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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 3

SHAWN J. SIVERTSON (REARGUMENT),

Appellant.

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20 Eagle Street  
Albany, New York  
March 22, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good afternoon,  
2 everyone.

3 The first matter on this afternoon's calendar is  
4 appeal number 3, people of the State of New York v. Shawn  
5 Sivertson.

6 Counsel.

7 MR. MURPHY: Good morning, Your Honors, or good  
8 afternoon, I should say.

9 CHIEF JUDGE DIFIORE: Good afternoon.

10 MR. MURPHY: May it please the court.

11 Ms. Lowry.

12 May I have two minutes for rebuttal, please?

13 CHIEF JUDGE DIFIORE: You may.

14 MR. MURPHY: Your Honors, I would like to address  
15 the second point in our brief, if I may, the Payton issue,  
16 if I may. I'll answer any questions the court has  
17 otherwise.

18 But to jump into it, this was an ordinary felony  
19 investigation, and the Warrant Rule applied. In order for  
20 the officer's conduct to be legal under the Fourth  
21 Amendment, it must be reasonable at its inception and at  
22 every stage along the way. And to rebut the presumption of  
23 unreasonableness, which attaches to every warrantless  
24 entry, one of the narrowly defined exceptions to the  
25 Warrant Rule must apply.

1                   Which means that in our case, the officer's  
2                   conduct, the bursting into my client's tiny apartment, must  
3                   have been to resolve or address an urgent need under the  
4                   exigent circumstances exception.

5                   JUDGE STEIN: Counselor, why isn't this a mixed  
6                   question?

7                   MR. MURPHY: Judge, it is a mixed question of law  
8                   and fact that - - - and this type of case has been  
9                   addressed before in that regard. What we would say is that  
10                  there isn't record support for the Appellate Division's  
11                  resolution of the issue of the urgent need.

12                  JUDGE ABDUS-SALAAM: Does it have to be just on  
13                  that issue, counsel? Because under McBride, there were  
14                  several factors, and the list was not exhaustive. So if  
15                  some of the factors have record support, but this  
16                  particular factor does not, does that mean that we can't  
17                  find that there is a record support?

18                  MR. MURPHY: I think that the - - - the purpose  
19                  of McBride, and I guess I would point specifically to page  
20                  446 of the decision, the - - - the prime inquiry that the  
21                  court is concerned about is the urgent need. The factors  
22                  in McBride were supposed to be to assist suppression  
23                  courts. It was - - - as Your Honor has just mentioned,  
24                  they weren't supposed to be an exhaustive list.

25                  And I think it might be a good example here to

1 contrast our situation with McBride. The officers in that  
2 case came to the scene and pretty much reacted to the  
3 situation in a similar way to the officers in our case, at  
4 the beginning at least. They were looking through the  
5 window and investigating.

6 But in McBride, what they saw was one person was  
7 lying on the ground, someone else was running for the door,  
8 and another person came to the door in great distress. And  
9 this court again, on that same page of the decision, noted  
10 that it was once that presentation at the door took place,  
11 the person was in need, that's what the court found to be  
12 in the urgent need, which the prime reason for the exigent  
13 circumstances exception.

14 JUDGE RIVERA: You - - - you're not disputing  
15 that the factors that deal with probable cause are  
16 resolved. They're nonissues in this case other than of  
17 course they waive - - - they weigh, excuse me, in favor of  
18 - - - of the People.

19 MR. MURPHY: They - - - I - - - I understand the  
20 argument in that regard that's against us. I think that as  
21 far as the factors go, I think probably our strongest  
22 arguments have to do with the gravity of the offense below  
23 as well as the potential for escape. Because I think this  
24 case is an easy contrast to a situation like People v.  
25 Burr.

