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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 80

TRAMEL CUENCAS,

Appellant.

20 Eagle Street
Albany, New York
September 14, 2022

Before:

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

Appearances:

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1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 80, People v. Tramel Cuencas.

3 MS. SHIVERS: Good afternoon. My name is Yvonne
4 Shivers. I represent Tramel Cuencas. I'd like to reserve
5 two minutes for rebuttal.

6 ACTING CHIEF JUDGE CANNATARO: You have two
7 minutes.

8 MS. SHIVERS: Thank you.

9 By going to appellant's residence with the
10 intention of making a warrantless arrest, the police
11 violated appellant's right to counsel and to be free from
12 unreasonable searches and seizures.

13 JUDGE GARCIA: But which is it? What's the
14 constitutional violation? Is it a search and seizure issue
15 or is it a right to counsel issue?

16 MS. SHIVERS: Your Honor, it's both because in
17 New York there is a constitutional and statutory right to
18 counsel. And as Harris - - - as Harris thirty years ago
19 recognized, when there's a intersection of the Fourth
20 Amendment right to be free from unreasonable - - - to be
21 free from a warrantless arrest in your home and that
22 intersects with New York's constitutional and statutory
23 right to be - - - to the right to counsel, it creates an
24 incentive for law enforcement to evade the constitutional
25 right to counsel.



1 JUDGE GARCIA: The Harris violation was a Fourth
2 Amendment equivalent, you know, a state equivalent
3 violation. And the remedy - - - the - - - was suppression.
4 I mean, all of Harris' deterrents for the Payton violation.
5 There was a Payton violation in Harris. Everyone accepts
6 that.

7 The question is are we going to say once you
8 leave the premises is you don't need to show attenuation
9 for a statement taken later. It wasn't a violation of that
10 right. It was a violation of the Fourth Amendment right.
11 The remedy involved suppression of the statement taken
12 later. So I'm - - - I'm struggling to see when a violation
13 would take place here.

14 MS. SHIVERS: I agree with you, of course, that
15 Harris was limited, at time, to the question of
16 attenuation. But in the Harris decision, it really did
17 presage what has occurred since then in terms of police
18 using the consent exception to Payton in order to avoid the
19 right to counsel attaching.

20 JUDGE SINGAS: But here we have no record of
21 that, right? You're asking us to discard our precedent.
22 And saying that the police acted with the intent to deprive
23 the defendant of counsel on a record that's not developed
24 on that issue. And - - - and - - - and it's sort of
25 speculative.



1 MS. SHIVERS: I would argue that it is developed
2 on that issue. Certainly Officer - - - Detective Fogelman
3 testified that he went to the house with his four
4 detectives in order to arrest the defendant without a
5 warrant. The only real reason for doing that is to
6 circumvent the right to counsel attaching. But nothing has
7 been presented by the People to suggest that there was any
8 other reason for him going there. He stated - - -

9 ACTING CHIEF JUDGE CANNATARO: But even if we
10 accept that proposition, that the intent behind going there
11 was to - - - was to arrest him and deprive him of his right
12 to counsel, the bar against warrantless arrests is - - -
13 it's not an absolute one. It's - - - it's - - - it's
14 qualified to the exceptions that we've previously
15 articulated. So it seems as if that is something that
16 happens sometimes if you can meet one of those exceptions.

17 MS. SHIVERS: I would argue that, as predicted by
18 Harris, the exception of consent, for purposes of New
19 York's right to counsel, has been used to really circumvent
20 that constitutional right, that Harris presaged that. And
21 that logical progression of Harris is that the exception is
22 that there should be, simply, basically a rule that says if
23 the police are going to go to the house with the intention
24 of making a warrantless arrest, absent exigent
25 circumstances - - - go to the house to make an arrest



1 absent exigent circumstances, they must have a warrant.

2 ACTING CHIEF JUDGE CANNATARO: So you're arguing
3 for a change in the law?

4 MS. SHIVERS: I am, Your Honor.

5 JUDGE GARCIA: What is the - - - I - - - I'm
6 trying to - - - what does the house have to do with it?
7 Why isn't it equally as bad under your theory if they went
8 out, they knew he was going to be at a candy store, and
9 they went to the candy store and arrested him without a
10 warrant, even though they could've gotten one, because they
11 think they can get a statement out of him?

