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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 84

TRAMEL CUENCAS,

Appellant.

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20 Eagle Street  
Albany, New York  
October 19, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 number 84, People v. Tramel Cuencas.

3 MS. SHIVERS: Good afternoon. May it please the  
4 court. Yvonne Shivers for Tramel Cuencas. I'd like to  
5 reserve two minutes for rebuttal, please?

6 CHIEF JUDGE WILSON: Yes. You may.

7 MS. SHIVERS: Thank you.

8 The police who had probable cause to obtain a  
9 search warrant and face no exigent circumstances violated  
10 Mr. Cuencas' constitutional right to counsel and to be free  
11 from unreasonable searches and seizures by coming to his  
12 home to make a warrantless arrest. The constitutional  
13 support for this position is found in the heightened  
14 protection that the Fourth Amendment accords the home, and  
15 also under New York State's constitution, which gives  
16 individuals an indelible right to counsel that attaches  
17 upon the issuance of a search warrant.

18 Now, there's a compelling justification for  
19 adopting a rule that finds it to be a constitutional  
20 violation of the right to counsel, for police to come to  
21 the home intending to make an - - - a warrantless arrest  
22 when there are no exigent circumstances, even when there's  
23 consent. The consent in Harris which was decided over 31  
24 years ago, the court stressed the importance of protecting  
25 the constitutional right to counsel in New York when it

1 intersects with the Fourth Amendment. And it specifically  
2 predicted that New York's right to counsel created an  
3 incentive for police to violate Payton by not obtaining an  
4 arrest warrant. Now, although consent was not the issue in  
5 Harris, since Harris, the consent exception has really been  
6 used in New York by law enforcement to undermine the  
7 constitutional protection of the indelible right to  
8 counsel. Police have an incentive - - -

9 JUDGE SINGAS: Then why doesn't that rule extend  
10 to public places? You're saying that the intention is to  
11 violate the right to counsel. Does it really matter that  
12 it's the home? It could be outside. It could be - - -

13 MS. SHIVERS: It matters that it's the home. And  
14 we're - - - we're talking here about limited ruling that  
15 applies to warrantless arrests in the home, because the  
16 Fourth Amendment has been applied to give heightened  
17 protection to the home. And crossing the threshold into  
18 the home to arrest someone without a warrant is a  
19 particular kind of violation. We're not asking for that to  
20 apply when an arrest is made elsewhere.

21 JUDGE HALLIGAN: What's the connection, exactly,  
22 to the right to counsel?

23 MS. SHIVERS: The connect - - - the connection to  
24 the right to counsel is that when the police obtain an  
25 arrest warrant, the right to - - - to the indelible right

1 to counsel attaches. Therefore, they're motivated - - -  
2 instead of getting an arrest warrant, when they have  
3 probable cause and there are no exigent circumstances,  
4 they're motivated to simply go to the home, attempt to get  
5 consent to enter the home, and thereby, avoid the  
6 attachment of the right to counsel that would happen if  
7 they went ahead and got a warrant.

8 JUDGE HALLIGAN: But why don't those concerns - -  
9 - I understand your point. But why don't those concerns  
10 apply outside the home? I'm asking about what's the  
11 connection between the home and the particular concern  
12 about the right to counsel when the officer comes in on  
13 consent?

14 MS. SHIVERS: Well, again, the home has special  
15 protection under the Fourth Amendment. And this, you know,  
16 there's an intersection, therefore, with two areas of  
17 constitution that have been held to have special  
18 protection, the home and in New York, the indelible right  
19 to counsel. So that is why our argument is that this  
20 should apply to a warrantless arrest in the home.

21 JUDGE CANNATARO: If you go that far, though, do  
22 you - - - do you have to overrule Garvin? Is - - - is that  
23 what you're arguing for?

24 MS. SHIVERS: I don't think you have to overrule  
25 Garvin because Garvin didn't really depend on consent. It

1 was a decision about - - -

2 JUDGE CANNATARO: About coming inside the house.

3 MS. SHIVERS: But to the extent that you do have  
4 to overrule Garvin - - - if you find that you have to  
5 overrule Garvin, I think you have a compelling  
6 justification for doing so.