1           If the court will recall, in Burr, this court  
2 described Mr. Burr's conduct as savagery. It was a - - -  
3 it was a situation where he had stabbed someone in the  
4 face, in the mouth, and he happened to have mentioned to a  
5 witness that he was going to go to Texas. So we have two  
6 of the factors right there that would be given a great  
7 amount of weight, not as much in our case.

8           Yes, Your Honor.

9           JUDGE GARCIA: But, counsel, so where we are now  
10 is we've had this finding which has been made, right, this  
11 determination has been made, the Appellate Division has  
12 ruled. So it seems to me our review here is limited,  
13 right, it's limited to whether there is evidence in the  
14 record to support that determination.

15           So we've just been having this discussion about  
16 the factors and the weight, and I think some of this is  
17 suggesting, isn't that a very difficult hurdle for you to  
18 overcome, where it's balancing of factors? I mean, you'd  
19 have to redo the balance in some way, because clearly, some  
20 of the factors are here. So how would we apply that  
21 standard in an argument based on the McBride factor  
22 balancing test?

23           MR. MURPHY: Well, I guess two things, Judge.  
24 Number one, those factors are just - - - they're  
25 considerations for the ultimate question of whether there

1 is an urgent need, and I know your court - - - Your Honor  
2 wasn't saying differently.

3 But what the Appellate Division found here, one -  
4 - - one thing the Appellate Division seized upon here was  
5 the fact that the officers did not know about other exits,  
6 whether they were exits or not. But the court also found  
7 that he was being watched the whole time. So our - - - our  
8 position is, if someone is - - - it's a very rare  
9 circumstance. If someone is being watched the entire time,  
10 even if there's fifteen exits in this place, how many times  
11 did they say during the suppression hearing that this is a  
12 very small apartment? The number of exits are just  
13 irrelevant. And that is something that the Appellate  
14 Division didn't - - -

15 JUDGE STEIN: Does the record indicate how many  
16 police officers were there at the time?

17 MR. MURPHY: There was approximately - - - there  
18 was somewhere between ten and twenty in the area; five went  
19 in. Ten or fifteen, I think, is close to - - - that were  
20 actually upon the residence from the outside.

21 JUDGE FAHEY: It seems we'd have to - - - Mr.  
22 Murphy, we would have to re - - - it wouldn't be a  
23 balancing of factors. We would basically be saying one  
24 factor, the nature of the offense, or the geography, or the  
25 layout of the apartment, would outweigh all the other

1 factors, because they clearly seem to mean it. At least,  
2 it seems in my view for the six factors that are on the  
3 McBride list. And I think that you'd have to add the  
4 geography of the apartment, too. I think that's fair.

5 But in essence, we'd be saying that this one  
6 factor would outweigh everything else. And isn't that  
7 purely a factual determination or a balancing test for - -  
8 - that's kind of inappropriate for the Court of Appeals?

9 MR. MURPHY: But the - - - the elements that the  
10 Appellate Division was focusing in on, I think the court  
11 can review, for sure - - -

12 JUDGE FAHEY: Um-hum.

13 MR. MURPHY: - - - and that the suppression court  
14 found. And what the court was focusing in on mostly about  
15 the escape, at least, was the number of - - - of potential  
16 places to exit - - -

17 JUDGE FAHEY: Um-hum.

18 MR. MURPHY: - - - which is - - - is not really a  
19 factor based on these established facts here. It's - - -  
20 it's not an issue of - - - of consequence at all.

21 I - - - I think what's unusual about this  
22 situation is that you're coming upon this scene, and for  
23 some reason, were able to watch the defendant the entire  
24 time. Even if there was some hint that he could possibly  
25 escape, they would seem right away and seize upon that

1 situation.

2 JUDGE GARCIA: But was there also - - -

3 MR. MURPHY: There was - - -

4 JUDGE GARCIA: - - - and I'm sorry if I have the  
5 facts wrong, but wasn't there some indication that there  
6 might be a way to get into other apartments, or another  
7 part of this building? So would the concern be, and again,  
8 it seems to me this is very factual, would the concern only  
9 be he can escape, or would it also be he just recently,  
10 within the hour, committed an armed robbery, so there might  
11 be access to others in this building?

