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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 147

JOHN ROSSI,

Appellant.

PEOPLE,

Respondent,

-against-

No. 148

BENJAMIN JENKINS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 09, 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

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 147 and 148, Rossi
2 and Jenkins.

3 Would you like any rebuttal time,
4 counselor?

5 MS. HARRINGTON: I'll take two minutes,
6 Your Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes; you have
8 it. Go ahead.

9 MS. HARRINGTON: Good afternoon, Your
10 Honors. My name is Jillian Harrington, may it please
11 the court, and I represent John Rossi on this appeal.
12 I did not represent Mr. Rossi in the trial court, but
13 I did represent him in the Appellate Division, Second
14 Department on this appeal. The issue that - - - that
15 we were going to address today is our claim that the
16 People failed to prove that there were exigent or
17 emergency circumstances sufficient to justify their
18 warrantless search of the backyard.

19 CHIEF JUDGE LIPPMAN: What about - - - what
20 about the issue that - - - that there's blood, you
21 know, a large amount of blood, the - - - the - - -
22 your client is not really very coherent about what's
23 gone on. There are kids involved. Why - - - why is
24 it - - - why could it not be viewed, when you have a
25 missing gun, that it's - - - it's an emergency

1 situation?

2 MS. HARRINGTON: Well, it - - - it - - -

3 CHIEF JUDGE LIPPMAN: What - - - what makes
4 this not an emergency in the particular circumstances
5 of your case?

6 MS. HARRINGTON: It started out as an
7 emergency. When the police got there, they - - -
8 when they arrived, Mrs. Rossi, my client's wife, was
9 on the front lawn talking on her cell phone. She
10 tells the police officers that her husband had been
11 shot in the hand. So clearly - - -

12 JUDGE PIGOTT: It's not clear from your
13 brief, but I think the - - - the - - - the People's
14 brief said that the 911 call went to the police.
15 Would this be a different case if the 911 call went
16 to a dispatcher who then dispatched an ambulance?

17 MS. HARRINGTON: I don't think it is a
18 difference, because when the police arrived, they
19 spoke with her on the scene.

20 JUDGE PIGOTT: You're missing my point. I
21 - - - I - - -

22 MS. HARRINGTON: I'm sorry.

23 JUDGE PIGOTT: What I'm suggesting is that
24 the 911 call could have gone to - - - to an ambulance
25 service who would have come and taken him away - - -

1 treated him and be gone. And there wouldn't - - -
2 there - - - so I mean is it - - - is it - - - is it
3 significant or important to any decision to say who
4 the 911 call goes to?

5 MS. HARRINGTON: I don't think in this
6 particular case it is. Maybe in the grand scheme of
7 things it is. Because when the police arrived here,
8 they knew that my client had been shot in the hand.
9 They knew when they entered the house. They saw him
10 right away and that he was bleeding profusely from
11 his hand.

12 JUDGE ABDUS-SALAAM: Counsel, in your
13 estimation, when did the emergency end?

14 MS. HARRINGTON: The emergency ended once
15 the police officers entered. And there were a bunch
16 of police officers who entered the house. It starts
17 out with the two who end up frisking him. They put
18 him on the ground. They frisk him. They find out he
19 does not have the weapon. And then according to
20 Police Officer Swanson, who was the second officer to
21 enter the home, he and the first officer, Police
22 Officer Allen, got - - - were able to speak with him
23 very quickly, mean - - - "him" meaning, Mr. Rossi - -
24 - and that the EMTs arrived within the first minute
25 or so, and they started treating him. And while they

1 were treating him - - - and he told them that he shot
2 himself in the hand - - - they - - - they understand
3 that there are children. They get the children.
4 They find out the children don't have the weapon.
5 And they take the children out of the home.

6 JUDGE GRAFFEO: Is it clear, though, at
7 what point they had the three children whether or not
8 the gun in the backyard had been found? Because one
9 of these children was only ten years old, right?

10 MS. HARRINGTON: Yes, the children are ten,
11 and I believe fifteen and sixteen, if I'm not - - -

12 JUDGE GRAFFEO: Right, so one - - - one was
13 a fairly young child.

14 MS. HARRINGTON: Yes.

15 JUDGE GRAFFEO: So I didn't see that it was
16 terribly clear in the testimony as to whether the
17 children were taken out of the house before the gun
18 was found by the garage in the backyard.

19 MS. HARRINGTON: Well, I - - - I think a
20 careful reading of the hearing testimony shows that
21 Police Officer Swanson's explanation at the hearing
22 was that they come in, they get my client on the
23 ground very quickly, they find out he doesn't have
24 the gun - - -

25 JUDGE GRAFFEO: But you're not answering my

1 question.

2 MS. HARRINGTON: I'm - - - I'm getting to
3 it. I'm sorry.

4 JUDGE GRAFFEO: Because it's reasonable for
5 the police to be concerned that one of the kids might
6 pick up a loaded gun - - -

7 MS. HARRINGTON: Okay, let's just - - -

8 JUDGE GRAFFEO: - - - - and it might - - -
9 and it might discharge.

10 MS. HARRINGTON: And let's just say that
11 that's true. That would mean that the emergency was
12 inside of the house, because if - - - if the children
13 were inside of the house, that is where the emergency
14 was.

15 JUDGE GRAFFEO: Well, that's why I'm asking
16 where in the record does it indicate when the
17 children were secured?

18 MS. HARRINGTON: It's not completely clear.
19 It - - - it depends on whose - - - whose testimony
20 you read. Because of that - - -

21 JUDGE GRAFFEO: Well, wouldn't that be a
22 mixed question then? Don't we have to look at this
23 through the mixed-question lens?

24 MS. HARRINGTON: No, I don't think that we
25 do, because the support is not in the record that the

1 emergency then - - - it - - - it - - - let's just say
2 we - - - we say for the sake of this argument that
3 we're not sure when they - - - when they were taken
4 out. Either they were in the house surrounded by
5 police, or they were in front of the house surrounded
6 by police. Either way, the - - -

7 JUDGE SMITH: Does - - - does Officer Alv -
8 - - sorry.

9 JUDGE READ: The Appellate Division said
10 that Officer Alvarado, who discovered the gun, didn't
11 know when the children had been removed and - - - and
12 when the scene had been secured. So isn't that
13 enough to make it a mixed question, his testimony?

14 MS. HARRINGTON: Well, according to his
15 hearing testimony, he arrived at approximately 7:10,
16 which would make the - - - I'm sorry, 5:10, which
17 would make that about ten minutes after the other
18 officers arrived. So if you look at his testimony
19 next to Police Officer Swanson's, who says this all
20 happened very quickly within the first minute or two
21 - - - they get him on the ground. They talk to him.
22 Then they get the kids. He personally takes - - -

23 JUDGE READ: So what you're - - - so aren't
24 you really saying is - - - to go back to Judge
25 Graffeo's question - - - you can - - - people could

1 draw different inferences from the testimony.