7 JUDGE CANNATARO: I mean, there were no exigent  
8 circumstances in Garvin either, right?

9 MS. SHIVERS: There were not. In Garvin, the  
10 question was simply whether or not the police could arrest  
11 the person on their threshold. However - - -

12 JUDGE GARCIA: Could we - - -

13 MS. SHIVERS: Garvin - - -

14 JUDGE GARCIA: - - - go back to Harris for a  
15 second?

16 MS. SHIVERS: Sure.

17 JUDGE GARCIA: The way I read Harris is there was  
18 a Payton violation. And then they took a statement and the  
19 Supreme Court said you can look at attenuation. And we  
20 said, no, because you can violate Payton in that, and you  
21 really have no consequences then under our right to  
22 counsel. And I'm - - - I'm having a hard time seeing the  
23 connection between your argument and that justification for  
24 departing from the federal rule in Harris.

25 MS. SHIVERS: What I'm saying about Harris is



1 that there was a very strong dicta in Harris in which the  
2 state constitution of New York and the right to counsel was  
3 discussed, and it was discussed in the sense of the ways in  
4 which the Fourth Amendment - - - Fourth Amendment  
5 violations, particularly warrantless arrests in the home -  
6 - -

7 JUDGE GARCIA: But you would have to create a new  
8 Payton violation here. In Harris, there was - - - there  
9 was an admitted Payton violation.

10 MS. SHIVERS: I unders - - - I understand, Your  
11 Honor, but I'm not talking about what is presently  
12 considered a Payton violation. What I'm talking about is  
13 consent.

14 JUDGE GARCIA: What's presently not a Payton  
15 violation is if you have consent.

16 MS. SHIVERS: Exactly.

17 JUDGE GARCIA: You would change that rule.

18 MS. SHIVERS: Yes.

19 JUDGE GARCIA: So that seems to me different from  
20 Harris, where we had an acknowledged Payton violation. And  
21 the issue was a statement taken after that violation.

22 MS. SHIVERS: I don't disagree that it's  
23 different from Harris. But what I am saying is Harris sort  
24 of presaged that the existence of this particular unique  
25 rule in New York regarding the right to counsel and

1           attaching - - - the right to counsel attaching when you get  
2           a search warrant, sort of was a preview to what the police  
3           were likely to do if given the opportunity to get around  
4           that right, and - - -

5                         JUDGE GARCIA: But the incentive was to violate  
6           Payton, openly violate Payton, and then you'd still get a  
7           statement because you could show it was attenuated once you  
8           took them out of the home. Here, you'd have to create a  
9           new violation, and then say you have an incentive after we  
10          create a new violation. So you know, there's no violation  
11          of Payton if consent is valid. Put aside the consent valid  
12          or not issue. But if consent is valid, then there's no  
13          Payton violation. So in Harris, they were concerned we  
14          have a Payton violation again. But you're getting around  
15          that by getting your statement in anyway on an attenuation  
16          basis.

17                        MS. SHIVERS: Well, Harris did involve an actual  
18          Payton violation. But I think that many of the - - - the  
19          concerns expressed in Harris about the Fourth Amendment,  
20          about warrantless arrests in the home, are applicable. And  
21          that rather than a Payton violation, the consent exception  
22          has sort of become the way that police have contravened or  
23          gotten around the - - - the New York right to counsel. So  
24          for that reason, I think that if to the extent that - - -  
25          that this rule would require the court to reconsider

1 aspects of Garvin and other cases in terms of consent,  
2 that's what we're asking for. And there are compelling  
3 reasons for it. One is the notion that we want to protect  
4 New York's right to counsel. And we also want to make sure  
5 that people in the home are protected from warrantless  
6 arrests. Another is that the consent exception has proven  
7 to be troublesome.

8 JUDGE SINGAS: What if they went to Gavin's house  
9 looking for consent to search for evidence, and they  
10 obtained that consent, and they go in, and then they see  
11 the defendant sitting there and arresting him. Is that  
12 good under your rule?

13 MS. SHIVERS: Well, if there are exigent  
14 circumstances?

15 JUDGE SINGAS: No exigency, consent, to look for  
16 evidence.

17 MS. SHIVERS: Consent to look for evidence and  
18 they see the defendant there and they arrest him on  
19 probable cause - - - if their reason for coming to the home  
20 is to arrest him without a warrant, then that's one  
21 scenario. If the reason for coming to home is not to  
22 arrest him without a warrant, then that's a different  
23 scenario.

