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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 118

LIONEL MCCRAY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 08, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 118, People v.  
2 McCray?

3 Counselor, you want some rebuttal time?

4 MR. BAKER: Please. Two minutes, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go  
7 ahead, counselor.

8 MR. BAKER: May it please the court, my  
9 name is Mark Baker. I'm here on behalf of the  
10 Cardozo Appeals Clinic, for - - -

11 CHIEF JUDGE LIPPMAN: Counsel, when you  
12 have a hotel in this building, what's the  
13 significance of that in terms of the business  
14 underneath?

15 MR. BAKER: I think - - -

16 CHIEF JUDGE LIPPMAN: I mean, is it hard to  
17 distinguish between the dwelling and the business  
18 going on underneath?

19 MR. BAKER: Well, I think we have - - -

20 CHIEF JUDGE LIPPMAN: Especially when you  
21 have interior stairwells going through?

22 MR. BAKER: You have to go back to what I  
23 submit is the discussion in Quinn about this. We  
24 obviously have a statute C.P.L. 140.00(2) which the  
25 district attorney's whole position is premised on as

1 was the Appellate Division.

2 I submit, if we go to the legislative  
3 history of that - - - and then I'll get right to your  
4 question about the - - -

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. BAKER: - - - the legislative history  
7 on page 50 of our brief, from the Legislative Annual,  
8 indicates that statute had a purpose of precluding  
9 someone from going into Apartment A just to get to  
10 Apartment B, without being prosecutable for Apartment  
11 A.

12 JUDGE SMITH: If I understand what you're  
13 saying, you - - - you acknowledge that if you read  
14 the statute literally, it reads on this sort of  
15 thing?

16 MR. BAKER: No, what I'm acknowledging is  
17 that the purpose of that statute is to allow a  
18 prosecution for both A and B - - -

19 JUDGE SMITH: Okay, okay. But is the - - -  
20 yeah. I mean, that's an argument against a literal  
21 reading?

22 MR. BAKER: Yes. No - - - wait a - - -

23 JUDGE SMITH: You won't - - -

24 MR. BAKER: - - - I have to - - -

25 JUDGE SMITH: - - - you won't admit that

1           it's a literal reading.

2                       MR. BAKER:   - - - I'm not going to admit  
3           that, Your Honor.

4                       JUDGE SMITH:   Okay.

5                       MR. BAKER:   Because - - - the fact of the  
6           matter is, if the statute talked about degrees of  
7           crimes, then the district attorney would be on much  
8           stronger ground.  But that's not what the statute  
9           discusses.  It just makes the offense prosecutable.

10                      The first area of that building could be a  
11           nondwelling.  The second part could be a dwelling.

12                      JUDGE SMITH:   Well, dwelling - - - dwelling  
13           means a building - - - let's try it literally.  
14           Dwelling means a building which is usually occupied  
15           by a person lodging therein at night.

16                      MR. BAKER:   That's subdivision 3 - - -

17                      JUDGE SMITH:   That - - - this building  
18           meets that description, right?

19                      MR. BAKER:   - - - that's subdivision 3.

20                      JUDGE SMITH:   Right.  And - - - and so far,  
21           this building is a dwelling?

22                      MR. BAKER:   Yes.  In a part of this  
23           building.

24                      JUDGE SMITH:   Right.  And - - - and where a  
25           building consists of two or more units separately

1           secured or occupied - - - still describes this  
2           building - - -

3                         MR. BAKER: Right.

4                         JUDGE SMITH: - - - right - - - then the -  
5           - - such units shall be deemed both a separate  
6           building and a part of the main building.

7                         MR. BAKER: Right. That's - - -

8                         JUDGE SMITH: So when he's in - - - so when  
9           he's in Madame Tussauds, he's in a part of the main  
10          building which is a dwelling.

11                        MR. BAKER: That's correct.

12                        JUDGE SMITH: So - - - okay. So why  
13          doesn't it - - - why isn't this literally burglary,  
14          under the statute?

15                        MR. BAKER: Because we are looking at - - -  
16          according to the district attorney, if - - - if  
17          there's an office building across the street from my  
18          office building - - - actually, it's not - - - I'm  
19          sorry, it's not an office building. It's a building  
20          where all along the street are commercial outlets,  
21          and on top, there's a penthouse where somebody lives.

22                        If I go in to the bodega on the bottom and  
23          steal a bagel, according to the district attorney's  
24          theory, that's burglary II.

25                        JUDGE SMITH: I understand the common sense

1 of what you're saying - - -

2 MR. BAKER: But - - -

3 JUDGE SMITH: - - - but you haven't said a  
4 word about the literal language of the statute yet.

5 MR. BAKER: No, I'm saying that if I went  
6 into the first store to get to the second store, and  
7 my intent was to rob in the second store only, then  
8 I'm still prosecutable, because of that statute, but  
9 not necessarily for whatever degree - - -

10 JUDGE READ: But you're - - - you're saying  
11 we shouldn't read the statute literally? We have - -  
12 -

13 JUDGE SMITH: That's what I think you're  
14 saying.

15 JUDGE READ: - - - to - - - because you're  
16 saying that there's a purpose that - - - that  
17 animates the statute, and we - - - we have to read  
18 the statute with that in mind.

