

✓ NEW HAMPSHIRE
SUPREME COURT

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

OCTOBER SESSION
1993 TERM

No. 92-516

State of New Hampshire

v.

Jason Carroll

BRIEF FOR THE DEFENDANT

Steven L. Maynard
Eric R. Wilson
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23 Factory Street
Nashua, New Hampshire 03060

(oral argument is requested)

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QUESTIONS PRESENTED

1. Whether a confession was voluntary when it was obtained after lengthy coercive interrogation despite defendant's repeated denials and where promises of immunity were made that if defendant confessed and cooperated he would not go to prison?

Issue preserved for appellate review under state and federal constitutions by defendant's Motion to Suppress Statements, ANOA 2-16, and court's opinion, ANOA 23-46.*

2. Whether the defendant's right to cut off interrogation was scrupulously honored consistent with Part I, Article 15 and the Fifth and Fourteenth Amendments in a case where the defendant's repeated attempts to end interrogation where ignored and police continued to interrogate defendant?

Issue preserved for appellate review under state and federal constitutions by defendant's Motion to Suppress Statements, ANOA 2-16, and court's opinion. ANOA 23-46.

(*see footnote on page 2 for abbreviations.)

STATEMENT OF THE CASE

The defendant, Jason Carroll, was indicted by the Hillsborough County Grand Jury for first degree murder, conspiracy to commit murder and kidnapping. Prior to trial, the defendant filed suppression motions. After lengthy hearing, the motions were denied. (Murphy, J.) A jury convicted the defendant on the conspiracy charge and acquitted him of kidnapping; however, the jury was hung on the murder charge. After retrial, the jury convicted Mr. Carroll of second degree murder and he was sentenced to forty-six years to life on the murder and conspiracy charges. This appeal followed.*

(*footnote from page 1)

"NOA" refers to Notice of Appeal.

"ANOA" refers to Appendix to Notice of Appeal.

"Mo. S." refers to transcript of suppression hearing followed by volume and page number.

"T1" refers to transcript of first jury trial followed by volume and page number.

"T2" refers to transcript of second jury trial followed by volume and page number.

STATEMENT OF FACTS

On the morning of July 29, 1988, the body of Sharon Johnson was discovered at a construction site in Bedford, New Hampshire. T1. I. 47-50. An autopsy conducted that day revealed that her death was caused by numerous stab wounds and manual strangulation. T1. III. 231. At the time of her death, Ms. Johnson was married to Kenneth Johnson and the couple resided in Bow, New Hampshire. T2. VI. 43-44.

In January of 1989, Sergeant Roland Lamy of the New Hampshire State Police became the lead investigator in charge of the homicide investigation. At that time the investigation into the death of Sharon Johnson remained unsolved and had produced no significant leads. Mo. S. I. 5. Shortly after Sergeant Lamy's involvement, Kenneth Johnson was considered a suspect in the death of his wife. T2. II. 82-83. In the early part of 1989, investigators focused their attention on Anthony Pfaff who had reportedly been linked to Kenneth Johnson. Mo. S. I. 6. In March of 1989, Pfaff informed police that, at the request of Kenneth Johnson, he had moved the deceased vehicle to the Mall of New Hampshire on the date of the homicide. Mo. S. I. 6-7. Police conducted an investigation into the background of Pfaff in the following months. During a review of Pfaff's work history, it was determined that at the time of the homicide, Pfaff was employed at a High-Tech in Hooksett, New Hampshire. Mo. S. I. 7. Work records at that business indicated that Pfaff worked on the same crew as the defendant, Jason Carroll. The records further indicated that Carroll failed to report to work on the evening of

July 28, 1988, the night before the body of Sharon Johnson was discovered. Mo. S. I. 7-8.

On November 24, 1989, sixteen months after the discovery of the deceased, Sergeants Lamy and Neal Scott of the State Police and Detective Dana Finn of the Bedford Police Department questioned the defendant, Jason Carroll, at the National Guard Armory in Manchester, where he was employed. Mo. S. I. 9-10. The purpose of the interview was to gather information on Pfaff and any information Carroll had with respect to the homicide. Mo. S. I. 10-11. During the initial hour of the interview, Sergeant Lamy related facts about the homicide to the defendant for approximately one hour. Mo. S. II. 174-176. During the course of the interview, the defendant gave police verbal and written statements which indicated that he had assisted Pfaff in moving a vehicle to the Mall of New Hampshire. Mo. S. I. 15-20. Following the statements, Sergeant Lamy pointed out inconsistencies in the defendant's statements and questioned him as to why he failed to report to work on the evening of July 28, 1988. The defendant became emotional and began crying and shaking. Mo. S. I. 20. The defendant then gave police a third statement indicating that he had been present at the scene of the homicide and had witnessed another individual stab Sharon Johnson. Mo. S. I. 22-26. Approximately five hours after the interview had begun, the defendant indicated that he was tired and wanted to go home. Mo. S. I. 28; II. 107. Following the defendant's request, the interview was terminated. Mo. S. I. 100.

The defendant's parents were contacted at Sergeant Lamy's direction and requested to respond to the Armory. Mo. S. I. 29. The defendant's mother, who was employed as a full-time Bedford Police officer, responded to the Armory along with her husband. Sergeant Lamy informed the Carrolls of the facts they had acquired from their son and advised the Carrolls of the importance of that information with respect to the homicide investigation. Mo. S. I. 29-30. The defendant then left the Armory with his parents. Mo. S. I. 32.

The following day, Saturday, November 25, 1989, the defendant informed his parents that what he had told the State Police was not true and he denied any involvement in the murder of Sharon Johnson. Mo. S. III. 101-102. The defendant attempted to contact Sergeant Lamy, via telephone, to recant his statements made the previous day, but was unsuccessful. Mo. S. III. 102. Karen Carroll, the defendant's mother, telephoned Captain Morency of the Bedford Police Department and requested that he speak with her son. Mo. S. III. 103. Morency had been at the Armory the previous evening and had knowledge of the defendant's statements. Mo. S. III. 12-13. Upon arrival at the Carroll residence, Captain Morency was informed by the defendant that his statements regarding the homicide were not true. The defendant further stated that he had fabricated the story from information provided by Sergeant Lamy and he wished to recant those statements. Mo. S. III 26-27. Captain Morency issued a Miranda warning to the defendant and the defendant did not understand the waiver portion

of the Miranda warning. Captain Morency then explained that portion to the defendant. Mo. S. III. 20-22.

