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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 113

SHAW (Samuel),

Appellant.

20 Eagle Street
Albany, New York
November 19, 2025

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

CLEA WEISS, ESQ.
MONROE COUNTY PUBLIC DEFENDER'S OFFICE
Attorney for Appellant
10 North Fitzhugh Street
2nd Floor
Rochester, NY 14614

MARTIN P. MCCARTHY, II, ESQ.
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Attorney for Respondent
144 Exchange Boulevard
Suite 200
Rochester, NY 14614

Joey Oliveros
Official Court Transcriber



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

3 MS. WEISS: Good afternoon, Your Honors. Clea
4 Weiss for Samuel Shaw. May I please reserve three minutes
5 for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. WEISS: Thank you. Before discussing
8 attenuation and the voluntariness of the purported consent
9 in this case, I'd like to start by addressing the SWAT team
10 raid in the arrest and why my client's arrest was illegal,
11 which the Fourth Department correctly held in this case.

12 JUDGE GARCIA: Can we reach that issue?

13 MS. WEISS: You can. County Court did render a
14 decision on that and the Fourth Department was correct to -
15 - - to review that decision.

16 JUDGE GARCIA: Right, but you prevailed on that
17 decision, right, and you're appealing, so - - -

18 MS. WEISS: So we did prevail on the issue of the
19 Fourth Amendment violation in the Fourth Department. I was
20 starting with that because I think the nature of the Fourth
21 Amendment violation does inform the - - - the rest of the
22 analysis. But what's - - -

23 JUDGE GARCIA: But do you think we can revisit
24 the Payton determination below?

25 MS. WEISS: I think it's a mixed question of law

1 and fact, and I think that there's record support for the
2 Fourth Department's determination that Mr. Shaw was forced
3 out of his house, therefore, violating Payton.

4 JUDGE CANNATARO: So that sounds like a no in
5 terms of our review.

6 MS. WEISS: I think this court should also find
7 that there's a Fourth Amendment violation in this case, and
8 I think that there are no impediments to this court's
9 review of that issue.

10 CHIEF JUDGE WILSON: I guess Judge Garcia's
11 question really is, you're not aggrieved by that part of
12 the decision, right? And if you're not aggrieved, then,
13 you know, would have to have a cross-appeal for us to be
14 able to reach the issue, which you don't. So we're stuck
15 with that ruling so you can move on, if you like, I think
16 is what he's suggesting.

17 MS. WEISS: And I will.

18 CHIEF JUDGE WILSON: Okay.

19 MS. WEISS: I - - - I know Mr. McCarthy - - -

20 JUDGE GARCIA: I thought she was arguing it.

21 MS. WEISS: - - - does take issue with the Fourth
22 Department even adjudicating that claim. But I think the
23 Fourth Department was correct because County Court did
24 render a reviewable decision.

25 And given that there is a Fourth Amendment

1 violation, in this case, the main issue for me is that the
2 People have never argued an exception to the exclusionary
3 rule in this case. And this court has held that exceptions
4 to the exclusionary rule, such as inevitable discovery,
5 have to be argued, and they have to be proven by the
6 People. And in this case, you know, Mr. - - - Mr. Shaw, on
7 his motion papers, identified the firearm as an
8 unattenuated fruit of his illegal arrest. It's twice in
9 his motion papers.

10 JUDGE SINGAS: Yeah, but what the People are
11 relying on is a voluntary consent. And they're basically
12 saying that, for lack of a better word, trumps what was
13 going on in terms of attenuation.

14 MS. WEISS: So I disagree with that because I
15 think the case law makes clear, including this court's
16 cases in Borges and Leroy M., that it has to be voluntary
17 and it has to be attenuated. There's two separate analyses
18 that have to be satisfied.

19 JUDGE GARCIA: It seems to me the Appellate
20 Division, when I read their opinion and their cite to their
21 other Appellate Division case, is saying a voluntary
22 consent by a third party is per se attenuation in this
23 case.

24 MS. WEISS: So I disagree with that, and I think
25 that this court's decision - - -

1 JUDGE GARCIA: But do you disagree that they said
2 that or you disagree with the premise?

3 MS. WEISS: I disagree with their premise.

4 JUDGE GARCIA: Right.

5 MS. WEISS: Yes. That is what the - - - the
6 Fourth Department in this case held that a voluntary
7 consent - - -

8 JUDGE GARCIA: But it seems to me that
9 attenuation goes to what you were talking about first,
10 which is fruit of the poisonous tree. And if I'm subject
11 to an illegal arrest, the defendant subject to an illegal
12 arrest, Payton violation, and that defendant gives consent,
13 even if that consent is voluntary, it has to be attenuated
14 from the Payton violation in order to sever that.

15 This is a third party consenting. So why isn't
16 the Appellate Division correct that voluntary consent,
17 which the voluntariness may take into account the facts and
18 circumstances of the Payton arrest, as it affects
19 voluntariness, but why do you need a separate attenuation
20 in an - - -

21 MS. WEISS: So a third party's consent can be a
22 fruit of the defendant's - - - of a Fourth Amendment
23 violation against the defendant. And we see that - - -

24 JUDGE GARCIA: Why?

25 MS. WEISS: Because the - - - the - - - coming

1 from Wong Sun directly, in which there's three defendants
2 in Wong Sun - - -

3 JUDGE GARCIA: No, but what is the logic in terms
4 of fruit of the poisonous tree and suppression of having a
5 third party consent be subject to that?

6 MS. WEISS: Because the law enforcement choosing
7 to seek consent from a third party, which in these cases is
8 often the wife or the girlfriend or the sister, is very
9 much a part of the entire strategy - - - an entire law
10 enforcement strategy of going to a home and seeking to
11 arrest somebody at their home.

12 JUDGE GARCIA: Let's say it was a different home,
13 right? They do an illegal Payton arrest at this residence,
14 and they simultaneously go to the defendant's other
15 residence, and they get a roommate consent. Is that
16 roommate's consent in residence 2 subject to attenuation
17 from the Payton violation?

