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COURT OF APPEALS  
STATE OF NEW YORK

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FERREIRA,

Appellant,

-against-

NO. 10

CITY OF BINGHAMTON,

Respondent.

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20 Eagle Street  
Albany, New York  
February 8, 2022

Before:

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

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 10, Ferreira  
2 v. the City of Binghamton.

3 Counsel?

4 MR. GENIS: Thank you. And Your Honor, if I may  
5 please have two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. GENIS: Thank you. May it please the court,  
8 my name is Bob Genis, and I represent the plaintiff-  
9 appellant, Jesus Ferreira. And I tried this case.

10 This is not a special duty case because of the  
11 judicially affirmed findings of fact establish that the  
12 city's police department was negligent in violating  
13 required police standards of care and good and accepted  
14 practices and planning and execution of a no-knock warrant,  
15 as conceded by the Chief of Police and others. There was  
16 no - - -

17 JUDGE SINGAS: Counselor?

18 MR. GENIS: - - - exercise of discretion. I'm  
19 sorry.

20 JUDGE SINGAS: Counselor, how do you get around  
21 Lauer?

22 MR. GENIS: Lauer's distinct on two different  
23 grounds. First of all, in Lauer, there was no direct  
24 contact between the medical examiner and the plaintiff.  
25 Here, there is direct contact between Miller, the police



1 officer, and the Binghamton Police Department and Mr.  
2 Ferreira. The second distinguishing feature is in Lauer,  
3 you have two different departments. We've got the Office  
4 of the Medical Examiner, and you've got the police  
5 department. Here, it's only the police department. This  
6 is the police, plain and simple, so that Lauer has - - -

7 JUDGE SINGAS: But the court didn't make that  
8 distinction. The court said there's a special duty if a  
9 municipal employee causes injury.

10 MR. GENIS: Your Honor, but however, in Lauer,  
11 the injury here was far more attenuated. You have the - -  
12 - what was the duty? The medical examiner has a duty to do  
13 with their discretion of how they do an autopsy report.  
14 Here, there was no discretion whatsoever. They failed.  
15 They violated required police procedures with respect - - -  
16 by - - - according to the Chief of Police, Hendrickson, the  
17 head of the SWAT unit, they failed to do what they were  
18 required to do. There was no discretion here whatsoever,  
19 at all. They just said, mount up and go get them, boys.  
20 They did not have any discretion.

21 JUDGE GARCIA: Do we have - - -

22 MR. GENIS: Yes.

23 JUDGE GARCIA: - - - to agree with that  
24 characterization to find for you, that they didn't exercise  
25 any discretion here?



1 MR. GENIS: Well, there's been a judicially  
2 determined determination of that. When the Second Circuit  
3 reviewed the findings of fact of the jury - - - unanimous  
4 jury verdict - - - that is what they, in fact, found. And  
5 with all due respect, this is a court of limited  
6 jurisdiction of law, not of fact. And here they sent you a  
7 certified question, a specific question, so that nothing  
8 else is - - -

9 JUDGE GARCIA: But they always say in the  
10 certified question that we can answer anything we think  
11 helpful.

12 MR. GENIS: No. What they - - - in - - - in the  
13 past, there have been other cases where they have asked  
14 this court, if you'd like to find other things, you're  
15 welcome to do so. Here, they asked a limited, narrow,  
16 specific question of law. They've already made factual  
17 determinations and upheld the factual determinations made  
18 by the unanimous jury.

19 JUDGE WILSON: Did - - - did the jury make - - -  
20 over here. Sorry. Did the jury make anything other than a  
21 general verdict of negligence? Did they make factual - - -  
22 were there special interrogatories or anything like that?

23 MR. GENIS: Well, the - - - it was a general  
24 interrogatory. However, first of all, the City of  
25 Binghamton did not request specific interrogatories, so



1 they waived it, and that the Second Circuit reconciled the  
2 verdict.

3 JUDGE WILSON: All - - - all - - - all I'm  
4 getting at is the facts that you're saying have been  
5 established are sort of an inference from a finding of  
6 negligence against - - - by the jury, against the city?

7 MR. GENIS: Well, as the Second Circuit has the  
8 authority to do, to reconcile the verdict, as do the  
9 appellate courts in this state as well.

