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January 14, 2022

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Re: *State v. Nestor Francisco*, Docket No.: A-3840-18

Honorable Judges:

Kindly accept this letter brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ). *R.* 2:6-2.

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Preliminary Statement

Although police officers are not required to provide immigration advice to suspects prior to an interrogation, when immigration consequences are top-of-mind for a suspect, officers cannot provide affirmative misinformation. When officers mislead suspects about critical issues, they render the statement involuntary. (Point I). As courts have time and again recognized, immigrants – especially those without lawful status in this country – are often as concerned about the impact a conviction would have on their immigration status as they are about incarceration. (Point II). Before he spoke to police, Mr. Francisco made clear that he was *most* concerned about how his actions would impact his immigration status; as a result, the officer's misrepresentation induced him to speak under false pretenses. Had the officer been forthright (or silent) about the inevitable removal that would flow from a conviction for murder, Mr. Francisco would likely not have provided a statement. The State, therefore, cannot prove beyond a reasonable doubt that the statement was knowing and voluntary. (Point III).

Statement of Facts and Procedural History

Amicus ACLU-NJ relies on the statement of facts and procedural history contained in Defendant's brief, adding that on December 29, 2021, the Court invited the ACLU-NJ and others to participate as *amicus curiae* in this matter.

Argument

The trial court admitted Defendant's statement, holding that "[s]omeone's immigration status doesn't provide them with any greater *Miranda* warnings than someone who's a citizen of this country." (1T72-11 to 13)[1]. That is both true and misses the point. Undocumented New Jerseyans are not entitled to *additional* protections against self-incrimination, but they are entitled to the *same* protections as everyone else. New Jersey's protections against self-incrimination, which are found in the common law, *State v. O'Neill*, 193 N.J. 148, 176 (2007) (finding that privilege against self-incrimination was "so venerated and deeply rooted" in New Jersey's common law that it was "unnecessary to include the privilege in our State Constitution"), and codified in both statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503, prevent law enforcement from making material misrepresentations to induce a person to provide a statement. Because that happened here, the statement should have been suppressed and the conviction must be reversed.

[1] Amicus uses the same notations as Defendant:
Da - appendix to Defendant's brief;
1T - transcript of March 22, 2017;
PSR - pre-sentence report.

I. Law enforcement officers cannot make affirmative misrepresentations to induce suspects to provide statements.

Separate and apart from the requirements imposed by *Miranda v. Arizona*, 384 U.S. 436, 467-77 (1966), the United States Constitution mandates that the State prove the voluntariness of any statement it seeks to admit. *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (suppressing as involuntary murder confession obtained by force); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (suppressing as involuntary confession obtained based on promise of protection from a mob). Although the New Jersey Constitution contains no explicit reference to self-incrimination, the New Jersey Supreme Court has "treated our state privilege as though it were of constitutional magnitude, finding that it offers broader protection than its Fifth Amendment federal counterpart." *O'Neill*, 193 N.J. at 176-77 (*citing State v. Muhammad*, 182 N.J. 551, 568 (2005)). In New Jersey, the State must prove the voluntariness of any confession beyond a reasonable doubt. *State v. Burris*, 145 N.J. 509, 534 (1996).

Although physical force or the threat of it can render a confession involuntary, as in *Brown* or *Payne*, this case focuses on a more subtle, but equally pernicious form of compulsion: a false promise of leniency. As the New Jersey Supreme Court has explained, those promises, when they are "'so enticing' that they induce a suspect to confess – have the capacity to overbear

a suspect's will and to render the confession involuntary and inadmissible." *State v. L.H.*, 239 N.J. 22, 27 (2019) (citing *State v. Hreha*, 217 N.J. 368, 383 (2014)).