24 JUDGE SINGAS: So we have to look at the  
25 subjective intent of the police officer.



1 MS. SHIVERS: You know, I was about to get to  
2 that. You know, there was a concern in Garvin by the  
3 majority that, you know, we would have to look at the  
4 subjective intent of the police officer. But actually,  
5 there are objective criteria that would really be looked at  
6 in these situations. The first would be did the police  
7 come there intending to arrest the person without a  
8 warrant? The second would be, did they have probable cause  
9 to arrest the person? That's an objec - - - a thing that  
10 can be objectively figured out. Were there exigent  
11 circumstances that - - - that justify not obtaining a  
12 warrant? Although we're - - - we're sort of, you know,  
13 technically, subjectively looking at what the police  
14 officer's reason for being there was, it's very easy - - -  
15 easily, through objective criteria in most cases, to figure  
16 out it - - - out what the reasons were. And this case is  
17 actually a perfect example.

18 Detective Fogleman and - - - and the Appellate  
19 Division found that the police went there with the  
20 intention of arresting him without a warrant. Det.  
21 Fogleman and his warrant squad, which is sort of an ironic  
22 name for them since they go without a warrant, but they  
23 went to the home with an open perp-positive eye card issued  
24 based on previous identifications of - - - of the defendant  
25 a couple of days earlier and had no other reason for being

1           there. In fact, that's the purpose of the warrant squad to  
2           go and make arrests. If you have those facts before you,  
3           you know that the police had probable cause, and there's -  
4           - - by his own testimony, he asked no questions. He simply  
5           did the arrest. And that was his entire participation in  
6           the case. You have objective criteria to figure out what  
7           the intention of the police were when they came to the  
8           house. That's just one example. I think that comes up  
9           quite often in these cases.

10                   JUDGE GARCIA: Would it just be probable cause to  
11           get an arrest warrant, minimum? Because then you're saying  
12           to the police, well, that's the stage where you really need  
13           to get one. Or it's close, you know, maybe technically you  
14           have probable cause, but you want to do more, then what's  
15           the rule? It would be good investigatory practice to do  
16           more rather than just arrest someone at the stage where  
17           we've developed probable cause to arrest. What happens?

18                   MS. SHIVERS: I'm not sure what you mean, do  
19           more.

20                   JUDGE GARCIA: You may have probable cause to get  
21           an arrest warrant, but there's an investigatory decision  
22           made that it's not a good time to get this. There's  
23           potential weaknesses in the case, we want to do more in  
24           this case before we get one.

25                   MS. SHIVERS: Uh-huh.



1 JUDGE GARCIA: But then under your rule, you  
2 can't go to the house, because you have enough to get a  
3 warrant.

4 MS. SHIVERS: If they're - - - right. That's an  
5 indication of their intention to make a warrantless arrest.  
6 I mean, if - - -

7 JUDGE GARCIA: Would - - - would - - - how would  
8 that not go on the subjective intent of the officer then?  
9 I've got enough, technically, maybe to get a warrant, and  
10 maybe some magistrate reviewing that would say, yes. I go  
11 to the house. Now, if I really am not intending to make an  
12 arrest, that's okay. But if - - -

13 MS. SHIVERS: Well - - -

14 JUDGE GARCIA: - - - I am, that's not okay, how  
15 is that not subjective?

16 MS. SHIVERS: If I'm understanding you, you know,  
17 these are criteria that the hearing court is going to  
18 consider in determining what the subjective intent is. So  
19 certainly the officer - - -

20 JUDGE GARCIA: That's what you were saying we  
21 might not have to do, given our concern in Garvin about  
22 doing that? We don't have to look at subjective intent?

23 MS. SHIVERS: No, I'm not saying you don't have  
24 to look at subjective intent. What I'm trying to say is  
25 that many times, the officer's con - - - intent can be

1 determined from objective factors. An officer can testify  
2 at a hearing that he had some other reason for going to the  
3 house. That's something that can be considered.

4 THE COURT: Subjective intent - - - and I don't  
5 see how that doesn't overrule Garvin, a case that's six  
6 years old, where we said a ruling turning on subjective  
7 police intent is fundamentally inconsistent with the Fourth  
8 Amendment.

