

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 154

RONEL JOSEPH,

Appellant.

20 Eagle Street
Albany, New York 12207
September 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
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:

EUNICE C. LEE, ESQ.
OFFICE OF THE APPELLATE DEFENDER
Attorneys for Appellant
11 Park Place, Suite 1601
New York, NY 10007

DIANE N. PRINC, ADA
MANHATTAN DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place, Room 854
New York, NY 10013

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: First matter on this
2 afternoon's calendar is number 154, People v. Ronel
3 Joseph.

4 MS. LEE: Good afternoon, Your Honors.
5 Eunice Lee from the Office of the Appellate Defender
6 for Ronel Joseph. I'd like to reserve two minutes
7 for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. LEE: Thank you.

10 CHIEF JUDGE DIFIORE: You're welcome.

11 MS. LEE: Your Honors, the sidewalk
12 basement of the deli should not have been deemed a
13 dwelling where it was completely inaccessible either
14 externally or internally from the apartments above
15 the deli. At all times, Mr. Joseph could only be
16 either underground in the basement or on a public
17 sidewalk.

18 JUDGE PIGOTT: In light of - - -

19 JUDGE RIVERA: Do you agree that - - - I'm
20 sorry.

21 JUDGE PIGOTT: In light of McCray, how did
22 - - - how did the Appellate Division end up where it
23 did?

24 MS. LEE: Well, I mean - - -

25 JUDGE PIGOTT: That's a softball. I

1 thought I'd cross that off here.

2 MS. LEE: That's - - - and that - - - no,
3 that's a - - - a good question. Essentially the
4 Appellate Division read this court's decision in
5 McCray as being some type of per se rule that the
6 only time that the exception applies, if it's a - - -
7 is if the building at issue is large, and that's - -
8 -

9 JUDGE STEIN: Well - - -

10 MS. LEE: - - - problema - - -

11 JUDGE STEIN: Didn't McCray refer to both
12 remoteness and inaccessibility?

13 MS. LEE: It - - - it - - - it - - - at
14 various points in McCray it talks about both of
15 those, but it's clear what it turns on is
16 accessibility, because the concern is whether or not
17 the entry - - - or whether or not the burglary
18 creates that likelihood for a special danger to the
19 residents or a confrontation or - - -

20 JUDGE STEIN: Well, can't remoteness play
21 on that too, because if - - - if it's - - - if it's
22 clo - - - if it's close, then that - - - that might
23 create that kind of fear and reaction and whatever -
24 - -

25 MS. LEE: Ab - - - absolutely remote - - -

1 remoteness is relevant to the question of whether
2 there is that possibility for confrontation.

3 JUDGE STEIN: And then isn't size relevant
4 to remoteness?

5 MS. LEE: Size is - - - size and the nature
6 of the building can both be relevant to remoteness,
7 and first I would say also that the building in this
8 particular case, I - - - I would characterize as
9 large itself. It's not a skyscraper, certainly.
10 It's a seven-story block-long building, but aside
11 from the question of the largeness of the building,
12 it really does turn on accessibility.

13 Here, there's no access at all to the
14 apartments, internally, externally - - -

15 JUDGE RIVERA: I don't know; it was a
16 little unclear. Where - - - where is the actual
17 entrance to this building - - -

18 MS. LEE: The - - -

19 JUDGE RIVERA: - - - vis-à-vis this deli?

20 MS. LEE: The - - - the prosecution could
21 pu - - - put forth no evidence with regard to the - -
22 - the - - -

23 JUDGE RIVERA: We don't know where the
24 entrance is?

25 MS. LEE: That's it.

1 JUDGE RIVERA: The photos shed no light of
2 where the entrance is of the building itself, the
3 residential part of this building?

4 MS. LEE: There's - - - there's no evidence
5 in the record of that. There's - - - there's a
6 picture introduced that shows the front of the deli
7 and the - - - the cellar doors into the basement, but
8 there was no either testimony or evidence introduced
9 about the entrance to the apartment building.