18 MS. WEISS: So I think it is. And in my brief, I
19 cite State v. Lane, which is a decision - - -

20 JUDGE GARCIA: So how would you analyze
21 attenuation in my hypothetical?

22 MS. WEISS: So I would - - - in State v. Lane,
23 the Iowa Supreme Court - - - I find it to be a very
24 thorough and persuasive opinion. In that case, the
25 defendant is illegally arrested at his neighbor's garage.

1 And they go to - - - down the street to his house, where
2 his girlfriend is present, and they seek consent from the
3 girlfriend to search his house. And the Iowa Supreme Court
4 goes on to analyze whether her consent is a fruit of the
5 illegal arrest. They ultim - - -

6 JUDGE GARCIA: And how do they do that?

7 MS. WEISS: By looking at the - - - the - - - by
8 - - - by applying the - - - the normal factors from Brown
9 v. Illinois, the exact same attenuation factors - - -

10 JUDGE GARCIA: So how much time it is between - -
11 - let's assume she doesn't know - - - I don't know the
12 facts of that case, but let's assume she doesn't know about
13 the arrest at all. So you would still look at how close in
14 time it was to the arrest that she knows nothing about?

15 MS. WEISS: So temporal proximity in that case
16 would be perhaps a less important factor. But you would -
17 - -

18 JUDGE CANNATARO: What are the important ones?

19 MS. WEISS: Sorry?

20 JUDGE CANNATARO: What are the important factors
21 regarding attenuation in that circumstance?

22 MS. WEISS: Intervening circumstances, the
23 flagrancy of the police conduct, the fact - - -

24 JUDGE CANNATARO: All happening at another place?

25 MS. WEISS: Well, in that - - - in a case where

1 there is a Fourth Amendment violation at one location and
2 the officers go to a second location to seek consent, I
3 think it is a weak - - - there'd be - - - the People would
4 have a strong argument that there is attenuation. So that
5 - - - what - - -

6 JUDGE HALLIGAN: So if - - -

7 MS. WEISS: - - - these factors go to - - -

8 JUDGE HALLIGAN: Go ahead.

9 MS. WEISS: The factors go, I think, to the
10 analysis and that there might be a strong claim for the
11 People that there is attenuation, but they do not say that
12 there is per se - - -

13 JUDGE GARCIA: So any investigative step they
14 take at the same time they do a Payton violation is subject
15 to an attenuation analysis?

16 MS. WEISS: Anything that is a fruit of that
17 Payton violation or that - - -

18 JUDGE GARCIA: So where - - -

19 JUDGE HALLIGAN: But that's circular, I think.

20 JUDGE GARCIA: Yeah.

21 JUDGE HALLIGAN: We're trying to figure out what
22 the fruit is.

23 MS. WEISS: So when the - - -

24 JUDGE HALLIGAN: What's properly deemed a fruit?

25 MS. WEISS: The defendant claims something is the

1 fruit of the arrest. That shifts the burden to the People
2 under Borges to - - -

3 JUDGE HALLIGAN: Right, but where you have third-
4 party consent - - - I understand that - - - that general
5 proposition, but where you have third-party consent, are
6 you saying that that framework doesn't shift at all? We -
7 - - we consider it exactly the same?

8 MS. WEISS: I - - - I think that framework does
9 not shift at all, and there are numerous federal courts of
10 appeals and state cases that - - - state courts that have
11 held that it is the same analysis.

12 JUDGE HALLIGAN: But why should that be as a - -
13 - as a - - - as a matter of - - - of logic? Why doesn't
14 the fact that it is - - - that there is another actor
15 involved somehow perhaps mitigate the attenuation concerns
16 a little bit?

17 MS. WEISS: Having another actor involved does
18 not per se take us out of an attenuation analysis. It does
19 affect it.

20 JUDGE HALLIGAN: I take that point. I'm just
21 asking you whether it - - - it makes it, for example,
22 easier for the People to show there was attenuation.

23 MS. WEISS: I think it would make it easier for
24 the People to show attenuation when it is a - - - a third
25 party.

1 JUDGE HALLIGAN: Just to shift gears for a minute
2 on voluntariness. Can - - - I take it your argument is
3 there's no record support for a voluntariness finding. So
4 okay, so in light of her testimony, how could that be the
5 case? She - - - she testifies in a way that I think could
6 perhaps be read to suggest that there's voluntary consent.

7 MS. WEISS: So her testimony is that she was not
8 coerced into consenting and that she was not promised
9 anything.

10 JUDGE HALLIGAN: And not intimidated, I think she
11 said, if I'm remembering the record correctly.

12 MS. WEISS: That's correct. And those three
13 things - - - taking her testimony at face value and
14 crediting it, those three things are not inconsistent with
15 caving to overwhelming official pressure.

16 JUDGE HALLIGAN: Yeah. But if the question is
17 record support, then - - - then whether it's consistent or
18 inconsistent may not get you across that line, right?

19 MS. WEISS: It may not, but I do think that this
20 court could hold, as a matter of law, that when somebody
21 has been subjected to a Payton violation, handcuffed, and
22 removed from their own home, and while that Fourth
23 Amendment violation is still ongoing, because she's still
24 in the car handcuffed, when they elicit the consent from
25 her - - -

1 JUDGE HALLIGAN: No matter what - - - no matter
2 what the - - - the individual says under oath - - -

3 MS. WEISS: Right. When you're - - -

4 JUDGE HALLIGAN: - - - about their reaction?

5 MS. WEISS: When you - - - when you've been
6 subject to a stressful Payton violation, removed from your
7 own home, that the consent to search your own home - - -

8 JUDGE HALLIGAN: Are there - - -

9 JUDGE SINGAS: Usually, in those circumstances,
10 that witness would be testifying for the defense to say
11 that she felt coerced. I mean, in this case, she's
12 testifying for the People and saying she didn't feel
13 intimidated. That, plus the testimony of the police
14 officer who basically said she leapt for whatever - - - I
15 don't know what he said, something like that - - - leapt
16 for joy or hugged him or was happy that they would get a
17 gun out of her house, and she was distressed when she found
18 out that it was her friends who were murdered, I mean, how
19 can we say that there's not record support for the court in
20 those circumstances? She's testifying for the People and
21 saying, no, it was voluntary.