Sergeant Lamy telephoned the defendant's residence and was informed by Captain Morency that the defendant had recanted the statements he made the previous day. Lamy requested that the defendant respond to the Bedford Police Department. Mo. S. I. 36. The defendant and Karen Carroll left their residence and proceeded to the Bedford Police Department, as did Captain Morency. They arrived there at approximately 1:00 p.m. Mo. S. III. 24. Sergeant Lamy arrived at approximately 1:10 p.m. and met with the defendant and Captain Morency in the captain's office. For a period of twenty minutes, the defendant continued to deny his involvement and Sergeant Lamy continually called the defendant a liar in a loud voice. Mo. S. III. 28-30. Following that twenty minute period, Sergeant Neal Scott arrived at the police department and entered Morency's office. Now present in the office were the defendant, Sergeants Lamy and Scott, along with Captain Morency. The defendant continued to emphatically deny involvement in the homicide. Mo. S. II. 114. The defendant indicated to the officers that he feared Kenneth Johnson and Anthony Pfaff and continued to deny any involvement. Mo. S. II. 57-59. This process continued for more than one hour after the arrival of Sergeant Scott until such time that the defendant requested his mother.* The interrogation of the defendant

*Although the suppression hearing testimony of Sergeants Lamy and Scott indicated that the defendant requested the presence of his mother in the interview, Mo.S. I. 38-39, II. 57, Captain Morency testified that the defendant said "I want my mother." Mo.S. III. 32. Further, Captain Morency's trial

continued by Sergeant Scott and Captain Morency. Mo. S. VI. 57-59.

Sergeant Lamy left the interview to locate Karen Carroll who was in a different area of the police department. Lamy informed Mrs. Carroll that her son had requested her presence. He instructed her then, although she was a Bedford Police officer, that her role in the interview would be that of the defendant's mother. A point which was in direct contrast to Karen Carroll's testimony.**

Sergeant Lamy re-entered the interview room accompanied by Karen Carroll at 2:50 p.m., nearly two hours after the interrogation began. At some point the defendant indicated that what he had told police the previous day was true and the reason he recanted was because he was afraid of Pfaff and Johnson. Mo. S. II. 58-59.

At some point during the interrogation, Captain Morency activated a tape recorder. Mo. S. III. 35-36. During the taped portion of the interrogation Karen Carroll took an immediate active role in the interrogation. Approximately twenty minutes after the tape was activated, the defendant admitted for the

testimony indicated the defendant requested an opportunity to speak with his mother. T2. VII. 112.

**Karen Carroll's testimony at the suppression hearing indicated that Sergeant Lamy instructed her to take an active role in the interrogation and to obtain the defendant's cooperation. Mo.S. III. 108-110.

first time his complicity in the actual homicide. Statement at 20.*

At 3:34 p.m., after the defendant had been interrogated for approximately two and one-half hours and admitted his actual involvement in the homicide, Sergeant Lamy issued the defendant a Miranda warning. Statement at 27.

Near the end of the taped portion of the interrogation the defendant repeatedly stated that he wanted to go home. Statement at 38-39. Mo. S. II. 17, 134-135. Sergeant Lamy continued to question the defendant and the taped portion of the interrogation ended shortly thereafter. Statement at 39-41. Subsequently, the defendant signed a consent to search his residence, which yielded a knife believed to be the murder weapon, and the defendant thereafter wrote out a statement detailing his involvement in the homicide which was completed at 6:20 p.m. Mo. S. II. 17, 135-139. Following the defendant's completion of the written statement, Sergeant Lamy requested that the defendant draw a diagram of the scene of the homicide. The defendant indicated that he was too tired to continue. Arrangements were then made so that the defendant would meet members of the State Police the following day, Sunday, November 26, 1989, for the purposes of drawing a diagram of the scene. Mo. S. I. 49. Sergeant Lamy then advised the defendant that he was free to go home with his

*Statement refers to the forty-one (41) page transcript of the defendant's tape recorded statement of November 25, 1989 followed by page number. The statement was introduced at trial as State's 60 (I.D.) as an aid to the jury in reviewing the actual audiotape. Transcript has been forwarded to the Court.

mother. Lamy further told the defendant that if he attempted to abscond, the police would apprehend him. Mo. S. I. 49. The defendant then left the Bedford Police Station with Karen Carroll. Mo. S. III. 131.

On Sunday, November 26, 1989, the defendant, accompanied by his mother, responded to State Police headquarters in Concord for the purpose of completing diagrams of the crime scene. Mo. S. I. 50-51. The defendant completed five diagrams and arrangements were made to meet with police the following day. The defendant then left headquarters with his mother. Mo. S. II. 68-73. On Monday, November 27, 1989, they again met with members of the State Police at the Bedford Police Department. The purpose of that meeting was to ask additional questions and to seek his assistance in the investigation with regard to Anthony Pfaff. Mo. S. I. 51. The defendant gave another statement which was tape recorded. Mo. S. II. 75. At approximately 3:00 p.m., the defendant agreed to accompany police to the crime scene for the purposes of confronting Anthony Pfaff with statements consistent with his earlier admissions. Mo. S. I. 54-55. Following that meeting, the defendant was returned to the Bedford Police station by members of the State and Bedford Police. The defendant remained at the police station until approximately midnight at which time he was arrested for Capital Murder. Mo. S. I. 56. The following morning, the defendant agreed to travel to Rhode Island with Sergeant Lamy for the purposes of confronting Kenneth Johnson. Mo. S. I. 56-57.

Based, in part, on his statements, Mr. Carroll was convicted of Second Degree Murder and Conspiracy to Commit Murder.

SUMMARY OF ARGUMENT

I. A confession is voluntary if it is "the product of an essentially free and unconstrained choice and was not extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." State v. McDermott, 131 N.H. 495, 500 (1989) (citations, quotation marks, and elipsises omitted). When a confession is made in reliance upon a promise of immunity it is involuntary and coerced under the New Hampshire Constitution. Id. at 501.

In the case at bar, the defendant was interrogated from 1:10 P.M. until 6:30 P.M. During the interrogation police repeatedly called the defendant a liar during the two and one half hours he denied his involvement. The defendant's mother, a police officer, actively assisted investigators in the interrogation of her son. Police indicated that they would provide safety for the defendant's protection if he disclosed all that he knew. Further, investigators implied that the defendant was not the target of their criminal investigation. Most significantly, they made direct promises that if the defendant was completely truthful and cooperated with police he would not go to prison.

Given the totality of the circumstances and the direct promise of immunity, the State failed to demonstrate beyond a reasonable doubt that Carroll's confession was voluntary.

II. During the course of interrogation, the defendant stated numerous times, "I want to go home." These statements

were direct assertions of the right to terminate questioning under Miranda which held that if the defendant "indicates in any manner" that questioning should end, the police must respect that invocation.

