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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 99

ELLIOT PARRILLA,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 30, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Next on the  
2 calendar is number 99, People v. Elliot Parrilla.

3 MR. DEAN: May it please the court. Robert  
4 Dean for Mr. Parrilla. I'd like two minutes for  
5 rebuttal.

6 CHIEF JUDGE DIFIORE: Two, sir?

7 MR. DEAN: Two minutes.

8 CHIEF JUDGE DIFIORE: You have two minutes.

9 MR. DEAN: The issue before the court is  
10 purely one of statutory construction. We're not  
11 asking the court to balance justice against the  
12 wording of a statute. We are asking the court to  
13 interpret the statute correctly; if it does so,  
14 justice will be happening.

15 Under Penal Law 15 and Section 15 and  
16 15.10, regardless of whether a Penal Law crime is one  
17 of strict liability, the minimal requirement for  
18 criminal liability is a voluntary act.

19 And under this court's case law, that  
20 minimal requirement includes, even in the case of a  
21 per se weapon, that the possession be knowing and  
22 voluntary. And under that case law, with respect to  
23 per se weapons, there is the minimal requirement - -  
24 -

25 JUDGE ABDUS-SALAAM: Mr. Dean, with respect

1 to this instrument, you know, it's a - - -

2 MR. DEAN: Folding knife.

3 JUDGE ABDUS-SALAAM: It's - - - yeah, a  
4 knife that is considered a gravity knife, right?

5 MR. DEAN: Well, no. I think there is a  
6 question there - - - there is a jury question there  
7 because - - -

8 JUDGE ABDUS-SALAAM: You think it's a jury  
9 question whether it's a gravity knife? If the - - -

10 MR. DEAN: No. There's a jury question of  
11 whether the defendant is guilty of possessing the  
12 gravity knife, because what we have here is a folding  
13 knife which is meant to be opened in the normal way,  
14 of which the ordinary consumer would only know to  
15 open in the ordinary way. And you've got - - -

16 JUDGE PIGOTT: A jackknife. Isn't that  
17 what they are called, a jackknife?

18 MR. DEAN: No. I think - - -

19 JUDGE PIGOTT: You've never heard that?

20 MR. DEAN: I haven't heard that term. But  
21 this is - - - this is opened in the normal way. Only  
22 a specially trained New York City police officer  
23 would be able to open it by the flick of the wrist,  
24 and they would have to know that certain way to do  
25 it. You would have to know that certain way to do

1 it. And my client testified that he bought the knife  
2 legally, which he did, and he used it as a laborer,  
3 just like tens of thousands of people in New York  
4 State, and he did not know - - -

5 JUDGE ABDUS-SALAAM: Yeah, well, I'm just  
6 unclear. You're saying that's a jury question, that  
7 there was a jury trial here - - -

8 MR. DEAN: Right.

9 JUDGE ABDUS-SALAAM: - - - so are you  
10 saying that the court didn't instruct the jury to  
11 make the determination?

12 MR. DEAN: The court instructed the jury  
13 that what the defendant testified to, which was that  
14 he didn't know the knife opened in that way, was  
15 completely irrelevant. And that the only question  
16 was, did he - - -

17 JUDGE ABDUS-SALAAM: Have the knife.

18 MR. DEAN: - - - have the knife. And  
19 that's what we're saying is wrong.

20 JUDGE RIVERA: Did he know he had a knife?  
21 As well as have the knife or just the possession?

22 MR. DEAN: Did he know that he had - - -

23 JUDGE ABDUS-SALAAM: A knife.

24 JUDGE RIVERA: A knife, period. As opposed  
25 to - - -

1                   JUDGE RIVERA: - - - this type of knife  
2 covered by the statute.

3                   MR. DEAN: As opposed to knowing the  
4 essential characteristic of this object.

5                   JUDGE RIVERA: Correct.

6                   JUDGE PIGOTT: You wanted to charge  
7 unknowingly possessed, and you didn't get it, right?

8                   MR. DEAN: Right. And in fact - - - yes,  
9 exactly, that he had to know the essential  
10 characteristics of this knife, that it could be  
11 flicked out.

12                   JUDGE RIVERA: That he had to know that it  
13 was a gravity knife as opposed to he had to know he's  
14 got a knife.

