

1 December 5, 1990

2 SUPREME COURT WESTCHESTER COUNTY

3 PART NC

4 THE PEOPLE OF THE STATE OF NEW YORK

5 against

6 JEFFREY DESKOVIC, Defendant

7 INDICTMENT NUMBER: 192-90

8 CHARGE: MURDER 2d

9 CONTINUED: TRIAL

10 BEFORE: HON. NICHOLAS COLABELLA,
11 Justice of the Supreme Court.

12

13 APPEARANCES: Same as previously noted.

14

15

16 (9:10 a.m.)

17 THE COURT CLERK: In the case of
18 the People of the State of New York
19 against Jeffrey Deskovic, under
20 Indictment 192 of 90.

21 Are the People ready?

22 MR. BOLEN: The People are ready,
23 your Honor.

24 THE COURT CLERK: Is the Defendant

1 and counsel ready?

2 MR. INSERO: The Defendant is
3 ready, Judge.

4 THE COURT: All right, bring the
5 jury in.

6 (Whereupon, the jury enters the
7 courtroom.)

8 THE COURT: Good morning.

9 My charge is lengthy and it's in
10 precise language, and I read. So, if I
11 don't look at you, that's why.

12 Ladies and gentlemen of the jury,
13 it now becomes my duty to instruct you
14 as to the law applicable to this case
15 and explain the manner in which you are
16 to arrive at your verdict.

17 Trial by jury in criminal cases
18 forms the very basis of the true
19 administration of justice in our
20 country. It is a procedure by which we
21 calmly, rationally and objectively try
22 to ascertain the truth in a given
23 situation. You, as jurors, and I, as
24 the Court, have a great responsibility

1 freely and voluntarily secured. In
2 simple terms, that means that the
3 People may not prove a Defendant's
4 guilt by a statement out of the
5 Defendant's own mouth, unless such
6 statement was knowingly, freely and
7 willingly given by the Defendant.
8 Therefore, a statement is voluntarily
9 made by the Defendant only if it was,
10 in fact, knowingly, freely and
11 willingly given by him.

12 Our law does not specifically
13 define when a statement is voluntarily
14 made. Instead, it defines when a
15 statement is involuntarily made.

16 In general, Section 60.45 of our
17 Criminal Procedure Law provides that a
18 statement of a Defendant is
19 involuntarily made and, therefore, may
20 not be considered by the jury if it is
21 obtained by the police or a prosecutor
22 by methods of the use of force or
23 threats of the use of force or by means
24 of deception, trickery or promises

1 likely to induce an unwilling
2 statement, or in violation of the
3 Defendant's rights under the
4 Constitution of the United States, or
5 the Constitution of the State of New
6 York.

7 These constitutional rights
8 include the right to remain silent and
9 the right to the advise and assistance
10 of a lawyer before the Defendant
11 answers any question and gives his
12 statement to the police or a
13 prosecutor.

14 As you are aware, during this
15 trial several statements are alleged to
16 have been made by the Defendant to
17 various police officers that have been
18 admitted into evidence and have been
19 heard by you. The Defendant contends
20 that he never made the statements
21 attributed to him. The People contend
22 that the statements did, in fact-- that
23 the Defendant did, in fact, make the
24 statements. Whether or not the

1 Defendant, in fact, made the statements
2 attributed to him is a question of fact
3 for the jury to be decided by you on
4 the basis of all the evidence in the
5 case.

6 I instruct you that the Defendant
7 has no burden to prove that he did not
8 make the statements. The burden of
9 proof to establish that the Defendant
10 did make the statements is on the
11 People. The People must prove that
12 fact to your satisfaction beyond a
13 reasonable doubt.

14 If the People fail to prove to
15 your satisfaction beyond a reasonable
16 doubt that the Defendant did, in fact,
17 make the statement or statements, you
18 must in arriving at your verdict
19 disregard the statement or statements
20 as though it or they had never be
21 admitted into evidence, and as though
22 you had never heard it or them.

23 You must then arrive at your
24 verdict solely on the basis of the

1 other evidence remaining in the case.