10 JUDGE RIVERA: So - - - so if part of the
11 building - - - you - - - you agree that part of the
12 building is a dwelling.

13 MS. LEE: That's correct.

14 JUDGE RIVERA: There's no doubt, right - -
15 -

16 MS. LEE: That's correct.

17 JUDGE RIVERA: - - - in your mind? Okay.
18 And - - - and you agree that the basement is part of
19 this building, yeah?

20 MS. LEE: Well, it's - - -

21 JUDGE RIVERA: Well, you - - - you don't
22 think it has a separate address or a block number or
23 something like that, right?

24 MS. LEE: The - - - the basement does not
25 have a separate address from the deli, but there's no

1 evidence that this - - - that the basement of the
2 deli is connected to anything else rela - - - any
3 other part of the apartment buildings.

4 JUDGE RIVERA: So are - - - are you
5 suggesting that there - - - there's not proof that
6 the basement is actually part of the building that's
7 a dwelling?

8 MS. LEE: Well, that's not really - - -
9 that - - - I guess that's not really sort of the - -
10 - the point of contention. The point is - - - is
11 that because the access - - - because there's a
12 complete lack of access here between the basement and
13 the deli, this is the type of situation that this
14 court in McCray acknowledges when we're - - - there's
15 not that special risk to the residents of the
16 apartment building. They - - -

17 JUDGE FAHEY: Well, but see, you seem to be
18 minimizing proximity in - - - in favor of
19 accessibility. And the reason I bring it up is I
20 guess McCray - - - I think of hotels, and in a hotels
21 (sic), you may not be a - - - a hotel room may not be
22 accessible, but certainly the kind of danger that's
23 talked about is created by the proximity of a burglar
24 going from room to room, and it's - - - it's - - -
25 it's - - - so - - - so it - - - it's really a two-

1 prong test, and I think you have to address both.

2 MS. LEE: Well, I think - - - and proximity
3 absolutely matters, but proximity in the absence of -
4 - - of access. I mean, the fact that a - - - an
5 offense can occur near someone's residence is not
6 something that makes it appropriate to consider it a
7 burglary of a dwelling if there's no access to the -
8 - - the residents, if there's no special position
9 that the residents - - -

10 JUDGE PIGOTT: Suppose - - - suppose
11 instead of going in - - - because this - - - this - -
12 - as I understand it, the doors are - - - are those
13 sidewalk doors that open so they can put - - -

14 MS. LEE: Correct. It's - - -

15 JUDGE PIGOTT: - - - stuff in. Suppose
16 instead of that, he had walked into the deli - - -

17 MS. LEE: Well - - -

18 JUDGE PIGOTT: - - - would that - - - would
19 that be a burglary of a dwelling?

20 MS. LEE: Well, at - - - well - - - as - -
21 - assuming that it did not occur during - - - again,
22 this was business hours when all of this - - - when
23 this particular case happened, but had he gone into
24 the - - - had this been a break in or a nighttime
25 entry into the dwelling - - -

1 JUDGE PIGOTT: No, no, I'm just saying - -
2 - the same time that this happened, I think it was
3 during the day; I don't know. But - - -

4 MS. LEE: Well, there'd be different issues
5 in terms of whether or not it was trespass, and so it
6 was a business and it was - - -

7 JUDGE PIGOTT: Well - - -

8 MS. LEE: - - - open hours, but - - -

9 JUDGE PIGOTT: - - - wouldn't your argument
10 be the same? It's not a dwelling. I mean, it - - -
11 it - - - right?

12 MS. LEE: Frankly, the - - - the lack of
13 internal or external access to the deli - - - there
14 is certainly a reasonable argument as well, that that
15 is not a dwelling. That might present a closer case,
16 because in that context, you do at least have a - - -
17 the nature of, you know - - - the shared nature of
18 the walls as sort of the closer context presents a -
19 - -

20 JUDGE PIGOTT: No, but my point is, isn't
21 it - - - isn't it - - - aren't there degrees of
22 burglary that - - - that make a distinction between a
23 building and a dwelling?