15                   MR. DEAN: He had - - - he didn't have to  
16 know specifically it was a gravity knife, he had to  
17 know that it had - - - it could be flicked out, that  
18 it had that essential characteristic. If you look at  
19 all the oth - - -

20                   JUDGE ABDUS-SALAAM: If this were a  
21 switchblade, would you say that he would be entitled  
22 to the same charge?

23                   MR. DEAN: I think he'd be entitled to the  
24 charge - - - his road would be much tougher, less, of  
25 course, as in People v. Wood, he had a cigarette

1 lighter which had a secret button on it somewhere and  
2 the knife flicked out.

3 CHIEF JUDGE DIFIORE: How would we exempt a  
4 gravity knife or any of the other weapons in 265.01  
5 in light of our holding in Saunders?

6 MR. DEAN: Okay. So Saunders involved a  
7 firearm.

8 CHIEF JUDGE DIFIORE: Right.

9 MR. DEAN: And so what I'm saying here is  
10 if you look at 265.01, subdivision 1, every object in  
11 there - - - every object in there, including true  
12 gravity knives, has an obvious outside appearance of  
13 being a weapon, a foul and illegitimate weapon.

14 CHIEF JUDGE DIFIORE: Does a gun have an  
15 obvious outside appearance of being operable?

16 MR. DEAN: It doesn't matter whether it's  
17 operable or not; a gun is a weapon. So if you have a  
18 gun, whether it's operable or not, you know you have  
19 a weapon. If you have a folding knife, you don't  
20 know that you have a weapon, because a folding knife  
21 or a box cutter is a completely legitimate  
22 instrument; as long as there are boxes, there are  
23 going to have to be box cutters.

24 JUDGE GARCIA: Does it make a difference  
25 that your client is looking at a felony as opposed to

1 a misdemeanor?

2 MR. DEAN: No. It doesn't matter because  
3 it's a misdemeanor if you possess a gravity knife.

4 JUDGE GARCIA: So in a misdemeanor case,  
5 you have to show the knowledge element that you're  
6 talking about.

7 MR. DEAN: Right.

8 JUDGE GARCIA: So that means - - -

9 MR. DEAN: And what elevates it to a felony  
10 is just a prior conviction of any crime, any time in  
11 the past.

12 JUDGE GARCIA: Right.

13 MR. DEAN: So really it doesn't matter.

14 JUDGE GARCIA: So it would have to apply to  
15 every case - - -

16 MR. DEAN: Doesn't matter.

17 JUDGE GARCIA: - - - misdemeanor or not.

18 MR. DEAN: Right.

19 JUDGE GARCIA: So the New York State, for a  
20 misdemeanor, would have to have a knowledge element  
21 in it.

22 MR. DEAN: The knowledge element is a  
23 minimal knowledge element of a voluntary act, that  
24 you know you have something with the essential  
25 characteristic of the object. And if you look at

1 every other object in there, whether it's a gun, or  
2 of bludgeon, a metal - - - knuckle knife - - - by the  
3 way, most of these - - -

4 JUDGE STEIN: Okay, so if you look at the  
5 statute - - -

6 MR. DEAN: Yes.

7 JUDGE STEIN: - - - they're - - - they're  
8 all the same. Right. And so if we say that for  
9 these other items, it's okay for the legislature to -  
10 - - to say that it's strict liability, as we call it,  
11 you don't need to know its characteristics, what is  
12 it that takes this type of knife out of that? I  
13 understand you're saying because you can't discern  
14 its nature as a weapon, but is it a constitutional  
15 argument that you're making?

16 MR. DEAN: No, we're not making - - - we're  
17 making a purely statutory argument here. That's - -  
18 -

19 JUDGE STEIN: How - - - so how do you - - -  
20 how can you make the distinction based on the statute  
21 itself?

22 MR. DEAN: This is what I'm trying to say.  
23 If you look at every other object in there, including  
24 true gravity knives, the outward appearance of the  
25 object says that this is a weapon that is not - - -



1                   JUDGE STEIN: I know, but the legislature  
2 put it in the same statute with all of those other  
3 things.