9 MS. SHIVERS: Well, to the extent that this goes  
10 to some of the concerns in Garvin, I would say that there  
11 are compelling reasons for nevertheless adopting this rule.  
12 The consent exception has proven to be troublesome, in a -  
13 - - in addition to the fact that it - - - it invites the  
14 police to sort of backdoor cons - - - constitutional  
15 rights. It's been troublesome in, particularly - - -  
16 you're getting into situations of he said, in multi-family  
17 households, where I note that where Amicus Legal Aid  
18 Society has noted that low-income New Yorkers and New  
19 Yorkers of color are more likely to live. It has proven  
20 troublesome in situations where English is not the first  
21 language of occupants of the premises. You know, so the  
22 exception has proven not to be the greatest rule to apply.  
23 It's great for police who have found, according to studies,  
24 that when they testify at hearings, the hearing court is  
25 more likely to believe their version of the events. But

1           you know, it's also led to difficult situations in which -  
2           - - which lead to undermining the public's confidence in  
3           the police. Also, I believe, as I stated, the new rule - -  
4           - a new rule would be easier to apply because essentially -  
5           - - of the objective criteria that I've mentioned earlier.  
6           So in short, I believe that to ensure the desired effect of  
7           protecting the state constitutional right and also the  
8           heightened protection of the home under the Fourth  
9           Amendment, the court should hold that, in absence of  
10          exigent circumstances, police who have probable cause and  
11          want to arrest someone in their home should get an arrest  
12          warrant.

13                         CHIEF JUDGE WILSON: Thank you.

14                         MS. SHIVERS: Thank you.

15                         MR. TWERSKY: Good afternoon. My name is Shalom  
16          Twersky, and I represent the respondent. Honestly, I just  
17          want to briefly explain the flaws in the rule that the - -  
18          - the appellant is proposing. Number 1, whether it  
19          overrules Garvin - - - but Garvin was a threshold case, so  
20          it simply rejects the reasoning of Garvin. Footnote 5 in  
21          Garvin says you can't consider subjective motivations.  
22          That's exactly what the rule is considering. Payton says  
23          there's a violation if there's a nonconsensual entry into a  
24          home, not a threshold case, entry into the home. And it  
25          completely ignores the ability of a hearing court to make a

1 determination whether there was a Payton violation  
2 regarding whether there was a knowing and voluntary consent  
3 to enter the home, which the People have a heavy burden to  
4 meet under the totality of circumstances. Plus, it assumes  
5 that the only purpose, if the - - - if the task fugitive  
6 force, which is the - - - the squad that went out here, if  
7 they had probable cause to arrest, their only reason - - -  
8 or their only motivation would be to - - - that the right  
9 to counsel not attach.

10 There could be a lot of reasons - - - Garvin  
11 talks about it - - - simpler, faster, less burdensome. Now  
12 that - - - those type of issues aren't necessarily  
13 dispositive, but they're factors in terms of whether you  
14 get a warrant or not. Also there are - - - the DA's would  
15 be concerned about the 30-30 clock starting to run when an  
16 accusatory instrument is filed. What happens to them if  
17 the defendant flees? And then all of a sudden there's  
18 going to be all that extra time running until they - - -  
19 they find him again?

20 JUDGE HALLIGAN: Counsel, can I ask you to change  
21 gears for a minute and address consent?

22 MR. TWERSKY: Yes.

23 THE COURT: Can you tell me what exactly gave the  
24 police the belief that they had consent to enter from what  
25 Mr. Jeter did at the time?

1 MR. TWERSKY: Your Honor, first in terms of that  
2 issue - - - so I have to begin by - - - on the train coming  
3 up here, I realized that there was a flaw in our Statement  
4 of Facts on page 6 of our brief. It's actually to our  
5 detriment. And the stars aligned because Ms. Shivers was  
6 actually on the same train. We exited the same door. And  
7 so as soon as I called my office, they agreed that there  
8 was a mistake. I immediately sat down with her. We looked  
9 at the transcript together and we realized that it was a  
10 mistake, which I think is important to answer your  
11 question. So it's on page 6 of our brief. I would ask you  
12 to look at pages - - - lines 10 through 13, and it has to  
13 do with which window the officers knocked on at the front  
14 of the house, which Jeter then came to. And then Jeter  
15 then seconds later opened the door. We had written someone  
16 that knocked on the ungated window that's next to the door.  
17 And if you look at Exhibits 4(a) and 4(b), this is - - -  
18 this was in evidence at the suppression hearing. We had  
19 assumed it was talking about this window when in fact it  
20 was this window. He said gated, 9394. That's the window  
21 that the police knocked on. That's the window, he said  
22 Jeter then showed up on, and then he immediately opened the  
23 door. And we think it's a reasonable inference for the  
24 task force, Det. Fogleman, to have believed that this  
25 window was the apartment or the room that they saw on the