12 MS. SHIVERS: Well, Your Honor, the house has
13 special protection under the Fourth Amendment.

14 JUDGE GARCIA: But you're not violating any of
15 that here? There's no Payton violation.

16 MS. SHIVERS: Yes, but it is - - - my argument is
17 in New York there's this intersection between the Payton
18 violation and the right to counsel.

19 JUDGE GARCIA: But if there's no --

20 MS. SHIVERS: And this particular - - -

21 JUDGE GARCIA: - - - Payton violation here?

22 MS. SHIVERS: Well, there wasn't a Payton
23 violation, but there was a violation of the right to
24 counsel in the context of Payton because - - -

25 JUDGE GARCIA: Well, see I'm struggling with what



1 the context of Payton makes that different than the candy
2 store.

3 MS. SHIVERS: Because of the unique protection
4 that the home has.

5 JUDGE GARCIA: But they didn't violate any of the
6 protections that the home has under our established rules
7 that you can stay outside and you can ask the person to
8 come out; or you can ask to go in; they can consent to
9 going in. And that's not a violation of anything right now
10 in terms of Fourth Amendment. So I don't understand the
11 difference. And it - - - it seems to me that this is an
12 argument in principle that at any time that you have
13 probable cause and you can get an arrest warrant and you
14 don't, it's a violation of the right to counsel.

15 MS. SHIVERS: That's - - - I think you've just
16 expressed what our basic argument is.

17 JUDGE GARCIA: Right.

18 MS. SHIVERS: Which is that, particularly in a
19 case like this where the police had two days, when they had
20 probable cause, they didn't go to get a warrant, and
21 instead went to the house, basically - - -

22 JUDGE TROUTMAN: Let's skip to the point where
23 they go to the house. The entry here, was it with consent?

24 MS. SHIVERS: Yes, entry into the vestibule was
25 with consent.



1 JUDGE TROUTMAN: Was there consent to enter
2 defendant's apartment?

3 MS. SHIVERS: No, and that's sort of bridging
4 into the second point which is that, at - - - at best, the
5 police had consent to enter the vestibule of the house, but
6 they did not have consent to go into the apartment.

7 JUDGE WILSON: So that's where your prior answer
8 confused me a little bit - - -

9 MS. SHIVERS: Uh-huh.

10 JUDGE WILSON: - - - because I thought that your
11 other argument here was there was a Payton violation.

12 MS. SHIVERS: That's - - - well, in the first - -
13 - of course, we're asking - - -

14 JUDGE WILSON: It was because there was no
15 consent?

16 MS. SHIVERS: There is. There is a Payton
17 violation because there was no consent to enter the
18 apartment. That's correct. And that's the point we make
19 in point 2 of the brief.

20 ACTING CHIEF JUDGE CANNATARO: And the consent
21 that was given to enter the vestibule, under no reasonable
22 version of the facts, would constitute a consent to walk
23 through, what I think was, an open door that actually
24 turned out to be defendant's apartment? Is that right?

25 MS. SHIVERS: That's correct. Whether it - - -



1 the - - - the question is whether there was an objective
2 view of the circumstances that would cause a reasonable
3 person to question whether or not the person who answered
4 the door had authority to allow the police to enter the
5 apartment. The person opened the door, gave implicit
6 consent to enter the vestibule. But the police - - - first
7 of all, Det. Fogelman knew this was a multi-family house.
8 He knew there was an - - -

9 ACTING CHIEF JUDGE CANNATARO: He knew - - -

10 MS. SHIVERS: - - - apartment upstairs.

11 ACTING CHIEF JUDGE CANNATARO: Yeah, expand on
12 that. I mean, - - - he knew before they went that it was a
13 multi dwelling.

14 MS. SHIVERS: He knew as soon as he entered the
15 vestibule. Actually, I don't know when he knew.

16 ACTING CHIEF JUDGE CANNATARO: Yeah, that's - - -

17 MS. SHIVERS: His testimony was that he thought
18 it was - - - was a multi-family house. Now, he didn't
19 clarify whether he knew that when he approached the house
20 or whether he knew that when he entered the vestibule.

21 ACTING CHIEF JUDGE CANNATARO: Because I have to
22 say I took a look at the photographs, advanced it up to the
23 testimony of the detective about what happened when he
24 walked in, and I think his testimony is basically about - -
25 - he said that there were two open doors when he walked



1 into the vestibule.

