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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 14

JAYQUAINE SEIGNIOUS,

Respondent.

20 Eagle Street
Albany, New York
January 11, 2024

Before:

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

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Seignious.

3 MR. GUENTHNER: Good afternoon, and may it please
4 the court, Franklin Guenthner, for the People. And if I
5 could reserve three minutes for rebuttal, please?

6 CHIEF JUDGE WILSON: Yes.

7 MR. GUENTHNER: Your Honors, this case is about
8 whether the defendant received fair notice at trial of the
9 lesser included offense of second-degree burglary. Now, by
10 charging him with the greater count of sexually motivated
11 second-degree burglary, the people necessarily place
12 Defendant on notice that he would have to defend against
13 all of the elements of second-degree burglary, including
14 his intent to commit a crime upon his unlawful entry.
15 Thus, as we argue in our briefs, the prosecution cannot and
16 did not here, disavow the possibility that they would later
17 seek the lesser included offense merely by urging the jury
18 to consider that distinct additional element of substantial
19 sexual motivation.

20 That's precisely what the Appellate Division held
21 here, that by focusing on the distinct element of sexual
22 motivation, the people essentially deprived Defendant of
23 notice that he would have to defend against a burglary.
24 And that rule makes it essentially impossible for the
25 People to request a lesser included offense in situations

1 like this one, where you have a sexually motivated - - -

2 JUDGE CANNATARO: Counsel, what's - - - what's
3 the difference between motivation for purposes of, you
4 know, that enhancement, sexually motivated crime and intent
5 as that term is generally understood in something like
6 burglary?

7 MR. GUENTHNER: Well, in the burglary context,
8 the intent element, is - - -

9 JUDGE CANNATARO: Is there a special intent for
10 burglary that's different than intent for say, some other
11 crime?

12 MR. GUENTHNER: Only in the sense that with
13 respect to burglary, the people don't have to necessarily
14 specify an intent to commit a specific crime. They can do
15 that in the charging instrument. That's not what happened
16 here. We - - -

17 JUDGE CANNATARO: So burglary incorporates an
18 element of intent to commit a crime once the burgling is
19 done?

20 MR. GUENTHNER: Yes. And - - - and then the
21 motivation aspect is what is the purpose for the unlawful
22 entry, that additional crime of - - - of the burglary.

23 JUDGE CANNATARO: Got it. So now distinguish
24 motivation and intent for me just so I'm clear on how to
25 read this record.

1 MR. GUENTHNER: I mean motivation is your purpose
2 for committing the unlawful entry. The intent element is
3 do you intend to commit some crime once you have committed
4 that burglary.

5 JUDGE CANNATARO: But those two things --

6 JUDGE HALLIGAN: Do you - - -

7 JUDGE CANNATARO: I'm sorry. Just one question.
8 Could those two things be the same, your purpose for
9 wanting to commit the unlawful entry and your intent for
10 committing the burglary could - - - is there any scenario
11 where those two things could be the same, or are those by
12 necessity different?

13 MR. GUENTHNER: There are situations where that
14 could be the same, but as the Appellate Division held here
15 under the statute, we actually established that there was a
16 reasonable view that although Defendant's intent may have
17 been to commit one thing, it was not necessarily - - - his
18 purpose was not necessarily substantially motivated by his
19 by his sexual urges.

20 JUDGE HALLIGAN: Do - - - do you - - -

21 JUDGE GARCIA: Let me ask it a different way. If
22 the burglary itself has to be done for the primary purpose
23 of sexual gratification, right, if you're going to make the
24 extra element, and one way you can show that is, you enter
25 the dwelling with the intent to commit, let's say, a sexual

1 assault. It's pretty obvious example, but could it also be
2 that you commit the burglary itself for sexual
3 gratification, that you enter the dwelling and that's you
4 go into somebody's bedroom and that's the sexual
5 motivation, not the crime? Maybe you intend to steal
6 something there, right?

7 MR. GUENTHNER: No, I think that's right. I
8 think - - - I think the - - - you could be motivated to
9 commit. You could intend to say steal someone's clothing
10 when you commit the unlawful entry and the purpose of that
11 act or the purpose of entering the person's apartment could
12 be sexually motivated.

13 JUDGE CANNATARO: That wasn't the question.

14 JUDGE GARCIA: Yeah, that's a little bit
15 different. I get that. I mean, you can use a bunch of
16 different crimes to larceny, right? And the item you steal
17 may give you that extra motivation, right? But what if
18 just entering the dwelling itself of - - - of a woman,
19 right, for this person, and going in the bedroom, that is
20 the primary motivation which is sexual gratification, but
21 while they are stealing credit cards or whatever?

22 MR. GUENTHNER: Yes, I think so. I mean, I think
23 that is an example of a sexually motivated burglary with
24 intent to commit, perhaps a nonsexual crime. And I think
25 that's what the evidence showed here, is that although we

1 argued to the jury - - - I don't think it would have made
2 sense for the people --

3 JUDGE RIVERA: You have to have formulated the
4 intent in this particular hypothetical for, I think you
5 said credit cards, before the entry or as you're entering?

6 MR. GUENTHNER: Well, I think that's what
7 happened here. I mean, I think - - -

8 JUDGE RIVERA: No, no, I'm saying in the
9 hypothetical.

10 MR. GUENTHNER: In the - - - in the hypothetical
11 of - - -

12 JUDGE GARCIA: Would you have to enter the
13 dwelling thinking, I'm going to steal credit cards, but the
14 sexual gratification you get is from just being in that
15 room.