19 MR. BAKER: I - - -

20 JUDGE READ: Right?

21 MR. BAKER: - - - respectfully disagree.

22 The literal reading of this statute requires burglary  
23 II as to both counts.

24 JUDGE READ: You do? Okay. I guess you  
25 disagree with Judge Smith and me on that.

1                   Okay. Okay.

2                   MR. BAKER: What I am saying is - - -

3                   JUDGE READ: What's wrong - - - what's - -  
4 - what's wrong with that interpretation of the  
5 statute?

6                   MR. BAKER: Because it's - - - it puts an  
7 extraordinary onus on someone who never intended to  
8 interfere with someone's dwelling, who was - - -

9                   JUDGE GRAFFEO: Well, wasn't the locker  
10 room here part of the hotel? I mean, the hotel  
11 employees used the locker room. It's an integral  
12 part of the hotel.

13                   MR. BAKER: You're - - - you're talking  
14 about Count I. And you know something, Judge, I'm  
15 willing to say - - -

16                   JUDGE GRAFFEO: No, I'm talking about the -  
17 - -

18                   MR. BAKER: Yes?

19                   JUDGE GRAFFEO: - - - fact that he was, for  
20 some of the time, in the locker room, and then went  
21 into the museum.

22                   MR. BAKER: No, what happened was, there's  
23 stairway E. According to the record, apparently the  
24 defendant came down stairway E, which goes right to  
25 the bottom, but is unique to the Hilton. And he

1           went, apparently, from stairway E down to the  
2           fourteenth floor, took another stairway up to the  
3           men's locker room, which was sealed off from the rest  
4           of the hotel. And then the last thing that he's seen  
5           doing after that, he goes across, down - - - back  
6           down the small stairway, across the conference level  
7           of the Hilton, down stairway D.

8                         CHIEF JUDGE LIPPMAN: But stay with the  
9           first part - - -

10                        JUDGE GRAFFEO: But - - -

11                        CHIEF JUDGE LIPPMAN: - - - that he's in  
12           the hotel.

13                        MR. BAKER: That's correct.

14                        JUDGE GRAFFEO: He's in the hotel. He's on  
15           hotel premises.

16                        MR. BAKER: He's in the men's locker room.  
17           I will concede to you - - -

18                        JUDGE GRAFFEO: He's using stair - - - he's  
19           using staircases, hallways and locker room - - -

20                        MR. BAKER: Correct.

21                        JUDGE GRAFFEO: - - - that's part of the  
22           hotel.

23                        MR. BAKER: I will concede to you - - -

24                        JUDGE GRAFFEO: Which is clearly - - -

25                        MR. BAKER: - - - I don't - - -

1                   JUDGE GRAFFEO: - - - a dwelling. You're  
2 not going to disagree with that, correct?

3                   MR. BAKER: I think Count I is precarious  
4 from my standpoint. Okay? And I think I'm going to  
5 have - - - I will concede that I have a real problem  
6 with Count I.

7                   Count II is what I am concentrating on.  
8 Because if you look at the record - - -

9                   JUDGE GRAFFEO: But when he moves from the  
10 hotel to the museum - - -

11                   MR. BAKER: Yes, but here's - - -

12                   JUDGE GRAFFEO: - - - doesn't this statute  
13 - - - the language of the statute still say that it's  
14 - - - you know, it's separate from but it's part of -  
15 - -

16                   MR. BAKER: That only makes - - -

17                   JUDGE GRAFFEO: - - - because of the risk  
18 once you have somebody who's broken into the  
19 building, there's a greater risk there.

20                   MR. BAKER: The statute - - - the  
21 legislative history of that statute reads as follows.

22                   JUDGE GRAFFEO: I understand that they used  
23 apartments - - -

24                   MR. BAKER: Yes.

25                   JUDGE GRAFFEO: - - - as an example. Is

1 that the exclusive reason - - -

2 MR. BAKER: No, it's not the - - -

3 JUDGE GRAFFEO: - - - they passed this  
4 language?

5 MR. BAKER: - - - exclusive, but - - - but  
6 I'm trying to find some - - - as Judge Pigott would  
7 say - - - common sense to a situation that is  
8 probably going to replicate itself manyfold, and has,  
9 in New York, in - - -

10 JUDGE RIVERA: What - - - what it really  
11 sounds like is you have a disagreement with the  
12 legislature. The legislature has decided that they  
13 want to cover your client and your client's conduct.  
14 You may think it's nonsensical. You may think it's  
15 inappropriate. You may think it's - - - you know,  
16 the prosecutor over-charges. But that's your  
17 disagreement. But not with - - - as Judge Smith and  
18 the other members of the bench have said - - - not  
19 with the literal - - - the language of the statute.