Under some circumstances, police may lie to suspects; those lies then become part of the totality of the circumstances used to determine whether the confession is truly voluntary. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Some sorts of lies categorically render the confession inadmissible: police may not fabricate physical evidence (*State v. Patton*, 362 N.J. Super. 16, 46-48 (App. Div.), *certif. den.* 178 N.J. 35 (2003)) nor can they promise that a conversation is "off the record," undermining the *Miranda* warning's statement that anything the suspect says may be used in a prosecution. *State v. Fletcher*, 380 N.J. Super. 60, 91-93 (App. Div. 2005).

With promises that do not fit into those categorical boxes, courts look to determine whether, under the totality of circumstances, a false promise of leniency has the capacity to overbear a suspect's will. *See Hreha*, 217 N.J. at 383. If a promise is "so enticing as to induce that confession [,]" *id.*, courts suppress the confession. Courts must bar statements where the promise of leniency "actually induce[s] the incriminating statement" by stripping the suspect of their "capacity for self-determination[.]" *Fletcher*, 380 N.J. Super. at 89 (*quoting State v. Pillar*, 359 N.J. Super. 249, 272-73 (App. Div. 2003)).

Recently, in *State v. L.H.*, the Supreme Court considered a promise in leniency. There, officers told a suspect in a kidnapping and rape that they were going to help him and that he needed counseling rather than jail. *L.H.*, 239 N.J. at 48. Critically, although the Court was sharply divided on whether the officers' false statements induced L.H. to confess, all seven justices agreed that the interrogation "crossed the line between proper and improper police tactics." *Compare Id.* at 29 (holding that "the detectives overbore defendant's will by false promises of leniency that assured counseling instead of incarceration, by representations that conflicted with the *Miranda* warnings, and by minimization of the gravity of the offenses) *with id.* at 57 (Paterson, J., concurring in part and dissenting in part) (explaining that "[c]learly, the officers should have refrained from offering any such assurances, which could deceive and coerce a suspect less intelligent and experienced than this defendant").

Although they agreed about the inappropriateness of the interrogation technique, the two opinions differed on the impact of that violation. The majority held that under "the totality of the circumstances, given the combination of all the relevant evidence and factors," including the timing of the interrogation and the significant promises of leniency made, "the State failed to show beyond a reasonable doubt that the interrogators'

representations to defendant did not overbear his will and induce him to confess." *Id.* at 52. In contrast, Justice Paterson's opinion explained that in her view, based on her review of the video of the interrogation, L.H. was "an intelligent, well-educated, self-confident veteran of the criminal justice system who was skeptical of the officers' reassuring comments and presented a carefully crafted narrative of his offenses that downplayed his culpability." *Id.* at 57. As will be discussed below (*infra*, Point III), Mr. Francisco does not share L.H.'s education or experience with police. But the interrogations shared a common theme: the suspect was deceptively assured leniency in a manner that could overbear his will.

II. Avoidance of adverse immigration consequences can provide a powerful motivation to cooperate with law enforcement.

Unlike in *L.H.*, the officers here made no promise that Mr. Francisco would avoid jail. Instead, they told him that the result of this case would not impact his immigration status. That was a lie.[2] A conviction for murder guaranteed that Mr.

[2] Later in the interrogation Officer Suarez perhaps "only" misled Mr. Francisco by responding to his question "have [I] not gotten into a stupid mess?" by explaining (accurately, but non-responsively) that "I am not going to ask questions on your status, or how you got here to this country. Absolutely nothing." (Da 32). But earlier, the officer affirmatively lied: when Mr. Francisco worried that "this thing will . . . cause me

Francisco would be removable and made it "practically inevitable" that he would be unable to obtain relief from removal. *See State v. Nunez-Valdez*, 200 N.J. 129, 140 (2009) (explaining application of the Illegal Immigration Reform and Immigrant Responsibility Act to aggravated felonies such as murder); *Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010) (explaining that "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of . . . amendments [to the Immigration and Nationality Act], his removal is practically inevitable"). Before the interrogation began, Mr. Francisco made clear that he was more concerned about immigration consequences than prison time. He asked about the impact this "stupid mess" would have on his status in the country, but not about whether it exposed him to prison time.