22 MS. WEISS: You know, and I do recognize it's a
23 mixed question of law and fact, and that is - - - that is a
24 difficult burden, but I think this court could - - - I
25 think it would be an appropriate rule to hold as a matter

1 of law that consent cannot be voluntary when you are giving
2 consent to search the location out of which you've just
3 been immediately - - - illegally removed.

4 JUDGE HALLIGAN: And are you aware of other kinds
5 of circumstances where we have held - - - I mean, usually
6 it's a fact-specific analysis, right? You look at the
7 record in front of you. And I hear you to be suggesting a
8 blanket rule which says, you know, when - - - when a third
9 party witnesses a Payton violation, per se cannot be
10 voluntary no matter what they experience or - - - or say
11 they experience. So where else have we - - - have we taken
12 a bright-line view like that. It seems unusual to me.

13 MS. WEISS: I think it would be - - - it - - - in
14 the context of voluntariness, I'm not sure that this court
15 has ever held something similar. So I understand that on
16 that point, that would be a novel rule we'd be asking for
17 this for - - - from this court.

18 But returning to the idea that the People's
19 burden is both attenuation and voluntariness, putting aside
20 voluntariness, which may be a mixed question of law and
21 fact for which this court might find record support, that
22 still leaves us with attenuation, which the People have not
23 preserved. And they've not preserved it, nor do I think
24 they could win on the merits because it's that - - - Ms.
25 McCoy's consent is also a fruit of the Payton violation.

1 The search is illegal for that - - - independently, for
2 that reason.

3 JUDGE SINGAS: So regardless of whether she was
4 in handcuffs or not, your position is still that that
5 consent was not properly attenuated from the illegal arrest
6 of Mr. - - - of your client.

7 MS. WEISS: That's correct, yes.

8 JUDGE SINGAS: So that - - - that - - - so the -
9 - - so the circumstances of the consent really have nothing
10 to do with this, in your view?

11 MS. WEISS: Because I think, looking at
12 attenuation - - - and again, it's my position that the
13 People have not preserved this contention, but when you
14 look at attenuation, you are measuring from the Fourth
15 Amendment violation to the consent itself. And I think
16 that this - - - this is a really important issue because
17 this court has said it both ways in different cases.

18 In Banks, this court concludes - - - it - - - it
19 concludes and it analyzes the attenuation from violation to
20 consent. But in matter of Leroy M. and Borges, the court
21 considers the nature of the consent in that analysis.

22 And in People v. Lane, there's an extended
23 discussion of this, and I think there's also in footnote 3
24 of that decision, the court is analyzing the Tenth Circuit
25 Court of Appeals, which like this court had had opinions

1 analyzing attenuation in both ways. And the Tenth Circuit
2 corrects itself in an eventual opinion and says, we want to
3 clarify our former holdings and note that we measure
4 between the violation and the consent itself.

5 And I think that this court also has cases that
6 analyze attenuation in both ways. And this case would be
7 an appropriate case to clarify that what we look at is what
8 is - - - from - - - from the violation to the giving of the
9 consent. And the nature of the consent actually doesn't
10 come into that determination. And the reason for that is
11 that when you're looking at - - - at the evidence that's
12 seized, it is not different from the consent, which is the
13 search - - - giving consent to do the search that gets that
14 evidence.

15 JUDGE SINGAS: Well, I think in Lane, and I'm - -
16 - I'm looking at page 386, the court is saying, "Thus, if
17 the circumstances show the initial questioning, or in this
18 case the consent, was given with detached reflection and a
19 desire to be cooperative, it indicates the presence of
20 intervening circumstances that break the causal chain". So
21 why - - - why isn't that what happened here?

22 MS. WEISS: So in Lane, what the court ultimately
23 - - - what the Supreme Court of Iowa ultimately concludes
24 is that they only want to look at - - - they're measuring
25 the girlfriend's consent in their separate home, whether

1 it's attenuated from the violation. And they're looking -
2 - - they do look at the nature of her consent in their
3 voluntariness analysis, which they do separately, but as to
4 the attenuation analysis, they do stop it upon the asking
5 for consent, is my recollection of that case.

6 JUDGE CANNATARO: It sounds like you're saying
7 attenuation analysis in this type of circumstance and maybe
8 anything other than the one that was the subject of the
9 prior hypothetical is really just time dependent. Or is it
10 more than time?

11 MS. WEISS: It's more than time. It looks at the
12 Brown v. Illinois factors of temporal proximity,
13 intervening circumstances, and flagrancy and purpose of the
14 police conduct.

15 JUDGE CANNATARO: Okay. So if we have
16 intervening circumstances such as, you know, new
17 information about the - - - the crime that took place, the
18 shooting that took place, which suggest a different
19 motivation for the consent, would - - - would that be the
20 proper subject of an attenuation analysis, or does that go
21 to the consent?

22 MS. WEISS: I think it can be considered. And
23 that could be weighed against the fact that she's still
24 handcuffed in the back of a police car. Lt. Zenelovic
25 testified she's not free to leave, so she's illegally

1 detained.

2 JUDGE CANNATARO: Next question.

3 MS. WEISS: Yeah, they're - - - I think that - -
4 -

5 JUDGE HALLIGAN: Do you think the record's clear
6 on that, that - - - is she handcuffed at the time of
7 consent? I thought the record was ambiguous on that
8 question.

9 MS. WEISS: Her testimony is clear that she's
10 still handcuffed in the car at that time and that after she
11 gives consent is when they let her come out of the car, and
12 they unhandcuff her in order for her to sign that form.

13 JUDGE HALLIGAN: So you read it as her giving
14 verbal consent in the car and then being uncuffed to - - -
15 to sign the form, outside the car.