1 ground floor when they - - - when Jeter, after they said,  
2 how are you doing, sir? May we come in and talk to you?

3 JUDGE CANNATARO: So that made them think it was  
4 Jeter's apartment. Is that what you're saying?

5 MR. TWERSKY: Or at least that Jeter lived there  
6 with defendant, the codefendant that - - - so therefore, he  
7 at least had the apparent authority when he opened the door  
8 to it - - - two feet - - - when they said after knocking,  
9 two feet, sir, may we come in and talk to you, sir? He  
10 opens it completely - - - this is according to the  
11 testimony. And then there - - - they enter this  
12 entranceway, which clearly, based on the photos, seemed  
13 very small because they say the threshold to that door,  
14 which Jeter, now we can see, clearly came out of.

15 JUDGE TROUTMAN: So that entryway is consent to  
16 enter the apartment that was entered. Is that what you're  
17 saying?

18 MR. TWERSKY: When the - - - when the officers  
19 come in, and Jeter has just stepped - - - not only opened  
20 the door but stepped aside. And what do they say? They  
21 say right in front of them -- I'm sorry.

22 CHIEF JUDGE WILSON: Since you were concerned  
23 about the accuracy of the record - - -

24 MR. TWERSKY: Yes.

25 CHIEF JUDGE WILSON: I believe the transcript,



1 Det. Fogleman's testimony is that he opened the door a  
2 little bit wider. There not completely - - -

3 MR. TWERSKY: There's a - - - there's another  
4 time where he says completely.

5 CHIEF JUDGE WILSON: Okay.

6 JUDGE HALLIGAN: But to be clear, you're relying  
7 exclusively on the physical behavior when he opens the door  
8 and steps back, whether it's a little bit or completely.  
9 There's nothing else that you're relying on to show  
10 consent.

11 MR. TWERSKY: I'm relying on the fact that it was  
12 reasonable for them to think that Jeter came out of that  
13 apartment, and that when you have - - - now it'll be four  
14 officers plus Jeter, all standing in a vestibule where he's  
15 clearly, impliedly consented to have a conversation. Yes.

16 JUDGE HALLIGAN: Just so I'm clear with respect  
17 to Jeter's conduct.

18 MR. TWERSKY: Yes.

19 JUDGE HALLIGAN: It's simply opening the door.  
20 And whether it was a little bit or completely, it's just  
21 that those physical acts.

22 MR. TWERSKY: And stepping back - - - and  
23 stepping back where after he had - - - after they had asked  
24 to have a conversation, the idea that all - - - that the  
25 officers would have assumed of the conversation could only

1 take place in this small vestibule when the front door is  
2 completely open. What I mean by the front door, the front  
3 door of the room downstairs.

4 JUDGE TROUTMAN: The officer entered because  
5 Jeter stepped into the actual apartment where the defendant  
6 was located because Jeter stepped to the side or because he  
7 saw the defendant in the apartment?

8 MR. TWERSKY: I would take the totality of  
9 circumstances. It's both. He stepped aside. It's a small  
10 - - - it's clearly a small entranceway area. And then he  
11 immediately - - -

12 JUDGE TROUTMAN: So you keep emphasizing it's a  
13 small entryway. So if you have a small entryway, but it is  
14 not - - - there's a door to the outside and there's a door  
15 to the actual apartment, are you saying that equals access  
16 to all?

17 MR. TWERSKY: When - - - when they clearly had a  
18 reasonable inference that Jeter had come out of that door  
19 and could easily have shut it before he opened the front  
20 door. That could be - - - that's a reasonable inference  
21 that he was allowing them to have this conversation that,  
22 apparently, he had agreed to.