10 JUDGE WILSON: Okay.

11 JUDGE CANNATARO: Going - - - in response to the  
12 first question you were asked about distinguishing Lauer,  
13 you said that there was no direct contact. And direct  
14 contact seems to be an element of a special duty test that  
15 involves other things like detrimental reliance and  
16 knowledge that harm can be done. That doesn't seem to play  
17 into your distinction here because you're claiming this is  
18 not a special duty case at all.

19 MR. GENIS: Correct.

20 JUDGE CANNATARO: So - - - so what - - - what is  
21 the significance of the absence of direct contact here?

22 MR. GENIS: The significance of absence of direct  
23 contact in Lauer or - - - or in our case? Because in here,  
24 we do have the direct contact, so I'm not following your  
25 question, Judge. I'm sorry.



1 JUDGE CANNATARO: Oh, I'm sorry. So you're  
2 saying that direct contact here occurred because the police  
3 officer entered the premises?

4 MR. GENIS: The police department have direct  
5 contact here because, yes, they entered the premises, and  
6 yes, they shot my unarmed client while he was lying in bed  
7 - - - or couch.

8 JUDGE CANNATARO: Okay. So my question is this.  
9 When you talk about direct contact, it's in the context of  
10 creating a detrimental reliance on the part of the  
11 plaintiff and establishing that the municipality had  
12 knowledge that harm could be done through certain action or  
13 inaction, and even if there is direct contact here, you  
14 don't have those other elements, or do you have those other  
15 elements?

16 MR. GENIS: Two separate issues, Judge. One can  
17 have direct contact and have nothing at all to do with  
18 special duty, or one can use it. It's - - - it's - - -  
19 it's - - - it has two purposes. Here, the purpose is not  
20 to do with special duty if this is not a special duty case.

21 Here, there was - - - as the court found below -  
22 - - I should say in the Second Circuit; I shouldn't say  
23 below - - - that the issues of discretion have already been  
24 resolved. There - - - it was no discretion exercised here.  
25 So this court has a factual record where there is no



1 discretion being exercised. There are no immunities. They  
2 violated required procedures. This is a Haddock case,  
3 plain and simple, and that special duty does not apply.

4 JUDGE CANNATARO: So just to follow up, the  
5 distinction that you're making with Lauer just is - - -  
6 just is a factual difference between the two cases; it  
7 doesn't relate to the special duty question?

8 MR. GENIS: It is a factual distinction, Your  
9 Honor, yes.

10 JUDGE WILSON: And it go - - - if I understand  
11 you correctly, it goes to - - - when you say it has nothing  
12 to do with special duty, it - - - it's a question of what  
13 the general duty the police have to people who are, let's  
14 say, innocent bystanders or happen to be somewhere where  
15 there's a police activity. And what you're asking us to  
16 do, I think, is to - - - I don't want to say - - - let's  
17 say infer a - - - a common law duty on the part of police  
18 who are planning at least a no-knock warrant but some - - -  
19 some sort of activity to - - - that runs to the general  
20 public. It's not a special duty; is that - - -

21 MR. GENIS: It's not a special duty. However,  
22 there is a duty to the occupants of the home. And - - -  
23 and Mr. - - -

24 JUDGE WILSON: Well, I guess what I'm asking is -  
25 - -



1 MR. GENIS: - - - Ferreira was not - - -

2 JUDGE WILSON: - - - is it - - - is it the same  
3 sort of duty that would also apply to a police officer who  
4 shoots in - - - in - - - negligently and doesn't notice  
5 that there's a crowd of people that he's shooting into and  
6 hits a bystander? It's that same sort of duty?

7 MR. GENIS: Yes, but here it's even more  
8 controlled because here, they are intentionally - - - they  
9 know they're going to this house. They have a duty. This  
10 is not where somebody on the street started doing something  
11 - - -

12 JUDGE WILSON: Well, yeah, I guess - - - I guess  
13 what I'm - - -

14 MR. GENIS: - - - and we have - - -

15 JUDGE WILSON: - - - getting at is the - - -  
16 trying to get at is the attenuation point, right? Because  
17 it seems to me you're distinguishing Lauer by saying, look,  
18 in Lauer - - - you said two things. One is they're two  
19 different parts of the municipality involved. Okay. And  
20 the other thing you said is that there was direct contact.  
21 That seems to me, maybe, makes a difference in terms of the  
22 type of duty you're trying to impose. But I don't actually  
23 see - - - and maybe you can elaborate - - - elaborate on  
24 this - - - how the officers who were in charge of planning  
25 had direct contact with Ferreira.