12 MR. MURPHY: No, that was a concern - - - that -  
13 - - there was something that was mentioned by Officer  
14 Mayhook, but I don't believe there was anything in the  
15 record to establish that they knew that there was any link  
16 from the apartment to any other apartments.

17 JUDGE GARCIA: But if they didn't know if there  
18 was, wouldn't that be a factor? I mean, if you're standing  
19 outside and you don't know, you don't have the blueprints  
20 for the place, you do know certain things which are in the  
21 record, but wouldn't you have to say they didn't know that?

22 MR. MURPHY: At the beginning of every  
23 investigation, it's understandable for the officers to  
24 perhaps deal with elements of the unknown. However, here,  
25 there was this intervening event of them being able to



1 watch him. So therefore, even if there was access to other  
2 rooms from his - - - other apartments from his apartment,  
3 they would see him immediately and seize him on it.

4 JUDGE GARCIA: Then you'd have to have the  
5 calculation, it would be your calculation, and that they  
6 would have enough time, no matter how many people they had  
7 outside, to get through the door and stop him from doing  
8 whatever they think he's going to be doing, now that they  
9 don't see him.

10 MR. MURPHY: Well, they're going to - - - they're  
11 going to see if he leaves his bed.

12 JUDGE STEIN: But couldn't - - - before that, if  
13 they have all these officers, can't they go into the  
14 building and - - - and - - - and ascertain whether there's  
15 access or not? If they're able to watch him and then if -  
16 - - if they can no longer watch him, then of course, there  
17 may be an urgency.

18 JUDGE RIVERA: And weren't there other people  
19 that they, in fact, spoke to in advance - - -

20 MR. MURPHY: That's correct, Your Honor.

21 JUDGE RIVERA: - - - knowing - - - to find out if  
22 he was in that building?

23 MR. MURPHY: That's correct, Your Honor. That's  
24 true. And I - - -

25 CHIEF JUDGE DIFIORE: Counsel, what about the

1 standard that courts should be careful not to second-guess  
2 police officers' assess - - - on-the-scene assessment of a  
3 possible - - - possibly dangerous situation unfolding?  
4 What do we do with that?

5 MR. MURPHY: Well, and certainly there's a  
6 concern, Judge.

7 CHIEF JUDGE DIFIORE: Yeah.

8 MR. MURPHY: What - - - what I believe this court  
9 has said a number of times, when we're approaching the  
10 Warrant Rule, the potential exceptions to the Warrant Rule  
11 have to be narrowly defined. We have to go about this in a  
12 way where the exceptions are narrowly approached. I - - -  
13 may I just make one - - -

14 CHIEF JUDGE DIFIORE: Yes, please.

15 MR. MURPHY: - - - one quick comment? There  
16 isn't any question that these officers are piecing together  
17 what's going on here. The bread crumbs kind of bring them  
18 to my client's apartment.

19 CHIEF JUDGE DIFIORE: Um-hum.

20 MR. MURPHY: But once they are seeing him there,  
21 and they're able to continuously see him, it seems like  
22 they've done this out of frustration, which I know this  
23 court does not believe is an exception to the rule.

24 JUDGE RIVERA: When they get there, what do they  
25 actually see?

1 MR. MURPHY: They're actually - - - they see him  
2 watching TV, he's not responding to their request to come  
3 to the door, and he's - - -

4 JUDGE RIVERA: But he's aware they're out there.

5 MR. MURPHY: That's correct.

6 JUDGE RIVERA: And what does he do once he's  
7 aware they're out there?

8 MR. MURPHY: At one point, he closes his eyes.

9 JUDGE RIVERA: He doesn't make an escape, he  
10 doesn't - - -

11 MR. MURPHY: There's no - - -

12 JUDGE RIVERA: - - - make a break for it, as they  
13 say?

14 MR. MURPHY: He doesn't make a break for it,  
15 there's no evidence being destroyed, and there's no other  
16 individual that is being hurt there.

