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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 3

SHAWN J. SIVERTSON,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 03, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
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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1 CHIEF JUDGE DIFIORE: Okay. The next case  
2 on this afternoon's calendar is appeal number 3, the  
3 People of the State of New York v. Shawn J.  
4 Sivertson.

5 MS. DAVIES: Good afternoon. Barbara  
6 Davies for Mr. Sivertson. I'd like to reserve two  
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. DAVIES: Five armed police officers  
10 illegally barged it to Shawn Sivertson's tiny  
11 apartment on a November night, and they probably did  
12 so by - - -

13 JUDGE RIVERA: So why isn't there an  
14 urgency, if they reasonably don't - - - if they don't  
15 know, they say, we just don't know if he has another  
16 way of getting out of that room, out of that  
17 apartment?

18 MS. DAVIES: There were ten to twenty  
19 police officers on hand that night. The building was  
20 small, they could have staged themselves at every  
21 wall while they - - - while others of them went to -  
22 - -

23 JUDGE RIVERA: Well, there is testimony  
24 they surrounded the apartment. I mean, there is - -  
25 - they are around the apartment.

1 MS. DAVIES: Then - - - then they - - -  
2 they - - - we have no reason to believe that he could  
3 have gotten out. And besides, the record is clear  
4 that he was in a stupor, as one of the police  
5 officers testified, he was in his bed, in a stupor,  
6 not likely to be able to leave the - - - the  
7 building, and if - - - talking about exigency, this  
8 was something that was a very chaotic enterprise.

9 JUDGE FAHEY: It seems though, you know,  
10 that the trial court seemed to really balance the  
11 evidence here for exigency. I thought that the - - -  
12 the glove, and the knit hat, the knives were kept  
13 out, but the other items that were removed after  
14 lifting, I guess, a cover on an ottoman - - -

15 MS. DAVIES: Yes.

16 JUDGE FAHEY: - - - you know the record  
17 better than I do, that those items were excluded. It  
18 seems that there was some thought given to those  
19 things that they were - - - he was being chased for,  
20 they created an emergency circumstance, arguably,  
21 anyway, created emergency circumstances were allowed  
22 in, but once that emergency was over, it seemed like  
23 the trial court said, well, okay, that other stuff  
24 isn't admissible, and kept that out.

25 There seemed to be a pretty reasonable

1 balance in here. We don't always see that, that's  
2 why I point it out. So - - -

3 MS. DAVIES: But when you look at the other  
4 factors in this court's McBride decision, whether  
5 there was violence involved, granted there was an  
6 allegation of a knife, and I do want to get to that  
7 later, whether there was actually a knife in this  
8 case.

9 There was an allegation of a knife, but  
10 there was no allegation that anyone was - - - was  
11 hurt, and that is one of the factors in the McBride  
12 case, about violence, and the - - - the circumstances  
13 of the entry here were chaotic, and at night, and I  
14 think people are entitled to peace in their home at  
15 night. And all of these factors.

16 JUDGE GARCIA: But isn't there one other  
17 factor here, and it's hard to get it from the briefs,  
18 but the timeline here is very short. I mean, as I  
19 calculated it, looking at the testimony, it's fifty  
20 minutes between the time that the call comes in, to  
21 the time your client is in custody.

22 So to me, it seems almost as if this is a -  
23 - - you could analogize it to a pursuit, where this  
24 person - - - and it's really, I don't think for this  
25 court to determine whether there's a knife here or

1 not. I mean, the allegation, and their belief, is  
2 there is a knife.

3 So he goes into this apartment, which is  
4 very close to the scene of the robbery, there's an  
5 allegation he has a knife, it's forty-five, fifty  
6 minutes later, they are essentially following him  
7 there almost, in - - - in a way. And isn't that all  
8 the facts and circumstances that I think Judge Fahey  
9 was saying, this trial court weighed, in making a  
10 determination of whether or not there were exigent  
11 circumstances?

12 And our rule, it seems to me, is really  
13 just to see if there is any factual support in the  
14 record for his findings.

15 MS. DAVIES: Well, we submit that - - -  
16 that the court erred in finding exigent circumstances  
17 that, notwithstanding the fact that it was a short  
18 period of time, we don't really have any - - - we  
19 have - - - do not have the victims being able to say,  
20 oh yes, he is in here. It's - - - it's all kind of  
21 police investigation.

22 JUDGE RIVERA: Well, in the timeframe,  
23 that's short because the police entered, right? If  
24 they didn't enter, it wouldn't be fifty minutes,  
25 would it?