16 MS. WEISS: Yeah, I think that's - - - that's
17 established by her testimony. Thank you.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. MCCARTHY: Good afternoon. Marty McCarthy
20 for the People. The question of Payton is unpreserved for
21 this court's review.

22 JUDGE HALLIGAN: Can I ask you to start by - - -
23 by telling us your response to the argument about whether
24 you preserved attenuation, and if so, how and where?

25 MR. MCCARTHY: To - - - to answer that question,



1 I have to - - - I would have to talk about Payton.

2 JUDGE HALLIGAN: Okay.

3 MR. MCCARTHY: And the reason why there is no
4 discussion of attenuation at the hearing level is the
5 hearing court summarily denied the Payton motion. It noted
6 that there were insufficient allegations, in its written
7 decision.

8 JUDGE HALLIGAN: I'm sorry. But were there
9 papers put in?

10 MR. MCCARTHY: I'm sorry?

11 JUDGE HALLIGAN: Were there papers that were
12 filed or was - - -

13 MR. MCCARTHY: You mean - - - the defense - - -

14 JUDGE HALLIGAN: Yes.

15 MR. MCCARTHY: - - - files their omnibus motion.

16 JUDGE HALLIGAN: Right.

17 MR. MCCARTHY: The omnibus motion sought - - -
18 they - - - they sought to litigate the issue of Payton.

19 JUDGE HALLIGAN: Yes.

20 MR. MCCARTHY: Their argument in the omnibus
21 motion was he was arrested inside the house.

22 JUDGE HALLIGAN: But - - - but presumably, you
23 could have raised attenuation in your response papers or
24 before the court, I assume.

25 MR. MCCARTHY: So - - -

1 JUDGE HALLIGAN: Why should you not have put that
2 in?

3 MR. MCCARTHY: So let me answer for myself. I'll
4 answer, first, for the prosecutor, and I'll answer for
5 myself. The allegations in defense motion was he was
6 arrested inside the house. The prosecutor said, no, he
7 wasn't. He was arrested outside the house. Had the
8 defendant made the motion in his motion papers that he was
9 constructively arrested inside his house, then the
10 prosecutor would have been triggered to say, assuming that
11 to be true, then the - - - the fruits of the illegally - -
12 - any illegal evidence were attenuated from the illegality
13 of that search.

14 JUDGE HALLIGAN: So your argument is that it
15 wasn't presented, and - - - and therefore, you raised it at
16 the first possible time?

17 MR. MCCARTHY: Correct. And when you looked at
18 it - - - and - - - and when you look at it as sort of as an
19 academic question, the defendant's arguing now - - - the
20 defendant argued at the - - - the Fourth Department, and
21 the defendant are arguing now that he was constructively
22 arrested inside the house. Had he litigated that issue,
23 then yeah, we would have been prompted to say, okay, well,
24 that conceivably could be true. Then we're going to argue
25 attenuation.

1 JUDGE GARCIA: So constructive arrest in the
2 house wasn't raised at the hearing either?

3 MR. MCCARTHY: It was raised in the motion. The
4 judge, prior to the beginning of the hearing, said the
5 purposes of this hearing are to litigate - - - litigate
6 issues of standing and suppression.

7 JUDGE CANNATARO: Wait, you - - - I - - - I
8 thought you said that the original motion was strictly
9 based on that he was arrested in the house - - -

10 MR. MCCARTHY: Correct.

11 JUDGE CANNATARO: - - - and that constructive
12 arrest wasn't part of the argument.

13 MR. MCCARTHY: Correct. But there was also - - -
14 they also raised the issue that he had standing to
15 challenge the search of the premises. So you can - - -
16 theoretically, he - - - let's say none of that stuff
17 happened with respect to the - - - let's say there was just
18 one police officer standing on the threshold, knocks on the
19 door, defendant walks out, he gets arrested, so no Payton
20 violation. Period. Theoretically, he can assert standing
21 - - -

22 JUDGE GARCIA: Right.

23 MR. MCCARTHY: - - - for the search of the house.
24 So those are two separate - - -

25 JUDGE GARCIA: He could challenge the



1 voluntariness of the consent, right.

2 MR. MCCARTHY: Correct. And so they're - - -
3 those - - - those, theoretically, are two separate
4 questions. They become related had he been arrested inside
5 the house. But when - - - when the issue was presented to
6 the hearing court, the hearing court looked at the
7 allegations in the motion papers and simply made the
8 determination: these were insufficient. We're only going
9 to litigate the issue whether you had standing to contest
10 the search of the house and the propriety of the search of
11 the house - - -

12 JUDGE GARCIA: But to my question - - -

13 MR. MCCARTHY: - - - and the voluntariness of the
14 consent.

15 JUDGE GARCIA: - - - the issue of constructive
16 arrest in the house was not litigated at the hearing?

17 MR. MCCARTHY: It wasn't in the motion papers.
18 The - - - the judge - - - I'm going - - - I'm going to
19 answer that; I promise you. It wasn't in the motion
20 papers. The judge limited the scope of the hearing. The
21 defendant started making arguments during the hearing, but
22 the written decision said that was summarily deci - - -
23 denied. So not only was it not raised in the motion
24 papers, although it was litigated at the hearing, the
25 court's decision said that had been summarily denied.

1 JUDGE HALLIGAN: On - - - on - - - on that - - -
2 on the papers, right, to make sure - - -

3 MR. MCCARTHY: Yes.

4 JUDGE HALLIGAN: - - - I'm looking at the right
5 piece of paper. I'm looking at defendant's renewed motion,
6 dated April 26, 2019. It's page 144 of the record, I
7 think.

8 MR. MCCARTHY: Yes.

9 JUDGE HALLIGAN: Okay. And so paragraph 43 says,
10 "On information and belief", gives the date, "officers
11 ordered the defendant to exit his temporary domicile and
12 arrested him". That suggests to me that's a constructive
13 arrest allegation, no?