24 MS. LEE: Oh, I'm sorry, yes. That would
25 be third degree burglary - - -

1 JUDGE PIGOTT: So - - - so - - -

2 MS. LEE: - - - not second degree.

3 JUDGE PIGOTT: - - - going into the deli
4 would be burglary of a building, right?

5 MS. LEE: Correct.

6 JUDGE PIGOTT: I'm trying to figure out how
7 if - - - if that's - - - if that's not a dwelling,
8 the - - - the basement where they store their
9 inventory and has no other access other than from the
10 sidewalk - - -

11 MS. LEE: Well, the - - - my adversary's
12 argument would be that that is a dwelling. That the
13 - - - the fact of this commercial space being
14 underneath apartment buildings, that that is - - -
15 regardless of access, that that is enough to make a
16 burglary of the - - - the deli, a burglary of a
17 dwelling, and - - - and I, obviously dispute that - -
18 - that position.

19 CHIEF JUDGE DIFIORE: Ms. Lee - - -

20 MS. LEE: Yes?

21 CHIEF JUDGE DIFIORE: - - - does the nature
22 of the use of that basement or the character of the
23 contents that are stored in there, does that change
24 the analysis? If that was space designated for the
25 tenants to keep their kids' bicycles or whatever?

1 MS. LEE: That would certainly - - - I
2 mean, if that were the case, that would be a factor
3 that the court could consider, because again the
4 question is what is the possibility of there being
5 either a confrontation or a special danger to the
6 residents. And so if this was part of this - - - if
7 this basement were the - - - the residents' basement
8 and they had cause or could perhaps have cause to be
9 there, that would present a different case than this,
10 where it is commercial space, solely belongs to the
11 deli, used as storage, and it's essentially for - - -

12 CHIEF JUDGE DIFIORE: Was that part of the
13 knowledge of the defendant?

14 MS. LEE: Is - - - I'm sorry, Your Honor.

15 CHIEF JUDGE DIFIORE: For the knowledge of
16 the - - -

17 MS. LEE: It's - - - it's not - - -

18 CHIEF JUDGE DIFIORE: - - - burglar?

19 MS. LEE: It's not really - - - it's not
20 really about, you know, the knowledge - - - it
21 doesn't turn necessarily on the knowledge of the
22 person going into this space. It's, again, sort of
23 what's the - - - the danger being created here, and
24 so - - -

25 JUDGE ABDUS-SALAAM: Can I come back to

1 what you said about remoteness and accessibility and
2 - - - are you saying that there have to - - - there
3 have to be both prongs or only one prong - - -

4 MS. LEE: Well, the - - - the - - -

5 JUDGE ABDUS-SALAAM: - - - for the test?

6 MS. LEE: What I'm - - - what I'm
7 suggesting is, the reason remoteness matters is
8 because of accessibility. The purpose of the statute
9 is to avoid these confrontations, and so to the
10 extent that a location that's being burglarized is
11 extremely remote from the dwelling, then that means
12 that there is a less - - - a lesser likelihood of
13 accessibility.

14 JUDGE ABDUS-SALAAM: So even if in - - - in
15 the - - - I think the example that Judge Rivera was
16 trying to bring up, although we have nothing in the
17 record, hypothetically, if the cellar were right next
18 to the entrance to the apartment building, would you
19 say that that wasn't proximate enough or it's not
20 remote enough, or it is - - -

21 MS. LEE: I - - -

22 JUDGE ABDUS-SALAAM: - - - too remote?

23 MS. LEE: I think the problem is it can
24 never be solely a question of remoteness here.

25 Access has to be considered combined with that. And

1 so even where it's a close location, where there's no
2 access and the only confrontation that occurs - - -
3 that could occur is on a public sidewalk, that take's
4 it out of the realm of being a burglary of a - - - a
5 dwelling.

6 CHIEF JUDGE DIFIORE: Thank you, Ms. Lee.
7 Counsel?

8 JUDGE FAHEY: Can I - - - Judge, would it
9 be all right - - -

10 CHIEF JUDGE DIFIORE: Yes.

11 JUDGE FAHEY: - - - if I just asked one
12 question? Just - - - I did - - - I didn't want to
13 miss you on this. The CJI has a slightly different
14 standard that's referenced. I think they refer to
15 the nature and the size of the building, rather than
16 just a large and - - - and - - - do you want to
17 address that for one second?