2 MS. HARRINGTON: I don't think so. I think
3 that - - - that to draw inferences would be
4 incorrect, because the facts show that there was no
5 emergency outside. So even if it were true that the
6 children had not been removed from the home, they
7 were in the home. The home was crawling with police
8 officers. They were everywhere. We - - -

9 JUDGE SMITH: How - - - how clear is it
10 that Officer Alvarado knew or should have known that
11 there was nobody else in the house besides the kids
12 and the moth - - - and the - - - and the man and his
13 wife?

14 MS. HARRINGTON: Well, there's no testimony
15 that - - - that they thought that they were looking
16 for another shooter or that they thought there were
17 other people. And the People had the burden of
18 proving that there was an emergency and that - - -

19 CHIEF JUDGE LIPPMAN: It's not remote that
20 - - - or is it, that there could have been a - - -
21 another perpetrator or someone - - -

22 MS. HARRINGTON: I don't think there's ever
23 been an allegation that there was. I mean my client
24 - - -

25 JUDGE SMITH: I mean, you have a guy - - -

1 you have a guy who says he shot himself and the gun
2 is no - - - and he doesn't know where the gun is and
3 nowhere - - - it's nowhere to be seen. Could the
4 police be initially a little skeptical that he shot
5 himself?

6 MS. HARRINGTON: That - - - but they've
7 never argued that. They've always argued that they
8 were there to find the gun to protect the children
9 and perhaps even themselves.

10 JUDGE SMITH: Well - - -

11 JUDGE RIVERA: Alvarado comes in. He's
12 told - - - or - - - or he talks to the guy, says he
13 shot himself. He understands there are kids. There
14 are cops inside the house, so he goes outside. Why -
15 - - why doesn't that mean he's thinking the kids are
16 outside or the kids might have access outside to this
17 gun?

18 MS. HARRINGTON: There's no reason to think
19 that they did have access to a gun that was beh - - -
20 in the backyard behind the shed.

21 JUDGE SMITH: Even - - - even if you're
22 right that we - - - that all - - - we can reach all
23 the conclusions that - - - that you reach from a
24 careful reading of the record, is it really fair to
25 ask Officer Alvarado to do that kind of analysis at a

1 moment when he could - - - he's rightly - - - rightly
2 worried that he's got a confused situation, doesn't
3 know what's going on. But he knows there's a missing
4 gun, and he wants to find it?

5 JUDGE READ: And there's blood everywhere,
6 including on the sliding glass door?

7 MS. HARRINGTON: Ab - - - absolutely, Your
8 Honor. And - - - and these are all true. These are
9 facts that were established. But the People had the
10 burden to prove - - -

11 CHIEF JUDGE LIPPMAN: So is it your
12 argument that as long as the kids were secured, then
13 the emergency doesn't exist? Is that basically what
14 it comes down to?

15 MS. HARRINGTON: If that was the reason
16 that the pol - - - that the police gave. The police
17 never alleged that they were in the backyard looking
18 for a perpetrator or that they thought - - -

19 JUDGE SMITH: But isn't - - - isn't the
20 test objective? Even if the police didn't - - - you
21 know, didn't have the right motive, if they
22 objectively could have feared a - - - another
23 perpetrator, isn't that - - - isn't that enough to
24 uphold the search?

25 MS. HARRINGTON: No, Your Honor. Because

1 according to this Court's ruling in Mitchell where
2 they set out the three prongs, this - - -

3 JUDGE SMITH: So that - - - that - - - that
4 would - - - that would essentially create the - - -
5 create the question whether that - - - that part of
6 Mitchell survived the Brigham - - - Brigham Parker,
7 Brigham City, whatever it is, holding.

8 MS. HARRINGTON: Yes, that's - - - that - - -
9 - whether prong two survives. And in this case,
10 there was clearly an emergency when he got there.
11 But we can't give the police - - -

12 CHIEF JUDGE LIPPMAN: But what ends the
13 emergency? What - - - what fact ends the emergency
14 here?

15 MS. HARRINGTON: What ends the emergency -
16 - -

17 CHIEF JUDGE LIPPMAN: Is it - - - it's that
18 the kids were secure?

19 MS. HARRINGTON: Yes.

20 CHIEF JUDGE LIPPMAN: I mean, that's your
21 argument?

22 MS. HARRINGTON: When they're inside - - -

23 JUDGE GRAFFEO: Even though - - - even
24 though they don't know if somebody else shot this
25 individual, including maybe somebody else in the

1 family?

2 MS. HARRINGTON: But nobody has ever
3 alleged that. The - - - the allegation has always
4 been that the - - - been that the emergency extended
5 to find this gun to make sure that the children
6 cannot get to it. The children were either in the
7 house surrounded by police or they were outside of
8 the house surrounded by police. There is no chance
9 that those children were going to escape the police,
10 go in the backyard behind the shed, and find the gun.
11 We - - -

12 CHIEF JUDGE LIPPMAN: Okay, counselor.
13 You'll have your rebuttal. Thanks.

14 MS. HARRINGTON: Sorry, Your Honor.

15 MR. KING: May it please the court.

16 Several years after this incident - - -

17 CHIEF JUDGE LIPPMAN: Counselor, let me ask
18 you a question.

19 MR. KING: Yes.

20 CHIEF JUDGE LIPPMAN: Is it - - - isn't it
21 rather remote that there would be somebody else
22 wandering around, or is this within what a reasonable
23 person would - - - would think was going on, that
24 maybe there was someone out there? Isn't it a really
25 remote contingency?

1 MR. KING: When you look at the totality of
2 the circumstances that the police officers were
3 confronted with when they went inside that house,
4 that - - -

5 CHIEF JUDGE LIPPMAN: Let's say, for the
6 sake of argument, the kids are secured.

7 MR. KING: Yes.

8 CHIEF JUDGE LIPPMAN: Let's assume that's
9 the case. What's the basis for the continued
10 emergency?

11 MR. KING: You have a set of circumstances
12 that collectively are raising a lot of alarm bells
13 for these police officers. There are very serious,
14 confusing inconsistencies between what the police
15 officers are being told and what they understood
16 their reason to be - - -

17 CHIEF JUDGE LIPPMAN: So what's going
18 through the police officers' head?

19 MR. KING: I - - - in this case, the police
20 officers are - - - won't - - - they don't know what's
21 going on in this property. They - - - they have no
22 way of knowing, because what they're being told and
23 what they're seeing doesn't match up. And what they
24 - - -

25 JUDGE GRAFFEO: What - - - what do you mean

1 by that? Because he's saying I shot myself and
2 there's no gun in the immediate vicinity?

3 MR. KING: Exa - - - exactly. He's - - -
4 he - - - the police were summoned there with the
5 understanding that somebody shot themselves while
6 cleaning their gun. They go in the house with that
7 understanding. The police are going to expect to be
8 able to either find that gun laying where they - - -
9 where the shooting happened, or at the very minimum,
10 that def - - - the defendant in this case ought to be
11 able to tell them where it is. It makes no sense - -
12 -

13 JUDGE PIGOTT: How many officers went - - -
14 how many officers went to the premises?

15 MR. KING: There was two that initially
16 went in and got the defendant on the ground. Another
17 officer came in sh - - - within ten minutes of the
18 two officers' initial arrival. And then Officer
19 Alvarado, who found the gun, also arrived
20 approximately ten minutes later.