16 MR. GUENTHNER: I think in this hypothetical,
17 yes, we would have to show that you intended -- well, you
18 could show that it was - - - it was after you entered the
19 apartment and stole the credit cards, and you could show
20 that that was evidence of his intent when he went in. I
21 think that's right.

22 JUDGE HALLIGAN: Counsel, it seems to me - - -
23 over here. Thanks. And I'm interested in whether you
24 agree that perhaps there are two ways in which the people
25 could limit themselves. I understand you say you didn't,

1 but one is to limit yourself to proving the sexual
2 motivation, which results in the - - - in the greater
3 charge. And the second, I think, is to limit yourself to
4 specific crimes that the defendant intends to commit with
5 respect to the burglary once inside the building, whether
6 that is, you know, larceny in another example, or perhaps a
7 sexual assault or some other crime in the building itself,
8 do you agree that - - - that both are possible?

9 MR. GUENTHNER: Yes, I agree, and I think you're
10 sort of speaking to the case law that my adversary thinks
11 applies here. For example, in the Roberts case, the people
12 - - - well, or in the Barnes case, the people specifically
13 limited themselves to, we believe that the defendant has
14 committed burglary with intent to commit a larceny. They
15 were not then allowed to later argue to the jury, well, you
16 can ignore the larceny part because we also have evidence
17 that he was committing an assault inside. That's the kind
18 of express limitation that we're asking this court to - - -
19 to clarify. And that just didn't happen here because of, I
20 think, the nature of the evidence and also the way we
21 charged - - - charged the events in this case.

22 JUDGE GARCIA: But I think you are - - -

23 JUDGE HALLIGAN: But that would be distinct from
24 the motivation question, right?

25 MR. GUENTHNER: In what - - - in what sense?

1 Maybe what I - - -

2 JUDGE HALLIGAN: What I mean is, the question of
3 whether you limited yourself to a specific crime or crimes
4 that would be committed within the building, is it, I
5 think, a distinct way of limiting yourselves, than saying,
6 we are only going to look to prove burglary with sexual
7 motivation and not the lesser included of, too, period?

8 MR. GUENTHNER: That's correct. I mean, we could
9 have argued to the jury, if you do not find that this is a
10 sexually motivated burglary, you should acquit the
11 defendant. Or we could have said, Your Honor, as - - - as
12 the people did in Rothman, we charge the lesser included
13 offense separately. And then we tell the court at the
14 beginning of trial, actually, we're no longer seeking that
15 charge. We are all in on the -- on the greater offense.
16 And because the motivation and the intent elements are
17 distinct, you cannot limit your theory of the lesser
18 included offense merely by asking the jury to consider an
19 additional and completely distinct element from - - - from
20 the intent.

21 JUDGE GARCIA: I think in Barnes, as I understand
22 it, it wasn't that in the trial the people tried to have it
23 both ways. It was that in the trial, the people argued to
24 the jury one particular crime that they intended to commit,
25 the defendant intended to commit. When this court reviewed

1 that case, we held them to that crime. It was that you're
2 not going to be able to come here and argue something
3 different on a sufficiency.

4 MR. GUENTHNER: Yeah. And Barnes was a
5 sufficiency case. I think Rothman is sort of the next step
6 there where you say, again, you're not allowed to, either
7 in the charging documents or in some affirmative statement
8 that you make to the jury. You know, we intend to prove
9 that he intended to commit X and then later say, well, now
10 that the evidence supports also that he intended to commit
11 Y, you can now - - - you can now ignore X and simply go to
12 Y.

13 JUDGE RIVERA: So why isn't it a factual finding
14 as to how the prosecution limited its case? The rest could
15 be, right, legal determinations about what that means. But
16 why isn't that - - - that determination? I look at this
17 record as a - - - is it a factual finding to say you
18 limited your theory?

19 MR. GUENTHNER: I mean, we're not disputing any
20 of the facts that what the prosecutor said in this case,
21 the way that the case was presented. I think that, you
22 know, the application of the statute and the case law to
23 those facts are purely procedural legal questions that this
24 court could answer.

25 JUDGE RIVERA: No. So all right. You're saying

1 no, but I just want to be clear about it. So yes, the
2 facts, what statements were made, what was filed and said
3 in those documents, all of that is - - - is the record, it
4 is what it is. But the Appellate Division, looking at all
5 of that and saying, oh, what you've done here is limit your
6 theory. Before we get to the consequences of that, you're
7 saying that determination, that conclusion is a legal one,
8 correct?

9 MR. GUENTHNER: Yes. Yes.

10 JUDGE RIVERA: Okay. What makes it legal as
11 opposed to factual?

12 MR. GUENTHNER: Because it's a - - - it's a
13 matter of - - - it's a matter of the way that the people
14 present their case is a procedural question, whether it's -
15 - - whether the charging document places the defendant on
16 fair notice, whether the - - - the statements that they
17 make after that point place the defendant on fair notice.
18 These fair notice questions are procedural legal questions.
19 And again, we're not disputing any of the facts on the
20 record here. It's a question of whether those facts
21 deprive the defendant of his constitutional fair notice
22 right.

23 JUDGE RIVERA: Well I see your point on the
24 ultimate conclusion. But if a judge reads a document and
25 says, okay, this is what this says, I'm reading it out,

1 right? And then says, and the consequences of, of what the
2 people filed is the following. That - - - isn't that based
3 on the law and just what is on the paper and what the court
4 intuits from that is a fact finding?