18 MS. LEE: Correct, yes. The - - - the CJI,
19 the current version, which was revised specifically
20 to reflect this court's decision in McCray includes
21 language saying basically that in - - - in
22 determining whether or not it should be considered a
23 dwelling, that the jury - - - it's appropriate to
24 consider the nature and the size of the building as
25 well, and it - - - I think it also includes language

1 as to whether or not there is a possibility of this,
2 again, confrontation or interaction with - - - with
3 residents in the building.

4 CHIEF JUDGE DIFIORE: Thank you.

5 Counsel?

6 MS. PRINC: May it please the court, Diane
7 Princ, on behalf of the People, the respondent. Your
8 Honors, defendant's conviction - - -

9 JUDGE GARCIA: Counsel, can I - - - I'm
10 sorry to interrupt you, but it seems to me you fall
11 within the statute; this is a dwelling, right? Four
12 corners, dwelling. So the issue here is, does this
13 fall within the exception to that rule, and that to
14 me is remoteness and accessibility. And I think we
15 can agree here, this isn't accessible. I mean, it's
16 a subbasement of a deli, which itself isn't connected
17 to the residences, right?

18 MS. PRINC: Yes.

19 JUDGE GARCIA: So it really turns, it seems
20 to me, on remoteness. And if you look back at the
21 old Quinn case - - -

22 MS. PRINC: Yes.

23 JUDGE GARCIA: - - - they talk about large,
24 and I think you argue that in - - - in your papers,
25 but what's the relationship between large and remote?

1 Because I think large is a bit of a misreading of
2 Quinn.

3 MS. PRINC: Well, first, Your Honor, I
4 would - - - I would say that Quinn actually says
5 large itself, when defining this exception. It
6 begins by saying to ward off apprehension, a
7 different rule comes in - - -

8 JUDGE GARCIA: Right, but I think if you
9 read Quinn - - - it's 1878, right? And that building
10 is somebody who owns the business lives there. And
11 the fear is, even though it's not connected, you're
12 going to hear this noise, and you're going to
13 respond, and that can lead to injury.

14 So it's in that context I think they're
15 using large, which isn't - - - is really large more -
16 - - more than a physical sense. It's large enough so
17 you don't have that type of relationship, it seems to
18 me. So it's really "remoteness", a better way, and I
19 think our more recent articulation of it, so it's
20 remoteness. So why isn't this building, where you've
21 got a subbasement of a deli that itself isn't
22 connected to residences, remote?

23 MS. PRINC: Well, I - - - to go back, Your
24 Honors, as - - - as we were des - - - as you were
25 describing the facts of the case with my adversary,

1 this isn't - - - this is one story removed from where
2 the residence begin. It's not so remote that it's -
3 - - as the court in McCray explained that there's
4 virtually no risk that the residents - - -

5 JUDGE GARCIA: Well, what if it was in the
6 building that was immediately adjacent to this
7 building, assuming that there is one? That would be
8 also pretty close in proximity, but would - - - would
9 that be enough?

10 MS. PRINC: No, but that wouldn't be the
11 same building. We're - - - we have to take a step
12 back. The - - - the statute in this case is - - - is
13 - - -

14 JUDGE RIVERA: Well, what - - - is - - - is
15 - - - is the defense correct that there's not
16 evidence in the record about where the actual
17 entrance to the residential part of the building is
18 located?

19 MS. PRINC: That is correct, Your Honor.

20 JUDGE RIVERA: Okay, did you put in any
21 evidence about access from the deli to the
22 residences?

23 MS. PRINC: At the - - - what is in the
24 record is that there's only one entrance to the
25 public to the deli, and that's the front entrance,

1 and you can see a - - - a photograph of that.

2 JUDGE RIVERA: The same thing to the
3 basement, right? You got to go through those doors
4 that are flush to the ground?