20 MR. BAKER: I don't think - - - and this is  
21 where I have to respectfully disagree. I don't think  
22 I'm taking issue with the legislature. What I am  
23 taking issue is, there's inherent ambiguity. I'll  
24 concede that. Because if you look at - - -

25 JUDGE RIVERA: Ah, okay. Where is the



1 example, you said there - - - there was a - - - like  
2 a bodega in the bottom of the building and people  
3 live above. Maybe in the penthouse.

4 MR. BAKER: All the way up on top, thirty  
5 floors up.

6 JUDGE READ: Okay. So you're saying it's -  
7 - - if somebody breaks into the bodega, then that  
8 doesn't qualify - - - that it's illogical, not what  
9 the statute's entitle - - - was intending to cover?

10 MR. BAKER: I'm - - - it's very logical.  
11 The statute allows me to be prosecuted for a  
12 burglary. I'm only arguing what level burglary.

13 JUDGE READ: Right. Okay.

14 MR. BAKER: May I - - - may I just read you  
15 from Quinn? Because the statute in Quinn is really  
16 not much different than the present - - -

17 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

18 MR. BAKER: - - - incarnation. "The rule  
19 is that a part of the dwelling house may be so  
20 severed from the rest of it, being let to a tenant,"  
21 and that's what we're talking about.

22 In Quinn and all the cases, you've had  
23 common owners - - - common owners where especially in  
24 Quinn, the facts in that case, the common owners  
25 lived upstairs and also ran the business downstairs.



1 MR. BAKER: Because nearness is a very  
2 relative term.

3 JUDGE SMITH: What's - - - what is the  
4 record on how close he came to any bedroom?

5 MR. BAKER: Excellent question. Because if  
6 you look at the record with regard to elevator D, the  
7 fact of the matter is that the record is very clear -  
8 - - and this is interesting, because it was the  
9 district attorney who solicited it, because the  
10 defense's theory at trial was this whole area's open  
11 to the public. In order to defeat that, the DA  
12 started to bring out how once you go into the  
13 stairway you can't get back into - - - into any  
14 establishment.

15 JUDGE SMITH: Okay, so you're saying there  
16 was a locked door between him and - - -

17 MR. BAKER: There was a locked door, and he  
18 couldn't get into - - -

19 JUDGE SMITH: How close - - -

20 MR. BAKER: - - - any - - -

21 JUDGE SMITH: - - - apart from that, how  
22 close did he get, locked or unlocked?

23 MR. BAKER: He didn't get close to the  
24 hotel, other than scurrying across the conference  
25 room - - -

1 CHIEF JUDGE LIPPMAN: What's not close?

2 JUDGE SMITH: He went - - - he went through  
3 the conference room floor.

4 MR. BAKER: He went to the conference room  
5 to get to elevator - - -

6 JUDGE SMITH: Is there any - - -

7 MR. BAKER: - - - to stairway D.

8 JUDGE SMITH: - - - is there any - - - is  
9 there any record as to where the nearest bedrooms  
10 were to that conference room?

11 MR. BAKER: No. The record is unclear.

12 JUDGE GRAFFEO: How far was the locker  
13 room?

14 MR. BAKER: The locker room is a contained  
15 area which is the only place - - -

16 CHIEF JUDGE LIPPMAN: What's on the next  
17 floor up?

18 MR. BAKER: We don't know. The record - -  
19 - I as - - - we don't know. The locker - - - the  
20 locker - - -

21 JUDGE GRAFFEO: But his presence - - -

22 MR. BAKER: - - - room - - -

23 JUDGE GRAFFEO: - - - at least his presence  
24 in the locker room caused enough concern for the  
25 employee to walk down to the - - -

1 MR. BAKER: Well, they saw him on the video

2 - - -

3 JUDGE GRAFFEO: - - - locker room.

4 MR. BAKER: - - - and - - - yeah. They saw

5 him on the video and somebody confronted him, and

6 that's when he scurried over down - - - across to

7 stairway D. But the point of it is - - -

8 JUDGE READ: Mr. Baker - - -

9 JUDGE RIVERA: But you're not really

10 arguing that the statute turns on - - - on how many

11 feet away the beds are?

12 MR. BAKER: I'm - - -

13 JUDGE RIVERA: Is that what you're arguing?

14 MR. BAKER: No, what I'm saying is if we

15 look at Quinn, A) all of these commercial

16 establishments are separate tenants. They're not

17 common. That's number one.

18 JUDGE ABDUS-SALAAM: But they're under - -

19 - but they're under the same roof?

