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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ANTWAINE T.,

Respondent.

No. 116

20 Eagle Street
Albany, New York 12207
May 08, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 116, Matter of
2 Antwaine T.

3 Counsel, would you like any rebuttal time?

4 MS. MORRIS: I'd take two minutes, please?

5 CHIEF JUDGE LIPPMAN: Two minutes. Go
6 ahead.

7 MS. MORRIS: May it please the court, I'm
8 Dona Morris, and I'm representing the appellant
9 presentment agency in this case.

10 JUDGE PIGOTT: I'm sorry, I can't quite
11 hear you.

12 CHIEF JUDGE LIPPMAN: Speak up, counselor,
13 yes.

14 JUDGE GRAFFEO: Can you pull the microphone
15 down? Thank you.

16 MS. MORRIS: Bring it down? Can you hear
17 me now?

18 JUDGE PIGOTT: Yes.

19 CHIEF JUDGE LIPPMAN: Yes, go.

20 MS. MORRIS: I'm representing the appellant
21 presentment agency. And our argument here is - - -
22 is that the petition in this case, which was under
23 Penal Law 265.05, a strict liability statute, no
24 intent requirement, any - - - it's unlawful for
25 weapons to be possessed by persons under the age of

1 sixteen.

2 JUDGE SMITH: And, well, suppose a kid in
3 an area where - - - where machetes are commonly used
4 to cut underbrush is carrying a machete to help his
5 father cut a path to - - - to the field, is he
6 violating the law?

7 MS. MORRIS: Well, the petition says that
8 he was found - - - the machete, which as we all
9 understand, is a heavy knife - - -

10 JUDGE SMITH: Well, what's the answer to my
11 question?

12 MS. MORRIS: I would say, probably at that
13 time, it would be daytime and he would be with his
14 father. In this case, it was - - -

15 JUDGE PIGOTT: So your answer would be no?

16 JUDGE READ: No?

17 JUDGE SMITH: No, he's not violating the
18 law?

19 MS. MORRIS: If - - - a machete is
20 inherently two - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but - - -

22 JUDGE SMITH: You can explain it all you
23 want but it's a yes or no first?

24 CHIEF JUDGE LIPPMAN: - - - in the context
25 of - - -

1 MS. MORRIS: Yes..

2 CHIEF JUDGE LIPPMAN: - - - what Judge
3 Smith said? In that hypothetical, what's your - - -

4 MS. MORRIS: I - - - I understand that, but
5 this - - - in this specific case the - - - the youth
6 - - -

7 CHIEF JUDGE LIPPMAN: Yeah, yeah, but he's
8 asking you about a hypothetical case that's not this
9 case. Is the answer yes or no?

10 MS. MORRIS: I think you could say the
11 petition was sufficient, and it was a prima facie
12 case, and then they could rebut it and say he was
13 going to use it for agricultural purposes.

14 In this case, the pet - - - the youth who
15 pled was found at 11:23 - - -

16 JUDGE PIGOTT: Well, there's a certain
17 amount of discretion within the police. Is that - -
18 - is that essentially what your argument is? I mean,
19 if you see a - - - you know, a twelve- or fourteen-
20 year-old kid out in the field with a sickle or a
21 scythe - - -

22 MS. MORRIS: Yes, you would be unlikely to
23 arrest him.

24 JUDGE PIGOTT: - - - no one's going to go
25 after him. But if you're standing - - -

1 MS. MORRIS: But - - -

2 JUDGE PIGOTT: - - - in the middle of, I'll
3 say Times Square, because a lot of people know where
4 that is - - - with one of these things, then maybe
5 it's a dangerous weapon.

6 JUDGE RIVERA: But weren't you arguing that
7 it's inherently dangerous?

8 MS. MORRIS: It's - - -

9 JUDGE RIVERA: But now it sounds like
10 you're arguing that you always look to the
11 circumstances. Which - - - which - - -

12 MS. MORRIS: Well - - -

13 JUDGE RIVERA: - - - rule is it that you
14 say applies from Jamie D.?

15 MS. MORRIS: In Jamie D., basically,
16 there's three ways, and - - - a - - - which refers to
17 a dangerous knife, which is not otherwise defined.
18 So first you look at to the statute which says
19 "weapons". Then you ask yourself, is this
20 objectively a weapon? A machete, with a fourteen-
21 inch blade, a broad, heavy knife, is objectively a
22 weapon.