5 MS. PRINC: Yes, Your Honor.

6 JUDGE RIVERA: Right? So - - - so how
7 would he in - - - in your argument - - - let's say
8 it's not - - - let's say it - - - it - - - there's
9 not a distance, right, that - - - that you don't have
10 the remoteness problem. How would he have gained
11 access to the residences?

12 MS. PRINC: Well, he was close physical
13 proximity and I don't think - - -

14 JUDGE RIVERA: I understand. How is he
15 going to gain access to the residences? He's in this
16 basement, and you - - - you - - - you concede the
17 basement doesn't connect anyway to the resident - - -
18 there's only one, right, entrance and exit from the
19 basement.

20 MS. PRINC: Yes, he - - - he - - -

21 JUDGE RIVERA: Okay, so how is he - - -

22 MS. PRINC: - - - he would have to - - -

23 JUDGE RIVERA: - - - going to get to the
24 residences?

25 MS. PRINC: I'm sorry, Your Honor. He

1 would have to break through. But I - - - I want to -
2 - -

3 JUDGE RIVERA: And then do what? Since you
4 didn't put in evidence about where the entrance to
5 the residences are.

6 MS. PRINC: He - - - he would have to climb
7 up, but we're talking about hypotheticals. And I - -
8 - I ask this court to - - - we have always argued
9 that the statute is clear. It says that if you break
10 into a building containing dwellings, that is the
11 burglary of the dwelling. We are talking about an
12 exception to this rule, which this court has defined
13 narrowly, and I have to point out, this court in
14 McCray repeatedly said "large" and that term has a
15 meaning. If you - - -

16 JUDGE PIGOTT: No, it doesn't, because the
17 reason we did that is you're in a big hotel, and - -
18 - and - - - and the question was, you know, when this
19 person's wandering around hitting all of these places
20 that really we're serving the - - - the hotel. I
21 mean, that's - - - that - - - that was a - - -
22 customers and things like that. It was almost
23 fortuitous that it was as big as it was.

24 But what - - - what we were concerned about
25 and what - - - what we debated so often was, that

1 there was certain ways that you could get from these
2 shops to the - - - the rooms, where the - - - where
3 the people were, but then distance, you know, and the
4 size made it less more a dwelling than - - - than
5 just being able to access it.

6 Here, you've got a situation where, in
7 fact, in - - - in capturing this guy, you - - - you
8 just closed the doors. He couldn't go anywhere. He
9 couldn't go to the deli. He couldn't go to the - - -
10 pardon me, the dwellings, which is where people sleep
11 at night, and - - - and so I don't see how that could
12 possibly be a dwelling. If it is, you know, if
13 you've got a bank in a - - - in an apartment
14 building, if you've got anything in an apartment
15 building, those are all dwellings. A dry cleaners in
16 the - - - on the first floor of their apartment
17 building is a dwelling, right?

18 MS. PRINC: Yes, but that's what this court
19 announced in Quinn. This court has - - - had - - -

20 JUDGE PIGOTT: Quinn was - - - Quinn was
21 150 years ago.

22 MS. PRINC: But it - - - the - - - the
23 court in McCray reaffirmed that ruling. The - - -
24 the crime is designed to deter the violence that - -
25 - as this court as said is inherent - - -

1 JUDGE FAHEY: No, but the question is - - -
2 is - - - is - - - you're right about the crime, but -
3 - - but the question is whether or not the large
4 standard is applicable or whether it's so inherently
5 subjective that to rely on it and not to grant the
6 exception on the basis of that is - - - is - - - it's
7 impossible to reconcile with the geography of the
8 entire state. Large in Auburn, New York - - - a
9 building that's large in Auburn, New York is not the
10 same as a building that's large in Manhattan. Those
11 are two different kinds of things. And the rules
12 that we make have to apply to everybody.

13 And the - - - the purely subjective nature
14 of that in - - - in refusing to apply that exception
15 in this particular circumstance, given the clear lack
16 of accessibility, makes your case more difficult.