20 MR. BAKER: They're under the same roof.

21 JUDGE ABDUS-SALAAM: The same roof. And -

22 - -

23 MR. BAKER: And they're separate tenants.

24 JUDGE ABDUS-SALAAM: And going back to what

25 you said about the stairwells, apparently some of



1 CHIEF JUDGE LIPPMAN: Say one thing,  
2 counselor. Go ahead.

3 MR. BAKER: - - - about the - - - this is  
4 about the consecutive sentencing.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead, very  
6 quickly.

7 MR. BAKER: Okay. This case is - - - was  
8 pleaded in such a way that the sentences cannot be  
9 consecutive. If you look at Count I and Count II,  
10 all they say is in Count I October 6th, 234 West 42nd  
11 Street, Count II October 7th, 234 West 42nd Street.  
12 They don't say which establishment he's in.

13 Theoretically, according to this theory, if  
14 I go into this building at 11:59 and I stay till 12  
15 o'clock, they can tack on another fifteen years.  
16 That can't be the rule, because quite frankly, if I  
17 were defense counsel during the trial proceedings, I  
18 would have moved to dismiss for multiplicity.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. BAKER: They should have said first  
21 count, or count - - -

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 MR. BAKER: - - - second - - -

24 CHIEF JUDGE LIPPMAN: You could - - -

25 MR. BAKER: - - - count, a new

1 establishment.

2 CHIEF JUDGE LIPPMAN: You can follow up - -

3 -

4 MR. BAKER: And then the statute applies.

5 CHIEF JUDGE LIPPMAN: You can follow up on  
6 this in your rebuttal.

7 MR. BAKER: Thank you.

8 CHIEF JUDGE LIPPMAN: Okay, go ahead.

9 Counselor?

10 MS. FELDMAN: May it please the court, my  
11 name is Sheryl Feldman. I'm here on behalf of the  
12 People.

13 CHIEF JUDGE LIPPMAN: Counselor, how close  
14 was this guy to the - - - to the - - - the defendant  
15 to - - - to people who were sleeping in their hotel  
16 room?

17 MS. FELDMAN: Your Honor, the record is - -  
18 - there is no record about that.

19 CHIEF JUDGE LIPPMAN: Does it matter how  
20 close he was?

21 MS. FELDMAN: Well, what matters is the  
22 reason why there's no record. Because below, counsel  
23 made - - - the defendant made the opposite argument  
24 that he's making here now. That's why there's no  
25 record about this.

1 JUDGE SMITH: Well, okay. But apart from  
2 the preservation point, though, what's the answer to  
3 the question? Does it matter how close he came?

4 MS. FELDMAN: No, it doesn't matter at all.  
5 It matters - - -

6 JUDGE SMITH: So if - - - you say that if  
7 the Empire State Building is an office building,  
8 except for one guy who lives on floor 83, and I break  
9 into the - - - to the ground floor, that's burglary  
10 of a dwelling?

11 MS. FELDMAN: That's absolutely right.  
12 Technically that's burglary of a dwelling. And it's  
13 exactly what the court has pointed out.

14 JUDGE PIGOTT: Building and dwelling is the  
15 same. We don't really need to - - -

16 MS. FELDMAN: Absolutely.

17 JUDGE PIGOTT: Then why do we have to - - -

18 MS. FELDMAN: According to - - -

19 JUDGE SMITH: And what - - - is there any -  
20 - - is there any case - - - I mean, has any case gone  
21 as far as this one on the - - - on the theory that  
22 you - - - you describe?

23 MS. FELDMAN: Well - - -

24 JUDGE SMITH: Is this - - - is this - - -  
25 is there any case in which the actual break-in was as

1 remote from the - - - the place where people live?

2 MS. FELDMAN: Well, I don't know that it's  
3 remote. We don't know that it's remote.

4 JUDGE SMITH: Okay.

5 MS. FELDMAN: Because he was on the  
6 sixteenth floor of the hotel. You have to under - -  
7 - in the build - - -

8 JUDGE SMITH: What's - - - what is the case  
9 that comes closest to this?

10 MS. FELDMAN: Okay. Well, in Quattlebaum,  
11 this court cited two cases, Rohena and Johnson. One  
12 of them was a music shop on the bottom of an  
13 apartment building. The other one was a doctor's  
14 office on the bottom of an apartment building.

15 And in Quattlebaum, they used that as an  
16 example of being under the same roof and the same  
17 four walls, and therefore it was a dwelling.

18 JUDGE RIVERA: But isn't that quite  
19 different from Times Square and basically stacked  
20 commercial enterprises? Isn't that quite different  
21 from a dwelling that has on the first floor, a  
22 business?