14 MR. MCCARTHY: But then they - - - then they went
15 on to say he was arrested inside the - - - I believe they
16 then say he was arrested inside the house so - - -

17 JUDGE HALLIGAN: But - - - but what I just read
18 to you does suggest constructive arrest, doesn't it,
19 paragraph 43?

20 MR. MCCARTHY: Only if he - - - only - - - in
21 that scenario, only if he did - - - he did walk out, but I
22 believe - - -

23 JUDGE HALLIGAN: It says, "ordered the defendant
24 to exit his temporary domicile and arrested him".

25 MR. MCCARTHY: But then they then allege he was

1 arrested inside the house. I believe it's the following
2 page, on 145. And if I'm wrong, I apologize.

3 JUDGE HALLIGAN: Well, paragraph 49 says the
4 defendant's warrantless arrest within his home was in
5 violation of his Payton rights. I'm paraphrasing there. I
6 guess you'd have to read "warrantless arrest within his
7 home" as meaning literally within his home and not as - - -
8 as instead, you know, shorthand for what a Payton violation
9 is, including - - -

10 MR. MCCARTHY: But that's - - -

11 JUDGE HALLIGAN: - - - a constructive arrest.

12 MR. MCCARTHY: But that's what the - - - that's
13 what the hearing court read. So even assuming - - -

14 JUDGE HALLIGAN: Well, the hearing court
15 presumably read paragraph 43, also.

16 MR. MCCARTHY: Yes, and even assuming if that was
17 enough for him - - -

18 JUDGE HALLIGAN: Uh-huh.

19 MR. MCCARTHY: - - - to put the issue in question
20 - - -

21 JUDGE HALLIGAN: Uh-huh.

22 MR. MCCARTHY: - - - the hearing court did not
23 grant the hearing. So the - - - the relief that was
24 required at the Appellate Division was not to litigate the
25 issue. It was to remand - - -



1 JUDGE HALLIGAN: Yeah, but you filed a response
2 on May 3rd, right?

3 MR. MCCARTHY: Correct.

4 JUDGE HALLIGAN: And presumably, if you
5 understood the defendant to be putting a constructive
6 arrest at issue, you could have - - - and I would guess
7 maybe would have - - - raised an attenuation argument, yes?

8 MR. MCCARTHY: Presuming - - - and I was not the
9 prosecutor - - - presuming - - -

10 JUDGE HALLIGAN: I wasn't - - - I didn't mean you
11 particularly.

12 MR. MCCARTHY: No, and I - - -

13 JUDGE HALLIGAN: I mean the office.

14 MR. MCCARTHY: Yes, I appreciate that. But I am
15 assuming that the prosecutor didn't read it that way
16 either. He read it the same way as the court did - - -

17 JUDGE HALLIGAN: Okay.

18 MR. MCCARTHY: - - - which is why the court
19 summarily denied it. So even if the defendant put it in
20 issue, the remedy is not for the court to - - - the remedy
21 wasn't for the Appellate Division to decide it. The remedy
22 for this court's not for this court to decide it. The
23 remedy was a - - - a remittal for a hearing on whether he
24 was arrested inside the house, and that didn't happen.
25 That wasn't what the defendant sought at the Appellate

1 Division, and it's not what the defendant is seeking here.

2 So that's really the - - - when we talk about
3 attenuation, that's why it's - - - yes, I didn't argue - -
4 - the prosecutor didn't argue attenuation in the motion. I
5 didn't argue attenuation at the Appellate Division either.
6 The Appellate Division - - -

7 JUDGE HALLIGAN: Can I - - - can I ask - - -

8 MR. MCCARTHY: - - - reached this question in its
9 interest of justice jurisdiction, which is greater than
10 yours, presumably.

11 JUDGE HALLIGAN: Right. On the Appellate
12 Division, it - - - it looked to me like perhaps the
13 Appellate Division maybe transposed the standards for
14 voluntariness and attenuation. It - - - it said that it
15 was analyzing in deciding that the consent was voluntary,
16 but it looks to me like the factors that were applied were
17 the ones that were outlined in Borges regarding
18 attenuation, not the Gonzalez factors on voluntariness.

19 MR. MCCARTHY: And I believe that's what the
20 dissent pointed out as well, that - - -

21 JUDGE HALLIGAN: Yes. So - - - so what - - -
22 what do we - - - what do we make of that? Why isn't that
23 something that we should send back for them to sort out so
24 that there's a voluntariness determination that's made
25 pursuant to the proper factors?

1 MR. MCCARTHY: Ultimately, you can always begin
2 with the trial court, because that's where your
3 jurisdiction emanates from. Trial court did decide
4 voluntariness on the correct factors.

5 JUDGE HALLIGAN: But - - - but I take it you're -
6 - - you're not disagreeing with the dissent's
7 characterization of the analysis that - - - in the majority
8 opinion.

9 MR. MCCARTHY: It seemed - - - it seemed
10 confusing to me, and I will admit that. It was confusing
11 to me, because it was also - - - and - - - and after - - -
12 after the - - - the decision was made - - -

13 JUDGE HALLIGAN: Uh-huh.

14 MR. MCCARTHY: - - - and then there was leave, it
15 was - - - it was apparent to me that the court shouldn't
16 have decided the issue of attenuation at all or the issue
17 of Payton at all because of that. And - - - and so I would
18 say that that decision was very confusing for a number of
19 reasons. So - - - but in terms of - - - do you want to
20 talk about attenuation because that's kind of how this all
21 started? And I wanted to make sure I did answer that
22 question, ultimately.

23 JUDGE HALLIGAN: Sure.

24 MR. MCCARTHY: So there was a discussion about
25 third-party consent, right? And I would point the court,

1 as I did in my brief, to the Fernandez case in the Supreme
2 Court. Someone who is not the subject of the police
3 action, which is the homeowner - - - or the apartment owner
4 in this case, should be free to give consent, regardless of
5 whether there is some sort of Payton violation with
6 somebody else, with this case, the defendant, because they
7 want to get dangerous contraband out of their home, or they
8 don't want to be associated with somebody who's subject of
9 criminal activity.