Here, the record supports a finding that the defendant was in custody for Miranda purposes. Additionally, the coercive conduct of police was calculated and designed to overbear the defendant's will, which rendered him incapable exercising his rights under Miranda.

When a defendant invokes the right to remain silent, the police must end the interrogation. Here, the police failed to do that. Therefore, the defendant's statements made after his assertion should be suppressed.

I. THE FINDING OF THE COURT BELOW THAT THE DEFENDANT'S STATEMENTS WERE VOLUNTARY IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE STATE.

Prior to trial, the defendant filed a Motion to Suppress Statements alleging that the statements obtained from him on November 25, 1989 through November 27, 1989 were obtained in violation of State and Federal Constitutions. ANOA 2-16. An evidentiary hearing was held on the defendant's motion. Mo. S. I - VI. The trial court held that the statements were voluntary and denied the defendant's motion. ANOA 23 - 46.

Due process requires that an involuntary statement cannot be used at a trial. See generally Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution.

The standards for determining the voluntariness of a confession are well established.

First, voluntariness is a question of fact for the trial court. State v. Wood, 128 N.H. 739, 742 (1986). This Court will not overturn such a finding unless it is "contrary to the manifest weight of the evidence, as viewed in a light most favorable to the State." State v. Lewis, 129 N.H. 787, 742 (1986).

Second,

Under the State Constitution, the standard by which the voluntariness of a confession is judged is whether it is the product of an essentially free and unconstrained choice and was not extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence.

State v. Copeland, 124 N.H. 90, 92 (1983) (quoting Bram v. United

States, 168 U.S. 532, 542-43 (1897)) (quotation marks omitted). See also State v. Howard, 17 N.H. 171, 182 (1845) ("Confessions, obtained by the hope of favor, or by fear of punishment, are inadmissible").

Third, voluntariness must be determined by examining the "totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." State v. McDermott, 131 N.H. at 500 (quoting State v. Damiano, 124 N.H. 742 at 747 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973))).

Fourth, the State must prove voluntariness beyond a reasonable doubt. State v. Phinney, 117 N.H. 145 (1977). On appeal, this Court can find that the State has not met its burden notwithstanding the finding by the lower court. See e.g. State v. Nash, 119 N.H. 728, 733 (1979); State v. Goddard, 122 N.H. 471 (1982).

A. The Court Below Erred When It Found That the Defendant's Statement Were Not Induced By Promises of Immunity and/or Leniency.

In the instant case, the defendant's admission to actual involvement in the crime was made during the second lengthy interview in less than twenty-four hours. During the first interrogation, occurring on November 24, the defendant admitted that he was present at the scene and observed two other individuals stab the victim. ANOA 24-25. The defendant expressed his desire to terminate the interview which had then lasted approximately five hours. Mo. S. I. 28. The following morning, November 25, the defendant informed his parents that the

statements he gave to police the previous day were not true. ANOA 24-25. When the defendant could not reach Sergeant Lamy by phone, his mother called Captain Morency of the Bedford Police. Morency traveled to the Carroll residence where the defendant indicated that his statements of the prior evening were not true and that he had fabricated the story from information provided by Sergeant Lamy. Mo. S. III. 26-27. While at the defendant's residence, Morency issued the defendant a Miranda warning and the defendant indicated that he did not understand what it meant to waive his rights. Morency then explained the waiver portion. Mo. S. III. 20-22. Sergeant Lamy telephoned the defendant's residence and was informed by Captain Morency that the defendant had recanted his earlier statements. The defendant agreed to meet with Sergeant Lamy and he, along with his mother, went to the Bedford Police station for that purpose. Mo. S. III. 24, ANOA 26.

At approximately 1:00 P.M., Lamy began questioning the defendant in the presence of Captain Morency in the latter's office. Sergeant Lamy did not advise the defendant of his rights under Miranda at the outset although defendant was now subject to interrogation at the police station. (Defendant was not issued Miranda warning until 3:34 P.M. after he had already admitted to stabbing the victim). Transcript at 27. The defendant continued to deny his involvement and Lamy repeatedly called the defendant a liar. Mo. S. III. 28-30. Within a short time period Sergeant Scott arrived at the police station and joined the interrogation. The questioning became more intense and the interrogation became

confrontational. ANOA 37. The defendant continued to emphatically deny involvement in the homicide. Mo. S. II. 114. Approximately one and one-half hours after the interrogation began the defendant requested his mother. Lamy left the office to locate Karen Carroll who was present in the police station. The interview, however, did not stop as Scott and Morency continued to question the defendant. Mo. S. VI. 57-59.

At some point after Lamy and Karen Carroll entered the interrogation, Captain Morency activated a tape recorder. During this time the dialogue was tense, with Karen Carroll actively participating in the interrogation. ANOA 26. Karen Carroll and Sergeant Lamy, on a number of occasions indicated that, in exchange for his cooperation, the defendant would receive benefit with respect to any potential punishment.

KC* You have got alot [sic] going for you Jason. You come through clean with them on this whole damn story (ina) one day. You have still got a life ahead of you. And you still got a good career ahead of you. (Ina) since you set off for Fort Dix last November. Look, you can't go back to July of last year and undo what's been done.

JC I know.

KC It's over and done with. So now (ina) will you tell these three men every last detail? Everything!

V. 1 (emphasis added).

* * * * *

RL ...What is it gonna take, on tape now listen to me clearly, on a day in the future, this tape which can

*"KC" is Karen Carroll. "RL" is Sgt. Roland Lamy. "JC" is Jason Carroll. "ina" means inaudible. This quote is taken from the transcript of the audio tape of the defendant's statement on November 25, 1989 and is cited as "V" followed by the page number.

never be destroyed or altered, will be placed before a jury of people that will have understood, listen to me clearly, that will have understood the horror of the type of killing that Sharon Johnson was subjected to. They will hear a voice that we will identify as Jason Carroll. A person that we are looking to, to help us bring forth those people...

JC Who did it. [interjecting]

RL ...who actually did this entire, ugly, unforgivable, horrendous act...

V. 15 (emphasis added).

* * * * *

RL Jason, the jury, the jury is listening, the jury is listening to you. You sound like a criminal, not a guy that has made a terrible mistake.

V. 19 (emphasis added).

* * * * *

KC Of course your [sic] friggin scared, these guys are gonna help you, we are not gonna sit and jump on your ass, and shoot you down.

JC But I feel like I'm getting jumped on my ass and shot down now.

KC We want the truth out of you, nobody is gonna be able to help you any more until you come forth with all the information that they need. Do you think I am going to love you any less.