4                   MR. DEAN: Right. So what makes the  
5 gravity knife here different is that when you look at  
6 it, this looks like an ordinary folding knife that is  
7 possessed by laborers, that they would not know  
8 opened like a gravity knife; it's a folding knife and  
9 it's sub - - -

10                  JUDGE GARCIA: So we would find that in  
11 this particular case, because of this particular  
12 knife, it takes it out of that statute. So we would  
13 substitute our judgment for what this looks like to  
14 the average person.

15                  MR. DEAN: What it looks like to the  
16 average person, unless they're a specially trained  
17 police officer, is a common ordinary folding knife  
18 that is sold legally in stores across the country,  
19 it's sold on the Internet, including Amazon.com; it  
20 was sold legally in New York before 2010.

21                  And looking at every other object that is  
22 in this statute, you would see the essential  
23 characteristic of this object. If it's a metal  
24 knuckles, you know you got metal knuckles. Most of  
25 these objects, they have no statutory definition in

1 the statute; it's not defined. Metal knuckle knife,  
2 billy, blackjack, bludgeon, plastic knuckles, metal  
3 knuckles, sandbags, sand clubs, slingshots, slug - -  
4 - they're not defined in this statute. Because you  
5 know when you have them, you have - - - you have an  
6 illegitimate object.

7 JUDGE FAHEY: You know, just to - - - just  
8 go off to a different direction for a second. Are  
9 you familiar with the Eastern District case, Irizarry  
10 - - -

11 MR. DEAN: Sure.

12 JUDGE FAHEY: With this, you are. Is this  
13 the same knife that was - - -

14 MR. DEAN: Yeah, essentially.

15 JUDGE FAHEY: Is it?

16 MR. DEAN: Yeah.

17 JUDGE FAHEY: Yeah. And in Irizarry, they  
18 said that - - - that this knife couldn't be opened by  
19 centrifugal force, right?

20 MR. DEAN: No, I believe that it could be,  
21 but most people would not be able to do it or even  
22 think to know that it opened that way. And this - -  
23 - there's a very specific case here, we're talking  
24 about - - -

25 JUDGE FAHEY: The reason I ask is - - -

1 MR. DEAN: Yeah.

2 JUDGE FAHEY: Let me just tell you the  
3 reason I'm asking. The reason I ask is - - - is the  
4 defendant still incarcerated?

5 MR. DEAN: Yeah.

6 JUDGE FAHEY: All right. Has there been a  
7 writ - - - habeas corpus writ brought under - - -

8 MR. DEAN: You mean a federal writ or - - -

9 JUDGE FAHEY: In this case - - -

10 MR. DEAN: Federal writ?

11 JUDGE FAHEY: Yeah, yeah.

12 MR. DEAN: Well, the conviction is not  
13 final. So it couldn't be a federal writ.

14 JUDGE FAHEY: Oh, it's not - - - okay. All  
15 right.

16 MR. DEAN: I think my time is up.

17 CHIEF JUDGE DIFIORE: All right, counsel.  
18 Counsel.

19 MR. SEEWALD: May it please the court,  
20 Andrew Seewald for the People.

21 Your Honors, the appellant in this case is  
22 asking the court to effectively decriminalize the  
23 procession of gravity knives. And perhaps there are some  
24 good public policy arguments for doing that, but if it's  
25 going to be done, that should be done by the legislature.

1 A knife - - -

2 JUDGE RIVERA: Why is that, because you  
3 won't be able to establish this particular element?  
4 Is that why?

5 MR. SEEWALD: Yes. Yes, that's why. It  
6 would make it almost impossible to prove that a  
7 defendant possessed a gravity knife if the  
8 prosecution was required to prove that he knew that  
9 it had the characteristics that made it a gravity  
10 knife. That would essentially require him to be  
11 caught in the act of flicking it open, or making some  
12 sort of admission; I mean, it's theoretically  
13 possible to think of a way it could be proven, but it  
14 would - - -

15 JUDGE PIGOTT: But isn't the flip side the  
16 concern? In other words, if you just possess a knife  
17 and a police officer comes by and is - - - it's been  
18 argued, you know, he flips it and you go, holy cow, I  
19 didn't even know you could do that.