2 MS. SHIVERS: Correct.

3 ACTING CHIEF JUDGE CANNATARO: Now, I know that
4 if the doors are closed you can see numbers on them, 1 - -
5 -

6 MS. SHIVERS: Correct.

7 ACTING CHIEF JUDGE CANNATARO: - - - and 2. But
8 if - - - if they're open that might not be something the
9 police would see. And they - - - I'm just thinking it's
10 possible that a reasonable person could conclude that the
11 officer thought he was walking into a single-family home
12 and didn't need a second layer of consent to go into what
13 we now know is an apartment; is that - - - am - - - am I
14 completely on the wrong track with that?

15 MS. SHIVERS: I - - - I think what the officer
16 understood was either before he knocked or after he knocked
17 and the door was opened, he saw immediately to his right
18 stairs going up.

19 ACTING CHIEF JUDGE CANNATARO: Right.

20 MS. SHIVERS: He saw in front of him another
21 apartment.

22 ACTING CHIEF JUDGE CANNATARO: Right.

23 MS. SHIVERS: He understood it was a - - - at
24 least a two - - - two-apartment dwelling.

25 ACTING CHIEF JUDGE CANNATARO: And - - - and - -



1 - and - - -

2 MS. SHIVERS: At that point - - -

3 ACTING CHIEF JUDGE CANNATARO: - - - is that
4 because he said so or - - -

5 MS. SHIVERS: Pardon?

6 ACTING CHIEF JUDGE CANNATARO: Is that because he
7 actually said, oh, I realized when I came in it was a two-
8 unit home?

9 MS. SHIVERS: I believe his testimony was that he
10 - - - he thought it was - - - was or might be a two-family
11 apartment.

12 JUDGE RIVERA: Were both doors closed -- or I'm
13 sorry - - - both doors open?

14 MS. SHIVERS: Both doors were open. Actually, he
15 said he was able to see the stairs going up when he entered
16 on the left. And he had the open door to appellant's
17 apartment in front of him.

18 JUDGE RIVERA: I'm sorry. The door at the top of
19 the stairs? Your position is that he could see in that
20 door?

21 MS. SHIVERS: Oh, no. I'm not talking about the
22 door at the top of the steps.

23 ACTING CHIEF JUDGE CANNATARO: The door at the
24 bottom of the steps.

25 MS. SHIVERS: I'm talking about the stairs going



1 up. The door to the bottom - - -

2 JUDGE RIVERA: Yeah.

3 MS. SHIVERS: - - - was open and he could see
4 stairs going up to another apartment.

5 JUDGE RIVERA: But - - - yes. But was the door
6 at the top open?

7 MS. SHIVERS: There's no record on that here.

8 So confronted with that situation, and not
9 knowing who Jeter was, having literally no information
10 about Jeter, at that point objectively the detective should
11 have inquired further rather than proceeding beyond the
12 vestibule into the apartment.

13 JUDGE WILSON: He knows Jeter - - -

14 MS. SHIVERS: In fact - - -

15 JUDGE WILSON: He knows Jeter is not Cuencas?

16 MS. SHIVERS: He knows Jeter is not Cuencas.

17 JUDGE WILSON: And he knows Jeter is not Gavin?

18 MS. SHIVERS: And he knows he's not Gavin. And
19 doesn't really know anything else about him. And he was
20 required to find out something else about him before
21 proceeding from the vestibule into the apartment. This is
22 regardless of the fact that - - -

23 JUDGE TROUTMAN: And it is - - - it - - - it's
24 established that he did see the defendant?

25 MS. SHIVERS: He absolutely saw the defendant in



1 the apartment, but that didn't give him a right to cross
2 over the threshold into the apartment and arrest him
3 without a warrant.

4 JUDGE TROUTMAN: So does that go to the argument
5 he simply entered because he saw him, as opposed to having
6 consent to enter?

7 MS. SHIVERS: Exactly, Your Honor.

8 JUDGE GARCIA: Counsel, I know your light is on
9 but before you sit, if it's okay, could you just address -
10 - - this - - - this, obviously, must be a state
11 constitutional argument because the Fourth Amendment
12 jurisprudence is, pretty much, clear on this as we've said
13 previously. So could you tell me where the state
14 constitutional argument is specifically preserved here?