21 JUDGE PIGOTT: Is that standard operating
22 procedure for somebody calling and saying they shot
23 themselves in the hand?

24 MR. KING: To send that - - - that many
25 officers? I - - - in this case, I think the police

1 are responding with the assumption that they have a
2 gunshot victim, and they - - - they're not going to
3 assume anything more than that. And I - - - I think
4 that's a - - - would be proper procedure for them not
5 to assume anything more than that. And certainly,
6 that was confirmed when they got on the scene and the
7 information that they're receiving, again, isn't
8 consistent with this report.

9 CHIEF JUDGE LIPPMAN: So the emergency is
10 because it's confusion as to what's going on?

11 MR. KING: That's cert - - - yes, this - -
12 - if you take all of these factors together, what you
13 have is a confusing scene. The officers are unclear
14 as to what's actually occurring. They don't know
15 what the scope of the danger is on that property.
16 They don't know - - - they have no basis to believe
17 defendant, because he's clearly being evasive. So
18 that raises this very serious question of what really
19 is going on. And in that case, at this point, we're
20 really entering into the area where the police, you
21 know, don't - - - have a responsibility beyond mere
22 law enforcement. They also have the responsibility
23 to - - - for public safety and - - - and to make - -
24 - ensure the safety of the people on that property
25 themselves.

1 CHIEF JUDGE LIPPMAN: Who were they
2 protecting if the kids are okay?

3 MR. KING: They're protecting themselves,
4 they're protecting defendant, they're protecting
5 defendant's wife - - - anyone who's in that scene
6 that could - - - that might be - - -

7 JUDGE RIVERA: Well, the wife is outside.

8 MR. KING: Correct, and again - - - but the
9 officers - - -

10 JUDGE RIVERA: But she's secure in that
11 way, correct?

12 MR. KING: I - - - I mean I think that the
13 officers wouldn't even know that under these
14 circumstances. Everything that they're being told
15 doesn't add up. And until that they can have a
16 chance to - - - to investigate this situation and
17 determine what's happening, those concerns that they
18 have that there may be some risk or there may be some
19 danger, are going to continue. Again, it - - - it's
20 - - - the - - - the officers certainly don't have any
21 basis to believe defendant when he says I shot
22 himself. That leads them to ask whether the
23 defendant was shot by somebody else - - - which may
24 include a family member, including the wife,
25 possibly; a third party that they don't know about

1 who may still be on the - - - on the premises.

2 CHIEF JUDGE LIPPMAN: So does the emergency
3 end when they go around the property and let's say
4 they did not find the gun? Then the emergency's
5 over?

6 MR. KING: I think once the officers have
7 that opportunity to go through that property and
8 determine that - - - first of all, that the gun - - -

9 CHIEF JUDGE LIPPMAN: Not only the house
10 but the property.

11 MR. KING: The property, correct. I think
12 once they have - - - those officers have an
13 opportunity to investigate that property and - - -
14 and all - - - and alleviate those initial concerns
15 that they have that there might be an unknown threat
16 that they have yet to identify, then I think that
17 that changes the circumstances. The - - - the level
18 of concern goes down. The exigenc - - - exigency, to
19 the extent that it still is there, is lessened. And
20 that's going to circumscribe what their actions are
21 from that point.

22 JUDGE RIVERA: If - - - if there had been
23 no children, this was a childless couple or the
24 children - - - there were no children in the house,
25 does that matter?

1 MR. KING: I mean, I think that the
2 children being there certainly is a very significant
3 factor, among others, in the totality of all of these
4 circumstances. You remove that, it's a lesser
5 concern; but again, it doesn't remove the concern,
6 because it doesn't change the fact that these
7 officers do not know the full story of what go - - -
8 is going on there, and they have a gunshot victim - -
9 -

10 JUDGE PIGOTT: I got the impression,
11 though, from - - - from the dissent, that if you did
12 take the kids out, as Judge Rivera's suggesting, and
13 they're not there - - - and they're saying at some
14 point they weren't - - - that - - - that - - - that
15 this would happen in a home, you know, where there's
16 a strong presumption of - - - of - - - of - - - of
17 the need for a warrant and - - - and - - - and they -
18 - - and they do all of this, that at some point - - -
19 you know, it's not hard to get a warrant, and at some
20 point a warrant should have been - - - should have
21 been gotten. How - - - how do you address that
22 thought?

23 MR. KING: At some point - - - if I
24 understand Your Honor's question, at some point the
25 emergency is going to abate. That's true. I think

1 it abates once the officers have a chance to - - - an
2 opportunity to address the concerns that they have
3 that are - - - that are reasonably coming up based on
4 what they're witnessing in that house.

5 JUDGE READ: They're trying to secure the
6 premises. Is that what you're saying?

7 MR. KING: I - - - I thi - - - you know,
8 again, I think that that's part of - - - of their
9 response. They're - - - they're put in a - - - in
10 this difficult situation where they're - - - they're
11 in a house with - - - with blood and - - - and family
12 members and confusing, evasive answers from the
13 defendant. They don't - - - and it's all within a
14 very short time frame. All this was within a - - - a
15 very short time frame when the actual incident
16 occurred. So whatever - - -

17 JUDGE ABDUS-SALAAM: How long, counsel,
18 could the police have roamed around the property or
19 throughout the house before we'd say there's no
20 emergency?

21 MR. KING: I - - - again - - -

22 JUDGE ABDUS-SALAAM: Do you know?

23 MR. KING: - - - I think these officers
24 have - - - they - - - they need an opportunity to
25 address the concerns that they have, which is an

1 opportunity to go in that property, have a look
2 around, see if that gun is somewhere that's been left
3 out, accessible, and also to make sure that nobody is
4 actually in possession of it or is going to be able
5 to access it very quickly. Once they've had a chance
6 to do that - - - that - - -

7 JUDGE RIVERA: And why isn't that scope
8 limited to the house alone? Why are they able to go
9 to the shed?

10 MR. KING: I think - - - because again, it
11 - - - it - - - you know, the - - - the search has to,
12 of course, be - - - be limited by and reasonably
13 related to the exigencies. That's - - - that's, of
14 course, the rule. If the exigency were just that
15 these children might have taken the gun, then - - -
16 then it's - - - you can put more limitations on the
17 police. But the exigency is so much broader than
18 that for these officers. It really relates to the
19 fact that they don't know what's happening.

20 CHIEF JUDGE LIPPMAN: But the only premise,
21 really, to support what you're saying, wouldn't it be
22 that there's some - - - somebody else roaming around?
23 You're not protecting the defendant from himself.
24 You're not protecting the children; they're secured.
25 The only thing - - - and again, as I asked you

1 earlier, is it - - - is it really quite remote in
2 this circumstance that maybe there's someone
3 wandering around who, you know, that - - - that has
4 this gun, or is going to pick up the gun and - - -

5 MR. KING: I - - -

6 CHIEF JUDGE LIPPMAN: Isn't that the real
7 thrust of your argument?

8 MR. KING: I think that these particular
9 circumstances - - - and there's some very specific
10 circumstances with this case that are unusual.