20 MR. SEEWALD: Well - - -

21 JUDGE PIGOTT: Maybe you can.

22 MR. SEEWALD: The question is whether it  
23 was within the legislature's prerogative to designate  
24 gravity knives based on the inherent dangerousness of  
25 the fact that they can be flipped open very easily

1 and locked into place, whether it was within the  
2 legislature's prerogative to designate those a per se  
3 weapon. And this court has said - - -

4 JUDGE PIGOTT: So what's - - - what's the  
5 jury supposed to decide?

6 MR. SEEWALD: The jury is supposed to  
7 decide whether the defendant was - - - whether he  
8 possessed the knife, and that means aware possession,  
9 that he was - - - that's the voluntary act that was  
10 necessary to be proven in this case, aware  
11 possession; did he know that he was possessing the  
12 knife and did it - - - was it a gravity knife.  
13 That's what the jury is supposed to find.

14 JUDGE PIGOTT: Are they supposed to find  
15 that too, that it was a gravity knife?

16 MR. SEEWALD: Yes. In fact, they are - - -  
17 they are - - - yes, that it fit the definition - - -

18 JUDGE PIGOTT: But why did the court say,  
19 "The proper instruction to the jury is that the  
20 knowledge element would be satisfied by a proof  
21 establishing the defendant's knowledge that he  
22 possessed a knife, in general, and did not require  
23 proof to the defendant's knowledge that the knife met  
24 the statutory definition of gravity knife."

25 MR. SEEWALD: That's right. And under

1           Saunders - - -

2                   JUDGE PIGOTT: Not to prove gravity knife.

3                   MR. SEEWALD: Didn't - - - we - - - the  
4 prosecution doesn't have to prove that the defendant  
5 knew that it - - - the knife fit the definition of a  
6 gravity knife.

7                   JUDGE PIGOTT: Right.

8                   MR. SEEWALD: But under Saunders, under  
9 Dryden, Brannon, this court has said that the weapons  
10 listed under 265.01(1), are per se weapons that - - -  
11 and the language of the statute itself requires only  
12 that the defendant possess one of those weapons for  
13 him to be guilty of that crime.

14                   JUDGE GARCIA: Right. But does the jury -  
15 - - I think that Judge Pigott's question, does the  
16 jury have to find, separate from the knowledge  
17 requirement, that this in fact was a gravity knife?

18                   MR. SEEWALD: Yes. Yes, that it - - -

19                   JUDGE FAHEY: So then they have to find  
20 that it was a gravity knife, and that he knew he  
21 possessed a knife, but they don't have to find that  
22 he knowingly possessed a knife.

23                   MR. SEEWALD: That's right. That it - - -  
24 aware possession is the - - - is the - - -

25                   JUDGE FAHEY: And that's how you read

1           Saunders?

2                   MR. SEEWALD:   Yes, Your Honor.

3                   JUDGE FAHEY:   Okay.

4                   JUDGE STEIN:   Could the legislature decide  
5           to put within that statute a small paring knife, you  
6           know, just a sharp - - - very sharp knife, but one  
7           that's small enough that it could, you know, fit  
8           inside a pocket or something and be pulled out and  
9           used, you know, in the same way that you could use a  
10          gravity knife?  Could the legislature say that a  
11          common kitchen paring knife is a per se weapon?

12                   MR. SEEWALD:   Well, probably, yes.  If the  
13          legislature determined that a certain type of knife  
14          posed some particular serious dangerous - - - serious  
15          threat to public safety, as the legislature  
16          determined in this case with gravity knives when they  
17          arose as a - - - as an alternative to switchblades,  
18          which had already been designated per se weapons.

19                   So the - - - and the question is, if there  
20          is some unfairness to the consequences of the  
21          legislature having designated a certain object a per  
22          se weapon, the question is what is the remedy for  
23          that type of unfairness.

24                   JUDGE RIVERA:   But the argument here is  
25          that the other - - - the re - - - the other weapons

1           that are in this category are ones that if - - - if  
2           you've got it on you, you know that it's a weapon of  
3           a sort. Maybe you don't even know what it's called,  
4           but you know that this is a weapon. That's the  
5           utility of it, that's - - - and you could appreciate  
6           that it might not be legal to carry it. Right. He's  
7           not going that far, but I'm just going to add that.  
8           But he says, with this kind of knife, the one  
9           involved in this case, defendant cannot do that. Or  
10          at least claims he did - - - he was not able to do  
11          that; he didn't appreciate that.