15 MS. SHIVERS: Oh, yes. Defense counsel
16 specifically argued in the hearing - - - if I can find the
17 language - - - "that the police did not obtain a warrant to
18 avoid having the right to counsel attach, that the police
19 went there to improperly question the defendant, and to
20 improper" - - - I'm sorry - - - "to illegally arrest the
21 defendant". And made specific attention - - - made
22 specific reference to the right to counsel and the purpose
23 being not have the right to counsel attach.

24 JUDGE GARCIA: But in Garvin, where we found that
25 the same issue was not preserved, the dissent made the



1 point that, "Mr. Garvin maintained at the hearing that the
2 violation both of his federal and state constitutional
3 rights was specifically intended to circumvent his right to
4 counsel". And in Garvin, we said that wasn't preserved,
5 the state constitutional issue.

6 MS. SHIVERS: Well, I would argue that Counsel's
7 argument, without actually citing the constitution or
8 cases, which is not necessary to preserve an issue, put the
9 issue squarely before the court. It was clear. It
10 implicitly invoked - - - evoked the - - - the New York's
11 constitutional and statutory law and right to counsel in
12 the context of Payton. So I would argue that was
13 sufficient to preserve the issue.

14 ACTING CHIEF JUDGE CANNATARO: Thank you,
15 Counsel.

16 MS. SHIVERS: Thank you.

17 MR. TWERSKY: Good afternoon. My name is - - -
18 excuse me - - - my name is Shalom Twersky and I represent
19 the respondent.

20 Regarding preservation, Your Honors, so first of
21 all, in terms of the state constitutional right, as the - -
22 - the majority in Gordon said in interpreting Garvin, that
23 the only thing that occurred in that case, like in this
24 case was in the defendant's pre-trial hearing papers, he
25 made one passing reference to Article 1, Section 12. At



1 the time of the post-hearing argument, in the context - - -
2 completely in the context of attenuation, not in the
3 context of the Payton violation that he was alleging - - -
4 he argued that the way that the defendants - - - the way
5 that the police conducted the arrest was improper for the
6 following reasons, based on Jeter's testimony, much of
7 which the hearing court rejected, as well as because the
8 intent of the officers was to prevent the right of counsel
9 to attach, even though defense counsel did not ask one
10 single question on the motives of the officers as to why
11 they got to that - - - why they came to that location.

12 And in fact, I disagree with my adversary. I
13 don't think Det. Fogelman ever actually even said he came
14 there to arrest the defendant.

15 JUDGE WILSON: I thought he thought - - -

16 MR. TWERSKY: But obviously when he saw the
17 defendant - - -

18 JUDGE WILSON: Counsel, I think there's - - -

19 MR. TWERSKY: - - - he grabbed him. And I'm - -
20 -

21 JUDGE WILSON: Counsel?

22 MR. TWERSKY: I'm - - -

23 JUDGE WILSON: Counsel?

24 MR. TWERSKY: I - - - I accept that. Yeah, I'm
25 sorry.



1 JUDGE WILSON: I think that there's a finding by
2 the Appellate Division that he came there for the purpose
3 of arresting him. Can we disturb that?

4 MR. TWERSKY: Well, Your Honor, the - - - all I'm
5 suggesting is in terms of what the intent of the officer
6 was in terms of his testimony. He simply said, I got the
7 I-card and I went to the location that I was given and I
8 had a photograph of the defendant.

9 But my point is that if the defendant wants to
10 claim that because the purpose of the police officer in
11 going to that location was to prevent the right of counsel
12 to attach, it's defendant's responsibility to create a
13 sufficient record, even in terms of a state right to
14 counsel issue, which he has not.

15 So therefore - - - and in terms of the merits,
16 the - - - the weakness that I found in defendant's argument
17 on the brief and even - - - even today is Garvin is never
18 mentioned. Garvin was in 2017. Garvin addressed this
19 issue. And the majority had an opportunity then to say
20 that the rule should be that every time you have probable
21 cause to arrest for the home and you go - - - even
22 conceding, let's say he intended to make the arrest - - -
23 you have to get a warrant because it's - - -

24 JUDGE GARCIA: Did Garvin really say that as a
25 matter of the Fourth Amendment?



1 MR. TWERSKY: It - - - it said it as - - - as - -
2 - as a matter - - - right. It refused to establish that
3 rule as a matter of the Fourth Amendment. And - - -