23 JUDGE TROUTMAN: How many doors are there? At  
24 the location, there's more than one apartment, correct?

25 MR. TWERSKY: Yes, there is. But - - -

1 JUDGE TROUTMAN: And it is important to know what  
2 the officer knew as he approached.

3 MR. TWERSKY: Right. And unfortunately, the  
4 record is not clear about that.

5 JUDGE TROUTMAN: Whose - - - whose fault is that?  
6 And whose burden was it to make a clear record as to what  
7 he knew when he entered?

8 MR. TWERSKY: Your Honor, perhaps the record  
9 should have been fleshed out more regarding whether this  
10 was his recollection two years later, as to what the  
11 structure was after he had gotten in, or whether he knew  
12 that before. But regardless of that, based on them seeing  
13 Jeter come out of that room and then allowing them to  
14 enter, there's plenty of - - - there's plenty of cases  
15 about - - -

16 JUDGE TROUTMAN: So everything is based on  
17 physicality. There's - - -

18 MR. TWERSKY: I'm sorry?

19 JUDGE TROUTMAN: Everything's based on  
20 physicality. So for some reason, the officer did not  
21 explicitly say, may we enter this apartment? Is this  
22 apartment yours? You don't dispute that there was no  
23 talking.

24 MR. TWERSKY: There also was no objection by  
25 Jeter.

1 JUDGE TROUTMAN: There was - - - point. There  
2 was no talking. Everything is based on implicit, correct?

3 MR. TWERSKY: There is - - - correct. There is  
4 such a thing as implicit consent under the totality of  
5 circumstances.

6 JUDGE HALLIGAN: So Counsel, it seems to me it  
7 might be different if this was, obviously, a one-family,  
8 unit building. But - - - but what does this mean for the  
9 many buildings that have more than one unit in them? Does  
10 that mean that anytime someone opens that front door, that  
11 that is sufficient to infer consent to go anywhere?

12 MR. TWERSKY: Absolutely not. It's just - - -  
13 it's not just opening the front door. It's the fact that  
14 he clear - - - he clearly had come out of that room and had  
15 left the door open with the defendant sitting on the couch  
16 in open view. I'm not saying, therefore, because they saw  
17 the suspect, that all of a sudden, oh, good, he's here,  
18 that they were ready to - - - that they simply grabbed him  
19 for that reason. I'm saying that the scope of consent - -  
20 - and that's really what we're talking about here is  
21 Jeter's apparent authority and scope of consent. They had  
22 a right because of the time - - -

23 JUDGE TROUTMAN: The apparent authority comes  
24 from where?

25 MR. TWERSKY: The fact that he came out of that

1 room based on a reasonable inference.

2 JUDGE CANNATARO: Your case got stronger on this  
3 train ride up to Albany today because last time they just  
4 showed up -- as far as they knew, he just showed up at the  
5 front door. Maybe at the window that was next to the door,  
6 but they had reason to believe that he might have been  
7 coming out of that apartment. Now, if I understand you  
8 correctly, you're saying, no, no, no. He was - - - they  
9 saw him at the window inside the apartment, which leads to,  
10 I guess, a greater degree of reliability to the assumption  
11 that he came out of that apartment.

12 MR. TWERSKY: That's exactly what I'm saying.

13 JUDGE SINGAS: And was that clear to the  
14 suppression court?

15 MR. TWERSKY: So the suppression court - - - the  
16 - - - the prosecutor did argue that there's a reasonable  
17 inference that he came out of that - - - of that room. But  
18 the suppression court didn't address that specifically. It  
19 just said there was tacit consent based under the totality  
20 of circumstances.

21 JUDGE GARCIA: But I guess it was the evidence in  
22 front - - - to Judge Singas's question - - - was the  
23 evidence in front of the suppression court what you  
24 explained to us today, or was it what you explained to us  
25 last time - - -

1 MR. TWERSKY: Yeah. Yes. Everything I told you  
2 is in evidence in front of the supp - - - was in evidence  
3 in front of the suppression court. I made the mistake of  
4 only figuring it out, but three hours ago - - -

5 JUDGE GARCIA: They didn't argue in the  
6 suppression court with the erroneous interpretation of  
7 that, right?

8 MR. TWERSKY: I'm sorry. Say that again, please?

9 JUDGE GARCIA: The prosecutor didn't argue the  
10 erroneous interpretation of what was in the record.

11 MR. TWERSKY: The prosecutor - - - well, it gets  
12 complicated. The prosecutor did say that Jeter came out of  
13 the - - - of this apartment. But the prosecutor had  
14 mistakenly said that the door to the stairwell had been  
15 closed. So that was a factor to be utilized. That's - - -  
16 that's the record.