11 CHIEF JUDGE LIPPMAN: But doesn't it come
12 down to that it would be someone's wandering around
13 or out there who might get this gun and hurt them or
14 the defendant or - - -

15 MR. KING: I - - - certainly, I think that
16 has to be central to their thinking. I think that
17 there's other - - - they - - - again, they don't - -
18 - the only thing that is - - - that would add to that
19 is they don't know - - - first of all, they have no
20 idea what actually happened. They have no idea who's
21 involved. A family member could have been involved.

22 JUDGE PIGOTT: Could they have sent an
23 ambulance? I - - - I was struck - - - and it was in
24 your - - - your - - - you had at least addressed it.
25 You say at approximately 5 o'clock defendant's wife

1 called 911 to report the defendant had shot himself
2 and needed assistance in their home. I always
3 wondered why - - - they could have sent an ambulance,
4 right? We wouldn't have had this situation.

5 MR. KING: Yeah, and it wasn't - - -
6 certainly didn't - - - that - - - there wasn't
7 testimony on that point exactly in the hearing, but I
8 - - - I think under these circumstances, when the
9 police get a report of - - - of a gunshot victim in a
10 home, again, they need to respond - - - they can't
11 make assumptions based on the report. They need to
12 respond to that scene with the concern that
13 whatever's - - - that - - - that - - - that there may
14 be a - - - there's - - - someone's been shot. I
15 think that's what it comes down to. This isn't a
16 report of gunfire. This isn't a report of a gun.
17 And this isn't even a threat that somebody's going to
18 use a gun. Somebody actually is shot with a hole in
19 their hand and blood pouring out. That means that,
20 you know, it's - - - it's a much more heightened
21 concern that results from that than there are in a
22 typical gun case. And it's - - -

23 JUDGE GRAFFEO: What's - - - what's - - -
24 what's your take on the record as to the sequence
25 here? Did the officer who was looking, searching in

1 the backyard, was he aware where the children were,
2 at that juncture?

3 MR. KING: It - - - this was much
4 discussed, particularly in the Appellate Division.
5 There was a response to a question. It was - - - was
6 actually a leading question. The officer responded
7 to it. The officer prefaced that question by
8 discussing witnessing the children outside - - -

9 JUDGE READ: Is this Alvarado you're
10 talking about?

11 MR. KING: Yes, excuse me. This is Officer
12 Alvarado. So in short, Officer Alvarado was asked
13 about the children. He said that he saw them
14 outside. Some - - - that - - - follow-up questions
15 were asked in which, based on the whole context of
16 Alvarado's testimony, would - - - would be limited to
17 what his - - - his view of the children was outside
18 the house, because he said elsewhere in the testimony
19 several times that he never saw them in the house.
20 He had nothing to do with that part of the police
21 activity.

22 CHIEF JUDGE LIPPMAN: As long as they're
23 secured, it doesn't matter whether they're outside or
24 inside, right?

25 MR. KING: I'm sorry, Your Honor? I - - -

1 CHIEF JUDGE LIPPMAN: As long as the
2 children are secured, it doesn't really matter
3 whether they're outside or inside, does it?

4 MR. KING: Well, I mean, that's - - - there
5 is an assumption, and I think that the appellant
6 makes that - - - that they can secure these children
7 safely under these circumstances. I don't think - -
8 - again, that's not an - - - an assumption that these
9 police officers were willing to make, and I don't
10 think should have made. They need to assume - - -
11 until they've ruled out the fact that there are any
12 external threats - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. KING: - - - they need to proceed in -
15 - - accordingly.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.
17 Thanks.

18 MR. KING: Thank you.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

20 MS. HARRINGTON: To answer Your Honor's
21 question, I believe that the ambulance probably was
22 called contemporaneously with the police, because
23 Police Officer Swanson testified that right after
24 they got him on the ground, pretty much, the EMTs
25 arrived and started treating him. So I would guess

1 when it went - - - the 911 call went in, maybe the
2 police and the ambulance came at, you know, almost
3 simultaneously.

4 JUDGE GRAFFEO: Well, they'd have to notify
5 the police, anyway, if it's a gunshot wound, right?
6 Even the hospital has to notify the police if it's a
7 - - -

8 MS. HARRINGTON: Right, that's - - - that's
9 how I remember it - - -

10 JUDGE GRAFFEO: - - - gun victim.

11 MS. HARRINGTON: - - - from my prosecutor
12 days many years ago.

13 If Your Honors have no further questions,
14 I'll rely on my brief.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MS. HARRINGTON: Thank you very much.

17 CHIEF JUDGE LIPPMAN: Thank you. Thank you
18 both.

19 All right, let's get to Jenkins now.

20 MR. FALLEK: Good afternoon, Your Honors.
21 My name is Allen Fallek. One minute rebuttal.

22 CHIEF JUDGE LIPPMAN: One minute, you've
23 got it.

24 MR. FALLEK: There - - -

25 CHIEF JUDGE LIPPMAN: Counselor, what is -

1 - - what's the difference in Jenkins from the prior
2 case?

3 MR. FALLEK: Well, first of all, if there -
4 - -

5 CHIEF JUDGE LIPPMAN: Is it clearer or less
6 clear?

7 MR. FALLEK: The facts are - - - the facts
8 are, I think - - -

9 CHIEF JUDGE LIPPMAN: Is it clearer or less
10 clear when it - - - when the emergency ended?

11 MR. FALLEK: Well - - - well, the exigency,
12 yes. It was a hot pursuit. Yes, it - - - it - - -
13 it's perfect - - - perfectly clear here. There are
14 no factual disputes about the circumstances.

15 CHIEF JUDGE LIPPMAN: When did - - - when'd
16 the emergency end in your case?

17 MR. FALLEK: It - - - the - - - the hot
18 pursuit ended once the police had arrested appellant,
19 his friend, handcuffed them, brought them into the
20 living room, watched them there. Four or five police
21 officers watched him there with his wheelchair-bound
22 mother and sister. And at that point, the exigency
23 was over. Police controlled the situation. And at
24 that point, the police embarked on this search.

25 JUDGE SMITH: Well, what about - - -

1 JUDGE READ: When the exigency is over - -
2 - when the exigency is over, that's the matter of law
3 that you're saying that we need to decide?

4 MR. FALLEK: Yes, yes. When the police
5 control the premises, as they did in this situation
6 where they unquestionably had everybody rounded up
7 and had four or five police officers guarding them -
8 - -

9 JUDGE READ: And that's a question of law
10 rather than a mixed question?

11 MR. FALLEK: Well - - - well that - - -
12 that's a preli - - - I think peop - - - Knapp says
13 that - - - that - - - that at point, concern for - -
14 - for police safety drops out of the case. So that's
15 not an exigency anymore.