1 MR. GENIS: They - - - they set the  
2 instrumentality at launch. They launched the  
3 instrumentality of harm. And that is they knew they were  
4 sending people out with no plan, with no intelligence. One  
5 of the things - - -

6 JUDGE WILSON: But - - - but isn't that true - -  
7 -

8 MR. GENIS: - - - for example, Hendrickson said -  
9 - -

10 JUDGE WILSON: Isn't that same thing - - -

11 MR. GENIS: I'm sorry?

12 JUDGE WILSON: Isn't that same thing true of the  
13 medical examiner in Lauer? He set the instrumentality,  
14 launched it. I mean, I take the point that it's a  
15 different - - - and maybe that has significance or not.  
16 It's a different arm of the government.

17 MR. GENIS: It's not only a different arm of the  
18 government. It's a far different thing. I'm a doctor; I'm  
19 doing an autopsy. That's a far different thing than  
20 saying, I'm a police chief; I'm sending seventeen men with  
21 AR-15s into someone's home, not knowing the layout, not  
22 knowing who's there, having no surveillance. The cops  
23 themselves, they endangered their own police.

24 That's why Miller, who is a good cop, had  
25 heightened danger, which was - - - Hendrickson said must be



1           avoided at all cost, the heightened danger, because that's  
2           why Miller - - - the door opened. All the other police  
3           have testified to that split second it opened, he shot  
4           because he's scared. He saw the first thing he saw. He  
5           didn't expect to see it, so he shot.

6                     They put Miller in this horrible position, and  
7           that's why the jury found that they proximately caused the  
8           harm here, as affirmed by the Second Circuit. It's wrong  
9           what they did to the police. They endangered their own  
10          police. They didn't do any planning. They went in blind.

11                    Could you imagine being sent on an operation?  
12          You don't know if there's twenty guys there with submachine  
13          guns waiting to get at you. You've now spent a minute to  
14          try to break into this door because nobody planned  
15          anything; nobody brought equipment; nobody thought about  
16          anything. And now you're on - - - up the creek.

17                    CHIEF JUDGE DIFIORE: Thank you, Counsel. You'll  
18          have your rebuttal time.

19                    MR. GENIS: Thank you.

20                    CHIEF JUDGE DIFIORE: Counsel?

21                    MR. SOKOLOFF: May it please the court, Judge  
22          DiFiore and Associate Judges, my name is Brian Sokoloff,  
23          and I represent the City of Binghamton.

24                    First, the Second Circuit has invited this court  
25          "to reformulate or expand upon the certified question as it



1       deems appropriate to determine whether Ferreira failed to  
2       establish the city's liability for its negligence in  
3       planning the raid."

4               There are two different issues on which the Court  
5       of Appeals, the Second Circuit, found New York law  
6       uncertain, one that they chose to ask a certified question,  
7       and the other they chose to decide, but they decided it  
8       against the weight of authority from this court. And  
9       because these two immunities are interrelated, and  
10      sometimes in prior decisions, this court has gotten them  
11      mixed up - - - they're intertwined - - - I suggest that  
12      this court can deal with either or both of those issues.  
13      But let me start with the special duty issue.

14              JUDGE RIVERA: Counsel, I'm sorry. I'm on - - -  
15      I'm on the screen, if I may interrupt you on that. Just -  
16      - - just to be clear, if - - - if the Circuit viewed that  
17      within the confines of the rule regarding certification  
18      that the only issue to which the - - - the panel could not  
19      be certain of the proper application of New York law was a  
20      special duty, can you clarify why, as you've just  
21      suggested, this court is free to reformulate, under the  
22      rule for certifying the question, this other part where the  
23      Circuit has - - - has - - - unless you - - - unless I'm  
24      wrong - - - you can correct me if - - - if you think I'm  
25      wrong - - - has - - - has not opined that it cannot



1 properly apply its understanding of New York law?

2 MR. SOKOLOFF: I think the Second Circuit went  
3 out of its way. It did more than pose the certified  
4 question and say, answer us yes or no, like it sometimes  
5 does. It invited you to reformulate the question in a  
6 manner that, frankly, makes sense of New York law. And  
7 these two immunities are so intertwined. I think it would  
8 be proper for this court to deal with the discretionary  
9 immunity issue.