5 MR. GUENTHNER: No, because those facts are - - -
6 are in the record and - - - and the statements that are
7 being made are what they are. It's a question of does that
8 rise to a legal level as a matter of law, as the defense at
9 one point believed them to be, is this a legal question of
10 deprivation of constitutional fair notice?

11 JUDGE RIVERA: Well, no, that's what I'm saying.
12 That's the consequences. The first part is did you
13 actually limit your theory? The next step is, okay, what's
14 the consequence of limiting your theory? You're limited
15 your theory in this way, now, what's the legal consequences
16 of having done that? I guess that's - - - that's my
17 question. But it seems your answer is no, the decision to
18 - - - the judicial decision or conclusion that you've
19 limited - - - that you limited your theory in this way is,
20 is a legal determination.

21 MR. GUENTHNER: Yes. Because it's a matter of,
22 again, fair notice and - - - and sort of, I mean, the - - -
23 the way that we presented our case is - - - is based on the
24 statements in the record and the charging documents. And
25 all of those facts are set. It's a question of whether

1 that rose to some legal challenge.

2 CHIEF JUDGE WILSON: So is there a factual
3 finding by the Appellate Division that the defendant was
4 lulled into defending his case in a particular way? I
5 mean, they refer to Rothman and then say that's exactly
6 what happened here.

7 MR. GUENTHNER: Well, I think, I mean, the
8 Appellate Division looked at sort of this question of
9 whether the defense was actually on notice. We don't think
10 that this court needs to decide that. I think it's more of
11 a question of is the - - - is it reasonable for the
12 defendant to have notice that these are the charges that
13 they might face?

14 CHIEF JUDGE WILSON: I'm asking something a
15 little different. Is there a way to read or should we read
16 the Appellate Division as making a factual finding of
17 prejudice?

18 MR. GUENTHNER: Well, I think think the Appellate
19 Division's finding that the defendant was lulled is, I
20 mean, I think that they - - - they, you know, distinguish
21 that from what the test has been up to that point. Now,
22 what we're saying is that that's actually just not the
23 test. The test is whether you - - -

24 CHIEF JUDGE WILSON: So it doesn't matter if he
25 was prejudiced?

1 MR. GUENTHNER: I don't think this court has to
2 decide whether he was prejudiced by this. I mean, I don't
3 think those - - - those haven't been - - - those issues
4 haven't been answered in these cases in the past. It's a
5 question of whether the notice that he - - - was it
6 reasonable for Defendant to know that, okay, I've been
7 charged with this greater offense. I should expect that -
8 - - and again, the indictment, but also the statute places
9 me on notice that somewhere down the road I could be
10 charged with a lesser included? And unless there are
11 questions, I'll save it for rebuttal.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. GUENTHNER: Thank you.

14 MS. HOTH: Good afternoon, Your Honors. Jan Hoth
15 again for Appellant Jayquaine Seignious. I noticed that
16 when my adversary was speaking to Your Honors, he seemed to
17 make a concentrated effort to stay away from any comments
18 made by the trial prosecutor below. And it's those
19 comments, in conjunction with the way they presented their
20 case, by charging and stuff, that led the Appellate
21 Division to conclude that they had, in fact, limited their
22 theory of the case. There's nothing in the case law that
23 says that they have to limit it by renouncing every other
24 crime that's possible - - -

25 JUDGE SINGAS: But did the bill of particulars

1 say anything about limiting the burglary?

2 MS. HOTH: The - - - what we have here is from
3 inception, from the indictment, bill of particulars - - -

4 JUDGE SINGAS: But did the bill of particulars,
5 right?

6 MS. HOTH: Ms. Seignious was only charged with
7 burglary at burg 2 as a sexually motivated offense and then
8 sex offenses. At no point was there ever a nonsex offense
9 introduced into the case.

10 JUDGE GARCIA: But what is a nonsex offense?
11 Larceny? Is larceny - - -

12 MS. HOTH: Robbery. Robbery, larceny.

13 JUDGE GARCIA: So larceny couldn't be the intent
14 in the burglary crime if the people were going to show that
15 - - -

16 MS. HOTH: Sure.

17 JUDGE GARCIA: - - - when - - - so what's a sex
18 offense limitation here?

19 MS. HOTH: Well, because he was charged with
20 burglary, which requires intent to commit a crime in that
21 it had to be in whole or substantial - - -

22 JUDGE GARCIA: Right.

23 MS. HOTH: - - - part for his sexual
24 gratification.

25 JUDGE GARCIA: Right.

1 MS. HOTH: So if you're limiting your - - - if
2 the prosecutor is limiting themselves in the way this trial
3 assistant did to a sexually motivated offense, defense
4 counsel does not think as they would in a typical burglary
5 case, that they have to be ready to defend against any and
6 all crimes.

7 JUDGE CANNATARO: Counsel - - -

8 JUDGE HALLIGAN: So your - - - thank you. So
9 your argument about limitation, I take it, is only that the
10 people limited themselves to proving a sexual motivation
11 for the burglary, which yields the greater offense, and not
12 that the people limited themselves to a specific crime that
13 would be performed within the building?

14 MS. HOTH: Exactly, Your Honor.

15 JUDGE HALLIGAN: Okay.

16 MS. HOTH: I mean, at no time did the prosecutor
17 ever say we intend to prove that he entered the building
18 with the intent to commit a crime. And the purpose of that
19 was for his sexual gratification.