While those citizens born in this country may scoff at the idea that a person's fear of deportation would be so significant that a lie about its likelihood would induce them to confess to killing another person – an action that often carries a significant prison term – our courts recognize that deportation carries tremendous import. *See State v. Heitzman*, 107 N.J. 603, 606 (1987) (Wilentz, C.J., dissenting) (describing immigration consequences as "devastating"); *see also Padilla*, 559 U.S. at

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problems with my record, because I do not have papers. I am undocumented[,]" *id.* Officer Suarez replied: "No. No." *Id.*

373-74 (noting that deportation is "the equivalent of banishment or exile"). Indeed, courts have long recognized the devastating effect of deportation. *See Galvan v. Press*, 347 U.S. 522, 530 (1954) (explaining that deportation may "deprive a man 'of all that makes life worth living,'" (*quoting Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). Professor John J. Francis has explained that "[d]eportation can separate an individual from his or her home and family, leave a family without the primary income earner, cause financial crisis, exact an emotional toll on the family unit, and sometimes permanently separate persons from their loved ones." John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw A Guilty Plea?*, 36 U. Mich. J.L. Reform 691, 735 (2003).

Courts ask whether a promise is "so enticing" as to cause the suspect to confess, not whether the promise would induce someone else to confess. *Hreha*, 217 N.J. at 383. It is therefore immaterial whether officers promised no prison time (as in *L.H.*), no immigration consequences (as here), or anything else that might be important enough to a person to overbear their will. So, if a person made clear that they did not want to speak to police because they were concerned about, for example, maintaining child custody or avoiding civil liability, an affirmative misstatement about those topics by law enforcement

could have the capacity to renderer statements involuntary in just the same way false promises of sentencing leniency do.

In other contexts, courts have recognized the similarities between immigration consequences – deportation or the inability to adjust status – and penal consequences. In *State v. Nunez-Valdez*, the New Jersey Supreme Court explained that even before that decision, courts "treat[ed] deportation similar to a penal consequence." 200 N.J. at 138. In that case, because the defendant was able to show that, but for the faulty immigration advice, he would not have pleaded guilty, the Court found his attorney rendered ineffective assistance and reversed the conviction. *Id.* at 142-43. But the standard differs in this context: in ineffective assistance of counsel cases, it is the defendant's burden to prove prejudice. *State v. DiFrisco*, 137 N.J. 434, 457 (1994) (*quoting Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (explaining defendants' burden to show "that there is a reasonable probability that, but for counsel's errors, [they] would not have pled guilty and would have insisted on going to trial.") In contrast, to admit a confession, the *State* must establish its voluntariness, beyond a reasonable doubt. *State v. Kelly*, 61 N.J. 283, 294 (1972). The State cannot do so here.

III. Defendant provided a statement because of the officer's affirmative misrepresentation about the immigration consequences that would follow.

The disagreement among Justices about whether L.H.'s will had been overborne focused on whether, in light of his "maturity, intelligence, education, and prior experience with the criminal justice system[,]" the officer's admittedly improper questioning technique induced L.H. to confess. *L.H.*, 239 N.J. at 65 (Paterson, J., concurring in part and dissenting in part). Mr. Francisco stands in stark contrast to L.H. in terms of his demeanor, his education, and, mostly, his experience with criminal justice system. Those differences undermine the State's ability to establish, beyond a reasonable doubt, the voluntariness of the statement.

The opinion dissenting part focused on L.H.'s demeanor throughout the interrogation: "From start to finish, defendant's demeanor was consistent; he was at all times alert, confident, and assertive." *Id.* at 66. That assessment comports with the trial court's findings: "defendant, throughout the statement, appears to be calm and in no physical distress," and "at times [he] could be seen laughing with the detectives as he tries to seemingly convince them of his lack of ill-intent towards the women he assaulted." *Id.* at 63 (alteration in original). Calmness, confidence, and assertiveness are not words that

describe Mr. Francisco's demeanor.[3] When police came to his apartment, just before they interrogated him, Mr. Francisco fainted at the mere sight of officers taking notice of his bandaged hand. 6T 104-14 to 105-11. Whether or not he calmed down somewhat at the hospital, there exists no evidence that Mr. Francisco possessed the calm, assertive manner that L.H. did.