4 JUDGE WILSON: I thought earlier you argued - - -

5 MR. TWERSKY: I - - - I'm sorry.

6 JUDGE WILSON: I'm sorry. I thought earlier you
7 argued that Garvin - - - that the issue in Garvin was not
8 preserved and that was the holding of the court. So if - -
9 -

10 MR. TWERSKY: Well we - - - even if - - -

11 JUDGE WILSON: If we - - -

12 MR. TWERSKY: Even if it was dicta, it was strong
13 dicta, Your Honor. That - - - the fact is they clearly
14 were presented by the defense with the opportunity to
15 consider and establish a rule regarding - - -

16 JUDGE WILSON: And Garvin was a case where the
17 majority determined that Mr. Garvin was outside of his
18 house, correct? And that's not the case of Mr. Cuencas.

19 MR. TWERSKY: You're right, Your Honor. That was
20 a threshold case - - -

21 JUDGE WILSON: Right.

22 MR. TWERSKY: - - - Garvin. But the fact is that
23 the broader rule of simply never going to a house if you
24 have, as they called it, a pre-planned arrest that was
25 definitely considered in Garvin. And it was clearly



1 rejected. And for good reason. The fact is, as Garvin
2 said, subjective intent is not relevant when it comes to
3 Fourth Amendment jurisprudence.

4 JUDGE GARCIA: We said Fourth Amendment. But we
5 said it - - - the - - - the issue as to the state
6 constitution wasn't raised - - - wasn't preserved?

7 MR. TWERSKY: Wasn't preserved, that's correct.

8 JUDGE TROUTMAN: So was there specific intent - -
9 - or excuse me - - - consent established to enter
10 defendant's apartment here?

11 MR. TWERSKY: Your Honor, the record supports
12 that Jeter gave implicit consent to - - - which defendant
13 concedes as going into the vestibule. But it's reasonable
14 that Det. Fogelman would've interpreted Jeter's implicit
15 consent to go into - - - to cross the threshold into the
16 open door as well.

17 JUDGE TROUTMAN: Does it matter that there are
18 more than one apartment, that there's - - -

19 MR. TWERSKY: So - - - so what Det. Fogelman
20 testified to is that he said he was aware that this single-
21 family home had one or two apartments. He didn't say two.
22 He said one or two. That means the possibility existed of
23 one or the other.

24 JUDGE WILSON: So was he given implicit consent
25 to go up the stairs? What - - - would a reasonable person



1 have - - - have concluded that the - - - by opening the
2 door - - - by Mr. Jeter opening the door a little bit more
3 than he did at first, the officers were allowed to go up
4 the stairs?

5 MR. TWERSKY: That's possible, Your Honor. But I
6 would say that it was stronger, the implicit consent, going
7 into the living area on the same floor. Why? Because
8 first of all, they had minutes. Jeter had minutes. They
9 were - - - the police were knocking and ringing the
10 doorbell. He could have - - - he came down. He clearly
11 knew they were police officers. What does he do? He opens
12 the front door two feet. That's the first time he opens
13 the door. Two feet he - - - Fogelman testifies to.

14 Then when they say, do you mind sir if we come in
15 to talk to you? He then opens the door completely, steps
16 back, and to the side. They walk in. Obviously it's a
17 small vestibule because they say they only have to walk a -
18 - - a little bit further to cross the threshold.

19 But the point is the difference between the
20 steps, Your Honor, and the living room area is that the
21 defendant is sitting on the couch. I think any reasonable
22 officer could've thought if, at 5:30 in the morning, if
23 someone's banging on your door, if you have people coming
24 from two different apartments, each one is at least going
25 to be standing up at their doorway. And - - - but what



1 clearly the officer could have assumed is that Jeter came
2 from that living room area. And defendant was sitting
3 there waiting to see what Jeter would find out about who's
4 knocking at that door.

5 JUDGE SINGAS: Can we consider Mr. Jeter's
6 testimony at the hearing when we're considering whether or
7 not he had apparent authority to consent? Or are we bound
8 only by what Fogelman knew at the time?