23 MS. FELDMAN: Your Honor, the law as it  
24 reads, as this court has pointed out, a literal  
25 reading of the statute - - -

1 JUDGE SMITH: Do we have to read it  
2 literally?

3 MS. FELDMAN: Well, there's no reason not  
4 to read it literally.

5 JUDGE SMITH: Well, what about - - - what  
6 about the - - - I'll suggest a reason. It's silly to  
7 convict someone for burglary of a dwelling when he  
8 was - - - when he's eighty-three miles away - - - or  
9 eighty-three floors away from the nearest residence.

10 MS. FELDMAN: Well, Your Honor, this  
11 defendant was not eighty-three miles - - - floors - -  
12 -

13 JUDGE SMITH: Okay, but - - - but - - -

14 MS. FELDMAN: - - - away.

15 JUDGE SMITH: - - - your - - - on your  
16 reading of the statute, he could have been, and it  
17 wouldn't matter.

18 MS. FELDMAN: That's correct. Under a  
19 literal - - - literal - - -

20 JUDGE SMITH: And that - - - so I am  
21 suggesting that that is a reason not to read the  
22 statute literally.

23 Let me suggest to you also, that the  
24 statute at the time it existed back in Quinn, 150  
25 years ago, if you read that literally, the Astor

1 House exception, which they describe in Quinn, would  
2 not have existed.

3 MS. FELDMAN: That's exactly right. I - -  
4 - now?

5 JUDGE SMITH: So that - - - so were we  
6 wrong in Quinn to say there was an exception for the  
7 Astor House?

8 MS. FELDMAN: There was language in Quinn  
9 that doesn't exist about connection. That's what  
10 counsel's - - -

11 JUDGE SMITH: I understand. I understand.

12 MS. FELDMAN: - - - arguing is there - - -  
13 the argument has always been, if there was some kind  
14 of an internal connection, then there was absolutely  
15 no problem. That - - - that's what his argument was  
16 - - -

17 JUDGE PIGOTT: Why don't we just use - - -

18 MS. FELDMAN: - - - in the brief.

19 JUDGE PIGOTT: - - - I hate to bring it up,  
20 but common sense. I mean, no one is sleeping in  
21 Madame Tussauds Wax Museum. No one's in danger  
22 there. And that's - - - and he's doing - - -

23 MS. FELDMAN: Your Honor - - -

24 JUDGE PIGOTT: - - - whatever he's doing.

25 MS. FELDMAN: - - - but that's not the law,

1            though.

2                    JUDGE PIGOTT: Well, I understand - - -

3                    MS. FELDMAN: Whether they're sleeping in  
4            there.

5                    JUDGE PIGOTT: - - - that you're trying - -  
6            - you know, you're trying to charge somebody with a  
7            burglary of a building by saying it's a burglary of a  
8            dwelling so that you can get a bigger sentence and a  
9            longer term. But it's - - - it's just not there. I  
10           mean - - -

11                   MS. FELDMAN: You know - - -

12                    JUDGE PIGOTT: - - - what's - - - what's  
13            wrong with saying he broke into a - - - into Madame  
14            Tussauds. If Madame Tussauds had been a separate,  
15            free-standing structure, you wouldn't be saying that  
16            that's a dwelling.

17                    MS. FELDMAN: Well, if you want to look at  
18            Quinn, Your Honor, Quinn draws the exception - - -

19                    JUDGE PIGOTT: I understand.

20                    MS. FELDMAN: - - - only if there is no  
21            internal connection.

22                    JUDGE PIGOTT: And I understand that you  
23            can - - - you know, you can always take this one, and  
24            you know, and there's a whole string cite about, you  
25            know, doctor's office or massage parlor or house of

1 prostitution, you know, and each one is a different  
2 one.

3 But the - - - the idea is that you don't  
4 want to break into somebody's house. I mean, it's  
5 pretty - - - for all the reasons that have been  
6 written about so many times - - - unless somebody's  
7 breathing in Madame Tussauds, what's the point?

8 JUDGE READ: Yes.

9 MS. FELDMAN: The reasoning is, the - - -  
10 obviously the legislature did not want people  
11 breaking into buildings that contained dwellings.  
12 They wanted to punish them more seriously, if you  
13 break into a building that has dwellings.

14 JUDGE SMITH: Does - - - does the - - - is  
15 that - - - does the night terror that we talked about  
16 in Quinn have anything to do with that?

17 MS. FELDMAN: And it certainly would apply  
18 in this case. This defendant was using these  
19 stairwells to go from - - -

20 JUDGE SMITH: And - - - take Count II.

21 MS. FELDMAN: I am.

22 JUDGE SMITH: If you're a guest at the  
23 Hilton - - -

24 MS. FELDMAN: Yeah.

25 JUDGE SMITH: - - - is the - - - does the

1 break-in to Madame Tussauds really create the night  
2 terror?