23 CHIEF JUDGE LIPPMAN: You would agree that
24 the supporting deposition is sparse, to say the least?

25 MS. MORRIS: It is sparse. But it does give

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JUDGE GRAFFEO: But I thought under Jamie D., under - - - that there - - - there is a provision that says "or the circumstances of its possession indicate its intent." So why - - - why isn't the circumstances under which the possession occurs relevant? Why do we have to declare this - - -

MS. MORRIS: Because this is - - -

JUDGE GRAFFEO: - - - objectively dangerous in all situations?

MS. MORRIS: Because of its very nature, it is a big, heavy knife, car - - - that is capable of use as a weapon. And to answer - - -

CHIEF JUDGE LIPPMAN: Yeah, but - - - but the question before, and what we're trying to get at is, if you're in the middle of cane fields, you know, in the middle of the day, and everyone has a - - - machetes and they're cutting down, you know, the - - - these canes, that's not objectively dangerous, is it, in that context?

MS. MORRIS: It's obj - - - still objectively capable - - -

CHIEF JUDGE LIPPMAN: So a machete, whatever the size of it - - - of that size, is always a dangerous instrument, and you don't need to say

1 anything more about it?

2 MS. MORRIS: Well, when you - - - when you
3 have the petition, it always has the time and the
4 place - - -

5 CHIEF JUDGE LIPPMAN: Yes, but that's what
6 I'm asking you. That - - - that - - - it's not
7 always the case. In a certain context, you could - -
8 - you could imagine that it would not be objectively
9 dangerous.

10 MS. MORRIS: You could imagine. But what
11 we're saying is - - -

12 JUDGE SMITH: But suppose - - - suppose you
13 have exactly this petition, change only two things:
14 time of occurrence, change p.m. to a.m.,
15 approximately 11:23 a.m.; place of occurrence says in
16 the vicinity of Tompkins Avenue and Halsey Street,
17 Brooklyn, New York, change to in the - - - in the
18 vicinity of John Brown's farm in South Ovid, or
19 wherever. Does that - - - is it still a sufficient
20 petition?

21 MS. MORRIS: Probably not. But we're
22 dealing with this petition. And this - - -

23 JUDGE GRAFFEO: But we're trying to
24 articulate a rule that's going to affect anybody
25 who's in possession of a machete. So we can't just

1 look at the facts of this case.

2 MS. MORRIS: Well, then I would say that a
3 machete is a prima facie case of an - - - a wea - - -
4 a big, heavy knife, with a long history of being a
5 dangerous con - - -

6 CHIEF JUDGE LIPPMAN: Wouldn't you have a
7 better argument to say that in one circumstance it -
8 - - it can be a danger - - - objectively dangerous,
9 and in another it's not?

10 MS. MORRIS: Well, I think it - - - I think
11 it is a weapon. And so all you have to be - - - have
12 in a petition is a prima facie case. Jamie D. was
13 after a fact finding. And the problem that - - -
14 with Jamie D. is that it tends to take a - - - a
15 statute which is a strict liability statute - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but I guess
17 that point that's being made here, isn't context
18 important? It has no - - - no relevance as to
19 whether it's in a - - - on a farm or in the middle of
20 the night in an - - - in an urban street?

21 MS. MORRIS: I would argue, fundamentally,
22 the petition is sufficient to make out a prima facie
23 case.

24 CHIEF JUDGE LIPPMAN: I - - - we understand
25 that's your argument.

1 MS. MORRIS: Well - - -

2 JUDGE RIVERA: So - - - so every big knife

3 - - -

4 MS. MORRIS: Not every - - -

5 JUDGE RIVERA: - - - is dan - - -

6 MS. MORRIS: - - - big knife.

7 JUDGE RIVERA: Okay, so what distinguishes
8 the machete from - - -

9 MS. MORRIS: A machete - - -

10 JUDGE RIVERA: - - - every big knife?

11 MS. MORRIS: Well, a machete is - - - a
12 machete is a particular kind of knife. There are
13 many different variations on them. But they are
14 heavy. They have a wide blade. They have a - - - a
15 history of being used as an offensive and defensive
16 weapon. A machete looks scary.