20 JUDGE GARCIA: But the prosecutor - - -

21 JUDGE SINGAS: So now are you saying that the
22 burglary that you're saying that it's not generally a
23 sexually motivated burglary, you're objecting to the fact
24 that it was a burglary with intent to commit a sex crime
25 therein? That's what the people limited themselves to.

1 MS. HOTH: That's - - -

2 JUDGE SINGAS: -- the burglary. Okay. And did
3 you object to that specifically below?

4 MS. HOTH: What counsel objected to below was
5 that she was not put on notice that she was going to have
6 to defend against burglary in the second degree without the
7 sexual modification.

8 JUDGE SINGAS: Generally. Correct. But now
9 you're saying that the issue is that they limited
10 themselves to a burglary and the intent to commit the crime
11 therein is a sex crime.

12 MS. HOTH: Yeah. Yes.

13 JUDGE SINGAS: But that's what I'm asking. So is
14 it preserved?

15 MS. HOTH: Yes. Yes. I mean - - -

16 JUDGE SINGAS: Is the argument you're making
17 today preserved?

18 MS. HOTH: Yeah. The - - - counsel objected that
19 she was not on notice to the lesser-included offense. So I
20 don't see how that's not - - - how it's not preserved.

21 JUDGE TROUTMAN: Is the - - - is the - - -

22 JUDGE SINGAS: What I'm getting at is that it's -
23 - - are you objecting to the burglary in the second degree
24 in general? Are you objecting to the people lulled you
25 into some theory that it was a burglary with intent to

1 commit a sex crime therein? Because the people don't have
2 to give a crime, right? Under burglary 2, the People - - -

3 MS. HOTH: Correct.

4 JUDGE SINGAS: - - - can just say you commit a
5 burglary with the intent to commit a crime therein, full
6 stop. Or the people can say, we intend to charge you with
7 a burglary in the second degree with intent to commit a
8 crime therein, i.e. a crime according to article 130 or
9 sexual crime, correct?

10 MS. HOTH: Correct.

11 JUDGE SINGAS: So those are two different
12 avenues.

13 MS. HOTH: Um-hum.

14 JUDGE SINGAS: So what are you objecting to here?

15 MS. HOTH: The people proceeded on the theory - -
16 - they charged him with Burg 2 s a sexually motivated
17 offense.

18 JUDGE SINGAS: That's a different crime, though.

19 MS. HOTH: A different crime from what, Your
20 Honor?

21 JUDGE SINGAS: From regular burglary. We have
22 burglary - - -

23 MS. HOTH: Sure.

24 JUDGE SINGAS: - - - as a sexually motivated
25 felony. That's one crime.

1 MS. HOTH: Right.

2 JUDGE SINGAS: And then there's the underlying
3 lesser included of burglary in the second degree, true?

4 MS. HOTH: Right. But when asked when - - - when
5 seeking to introduce Molineux evidence, the district
6 attorney in response to the court - - - so you're saying
7 this video proves his intent to commit a sex crime? The DA
8 said yes.

9 JUDGE SINGAS: Okay. And why does - - - why
10 isn't that --I think you're conflating the evidence for
11 proof of sexual motivation, which was the Molineux
12 argument, with just the burglary below as the lesser
13 included. Like in other words, for example, I'm worried
14 about what this means if we rule in your favor for a hate
15 crime. Because let's say you have arson and we charge
16 arson as a hate crime if somebody sets fire to a house of
17 worship, right? Would you be arguing that the arson is
18 then limited in some way, only to show it was committed
19 because someone is antisemitic because they charge the
20 higher crime of arson as a as a hate crime. Do you
21 understand what I'm saying?

22 MS. HOTH: What I'd be arguing is that if the
23 district attorney, whatever the case, be it a hate crime or
24 be it a sexually motivated offense, if the district
25 attorney chooses not to either say, look, my theory is he

1 did this for sexual motivation, but I don't rule out that
2 he might not have. The district attorney here pursued.
3 One theory, made it clear that it was a sexually motivated
4 offense - - -

5 JUDGE TROUTMAN: When you say - - -

6 MS. HOTH: He was the one conflating - - -

7 JUDGE TROUTMAN: Counselor? So when you say made
8 it clear here, are you talking about actions and arguments
9 made in response to motions all the way through, up to and
10 including trial or just trial?

11 MS. HOTH: No, everything from the beginning up
12 to and including trial. And it was only after the people -
13 - - the witnesses for this particular crime, because there
14 was another one involved, had already testified and been
15 cross-examined for the first time the district attorney
16 said, now I want the lesser included. And defense counsel
17 said I had no notice of that. You have to look at what the
18 district attorney was saying in response to all of these
19 motions.

20 JUDGE SINGAS: Okay. Can we go back then to my
21 example - - -

22 MS. HOTH: Sure.

23 JUDGE SINGAS: - - - as the hate crime, because
24 if they charged it as arson, as a hate crime, no other
25 charge.

1 MS. HOTH: Right.

2 JUDGE SINGAS: And they present evidence and
3 they're presenting evidence that this person engaged in
4 other anti-religious, antisemitic acts as proof of the
5 motivation of the hate crime and then say we want the
6 lesser included of arson.

7 MS. HOTH: But I don't - - -

8 JUDGE SINGAS: Are you saying that - - -

9 MS. HOTH: I don't - - -

10 JUDGE SINGAS: - - - it was limited then? Is
11 that arson somehow limited? And they're - - - they're - -
12 - they don't get that charge?