10 And as Justice - - - or Judge - - -

11 CHIEF JUDGE WILSON: Well, why can't - - - why
12 can't those be examined under - - - sorry, right in front
13 of you.

14 MR. MCCARTHY: Oh, there you are.

15 CHIEF JUDGE WILSON: Yes, here I am.

16 MR. MCCARTHY: Sorry.

17 CHIEF JUDGE WILSON: Why can't those be examined
18 under a attenuation analysis, those factors?

19 MR. MCCARTHY: I - - - I don't think that they -
20 - - I don't - - - I'm going to say this negatively. I mean
21 it positively. I think you can, right? I - - - I think
22 you can do it. But I think that desire is a big
23 intervening factor. And to me, it's an outcome-
24 determinative intervening factor that this particular
25 individual who had very little connection to the defendant

1 - - - and - - - and I talked about standing. I imagine you
2 probably don't want to talk about standing. It's in my
3 brief. No one's brought up standing. I'm not going to
4 bring up standing.

5 That being said, when you look at the
6 relationship between these two people, this isn't a
7 boyfriend-girlfriend. This isn't a husband-wife. This
8 isn't father-son or mother-daughter. These are casual
9 acquaintances.

10 JUDGE RIVERA: That sounds like you're, in
11 addition to responding yes, going through the factors of
12 attenuation.

13 MR. MCCARTHY: I'm sorry?

14 JUDGE RIVERA: Are you going through the factors
15 - - -

16 MR. MCCARTHY: Yes, yes, I'm going through - - -

17 JUDGE RIVERA: - - - of attenuation or
18 voluntariness?

19 MR. MCCARTHY: I'm - - - I'm going to go to the
20 factors of attenuation and voluntariness. So I guess - - -

21 JUDGE SINGAS: I mean, but do those have to be
22 connected? Why can't they exist on parallel terms,
23 attenuation and voluntariness? And why can't the Appellate
24 Division decide that they're going to decide this case on
25 voluntariness? I'm going to push back on you a little bit

1 on that because I think - - -

2 MR. MCCARTHY: Yeah.

3 JUDGE SINGAS: - - - the AD said - - - I'm
4 reading from 1185. "The tenant testified for the
5 prosecution. She voluntarily consented to the search out of
6 a desire to have the gun removed. The tenant never claimed
7 that her consent to search was anything but voluntary. We
8 reject the defendant's contention that the tenant's
9 testimony is unworthy of belief. We, thus, conclude that
10 the court properly refused to suppress the gun".

11 So I - - - I - - - I feel like they're deciding
12 this on voluntariness. Do you disagree with your
13 colleague's assertion that Borges says you have to do both,
14 that you have - - - it's a two-part test, attenuation and
15 voluntariness. Or can you just decide this case on
16 voluntariness?

17 MR. MCCARTHY: Only if the - - - and that - - -
18 and that was one of the other issues that I don't think is
19 preserved because the argument that the consent was
20 procured as a result of the Payton violation isn't - - -
21 isn't accurate because the consent didn't come from the
22 defendant. The consent came from the third party. So I
23 think you can only look at it in terms of voluntariness,
24 and not attenuation, because you don't have that scenario.
25 You don't have the scenario - - -

1 JUDGE HALLIGAN: You know, there are a number of
2 federal cases I - - - I saw, which - - - without a whole
3 lot of analysis, but which treat a Payton violation as to a
4 defendant as having equal force with regard to some third
5 party who's providing consent, you know, usually somebody
6 else who is - - - who is in the house. So why is that not
7 correct? Why - - - why do you say that it's only
8 voluntariness and not attenuation because of the third-
9 party component here?

10 MR. MCCARTHY: Well, because of the fact that
11 when - - - when a defendant is making a motion and arguing
12 for the illegality of something, he can only assert his own
13 constitutional violations. He cannot assert a third
14 party's constitutional violations.

15 JUDGE HALLIGAN: Well, there - - - there - - -
16 I'm not sure that, you know, a third party could - - -
17 could make a claim as to a Payton violation as - - - as to
18 them. I think the question is, you know, what - - - what -
19 - - what flows from a Payton violation as to the defendant.

20 MR. MCCARTHY: Correct, but that - - - but that's
21 my point. Like, how can - - -

22 JUDGE HALLIGAN: Well, why doesn't it, I guess,
23 is what I'm asking.

24 MR. MCCARTHY: Because a defendant can't assert
25 the - - - the - - - the constitutional - - - and I think I

1 said this already, so I apologize. A defendant can't
2 assert - - - because the defendant can't assert the
3 constitutional violations of a third party, then any third
4 party's - - -

5 JUDGE HALLIGAN: So the federal cases that - - -
6 that treat it differently are - - - are wrongly decided, in
7 your view?

8 MR. MCCARTHY: I would say without more in-depth
9 analysis - - -

10 JUDGE HALLIGAN: Right.

11 MR. MCCARTHY: - - - or guidance from the Supreme
12 Court, I would say - - - I would have to say that - - -
13 that they should be treated differently.

14 JUDGE HALLIGAN: Just shifting gears for a
15 minute, can I ask, if - - - if we were to disagree with you
16 and conclude, you know, at the end of whatever analysis,
17 that the gun should have been suppressed, I - - - I read
18 your briefs as not suggesting that as to the CPW count
19 specifically that there's a harmlessness error? Am I right
20 about that?