10 JUDGE CANNATARO: When you say "deal with,"  
11 Counsel, you really mean correct them?

12 MR. SOKOLOFF: Yes.

13 JUDGE CANNATARO: Reverse their holding with  
14 respect to discretionary immunity?

15 MR. SOKOLOFF: Yes. And - - - and - - - and  
16 doing so would, in a way, make your job easier because it  
17 could defer to another day, perhaps, the more difficult,  
18 the more uncertain issue of - - - of special duty. That  
19 would take care of the case, and it should've taken care of  
20 the case.

21 JUDGE WILSON: Can I ask you about special duty  
22 for a moment? Sorry. Over here. As I understood your - -  
23 - and you correct me if I'm wrong. As I understood your  
24 brief, had the officer gone in, closed his eyes, and just  
25 started shooting, you wouldn't say that there's any special



1 duty requirement there; the - - - the municipality could be  
2 held liable for the officer's conduct, right?

3 MR. SOKOLOFF: I would say that the officer was  
4 in direct contact with the people in the house - - -

5 JUDGE WILSON: Yes.

6 MR. SOKOLOFF: - - - knew that they were there.

7 JUDGE WILSON: Yes.

8 MR. SOKOLOFF: They knew that he was there. They  
9 were relying on him acting safely and appropriately. So  
10 arguably, I would say, yes, that officer in that situation  
11 had a special duty.

12 JUDGE WILSON: Well, so okay. So how about a  
13 crowd of people where an officer is chasing a suspect and  
14 shoots negligently and injures a bystander? Is - - - is  
15 the special - - - would - - - could you recover against the  
16 municipality?

17 MR. SOKOLOFF: So I - - - I would answer it this  
18 way. There is always a - - - always has been - - - always,  
19 until today, always been a special duty requirement. And  
20 you could argue about the facts of that case to say, well,  
21 there was, or there wasn't. But it's always the  
22 plaintiff's burden to show - - -

23 JUDGE WILSON: What would - - - what would the  
24 special duty be in my hypothetical? Why doesn't that run  
25 to the general public? I mean, to take your prior answer,



1 none of the people in the crowd know the police officer's  
2 there, are aware of him. He might not have known they were  
3 there.

4 MR. SOKOLOFF: You know, the - - -

5 JUDGE WILSON: There are cases like that, right,  
6 where bystanders are shot?

7 MR. SOKOLOFF: It's true. And - - - and this  
8 brings up the earlier point. The court, to my knowledge,  
9 has not discussed your hypothetical in the - - - in the  
10 special duty context because it's dealt with those  
11 shooting-into-crowd cases on discretionary immunity and  
12 said, well, we don't have to get to the special duty  
13 issues. So that's why they're intertwined.

14 Now, this court has never, ever dispensed with  
15 the plaintiff's burden to show a special duty for  
16 negligence cases against the government acting in a  
17 governmental capacity, like the police. And it should not  
18 do so here, for two reasons.

19 One, a jury has already determined that Ofc.  
20 Miller's shooting of the plaintiff was not excessive force  
21 and was not negligent. So if you were to find a special  
22 duty here, you would say that the - - - some unknown person  
23 - - - and that's a whole different issue. We don't know  
24 whose negligence this was. Some unknown person didn't  
25 prevent the plaintiff from doing something that was legal,



1 Constitutional - - -

2 JUDGE TROUTMAN: But isn't - - -

3 MR. SOKOLOFF: - - - and proper.

4 JUDGE TROUTMAN: Counselor? But wasn't there  
5 more than one police officer involved?

6 MR. SOKOLOFF: Yes, there were.

7 JUDGE TROUTMAN: So couldn't the collective  
8 manner in which it was done - - - so couldn't you find that  
9 one - - - the jury could find as to the one officer but  
10 still consider the overall manner in which the execution of  
11 the no-knock warrant took place?

12 MR. SOKOLOFF: Well, Your Honor, thank you for  
13 that question. And it brings up a very important point.  
14 This entire operation was not exclusively Binghamton  
15 employees. In the SWAT team, there were members from the  
16 Town of Vestal and the Village of Johnson City, right? I  
17 might have the town and village reversed, but two other  
18 municipalities were part of it. And also, this was  
19 connected to an investigation by the Broome County Task  
20 Force. And that involved the Broome County Sheriff.

21 The record here does not tell us who decided  
22 there wasn't enough surveillance, when it was decided, and  
23 most importantly, who that person worked for and what that  
24 person's job duties were. The record on that is a total -  
25 - - I - - - I'll say a mess. It's - - - it's not a mess.