2 In this case the defense also
3 contends that if the Defendant made the
4 statement or statements, they were made
5 involuntarily, because they were
6 obtained in violation of his rights
7 under the State and Federal
8 Constitutions. Specifically, the
9 defense contends that the statement or
10 statements were involuntarily made,
11 because the police failed to advise him
12 of his constitutional rights before
13 questioning him while he was in
14 custody.

15 The defense also contends that the
16 Defendant's statement or statements
17 were involuntarily made, since prior to
18 making such statements he did not
19 knowingly and intelligently waive his
20 constitutional right in the presence
21 after assistance of counsel before
22 answering any questions.

23 The People contend that the
24 Defendant was not in custody at the

1 time his statements were made, and that
2 the police informed the Defendant of
3 his constitutional rights regardless,
4 and that the Defendant did knowingly
5 and intelligently waive his
6 constitutional rights.

7 As I have instructed you, a
8 statement is voluntarily made if it is
9 given knowingly, freely and willingly.
10 In order to assure that the statement
11 is knowingly given, the police or
12 prosecutor, before asking any question
13 or questions, must advise the Defendant
14 of his constitutional rights in words
15 or substance as follows:

16 That he has the right to remain
17 silent, and that anything he says to
18 the police may be used against him in a
19 court of law. That he has the right to
20 the presence and advise of a lawyer
21 before he answers any questions, and
22 that if he cannot afford a lawyer one
23 will be appointed for him prior to any
24 questioning, if he so desires.

1 However, these warnings must be
2 given to a person only if he is in
3 custody at the time of questioning. If
4 the person is not in custody, the
5 warnings need not be given to him.

6 The constitutional requirements
7 are really very simple. If the
8 Defendant is in custody, the warnings
9 must be given to him before he is
10 questioned. If not given to him, then
11 any statement the Defendant makes is
12 involuntarily made as a matter of law
13 and must not be considered by the jury
14 in arriving at its verdict.

15 On the other hand, if the
16 Defendant was not in custody, then the
17 warnings need not be given to him. Any
18 statements he then makes may be
19 considered by the jury in arriving at
20 its verdict.

21 When the facts are disputed, the
22 question whether the Defendant was in
23 custody at the time he was questioned
24 is an issue in fact for the jury. Our

1 law says that a person is in custody
2 when he is not free to go, when the
3 police stop or detain a person for the
4 purpose of questioning him, the test is
5 whether he is free to go. That is,
6 whether the police would prevent him
7 from leaving if he desired to leave.

8 The same test applies when a
9 person voluntarily goes to a police
10 station to be questioned. However, the
11 law says it is not the Defendant's
12 belief whether he is free to go that is
13 determinative. Instead, the test is,
14 rather, what a reasonable person,
15 innocent of any crime, would have the
16 right to believe if he had been in the
17 Defendant's position. That is the test
18 the jury must apply. What would a
19 reasonable person, innocent of any
20 crime, have the right to believe if he
21 had been in the Defendant's position?

22 Of course, in deciding that
23 question, the jury may consider the
24 conduct of the police in deciding what

1 a reasonable man would have the right
2 to believe. If the police stopped the
3 Defendant with guns drawn, if the
4 police handcuffed the Defendant, if the
5 police took the Defendant without his
6 consent from the street into the police
7 station in like or similar fact
8 situations, a reasonable person in the
9 Defendant's position would probably
10 have the right to believe he could not
11 get up and go home.

12 I instruct you that the Defendant
13 does not have to prove that he was in
14 custody. The burden of proof is upon
15 the People to prove to your
16 satisfaction beyond a reasonable doubt
17 that the Defendant was not in custody
18 when he was questioned and, therefore,
19 was free to go. If the People proved
20 to your satisfaction beyond a
21 reasonable doubt that the Defendant was
22 not in custody, you will find that the
23 statements were voluntarily made.

24 If the People failed to prove that

1 the Defendant was not in custody, or if
2 you have a reasonable doubt thereof,
3 they must prove that he was warned of
4 his constitutional rights and waive
5 those rights. Otherwise, you must find
6 the Defendant's statements were
7 involuntarily made.

8 Whether the Defendant was given
9 such warnings involves an issue of fact
10 for the jury to decide on the basis of
11 the evidence in this case. The
12 Defendant has no duty to prove that he
13 was not given such warnings. The
14 People have the burden of proof to
15 establish that he was given such
16 warnings.