JC I don't know Ma.

KC You're my kid, of course not.

JC I don't know.

KC And I'm gonna stand by you through this. You are the link that they need to put Johnson and Pfaff behind friggin bars.

JC I know Ma, but I can't (ina).

KC If you put a knife, if you put a knife in that woman, I want to know. You stabbed her, didn't you?

JC Yes I did, Ma.

V. 20 (emphasis added).

* * * * *

KC Jason, look at me, you don't have to be afraid, we know you're scared we understand that, so we're going to protect you.

RL He's close to it, he's close to it.

KC Yeah, you are, you're on the verge. We got this much out of you, let's have the rest of it. Let's have the truth.

RL It can't get any worse, come on and tell the truth.

KC The longer you put off telling the truth, the harder it is gonna be, and the worse it is gonna be on yourself because you still have a chance to save your ass, my dear. I don't want to see you go to prison...that would...

JC I don't want to go to prison either Ma.

RL Then, be truthful.

KC Then, tell us every god damned thing you know.

V. 28 (emphasis added).

The trial court found that, with respect to the defendant's claim that promises of immunity induced his confessions, no express or implied promises were made. ANOA 38-39. This finding is "contrary to the manifest weight of the evidence, as viewed in the light most favorable to the State." State v. Lewis, 129 N.H. 787, 791 (1987).

The most significant fact that the lower court completely omitted from its analysis was the direct promise that the defendant would avoid prison if he was truthful and cooperated fully. Transcript at 28. In its order, the trial court ruled that although Karen Carroll's and Sergeant Lamy's tones were intense during the November 25 taped interrogation, they were not

deemed to have been threatening or coercive. ANOA 37-38.

However, the trial court failed to address the substance of what was actually uttered to the defendant by Karen Carroll and Sergeant Lamy.

Here, the statements made by Karen Carroll, as captured by the November 25 tape recording, creates the clear implication that if the defendant was truthful he would avoid going to prison. Sergeant Lamy then endorses that implication by instructing the defendant to be truthful, following the defendant's acknowledgement that he did not want to go to prison. Transcript at 28. According to Sergeant Lamy's testimony at the suppression hearing, the defendant's belief that he would avoid prison if he were truthful would not have been unreasonable:

- Q. [by defense counsel] But you agree with me, and I understand what you're saying, that the impact of what Karen was saying or the clear meaning of the words was some kind of suggestion that if he was truthful with the police, she was saying he might get some benefit, protection, something else?
- A. Well, I would agree that if someone said that to me, that's how I would interpret it. I can't really testify how Jason interpreted it.
- Q. In the same vein, directing your attention to page 1783, about in the middle of the page, you say to Jason, 'It can't get any worse. Come on and tell the truth.' and then Karen puts in, 'The longer you put off telling the truth, the harder it is going to be and the worse it is going to be on yourself because you still got a chance to save your ass. I don't want to see you go to prison.' 'I [defendant] don't want to go to prison, Ma' 'Then tell us every goddamn (sic) thing you know' Would you agree with me the plain suggestion of those words is that -- from Karen that if Jason cooperates, he might avoid going to prison?
- A. That's what the message seems to be here, I guess.

Mo. S. I. 113-114 (emphasis added). See United States v. Pinto,

671 F.Supp. 41, 58 (D. Me. 1987) (citing Bram v. United States, 168 U.S. 532, 564 (1897)). (It is the suspect's understanding which is important for due process analysis regarding voluntariness).

While promises to inform other authorities of the defendant's cooperation or to recommend reduced bail in exchange for incriminating statements do not require a per se exclusion under the State Constitution, they add to the State's burden of proof under the totality of the circumstances. State v. McDermott, 131 N.H. at 501 (citations omitted). However, such promises are "categorically different from a promise of confidentiality or of immunity from prosecution in exchange for a statement or confession." Id. A confession made in reliance upon a promise of confidentiality or a promise of immunity is involuntary and coerced under the State Constitution. Id. (citing State v. Copeland, 124 N.H. 90 (1983) and State v. Nash, 421 N.W.2d 41 (1988)).

In this case, the events of the interrogation demonstrate that the defendant's will was overborne by the repeated direct and implied promises of immunity.

The circumstance surrounding the defendant's statement show that his will was overborne. Although the defendant had admitted his presence at the crime scene to investigators on the evening of November 24, that acknowledgement came after a confrontational interview with police. The following morning, free from the influences he had been exposed to the previous night, the defendant recanted his statements. More significantly, the

defendant took affirmative steps to contact the State and Bedford police for the purpose of recanting his statements.

Once at the Bedford Police station, the defendant continued to deny his involvement for more than two hours despite the fact that he was subjected to intense interrogation by Sergeants Lamy and Scott. Mo. S. III. 28-30. Following a conversation with Sergeant Lamy, the defendant's mother, a full time Bedford police officer, entered the office and immediately took an active role in the interrogation. ANOA 26. Despite his emphatic denial of involvement for approximately three hours, the defendant made statements implicating himself in the homicide. As evidenced by the transcript of the November 25 interrogation, the defendant's statements were made following, and as a result of, direct promises of immunity.

Whether or not Karen Carroll was acting on behalf of the State of New Hampshire does not alter the involuntariness of the defendant's confession. Many cases have held inculpatory statements to private individuals to be involuntary. People v. Ruegger, 336 N.E.2d 50 (Ill. App., 1975), found that the unusual factor that defendant was interrogated by a relative may have added a subtle compulsion to confess. Agee v. State, 185 So.2d 671, 674 (Miss., 1966), held involuntary confession prompted by a former professor of the accused who told him that "it would be lighter on him if he'd tell the truth." Hinshaw v. State, 398 So. 2d 762 (Ala. Ct.App., 1981), found involuntary the accused's admission to his boss that he stole money from her cash register. (She had threatened to call the police if he did not admit

guilt.) In People v. Andricopulos, 516 N.E.2d 302 (Ill.App. 1 Dist. 1987), although the defendant's confession was held voluntary, the court found that close relationship between a law enforcement officer and a defendant is factor to be considered in the totality of the circumstances surrounding a confession. (Officer, although present during interrogation, had only limited involvement and made no promises of leniency to the defendant).

In the present case, the defendant indicated that he perceived his mother's role as that of a police officer during the interrogation. That impression was confirmed by Sergeant Lamy when he stated that Karen Carroll was present in a dual role i.e., as his mother and a police officer. Transcript at 27. The fact that Lamy never attempted to dissuade the defendant of that belief, is another circumstance showing involuntariness. Mo. S. II. 132. Furthermore, one of the interrogators acknowledged that Karen Carroll had her roles as a mother and a police officer mixed up. Mo. S. III. 72.