17 I'm not sure where you would draw the line.
18 But it's certainly not - - -

19 JUDGE ABDUS-SALAAM: But didn't we - - -

20 MS. MORRIS: - - - the other knife - - -
21 excuse me. Yes?

22 JUDGE ABDUS-SALAAM: Didn't we draw the
23 line in Jamie D.? Machete was not one of the
24 examples that was listed. There was - - -

25 MS. MORRIS: No, but the - - - Jamie D.

1 does not say - - -

2 JUDGE ABDUS-SALAAM: - - - bayonets,
3 stilettoes, and daggers.

4 MS. MORRIS: - - - it had to - - - Jamie D.
5 did not say that it had to be one of the weapons
6 listed. It - - -

7 JUDGE ABDUS-SALAAM: No, but it wasn't
8 immediately one of the examples that was listed.

9 MS. MORRIS: But they - - -

10 JUDGE ABDUS-SALAAM: That's my point. You
11 say it's - - -

12 MS. MORRIS: - - - but they men - - - they
13 mentioned a - - - a bayonet, which is not mentioned
14 in the Penal Law. There's certain knives which, by
15 their inherent characteristics, are - - - are
16 weapons.

17 JUDGE RIVERA: Yeah, but the difference
18 between the bayonet, is that it usually doesn't have
19 any utilitarian purpose, right? The point of it is
20 as a weapon. But to the extent that machetes around
21 the world are used for other purposes, agricultural
22 and otherwise, and perhaps in part of the state are
23 used for that purpose - - -

24 MS. MORRIS: Well - - -

25 JUDGE RIVERA: - - - I think that's the

1 challenge. And the question of - - - of why not look
2 at the circumstances? Why is it, it has to be
3 categorized inherently as falling within the Penal
4 Section?

5 MS. MORRIS: Because it's inherently a
6 weapon. It has a history of being a weapon.

7 JUDGE READ: Well, are you saying it's - -
8 - it has a dictionary definition included?

9 MS. MORRIS: Yes. The dictionary def - - -
10 definition is that it's a broad, heavy knife, used
11 either as a weapon or for cutting sugar cane or thick
12 vegetation. But it's definitely defined as a weapon.
13 A steak knife is not defined as a weapon. A - - -

14 JUDGE ABDUS-SALAAM: So if this were not -
15 - - going back to Judge Smith's hypothetical, if we
16 changed a couple facts - - - it's the summertime.
17 There's a community garden in the area where the kid
18 was found, and it's not pitch black all - - - it's,
19 you know, relatively light out, this would still be,
20 in your view, a weapon, not something that he could
21 actually go out and use in the garden?

22 MS. MORRIS: No, I can't make the argument
23 that you can't use it in a garden. I'm saying - - -

24 JUDGE ABDUS-SALAAM: But you're saying it -
25 - - it would be a weapon no matter what. It's a

1 weapon that would still be used in - - -

2 MS. MORRIS: Well, in itself, it is a
3 weapon. It can be used for an agricultural purpose.

4 JUDGE SMITH: You - - - you say that any
5 petition that says he has a machete, anytime,
6 anyplace, is a sufficient petition, but that it can
7 be defeated by proof that he had an innocent use for
8 it?

9 MS. MORRIS: Yes.

10 JUDGE SMITH: And would you say - - - may
11 say the same if a bayonet - - - if I'm carrying a
12 bayonet around, and I prove that I was going to use
13 it to - - - what do I - - -

14 MS. MORRIS: Peel and orange?

15 JUDGE SMITH: - - - what would I use it
16 for.

17 JUDGE PIGOTT: You're in a play.

18 JUDGE SMITH: To show - - - to show my son
19 how to make holes in the wall.

20 JUDGE RIVERA: March in the parade. March
21 in the parade.

22 JUDGE READ: To pick up trash.

23 JUDGE SMITH: Yeah. Yeah, or to pose - - -
24 to pose for a picture. Is that a defense?

25 MS. MORRIS: Yes. A petition is - - - only

1 has to make a prima facie case that the - - -

2 JUDGE SMITH: Okay, but I'm - - - I'm
3 asking a - - -

4 MS. MORRIS: - - - that the - - -

5 JUDGE SMITH: - - - different question.

6 Are you really saying that in the bayonet case, you
7 can defend on the ground that you were going to use
8 the bayonet to pick up trash?