9 MR. TWERSKY: Your Honor, I think the - - - it's
10 the entire record that's - - - that's relevant here. And
11 Jeter basically describes the - - - the downstairs
12 apartment as his home. He says he goes in and out. He
13 says he has the key. Obviously - - -

14 JUDGE WILSON: Did he - - -

15 MR. TWERSKY: - - - Det. Fogelman wasn't aware of
16 that.

17 JUDGE WILSON: Did he say the downstairs
18 apartment was his home? He used those words?

19 MR. TWERSKY: He's - - - he - - - he said - - - I
20 believe he said his house. And he said - - -

21 JUDGE WILSON: In reference to the building?

22 MR. TWERSKY: He said - - - but in other words it
23 was in the context of being asked about what was your
24 connection to the downstairs apartment. He says, I had a
25 key, I could go in and out as much I want, and that I



1 considered it my house, just like upstairs, just like
2 downstairs.

3 So the fact is - - - and - - -

4 JUDGE WILSON: Did he say that?

5 MR. TWERSKY: He said that he can - - -

6 JUDGE WILSON: That upstairs was no different to
7 him than the downstairs?

8 MR. TWERSKY: Well, he didn't say no different.
9 But he just said that both - - - he considered both his
10 house.

11 JUDGE WILSON: Both or the whole thing?

12 MR. TWERSKY: I believe he talked about the
13 upstairs and the downstairs as being his house.

14 ACTING CHIEF JUDGE CANNATARO: He said he had a
15 key?

16 MR. TWERSKY: He said he said a key to the
17 downstairs - - -

18 ACTING CHIEF JUDGE CANNATARO: Living room?

19 MR. TWERSKY: - - - apartment.

20 ACTING CHIEF JUDGE CANNATARO: The living room
21 door?

22 MR. TWERSKY: Correct. Correct.

23 ACTING CHIEF JUDGE CANNATARO: Which we know - -

24 -

25 MR. TWERSKY: And he said he could go in and out.



1 So - - -

2 JUDGE TROUTMAN: Unqualified?

3 MR. TWERSKY: He didn't qualify it.

4 JUDGE TROUTMAN: And so he spoke about his mother
5 actually owned the - - - the home?

6 MR. TWERSKY: That's correct.

7 JUDGE TROUTMAN: But he considered it his own.

8 So are you saying that if a landlord has a key, he has the
9 right to consent to open any apartment at any time?

10 MR. TWERSKY: I'm not saying that. The - - - the
11 - - - the relationship here, at least from the - - - the
12 record, is very different than simply a landlord-tenant
13 relationship. These people considered each other like
14 family. The defendants considered each other like
15 brothers. The - - - the mother considered them like sons.
16 So it was very unclear as to exactly what the - - - I mean,
17 not unclear. But what I'm saying is, it was much more than
18 a typical landlord-tenant relationship. And I think that
19 would allow - - -

20 JUDGE TROUTMAN: And a reasonable police officer
21 would know that - - -

22 MR. TWERSKY: So - - -

23 JUDGE TROUTMAN: - - - upon approach?

24 MR. TWERSKY: I - - - I understand what you're
25 saying, Your Honor. Obviously, the officer didn't ask



1 Fogelman those questions. But - - - I mean Fogelman didn't
2 ask Jeter those questions.

3 But what my point is, I think Jeter's sort of
4 understanding of his relationship to that apartment, I
5 think, is relevant in terms of the reasonableness of why
6 the officer would've assumed that Jeter may have emerged
7 from that apartment at 5:30 in the morning while defendant
8 was sitting there waiting to see what Jeter would find out
9 as to who was at the door.

10 JUDGE RIVERA: Is there any testimony about
11 whether or not the door above the staircase was open?

12 MR. TWERSKY: So there - - -

13 JUDGE RIVERA: I mean at the top of the
14 staircase, excuse me.

15 MR. TWERSKY: I'm not aware of there being any
16 testimony to that. I'm not even being - - - I'm not even
17 aware that before going into and apprehending the
18 defendant, any of the officers, sort of, even noticed that
19 there was a door at the top the steps, from the - - - from
20 the hearing testimony. So - - - and - - - so certainly
21 whether it was open or not was not something that was - - -
22 was fleshed out at the hearing.

23 JUDGE RIVERA: Uh-huh.

24 MR. TWERSKY: Your Honors, so we would argue that
25 there is no Fourth Amendment violation, that Garvin was



1 properly decided.