16 JUDGE SMITH: Assume - - - assume even - -
17 - assume there are questions of fact here. I mean
18 the Appellate Division reversed - - - was it county
19 court or Supreme - - - Supreme Court, right?

20 MR. FALLEK: Yes.

21 JUDGE SMITH: So we would - - - if it's a -
22 - - if there's a factual disagreement between the
23 two, we would have some factual review power,
24 correct?

25 MR. FALLEK: I don't think - - -

1 JUDGE SMITH: And maybe you don't even know
2 that.

3 MR. FALLEK: - - - there was a factual
4 dispute. To - - - to the degree that the Appellate
5 Division and - - - and the opinion is - - - is hardly
6 clear on that.

7 JUDGE GRAFFEO: We have to determine - - -
8 don't - - - don't we have to determine which posture
9 the record best supports?

10 MR. FALLEK: Well, our position - - - yeah,
11 our position is that the - - - the only inference on
12 the facts, and even from the Appellate decision, is
13 that if there is an exigency at all, it would - - -
14 it would be that the hidden gun itself was an exigen
15 - - - exigency in light of the - - - the appellant's
16 mother and sister. In other words, the police - - -

17 JUDGE SMITH: Well, the Appellate Division
18 said that it was reversing on the law. We're not
19 bound by that, but they did say that. Is it your
20 interpretation that they basically accepted the facts
21 as found by the - - - by Supreme Court - - -

22 MR. FALLEK: Yes.

23 JUDGE SMITH: - - - and held that as a
24 matter of law there was a - - - there was a - - - a -
25 - -

1 MR. FALLEK: Yes, yes. The only difference
2 is that they're saying that as a matter of law the
3 hidden gun under these particular circumstances, that
4 is where the - - - the mother and sister are occupied
5 - - - are occupants.

6 JUDGE PIGOTT: Well, Supreme Court - - -
7 Supreme Court alluded to the fact, and I think you do
8 in your brief, that the - - - that it was a
9 subsequent search of a closed box that required a
10 warrant. Is that what you're resting your argument
11 on?

12 MR. FALLEK: Exactly, that that was a
13 search. I mean that was part and parcel of - - - of
14 the whole sear - - - of the search that started
15 actually in another room. And we don't even know
16 what they did, you know, in - - - in this room prior
17 to opening. So that box was hardly the target of
18 this search, though.

19 JUDGE GRAFFEO: I'm - - - I'm still a
20 little bit confused. Are you saying that the
21 illegality occurred when they went into the other
22 rooms of this residence?

23 MR. FALLEK: Well - - -

24 JUDGE GRAFFEO: Or when they - - - when
25 they got - - - secured the box and then opened the

1 box?

2 MR. FALLEK: Well - - - well they went in
3 the rooms initially to search - - - under the hot
4 pursuit to search for the defendant.

5 JUDGE GRAFFEO: So that part was okay in
6 your - - -

7 MR. FALLEK: So that - - - that's out - - -
8 that's out.

9 JUDGE GRAFFEO: So it's the box?

10 MR. FALLEK: It's the box. Which - - -

11 JUDGE GRAFFEO: Okay, I just want to
12 understand your posture.

13 MR. FALLEK: Yes. Yeah, no, the - - - once
14 the hot pursuit was over, once the police controlled
15 the premises, the search is a separate Fourth
16 Amendment event.

17 JUDGE SMITH: Okay, but as I understand it,
18 they found the - - - the defendant and his friend
19 under the bed in one room, right?

20 MR. FALLEK: Right.

21 JUDGE SMITH: And then they - - - they then
22 proceeded to into the other rooms?

23 MR. FALLEK: Well, not - - -

24 JUDGE SMITH: Or was it - - -

25 MR. FALLEK: - - - not exactly in that

1 order. Once they found the defendant and his friend,
2 they cuffed them and brought them into the living
3 room with his - - -

4 JUDGE SMITH: And then they started - - -
5 and then they started looking for the gun?

6 MR. FALLEK: - - - mother and sister.
7 Then - - - then they proceeded to search.

8 JUDGE SMITH: Okay, yeah, you're - - -
9 you're saying that at that point they shouldn't have
10 been searching. They should have been on the - - -
11 on the telephone looking for a search warrant?

12 MR. FALLEK: Exactly. That was a separate
13 - - - that was - - -

14 CHIEF JUDGE LIPPMAN: So once they're
15 handcuffed - - -

16 MR. FALLEK: Once - - -

17 CHIEF JUDGE LIPPMAN: - - - the exigency
18 is over.

19 MR. FALLEK: Under these circumstances for
20 sure.

21 CHIEF JUDGE LIPPMAN: You - - - you need to
22 get a warrant in your view?

23 MR. FALLEK: Yeah, this was a relatively
24 benign situation. Everyone was completely compliant
25 with the police. There were no added circumstances

1 that make this an - - - an extraordinary case where
2 even though the police control the premises where
3 somehow they - - - they still have reason to app - -
4 - to - - -

5 JUDGE RIVERA: But, counselor, does it - -
6 - does it - - - does it matter the reason that
7 they've gone - - - I mean they got the shots on the
8 roof. They go in the building. There's shots in the
9 building, on the floor. They see one of the - - -
10 the defendant with - - - with the gun run into the
11 apartment. They have to break down the apartment,
12 because whoever's inside is not allowing them access,
13 saying there's nobody there.

14 MR. FALLEK: Right.

15 JUDGE RIVERA: Does that influence - - -

16 MR. FALLEK: That's - - - that's all part
17 of the hot pursuit, which, in our view, has - - -
18 drops out of the case at some point. During the hot
19 pursuit the - - -

20 JUDGE RIVERA: How could they be sure
21 there's not someone else with a gun in that third
22 bedroom?

23 MR. FALLEK: In the third - - - well,
24 initially during the - - - the search for the
25 defendant, at least inferred - - - as inferred by the

1 hearing court - - -

2 JUDGE RIVERA: Because the defendant and
3 the other person are unarmed.

4 MR. FALLEK: - - - there was - - - there
5 was a sweep of this apartment, so that they were
6 ensured - - - and this is not que - - - debated or
7 questioned by the - - -

8 JUDGE RIVERA: So then - - -

9 MR. FALLEK: - - - Appellate Division.

10 JUDGE SMITH: You said that there had
11 already been a protective sweep?

12 MR. FALLEK: That - - - that - - - with - -
13 - yeah, there was a - - - there was a sweep of the -
14 - - of the apartment to ensure - - -

15 JUDGE RIVERA: So that part is - - -

16 MR. FALLEK: - - - that there were no
17 third parties. That - - -

18 JUDGE RIVERA: So after they handcuffed
19 them, they do the protective sweep?

20 MR. FALLEK: No, no, prior to handcuffing
21 them. I mean they're - - - they're in - - - they
22 invaded this apartment and start sweeping, searching
23 for - - -

24 JUDGE RIVERA: I understand. But after
25 they found them - - -

1 MR. FALLEK: Or - - - or perhaps even
2 during - - -

3 JUDGE RIVERA: - - - and they removed them
4 to the living room.

5 MR. FALLEK: - - - the - - - the time that
6 they're bringing the defendant into the living room.
7 But they've swept the apartment prior to the search.
8 And I - - - I think the record establishes that quite
9 clearly. There's - - - there's no - - -

10 JUDGE PIGOTT: Isn't that - - - but part of
11 what the Appellate Division - - -

12 JUDGE RIVERA: Their objection is only to
13 the box, because that's where they found the gun?

14 MR. FALLEK: Yeah, and - - - and - - -

15 JUDGE RIVERA: In any event.

16 MR. FALLEK: - - - even if - - - even if
17 they were allowed to - - - to sweep, a sweep would
18 only allow a plain-view search.