Justice Paterson's opinion also focused on L.H.'s college education. *L.H.*, 239 N.J. at 64 (Paterson, J., concurring in part and dissenting in part). At the time of the interrogation, the "defendant was twenty-six years old and held an Associate's Degree from a local community college." *State v. L.H.*, 239 N.J. at 35, n.3. In contrast, Mr. Francisco was a 40-year-old man, who completed high school in the Dominican Republic. PSR 16. He did not further his education and cannot read, write, or speak English. *Id.*

The single most powerful factor supporting admission of L.H.'s statement advanced by the opinion dissenting in part was his familiarity with the criminal justice process. *See, e.g.*, *L.H.*, 239 N.J. at 57 (Paterson, J., concurring in part and dissenting in part) (describing L.H. as a "self-confident

[3] In *L.H.* the trial court and the Supreme Court were able to view a video of the interrogation, allowing the jurists to independently evaluate L.H.'s demeanor. *L.H.*, 239 N.J. at 39, n.6. Here, because the statement was only audio recorded (Da 29-103), we are forced to make certain inferences from the record.

veteran of the criminal justice system who was skeptical of the officers' reassuring comments and presented a carefully crafted narrative of his offenses that downplayed his culpability."). The Justices did not merely take notice of the fact that L.H. had previously been convicted of a crime, they explained:

> Before he set foot in the Bloomfield Police Department interrogation room, defendant had experienced firsthand the consequences of admitting to police officers that he had committed a sexual assault. As his interrogation revealed, defendant fully understood the serious offenses for which he was investigated. He had every reason to disbelieve the officers' suggestion that the outcome of the investigation might be counseling rather than a custodial sentence. In the videotaped record of his interrogation, defendant's skeptical reaction to the officers' cajoling comments is on display. He invoked his prior experience with law enforcement to challenge the officers' ingratiating remarks.
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> [*Id.* at 65-66.]

In other words, L.H. had not only been arrested, charged, and convicted of a similar offense in the past: he had provided law enforcement with a statement that resulted in his incarceration. So, the opinion dissenting in part concluded, he knew that the officer's false promise of counseling in lieu of prison was bluster and, therefore, it was unlikely to overbear his will.

None of that was true for Mr. Francisco: he had never been arrested, charged, convicted, or incarcerated. PSR 16 (noting no

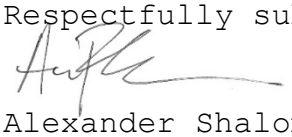
prior arrests); Da 23 (finding mitigating factor 7, no history of prior delinquency). There exists no indication that he had ever been interrogated, and certainly not for a crime as serious as murder. Nor does there exist any information to suggest that he was well-versed in immigration law, which has been described as "complex, and it is a legal specialty of its own[.]" *Padilla*, 559 U.S. at 369.

In short, the ways in which L.H. arguably could resist promises that were otherwise "so enticing" that they could overbear a suspect's will, are not present here. Mr. Francisco made clear that his immigration status was top-of-mind and Officer Suarez lied and told him that his statement would not impact it. That deception was so significant that it renders the confession involuntary and inadmissible.

Conclusion

Because the officer made an affirmative misrepresentation to Mr. Francisco, promising him that the statement would have no impact on his tenuous immigration status, and because that false promise was so appealing that it prompted him to provide a statement to police that he would not have otherwise, the State cannot prove that the statement was voluntarily given. As a result, the statement should have been suppressed and the conviction must be reversed.

Respectfully submitted,



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