13 MS. HOTH: No, Your Honor. I think the analogy
14 fails because burglary is such an outlier. Burglary
15 requires intent to commit a crime, and the people are not
16 required as they would be in your hypothetical, to prove a
17 specific crime. The district attorney here did not have to
18 say he entered with the intent to commit larceny or sex
19 abuse or robbery or anything. He didn't have to. He had
20 to say he intended to enter the private part of the
21 dormitory with the intent to commit a crime and whatever
22 crime he intended to commit, he was doing it in whole or
23 part for his sexual gratification. Unfortunately, here,
24 the district attorney repeatedly referred to what he
25 intended to prove as, he entered with the intent to commit

1 a sexually motivated offense.

2 JUDGE TROUTMAN: So you're not suggesting that
3 the prosecutor in all instances would be foreclosed for
4 getting the lesser? It's just because of how this case was
5 prosecuted that that limitation applies here?

6 MS. HOTH: Exactly, Your Honor. All he had to
7 say was open, I intend to prove he intended to commit a
8 crime and the purpose of that crime was for sexual
9 gratification.

10 JUDGE SINGAS: Yeah, but - - - but couldn't - - -
11 wouldn't a jury be free to reject the notion that he
12 committed a crime for sexually motivated purposes, even - -
13 - even on a sex crime? Couldn't a jury say we don't think
14 that he committed that sex crime when he entered the
15 dormitory for his own sexual gratification? We think he
16 did it to intimidate women, to assert his power and
17 control. Is a jury free to do that?

18 MS. HOTH: I don't see why not, but that - - -
19 the issue here is that under - - - because of burglary and
20 again, it's an outlier, Barnes says they don't have to tell
21 anybody what crime he intended to commit, but if they do,
22 they have to be held to it. So the question here and what
23 the Appellate Division found was the way the prosecutor
24 went through this case, step by step, he never once
25 separated out the crime from the sexual motivation.

1 JUDGE RIVERA: So does the prosecutor then have
2 to expressly state that they are preserving the opportunity
3 to just argue a crime? So they have to say something
4 expressly under your rule or how you - - - how you would
5 say we should resolve this case moving forward.

6 MS. HOTH: Moving forward, I think the rule is
7 quite simple and it flows directly from Barnes. If they
8 limit their theory of the case, then they must be held to
9 that theory. Again, the - - -

10 JUDGE RIVERA: Well, that's an easy one if they
11 expressly say, I'm limiting my theory of the case to X, Y,
12 and Z. So my question is, if that's not what they want to
13 do, do they have to say expressly I am not limiting my
14 case?

15 MS. HOTH: Well, that's one way to do it.
16 Another way is to simply describe this crime exactly as
17 it's written. I intend to prove to the jury that he
18 intended to commit a crime and that crime was sexually
19 motivated.

20 JUDGE CANNATARO: So if the prosecutor has said
21 to his adversary or the court, at some point during these
22 proceedings, or even to the jury, the evidence is going to
23 show here that this defendant entered with the intent to
24 commit a sexual assault or possibly some other crime, we
25 wouldn't be here today; is that right?

1 MS. HOTH: Probably not. Because the question
2 here was whether the presentation of the case limited their
3 theory.

4 JUDGE CANNATARO: And you're talking about
5 exclusive reliance on one intent - - - on the intent to
6 commit one crime, i.e. a sexual assault?

7 MS. HOTH: And that is what the prosecutor
8 proceeded on the theory. And that's what the Appellate
9 Division found.

10 JUDGE CANNATARO: So let me just ask you this
11 next question. If the evidence shows something else, and I
12 think the evidence must have shown something else because
13 the jury did convict of burglary, but not a sexually
14 motivated. So they must have found that he entered with
15 intent to commit some other crime, and the prosecutor
16 simply doesn't mention it, is that not sufficient for the
17 jury to make the finding that it did, regarding intent?
18 For example, if - - - I don't know, if the jury watched
19 security footage and they saw the defendant go into the
20 dorm and assault a security guard when he got in there,
21 would the jury be within its rights to infer that Defendant
22 entered the building with the intent to commit an assault
23 and not a sexual assault, notwithstanding the fact that the
24 attorney didn't argue it?

25 MS. HOTH: Well, I would disagree for two

1 reasons. One, he entered the building. We don't - - -
2 where from there do we derive he intended - - - entered
3 with the intent? And - - -

4 JUDGE CANNATARO: I'll tell you where I derive it
5 from. There was a hypothetical question before about
6 someone breaking into a home for a sexually motivated
7 purpose and then finding credit cards and taking the credit
8 cards. And the answer that I thought I heard is that if
9 you can show that they had the credit cards, that - - -
10 that that's legally sufficient evidence of intent to steal
11 the credit cards. So if and since the jury here did
12 convict of burglary, they must have found an intent to
13 commit some crime because they rejected the sexual theory,
14 but they still convicted. And I'm wondering whether it
15 really does key so much to what the advocate says as what
16 the evidence is in the case.

17 MS. HOTH: But the point is that defense counsel
18 was lulled into thinking she had to defend against burglary
19 as a sexually motivated offense. And then - - - that's
20 what he was charged with originally. But then throughout
21 the course of the proceedings, the trial assistant
22 repeatedly said, our theory is that I believe what he said
23 exactly was that the video was probative of his intent when
24 he enters the dorm. He entered unlawfully with the intent
25 to gratify his own sexual desire. When the court said, you

1 don't have a witness to a sex crime. So this video is your
2 only evidence that he entered to commit a sex crime. And
3 he said yes. And he opened on that theory. He never said,
4 no, he entered with the intent to commit a crime for
5 purposes of sexual gratification.