3 MS. FELDMAN: From Madame Tussauds he could  
4 then make his way through stairway D, and he did - -  
5 - he did exactly this - - - in the opposite direction  
6 - - - up past the fourteenth floor, triggered the  
7 alarm, which he did, and - - - and go up where the  
8 rooms are and break into the - - -

9 JUDGE SMITH: Okay. And - - -

10 MS. FELDMAN: - - - to one of the doors  
11 where the - - - the rooms are that the people are  
12 housed.

13 JUDGE SMITH: - - - but your case, as I  
14 understand it, would be exactly the same. Your  
15 theory - - - you would - - - it would change nothing,  
16 if he had just broken into Madame Tussauds from the  
17 outside and never left it.

18 MS. FELDMAN: That's correct. Because - -  
19 -

20 JUDGE SMITH: You say - - -

21 MS. FELDMAN: - - - there's the - - -

22 JUDGE SMITH: - - - that's burglary of a  
23 dwelling?

24 MS. FELDMAN: Absolutely.

25 JUDGE PIGOTT: Aren't there subways under

1           some of these buildings? I mean do you charge him  
2           with burglary of a dwelling when they're holding  
3           somebody up in a subway?

4                    MS. FELDMAN: It's not under the same four  
5           walls and within the structure, a subway.

6                    JUDGE PIGOTT: So we can exclude - - -

7                    JUDGE READ: Under the same roof.

8                    JUDGE PIGOTT: - - - them?

9                    MS. FELDMAN: It's got to be the same roof,  
10          the same structure. The structure is the building.

11                   JUDGE PIGOTT: Doesn't the subway go  
12          underneath these things, some of these buildings?

13                   MS. FELDMAN: It's not part of the  
14          structure, Your Honor.

15                   JUDGE PIGOTT: The subway is not part of  
16          the structure?

17                   MS. FELDMAN: No.

18                   JUDGE PIGOTT: Oh, okay.

19                   JUDGE SMITH: I've been in - - -

20                   JUDGE GRAFFEO: If you didn't - - - if you  
21          didn't have the internal staircases, would this be a  
22          harder case for you to defend - - - for you to  
23          prosecute?

24                   MS. FELDMAN: If there were not the  
25          internal stairways, legally, it still would be the

1 burglary of the dwelling. Whether he would be  
2 charged with it, I don't know.

3 JUDGE GRAFFEO: But for the - - - for the  
4 purpose of - - - assuming that this night terror is  
5 one of the legislative purposes behind the statute,  
6 the internal staircases tend to support that premise?

7 MS. FELDMAN: Absolutely. And I'm sure  
8 that that's the reason why he was charged with  
9 burglary in the second degree.

10 JUDGE SMITH: So you're - - - what you're  
11 really saying is even if the - - - even if the  
12 internal staircases weren't there, it would make no  
13 difference. But that's okay, because we can trust  
14 prosecutorial restraint not to charge it?

15 MS. FELDMAN: Your Honor, I'm saying that  
16 you have to follow the literal reading of the  
17 statute, because that's what the legislature  
18 intended.

19 JUDGE SMITH: Do we have to follow - - - I  
20 mean, did the - - - did the court - - - did we follow  
21 the literal reading of the statute in Quinn?

22 MS. FELDMAN: In Quinn? No, you went - - -  
23 well, actually, you did, yeah.

24 JUDGE SMITH: Have we never - - - we never  
25 departed from the literal reading of the statute?

1 MS. FELDMAN: Well, Your Honor, you're - -  
2 - this court has written that it's not supposed to  
3 legislate under the guise of interpretation. And  
4 that's what you would be doing.

5 JUDGE SMITH: Okay. Does that - - - but  
6 does that really mean you have to be literal, or does  
7 it mean you try to figure out what the legislature  
8 actually meant?

9 MS. FELDMAN: Well, you can figure out what  
10 the legislature meant, because what the legislature  
11 gave as an example was somebody going into one unit  
12 with the intent to commit a crime in another unit.  
13 And they said, at that time, that person was not  
14 guilty of a burglary at all.

15 JUDGE SMITH: And they wanted to fix that.

16 MS. FELDMAN: And they wanted to fix that.  
17 Right?

18 So in this case, if the defendant went into  
19 Madame Tussauds and his defense was, I didn't intend  
20 to commit a crime in here, I intended to commit a  
21 crime - - - I tried to - - - I came in here only  
22 because I wanted to get to the rooms in the Hilton,  
23 then he would not be guilty of a burglary - - -

24 JUDGE SMITH: Under - - -

25 MS. FELDMAN: - - - burglary in the second

1 degree.

2 JUDGE SMITH: - - - under the pre-1967  
3 statute? Right?

4 MS. FELDMAN: If you decided differently,  
5 is what I'm saying.

6 JUDGE SMITH: I see. You're saying that  
7 there - - -

8 MS. FELDMAN: I'm saying - - -

9 JUDGE SMITH: I see. You're saying that  
10 because they - - - the legislature, because it fixed  
11 that problem in 1967, also, whether it knew it or  
12 not, made it a burglary to break into Madame  
13 Tussauds?