19 JUDGE PIGOTT: Well, they - - - the
20 Appellate Division said that the police knew the gun
21 was in the apartment which had occupants other than
22 the defendant. Were they correct in that?

23 MR. FALLEK: Yes, yes. That's correct.
24 And it's - - - that's what the hearing court found.
25 The only - - - the only difference is that the - - -

1 the Appellate Division found that as a matter of law,
2 those circumstance constituted an exig - - -
3 exigency.

4 JUDGE SMITH: What - - - what - - - what
5 about the Appellate Division's superior convenience
6 theory that - - - that you - - - they interfered less
7 with the privacy and liberty of the residents of the
8 apartment by doing the search than they would by
9 having a guard - - -

10 MR. FALLEK: Right.

11 JUDGE SMITH: - - - stand over them while
12 they got a search warrant?

13 MR. FALLEK: Yeah, I mean - - - certainly,
14 in this - - - I mean as far back as Coolidge and - -
15 - and those - - - those cases in the '70s, the
16 inconvenience of the police or expediency or
17 inconvenience to others is just not a - - - a
18 substitute for - - - for a warrant where - - - where
19 - - - where there's time to get a warrant.

20 JUDGE SMITH: So you - - - you say that no
21 matter how much - - -

22 MR. FALLEK: Certainly, in this day and age
23 there's - - - there's hardly any inconvenience. They
24 could just call and - - - and actually almost fax a
25 warrant. So - - -

1 JUDGE RIVERA: Well, they didn't ask the
2 mother for consent?

3 MR. FALLEK: And they didn't ask the - - -
4 right, they could have asked the mother for consent.
5 And if it was so inconvenient, certainly she would
6 have consented.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you.

9 MR. FALLEK: That's - - - that's our
10 argument. Thank you.

11 JUDGE RIVERA: Thank you.

12 CHIEF JUDGE LIPPMAN: All right, let's hear
13 from your adversary.

14 MR. TWERSKY: Good afternoon. My name is
15 Sholom Twersky, and I represent the respondent. The
16 - - -

17 CHIEF JUDGE LIPPMAN: Counselor, where's
18 the - - - where's the - - - the exigency once they
19 handcuff these guys and have them in the - - - in the
20 room? Why do they even no - - - need to go any
21 further, if you agree that they did a sweep
22 beforehand?

23 MR. TWERSKY: Your Honor, first of all,
24 they did not go to the room with the box until after
25 the cuffing. That was the one room that they had not

1 swept until they cuffed.

2 JUDGE SMITH: Okay, suppose that it's - - -
3 suppose it's fine for them to go in and see if
4 there's nobody there, how do you get from there to
5 picking up the box and shaking it?

6 MR. TWERSKY: Because you have a reasonable
7 basis to believe that the defendant has fired a
8 weapon, not just possessing a gun. You have the - -
9 - you have the defendant being intoxicated. You have
10 two female residents - - -

11 CHIEF JUDGE LIPPMAN: Well, what's the - -
12 - what's the emergency from that?

13 MR. TWERSKY: Well, in other words, the - -
14 - the - - - the idea that the situation is calm and
15 controlled and - - -

16 CHIEF JUDGE LIPPMAN: To go - - - so that
17 gives them the right to go into the box?

18 MR. TWERSKY: No, not just that, Your
19 Honor. But then you have two female occupants who
20 not only didn't allow them in when they twice knocked
21 and - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but they're in
23 the living room, right? They're in the - - -

24 MR. TWERSKY: Well, that - - - and that - -
25 - that's one of the confusing aspects, which is why

1 this is a mixed question of law and fact.

2 JUDGE RIVERA: No, but it's - - - they're
3 all under control. The mother isn't in the living
4 room, because the officers allowed her to go to the
5 bedroom. Obviously they don't think there's such an
6 exigency. They're letting people walk around.

7 MR. TWERSKY: Your Honor, the - - - the
8 fact of the matter is that there are a lot of moving
9 players. They - - - they're not all in the living
10 room. You have - - -

11 JUDGE SMITH: What - - - what - - - what
12 would have - - - what might have happened? What's
13 the risk that something would have happened if they
14 had - - - if they had waited and got a warrant?

15 MR. TWERSKY: Because there were - - -
16 there was enough time between when they had to - - -
17 they knocked on the door and they got the battering
18 ram to go - - - to finally go in for four people who
19 - - - to know where the gun was hidden, and could
20 have acc - - - accessed it to either threaten the
21 officers - - -

22 JUDGE SMITH: But all - - - but all four of
23 those people were under the watchful eye of several
24 police - - -

25 MR. TWERSKY: Well, and - - -

1 give us in some - - - give us a scenario. Exactly
2 what's going to happen if they - - - if they say
3 okay, now hold everything. We're going to - - -
4 everybody stand still. We're going to get a warrant.
5 What is the danger?

6 MR. TWERSKY: Your Honor, the - - - the
7 danger is if it's - - - number one, if it's not in
8 the box, it could be anywhere including the living
9 room.

10 JUDGE SMITH: What is the danger? What is
11 going to happen?

12 MR. TWERSKY: Well, the dang - - - the
13 danger could be that anybody could pull out the
14 weapon and could threaten the officers. They - - -

15 JUDGE SMITH: Anybody - - - anybody meaning
16 one of those four people?

17 MR. TWERSKY: That's correct. That's
18 correct.

19 JUDGE SMITH: I don't - - -

20 JUDGE RIVERA: Even though two are
21 handcuffed? That's a good trick.

22 MR. TWERSKY: Your Honor - - - Your Honor
23 the fact is that you have - - -

24 CHIEF JUDGE LIPPMAN: The old woman - - -
25 the old woman's going to get the gun?

1 MR. TWERSKY: Well, Your Honor - - -

2 CHIEF JUDGE LIPPMAN: The mother?

3 MR. TWERSKY: - - - it's a reasonableness
4 test. Could the officer - - -

5 CHIEF JUDGE LIPPMAN: Is that reasonable
6 that the mother's going to get the gun - - - the - -
7 -

8 MR. TWERSKY: Well, the - - - could the
9 officer have assumed that none of these parties, who
10 had been so resistant to cooperating with the
11 officers, who had lied to the officers about the fact
12 that the defendants had just run in, that could they
13 not have grabbed the weapon?