17 The People must, therefore, prove
18 to your satisfaction beyond a
19 reasonable doubt that the Defendant, in
20 fact, was given the warnings. If the
21 People fail to prove to your
22 satisfaction beyond a reasonable doubt
23 that the Defendant was given the
24 warnings while in custody, you must

1 find that the statement of the
2 Defendant were involuntarily made.

3 On the other hand, if you find
4 that the People have established to
5 your satisfaction beyond a reasonable
6 doubt that the Defendant, in fact,
7 received the warnings while in custody,
8 then you may find that the statement or
9 statements of the Defendant were
10 voluntarily made if he waived his
11 constitutional rights.

12 As previously instructed, our law
13 provides that before any person can be
14 questioned he must be warned of his
15 right to remain silent and to have the
16 assistance of counsel in such a manner
17 that he fully understands them.

18 Our law further provides that
19 before a statement made by the
20 Defendant after such warnings are given
21 can be voluntarily made, it must be
22 established that the Defendant
23 knowingly, freely and intelligently
24 waived his right to remain silent and

1 waived his right to the assistance of
2 counsel. The defense in this case
3 contends that the Defendant did not
4 knowingly and intelligently waive his
5 constitutional rights.

6 The People contend that despite
7 his present contention to the contrary,
8 at the time the Defendant was advised
9 of his constitutional rights he did, in
10 fact, knowingly and intelligently waive
11 his right to remain silent and his
12 right to the assistance of counsel, and
13 that he freely and willingly made the
14 statements in evidence.

15 Since there are disputed issues of
16 fact whether or not the Defendant
17 knowingly and intelligently waived his
18 constitutional rights is a question of
19 fact for the jury of the totality of
20 all the circumstances surrounding the
21 giving of the warnings and the making
22 of the statement or statements in
23 evidence by the Defendant. The jury
24 may consider the following

1 circumstances as bearing upon the
2 making of a knowing and intelligent
3 waiver:

4 As an example, the jury may
5 consider the age, education and general
6 intelligence of the Defendant in
7 deciding whether he made a knowing and
8 intelligent waiver. Proof that the
9 Defendant was a minor or had little
10 education or had low intelligence could
11 tend to establish that he did not make
12 a knowing and intelligent waiver.

13 On the other hand, proof that the
14 Defendant was an adult of higher
15 education and intelligence could tend
16 to establish that he did make a knowing
17 and intelligent waiver.

18 For example, the jury may consider
19 whether the police resorted to
20 deception or trickery or promises in
21 order to obtain the statement. Proof
22 that the People resorted to deception,
23 proof that the police resorted to
24 deception, trickery or promises would

1 tend to establish that the Defendant
2 did not make a knowing and intelligent
3 waiver.

4 On the other hand, proof that the
5 police did not resort to deception,
6 trickery or promises could tend to
7 establish that the Defendant did make a
8 knowing and intelligent waiver.

9 As an example: The jury may take
10 the length of the giving of the warning
11 or the warnings and the statement by
12 the Defendant. Proof that a
13 considerable period of time expired
14 between the giving of the warnings by
15 the police and the making of the
16 statement by the Defendant could tend
17 to establish that the Defendant did not
18 make a knowing and intelligent waiver.

19 On the other hand, proof that the
20 Defendant's statement or statements
21 followed closely upon the giving on the
22 warnings could tend to establish that
23 the Defendant did make a knowing and
24 intelligent waiver.

1 For example, the jury may consider
2 whether or not the Defendant made an
3 expressed statement, that he did not
4 wish to remain silent or did not wish
5 the assistance and advise of a lawyer.
6 Proof that the Defendant expressly said
7 "I wish to make an a statement" or "I
8 do not wish the advice of a lawyer,"
9 could be strong evidence that he made a
10 knowing and intelligent waiver.

11 On the other hand, proof that the
12 Defendant did not make such expressed
13 request or proof that the Defendant
14 remained silent when asked whether he
15 wished to make a statement in the
16 absence of a lawyer can tend to
17 establish that he did not make a
18 knowing and intelligent waiver.