14 MS. FELDMAN: That's exactly right. That's  
15 exactly what they did. Because they made - - - the -  
16 - - the entire building took on the character of a  
17 dwelling that's in the building, and the dwelling  
18 took on the cha - - - and the - - - and the unit that  
19 he enters took on the character of the whole  
20 building.

21 JUDGE SMITH: And you don't see any common  
22 sense problem with that?

23 MS. FELDMAN: No, I don't. Not - - -  
24 because I think that sometimes you do have to rely on  
25 prosecutorial discretion, whether it's fair or

1           whether that's what the legislature intended.

2                   JUDGE SMITH:  Is this - - - is this case an  
3           outstanding example of prosecutorial restraint, to  
4           prosecute the - - - Count II, to prosecute for Madame  
5           Tussauds on the ground that he was in a dwelling?

6                   MS. FELDMAN:  Yeah, because this guy,  
7           that's how he was traveling around.  That's how he  
8           was traveling around, through those staircases.

9                   JUDGE ABDUS-SALAAM:  On that point, if  
10          there - - - if the staircases - - - of course they  
11          have to have internal staircases for fire purposes.  
12          But what if they were external?  Does it really  
13          matter whether it's internal staircases, as long as  
14          they're under the same roof?

15                  MS. FELDMAN:  Well, Quinn, if you - - - if  
16          you're going to look at the Quinn exception, which is  
17          what defense counsel is asking you to do, he's  
18          completely relying on the Quinn exception.  And the  
19          Quinn exception specifically says internal  
20          communication.  If there wasn't internal  
21          communication, then it may be a different situation.

22                  JUDGE SMITH:  It also says contiguous to  
23          where the owner sleeps.  You know, the - - - is that  
24          relevant?

25                  MS. FELDMAN:  Your Honor, I'm just - - - I

1 - - - in what context does it say that? You know,  
2 I'm not familiar with the exact words.

3 JUDGE SMITH: I'll find it for you.

4 MS. FELDMAN: Sure. Because the exception  
5 only applies to parts of a large hotel that had been  
6 rented to the different persons - - - so that's why  
7 the Hilton locker room doesn't even apply to the  
8 Quinn exception - - - for purposes of trade or  
9 commerce, and - - - and if no internal communications  
10 - - -

11 JUDGE SMITH: Well, here's - - - here's  
12 what I'm talking about. Indeed, the essence of the  
13 crime of burglary at common law, and burglary at  
14 common law is burglary of a dwelling, right?

15 MS. FELDMAN: Yeah.

16 JUDGE SMITH: The essence of the crime in  
17 burglary at common law is the midnight terror excited  
18 and the liability created by it of danger to human  
19 life, growing out of the attempt to defend property  
20 from depredation. It is plain that both of these may  
21 arise when the place entered is in close contiguity  
22 with the place of the owner's repose, though the  
23 former has no relation to the latter by reason of  
24 domestic use or adaptation.

25 Were we right or wrong?

1 MS. FELDMAN: But, I mean, close is a  
2 relative - - -

3 JUDGE SMITH: That's what I was talking  
4 about.

5 MS. FELDMAN: - - - term. That - - -

6 JUDGE SMITH: Which is - - - which is a  
7 relative term?

8 MS. FELDMAN: - - - they give - - - you  
9 have to look at the - - -

10 JUDGE SMITH: Which term is relative?

11 MS. FELDMAN: You have to look at the Astor  
12 exception applied. They - - - they - - - in - - -  
13 you have to look at why they wrote the Astor  
14 exception in the first place, because there was no  
15 internal communication between the store above - - -  
16 the store below the apartments in Quinn. You had to  
17 go outside and go in a different entrance in order to  
18 get in.

19 JUDGE SMITH: But the guy was still guilty.

20 MS. FELDMAN: And they said well, there may  
21 be a different rule if there's no internal  
22 communication. So these stairways made it very easy  
23 for this defendant to - - -

24 JUDGE SMITH: Wait, wait - - -

25 MS. FELDMAN: - - - travel from one to the

1 other.

2 JUDGE SMITH: - - - wait a minute. Under  
3 the facts of Quinn there were no internal  
4 communication, and we affirmed the conviction.

5 MS. FELDMAN: Correct.

6 JUDGE SMITH: So internal communication,  
7 obviously, isn't - - - it doesn't - - - isn't what  
8 the case turned on.

9 MS. FELDMAN: It's what the exception  
10 turned on, is what I'm saying. And he's relying on  
11 the exception.

12 I'm saying Quinn has absolutely - - - the  
13 Quinn dicta has absolutely no application here - - -

14 JUDGE RIVERA: Does it matter - - -

15 MS. FELDMAN: - - - whatsoever.

16 JUDGE RIVERA: - - - based on the statute?

17 MS. FELDMAN: No.

18 JUDGE RIVERA: It doesn't matter what we  
19 said - - - it's what we - - - it's the statute - - -

20 MS. FELDMAN: Exactly.

21 JUDGE RIVERA: - - - that's in front of us.

22 MS. FELDMAN: That's exactly right.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MS. FELDMAN: They would - - - that Quinn  
25 dicta would never be written today - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MS. FELDMAN: - - - because it doesn't have  
3 any application.