1 MS. DAVIES: Well, they entered. They  
2 barged in, and they broke his door - - -

3 JUDGE RIVERA: Right.

4 MS. DAVIES: They broke his door - - -

5 JUDGE RIVERA: They didn't - - -

6 MS. DAVIES: They broke his door - - -

7 JUDGE RIVERA: They could have delayed.

8 Isn't the - - - isn't your argument, they could have  
9 delayed?

10 MS. DAVIES: Yes, they could have delayed.

11 JUDGE RIVERA: So it's fifty minutes

12 because they chose to make it fifty minutes.

13 MS. DAVIES: They - - - right. And they  
14 barged in, and - - -

15 JUDGE GARCIA: But isn't the point really  
16 on fifty minutes, you're basically, almost following  
17 a guy, a perpetrator with a knife, with a weapon into  
18 an apartment building. So while they're sitting  
19 there, it's forty-five minutes, let's say, after this  
20 crime has occurred. I think that certainly goes to  
21 exigency.

22 I mean, how - - - it could be three days later,  
23 when you surround the apartment, certainly, and I think  
24 one of our cases is three days later, where we found  
25 exigency.

1 MS. DAVIES: I believe it's McBride.

2 JUDGE GARCIA: But that timeframe, to when  
3 you get to the staging area of, are we going in or  
4 not, in making a decision, that's, to me, what's  
5 relevant here.

6 Apart - - - at least in part, that you have  
7 a forty-five-minute time-lapse between the time  
8 somebody has seen him, we - - - in the record, with a  
9 knife, robbing a - - - an establishment, to the time  
10 you're at the building, where that person is clearly  
11 inside and not responding.

12 MS. DAVIES: Well, there - - - there - - -  
13 as Judge Rivera pointed out, there really wouldn't  
14 have been any harm in waiting, and they could have  
15 gone and gotten a warrant, they were - - - there were  
16 numerous police officers.

17 JUDGE ABDUS-SALAAM: Counsel, I'm curious,  
18 how long would it have taken to get a warrant? This  
19 - - - this crime occurred at 8:45, approximately, in  
20 the evening, right?

21 MS. DAVIES: Yes.

22 JUDGE ABDUS-SALAAM: So how long would it  
23 have taken to get a warrant? Would - - - would the  
24 police have to have been there overnight, do you  
25 think?

1 MS. DAVIES: That's totally speculative.  
2 We really don't know how long it would have taken.  
3 I'd - - - I'd like to think that there are judges on  
4 hand who are available to sign arrest warrants in  
5 circumstances like this, and we really - - - we  
6 really don't know. But - - -

7 JUDGE RIVERA: But the officer who  
8 authorized the entry never said that it was  
9 authorized because there would be an undue delay.  
10 Isn't there suppression testimony, have nothing to do  
11 with any undue delay and how long it might take to  
12 get a warrant?

13 MS. DAVIES: No, there was nothing, that's  
14 - - -

15 JUDGE RIVERA: It has to do with what that  
16 officer perceived to be a danger, the urgency.

17 MS. DAVIES: Even though they looked in the  
18 window, and they saw him in a stupor, they decided  
19 they wanted to break the door down and get into the -  
20 - - into the apartment.

21 JUDGE RIVERA: Well, what's the testimony  
22 about the forced entry? Do they break the door down?

23 MS. DAVIES: The testimony is very nebulous  
24 about that. It's - - - it's curious that the  
25 prosecutor is very careful not to ask the police

1 officers precisely how they got in the door - - - in  
2 the apartment.

3 My client's statements, when he is interrogated  
4 by the detective, are that he's very upset how people got  
5 into his apartment. They - - - he wants it investigated  
6 how somebody broke the door down, or broke the lock. I -  
7 - - I think the inference is that it was a - - - a forced  
8 entry.

9 JUDGE GARCIA: Was there cross - - -

10 JUDGE STEIN: It seems to me that their - -  
11 - I'm sorry.

12 JUDGE GARCIA: I'm sorry. Was there cross  
13 on that issue? I mean, the defense lawyer was there,  
14 right?

15 MS. DAVIES: The defense - - - yeah, there  
16 was not cross on that issue, unfortunately. And one  
17 of the other argument I would like to get to this  
18 afternoon is the ineffectiveness of the defense  
19 attorney in - - - in not objecting to a very serious  
20 misconduct by the prosecutor during the summation.

21 And this business about not cross-examining  
22 how the police officers got in, is perhaps another  
23 example of a failure - - -

24 JUDGE FAHEY: On the prosecutor's  
25 summation, you're talking about the silence issue

1 again?