In determining the voluntariness of Carroll's confession, the question is not whether Sergeant Lamy had actual authority to offer immunity but whether defendant could have reasonably supposed that he had the power. See Commonwealth v. Peters, 373 A.2d 1055, 1062 (Pa., 1977). Carroll had ample reason to believe that Lamy had authority to perform the promise. The defendant, at nineteen years old, had not graduated from high school and had no previous experience with the criminal system. Additionally, the defendant was cognizant of the fact that Lamy had allowed him to go home the previous evening despite the defendant's admission

to criminal complicity. Mo. S. I. 103.

Further, Sergeant Lamy failed to take affirmative steps to correct any misconception the defendant may have possessed regarding the benefit for his cooperation. Such inaction further enforced the defendant's impression that he would receive benefit for his cooperation. Acknowledging that offers of immunity were made, Sergeant Lamy's conjecture was that he had no obligation to correct or clarify the defendant's expectations:

Q. [by defense counsel] You didn't see that you had any role in controlling her behavior in that room; is that my understanding?

A. That's correct.

Q. So when she suggested to Jason that his cooperation with the police might mean that he wouldn't go to prison, you didn't feel any obligation to correct that obvious misstatement?

A. No.

Mo. S. I. 108.

Q. Let's start on page 1767, the first page.

A. Yes.

Q. That's the third line down after the tape has just gone on.

A. Yes.

Q. Her first involvement is to tell her son, 'You have got a lot going for you, Jason. Come clean on this whole damn story. You still got a life ahead of you. You still got a career ahead of you.' You enforce that kind of representation to Jason, correct? There's nothing wrong with that?

A. Are you saying did I enforce it then or now or --

Q. Well, you allowed that statement to be made without comment, correct?

A. Yes.

Q. And you allowed Jason to gather whatever impression he wanted to from that?

A. Yes.

Mo. S. I. 109-110 (emphasis added).

Q. But you didn't step in and say, 'Whoa, this is wrong. We're impinging on his voluntariness now. He's relying on some kind of a suggestion I'm not making. Jason, I want you to understand this is your mother talking. She's putting the cart before the horse. Your decision to testify -- to tell me the truth, to implicate yourself in a capital murder can't be based on any kind of suggestion like this.' You didn't do that, did you?

A. No.

Mo. S. I. 113-114.

Here, Sergeant Lamy "actively deceived the defendant by promising something he knew he lacked the power to do." United States v. Pinto, 671 F.Supp. 41, 58 (D. Me. 1987). More significantly, Lamy allowed Karen Carroll to make promises of immunity, yet took no steps to correct the impression the defendant adopted from those promises. A confession induced by deliberately misrepresenting its consequences is involuntary. United States v. Goldstein, 611 F.Supp. 626, 632 (N.D. Ill. 1985).

An interrogator, if he so chooses, may discuss the possibility of cooperation with a suspect or may promise to inform the prosecutor of the suspect's cooperation, however, the interrogator must make it clear he himself has no power to grant immunity or confer other benefits. Id. at 631. (citations omitted). In the present case, Sergeant Lamy participated in and endorsed promises of immunity. Transcript at 28. Nonetheless, he felt he was under no obligation to inform the defendant that he

could not follow through on such promises. Mo. S. I. 108. Here there can be no doubt that direct promises of immunity were extended to the defendant and his confessions were a consequence thereof. The lower court's failure to consider and find such was patently wrong.

A confession made in reliance upon a promise of immunity is involuntary and coerced as a matter of law under the State Constitution, and is therefore inadmissible. State v. McDermott, 131 N.H. 495 (1989). Further, where the State fails to prove beyond a reasonable doubt a confession was voluntary, the conviction cannot stand, regardless of any other evidence presented at trial. State v. Copeland, 124 N.H. 90, 92 (1983). Here, the defendant's statements of November 25 were obtained as a result of not simply violations of the principles set forth in Miranda v. Arizona, 384 U.S. 436 (1966), but through deliberate coercive conduct on the part of the officers designed to overcome the defendant's will to remain silent. Therefore, under this Court's holding in State v. Dellorfan, 128 N.H. 628, 635 (1986) (citing Oregon v. Elstad, 470 U.S. 298 (1985)), statements and evidence obtained from the defendant over the following days must also be suppressed.

B. The Court Below Erred In Failing to Find That The Defendant Was Subject to Coercive and Improper Influences Which Resulted in His Confessions.

The defendant, beginning with the early stages of the interrogation on November 25, 1989, indicated that he was fearful of Kenneth Johnson and Anthony Pfaff. Mo. S. II. 57-59. The taped portion of the interrogation reflects that the defendant

continually expressed fear for his safety. The defendant's expressions of fear were met with Lamy's assurances of protection; however, the defendant's protection was predicated upon his cooperation:

RL ...And if you're afraid, and you tell us what you're afraid of, include Mr. Johnson, we can take care of protecting you. We can't take care of protecting something we don't understand.

KC Jason, is someone out there now? That Johnson has...

JC Well, see that's just it, I don't know Ma, cause those nights with the f____n van, I don't know if he has informed anybody or not. I don't know. I don't know if he did or he didn't.

KC There were a few nights that he came home. There were several nights that he came home and claimed he had been followed by a van.

RL And again, keep in mind Johnson has no resources, no money, Ken Johnson has no money whatsoever to do this, okay.

JC (ina) I know.

RL Again we are putting the cart before the horse. Protection for your safety is commensurate on you convincing us that you want to be truthful. You haven't done that to me.

JC Sergeant, I am trying to be so f____g truthful.

RL But why don't you just skip trying and why don't you just be truthful.

JC I'm just too scared....

V. at 17-18 (emphasis added).

* * * * *

KC (ina) Jason, you can be protected.

JC I am very afraid of someone coming up to me.

KC Who?

JC Johnson. I am so afraid of Johnson, since he made that threat. I am afraid that he is gonna get somebody,

after those couple nights with that f_____g van, I am afraid that somebody is gonna come after me.

RL Look, I understand that, we already told you, if you get to the bottom dollar here and tell us the truth, we will then discuss your safety...

V. at 29 (emphasis added).

It is clear from the record of the November 25 interrogation that the defendant was concerned for his safety. In addition, the defendant makes specific reference to events that caused him fear i.e., Kenneth Johnson's threat and being followed by a van. Further, Carroll disclosed to investigators that fear for his safety led him to recant his statements of November 24. Mo. S. II. 58-59. The defendant received repeated assurances from Sergeant Lamy that protection would be provided. It is also evident that in each instance Lamy informed the defendant that protection for his safety was "commensurate" on his cooperation with police.