6 JUDGE GARCIA: But let's say if the prosecutor
7 had said in argument they get the lesser included, and they
8 say, we are going to show that he entered with the intent
9 to commit a sexual assault, and the primary purpose of that
10 assault was gratification. So that's this charge. But
11 even if it's not for the primary purpose of gratification,
12 it's a second-degree burglary because he intended to come
13 in and commit that sexual assault. Would that have been
14 okay?

15 MS. HOTH: When did they decide that even if it's
16 not, when are they first making that announcement, here
17 after all the evidence has been presented and defense
18 counsel - - -

19 JUDGE GARCIA: Yeah, what haven't you defended
20 against in that case? Because they're saying he intended
21 to go in and commit this sexual assault. And the primary
22 purpose of committing that sexual assault was
23 gratification. And when they get up in front of the jury,
24 they say that's all true. And that's our theory. And even
25 if you don't find the extra element of gratification, you

1 can convict under second degree burglary because he
2 intended to come into the dwelling and commit a sexual
3 assault. Would that be okay?

4 MS. HOTH: Probably, yes, because they're
5 limiting their theory to sexual assault.

6 JUDGE GARCIA: And what did they do here in
7 arguing to the jury that's inconsistent with that?

8 MS. HOTH: Well, it's not a question of what they
9 did in in arguing to the jury once the court granted their
10 request for the lesser included.

11 JUDGE GARCIA: But in mine it was. It's the same
12 hypothetical except - - - my hypothetical is same facts
13 here, except the argument to the jury is intended to commit
14 a sexual assault, but for sexual gratification. But even
15 if you don't find sexual gratification, you can find that's
16 a burglary.

17 MS. HOTH: Yeah, but the issue here is whether
18 they deprive defense counsel of notice - - -

19 JUDGE GARCIA: Right.

20 MS. HOTH: - - - that they, at some point, were
21 going to be seeking general burglary.

22 JUDGE GARCIA: So is the answer to my
23 hypothetical that's a violation under your theory or it's
24 not a violation? My hypothetical?

25 MS. HOTH: Well, your hypothetical doesn't seem

1 to be addressing when defense counsel is first finding out
2 - - -

3 JUDGE GARCIA: Same facts here.

4 MS. HOTH: - - - that she needs to defend against
5 both.

6 JUDGE GARCIA: Same facts here. Only difference
7 is the argument of the prosecutor is, sexually motivated
8 because they intended to commit a sexual assault. And if
9 you don't find the motivation, it's still burg 2.

10 MS. HOTH: And he's been saying that - - - he
11 only says that after the evidence?

12 JUDGE GARCIA: It's the same facts in this case,
13 except for my argument.

14 MS. HOTH: Right. So at the charge conference is
15 the first time he announces that if you don't believe in
16 this - - - because that's what happened here, it wasn't
17 until the charge conference that the district attorney
18 said, wait a minute. If I - - - if the jury doesn't find
19 it was sexually motivated, they should be allowed to
20 consider any regular burglary. It wasn't - - -

21 JUDGE GARCIA: The argument - - - would
22 everything that happened here happened exactly the way it
23 did, except the prosecutor's argument to the jury is what I
24 said?

25 MS. HOTH: I am not one hundred percent sure I'm

1 understanding, but I'm going to say that that's probably
2 improper. If defense counsel gets all the way to the
3 charge conference with the belief that she is defending
4 against a sexually motivated offense, the district attorney
5 sexual assault - - -

6 JUDGE GARCIA: Yeah, but wouldn't that apply to
7 any lesser included offense?

8 MS. HOTH: Because, again, I can only go back to
9 - - -

10 JUDGE GARCIA: No, no. I know what your burglary
11 argument is.

12 MS. HOTH: Right.

13 JUDGE GARCIA: But why does burglary matter in
14 that case because the prosecutor is locked into the crime
15 arguing the same crime? But you're just saying, but I was
16 only defending with the extra element in it, right? It's
17 not a surprise that you're arguing the burglary was
18 intended to commit a sexual assault. You're just saying I
19 was locked into the higher crime with the extra element.
20 But that's always true of a greater offense that includes a
21 lesser included. I was only defending against this because
22 it was a - - - this crime with an intentional racial
23 component. But I wasn't going to defend just the regular
24 crime. I thought you had to prove this racial component.
25 So when you got to the jury and you argue - - - ask for



1 this lesser included offense, why would I have to defend
2 that? I was lulled.

3 MS. HOTH: I disagree, Your Honor. I think that
4 the burglary, being the way it's written cannot be
5 analogized to other crimes, even hate crimes, because there
6 the defendant is charged with a specific crime as a hate
7 crime. He's not charged with intent to commit a crime with
8 for purpose of hate.

9 JUDGE GARCIA: Here the prosecutor locks into a
10 specific crime, locks in first-degree sexual assault.
11 That's what this defendant intended to commit in the
12 building, from opening to closing, always saying that and
13 gets the jury and says even if you find no motivation, you
14 still get burg 2. Why is that lulling the defense lawyer
15 in?

16 MS. HOTH: But I'm not saying that. If you have
17 a general case and if somebody is charged with murder,
18 defense counsel is on notice --

19 JUDGE GARCIA: But in this case - - -

20 MS. HOTH: - - - that they might end up seeking
21 manslaughter.

22 JUDGE GARCIA: - - - was is - - - what is the
23 unfair notice in my hypothetical, what didn't the defense
24 lawyer have notice of to defend in my hypothetical?