17 JUDGE RIVERA: Thank you.

18 MR. MURPHY: Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: Just one more question - -  
20 -

21 MR. MURPHY: Yes, Your Honor. Please.

22 CHIEF JUDGE DIFIORE: - - - counsel, getting back  
23 to your point about it has to be limited. So aren't these  
24 limited circumstances given the immediacy of this pursuit  
25 and the circumscribed nature of the actual search for an

1           arrest, not for a full-blown search?

2                   MR. MURPHY:   They're not, Your Honor.   And the  
3           contrast I would make would be McBride.   They have the  
4           basic factors as background, being assistance to the court  
5           analyzing it.   But then there are exigent circumstances at  
6           the scene that puts it over the top and compels the  
7           officers to make a warrantless entry.

8                   The exception, I would say, other than seeing  
9           things at the scene, would be the Burr situation, where  
10          you're dealing with someone who has done a savage crime  
11          that has indicated he's going to escape, and you know where  
12          he is.   Mr. Burr not responding is an exigency, based on  
13          what the police knew, but not under these circumstances.

14                   CHIEF JUDGE DIFIORE:   Well, this was someone who  
15          had just committed an armed robbery, correct?

16                   MR. MURPHY:   He had flashed a knife, that's true,  
17          Judge, but there - - - there was some dispute in that.   But  
18          yes, there was an allegation of a recent - - - a recent  
19          robbery.   That's true.

20                   CHIEF JUDGE DIFIORE:   Thank you, counsel.

21                   MR. MURPHY:   Thank you.

22                   CHIEF JUDGE DIFIORE:   Counsel.

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

25                   There is a record support for the hearing court's

1 determination that the entry, based on exigent  
2 circumstances, was lawful. In defendant's attempts - - -

3 JUDGE ABDUS-SALAAM: What were those  
4 circumstances, counsel, that you say we're so exigent that  
5 a warrant was not necessary in this case?

6 MS. LOWRY: The focus here is not whether  
7 defendant would have used violence. I mean, we have some  
8 allegations, the police officers talked about it during  
9 their testimony; and it's violence against the responding  
10 police as well as the other people, but it's whether the  
11 police officers reasonably believed that he might do so.

12 JUDGE STEIN: Well, but wouldn't that then give  
13 the officers the right to enter without a warrant in any  
14 situation in which they had reasonable cause, probable  
15 cause, whatever, to believe that the person in there had  
16 committed a violent crime?

17 MS. LOWRY: I don't think it would be so broad.  
18 I mean, obviously, every - - -

19 JUDGE STEIN: What - - - what makes this  
20 different? Especially - - - to me, it seems like the - - -  
21 the difference, if any, would be go the other way because  
22 of the - - - the peculiar facts of the case where the  
23 apartment was so small and they could see everything he was  
24 doing.

25 So what makes this different from any other case

1 in which they - - - they track a suspected criminal down to  
2 - - - to their apartment, why can't they just go in without  
3 a warrant any time?

4 MS. LOWRY: Based upon the steps that the police  
5 officers took, they were trying to ascertain the same.  
6 They couldn't really determine how small that apartment was  
7 until they got into it. You know, they tried to speak to  
8 the residence at the scene to determine whether or not  
9 there were other points - - -

10 JUDGE ABDUS-SALAAM: How long were they there,  
11 counsel?

12 MS. LOWRY: I'm sorry?

13 JUDGE ABDUS-SALAAM: How long were - - - how long  
14 were the police officers there before they went in?

15 MS. LOWRY: I believe it was about twenty  
16 minutes, and then they were knocking on the windows and  
17 doors trying to get the defendant's attention for  
18 approximately ten minutes. And he made eye contact, he  
19 rolled over. I mean, none of the officers testified that  
20 he was sleeping. They all testified that he was watching  
21 TV. And then - - -

22 JUDGE RIVERA: Well, he didn't - - - he didn't  
23 make an escape, right, he didn't move off his bed to a  
24 window, to a door, to a corner in the apartment; did he?