21 MR. MCCARTHY: So there were nine - - - there
22 were nine total counts for which he was convicted.

23 JUDGE HALLIGAN: Yes.

24 MR. MCCARTHY: The - - - the last count, count 9
25 - - -



1 JUDGE HALLIGAN: Yeah.

2 MR. MCCARTHY: - - - related to his possession of
3 the firearm - - -

4 JUDGE HALLIGAN: That's the CPW count, yes.

5 MR. MCCARTHY: Yes, yes, CPW.

6 JUDGE HALLIGAN: Yeah.

7 MR. MCCARTHY: On the date of the search.

8 JUDGE HALLIGAN: Yes.

9 MR. MCCARTHY: That one clearly is not harmless
10 error.

11 JUDGE HALLIGAN: I understand you're arguing
12 harmless as to the others, but not as to that specific
13 one.

14 MR. MCCARTHY: Certainly not.

15 JUDGE HALLIGAN: Thank you.

16 MR. MCCARTHY: Because again, that - - - that was
17 the primary and only evidence of possession of a weapon,
18 that particular day. So if I'm wrong on, I guess,
19 everything in that scenario, and in terms of your harmless
20 error analysis, the rest of the counts - - - because the
21 rest of the counts pertain to the two murder 1's and the
22 criminal possession - - - the assault 1 and the criminal
23 possession of a weapon occurring on the day of the
24 shooting, there's more than ample proof absent the gun of
25 those.

1 And if there are no other questions, my time is
2 up. Thank you.

3 CHIEF JUDGE WILSON: Thank you.

4 MS. WEISS: I'd like to also address
5 harmless. But before getting there, I want to just dig
6 into the record a little bit to talk about what's presented
7 in this case and why the People's failure to argue
8 attenuation becomes determinative.

9 Besides paragraph 43 from the renewed motion,
10 looking at the argument after the hearing, it starts with,
11 on page 711 to 712 of the appendix, defense counsel's oral
12 summation saying it wasn't optional that Mr. Shaw leave the
13 residence. He didn't walk out there. RPD didn't ask - - -
14 ask politely. And that's an arrest, under Payton. That's
15 where the defendant starts.

16 The People respond to that on the merits. In the
17 People's post-hearing argument, they do not say, Your
18 Honor, there was no Payton hearing. Instead, they argue it
19 on the merits, and they waive that issue. Specifically - -
20 -

21 JUDGE HALLIGAN: What - - - you're at 711 to 712
22 of the record?

23 MS. WEISS: That's defense counsel's argument.
24 And then looking at the People's argument, going to page
25 718, the trial ADA says, "The testimony that you have is

1 credible. He voluntarily walked out. Was it in response
2 to being ordered out? Perhaps. Was it a bad choice for
3 him? Perhaps. Does that mean there's a Payton issue?
4 There does not". So the People responded to the Payton - -
5 - the constructive Payton violation on the merits, and I
6 think they waived their contention through that argument
7 that there - - - that this wasn't decided by the trial
8 court.

9 And then, I do want to focus on something that I
10 didn't highlight in my brief, and that's on page 720 of the
11 appendix. It's defense counsel's rebuttal to the People's
12 argument. Any - - -

13 JUDGE GARCIA: But Counsel, I'm sorry, if they
14 waived an attenuation argument at the - - - the hearing
15 court, and the Appellate Division reached it, they can do
16 that, right? The Appellate Division could reach an
17 attenuation argument, no?

18 MS. WEISS: They cannot, not where the People
19 have not preserved the issue.

20 JUDGE GARCIA: They can never reach it?

21 MS. WEISS: No, it's - - - it was unpreserved - -
22 - it was undecided by the trial court. And because it's
23 unpreserved, there is nothing to remit for under
24 LaFontaine. And that's why I think, if this - - - if this
25 court agrees there's a Fourth Amendment violation, and if

1 this court agrees that the People failed to preserve an
2 exception to the exclusionary rule, the next inquiry is
3 simply harmless error.

4 JUDGE HALLIGAN: Do you want to address your
5 adversary's argument that attenuation doesn't apply because
6 of the third-party aspect?

7 MS. WEISS: I think that that's a novel rule the
8 People are advocating, that just per se, a third party's
9 consent can never be considered under an attenuation
10 analysis.

11 JUDGE HALLIGAN: But do you think our cases have
12 - - - have clearly sorted that out, or is that not
13 something we've explored?

14 MS. WEISS: No, I think that's in - - - in - - -
15 I'm going to pronounce this wrong, but *Xochimitl*, *People v.*
16 *Xochimitl*, is a grandmother at the front door, stepping
17 back to consent, and that - - - so that's - - - that was
18 more voluntariness, but that's a third-party consent.

19 And then, in *Banks*, of course, you've got two men
20 in a car. There's a traffic infraction, a traffic stop,
21 and they are both seized during that traffic stop. And the
22 defendant can object under attenuation grounds as to the
23 driver's consent.

24 JUDGE GARCIA: I'm struggling with how that
25 affects the fruit of the poisonous tree argument. Because

1 again, you see it with the defendant who makes a statement
2 or gives consent, and you have to attenuate that from the
3 violation that he's suffered.

4 And it seems like we're merging standing here
5 with an attenuation analysis, because he - - - he has
6 standing - - - clearly, it's been decided - - - to
7 challenge this. But there's voluntary consent given by
8 someone else. And to the extent that consent is affected
9 by the Payton violation in terms of the facts, I understand
10 that. You know, he was handcuffed. I saw this person
11 arrested in front of me and taken from my house. All that,
12 to me, would go to, was it a voluntary consent?

13 But I understand what line in the fruit of the
14 poisonous tree analysis we're trying to sever here, because
15 yes, you have standing to challenge it, but it isn't the
16 fruit of your - - - of your illegal arrest.

17 MS. WEISS: So I think - - - where I would
18 disagree is, I think, it often is the fruit of the illegal
19 arrest because part of the attenuation analysis is purpose
20 and flagrancy. And what we see with law enforcement is
21 that they're often affecting an arrest and purposefully
22 going to someone else, purposefully the girlfriend, the
23 wife, or the sister, in order to get that consent. So it
24 is because it's part of the law enforcement strategy - - -

25 JUDGE GARCIA: But you said it would apply to a

1 separate house down the block, that the person doesn't even
2 know the arrest is going on.