2 MS. DAVIES: Yes. Yes, I'm talking - - -

3 JUDGE FAHEY: Why don't you go ahead to  
4 that - - -

5 MS. DAVIES: Oh, thank you, Your Honor.

6 JUDGE FAHEY: - - - because you don't have  
7 much time left. Yeah.

8 MS. DAVIES: Well, as the court knows, that  
9 the prosecutor impermissibly utilized Mr. Sivertson's  
10 silence. He said nothing at the time of the entry of  
11 the - - -

12 JUDGE FAHEY: Well, you know, the way I  
13 read the prosecutor's remarks, it seems like the  
14 prosecutor, you know, relied on the - - - on a number  
15 of statements that the defendant actually made to the  
16 police when he chose not to remain silent, and those  
17 seem fine to me.

18 There was some - - - I think you could  
19 argue that there was improper comment arguing on what  
20 an innocent person would have said, or something like  
21 that. That's the language you're talking about.

22 MS. DAVIES: Yes. That - - - which the - -  
23 -

24 JUDGE FAHEY: So let's assume this. Let's  
25 assume that it was error and - - - for him not to

1 object, and that was ineffective.

2 MS. DAVIES: Yes.

3 JUDGE FAHEY: But it kind of - - - then - -  
4 - then the question for us becomes, does it rise to  
5 that Turner standard of a dispositive error for a  
6 single ineffective assistance of counsel issue. Do  
7 you think it does?

8 MS. DAVIES: I think it does, and - - - and  
9 when you - - -

10 JUDGE FAHEY: It seems like a stretch to  
11 me. That's why I ask it.

12 MS. DAVIES: Well, when you combine - - -  
13 it's almost a dual Turner error. When you combine  
14 counsel's performance with - - - on the knife issue.  
15 He had a strategy that there was no knife. That was  
16 his theory of the case - - -

17 JUDGE FAHEY: Um-hum.

18 MS. DAVIES: - - - there was no knife. His  
19 first statement to the jurors in summation was, there  
20 never ever was a knife. And the jurors clearly  
21 bought that. They spent a long time looking at the  
22 video, trying to determine if there was a knife. And  
23 so that was - - - that, in and of itself, should go a  
24 long way to proving that there was not overwhelming  
25 evidence in this case.

1           But if he's going to argue that there was no  
2 knife in a case where his client is charged with first  
3 degree robbery, and was subjected to a mandatory life  
4 sentence, then it behooved him, I believe, as an effective  
5 representative for his client to ask for a lesser included  
6 offense of a nonviolent robbery, which indeed, he did not.

7           So you couple that with the fact that he did not  
8 object to the improper argument on pretrial silence, we  
9 would suggest that that is sufficient for a Turner  
10 violation.

11           CHIEF JUDGE DIFIORE: Thank you, Ms.  
12 Davies.

13           Counsel.

14           MS. LOWRY: May it please the court.  
15 Ashley Lowry, on behalf of the People.

16           Defendant here received a fair trial despite  
17 defense counsel's and the prosecutor's minor  
18 misapprehension about the timing of defendant's statement  
19 to police. Defendant here accords undue weight to the  
20 trial counsel's failure to object to that single comment  
21 in the prosecutor summation.

22           We submit that this comment was not pervasive,  
23 it was not egregious, and it was not clear-cut and  
24 dispositive error, which could have been cured by a  
25 curative instruction.

1           Taking all of that into account, viewed  
2           objectively, defense counsel's representation was  
3           meaningful.

4           So in looking at the pervasiveness, or lack  
5           thereof of this comment, yes, when you read it in the  
6           transcript, perhaps it is eluding to defendant's silence.  
7           So in that respect, perhaps it's improper. But this is a  
8           minor slip in an otherwise fair summation.

9           Both attorneys - - -

10          JUDGE ABDUS-SALAAM: Who argued below that  
11          there was a combination of things that resulted in a  
12          Turner error?

13          MS. LOWRY: Defense counsel does say - - -  
14          does refer to two other comments, and if I could  
15          elaborate, the first - - -

16          JUDGE ABDUS-SALAAM: No, I mean - - - I  
17          mean, the reference to, there was no knife. Was that  
18          argued in combination with these comments about  
19          silence, as - - - as constituting a Turner error?

20          MS. LOWRY: No, I don't believe so, Your  
21          Honor.

22          JUDGE ABDUS-SALAAM: I didn't think I read  
23          anything like that.

24          MS. LOWRY: No, no, no. And not only that,  
25          I would remind the court that, you know, the reason

1           why this isn't ineffective assistance of counsel  
2           claim is because this, you know, comment, it's  
3           unpreserved, and the - - - it's - - - the statements  
4           were not made in bad faith.