12                    JUDGE FAHEY: Well, and then on top of it,  
13           the marketing of the knife itself. It was a Husky  
14           knife we're talking about, right. They were sold at  
15           Home Depot, there were tens of thousands of them sold  
16           - - - millions, I guess, in New York State alone, so  
17           it's - - - it's - - - from an equitable point of  
18           view, it's a little different situation than somebody  
19           with a star on them, say, or chunka sticks, those  
20           kind of weapons.

21                    MR. SEEWALD: Well, I - - - first of all,  
22           there is no evidence really about how many of these  
23           knives were sold in New York.

24                    JUDGE FAHEY: No, but I've read a lot of  
25           these cases; there is those other cases. There's an



1 awful lot of evidence on this issue.

2 MR. SEEWALD: Right. And I know - - -

3 JUDGE RIVERA: Isn't that the point of the  
4 Manhattan DA's agreement with Home Depot over this,  
5 because they were selling these knives?

6 MR. SEEWALD: Well, one of the points was  
7 that Home Depot is not the legislature. Home - - -  
8 Amazon is not the legislature.

9 JUDGE RIVERA: Understood.

10 MR. SEEWALD: They can't determine which  
11 sections of a particular Penal Law statute are  
12 enforceable.

13 JUDGE PIGOTT: That's what makes it ironic,  
14 because you could buy these knives in Buffalo, New  
15 York, and it's not a crime. But you can't buy them  
16 in New York City.

17 MR. SEEWALD: Well, Your Honor, the statute  
18 applies throughout New York. Now, there are - - -  
19 there is an exemption built into the Penal Law for  
20 hunting and fishing and trapping purposes.

21 JUDGE PIGOTT: We don't trap in - - -

22 MR. SEEWALD: So the legislature - - -

23 JUDGE PIGOTT: Let me ask you, it seems  
24 ironic, I know we're - - - it's a statutory thing,  
25 but we're saying, if you knowingly possess a knife

1 and the knife ends up fitting this definition, you're  
2 guilty of a crime. If you possess this knife without  
3 knowing that you possess a knife, just a generic  
4 knife, you're acquitted. Doesn't seem odd?

5 MR. SEEWALD: Well, there would really be  
6 no way to possess this knife to be aware that you're  
7 possessing this knife without being aware that you're  
8 possessing a knife.

9 JUDGE PIGOTT: You're sitting in your car  
10 and all of a - - - you know, and there is this  
11 presumption, and all of a sudden they go through the  
12 glove compartment and say, ha, you got a knife - - -  
13 say, I didn't know that knife was in there.

14 MR. SEEWALD: Well, then - - -

15 JUDGE PIGOTT: That's one thing, right?  
16 But the other one is, yeah, it's my knife. Well,  
17 guess what, it's a gravity knife. Now you're guilty  
18 of a crime even though you knew you had knife, you  
19 just didn't know you had a gravity knife, but somehow  
20 that doesn't make any difference. You see how odd  
21 that seems?

22 MR. SEEWALD: Well, it doesn't seem odd if  
23 you think that the legislature determined that those  
24 knives - - -

25 JUDGE PIGOTT: That strict liability - - -

1 MR. SEEWALD: - - - knives that can be  
2 flicked open are inherently dangerous. And - - - and  
3 there are good reasons for the legislature to have  
4 determined that. And, you know, in New York City,  
5 there have been a rash of stabbings recently, I'm  
6 sure Your Honors are aware of. And it's certainly  
7 rational for the legislature to have determined and  
8 to continue to determine that there is something more  
9 dangerous about a knife that can be flicked open.

10 JUDGE ABDUS-SALAAM: Do we know whether  
11 those slashings that are occurring in New York City  
12 have been done by these kinds of knives? It could be  
13 just regular knives that somebody is pulling out.

14 MR. SEEWALD: That's - - - of course, Your  
15 Honor, and - - - that's why it's for the legislature  
16 to determine what the appropriate course of action  
17 should be, if any, with respect to gravity knives.  
18 Whether they - - -

19 JUDGE PIGOTT: In terms of mens rea, you  
20 say, I'm in the flooring business, I cut tile all the  
21 time, so do I have a knife? Absolutely. All of a  
22 sudden, some officer, when I'm coming home, stops me  
23 in the subway and says, that's a gravity knife.  
24 That's news to me, because I've been using it for the  
25 last seven years cutting tile.