2 And the fact is one of the things Garvin talked
3 about was the practical considerations that are - - - are
4 very relevant in these - - - in these circumstances, why
5 you shouldn't broaden the rule. The fact is that part of
6 the practical considerations that Garvin talked about was
7 it's simpler, faster, and less burdensome to get a warrant.
8 That's not a convenience factor. That's a safety factor.
9 When you have violent felons like this one, you want to be
10 able to apprehend the defendants as soon as possible.
11 Moreover - - -

12 JUDGE WILSON: But that was two days later here.

13 MR. TWERSKY: Thirty-one hours later. But Your
14 Honor, for example, another - - - another issue that - - -
15 that comes up in terms of - - - that that's why law
16 enforcement's hands can't be tied is this was a third-
17 party's - - - a third-party dwelling. So under 690, it's
18 possible that the police might have needed both an arrest
19 warrant for the defendant and a search warrant to get into
20 Jeter's home.

21 JUDGE RIVERA: Did - - -

22 MR. TWERSKY: But for a search warrant, you have
23 to have - - -

24 JUDGE RIVERA: Did they argue below exigent
25 circumstances, which is what I think you're actually



1 arguing?

2 MR. TWERSKY: I'm not saying it - - -

3 JUDGE RIVERA: That's why you don't need the
4 warrant?

5 MR. TWERSKY: I'm not saying it - - - I'm not
6 saying it necessarily reached the level of exigent
7 circumstances. All I'm saying is that - - -

8 JUDGE RIVERA: Well, you've only got but so many
9 exceptions.

10 MR. TWERSKY: No, I - - - I understand, Your
11 Honor. But the fact is, particularly with violent felons,
12 police officers want to get them incarcerated as soon as
13 possible, if you have probable cause, so that they don't
14 commit more crimes or they don't flee. So it's certainly
15 they have a right to take that into account. And if you
16 have to get a search warrant where you have to have - - -

17 JUDGE RIVERA: If you ask me, the fear of flight
18 might be an exigent circumstance, but if they didn't argue
19 that, that's not what drives their - - - their interest in
20 getting to this building.

21 MR. TWERSKY: Well, I - - - I - - - I'm not
22 talking about necessarily in this particular case. I'm
23 saying it - - - in terms of the broader rule, it could be a
24 fair consideration - - -

25 JUDGE TROUTMAN: That there may be unintended



1 consequences by establishing the rule that's being
2 requested?

3 MR. TWERSKY: That's right. And particularly
4 when you need probable cause to get the search warrant
5 because if defendant had a strange relationship to this
6 apartment - - - apparently he was crashing on the couch of
7 codefendant for several weeks. So it's unclear what the
8 police officers knew as to exactly if defendant would be
9 there or not and certainly to be able to get a search
10 warrant and to establish probable cause.

11 And finally, Your Honor, I just - - - I just want
12 to say that if the court would disagree with our position
13 on the first issue or on the second, this court should find
14 that the statements were attenuated as a matter of law and
15 we discussed why in our brief. Particularly the videotaped
16 statement, which was sixteen hours after the arrest and
17 after the defendant was specifically told that - - - after
18 the defendant got an opportunity to speak to his
19 accomplice, where the accomplice said to him I'm going to
20 talk now.

21 JUDGE WILSON: And how about the - - -

22 ACTING CHIEF JUDGE CANNATARO: Thank you,
23 Counsel.

24 JUDGE WILSON: How about the Jaguar title and the
25 photograph on attenuation?



1 MR. TWERSKY: I - - - I'm sorry. I don't
2 understand your question.

3 JUDGE WILSON: Sure. You were asking us - - -
4 you were saying were we to, on one ground or the other,
5 rule against you, we should decide attenuation on the
6 video, et cetera, that they're sufficiently attenuated.
7 I'm asking what is it you would like us to say - - -

8 MR. TWERSKY: You're talking about the cell phone
9 - - - photograph in the cell phone?

10 JUDGE WILSON: The - - - the - - - those
11 photographs and the title to the Jaguar that's in the - - -

12 MR. TWERSKY: So - - - so the title to the Jaguar
13 was in the apartment. And that was found as a result of a
14 search warrant that came later. The - - - the thing that
15 would not be attenuated is the photos in the cell phone,
16 which were found at the time of the arrest. So there would
17 be no attenuation as to that.