14 JUDGE SMITH: Even if - - - even if these
15 are the four most evil people in the world, what are
16 they going to do? You've got an old lady in a
17 wheelchair, two handcuffed men, and a young woman of
18 about twenty. You - - - the - - - the police can't
19 handle them while a search warrant is - - -

20 MR. TWERSKY: Your Honor, even if it's not
21 threatening the officers' safety, the - - - there's
22 testimony the apartment had windows. This was the
23 eighth floor. There - - - they - - -

24 CHIEF JUDGE LIPPMAN: What - - - what does
25 that mean?

1 JUDGE ABDUS-SALAAM: What's that mean?

2 CHIEF JUDGE LIPPMAN: What is - - - what -

3 - -

4 MR. TWERSKY: They could have discarded the
5 gun.

6 JUDGE RIVERA: Well, then it's not on the
7 premises, because they're in control. You've - - -
8 you've controlled them. The officers have these
9 people under control. There are several officers.
10 There's not one officer in this apartment.

11 MR. TWERSKY: There are four or five
12 officers, and you have four - - -

13 JUDGE RIVERA: They outnumber them.

14 MR. TWERSKY: - - - people.

15 JUDGE RIVERA: They've got them isolated in
16 an area of the apartment. Who's going to discard
17 this gun? When are they going to do that?

18 MR. TWERSKY: Your Honor, like - - - like I
19 said, this apartment was not under complete control,
20 as defendant has described - - -

21 JUDGE RIVERA: Let me ask you another
22 question, counsel.

23 MR. TWERSKY: Yes.

24 JUDGE RIVERA: So he finds the box. He
25 shakes the box. He thinks there's a gun in the box.

1 He opens the box. He finds a gun in the box. What
2 if it's not the gun? What if there's another gun?

3 MR. TWERSKY: Your Honor, there is no - - -
4 the - - - they - - - they heard gunfire in - - - on -
5 - - on top of the stairwell. They go - - - they go
6 to the eighth floor where the voices are coming from
7 - - -

8 JUDGE RIVERA: Yes.

9 MR. TWERSKY: - - - right after the shot.
10 They see one gun in one hand, and that's the
11 defendant. There was no testimony that they planned
12 on doing any further search. And the fact is my
13 opponent says that this was all about convenience of
14 the police. The fact is that why shouldn't the
15 Fourth Amendment interests of the mother and sister
16 be taken into - - - into account here?

17 JUDGE RIVERA: Yeah, but if - - -

18 MR. TWERSKY: He - - -

19 JUDGE RIVERA: But if he was going to take
20 the kind of action you suggest, don't you think he
21 would have run in and thrown the gun out the window?
22 He's going to put it in the box, go into the other
23 room, go under the bed in the other room.

24 MR. TWERSKY: Your Honor, the - - -

25 JUDGE RIVERA: This is quite the scenario.

1 MR. TWERSKY: That - - - that bedroom was
2 right next to where - - - his mother's bedroom where
3 he was found hiding.

4 JUDGE RIVERA: Right.

5 MR. TWERSKY: He - - - he throws it in the
6 box. He shuts the box. The box is sitting
7 conspicuously in the middle of the floor. There was
8 probable cause to believe there was a gun in that
9 box. But what do you do now? You have a mother and
10 sister, middle of the night, New Year's Eve.

11 JUDGE SMITH: You say that - - - well, wait
12 a minute. You say there was a probable cause to
13 believe there's a gun in the box before he shook it?

14 MR. TWERSKY: I would say even before he
15 shook it, even before he shook it. Because the - - -
16 the - - - the - - - the proximity of that bedroom to
17 where he was found, the idea of the box just sitting
18 in the middle of the room - - -

19 CHIEF JUDGE LIPPMAN: But that is - - -

20 JUDGE SMITH: Doesn't that apply to any
21 container in the apartment that's big enough to hold
22 a gun?

23 MR. TWERSKY: Your Honor, I would say that
24 under the totality of circumstances, it was
25 reasonable to - - - for him to find that because this

1 was next door to where he was found, it would have
2 been a logical place for him to have looked to hide
3 the gun.

4 CHIEF JUDGE LIPPMAN: Counselor is it - - -
5 is it in plain view if it's in the box? Is that what
6 you're saying?

7 MR. TWERSKY: No, the - - - the box was in
8 plain view. So they didn't have to go through any
9 rummaging.

10 CHIEF JUDGE LIPPMAN: Yeah, but what about
11 what's inside the box?

12 MR. TWERSKY: The box - - - the - - - the
13 gun was only in plain view once they opened the lid.
14 But this was this - - - a minimal - - -

15 JUDGE GRAFFEO: Counsel, this - - - this -
16 - - this scenario seems to push our definition of
17 exigency a bit. Is there - - - what - - - is there
18 any precedent that you think supports your view that
19 after - - - after the perpetrators are handcuffed
20 that you can still continue the search?

21 MR. TWERSKY: Your Honor, I - - - I think
22 that what this does is - - - there's no case directly
23 on point when it comes to the presence of civilian
24 occupants. But I - - - what I think this does is
25 rather than expanding the exception to the warrant

1 requirement, it - - - it expands the protection of
2 the Fourth Amendment to civilian occupants, because
3 in impounding that apartment for the several hours it
4 would take to get a warrant would have been
5 incredibly intrusive on this mother and sister.

6 JUDGE SMITH: Why not - - - why not ask
7 them - - - why not let them choose? Ask - - - ask if
8 they'll consent to a search?

9 MR. TWERSKY: Your Honor, but then - - -
10 then my opponent would be up here arguing was that a
11 knowing and voluntary consent? You're - - - you're -
12 - - you're giving them a Hobson's choice?

13 JUDGE SMITH: And you'd - - - and you'd be
14 arguing yes. Wouldn't you have a better chance with
15 that argument?

16 MR. TWERSKY: And - - - and plus - - -
17 well, plus with the defendant being there, under
18 Georgia v. Randolph he would have gotten a say, too.
19 So the fact is was it - - - and maybe - - - maybe
20 they could have. But the question is does the Fourth
21 Amendment require them to ask for that consent versus
22 balancing the incredible intrusion.

23 JUDGE SMITH: The Fourth Amendment didn't
24 require them to do anything except get a warrant.
25 But they could - - - but - - - but if they thought it

1 would - - - but if convenient - - - if the
2 convenience of the occupants is the problem, I don't
3 see why - - - why - - - why consent isn't the answer.

4 MR. TWERSKY: Your Honor, we're not talking
5 about convenience. We're talking about standing over
6 them, particularly because these women had shown a
7 lack of cooperation.

8 JUDGE SMITH: Okay, whatever you want to
9 call it. If the - - - if the possible humiliation
10 and - - - and indignity to the occupants of a long
11 delay is a problem, why isn't consent the answer?

12 MR. TWERSKY: Your Honor, the - - - the
13 Fourth Amendment wouldn't requi - - - if there - - -
14 if there's an exigency, there's an exigency. And the
15 exigency is that if you're - - - you're balancing out
16 the intrusion of - - - of, you know, following them
17 like a hawk or evicting them from the apartment for
18 the several hours it would take versus in - - - under
19 these particular circumstances.