5                     Defendant, in her brief, at page 16, admits that  
6           the prosecutor's language became a bit jumbled. It's - -  
7           - it's a little confusing as to how it came out, and, you  
8           know, perhaps defense counsel didn't really follow the  
9           path as to why it was, you know, or was not a  
10          constitutional error, but in that respect, it's not  
11          egregious. This was a single comment throughout the  
12          course of an entire summation.

13                     And viewed in context, it happened right around  
14          the same time that the prosecutor actually played  
15          defendant's statements in the recording. Defendant made  
16          these statements, denied his own guilt, he denied his own  
17          guilt, and then the prosecutor was playing his on  
18          statements.

19                     So in that respect, it - - - it greatly  
20          diminishes any potential harm. Because you're hearing the  
21          defendant's actual statements.

22                     JUDGE RIVERA: So counsel, if I - - - if I  
23          can ask you about the other challenge.

24                     MS. LOWRY: Sure.

25                     JUDGE RIVERA: The exigency - - -

1 MS. LOWRY: Yes.

2 JUDGE RIVERA: - - - challenge, exception  
3 to the warrant requirement. What - - - what are the  
4 urgent needs, as articulated at that suppression  
5 hearing?

6 MS. LOWRY: Well, initially, I do - - - I  
7 would like to remind the court that we submit that  
8 this is a mixed question of law and fact, which would  
9 be beyond this court's jurisdiction. The hearing  
10 court, here, referred to numerous determinations - -  
11 -

12 JUDGE RIVERA: Well, what we're looking for  
13 is to make sure the record supports the - - -

14 MS. LOWRY: Yes, yes.

15 JUDGE RIVERA: - - - that conclusion.

16 MS. LOWRY: Exactly.

17 JUDGE RIVERA: So that's what I'm asking  
18 you, where in the record does it support the  
19 conclusion that there is an urgent need - - -

20 MS. LOWRY: Yes.

21 JUDGE RIVERA: - - - to enter without a  
22 warrant?

23 MS. LOWRY: The hearing court - - - if you  
24 look at page 9 of the appendix, the hearing court  
25 referred to the officer's testimonies, and we had

1 several officers testify that the forced entry was  
2 based on the defendant matching the description,  
3 middle aged, you know, and it's - - - it's all there.

4 JUDGE RIVERA: Right.

5 MS. LOWRY: Yeah.

6 JUDGE STEIN: Well, that goes to probable  
7 cause.

8 JUDGE RIVERA: Yeah, it doesn't go to the -  
9 - -

10 JUDGE STEIN: It doesn't go to urgency.

11 JUDGE RIVERA: - - - exigency, which is  
12 what I'm asking you about.

13 MS. LOWRY: Yes. Okay. So there was - - -  
14 it was a robbery at knifepoint, which is what the,  
15 you know, the - - -

16 JUDGE RIVERA: Um-hum.

17 MS. LOWRY: - - - excuse me, the clerk  
18 testified to. When she called 911 - - -

19 JUDGE RIVERA: Um-hum.

20 MS. LOWRY: - - - she said this man had a  
21 knife.

22 JUDGE RIVERA: That's a reasonable belief  
23 that he's armed with a knife. Yes.

24 MS. LOWRY: Absolutely.

25 JUDGE RIVERA: Um-hum.

1 MS. LOWRY: And then when the officers, you  
2 know, kind of - - - some go watch the surveillance  
3 video, some go to this property, he matches the  
4 description, they're looking inside, they see those  
5 white gloves. Those white gloves worn improperly  
6 with the black rubber band on top.

7 JUDGE RIVERA: But that goes, again, to - -  
8 - to him being a suspect.

9 MS. LOWRY: Yes.

10 JUDGE RIVERA: This is about the need to  
11 enter - - -

12 MS. LOWRY: Yes.

13 JUDGE RIVERA: - - - immediately - - -

14 MS. LOWRY: Okay.

15 JUDGE RIVERA: - - - rather than take time  
16 to go get the warrant.

17 MS. LOWRY: Yes, Your Honor. I apologize.

18 So when they spoke with the neighbors, they  
19 confirmed that this was a multi-unit house. They  
20 spoke to the neighbor who is in the front unit. He  
21 is in a lower back unit. That means there's an  
22 upstairs unit, there was also testimony that there  
23 was a basement. He could have escaped through the  
24 basement, he could have gone upstairs and harmed  
25 another individual.

1 JUDGE STEIN: Well, they could see him.  
2 Right?

3 MS. LOWRY: They could.

4 JUDGE STEIN: So if they had surrounded  
5 this building, and sent someone to go get a warrant,  
6 and at some point, he gets out of bed and starts  
7 moving, and starts moving to where they can't see  
8 him, couldn't they have - - - it seems to me that  
9 would be a little more urgent, because as long as  
10 he's laying there in bed, and they can see him in  
11 bed, I just don't understand what the urgency is in  
12 preventing anything.