25 MS. LOWRY: No, he did not at that time.

1 JUDGE RIVERA: No, he didn't. So if he knew they  
2 were there, would that not have been the moment to do so  
3 rather than sit around and wait for them to perhaps break  
4 through that door and - - -

5 MS. LOWRY: I'm not sure - - -

6 JUDGE RIVERA: - - - slow down the amount of  
7 escape time?

8 MS. LOWRY: I'm not sure what was going through  
9 defendant's mind, but the police officers also did not  
10 know, and that is included in the testimony below.

11 JUDGE WILSON: The difficulty I'm having,  
12 counsel, with the police officers not knowing things is  
13 that if they come to my house, they don't know how big it  
14 is, they don't know how many exits there are, they don't  
15 know if I have knives, I actually have knives in the  
16 kitchen, because I cut vegetables from time to time. They  
17 don't know whether I have a gun. I don't; I've never owned  
18 a gun, but they don't know any of that.

19 So to justify a warrantless entry on the basis  
20 that the police officers genuinely don't know about the  
21 circumstances, those things seem to me to be very  
22 difficult.

23 MS. LOWRY: The police officers testified that  
24 they believed themselves and the other residents were in  
25 danger. That is, you know, included in the record - - -

1 JUDGE WILSON: But - - - but, you know - - -

2 MS. LOWRY: - - - at pages 96 and 97.

3 JUDGE WILSON: - - - back to Judge Abdus-Salaam's  
4 question, it's why. It's not what they believed; it's what  
5 is the evidence on which they could reasonably rest that  
6 belief.

7 MS. LOWRY: I believe it fits squarely within the  
8 McBride factors. Here, we have defendant that, just  
9 recently committed, you know, an armed robbery. He had a  
10 knife and held up this - - - this store directly across  
11 from where he lived. They had not yet recovered that  
12 weapon. They believed that he was still armed. Three  
13 officers, three out of the eight officers testified that  
14 they believed he was armed, and they believed he posed a  
15 danger to the community, to the residents.

16 JUDGE WILSON: Okay. So that - - - that then is  
17 a question. So is it the case that a warrantless entry is  
18 allowed, whenever the police have probable cause to believe  
19 that the person inside his home has a weapon that was  
20 recently used to commit a robbery?

21 MS. LOWRY: No. That would be - - - again, that  
22 would be broad. I - - - I agree that that would be  
23 problematic. But if we're looking and we're applying all  
24 of these factors as well as, you know, additional  
25 circumstances that we have here, I mean, the court below



1           relied on, you know, defendant - - -

2                   JUDGE STEIN:   So are you saying this would be a  
3           different circumstance if it was a one-family house?

4                   MS. LOWRY:   I don't think that goes to - - - that  
5           doesn't apply - - - everything that we have here, another  
6           factor that the police testified to - - -

7                   JUDGE STEIN:   So even if it was a one-family  
8           house, maybe there were other people in the house, right?

9                   MS. LOWRY:   Correct.

10                  JUDGE STEIN:   So again - - -

11                  MS. LOWRY:   But we also don't know - - -

12                  JUDGE STEIN:   - - - I'm trying to figure out how  
13           do - - - how do we narrow down - - - I think that Judge  
14           Wilson and I are sort of both honing in on the same, you  
15           know, difficulty we're having with this argument.

16                  MS. LOWRY:   Yes.   Defendant was also  
17           unresponsive, and he was unresponsive after he had made eye  
18           contact with the police.   And he could not understand - - -

19                  JUDGE RIVERA:   Yeah, but isn't that the point.  
20           He doesn't have to respond to them.   But he didn't try to  
21           do anything.   He just stayed in his bed.