Arizona v. Fulminante, 111 S.Ct. 1246, 1252 (1991) held statements involuntary where fear of physical violence from other inmates, absent protection from jail house informant (government agent), motivated defendant to confess. See Payne v Arkansas, 356 U.S. 560, 565 (1958) (confession coerced where officer promised protection from angry mob if accused confessed). In the present case, Sergeant Lamy's testimony indicates the defendant's fears were used to obtain his statements:

Q. [by defense counsel] You tell him that if he's afraid, before you can take care of him and protect him, you have to understand what he's talking about in detail?

A. Yes.

Q. And you go down a little bit further and you tell him,

'Protection for your safety is commensurate on you convincing us that you want to be truthful, and you haven't done that to me.', right?

A. Correct.

Q. Would you agree with me that a fair inference for a nineteen year old to make is that unless he's completely truthful with you, you're not going to do anything to protect him?

[Objection from counsel]

A. [witness answers] Well, this is an interrogation setting. Again, I said that, and I said it for effect, I would imagine, and Jason Carroll would have to explain exactly just what that meant to him. This is part of an interrogation setting.

Q. And then Karen picks up on that on page 1778, towards the bottom. She tells him, 'Of course you're friggin scared. These guys are going to help you. We're not going to sit and jump on you ass and shoot you down.', and then continuing, 'We want the truth out of you. No one is going to be able to help you anyway until you come forth with all the information that they need. Do you think I'm going to love you any less?' and she's telling him in her words that he's not getting any help in any way, either protection or in any fashion unless he comes forward and is truthful with you. Doesn't that strike you as suggesting to him that there's some benefit for his coming forward and being truthful?

A. Yes.

Q. And you wouldn't have used those words, would you?

A. I didn't use those words.

Q. Right, and you wouldn't use them because they're not appropriate for someone in your position interrogating -- an interrogating detective, correct?

[objection from counsel]

A. [witness answers] I won't say I wouldn't have used it if I felt it was necessary. The point is, I didn't use it in this setting.

Sergeant Lamy's last statement above is indicative of the manner in which he preyed on the defendant's fears. Although Lamy himself made implied promises of the same nature, he allowed

the defendant's mother to make direct assurances that the defendant would be protected if he cooperated and "gave [police] all the information that they needed." In his own words, Lamy acknowledged that the promises of protection were used for "effect" on the defendant. Lamy used the defendant's mother as a tool to extract the defendant's confession. Again, Sergeant Lamy took no action to correct the inherent psychological pressures bestowed upon the defendant by Karen Carroll to confess.

In United States v. Goldstein, 611 F.Supp. 626 (D.C. Ill. 1985), the court held statements elicited by federal agents were involuntary after they falsely assured the defendant that he was not the target of their investigation. In the case at bar, Sergeant Lamy made similar assurances to the defendant that he was not the objective of their investigation:

RL What's Pfaff saying during this time.

JC He was watching, he was watching. He was standing still watching.

RL Did you guys ah, I want to know what weapons you had, you can tell us the part you did.

V. 7 (emphasis added).

RL [A jury] will hear a voice that we will identify as Jason Carroll. A person we are looking to, to help us bring forth those people...

JC Who did it.

V. 15 (emphasis added).

RL Jason, the jury, the jury is listening, the jury is listening to you. You sound like a criminal, not a guy that has made a terrible mistake.

V. 19 (emphasis added). In addition, where Karen Carroll made similar guarantees to the defendant, Sergeant Lamy did nothing to

dissuade the defendant's belief:

KC ...You are the link that they need to put Johnson and Pfaff behind friggin bars.

JC I know Ma...

V. 20 (emphasis added).

These statements -- that the defendant was the "link" and the person police were "looking" to for assistance -- clearly and deliberately misrepresented the defendant's status in the investigation. It was clearly implied that Johnson and Pfaff were the only criminal targets, carrying the reasonable implication to Carroll that his statements would not be used against him in a criminal prosecution. Where the government misleads a suspect concerning the consequences of a confession, his statements are induced by direct or implied promises and therefore involuntary. United States v. Goldstein, 611 F.Supp. at 632. (citations omitted). Goldstein involved non-custodial interrogation; like the defendant in the instant case, Goldstein did not want to make incrimination statements to police during the interrogation. He confessed only after the FBI agents made an implied misrepresentation that his statements would not be used against him in a criminal prosecution. Id. at 632. Like Carroll's response to Lamy on November 25, 1989, Goldstein's uncharacteristic willingness to talk after hearing such representations showed that he accepted the assurances, and made the ensuing statements involuntary. Unlike Goldstein, Carroll was subject to the additional inherent psychological pressure as a result of his mother's presence and active participation in the interrogation. Those factors coupled with the direct and implied

promises of immunity, rendered the defendant's statements involuntary.

On Saturday, November 25, 1989, Captain Morency responded to the defendant's residence in response to Karen Carroll's request that he speak with her son. Morency arrived at the Carroll residence at approximately noontime. Mo. S. III. 17-18. The defendant indicated to Morency that what he had said the night before was not true and he wished to recant his earlier statements. Morency told Carroll that before they could speak, he would have to advise him of his Miranda rights. Mo. S. III. 19. The defendant then explained that the statements made to Sergeant Lamy the previous night were not true and that he had fabricated the story from information Lamy had provided.

At the time Morency issued the Miranda warning and spoke with the defendant at his residence, the atmosphere was calm and composed. Mo. S. III. 80. Later that afternoon, at 3:34 P.M., the defendant was again issued a Miranda warning by Sergeant Lamy; however, much had occurred in the three and one half hours that had elapsed. The interview location had changed from the defendant's residence to the Bedford Police station where he was now being interrogated by three police officers. The defendant had been subject to intense questioning for two and one half hours, while continuing to deny his involvement. ANOA 37. Sergeant Lamy had repeatedly called Carroll a liar in a boisterous manner. Mo. S. III. 28-30. The defendant had been crying. Mo. S. III. 77. Karen Carroll took an active role in the interrogation. ANOA 26. On tape, promises of immunity and

protection were made; the defendant was lead to believe Johnson and Pfaff were the target of the investigation; and the defendant admitted his actual involvement. All of the foregoing occurred before a Miranda warning was read to the defendant by Sergeant Lamy. Transcript 1-27.