4 CHIEF JUDGE LIPPMAN: Thanks, counselor.

5 MS. FELDMAN: Thank you.

6 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

7 MR. BAKER: First of all, I don't think the  
8 statutes are that different. The one in Quinn talked  
9 about immediately connected, and the one presently  
10 talks about a part of the main building. So the  
11 question becomes, when Quinn talked about internal  
12 communication, what does that really mean? That  
13 means - - -

14 CHIEF JUDGE LIPPMAN: Well, what does it  
15 mean - - -

16 MR. BAKER: - - - accessible - - -

17 CHIEF JUDGE LIPPMAN: - - - in its normal  
18 sense?

19 MR. BAKER: - - - it means accessible. And  
20 if you read about - - -

21 CHIEF JUDGE LIPPMAN: So what about our  
22 case? Is it accessible?

23 MR. BAKER: No, that's my point. All the -  
24 - -

25 CHIEF JUDGE LIPPMAN: Why not?

1 MR. BAKER: Because all the references to  
2 stairway D: page 471, 477, 478, 490, 511, 570-71,  
3 all talk about not being able to get back in, because  
4 without a key - - - and the judge even - - -

5 JUDGE GRAFFEO: So if he's - - - if he  
6 started in Madame Tussauds, and then went upstairs to  
7 the hotel, this would be a different case?

8 MR. BAKER: He would have been - - - he  
9 wouldn't have been able to get in.

10 JUDGE GRAFFEO: This would be a different  
11 case, if he had gotten into the fourteenth floor? If  
12 the - - - if the sequence - - -

13 MR. BAKER: We wouldn't have Count I.

14 JUDGE GRAFFEO: - - - of what he was  
15 burglarizing was reversed?

16 MR. BAKER: Yeah, we wouldn't have had  
17 Count I, because he couldn't have gotten into the  
18 Hilton. And that's - - - that's the point here.  
19 It's not accessible.

20 JUDGE GRAFFEO: No, I'm saying, in another  
21 hypothetical - - -

22 MR. BAKER: Yes.

23 JUDGE GRAFFEO: - - - if somebody broke  
24 into Madame Tussauds and somehow managed, like he  
25 did, that there was a lock that was not operating

1           correctly, he was able to go up to the hotel, then  
2           that would fulfill the second count - - -

3                     MR. BAKER:   Yes.

4                     JUDGE GRAFFEO:  - - - because he's now in  
5           the hotel.

6                     MR. BAKER:   Yes.

7                     JUDGE GRAFFEO:  So it depends on the  
8           sequence of what floors - - -

9                     MR. BAKER:   It depends upon - - -

10                    JUDGE GRAFFEO:  - - - he goes up and down  
11           on the staircase?

12                    MR. BAKER:   - - - and what his - - - well,  
13           it depends upon what his intent is.

14                    JUDGE GRAFFEO:  That's not very logical, it  
15           is?

16                    MR. BAKER:   Well, it depends upon what his  
17           intent is and what he then does with that intent.

18                    His intent was to leave the Hilton and go  
19           to Madame Tussauds, apparently, at least that's our  
20           inference.  And once he got to Madame Tussauds, he  
21           can't get back to the hotel, because stairway D  
22           doesn't allow him.

23                    And it's very interesting - - -

24                    JUDGE GRAFFEO:  Maybe there's another  
25           broken lock?  He somehow managed to get - - -

1                   MR. BAKER: But there - - -- well, that's  
2                   in another record. And if there is a broken lock,  
3                   and he gets access, he's prosecutable.

4                   What's interesting here, is the defense  
5                   attorney was arguing, obviously differently than I  
6                   am, except for the one part where he preserved it,  
7                   that it's - - - there's no public access.

8                   And what the judge said to him at the end  
9                   of the case in that regard was, the proof shows that  
10                  those doors were locked and he can't get back in.  
11                  The judge even said that. And that's what the record  
12                  reflects.

13                  And so there is no internal communication,  
14                  just like Quinn suggests. And because all the cases  
15                  she relies upon talked about the same tenants in  
16                  owning the building, just like the facts in Quinn,  
17                  here, we had different tenants with different  
18                  interests and different securities and different  
19                  needs, and none of them have anything to do with the  
20                  Hilton.

21                  CHIEF JUDGE LIPPMAN: Okay, counselor.

22                  MR. BAKER: Thank you.

23                  CHIEF JUDGE LIPPMAN: Thank you both.

24                  (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lionel McCray, No. 118 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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