18 But under a harmless error analysis, you wouldn't
19 necessarily need that because as, even the prosecutor
20 argued at - - - on summation, the jury didn't need anything
21 but Winnie and Travis' identification testimony that this
22 was a violent kidnapping that led to the death of - - - of
23 the victim in which during the kidnapping, the defendant
24 (sic) was zip-tied by - - - by the defendant. And he was
25 found the next morning, dumped in a park, his throat and



1 wrists slashed, with the bloodied zip ties next to him.

2 ACTING CHIEF JUDGE CANNATARO: Thank you,
3 Counsel.

4 JUDGE GARCIA: Counsel, could we just pick up on
5 that - - - that attenuation point? So clearly if we were
6 to agree - - - to agree with you on the consent issue and
7 find there was no consent, that's a Payton violation, and
8 as to the later statement at the precinct, that would be an
9 attenuation analysis under Harris. If we were to agree
10 with you on your broader rule, would it be an attenuation
11 analysis or would it be a per se violation of the right to
12 counsel?

13 MS. SHIVERS: I would argue that it would be a
14 per se violation of the right to counsel.

15 JUDGE GARCIA: So it would be broader than a
16 Payton violation?

17 MS. SHIVERS: Yes, that's - - - that's - - -
18 that's our position.

19 Just to address a couple of other things, with
20 respect to Fogelman's testimony regarding the purpose of
21 being there, the Appellate Division plainly found that they
22 came to the apartment for the purpose of making a
23 warrantless arrest. And that's supported by the record
24 because Fogelman testified that he came there with the I-
25 card to arrest the defendant.



1 Now, with respect to the - - - the question of
 2 whether or not Jeter's having keys and Jeter's feeling that
 3 he had authority over the apartment, it's not really
 4 relevant to the question because what is relevant under
 5 Adams is what was the view of the officer at the time he
 6 encountered the circumstances there. He wasn't aware of
 7 Jeter's having keys. He wasn't aware of Jeter's
 8 relationship with the defendant. As far as the record
 9 shows, he wasn't aware of anything about Jeter.

10 And the circumstances he was confronted with were
 11 what he believed could have been a multi-family house with
 12 two apartments. He came in and he saw the stairs going up
 13 to one apartment. And he saw appellant's apartment open in
 14 front of him.

15 ACTING CHIEF JUDGE CANNATARO: But Counsel, what
 16 he really saw - - -

17 MS. SHIVERS: And Jeter said - - - I'm sorry.

18 ACTING CHIEF JUDGE CANNATARO: What he really saw
 19 when he walked in was an open doorway with somebody sitting
 20 on a couch - - -

21 MS. SHIVERS: That's correct.

22 ACTING CHIEF JUDGE CANNATARO: - - - maybe
 23 watching television, I sort of got, I don't know. But I'm
 24 not sure that you know going in there that that's an
 25 apartment, it's more like just a room on the other side of



1 a doorway.

2 MS. SHIVERS: Well, certainly if he was aware
3 that it might be a multi-apartment house, that would have
4 created a reasonable reason - - - a reasonable person to
5 question what was the situation? What could this party who
6 was giving consent by saying nothing, did they have consent
7 over that area?

8 ACTING CHIEF JUDGE CANNATARO: That may be true.
9 But I - - - would a different reasonable person might find
10 that that's just the living room that - - - that you see
11 after you walk into the vestibule? Which - - - all of
12 which I'm - - - I guess I'm suggesting we're sort of in a
13 mixed question scenario here.

14 MS. SHIVERS: In this case, I don't think there's
15 a mixed question because I think the findings of the court
16 below was that it was appellant's apartment that the police
17 officers stepped into. The Appellate Division said that
18 and the trial court said that. So that's - - - that's a
19 given. And we're assuming for the purposes of the argument
20 that he gave consent to enter the vestibule.

21 But neither court below took it as a living room
22 as part of a bigger house. They definitely ruled that it
23 was appellant's apartment and that Jeter gave consent by
24 simply moving aside and letting the police officers step
25 into the vestibule.



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ACTING CHIEF JUDGE CANNATARO: Okay.

MS. SHIVERS: I think that's - - - that's really
what I wanted to address. Thank you.

ACTING CHIEF JUDGE CANNATARO: Thank you.

(Court is adjourned)



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

I, Jaymi D. Castleberry, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Tramel Cuencas, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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