13 MS. LOWRY: At the time when they first  
14 located the defendant and they saw him in the  
15 apartment, he was moving around. He was - - -

16 JUDGE RIVERA: No. No. All of the  
17 testimony at the suppression hearing is he is laying  
18 in bed. I think you're referring - - - and the AD, I  
19 think, was referring to testimony that contradicts by  
20 one officer at trial that said he was moving around,  
21 and it's very ambiguous, that statement - - -

22 MS. LOWRY: My - - - my recollection - - -

23 JUDGE RIVERA: - - - but every officer at  
24 the suppression hearing says he was laying in bed.  
25 He's asked several times on cross, what did you see

1 when you first saw him, and they all say, he's laying  
2 in bed.

3 MS. LOWRY: My recollection was different,  
4 but we'll go on that premise.

5 The defendant did make eye contact with the  
6 officers, and at the point which he turned over - - -

7 JUDGE RIVERA: Well, but that's only once  
8 they banged on the windows and the door. When the  
9 go, all the see is a man in bed. They did - - - they  
10 didn't have to do anything at that point, but get a  
11 warrant. What's the urgent need?

12 MS. LOWRY: At that point, he - - - you  
13 know, he knew that the police were there.

14 JUDGE RIVERA: How is that? Where does the  
15 record show that?

16 MS. LOWRY: Because they - - - I - - -  
17 again - - - my understanding of the record was that  
18 defendant had made eye contact with the officer - - -

19 JUDGE RIVERA: After they bang on the door  
20 and yell at him.

21 MS. LOWRY: Yes. And he - - - and he was  
22 being unresponsive to - - -

23 JUDGE RIVERA: But until that moment, how  
24 do - - - where's the - - - where's the evidence in  
25 the record? Where does the record indicate that he

1 knew the police were outside his door?

2 MS. LOWRY: I - - - just - - - just the eye  
3 contact.

4 JUDGE RIVERA: But that's after they bang  
5 on the door.

6 MS. LOWRY: I - - - I don't - - - I don't  
7 know. I feel - - - I feel like it's all happening  
8 simultaneously.

9 JUDGE RIVERA: Well, I don't, because I  
10 read that suppression hear - - -

11 MS. LOWRY: Okay.

12 JUDGE RIVERA: - - - hearing transcript,  
13 and that's not what it says.

14 MS. LOWRY: Well, I mean, my understanding  
15 was that he had made eye contact with the officers,  
16 and that he pretended to fall sleep. He was up, he  
17 was - - - maybe he was not up, but he was watching  
18 TV, and then he climbed underneath the covers, and  
19 the officers could see his hands moving underneath  
20 the blanket.

21 JUDGE STEIN: Why would that present an  
22 urgency situation?

23 MS. LOWRY: Because they believed that he  
24 was armed.

25 JUDGE STEIN: So - - -

1 MS. LOWRY: They saw the gloves - - -

2 JUDGE STEIN: Okay. So they believed he  
3 was armed, so I guess my question is, is does that  
4 then give the police the right to make a warrantless  
5 entry anytime they have probable cause to believe  
6 that someone committed a crime, and that they're  
7 armed? Maybe a crime involving - - -

8 MS. LOWRY: If we apply - - -

9 JUDGE STEIN: - - - a weapon.

10 MS. LOWRY: - - - the factors, those six  
11 enumerative factors - - -

12 JUDGE STEIN: No, no. Answer my question.  
13 Any time that there is an - - - a crime involving a  
14 possible weapon, they have probable cause to believe  
15 that they - - - that the person is in - - - in the  
16 residence - - -