17 JUDGE SINGAS: My - - - my question, though, is -  
18 - - is more specifically, did the suppression court know  
19 that the window that they knocked on was that gated window?  
20 And that's where Jeter came out of?

21 MR. TWERSKY: The - - - the - - - what I read to  
22 you is from the suppression court minutes. So that's what  
23 the hearing court heard. I mean, you know, I can - - - I  
24 can read you the three lines.

25 JUDGE GARCIA: What's the page of the record?

1 MR. TWERSKY: Let's see. Of the defendant's  
2 appendix 93 through 95. Looking at 4(a) which is this.

3 Can you just describe what will help refresh your  
4 recollection? Do you recall which window it was, meaning  
5 the window you knocked on? One of the front windows, right  
6 to the right to the front door? Not the one with the gate?  
7 No, the one with the gate. And then the one with the gate.  
8 Okay.

9 And if you look at the trial record and I know  
10 that's not supposed to be it - - - it - - - it supports  
11 that - - - the credibility of that testimony from Fogle - -  
12 - Det. Fogleman.

13 CHIEF JUDGE WILSON: If the records show that Mr.  
14 Cuencas - - -

15 MR. TWERSKY: I'm sorry, Your Honor?

16 CHIEF JUDGE WILSON: If the records show that Mr.  
17 Cuencas was in that room with the gated window?

18 MR. TWERSKY: Correct. It does, because as soon  
19 as they open - - - as soon as they enter the entranceway,  
20 they immediately see right in front of them the - - - that  
21 door completely open of that area with defendant sitting on  
22 the couch in that apartment.

23 JUDGE HALLIGAN: And is the picture that you  
24 showed us - - - where in the record is that?

25 MR. TWERSKY: Well, page 93 just says, take a



1 look at 4(a). And this is 4(a).

2 JUDGE HALLIGAN: So this what they referenced in  
3 - - -

4 MR. TWERSKY: Yeah. 4(a) and 4(b). Correct.  
5 Because 4(b) is the in - - - interior where the - - - where  
6 the - - - this is the interior. And they say they saw this  
7 right in front of them.

8 Your Honors, let me just briefly say, if this  
9 court would disagree - - - this court can find that the  
10 statements were attenuated as a matter of law. We're not  
11 suggesting that the - - - the photos and the cell phone,  
12 they would still be precluded. But the attenuation here -  
13 - - you have statements, eight hours, eleven hours, sixteen  
14 hours. You have Miranda warnings being given twice. The -  
15 - - even if you don't want to talk about the eight or  
16 eleven-hour statements, the sixteen-hour ones, that's from  
17 - - - that's on video from the ADA. Certainly, that would  
18 be admissible. And even if you don't want to find it  
19 attenuated as a matter of law, remand - - - you can remand  
20 it to the lower court to make that determination. Because  
21 the court didn't have to, because it found as - - - as the  
22 Appellate Division affirmed, that there was no Payton  
23 violation, because there was, under the totality of  
24 circumstances, valid consent. And even if you don't agree  
25 with that, as I had argued last time, you could find that



1 its harmless error based on Winnie and Travis' unequivocal  
2 ID testimony that they saw the defendant and codefendant  
3 kidnap Dudley with zip ties, making violent threats.  
4 Codefendant is showing a gun. And then Dudley is found the  
5 next morning in a park with his throat and wrist slashed,  
6 with bloody zip ties next to him. So therefore, you could  
7 still affirm this based on harmless error. If the court  
8 has no further questions, the People rely on our brief.

9 CHIEF JUDGE WILSON: Thank you.

10 MS. SHIVERS: Okay. Just to address the new  
11 interpretation of the - - -

12 JUDGE RIVERA: The revelation.

13 MS. SHIVERS: The revelation. First, I'd submit  
14 that it's really still not clear from the record that  
15 Fogleman understood - - - Fogleman wasn't the one who  
16 knocked on the window. And it's not clear that Fogleman  
17 understood that the gated window was the - - - was the  
18 window to apartment 1. It's also not clear from the record  
19 that - - - that Fogleman knew that the person who answered  
20 the door was the person who looked out the gated window.