9 MS. MORRIS: Or to show you son how you
10 behaved in the war.

11 JUDGE SMITH: So you're saying yes, to
12 that, because - - -

13 MS. MORRIS: I guess I am.

14 JUDGE SMITH: - - - it's not obvious to me.
15 I mean, I can imagine the - - -

16 MS. MORRIS: What I'm saying - - -

17 JUDGE SMITH: - - - law could be that a
18 bayonet - - -

19 MS. MORRIS: - - - that this - - -

20 JUDGE SMITH: - - - is always illegal.

21 MS. MORRIS: Is a - - - the bayonet I don't
22 believe is listed in the Penal Law.

23 JUDGE SMITH: Okay. But I can still
24 imagine.

25 JUDGE RIVERA: But despite the - - - the

1 words in Jamie D. that specifically identify a
2 bayonet? Remember, this is about minors, it's not
3 about adults.

4 MS. MORRIS: This is - - - that's right.
5 There's no intent involved in this statute. We don't
6 - - - do not want children carrying around machetes,
7 bayonets, or other - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MS. MORRIS: - - - dangerous knives.

10 CHIEF JUDGE LIPPMAN: You'll have your
11 rebuttal time.

12 MS. MORRIS: Thank you.

13 CHIEF JUDGE LIPPMAN: Let's hear from your
14 adversary.

15 Counselor?

16 MR. NEWBERY: Good afternoon. May it
17 please the court, my name is John Newbery. I'm
18 counsel for Antwaine T.

19 CHIEF JUDGE LIPPMAN: Counsel, does context
20 matter?

21 MR. NEWBERY: Context certainly does
22 matter, Your Honor. I think as the Second Department
23 correctly did, it applied the circumstances test in
24 Jamie D. to this situation - - -

25 JUDGE SMITH: Well, the circumstan - - - I

1 mean, how - - - how likely is it that a boy - - -
2 he's a boy, right, he's under sixteen?

3 MR. NEWBERY: Yes.

4 JUDGE SMITH: A boy of fifteen carrying a
5 machete in Brooklyn half an hour before midnight, is
6 planning to use it to cut vegetation?

7 MR. NEWBERY: That's not the test, Your
8 Honor, how likely is it? Respectfully, the fact that
9 you're asking that question to me, shows that the
10 petition doesn't tell you what it - - - the question
11 really is, another version of what's he doing with
12 that at this hour - - -

13 JUDGE GRAFFEO: Then aren't you writing an
14 intent - - -

15 MR. NEWBERY: - - - of night?

16 JUDGE GRAFFEO: - - - element into the
17 statute, if that's what the petition has to say?

18 MR. NEWBERY: I don't believe I'm reading
19 an intent element into the statute. I'm not quite
20 sure why the legislature, in enacting this statute
21 used the term "dangerous knife" without giving any
22 definition or guidance.

23 JUDGE GRAFFEO: What are you claiming was
24 the legitimate purpose that he had the machete for -
25 - -

1 MR. NEWBERY: I don't - - -

2 JUDGE GRAFFEO: - - - at that time of
3 night?

4 MR. NEWBERY: - - - I don't think that's my
5 burden, Your Honor. I think the burden is for the
6 prosecution to set forth sufficient allegations to
7 make out a prima facie case that - - -

8 CHIEF JUDGE LIPPMAN: Well, or is it that
9 they make out that under the circumstances, it's
10 dangerous, and then you could come in and give some
11 innocent reason - - -

12 MR. NEWBERY: Well - - -

13 CHIEF JUDGE LIPPMAN: - - - why he has it?

14 MR. NEWBERY: Well, what - - - what are the
15 circumstances? The circumstances that - - -

16 CHIEF JUDGE LIPPMAN: These particular
17 circum - - - tell us what the circumstances are, why
18 they don't jump out at you and say this is
19 objectively dangerous.

20 MR. NEWBERY: I'm not sure what the
21 circumstances are.

22 CHIEF JUDGE LIPPMAN: Well, we know the - -
23 -

24 MR. NEWBERY: I can tell you - - -

25 CHIEF JUDGE LIPPMAN: - - - time and the

1 place.