22                  MS. LOWRY:   However - - -

23                  JUDGE RIVERA:   Are you saying that the only way  
24           an individual in their home can avoid someone breaking down  
25           the door is to actually go to the door, and open the door,

1 and engage with the police?

2 MS. LOWRY: No. I mean, that would be to ignore  
3 all of the other circumstances here. I mean, he was  
4 unresponsive, they believed that he was still armed and  
5 that he did have - - - you know, a weapon was used, and  
6 that he was still armed. You know, they had that probable  
7 cause.

8 JUDGE ABDUS-SALAAM: But the weapon they knew  
9 about was a knife. And the door was closed, the windows  
10 were down. I - - - I might, you know, I don't want to draw  
11 a real distinction between knives and guns, but I can't see  
12 his laying in bed with the door closed, the police are so  
13 afraid that he's going to, what, throw the knife and hit  
14 whom at a closed door?

15 I'm - - - I'm really not clear about what you're  
16 saying about the dangerous weapon here. I'm not suggesting  
17 that a knife couldn't be a dangerous weapon in some  
18 circumstances, but under these circumstances, I'm not  
19 seeing - - -

20 MS. LOWRY: Yes. I mean, the police did make  
21 attempts to verify whether or not this particular apartment  
22 was attached or, you know, if there were other ways for the  
23 defendant to go. So had he exited that room and gone, you  
24 know, in toward the house, was he going to an additional  
25 residence, was he going to the upper, was he going to the

1 front unit, was he going to the basement. There was no way  
2 for them to verify that after speaking to - - -

3 JUDGE ABDUS-SALAAM: There were no - - - no  
4 officers in the hallways?

5 MS. LOWRY: No. I mean, they went - - - they  
6 spoke to the front resident, but they didn't - - - they  
7 could not reach the - - - the resident on the top, and they  
8 didn't know anything about the basement.

9 JUDGE RIVERA: Were they posted at the back?

10 MS. LOWRY: Yes. That's actually where the  
11 apartment was.

12 JUDGE RIVERA: They're posted at the back,  
13 they're posted at the front - - -

14 MS. LOWRY: The rear lower apartment.

15 JUDGE RIVERA: - - - they're looking - - -  
16 they're looking through the windows, the door is locked,  
17 they can see him, you've described every move that he's  
18 made.

19 MS. LOWRY: But he's unresponsive.

20 JUDGE RIVERA: Where - - - where - - - where - -  
21 - this is an exception to the rule. This is not the rule -  
22 - -

23 MS. LOWRY: Agreed.

24 JUDGE RIVERA: - - - that you get to go in.  
25 Right. It's the exception.

1 MS. LOWRY: Yes.

2 JUDGE RIVERA: So given that it's an exception,  
3 why is it that the officers are unable to get a warrant?  
4 Because that's all you're talking about. They just have to  
5 get a warrant. No one is saying they can't eventually go  
6 in. They seem to have probable cause to do so, at some  
7 point, to convince a magistrate to issue a warrant.

8 MS. LOWRY: I mean, the fact is, we have this  
9 exigent circumstances analysis which the police officers  
10 are able to apply in limited circumstances. I mean, this -  
11 - - this happened - - -

12 JUDGE FAHEY: Isn't - - -

13 MS. LOWRY: - - - 8:25 at night.

14 JUDGE FAHEY: Isn't - - - doesn't - - - doesn't  
15 the timing and the geography come into play a little bit  
16 here?

17 MS. LOWRY: Agreed, Your Honor.

18 JUDGE FAHEY: It does.

19 MS. LOWRY: Yes.

20 JUDGE FAHEY: It - - - it seems to me that - - -

21 MS. LOWRY: Close pursuit.

22 JUDGE FAHEY: Yeah. It's in close pursuit, the -  
23 - - the store clerk is there, he flashes a knife and tries  
24 to rob a jar with donations in it. She follows him out,  
25 tells - - - she doesn't give it to him. He - - - she

1 chases him out, he runs out of the 7-Eleven; she chases him  
2 out holding her cell phone, calling the police.