1 It's empty. You can't use this case - - - it would be - -  
2 - it would be a mistake to use this case to create these  
3 kind of rules, now, that the plaintiff is asking you to do  
4 because the facts are not there to support it.

5 But let me go back to the second reason why. In  
6 this case - - -

7 JUDGE RIVERA: Counsel, I - - - I'm going to  
8 interrupt you on that just to clarify. But when you say  
9 that there were other municipalities, but wasn't - - -  
10 again, you can correct me if I'm wrong. Isn't - - - isn't  
11 Binghamton's police department running the show?

12 MR. SOKOLOFF: The record doesn't bear that out.  
13 Who - - - the record does not show, Judge Rivera, who made  
14 the decision we had enough surveillance. That person has  
15 not been identified, nor has that person's employer been  
16 identified.

17 JUDGE CANNATARO: Could I just ask, as a point of  
18 clarification, that decision whether we have enough  
19 surveillance, is that a discretionary decision, or is there  
20 really just one clear answer to that question?

21 MR. SOKOLOFF: It's totally discretionary. And  
22 they have not identified - - - the record contains nothing  
23 saying that it's mandatory. They did an hour of  
24 surveillance to make sure that the guy actually lives where  
25 they're going to go the next morning. But there's nothing





1 that says you have to do two hours, three days, a week; you  
2 have to sit there to know exactly every person that's in  
3 the apartment, which, by the way, wouldn't tell you where  
4 everybody is exactly located. Even if you knew, even if  
5 they did enough surveillance - - -

6 JUDGE TROUTMAN: So Counselor, are you saying  
7 that the police aren't required to make sure they know that  
8 the person they seek is actually present at the time that  
9 the warrant is executed?

10 MR. SOKOLOFF: It would be a good idea for them  
11 to do that, but I don't know of a legal requirement that  
12 they - - - that they know that. They - - - just before  
13 they - - - they went on this operation, they satisfied a  
14 criminal court judge that New York law and the Constitution  
15 were satisfied. A judge gave them permission to use speed  
16 - - -

17 JUDGE RIVERA: And - - - and Counsel, how - - -  
18 how far in advance of the actual entry did that  
19 determination occur, which was based on surveillance that  
20 happened even before that?

21 MR. SOKOLOFF: The - - - the warrant was gotten  
22 at, like, 3 o'clock in the afternoon. They went in 6  
23 o'clock in the morning. So I'm not sure how much  
24 surveillance they would need to know - - -

25 JUDGE RIVERA: And when - - - and when did they



1 do the surveillance before they went to the judge?

2 MR. SOKOLOFF: The evening before, like, 8 to 9  
3 o'clock at night.

4 JUDGE RIVERA: So - - - so how many days had  
5 passed before they actually went in?

6 MR. SOKOLOFF: No, no, no. It was less than a  
7 day.

8 JUDGE RIVERA: Okay. From the surveillance?

9 MR. SOKOLOFF: Yes. It was what - - -

10 JUDGE RIVERA: I thought you said the - - -

11 MR. SOKOLOFF: It was - - -

12 JUDGE RIVERA: I thought you said the  
13 surveillance was the evening before they went to the judge,  
14 and then the judge - - -

15 MR. SOKOLOFF: No, no, no. I - - - I'm sorry.

16 JUDGE RIVERA: - - - a day before they - - - oh,  
17 I misunderstood, then.

18 MR. SOKOLOFF: They got the warrant in the  
19 afternoon, 3 o'clock in the afternoon. 9 o'clock, they did  
20 - - - 9 o'clock at night, they did one hour of  
21 surveillance. Their plan was to go in first thing in the  
22 morning, 6 o'clock in the morning. And that's what they  
23 did. It was all in less than a day.

24 Now, this whole thing is premised on the idea,  
25 well, they didn't know that Mr. Ferreira was in the



1 apartment. Well, Mr. Ferreira was visiting. What if he  
2 was in the apartment for two days or three days? Maybe he  
3 was sick, and he - - - and he didn't go outside. How much  
4 surveillance is a negligence court going to tell a police  
5 department you have to do before you execute something that  
6 a criminal court has said merits - - -

7 JUDGE TROUTMAN: But it's - - -

8 MR. SOKOLOFF: - - - emergency action?

9 JUDGE TROUTMAN: Counselor, it's an extraordinary  
10 power to be given the right to enter unannounced to a  
11 residential home.