1           The fact that he knew he had a knife, no  
2 big deal. The fact that a knew he had a knife but  
3 didn't know that it was a gravity knife is of no  
4 consequence. There is a strict liability statute on  
5 that, right?

6           MR. SEEWALD: That's right, Your Honor.

7           JUDGE PIGOTT: So he's going down.

8           MR. SEEWALD: That's right. He is aware  
9 that he possessed the knife, and the knife that he  
10 possessed was a gravity knife. And the legislature  
11 has determined that these types of knives, because of  
12 the way they function, are inherently dangerous and -  
13 - - and are - - -

14          JUDGE ABDUS-SALAAM: It's okay to have them  
15 for fishing, hunting, and trapping, but not for work.

16          MR. SEEWALD: Well, that's the judgment of  
17 the legislature. And it was based on - - - in part,  
18 on the legislature's experience that - - - or finding  
19 that when there was an exemption for - - - for use in  
20 business for switchblades, that - - - that vitiated  
21 the effectiveness of the statute.

22          And so if the legislature wants to take up  
23 a similar exemption - - - exemption, revive that  
24 exemption for gravity knives, the legislature could  
25 do that. But for the court to carve out a separate

1 rule for one particular weapon within that statute  
2 just wouldn't make any sense.

3 JUDGE RIVERA: So what - - - what does the  
4 defendant have to know or be aware of with respect to  
5 a shirken?

6 MR. SEEWALD: With - - - I'm sorry, Your  
7 Honor.

8 JUDGE RIVERA: The shirken. It's right  
9 before Kung Fu star. What do you have to know?

10 MR. SEEWALD: That - - -

11 JUDGE RIVERA: What does your level of  
12 awareness have to be; what would the jury instruction  
13 look like for the shirken?

14 MR. SEEWALD: That - - - I'm not familiar  
15 with that exact object, but you would have to be  
16 aware that you possess - - -

17 JUDGE RIVERA: Join the club on that one.

18 MR. SEEWALD: - - - that you have to  
19 possess the object, I would say.

20 JUDGE RIVERA: Does that say - - - so the  
21 instruction would just be the object?

22 MR. SEEWALD: That - - - and you have - - -

23 JUDGE RIVERA: How would you reference it?  
24 What - - -

25 MR. SEEWALD: Well, you would have to have

1           some awareness of the - - -

2                   JUDGE RIVERA: Uh-huh.

3                   MR. SEEWALD: - - - that you were - - -  
4           yes, that you were possessing the object - - - I'm  
5           not sure - - -

6                   JUDGE RIVERA: Doesn't it then go to that  
7           characteristic that makes whatever the shirken is  
8           uniquely a shuriken, as opposed to anything else?

9                   MR. SEEWALD: I suppose if there were  
10          something about the shirken - - -

11                  JUDGE RIVERA: Yes.

12                  MR. SEEWALD: - - - that was - - - that  
13          made it - - - that made its essential shirken-ness  
14          incredibly well-disguised - - -

15                  JUDGE RIVERA: Okay.

16                  MR. SEEWALD: - - - that that perhaps could  
17          be a significant issue in determining whether the  
18          defendant was aware that he was possessing a shirken.  
19          But in this case, I don't think there is any argument  
20          that the defendant didn't know that he was possessing  
21          a knife. And so he is responsible for the  
22          characteristics of that knife that made it a gravity  
23          knife.

24                  CHIEF JUDGE DIFIORE: Thank you, sir.

25                  MR. SEEWALD: Thank you.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. DEAN: I would like to make - - -

3 CHIEF JUDGE DIFIORE: Counsel, are the  
4 kinds of cases where the defendants are just mistaken  
5 consumers, to Judge Pigott's point, are those kinds  
6 of cases - - - or even your client who used his knife  
7 as a - - - for work purposes, are those cases ripe  
8 for motions to dismiss in the interest of justice?