3 MS. WEISS: And you know, the federal circuit
4 courts, State v. Lane and other state courts, have done
5 this analysis. And I think that it's one of - - - it's
6 like evidence. It doesn't go to admissibility. It goes to
7 weight. It - - - the People would like to turn it into a
8 per se standing rule.

9 JUDGE HALLIGAN: But I thought they've only done
10 that in a circumstance where they're in the same place.

11 MS. WEISS: That we - - - that this court has
12 only done that where - - -

13 JUDGE HALLIGAN: No, no, that - - - are there
14 other courts - - - I know your light's on. I'll stop. But
15 are there other courts that have said where you have a
16 defendant and a third party in different places that
17 there's an attenuation analysis that has any meaningful
18 teeth there?

19 JUDGE GARCIA: Other than Iowa? I think you
20 mentioned Iowa.

21 MS. WEISS: I think the Second Circuit's decision
22 in United States v. - - - it's not Snipe - - - Valentine,
23 where a defendant is illegally arrested on the street close
24 by to the entrance to his apartment, and the police go up
25 the stairs to the apartment, and they elicit consent from

1 the wife who's up there.

2 JUDGE HALLIGAN: But that's the same location,
3 right, I mean, the same - - -

4 MS. WEISS: I mean, he was arrested on the
5 street. So I - - -

6 JUDGE HALLIGAN: Okay.

7 MS. WEISS: - - - it is a close location, but it
8 is not the same location.

9 JUDGE CANNATARO: Does the wife know about the
10 arrest?

11 MS. WEISS: I believe, in Valentine, the wife is
12 aware of the arrest, at that point. And the Second Circuit
13 in the Valentine decision actually remits - - - they say we
14 need to analyze attenuation, and they remit for that
15 consideration. They don't decide it themselves.

16 I'll touch briefly on harmlessness, just to say
17 that a homicide prosecution where there's a murder weapon
18 in evidence is a lot different from a homicide prosecution
19 where there's not a murder weapon in evidence. The People
20 set up their trial strategy to emphasize the forensic
21 evidence in this case. Mr. Hoepfl was the last witness,
22 and he came in and testified that he had identified that
23 these bullets recovered at the scene were fired from the
24 gun.

25 JUDGE TROUTMAN: But with respect to

1 harmless, you do consider what the other evidence was
2 or wasn't, correct?

3 MS. WEISS: Absolutely. I think that there's
4 just a reasonable possibility of a different verdict in
5 this case.

6 JUDGE RIVERA: Well, you've got the - - - the two
7 eyewitnesses. You've got, if I'm remembering correctly,
8 the - - - the print on - - - and you've got the casings,
9 the print on the magazine from a different location, and
10 the - - - and the casings from the bullets.

11 MS. WEISS: But the casings from the bullets lose
12 - - - lose evidentiary value when the weapon itself is not
13 in evidence, because they're just casings, at that point.
14 And you know, while I don't think there's overwhelming
15 evidence - - -

16 JUDGE RIVERA: I'm misremembering the record?
17 There's not a fingerprint of his on the casing?

18 MS. WEISS: There is a palm print on a magazine
19 left at the scene. You know, and even - - -

20 JUDGE RIVERA: That's the magazine, yeah.

21 MS. WEISS: - - - if this court determined that
22 the evidence was overwhelming, kind of reaching the second
23 step in harmless, there's a reasonable possibility that
24 a jury, without the murder weapon and evidence, without all
25 that supporting forensic evidence that showed that this - -

1 - as the People argued in their closing, this was the
2 weapon that committed the murders at 670 Thurston, that is
3 powerful - - - that's powerful evidence for a jury, and
4 without it, I don't think you could say that we'd have the
5 same verdict.

6 JUDGE TROUTMAN: Even with identification
7 evidence, eyewitness identification?

8 MS. WEISS: So there are two eyewitnesses in this
9 case. And you know, when those eyewitnesses are
10 corroborated by strong forensic evidence, it's pretty hard
11 to attack them. But they are - - - they're not the
12 strongest eyewitnesses. They're not the weakest
13 eyewitnesses. I would concede that.

14 JUDGE TROUTMAN: Didn't - - - didn't one say she
15 knew him for a period?

16 MS. WEISS: She was familiar with him from the
17 neighborhood. But again, with that witness' testimony, she
18 has just suffered a traumatic injury when she sees him.
19 And not questioning her credibility, but simply her ability
20 to recall what was happening in that moment, a lot of her
21 testimony was inconsistent, saying that he was in front of
22 her when the evidence showed that he would have been to the
23 side of her. So an eyewitness like her, some - - - you
24 know, defense counsel - - -

25 JUDGE TROUTMAN: But whether she knew him would

1 be the dispositive and could identify him as the
2 perpetrator of the harm that she suffered is what was for
3 the jury to determine. And if she said she knew him, as
4 opposed to she'd never seen him before, those are factors
5 for the fact-finder, right?

6 MS. WEISS: Certainly. And I just think that - -
7 -

8 JUDGE RIVERA: And there's another witness?

9 MS. WEISS: The credibility of both Mr. White and
10 - - - and Ms. Nunez was really more up for grabs in a trial
11 where their testimony is not corroborated by very strong
12 forensic evidence. And that's why I think that, though - -
13 - though there's two eyewitnesses and - - - and there's the
14 palm print - - -

15 JUDGE RIVERA: The palm print - - - the palm
16 print doesn't put him at the scene?

17 MS. WEISS: It doesn't - - -

18 JUDGE RIVERA: Connecting him to a weapon?

19 MS. WEISS: It's difficult - - - it's difficult
20 evidence. But I think that, still, taking the murder
21 weapon out of this prosecution, just answering the
22 question, is it constitutional harmless error? So is there
23 a reasonable possibility that this affected the jury's
24 verdict? And I think when you take the murder weapon away
25 from a homicide prosecution, there is a reasonable

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possibility.

CHIEF JUDGE WILSON: Thank you.

MS. WEISS: Thank you.

(Court is adjourned)



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

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Shaw (Samuel), No. 113 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Joey Oliveros

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

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