantial question and not brought for purpose of delay. Petitioner respectfully urges that the within Petition for Certiorari be granted in the interest of justice to correct the erroneous judgment of the Third Circuit.

Respectfully submitted,

Victor M. Barahona,