9 MR. DEAN: Yes.

10 CHIEF JUDGE DIFIORE: Did you pursue that  
11 here?

12 MR. DEAN: I don't believe that counsel  
13 below did.

14 I'd like to make some very important points  
15 here.

16 JUDGE RIVERA: But you'll agree this is  
17 prosecutorial discretion.

18 MR. DEAN: Yes.

19 Some very important - - - one very important  
20 point here. The People here seem to be conceding that you  
21 do have to prove that the defendant knew he had a knife.  
22 Well, actually, that's not their position. Their  
23 position, if you read their brief, is all he has to know  
24 is that he had the object.

25 So when the People are saying, well, yeah, he

1 had to know he had a knife, well, now they are conceding  
2 that they - - - the defendant has to have some knowledge  
3 of the essential characteristic of the object. And I  
4 think this is very important. They have changed their  
5 argument in order to make it seem more reasonable to the  
6 court.

7 JUDGE RIVERA: So you're saying, now they  
8 are saying, you have to know some characteristic - -  
9 -

10 MR. DEAN: Yes, exactly.

11 JUDGE RIVERA: - - - but you don't have to  
12 know all these characteristics.

13 MR. DEAN: Yes. Exactly, exactly; that is  
14 my point.

15 JUDGE RIVERA: And that's not what was  
16 argued before.

17 MR. DEAN: If you read their brief - - -  
18 and now - - - so they've partially conceded our  
19 argument, even, in the face of questioning from this  
20 court.

21 JUDGE RIVERA: What was the jury  
22 instruction?

23 MR. DEAN: The jury instruction is, it  
24 didn't matter whether the defendant knew the  
25 essential characteristic of the object; if he knew he



1 had the object, then he's guilty.

2 JUDGE RIVERA: Is that the word that was  
3 used, object?

4 MR. DEAN: The court could have said if he  
5 knew he had a knife. But my point is, that's not  
6 enough.

7 Also, if you poss - - -

8 JUDGE RIVERA: How - - - how would the rule  
9 you're advocating here apply to shirken?

10 MR. DEAN: Shuriken is actually a Kung Fu  
11 star. And my point is - - -

12 JUDGE RIVERA: Thank you for clarifying.

13 MR. DEAN: - - - if you have a Kung Fu  
14 star, you know you have a Kung Fu star. And if you  
15 possess this knife in Buffalo, you're guilty. It's  
16 just that the cops in Buffalo haven't realized it  
17 yet, but they'll realize it if you rule against me.  
18 Then they'll know - - -

19 JUDGE PIGOTT: You're going to send it out.

20 MR. DEAN: - - - because under the People's  
21 position, it's illegal all throughout New York State.

22 JUDGE PIGOTT: Right.

23 MR. DEAN: All throughout New York State.

24 And the final point is, you have to  
25 exercise some idea of context. What's a bludgeon?

1           What's a bludgeon; have you thought about that?

2           Well, if you go to a Yankee Stadium game, okay, on

3           souvenir bat day, and they give you one of these

4           souvenir bats, well, you could hit somebody over the

5           head with that and do some damage. Is it a bludgeon?

6           No.

7                         But if I take that object home, and I take

8           a strip of leather, and I wrap it around the handle

9           so that it's got a loop on it so I can stick my wrist

10          through it, and then hold the handle, that's a

11          bludgeon. I know I've got a - - - I know I've got a

12          weapon; that thing could only be a weapon.

13                         JUDGE RIVERA: But he says that - - - then

14          isn't going to end up being a strict liability - - -

15                         MR. DEAN: It is strict liability, for the

16          most part, that you have to know the essential

17          characteristics - - -

18                         JUDGE RIVERA: Well, that's his point.

19                         MR. DEAN: - - - of the object you

20          possess.

21                         JUDGE RIVERA: That's his point about

22          trying to establish that, right?

23                         MR. DEAN: It's a minimal - - -

24                         JUDGE RIVERA: Many people will say, I

25          didn't know.

1                   MR. DEAN:   - - - minimal scienter  
2                   requirement.  And the defendant testified, I didn't  
3                   know, and the judge told the jury, it doesn't matter.

4                   JUDGE RIVERA:  So then it's a jury  
5                   question, is what you're saying.

6                   MR. DEAN:  It's a jury question.

7                   CHIEF JUDGE DIFIORE:  Thank you, counsel.

8                   MR. DEAN:  Thank you.

9                   (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Elliot Parrilla, No. 99 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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