17 MS. LOWRY: Yes.

18 JUDGE STEIN: - - - and that he's armed,  
19 that's enough.

20 MS. LOWRY: I believe we have more, but  
21 based on - - -

22 JUDGE STEIN: What more?

23 MS. LOWRY: - - - those, yes.

24 JUDGE STEIN: What more? It was urgent.

25 MS. LOWRY: It was - - - it was a violent

1 felony that was committed directly - - -

2 JUDGE STEIN: That's part - - -

3 MS. LOWRY: - - - across the street.

4 JUDGE STEIN: - - - of my hypothetical.

5 MS. LOWRY: Yes. Yes.

6 JUDGE STEIN: Okay.

7 MS. LOWRY: So - - -

8 JUDGE STEIN: So what more?

9 MS. LOWRY: And then they believed he was  
10 armed - - -

11 JUDGE STEIN: Okay.

12 MS. LOWRY: - - - with a knife.

13 JUDGE STEIN: That's part of my  
14 hypothetical.

15 MS. LOWRY: There was the clear showing of  
16 probable cause.

17 JUDGE STEIN: Part of my hypothetical.

18 MS. LOWRY: And there was a strong reason  
19 to believe that he was in the premises; they saw him  
20 there.

21 JUDGE STEIN: Right.

22 MS. LOWRY: I mean, these - - - these are  
23 the six factors. I mean - - -

24 JUDGE STEIN: No, I know. But doesn't that  
25 essentially eviscerate the Fourth Amendment?

1 MS. LOWRY: No, Your Honor.

2 JUDGE STEIN: Aren't we - - - aren't we - -  
3 - isn't that conflating probable cause with urgency?

4 To me, the urgency is, is that someone is  
5 going to do something either to - - - to hide  
6 evidence or to hurt somebody. And based on what they  
7 were viewing in this window, I just don't - - - I'm  
8 having a hard time seeing what the evidence of either  
9 one of those things was.

10 MS. LOWRY: We're talking about a  
11 developing situation. You know, this was a matter  
12 of, you know, thirty-five, forty minutes from the  
13 time that the police received this call. It's a  
14 developing investigation, they're trying to determine  
15 what's happening, and I feel like we would be doing a  
16 disservice to police to ask them to go through these  
17 hypotheticals at the time of an arrest, or at the  
18 time - - -

19 JUDGE RIVERA: Well, what - - - what - - -

20 MS. LOWRY: - - - of an investigation.

21 JUDGE RIVERA: What's the concern - - -

22 JUDGE STEIN: So there's good faith?

23 I'm sorry.

24 JUDGE RIVERA: No, no. Finish that, and  
25 then I'll get to it.

1                   JUDGE STEIN: No, so then the - - - then  
2                   the defining factor is whether there's good faith; is  
3                   - - - is that - - -

4                   MS. LOWRY: That it's a matter of  
5                   reasonableness. You know, obviously, the warrant - -  
6                   - the warrant requirement exists, but the touchstone  
7                   of the Fourth Amendment is reasonableness.

8                   JUDGE RIVERA: Well, let's go with - - -  
9                   with the finding that the police reasonably believed  
10                  he is still armed at the time, but - - - but that  
11                  reason belief is based on statements and viewing the  
12                  video about a knife.

13                  Does it matter that it's a knife, as  
14                  opposed to say, a gun with respect to the concern  
15                  that either the officers are in danger or someone  
16                  else in this building is in danger?

17                  MS. LOWRY: Under the exigent circumstances  
18                  analysis that this court has repeatedly upheld - - -

19                  JUDGE RIVERA: Um-hum.

20                  MS. LOWRY: - - - that is a distinction  
21                  without a difference.

22                  JUDGE RIVERA: Why so?

23                  MS. LOWRY: The court has focused that - -

24                  -

25                  JUDGE RIVERA: Doesn't it matter, I am - -

1 - he's in bed. Let's say he's got the knife in the  
2 bed. We'll go with it, because, of course, they've  
3 said they didn't see any knife otherwise. Once there  
4 in, they find knives.

5 But he's in bed. Let's assume he's got at  
6 least one knife with him, the knife that apparently  
7 he's used by the robbery. How are they in danger?  
8 Doesn't he have to get up, pull off the covers, rush  
9 to the closed door and the closed windows?

10 MS. LOWRY: What this court has looked at  
11 is defendant's possession of, and willingness to use,  
12 a weapon. Whether that be a knife, and gun, a claw  
13 hammer, what have you. If this defendant was willing  
14 and - - - and seemingly desperate enough to rob - - -

15 JUDGE RIVERA: Yes, but isn't it - - -

16 MS. LOWRY: - - - the store across the  
17 street - - -

18 JUDGE RIVERA: - - - also the probability  
19 that actually that - - - that danger you're talking  
20 about is meaningful? How is it meaningful when  
21 they're behind doors and behind closed windows, and  
22 they've surrounded the apartment, and - - - and all  
23 they know is he has a knife?