2 MR. NEWBERY: Right.

3 CHIEF JUDGE LIPPMAN: And we know the item
4 itself.

5 MR. NEWBERY: We - - - we know the time.
6 I'll grant that. The place, I - - - I don't know if
7 I'm - - -

8 JUDGE READ: Well, the item itself is
9 generally understood and defined by dictionaries to
10 be a weapon.

11 MR. NEWBERY: To be a utilitarian
12 instrument which has been used as a weapon, Your
13 Honor. I think there's a difference. Now, in - - -

14 JUDGE PIGOTT: Well, if he had told the
15 officer that he got a phone call from someone who
16 told him that he wanted to fight, and he immediately
17 went to the address and found fifty people fighting
18 each other, and found himself in the mix, does that
19 help?

20 MR. NEWBERY: It doesn't help me. It
21 certainly helps the prosecution.

22 JUDGE PIGOTT: You don't - - - I mean - - -

23 MR. NEWBERY: If they - - - if they put
24 that in their - - -

25 JUDGE PIGOTT: - - - you could - - -

1 MR. NEWBERY: - - - dep - - - if they put
2 it in the deposition - - -

3 JUDGE PIGOTT: You - - - if that was in
4 there, would you then be happy?

5 MR. NEWBERY: I think it would be
6 sufficient.

7 JUDGE PIGOTT: Which - - - which goes to, I
8 think, to Judge Graffeo's point, that you - - -
9 you're saying there has to be an intent. And that's
10 not what the statute says. And it just seems to me,
11 can't there be a little common sense here?

12 MR. NEWBERY: Well, I - - - this court in
13 Jamie D. set - - - set out the test.

14 JUDGE PIGOTT: I know.

15 MR. NEWBERY: So I'm speaking about - - -
16 about the test of - - -

17 JUDGE PIGOTT: But as - - - as we pointed
18 out, I mean, they mentioned three - - - that - - - we
19 didn't mention three to the exclusion of everything
20 else.

21 MR. NEWBERY: I'm sorry, you didn't - - -

22 JUDGE PIGOTT: In Jamie D., they said a
23 bayonet, a stiletto, and I - - -

24 MR. NEWBERY: Right.

25 JUDGE PIGOTT: - - - forget what the other

1 one is.

2 MR. NEWBERY: But - - -

3 JUDGE PIGOTT: But that was not to the - -

4 -

5 MR. NEWBERY: Exactly.

6 JUDGE PIGOTT: - - - if the - - - if Jamie

7 D. had said - - - had been a machete, it may have

8 been in there. I mean, it - - -

9 MR. NEWBERY: That's right. But I think
10 the reason why the court then singled out those three
11 implements as illustrative examples, is it was trying
12 to figure out what is the essence of the prescription
13 in that statute.

14 JUDGE PIGOTT: Right.

15 MR. NEWBERY: It's going after a weapon.

16 For instance, a bayonet, a stiletto or a dagger.

17 Those primarily are intended and designed for use as
18 weapons. That's not the case with a machete.

19 JUDGE PIGOTT: But you're making the
20 argument that - - - that a machete - - - and I don't
21 want to get into the dictionary; I just want to get
22 into common sense. I mean, we're trying to protect
23 kids. He's fifteen. He - - - it's a - - - it's in
24 the middle of the night. And - - - and he says that
25 - - - that he found himself in the middle of a fight.

1 So the officer arrests him, charges him with
2 possession of a dangerous weapon, says date, time and
3 place, and you're saying, well, you know, he had to -
4 - - he had to say that he had intent to - - -

5 MR. NEWBERY: No, I'm - - -

6 JUDGE PIGOTT: - - - use it.

7 MR. NEWBERY: - - - I'm - - - maybe I'm
8 misunderstanding your question. In that - - - that
9 hypothetical you're setting up, assuming those facts
10 which are not what we have here, I think there - - -
11 that it would be sufficient. But - - -

12 JUDGE READ: Are you saying that a mache -
13 - - that it's not sufficient to say a machete, with
14 or without the - - - the circumstances, because it
15 can have a utilitarian use?

16 MR. NEWBERY: That's certainly part of it.
17 Now, as to - - - as to this machete being described,
18 and with reference to the dictionary definition, as a
19 big heavy knife, all we know from this petition, is
20 the officer calls it a machete but certainly doesn't
21 - - - it has a fourteen-inch blade, but - - -

22 JUDGE RIVERA: But can't we - - - can't you
23 infer from an officer's experience, that - - - that
24 the officer knows what a machete is?

25 MR. NEWBERY: I don't know what experience

1 - - - I don't know what experience he has.