3 MS. LOWRY: Yes.

4 JUDGE FAHEY: He goes at basically two buildings  
5 away and - - -

6 MS. LOWRY: Directly across the street.

7 JUDGE FAHEY: Directly - - - well, not - - - not  
8 even across the street, I think it's on the same side of  
9 the street. And he goes two buildings down, and he goes  
10 inside the building which is a multi-apartment building.  
11 The police come in pursuit of him. They find him in the  
12 place.

13 This seems to be all - - - all happening  
14 relatively quickly in - - - within a limited geographic  
15 area. It - - - it's not like the police came upon a house  
16 two miles away and were wait - - - and surrounded the  
17 house, and saw him sitting inside watching TV; they were in  
18 direct pursuit in response to a call that a victim of the  
19 crime had made.

20 MS. LOWRY: Right, Your Honor.

21 JUDGE FAHEY: What I wonder is, you know, he went  
22 into his apartment, do you think it makes any difference -  
23 - - let's say he had gone to the basement and hidden, would  
24 the police had a greater right to go in and - - - and to  
25 get him than they would have to, say, by him being in his

1 apartment? Does that make any difference?

2 MS. LOWRY: I don't think under these  
3 circumstances it really factors in, because we would still  
4 be faced with the fact that he entered a part of the  
5 building that they could not verify if he could escape, or  
6 if other people were in danger.

7 JUDGE FAHEY: Well, are you saying that the  
8 McBride factors would apply in the same way then?

9 MS. LOWRY: Yes. And I mean, with the basement,  
10 it's almost, I mean, in a multi-unit house, basements, I -  
11 - - I think most likely would be, like, a common area.

12 JUDGE FAHEY: Um-hum.

13 MS. LOWRY: And so I don't think we would  
14 necessarily be having, you know, it would actually go more  
15 in favor.

16 JUDGE FAHEY: Um-hum.

17 JUDGE RIVERA: Well, in a basement, you might not  
18 be able to see anything. You might know he's gone down  
19 there, but you don't necessarily see any - - -

20 MS. LOWRY: True.

21 JUDGE RIVERA: - - - of his movements, right?

22 MS. LOWRY: Yeah. However, there were only the  
23 two small windows that they could see into, and there were  
24 three officers who would be able - - -

25 JUDGE RIVERA: But - - - but - - -

1 MS. LOWRY: - - - to kind of peer in.

2 JUDGE RIVERA: But the testimony is that they  
3 could see. There's no argument that they - - - that there  
4 was any obstruction.

5 MS. LOWRY: No.

6 JUDGE RIVERA: There's no shades - - -

7 MS. LOWRY: And all of the lights on - - -

8 JUDGE RIVERA: There are none of that.

9 MS. LOWRY: All of the lights were on inside the  
10 apartment.

11 JUDGE RIVERA: Yeah, the TV is on.

12 MS. LOWRY: He was fully clothed underneath the  
13 covers. I mean, they did not believe that he was sleeping.

14 JUDGE RIVERA: There - - - um-hum.

15 MS. LOWRY: They couldn't understand why he  
16 wasn't responding to them.

17 JUDGE RIVERA: Well, because no one has to.  
18 Because no one has to. He doesn't have to. It sounds to  
19 me like you're arguing that he - - - he actually had to  
20 engage with the police officers; he doesn't have to.