24 MS. LOWRY: They know that he has a knife,  
25 they don't know that he doesn't have a gun. I mean,

1 he was willing to use a knife - - -

2 JUDGE RIVERA: Well, you can't base that.

3 MS. LOWRY: I - - -

4 JUDGE RIVERA: You can't base this - - -

5 MS. LOWRY: - - - I understand. You know -  
6 - -

7 JUDGE RIVERA: - - - exception on the - - -

8 MS. LOWRY: - - - but - - - but we are  
9 asking - - -

10 JUDGE RIVERA: - - - speculation maybe he's  
11 got a gun - - -

12 MS. LOWRY: But - - -

13 JUDGE RIVERA: - - - maybe he's got a lot  
14 of things.

15 JUDGE STEIN: What if he had a screwdriver?

16 MS. LOWRY: It's still - - - it's still a  
17 weapon. Under these factors, if we apply these  
18 factors - - -

19 JUDGE RIVERA: The likelihood of the danger  
20 is what we're talking about now.

21 JUDGE STEIN: Yeah.

22 JUDGE RIVERA: The likelihood of that in  
23 this scenario, when the man is in bed, under these  
24 covers.

25 MS. LOWRY: Well, here, we're looking at it

1 in hindsight, Your Honor. I mean, perhaps he knew  
2 how to throw a knife, perhaps, you know, he had other  
3 weapons.

4 JUDGE RIVERA: Through a - - - through a  
5 closed door and a shut window?

6 MS. LOWRY: I mean, if he were to open the  
7 door, if you were to charge, I mean - - -

8 JUDGE RIVERA: But again, then they would  
9 have time.

10 CHIEF JUDGE DIFIORE: Do we know whether  
11 the defendant had access to any other part of that  
12 building?

13 MS. LOWRY: We don't, Your Honor. They  
14 asked the - - - the resident of the front apartment,  
15 and they knew that there was an upper, and they also  
16 knew that there was a basement. There was no  
17 testimony, or there were - - - excuse me, there was  
18 no way for the police officers to know whether or not  
19 he could have escaped through the apartment.

20 JUDGE RIVERA: Is there anything, in the  
21 record, as to whether or not the officers sought to  
22 determine the layout of that particular apartment,  
23 and whether or not there was access?

24 MS. LOWRY: They were able to look in  
25 through - - -

1 JUDGE RIVERA: Did they ask that  
2 shopkeeper, the barbershop owner?

3 MS. LOWRY: They were asked - - - they  
4 asked the two neighbors, in which case they did find  
5 out that there was, you know, the upper and the  
6 basement. The neighbor - - - the neighbor with the  
7 barbershop did not know, and - - - what was the other  
8 part?

9 Well, they just - - - they - - - they did  
10 know that there was a basement, and then there were  
11 only two windows in the apartment that they could see  
12 in through. So there was no real way for them to get  
13 a good look as to whether or not there were stairs or  
14 - - -

15 CHIEF JUDGE DIFIORE: Ms. Lowry, to Judge  
16 Garcia's earlier point, do you know what the timeline  
17 was between the time that the victim reported that  
18 she was held up at knifepoint, until the time that  
19 the police were there at the - - -

20 MS. LOWRY: I have - - - I have that the  
21 911 - - -

22 CHIEF JUDGE DIFIORE: - - - Mr. Sivertson's  
23 home?

24 MS. LOWRY: The 911 call came in at 8:25,  
25 and that the officers saw him in bed, or walking

1           around by 8:45. So they saw him within twenty  
2           minutes, they're trying to determine, you know,  
3           whether or not they should go in. He's being  
4           unresponsive, there was a weapon used in the robbery,  
5           they saw the gloves, same guy, time, place; they  
6           believed they had enough.

7                        CHIEF JUDGE DIFIORE: Thank you, Ms. Lowry.

8                        MS. LOWRY: Thank you.

9                        CHIEF JUDGE DIFIORE: Ms. Davies.

10                      MS. DAVIES: Just very briefly, I want to  
11           concur with Judge Rivera and Judge Stein that there  
12           was no urgency in this matter. He - - - this client  
13           only looked to the window when the officers knocked  
14           on the door. This is someone who was under heavy  
15           medication, he told the - - -

16                      JUDGE RIVERA: Well, they didn't know that  
17           at the time.

18                      MS. DAVIES: No, they didn't know - - -

19                      JUDGE RIVERA: The officer didn't know  
20           that.

21                      MS. DAVIES: But they - - - but they - - -

22                      JUDGE RIVERA: They only knew this was an  
23           armed suspect, they believed this is the guy, he's in  
24           this very small apartment, they don't know whether or  
25           not he's got access upstairs, it's 8:30 on a Monday,

1           there are probably people home, there's a basement.  
2           Why isn't that an urgency? He's got a knife; he can  
3           go and hurt someone.

4                     MS. DAVIES: They also so that he was in  
5           his bed, and that he was in a stupor, and they - - -  
6           they were far outnumbering him, and - - -

7                     JUDGE RIVERA: Yeah, but given the size of  
8           the apartment, let - - - if there really is a way to  
9           get either upstairs, or the basement, or some other  
10          exit, by the time they got through the door and the  
11          windows, if he jumped out of the bed, wouldn't he  
12          have had time to escape?