12 MR. SOKOLOFF: I'm sorry, Your Honor. I didn't  
13 hear the beginning.

14 JUDGE TROUTMAN: It is an extraordinary power to  
15 be given the right to enter unannounced to a residence.

16 MR. SOKOLOFF: Absolutely.

17 JUDGE TROUTMAN: Would you not agree?

18 MR. SOKOLOFF: I would agree.

19 JUDGE TROUTMAN: So I'm not understanding why  
20 there shouldn't be an expectation that there is  
21 responsibility involved with that power.

22 MR. SOKOLOFF: Because if you were to dispense  
23 with this - - - really, what this involves is a question  
24 about the allocation of police resources. What this boils  
25 down to is alleged negligence, that they didn't do enough



1 surveillance. Nothing else was done wrong, according to  
2 the Second Circuit. They didn't do enough surveillance.

3 Now, if you're going to impose a duty without - -  
4 - a special duty on the police, then you're going to do  
5 exactly what this court's cases have said courts should not  
6 do, and that is second-guess police on the allocation of  
7 resources.

8 JUDGE CANNATARO: Counsel, if I could reframe  
9 Judge Troutman's question another way, though, maybe - - -  
10 maybe the issue here isn't how much surveillance do you  
11 have to do before you'll say that it's enough, but how  
12 little surveillance can you do before you say it's a  
13 complete abdication of your discretionary decision-making  
14 authority?

15 MR. SOKOLOFF: Well, and Judge, let me just point  
16 out that the alleged flaw here is not that they - - - they  
17 did bad surveillance. Didn't you see an infant going in;  
18 the officer was asleep in the police car; that's not real  
19 surveillance. That's not what they're saying here.  
20 They're saying that one hour was not enough. So how much -  
21 - -

22 JUDGE RIVERA: No, but Counsel, I mean, the  
23 surveillance that you're talking about, the last  
24 surveillance, is that the individual had left. There's no  
25 surveillance about him returning. Doesn't that go to sort



1 of the quality of the surveillance? It's not so much about  
2 resources but the value of the surveillance. I mean, if  
3 your only surveillance is the person left; they're not  
4 there, what are you doing going in until you confirm he's  
5 back - - -

6 MR. SOKOLOFF: When - - - or - - -

7 JUDGE RIVERA: - - - or did I misunderstand the  
8 record?

9 MR. SOKOLOFF: When the police got there at 6  
10 o'clock in the morning, he was already back. So - - -

11 JUDGE RIVERA: They had confirmed that before  
12 they went in?

13 MR. SOKOLOFF: No, they didn't confirm that, but  
14 it wouldn't have changed anything.

15 JUDGE RIVERA: So that's a fortunate  
16 circumstance?

17 MR. SOKOLOFF: Well, yes. I mean, had they  
18 stayed there until 2 o'clock in the - - - in the morning,  
19 when he got there, and said, all right, well, now we know  
20 he's in there, that wouldn't have changed the outcome of  
21 this, not one bit.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 JUDGE RIVERA: They could have arrested him when  
24 they saw him, right, at 9 o'clock - - - at 3 in the  
25 afternoon, whatever time it was, 6, whatever time it was?



1 MR. SOKOLOFF: But - - - but there are already  
2 cases from this court that say that that's not a cause of  
3 action: you could've arrested somebody earlier.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MR. SOKOLOFF: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

7 MR. GENIS: Thank you. Quick points. First,  
8 yes, Binghamton spearheaded this whole thing. Chief  
9 Zikuski was in charge. It was a Binghamton operation.  
10 Two, one of the things he just talked about that  
11 was - - - he admits there was no discussion about the  
12 sufficiency of the surveillance because there was no  
13 discussion. There was no discretion exercised here. It  
14 was never even a topic. They abdicated absolutely, to use  
15 the word "abdicate."

16 Third, it's a nonissue because we already have  
17 affirmed facts by the Second Circuit that the jury found.  
18 In the special duty counsel - - - cases counsel was just  
19 referring to in response to your question about shooting it  
20 through a crowd, special duty did not even come up in those  
21 cases, except in one of the cases in the context of  
22 somebody should have prevented an officer from shooting a  
23 third party. Here, we're not saying they should have  
24 prevented it. They actually caused the shooting.

25 The last point is there was no - - - the Second



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Circuit did not ask for general appellate review. They asked for a specific review on a specific certified question.

Any other questions for me? And I'll gladly take them.

CHIEF JUDGE DIFIORE: Thank you, Counsel.  
(Court is adjourned)



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

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of Ferreira v. City of Binghamton, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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