21 MS. LOWRY: No, but they believed that he was  
22 armed and he was dangerous. So the defendant's - - -

23 JUDGE STEIN: Did - - - did you argue the hot  
24 pursuit - - -

25 MS. LOWRY: Not below - - -

1 JUDGE STEIN: - - - there?

2 MS. LOWRY: - - - Your Honor.

3 JUDGE STEIN: Okay.

4 MS. LOWRY: No, we were limited here to the  
5 exigent circumstances. But I believe that the record  
6 contains ample evidence and ample support for that  
7 determination, based on defendant's description, his  
8 location, the timeliness, the seriousness of the crime, and  
9 his apparent dangerousness.

10 JUDGE RIVERA: Well, obviously, the store manager  
11 was willing to chase him down, so I guess she didn't think  
12 that a little pen knife was so dangerous.

13 MS. LOWRY: She, just on instinct, went ahead and  
14 she was - - -

15 JUDGE RIVERA: For some time, apparently.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 Counsel, is it your argument that the police,  
18 when pursuing this man, and according to the testimony  
19 below, they are pursuing an armed robber, they locate him  
20 through the windows of his apartment, they're knocking on  
21 the window, they make eye contact with him, they give him -  
22 - - according to the testimony, he gives him a Freddy  
23 Krueger kind of look, that he's nonresponsive, it's a  
24 multiple-family dwelling.

25 Is it your argument that based on those facts, as



1 elicited, that it's reasonable to expect the police to set  
2 up outside this guy's home, and potentially be targets, and  
3 endanger themselves?

4 MR. MURPHY: Well, they're not - - - I don't  
5 believe they're targets themselves, Your Honor. Under  
6 these circumstances, because we have - - -

7 CHIEF JUDGE DIFIORE: Well, his arm - - - also,  
8 did I mention that he had his arms underneath a blanket,  
9 they couldn't see if he had a weapon?

10 MR. MURPHY: May I address that first, Judge?

11 CHIEF JUDGE DIFIORE: Yeah.

12 MR. MURPHY: And I don't - - -

13 CHIEF JUDGE DIFIORE: Yes, please.

14 MR. MURPHY: - - - and I don't mean to go  
15 backwards.

16 People v. Lavon, the officers can't place  
17 themselves in an exig - - - they can't create the exigency  
18 themselves. They can't enter the residence and then get  
19 close to him, in close proximity, and say, oh, I think he  
20 may have a weapon. They had to be in danger on the outside  
21 of the building. They were not in danger, as Judge Rivera  
22 commented in the first oral argument, by a knife being  
23 thrown through a window or a door. That aspect, I would  
24 just note.

25 But Your Honor, this whole - - - this whole fluid

1 situation is there has to be a concern to any law  
2 enforcement officer. However, there are intervening facts  
3 here, and the intervening event here is what they observed  
4 continuously through that window. It's not like a Mitchell  
5 situation where it's just flowing; we have no time for a  
6 warrant.

7 They had this under control, the place was  
8 surrounded, and this - - - how many times did we hear  
9 "small apartment" in the suppression hearing. They  
10 volunteered about seven times how small this was. If he  
11 makes a move, they're going to grab him.

12 As far as being unresponsive - - -

13 JUDGE WILSON: So is it your position that if he  
14 may had moved, that is, if he disappeared from sight for a  
15 moment, went to the bathroom, went to some exit they  
16 couldn't see, at that point, a warrantless entry is  
17 justified?

18 MR. MURPHY: Potentially, Judge. If they can't  
19 see him anymore, our argument about him being monitored  
20 consistently would be gone. I can't imagine that happening  
21 very quickly, or too quickly for the police to react, based  
22 on the size of this apartment.

23 Our point, Your Honors, is that any investigation  
24 of a felony involving a weapon, this is going to be a huge  
25 net that's cast if the court finds exigent circumstances

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here.

Yes, Your Honor. Oh, I'm sorry, Judge, I thought you were going to say something.

CHIEF JUDGE DIFIORE: Thank - - -

MR. MURPHY: Unless there's any questions - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MURPHY: I thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Shawn J. Sivertson (Reargument), No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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