Although for the purposes of Miranda, the defendant was not in custody when he initially responded to the Bedford Police station, the principles of fundamental fairness under the due process clause of the Federal Constitution are applicable to noncustodial interrogations.* State v. Portigue, 125 N.H. 352, 362 (1984). In Portigue, this Court held that "'noncustodial interrogation might possibly in some situation, by virtue of some special circumstance, be characterized as one where the behavior of...law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.'" Id. at 362-63. (quoting Beckwith v. United States, 425 U.S. 341, 347-48 (1973)).

In Commonwealth v. Peters, 373 A.2d 1055 (Pa., 1977), the court held the accused's post Miranda statements inadmissible, where promises which preceded the warning operated to "undercut the effect of the warning by offering an inducement to speak." Id. at 1063. Here, although Lamy read the defendant Miranda, that warning did not take place until after the defendant admitted to taking part in the homicide. More

*The defendant does not concede that the November 25, 1989 interrogation was noncustodial. In fact, it is the defendant's position that during the course of the events it developed into a custodial interrogation.

significantly, the warning issued by Lamy came after the defendant was assured his statements would not be used against him if he was truthful and cooperated with police. Like Peters, the promises and inducements made to Carroll rendered the subsequent Miranda warning ineffective. Therefore, the defendant's purported waiver could not have been knowing, intelligent and voluntary in light of the events which preceded the warning.

The facts in the present case are akin to those in State v. Tapply, 124 N.H. 318 (1983), where "the incriminating statements came only after a long period of skillful interrogation in a police-dominated atmosphere..." Id. at 323. Here too, a review of the record "militates against a finding that the defendant had waived" his right to silence. Id.

A defendant may waive his Miranda rights provided the waiver is made knowingly and intelligently. Miranda v. Arizona, 384 U.S. 436, 475 (1966). Under the New Hampshire Constitution, the State must prove beyond a reasonable doubt that the defendant waived his rights under Miranda. State v. Gullick, 118 N.H. 912, 915 (1978); State v. Phinney, 117 N.H. 145, 146 (1977). The determination of whether a person knowingly and intelligently waived his Miranda rights is made after considering the totality of the circumstances. State v. Bushey, 122 N.H. 995, 999 (1982) (citing North Carolina v. Butler, 441 U.S. 369, 374-75 (1979)).

Where a defendant raises the issue of whether the behavior of police in a noncustodial situation overbore his will to resist, "it is the duty of an appellate court ... to examine the

entire record and make an independent determination of the ultimate issue of voluntariness." Beckwith v. United States, 425 U.S. 341, 348 (1976). An independent review of this record supports a finding that police employed coercive and improper tactics calculated to elicit a confession from the defendant. Such conduct fails to comport with the principles set forth in the State and Federal Constitutions.

II. WHERE THE DEFENDANT INDICATED TO POLICE A DESIRE TO END THE INTERROGATION AND THE POLICE FAILED TO END THE INTERROGATION OR CLARIFY THE DEFENDANT'S EQUIVOCAL INVOCATION OF THE RIGHT TO REMAIN SILENT, THE CONFESSION MUST BE SUPPRESSED.

One of the basic rules of Miranda v. Arizona, 384 U.S. 436 (1966) is that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-474, (footnote omitted) (emphasis added). State v. Reynolds, 124 N.H. 428, 433 (1984). In Michigan v. Moseley, 423 U.S. 96, 103-104 (1975), the Court held "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning was 'scrupulously honored'".

During the interrogation of Carroll on November 25, 1989, the defendant made statements that clearly indicated his desire to end questioning. The subsequent failure of police to stop the interrogation or otherwise seek clarification of the defendant's request constitutes a failure to scrupulously honor his right to remain silent.

At 3:34 P.M., following two and one half hours of interrogation, Sergeant Lamy read the defendant his Miranda rights. Within minutes Carroll expressed his desire to terminate the interrogation:

RL Have we promised you anything? Have we intimidated you or threatened you, to tell this story, answer that?

JC (ina) I'm tired, I want to get it over with, I want to go home.

RL Tell the truth. Tell the truth. Relax kid, you gonna crack up. Relax. Alright we are gonna open windows

and let some air in. Relax. Just rest yourself for a minute. (ina) just relax and don't think for a minute. What do you think Captain?

JC I want to go home. I want to go home. I want to go home.

RL (ina)...go get that knife.

JC I want to go home. I want to go home, Ma. I want to go home, Ma. Why do you have the knife? Are you gonna give them that knife? I want to go home. (ina) I want to go home.

RL Shirt. We need that shirt.

JC I want to go home.

KC Jason, where is the shirt?

RL Jason, you want to do something for the jury right now, tell us where that shirt is, lets just go get the shirt, lets finish this, that will be the last thing I'll ask you, then we'll start rebuilding again. Help us find that shirt please. Please help us find the shirt.

JC I don't know where the shirt is at, I swear to God, I swear on the f____n Holy Bible....

V. 38-39 (emphasis added).

* * * * *

JC I want to go home, I want to go home, Ma. I want to go home.

RL Relax will ya, just relax, (ina). We got to think a little here.

V. 39 (emphasis added).

Following the above statements Sergeant Lamy questioned the defendant regarding various items of physical evidence for approximately two minutes, at which time the taped portion of the interrogation ended at 3:39 P.M. The defendant then executed a Consent to Search Form for the purposes of searching his residence; thereafter, he produced a written statement detailing

his involvement in the homicide which was completed at 6:20 P.M.

Sergeant Lamy testified about the defendant's requests to go home as follows:

Q. And in fact, he was sobbing and said, 'I want to go home. I just want to go home. I want to go home.', right?

A. Yes.

Q. And you're telling us that from that statement you inferred that he didn't really mean it, right?

A. I didn't say he didn't mean it.

Mo. S. II. 31.

Q. Did you follow-up and say, 'Jason, you know, you're free to leave. You're not in custody. As you understand, because I've already told you, you can stop questioning and go home whenever you want. I know you're upset. Do you really want to go home and stop this now?' Did you ask him questions like that?

A. I issued Miranda and Miranda is very clear as to what he could do.

Q. I understand that, but when he expressed to you in a fearful, sobbing voice that he wanted to go home, and you tell us that you heard that in a different way than the words say, did you stop and say, 'Jason, this is my understanding of what you're saying. Do you want to continue with this, or do you want to stop and go home?' Did you do that?

A. No.

Q. Did you honor his expression of a desire to go home?

A. No.

Q. Did you ask him to explain what that meant?

A. No.

Mo. S. II. 31-32.