2 JUDGE PIGOTT: But you're talking - - -

3 MR. NEWBERY: It could be - - - but let's
4 assume - - -

5 JUDGE PIGOTT: - - - wait a minute. Wait a
6 minute. You're talking facial sufficiency.

7 MR. NEWBERY: Right, right.

8 JUDGE PIGOTT: It says machete.

9 MR. NEWBERY: Okay. All right. So - - -

10 JUDGE PIGOTT: You can't say, well I didn't
11 know what he meant by it, because if he'd said
12 bayonet, you'd sure as hell know, and it may not be a
13 bayonet.

14 MR. NEWBERY: Well, I think the - - - I
15 think there's a question as to whether, based on that
16 description, you can fairly get from it, it's a
17 machete - - -

18 JUDGE ABDUS-SALAAM: So what's missing?

19 MR. NEWBERY: - - - but assuming.

20 JUDGE ABDUS-SALAAM: What's missing from
21 this prima facie - - - what's missing from the
22 incident - - -

23 MR. NEWBERY: What's missing? Well, number
24 - - - number one, in the vicinity of these two
25 streets, I don't know, you know, what's the

1 intersection. But - - -

2 JUDGE PIGOTT: Oh, so your argument is that

3 - - - that - - -

4 MR. NEWBERY: Well, that's part of it.

5 JUDGE PIGOTT: - - - venue is not proper?

6 MR. NEWBERY: No. I don't know where - - -

7 I don't know where this is. We don't know - - - I

8 don't think any of us can say was this inside, was

9 this outside? And we keep hearing it's on the - - -

10 on the streets of Brooklyn.

11 JUDGE RIVERA: Well, but it's on a city.

12 What does it matter, it's inside or outside, to that

13 extent? I mean, either way - - -

14 MR. NEWBERY: Well, an apple - - -

15 JUDGE RIVERA: - - - she's saying that this

16 is a minor carrying a machete with a fourteen-inch

17 blade, late at night, in an urban environment.

18 MR. NEWBERY: Well - - -

19 JUDGE RIVERA: In - - - inside the

20 building, outside the building? It's less dangerous,

21 more dangerous?

22 MR. NEWBERY: Well, I think under Jamie

23 D.'s circumstances test, certainly it does matter if

24 you have it - - -

25 JUDGE PIGOTT: But if it was a bayonet - - -

1 -

2 MR. NEWBERY: - - - inside or outside.

3 JUDGE PIGOTT: - - - you'd say well, it's
4 dismissible. It doesn't say what - - -

5 MR. NEWBERY: Because it's primarily de - -
6 -

7 JUDGE PIGOTT: - - - it doesn't say whether
8 it's inside or outside. So I - - - I win, dismiss
9 the case.

10 MR. NEWBERY: No, I wouldn't say that in
11 the case of a bayonet.

12 JUDGE PIGOTT: When you're - - -

13 MR. NEWBERY: Because a bayonet - - - a
14 bayonet is primarily designed and intended as a
15 weapon. Whereas the very definitions that even they
16 cite in their brief - - -

17 JUDGE RIVERA: Is - - -

18 MR. NEWBERY: - - - that is not the case.

19 JUDGE RIVERA: - - - is it possible,
20 however, that given the history of a machete in - - -
21 in an urban environment, which is just the only thing
22 that's being referred to here, that one cannot see
23 the utilitarian use of it? There's no argument for
24 the utilitarian use of it?

25 MR. NEWBERY: Well, sure there's an

1 argument for utilitarian use.

2 JUDGE RIVERA: What would that be?

3 MR. NEWBERY: Certainly in the city of New
4 York, they do sell sugar cane and they do sell
5 coconuts. I know that they - - -

6 JUDGE GRAFFEO: So he was - - - he was out
7 in - - - at this hour of night planning to cut down
8 dandelions?

9 MR. NEWBERY: Well - - -

10 JUDGE GRAFFEO: I mean, I do think Judge
11 Pigott's right. Don't we have to bring a little
12 common sense to this?

13 MR. NEWBERY: Certainly we do, but I think
14 also we have to bring common sense in - - - in
15 recognizing that really the fact of these questions -
16 - - that you're asking these questions, it's because
17 really, we don't know; it doesn't say in the - - - in
18 the petition itself; it gives us no clue what he was
19 doing. And that's - - - that's the prosecution's
20 minimal - - -

21 JUDGE SMITH: Well, suppose - - -

22 MR. NEWBERY: - - - burden - - -

23 JUDGE SMITH: - - - the officer - - -

24 MR. NEWBERY: - - - to be - - -

25 JUDGE RIVERA: All you have to know is that

1 he's possessing it.