19 These are some of the
20 circumstances which, if the proof
21 established were present, you may wish
22 to consider in deciding whether or not
23 the Defendant made a knowing and
24 intelligent waiver of his

1 constitutional rights. Those are just
2 some examples.

3 I instruct you that the Defendant
4 has no burden to prove that he did not
5 make a knowing and intelligent waiver.
6 Instead, the burden is on the People to
7 prove to your satisfaction beyond a
8 reasonable doubt that the Defendant, in
9 fact, did make a knowing and
10 intelligent waiver. If the People
11 failed to prove to your satisfaction
12 beyond a reasonable doubt that the
13 Defendant made a knowing and
14 intelligent waiver of his
15 constitutional rights while in custody,
16 then you must find that the Defendant's
17 statements were involuntarily made.

18 On the other hand, if you find
19 that the People have established to
20 your satisfaction beyond a reasonable
21 doubt that the Defendant knowingly and
22 intelligently and willingly waived his
23 constitutional rights while in custody,
24 you may then find that the statement or

1 statements of the Defendant was
2 voluntarily made.

3 You will then continue with your
4 deliberations in accordance with my
5 further instructions. I instructed you
6 earlier, that in addition to proving
7 the statement or statements of the
8 Defendant was voluntarily made, the
9 People are required to prove to your
10 satisfaction beyond a reasonable doubt
11 that the statement was truthful. If
12 you find that the statement was
13 involuntarily made, you must disregard
14 it, whether or not it is truthful.

15 Only if you are so satisfied
16 beyond a reasonable doubt that the
17 statement was voluntarily made must you
18 then turn to the consideration of
19 whether it was also truthful. As a
20 jury is required to disregard any part
21 of the testimony of a witness given
22 during the trial he finds false, it
23 must also disregard any part of the
24 statement of the Defendant which it

1 finds to be false.

2 In deciding whether the
3 Defendant's statements are true or
4 false in whole or in part, you should
5 apply the same tests of credibility you
6 apply in determining whether the
7 testimony of a witness is true or
8 false.

9 Are the facts of the statement or
10 statements consistent with or
11 inconsistent with the facts as
12 presented by witnesses? Is the
13 Defendant's statement or statements
14 probable or improbable? Did the
15 Defendant have any motive or did he
16 lack any motive for giving a false
17 statement or statements? These are
18 some of the tests you should apply.

19 In reaching your verdict you may
20 give weight and consideration only to
21 that part of the statement you find to
22 be truthful, and disregard any part you
23 find to be false.

24 Before you may give any

1 consideration or any weight to the
2 Defendant's statement or statements,
3 the People must satisfy you beyond a
4 reasonable doubt that the statement or
5 statements were voluntarily made as I
6 defined that term to you.

7 If the People have failed to
8 satisfy you beyond a reasonable doubt
9 that the statement or statements were
10 voluntarily made in arriving at your
11 verdict, you must disregard the
12 statement or statements as though they
13 have never been received in evidence
14 and as though you had never heard them.
15 You must then base your verdict solely
16 on the other evidence remaining in the
17 case.

18 If, on the other hand, however,
19 the People have satisfied you beyond a
20 reasonable doubt that the Defendant's
21 statement or statements were
22 voluntarily made, you must then turn to
23 the consideration of whether the
24 statement or statements of the

1 Defendant were truthful as I have
2 defined that term to you.

3 Only if you are satisfied beyond a
4 reasonable doubt that the Defendant's
5 statement or statements were both
6 voluntarily made and truthful, may you
7 then give consideration and weight to
8 such statements, together with all the
9 other evidence in the case in arriving
10 at your verdict.

11 Inasmuch as the Defendant Jeffrey
12 Deskovic was sixteen years old at all
13 relevant times at and between November
14 15th, 1989 and January 25th, 1990, I
15 charge you that he was criminally
16 responsible for his conduct. As such,
17 the police in their contacts with the
18 Defendant in this case were under no
19 legal obligation to first affirmatively
20 contact the Defendant's parent or
21 guardian.

22 We now come to the particular law
23 applicable to this case. The Defendant
24 Jeffrey Deskovic is charged with