Q. And Jason towards the bottom of the page again says, 'I want to go home.', correct?

A. Yes.

- Q. And you respond, 'Relax. Will you relax? Just relax.'?
- A. Yes.
- Q. And you continue with your questioning?
- A. Yes.
- Q. And you continue to obtain statements and you have him sign a statement, sign a consent to search?
- A. Yes.
- Q. And you had explained to him that paragraph five of the Miranda warning, as we talked about, and he understood that, that he could stop questioning and go home whenever he wanted to, right?
- A. Yes.
- Q. And on Friday night he said he wanted to stop questioning and go home, and you let him go home?
- A. Yes.
- Q. But you didn't do it on Saturday, did you?
- A. No.

Mo. S. II. 33-34.

Whenever the State seeks to introduce statements made by a defendant into evidence at trial, it must establish beyond a reasonable doubt that it did not violate the defendant's constitutional rights under Miranda. State v. Chapman, 135 N.H. 390, 394 (1992) (citations omitted). Where a defendant seeks review of a lower court's finding that no Miranda violation occurred, this Court will review the evidence in the light most favorable to the State. Id.

In the present case, when the defendant expressed his repeated desire to go home, his requests were ignored and he was subjected to continued questioning for almost three hours. Mo. S.

II. 33, 135-38.

In State v. Riley, 126 N.H. 257 (1987), for purposes of determining custody, this Court adopted the analysis that "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. at 263. (quoting United States v. Mendenhall, 446 U.S. 544 (1980)). Further, in State v. Cote, 129 N.H. 358, 365 (1987), this Court stated "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty..." Id. (quoting Mendenhall, supra at 554). This Court, in finding that Cote was not in custody, held significant the fact that questioning did not take place at a police station. Cote, supra.

Custody determinations for Miranda purposes are essentially factual, and this Court will uphold the lower court's ruling unless contrary to the manifest weight of the evidence or the result of an error of law. State v. Carpentier, 132 N.H. 123, 126 (1989) (citations omitted). In considering the issue of custody the trial court should consider, inter alia, "the suspect's familiarity with his surroundings, the number of officers present, the degree to which the suspect was physically restrained, and the interview's duration and character." Id. at 127. See United States v. Masse, 816 F.2d 805, 809 (1st Cir. 1987).

Assuming arguendo, that Carroll was not in custody at any point on November 25, 1989, Part I, Article 15 of the State

Constitution requires that he be afforded protection consistent with the principles of Miranda as a result of nature of the interrogation and the conduct of the police in this instance. See State v. Carpentier, 132 N.H. at 128; Beckwith v. United States, 425 U.S. 341, 348 (1976).

In the instant case, it is clear that the defendant could not simply ignore the questions and walk away, as evidenced by his repeated attempts to do just that. Unlike Cote, the interrogation without doubt took place at a police station. In fact, it took place in Captain Morency's office which has physical dimensions of 10' x 10'. Mo. S. III. 27. When Carroll expressed his desire to terminate the interrogation, not only had he admitted his direct involvement in a homicide, he was in the presence of three police officers, excluding his mother. Further, at the end of the interview Sergeant Lamy told him that, although he would be allowed to go home that evening, he would be apprehended if he attempted to run. Mo. S. I. 49. An independent review of this record, under the reasonable doubt standard, supports a finding that the interrogation of the defendant occurred in a custodial atmosphere.

Here, the lower court applied the correct standard for Miranda determination; however, the court failed to apply the relevant facts raised by the defendant to the analysis. In its order, the trial court failed to address the defendant's repeated requests to terminate the interview. In holding that the defendant was not in custody, the court did not go on to consider the defendant's request to terminate the interrogation.

This analysis, in light of the coercive and improper conduct of the police, overlooks the principles of fundamental fairness under the due process clause of the federal constitution which applies to noncustodial interrogations. See Beckwith v. United States 425 U.S. 341, 347-48 (1976); State v. Reynolds, 124 N.H. 428, 432 (1984).

This Court, in State v. Chapman, 135 N.H. 390 (1992), reviewed the issue of a defendant's right to terminate questioning. The Court determined that the defendant was professing his innocence, rather than attempting to terminate questioning. Carroll, unlike Chapman, expressed a clear desire to end the interrogation. The present facts, taken in light of State v. Carpentier, 132 N.H. 123 (1989), supports a finding that the defendant sufficiently asserted his right to terminate the interrogation. In Carpentier, the Court cautioned "that officers would be well advised to respond to any reference to counsel, however ambiguous, by repeating that the suspect may have counsel if he wishes and reminding him that he may request counsel at any time. Id. at 128. Similarly, when a suspect "in any manner" makes reference to the right to remain silent the police should repeat that the defendant has the right to remain silent and remind him that he can end the interrogation at any time.

The police failed to follow this rule. When the defendant said repeatedly that he wanted to go home, the police ignored his requests and did not stop the interrogation. Nor did they ask a clarifying question to determine the defendant's intent. Instead, Sergeant Lamy continued to interrogate the defendant and

obtained further statements, written and oral, along with physical evidence. Thus, the police did not scrupulously honor Carroll's assertion of his right to remain silent.

The lower court's finding that the defendant's rights under Miranda were not violated during the November 25 interrogation is contrary to the manifest weight of the evidence.

This error by the police requires the suppression of all statements made by the defendant following his assertion of his right to terminate questioning, including the oral and written statements made on November 25, 1989, and any incriminating evidence obtained thereafter. Oregon v. Elstad, 470 U.S. 298 (1984); Michigan v. Moseley, 423 U.S. 96 (1975); State v. Dellorfan, 128 N.H. 628, 634-35 (1986). A review of the record establishes that the coercion and improper influences which rendered the statements of November 25, 1989 involuntary, could not have sufficiently dissipated over the following days as to render his subsequent statements voluntary.

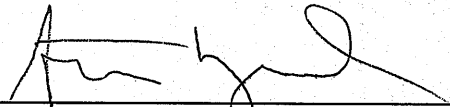
CONCLUSION

WHEREFORE, the defendant prays that this Honorable Court will reverse the defendant's conviction.

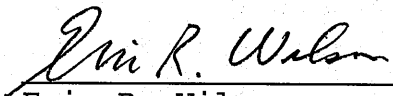
The defendant requests oral argument.

Respectfully submitted,

Dated: October 25, 1993



Steven L. Maynard

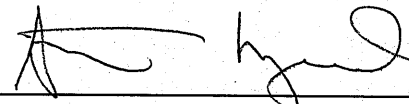


Eric R. Wilson

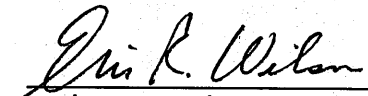
Certificate of Service

I hereby certify that a copy of the within Brief for the Defendant was this date hand delivered to the Attorney Generals' Office.

Dated: October 25, 1993



Steven L. Maynard



Eric R. Wilson