2 JUDGE READ: Yeah.

3 MR. NEWBERY: Sorry?

4 JUDGE RIVERA: All - - - don't you - - -
5 only - - - you have to know he's possessing it.
6 Isn't that the point of the statute? Are you in
7 possession of a dangerous knife? Isn't that the
8 point? Just by possession?

9 MR. NEWBERY: But the circums - - - our
10 position is under Jamie D., that the circumstances
11 test applies. And so presumably, at that point, when
12 the officer sees whatever is going on, and I don't
13 know what was happening here, and presumably has
14 probable cause to arrest him, there are circumstances
15 to make the officer conclude that it was a dangerous
16 knife.

17 JUDGE SMITH: Well - - -

18 JUDGE GRAFFEO: If we don't look at the
19 circums - - -

20 MR. NEWBERY: It's a minimal burden.

21 JUDGE GRAFFEO: - - - if we don't look at
22 the circumstances, and we add machete to the list of
23 bayonet, stilettos and daggers, aren't you worse off?
24 I mean, the circumstance test allows more of a
25 defense, doesn't it? I realize in this particular -

1 - -

2 MR. NEWBERY: If - - -

3 JUDGE GRAFFEO: - - - case, perhaps your -

4 - -

5 MR. NEWBERY: Yes.

6 JUDGE GRAFFEO: - - - your client won't be
7 successful. But it would - - - it would allow other
8 juveniles that perhaps possess this to be able to - -

9 -

10 MR. NEWBERY: Well - - -

11 JUDGE GRAFFEO: - - - explain a different
12 set of circumstances that could justify agricultural
13 or other legitimate use of this.

14 MR. NEWBERY: Well, one consideration to
15 take into account is this is - - - this is not a
16 situation that's going to be limited exclusively to
17 juveniles. 265.01(2) penalizes possession of
18 dangerous knives. 265.15(4) gives a presumption of
19 unlawful intent if you possess a dangerous knife.

20 JUDGE GRAFFEO: Yeah, well, if somebody's
21 standing in a bar with a machete, I wouldn't be too
22 excited about that. I mean, that's probably - - -
23 that's probably a dangerous weapon in that situation
24 as well. I don't care what the age of the - - -

25 MR. NEWBERY: Might be.

1 JUDGE GRAFFEO: - - - person is.

2 MR. NEWBERY: Might - - - might be. Might
3 be.

4 JUDGE SMITH: Well, 265.01(2) has in it the
5 element of intent to use the same unlawfully against
6 another.

7 MR. NEWBERY: Right. Right. It does. And
8 that - - - and that element can be supplied through
9 application of a presumption, which can be satisfied
10 by establishing that the person possesses a dangerous
11 knife. So in the - - - in the Campos case, the First
12 Department did find that somebody charged with that
13 particular section with possessing a machete, that
14 that was under the Jamie D. test, a dangerous knife,
15 because in contrast to the situation here, it wasn't
16 simply that he was carrying it under circumstances
17 which made its agricultural use unlikely, he was
18 waving it; he was threatening people; he was
19 shouting; he told an officer - - -

20 JUDGE SMITH: Okay. Let me - - -

21 MR. NEWBERY: - - - I have this for
22 protection.

23 JUDGE SMITH: - - - let me ask you - - -

24 JUDGE GRAFFEO: That's the intent.

25 JUDGE SMITH: - - - if I could just one.

1 As a practical matter, you're saying and off - - - a
2 police officer who sees a young - - - a fifteen-year-
3 old boy carrying a fourteen-inch - - - machete with a
4 fourteen-inch blade, in the streets of Brooklyn, at
5 11:30 at night, and apart from the machete, the boy
6 has done nothing wrong, he's - - - he's just minding
7 - - - he's just an innocent kid minding his own
8 business, the officer is - - - is not entitled to do
9 anything? He's supposed to say, have a nice day,
10 son?