25 MS. HOTH: I'm not saying that he - - - which

1 one? The one you just said about?

2 JUDGE GARCIA: No, the one where I've argued - -
3 - the prosecutor has argued from opening to closing, that
4 the defendant intended to enter the dwelling to commit a
5 sexual assault, but it then asked for a lesser included and
6 then says, if you find that the primary motivation wasn't
7 in sexual gratification, you can still commit under
8 burglary 2.

9 MS. HOTH: So you're - - - so you're saying that
10 - - - yeah. Maybe then defense counsel is on notice if the
11 - - - if the prosecutor specifically saying he intended to
12 commit sexual assault, then they're limited to proving
13 sexual assault. But I'm going to - - - I'm going to allege
14 it was for the purpose of sexual gratification. I do
15 believe that defense counsel would be on notice that she's
16 going to have to defend against sexual assault.

17 JUDGE GARCIA: And what specifically did the
18 prosecutor argue here that was inconsistent with what you
19 call a sex crime?

20 MS. HOTH: Well, I don't think he argued anything
21 that was inconsistent, but under the People's theory, what
22 he could have - - - because he only - - - they only had a
23 show intent to commit a crime, now the defense has to
24 charge against everything.

25 JUDGE GARCIA: Did they argue to the jury that it

1 could be some other crime, a nonsex crime?

2 MS. HOTH: No, I don't believe that even after
3 getting the lesser included, I believe the district
4 attorney's summation really stuck to his theory that he
5 entered with the intent to commit a sexually motivated
6 offense.

7 JUDGE HALLIGAN: But - - - but Counsel, thank
8 you. That - - - that's where I think I'm confused. And I
9 think I'm following up on the exchange you had with Judge
10 Singas. So I'm looking at page 37 and 44 of the record,
11 which is the opening statement. And it looks to me like
12 the prosecutor says, and I think this is part of what
13 you're referring to, that the defendant entered the private
14 area of the dorm to grab, grope, and harass the young women
15 who live there.

16 Now, I thought I heard you say in response to my
17 question that you were not arguing that that passage, and
18 there's a similar line on page 44, and you referred us to
19 one in 537, that - - - that your complaint was not that the
20 people limited themselves to specifically what crime would
21 be committed within the building, that it would be
22 harassment or forcible touching or whatever it was, but
23 instead committed themselves to charging the burglary with
24 the additional element of the sexual motivation. So do I
25 have that right that the objection is only the additional

1 element of sexual motivation, that that's the lulling
2 you're objecting to?

3 MS. HOTH: Correct.

4 JUDGE HALLIGAN: Okay. And so what in that
5 exchange suggests that the prosecution is foreclosing,
6 seeking the lesser charge of just the burg 2?

7 MS. HOTH: Well, you're taking the opening
8 statement in isolation and as the Appellate Division found
9 - - -

10 JUDGE HALLIGAN: Well, the - - - yeah.

11 MS. HOTH: - - - it's not - - -

12 JUDGE HALLIGAN: I just want to make sure I have
13 the record pages. You have 537. You have 37 and 44. Is
14 there anything else you would have us look at?

15 MS. HOTH: Well, certainly you have to go back to
16 pre-trial just a day or two before the trial started, when
17 the people were seeking to introduce the video from Mr.
18 Seignious' behavior outside. And in response to that, they
19 - - - they announced that the touching of a sexual nature
20 was extremely probative of his intent when he enters the
21 dorm. They then asserted that he crossed the boundary. He
22 committed a sexually motivated burglary. He entered
23 unlawfully with the intent to gratify his own sexual
24 desire. And that is the substance of the burglary charge.

25 When the court said, oh, that video is your only

1 evidence of a burglary, you don't have a witness to a sex
2 crime, so his entry into the building was for the purpose
3 of committing a sex crime. The district attorney said,
4 yes.

5 JUDGE HALLIGAN: And I think that's at 537 of the
6 appendix. So it's there. And the pages of the opening
7 statement. Is there anything else you would direct our
8 attention to? I'm not suggesting it's not sufficient. I
9 just want to make sure I know where all of it is.

10 MS. HOTH: Well, we also refer to the district
11 attorney's representation in response to the motion to
12 sever counts.

13 JUDGE HALLIGAN: Okay. Thank you.

14 MS. HOTH: Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 JUDGE RIVERA: So I'm sorry. I don't know that
17 you can answer this. So let's say we agree with your
18 adversary.

19 MS. HOTH: Um-hum.

20 JUDGE RIVERA: How would that change trial
21 counsel's strategy. Would they then always have to assume
22 the possibility of the lesser included being charged to the
23 jury?

24 MS. HOTH: Yes. I do believe that's actually
25 what my adversary's position is that by being charged with

1 a greater crime, you should always assume that you're going
2 to have to defend against the lesser included. And that
3 might probably is the rule. And I think in general that's
4 true. I think defense counsels are aware that - - - of
5 that. Again, burglary is something of an outlier because
6 of that specific intent to commit a crime which need not be
7 defined. And the question is - - - and there's no question
8 if it is limited, then they have to be held to it.

9 JUDGE RIVERA: No, no, I get that. I understand
10 your point about the peculiarity. Let's put it that way.

11 MS. HOTH: Right.

12 JUDGE RIVERA: Of the burglary, the lesser
13 included burglary, which is why I asked before if I can
14 come back to my other question. It seems to me if we - - -
15 if we were not persuaded by his argument, we're more
16 persuaded by what you are advocating that the prosecutor
17 would have to go about the business of making express so
18 not to fall into this quagmire, making express that they
19 are not limiting their theory.