20 JUDGE ABDUS-SALAAM: Several hours?
21 Counselor, you keep saying several hours.

22 MR. TWERSKY: Yes.

23 JUDGE ABDUS-SALAAM: How - - - I mean are
24 you saying that it takes normally several hours to
25 get a warrant, when most of the time you can just

1 call a judge or call the DA or somebody and get
2 something very quickly, right?

3 MR. TWERSKY: Your Honor, first of all,
4 this was after midnight on New Year's Eve. I think a
5 reasonable police officer, which is really what the
6 standard is, could - - - could reasonably have
7 thought it was going to take several hours to be able
8 to get a DO on the phone.

9 JUDGE ABDUS-SALAAM: In Brooklyn?

10 MR. TWERSKY: I'm sorry?

11 JUDGE ABDUS-SALAAM: In Brooklyn? We're
12 talking about Brooklyn, right?

13 MR. TWERSKY: We're talking about Brooklyn.
14 We're talking about Brooklyn.

15 JUDGE PIGOTT: Is it a good - - - is it a
16 good argument, though, to make that - - - that in
17 order to protect our citizens, speaking generally
18 now, it's better for the police to go in without a
19 warrant than to get one?

20 MR. TWERSKY: Well, in terms of going in,
21 this was hot pursuit. Nobody is questioning their
22 right to go in.

23 JUDGE PIGOTT: No, I understand that. You
24 - - - you were just making the argument that for the
25 benefit of these people who own the apartment, we did

1 them a favor. We did not get a warrant.

2 MR. TWERSKY: Under the circumstances of
3 where you have hot pursuit, meaning they didn't have
4 time to get a warrant beforehand, where you have
5 reason to believe that these occupants would have
6 known where the gun is and could potentially have
7 disc - - - had worked to discard or thrown out a
8 window, so therefore, they would have to be watched
9 like a hawk for the hours it would take to get a
10 warrant, under those circumstances, unless it would -
11 - - it would be less time to - - - it would be more
12 time to do an imminent search right at the moment
13 versus the time it would take for them to be under
14 the intrusion of police in their home, then yes.

15 JUDGE PIGOTT: I - - - I need to repeat
16 Judge Smith's point, though. But if - - - if you're
17 saying we don't want to put you to a lot of trouble
18 of getting a warrant, but we're going to search your
19 apartment, could they say please do?

20 MR. TWERSKY: They could say please do.
21 But on - - - on - - - on - - - under these
22 circumstances, Your Honor, the fact is - - - and I'm
23 not trying to dilute the warrant requirement here,
24 but the fact is they saw the gun in the apartment.
25 They probably would have had to say to them listen,

1 we're going to get a - - - we're going to get a
2 warrant. We're - - - this - - - this apartment is
3 going to be searched either now - - -

4 JUDGE SMITH: Are you really - - -

5 MR. TWERSKY: - - - or later.

6 JUDGE SMITH: Are you really suggesting
7 that it really - - - that it ought to be a rule that
8 when you've arrest - - - lawfully arrested someone
9 for a crime committed with a gun, that you can search
10 the premises for the gun? That - - - that should be
11 the first thing you do, anyway?

12 MR. TWERSKY: Absolutely not, because here
13 they had no time to get a warrant beforehand, because
14 the exigency of the search - - - of the situation
15 started before they actually went into the apartment.

16 JUDGE GRAFFEO: So what - - - what - - -
17 what troubles me - - -

18 JUDGE ABDUS-SALAAM: Wouldn't it have been
19 just as reasonable - - - wouldn't it have been just
20 as reasonable, as you say, these police officers saw
21 someone run into this house with a gun. You're - - -
22 you're - - - you earlier said that the mother or - - -
23 - and/or the sister might try to discard the gun.
24 Wouldn't it have been as reasonable to think that
25 these - - - the perpetrator, who ran into the house

1 from the police, would have discarded the gun even
2 before the police got in, because there was a time
3 between when they got in, getting the battering ram
4 and all of that?

5 MR. TWERSKY: Cert - - -

6 JUDGE ABDUS-SALAAM: The gun might have
7 already been gone.

8 MR. TWERSKY: Cert - - - certainly, either
9 scenario is possible, but the question is was it
10 reasonable for a police officer to - - - to believe
11 that the gun was in the box and it would be less
12 intrusive simply to open the lid - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. TWERSKY: - - - rather than - - -

15 JUDGE GRAFFEO: But with the - - - except
16 that, you know, we're - - - you're asking us to
17 articulate a rule here, and we have to give guidance
18 to the police in these cases. And what's - - - I
19 find troublesome in this case is if this gun had not
20 been in the box or the box had been on the dresser
21 not on the floor, does this mean that when there's a
22 - - - when the police are in hot pursuit and they
23 know that there had been a weapon they can search an
24 apartment for any length of time in order to try to
25 find the weapon?

1 MR. TWERSKY: Your Honor, obviously my case
2 is better than - - - than what you're describing.

3 JUDGE GRAFFEO: Right, but I'm - - -

4 MR. TWERSKY: But yes.

5 JUDGE GRAFFEO: - - - concerned with the
6 rule that - - - that we'd be establishing.

7 MR. TWERSKY: But yes, if - - - along those
8 circumstances and that the officers have reason to
9 believe that the occupants are aware of where the
10 weapon is, could discard it, and that under those
11 circumstances, unless it was going to take more time
12 to - - - to conduct a search at the moment rather
13 than wait for a warrant, yes, that would be - - -
14 that would be the rule we're suggesting.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MR. TWERSKY: But you don't have to apply
17 it under these circumstances.

18 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
19 you.

20 Counsel, rebuttal - - - any rebuttal?

21 MR. FALLEK: I only have a minute, and I
22 don't know - - - know what to respond to. But I just
23 want to make it clear that with respect to the mixed
24 question at all, our position is that as the - - - as
25 my opponent has made clear, that the - - - the

1 People's position is that the People had - - - that
2 the po - - - police had to be concerned that at any
3 moment the - - - the mother and the daughter or even
4 the defendant, were - - - were going to launch an
5 attack against them with a gun.

6 JUDGE SMITH: Or - - - or throw away the
7 weapon.

8 MR. FALLEK: Excuse me?

9 JUDGE SMITH: Or throw away the weapon.

10 MR. FALLEK: Or throw away. Our position
11 is that it's just so remote and so improbable, then,
12 that there's no possible record support for - - - for
13 that scenario, and that therefore, the only inference
14 here or the only question for this court is purely
15 legal - - - whether or not the hidden gun itself - -
16 -

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. FALLEK: - - - was - - - was an
19 exigency.

20 CHIEF JUDGE LIPPMAN: Thank you, counselor.

21 MR. FALLEK: Thank you.

22 CHIEF JUDGE LIPPMAN: Thank you. Thank all
23 of you.

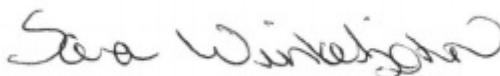
24 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. John Rossi, No. 147, and People v. Benjamin Jenkins, No. 148 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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