13                    MS. DAVIES: With twenty police officers  
14          there, I think that would be very hard to escape.

15                    JUDGE ABDUS-SALAAM: Did they know whether  
16          there was anyone else in the apartment with them?

17                    MS. DAVIES: That's on the record, no, they  
18          did not know that. There was a determination, I  
19          think it was a precipitous determination to make a  
20          forced entry in this case, and they did so by  
21          breaking down the door.

22                    JUDGE ABDUS-SALAAM: Would it - - - would  
23          it have made a difference if within five minutes of  
24          the robbery, the police showed up and saw him  
25          running; would that be the pursuit that Judge Garcia

1 mentioned earlier? Would - - - had - - - could they  
2 have followed him into the apartment without a  
3 warrant?

4 MS. DAVIES: No, they could not have  
5 followed - - - I think they would have had to have  
6 known more information about the dangers. They  
7 really didn't - - -

8 JUDGE GARCIA: What if they don't know  
9 whose apartment it is? They just follow him into an  
10 apartment; he runs into an apartment, they can't  
11 follow after him, after he's just robbed an  
12 establishment with a knife?

13 MS. DAVIES: Well, that's a different  
14 situation, because indeed, it did - - - the record is  
15 clear that it was his apartment in this case. And -  
16 - -

17 JUDGE RIVERA: Well, it's not the exception  
18 the People relied on.

19 MS. DAVIES: No, it is not. They - - -

20 JUDGE RIVERA: The only exception at issue  
21 here is - - -

22 MS. DAVIES: Is the - - -

23 JUDGE RIVERA: - - - the exigent  
24 circumstances.

25 MS. DAVIES: - - - ex - - - is the - - -

1           that's right.

2                         JUDGE RIVERA:  No one has argued hot  
3           pursuit.

4                         MS. DAVIES:  No.  We - - - we're only  
5           talking about exigent circumstances in this case.

6                         JUDGE GARCIA:  But I think the point of the  
7           original question, going back to my questions there,  
8           the fact that the pursuit is fairly hot, so to speak,  
9           goes to the exigent circumstances, it seems to me.

10                        And if it's twenty minutes that you get to  
11           the building, I mean, you have much more reason to  
12           believe the person is still armed, that they're  
13           inside this building with a weapon, that you don't  
14           know what other access points are there.

15                        If it's three days later, as it was in one  
16           of the cases where I think we did find exigent  
17           circumstances, you can look at blueprints, you can  
18           talk to people, you can see about other ways to get  
19           out, who else is in the building.  But here, twenty  
20           minutes later, at the doorstep - - -

21                        MS. DAVIES:  I would disagree with Your Honor  
22           that this was a hot pursuit.  I mean, I know not in the  
23           technical sense, but if you - - - one reads the transcript  
24           of the suppression hearing, they were stymied, they're  
25           looking all over the neighborhood, they - - - they - - -

1 all of - - - all of these many officers from the  
2 University of Buffalo Safety Police, Buffalo Police,  
3 transit police, many of them are looking all over the  
4 neighborhood, and so it wasn't as quick as Your Honor  
5 perhaps - - -

6 JUDGE GARCIA: But I think - - -

7 MS. DAVIES: - - - makes it appear.

8 JUDGE GARCIA: - - - the timeframe is - - -  
9 is there, as I read that record. It is, I think,  
10 twenty minutes to when they are there, forty-five  
11 minutes he's in custody, or fifty minutes he's in  
12 custody, that's the timeframe that's established by  
13 the testimony.

14 MS. DAVIES: But in terms of all of the  
15 other factors, exigent - - - of exigent  
16 circumstances, we submit that they - - - they just  
17 were not here, that there was just not the urgency.

18 CHIEF JUDGE DIFIORE: Thank you, Ms. - - -

19 JUDGE RIVERA: Well, whether - - -

20 I'm sorry, if I may just - - -

21 CHIEF JUDGE DIFIORE: Yes.

22 MS. DAVIES: Whether it's twenty minutes or  
23 an hour and twenty minutes, when they get there, what  
24 do they see?

25 MS. DAVIES: They see a person lying in

1 bed.

2 JUDGE RIVERA: Is he trying to escape?

3 MS. DAVIES: No, he's not trying to escape;  
4 they don't even see the knife. They don't really - -  
5 - they don't see anything. They don't see that - - -  
6 they don't see the knife on his person, they don't  
7 see the - - - a knife in the - - - anywhere in the  
8 apartment.

9 They see a person in a stupor, in his bed.

10 CHIEF JUDGE DIFIORE: Thank you, Ms.

11 Davies.

12 (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. Shawn J. Sivertson, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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