20 MS. HOTH: That's one way to do it or - - -

21 JUDGE RIVERA: Can they just say that? I just
22 want to make clear I'm not limiting my theory.

23 MS. HOTH: Yeah.

24 JUDGE RIVERA: And move on.

25 MS. HOTH: Um-hum.

1 JUDGE RIVERA: Okay.

2 MS. HOTH: They could do it the other way too,
3 and just refer to it as it's written. He intended to
4 commit a crime for sexual gratification. There's many
5 ways. It's not hard for them to not limit their case. And
6 this - - - it's really - - -

7 JUDGE RIVERA: If they intended to commit a crime
8 for purposes of sexual - - - for sexual gratification. You
9 say that preserves their position on the lesser included?
10 Am I understanding you right?

11 MS. HOTH: Um-hum. Probably.

12 JUDGE RIVERA: Okay.

13 JUDGE SINGAS: But isn't it not - - - it's hard
14 not to limit your case when the top count is burglary as a
15 sexually motivated felony. And I think you're saying all
16 the evidence that's elicited on the top count, you are now
17 using to confine on the lesser included, that's where my
18 issue is.

19 MS. HOTH: But I think that if we look at it as
20 respect to any crime, the district attorney's always going
21 to put their focus on the top count. And nobody's here
22 saying that by focusing on the top count, defense counsel
23 isn't aware that they need to be defending against possible
24 lesser includeds because - - - so the question is in
25 pursuing the top count, did they go too far here?

1 JUDGE SINGAS: Okay. Okay.

2 JUDGE RIVERA: Why - - - why - - - I'm sorry.

3 One last -- I forgot to ask about this before. When we - -
4 - going down this road about whether or not this is a
5 factual determination, are you in agreement that that
6 decision that indeed they limited their theory, you agree
7 that that is not a factual determination? That was his
8 argument.

9 MS. HOTH: No. I believe my - - - our position
10 was that the Appellate Division's decision was a mixed
11 question of law and fact, and that the Appellate Division
12 did interpret comments by the district attorney to come to
13 a conclusion and then also look to the lower - - - also
14 found that the defense attorney's representation, that she
15 had never been given notice of this. There were no prior
16 colloquy about this, which the DA was saying had happened,
17 that she was more credible and she was surprised by this.
18 All of that resulted to a mixed question of law and fact.
19 And this decision is not on the law alone.

20 JUDGE RIVERA: No. You have your pending motion.
21 Thank you.

22 MS. HOTH: Thank you.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. GUENTHNER: Just a few brief points. Counsel
25 said something about the - - - the mere focus on the

1 greater offense would somehow be okay, but that's exactly
2 what the Appellate Division said was not okay. That merely
3 by arguing for the greater offense, we are now disavowing
4 or renouncing the possibility of a lesser included offense.
5 And the reason that that's - - - that the focus is not
6 enough is because the greater offense - - -

7 JUDGE RIVERA: Well, I thought she was really
8 arguing something else. I didn't - - - I may have misheard
9 her, so fair enough. I thought she wasn't just saying it's
10 the focus because of course you're trying to prove that
11 particular crime. So of course you're going to focus on
12 the crime in that sense, but it's that you're disavowing
13 anything else. That - - - that that's what the defense
14 attorney understood from the statements, the actions, the
15 conduct of the ADA. And that's kind of the difference.
16 Not - - - not that she's arguing now to us that you
17 couldn't have focused. Yes, you can focus. But somewhere
18 along the way, the peculiarities of this record, right, led
19 that trial counsel to believe that's all you're doing.
20 You're not going to be doing anything else.

21 MR. GUENTHNER: I think the case law suggests
22 that you need much more than that. Barnes requires an
23 express limitation. Rothman talks about, you know,
24 expressed disavowal by moving to dismiss the - - - the
25 lesser included offense. Roberts, the case we cite in our

1 brief talks about how if you have a factual theory of the
2 case at one instance and then it affirmatively disproves
3 the evidence - - -

4 JUDGE TROUTMAN: And what do you say with respect
5 to defense's argument that all the way through the
6 litigation of the case, the people did things that lulled
7 the defense into thinking that you were, in fact, limiting
8 the case with respect to the Molineux motions and other
9 things?

10 MR. GUENTHNER: I mean, much of the pre-trial
11 litigation was really, like, the severance motion. All
12 that is, is a recitation of the facts, the grand jury
13 testimony that they talk about in their brief. The
14 prosecutor asks open-ended questions, as any prosecutor
15 would at a grand jury presentation designed to elicit facts
16 about what happened at the crime. There's no limiting of
17 our theory of the case at that point.

18 JUDGE TROUTMAN: So your argument is this is no
19 different than in any other case. You prove the greater.
20 But just in case, always, there's the possibility that the
21 lesser would be requested?

22 MR. GUENTHNER: Yes. As long as the - - - as
23 long as the theory of the lesser is consistent throughout.
24 And there isn't some retraction of that notice at some
25 point that is initially laid out in the indictment or - - -

1 or - - - or in other supporting documents, then yes, this
2 is no - - - no different than any other lesser-included
3 offense. Because the motivation element attaches to the
4 burglary, it does not attach to the intended crime that is
5 part of the burglary.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. GUENTHNER: Thank you.

8 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jayquaine Seignious, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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