21 JUDGE TROUTMAN: And again, it's incumbent upon  
22 the People to establish what he knew at that time.

23 MS. SHIVERS: What he knew at that time. And I  
24 would add that Jeter said he looked out the window next to  
25 the front door, which is the other window. So it's

1 possible someone else looked out the gated window. It's  
2 not clear from the record.

3 JUDGE TROUTMAN: What do you say about consent?

4 MS. SHIVERS: In this case what Fogelman knew was  
5 that this was a single structure that may have had two  
6 apartments, an upstairs and a downstairs. When he got  
7 inside, he said he was in a vestibule area. That's his - -  
8 - his words. And that once we entered the vestibule, we  
9 looked to the left, so upstairs - - - going upstairs to the  
10 upstairs apartment. And in front of him, apartment 1 we'll  
11 call it, the door was open, so he knew there were two  
12 apartments. He called them apartments. There's certainly  
13 no suggestion he thought he was in a single-family house  
14 and looking into a living room. He called them apartments.  
15 So this was Fogleman's understanding.

16 So I don't think it necessarily decides the  
17 issue, even if Jeter came out of the apartment, because the  
18 question is the scope of the consent that Jeter gave. When  
19 Jeter opened the door to a police officer saying, can we  
20 come inside and speak to you, there's no reason the police  
21 officer would necessarily have to believe that that meant  
22 come on in - - - come on in this apartment, and we'll  
23 speak. It meant come into this vestibule, and we'll speak.  
24 After that, things happened so quickly, because - - -

25 JUDGE CANNATARO: Would it be inappropriate or

1 error for the suppression court to reach the other  
2 conclusion that he meant, come on in, come into the  
3 apartment that I just walked out of and we'll talk?

4 MS. SHIVERS: It would, because I don't think  
5 it's supported by the record. You know, he had them enter  
6 the vestibule. He made no further gestures indicating to  
7 enter the apartment. And things happened so quickly that I  
8 don't think the police even thought, oh, do I have extra  
9 consent to - - -

10 JUDGE TROUTMAN: What about the - - -

11 MS. SHIVERS: - - - to enter the apartment? They  
12 saw the appellant.

13 JUDGE TROUTMAN: What about the emphasis of him  
14 stepping aside?

15 MS. SHIVERS: I guess he had to step aside. I  
16 mean, he's opening the door. They're coming in, and he  
17 steps aside. I don't think that - - -

18 JUDGE TROUTMAN: Well, Counsel says it's really a  
19 small space and he stepped aside. So it can be implied  
20 that it was consent to not only the vestibule, but the  
21 apartment that he apparently came out of.

22 MS. SHIVERS: Well, I'd submit that that's not  
23 really a reasonable interpretation of the scope of - - - of  
24 Jeter's consent. I think that - - -

25 JUDGE RIVERA: How big is the vestibule?

1 MS. SHIVERS: The vestibule is pretty small. But  
2 you know, when they - - -

3 JUDGE RIVERA: Let's go with your suggestion that  
4 it's just a vestibule. Could they all fit in that  
5 vestibule?

6 MS. SHIVERS: I believe - - - it's difficult to  
7 tell from the record. We know that Det. Fogleman stepped  
8 in, and that he was with two other detectives. What we  
9 don't know is as soon as Fogleman came in, did he proceed  
10 into the apartment before the other two detectives were  
11 fully in the vestibule? It looks from the record as if all  
12 three got in the vestibule along with Jeter, but it's very  
13 difficult to say. But you know, sometimes the area is  
14 small. In this court's decisions on - - - on things like  
15 in Garvin, such as stepping over a threshold, we're talking  
16 about a two or three-inch space between door posts. Here,  
17 yes, the vestibule is small, but - - - but I think  
18 scrutinizing the record, there's not support to find that  
19 Jeter - - - the scope of Jeter's consent was to step over  
20 the threshold into the apartment.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. SHIVERS: Thank you.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Justin Kim, certify that the foregoing transcript of proceedings in the Court of Appeals of Tramel Cuencas v. People, No. 84 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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