11 MR. NEWBERY: Well, I - - - I suppose the
12 officer can certainly ask him some questions. But I
13 don't think the officer - - - well, to bring it in -
14 - - into the context here, if those are the only
15 facts that - - - which wind up in the charging
16 instrument, regardless of what happens, I don't think
17 that's a sufficient - - -

18 JUDGE SMITH: Well, okay. Suppose - - -
19 but isn't it perfectly conceivable that they're the
20 only facts that existed, that that's all the officer
21 did know?

22 MR. NEWBERY: Well, then I think under
23 Jamie D. it wasn't a violation of 265.05. It may
24 have been a violation of the administrative code for
25 possessing a knife which was more than four - - -

1 with a blade with more than four inches, but that
2 wasn't charged here.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks.

5 Counselor, rebuttal?

6 MS. MORRIS: Yes. I would just be brief.
7 Jamie D. was trying to define - - - find out how you
8 found out a knife was dangerous. There were three
9 routes. One of them was an objective test of is this
10 knife a weapon. And under that - - - and this is a
11 case where we're only talking about the facial
12 sufficiency of a petition in an - - - under a statute
13 which requires no intent. And therefore - - -

14 JUDGE SMITH: Let me just be clear. Maybe
15 you made this clear already. For you - - - is it
16 your position that a machete and a bayonet are the
17 same for these purposes?

18 MS. MORRIS: I'm not expert on bayonets,
19 but I would say it - - - actually there is more
20 likelihood that you could find a utilitarian purpose
21 somewhere for a machete. But a machete is defined as
22 a broad, heavy knife used as a weapon.

23 JUDGE SMITH: Well, I thought we said - - -
24 I thought we said in Jamie D. there's some things:
25 bayonets, dirks and stilettos or bayonets, daggers

1 and stilettos - - - whatever it is - - - that are
2 always dangerous.

3 MS. MORRIS: I think I would put a machete
4 in that case.

5 JUDGE SMITH: You would put a machete in
6 that category.

7 MS. MORRIS: For the purpose of a having a
8 petition - - - a petition or - - -

9 JUDGE PIGOTT: Well, the third one - - -
10 you mentioned there were three - - - the third one is
11 the possessor considers the knife to be a weapon
12 rather than a utilitarian instrument based on the
13 totality of the circumstances.

14 MS. MORRIS: Right. We don't have to go
15 there.

16 JUDGE PIGOTT: Okay.

17 MS. MORRIS: And then - - - and - - -

18 JUDGE RIVERA: But - - -

19 MS. MORRIS: - - - which is irrelevant here
20 - - -

21 JUDGE RIVERA: - - - but let's say we - - -

22 MS. MORRIS: - - - to say it was some
23 utilitarian - - -

24 JUDGE RIVERA: - - - but - - - counsel,
25 let's say we - - -

1 JUDGE READ: But if we disagree with you -
2 - -

3 JUDGE RIVERA: - - - disagree with you on -
4 - - on sort of the inherent nature of this, that it
5 first the first category in Jamie D. and now we're
6 going over to the last category, circumstances.

7 The circumstances here are, he's standing
8 on the street corner carrying this machete - - -

9 MS. MORRIS: At - - -

10 JUDGE RIVERA: - - - in the middle of the
11 night?

12 MS. MORRIS: In the middle of the night.

13 JUDGE RIVERA: Okay. Does it matter, the
14 neighborhood?

15 MS. MORRIS: I think it probably matters
16 that it's an urban neighborhood rather than - - -

17 JUDGE RIVERA: Well, does it matter which
18 urban neighborhood?

19 MS. MORRIS: No.

20 JUDGE RIVERA: I only ask because there are
21 many mentions of a particular urban neighborhood in
22 your brief, so I thought that you were going to - - -

23 MS. MORRIS: That's - - - that's true.

24 That seems - - -

25 JUDGE RIVERA: - - - say there was

1 something unique.

2 MS. MORRIS: No, there seems to be a
3 particular problem with gangs in Brooklyn using
4 machetes. But that doesn't mean that if somebody
5 were standing across the street here at 11 o'clock
6 with a machete, and you were leaving the office, you
7 might feel fear.

8 We're basically asking for the application
9 of common sense for the facial sufficiency under a
10 statute that requires no intent.

11 CHIEF JUDGE LIPPMAN: Okay, counsel. Okay.
12 Thanks, counsel.

13 Thank you both.

14 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Antwaine T., No. 116 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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