17 MS. PRINC: I would say, Your Honor, this
18 court used the term large. It explained - - - you
19 can look at the facts of the case. It defined that
20 building as large.

21 JUDGE PIGOTT: So let's assume you've got a
22 building - - - this - - - this seems to be getting
23 more and more common. You've got a brand new office
24 building that's set up and in - - - and as part of
25 the office building, there's a hotel.

1 MS. PRINC: Yes.

2 JUDGE PIGOTT: Every office in that
3 building is now a dwelling?

4 MS. PRINC: Yes, Your Honor. I - - - the
5 statute - - - I - - - I - - - I'm sorry if I'm
6 repeating myself - - - the statute is clear - - -

7 JUDGE PIGOTT: Please do.

8 MS. PRINC: - - - and the court has carved
9 out - - - the court has recognized a narrow exception
10 to that statute, and - - - and what I - - - I'm
11 asking - - -

12 JUDGE PIGOTT: What - - - what - - - what
13 is - - -

14 MS. PRINC: - - - this court not to narrow
15 the verdict.

16 JUDGE PIGOTT: - - - what is - - - what is
17 a building? I mean, I - - - I'm - - - you - - -
18 you're making every business in the - - - in - - - in
19 the city of New York, I guess, and - - - and - - -
20 and probably a lot of upstate, that even - - - even
21 hints at having a hotel or any - - - any type of
22 thing like that, a dwelling, even if it's mainly an
23 office building.

24 MS. PRINC: That's what the legislature
25 intended. That's what the statute says. It says if

1 buildings are an entire block.

2 MS. PRINC: Well, there's a photograph in
3 the record - - -

4 JUDGE RIVERA: Some buildings are very
5 small. I looked at the photograph, that's why I'm
6 asking the question. Is that - - -

7 MS. PRINC: Well, it's not an entire block.

8 JUDGE RIVERA: Was that all the evidence,
9 by the way? Is that - - - just the photos?

10 MS. PRINC: We have the photos and then
11 testimony from the police officer who explained that
12 it was a residential apartment building. All six
13 floors above contain resident - - -

14 JUDGE RIVERA: Counsel, we don't really
15 know how big the building is - - -

16 MS. PRINC: We don't know feet wise - - -

17 JUDGE RIVERA: - - - in reality.

18 MS. PRINC: - - - but we can picture - - -
19 it's not an entire block. It's a - - - it's a deli -
20 - - and I think from the photograph, it's reasonable
21 to infer that it's no bigger than this room.

22 JUDGE ABDUS-SALAAM: Well, counsel, even if
23 we were to agree that we - - - and we did use the
24 term "large" in McCray and in Quinn - - -

25 MS. PRINC: Yes.

1 JUDGE ABDUS-SALAAM: - - - because we took
2 the language from Quinn. But we also said in McCray
3 that in large buildings, situations can arise which -
4 - - in which the general rule will not be applied
5 because it do - - - it does not make sense. So even
6 if we didn't - - - if - - - even if this were not a
7 large building and it may not be in some - - - by
8 some standards, aren't we really trying to figure out
9 what makes sense?

10 MS. PRINC: Well - - -

11 JUDGE ABDUS-SALAAM: And - - - and does it
12 make sense to say that a - - - a cellar that is
13 inaccessible other than through two doors on a
14 sidewalk that can be locked and - - - and contained
15 the alleged burglar, does it makes sense to say that
16 that's a dwelling?

17 MS. PRINC: Yes, Your Honor, I think it
18 does, and I will point out where Your Honor was
19 quoting, that's the court discussing the policy
20 behind this narrow exception. And the court ends by
21 once again noting in large buildings situations. So
22 what I'm asking this court is please do not read out
23 the largeness requirement. Please do not expand this
24 exception, especially when the statute is so clear on
25 its terms.

1 JUDGE STEIN: Is there a difference between
2 large and remote or is - - - is large a - - - a - - -
3 a factor in considering remoteness?

4 MS. PRINC: I - - - yes, Your Honor, and I
5 - - - I think remoteness explains the largeness.
6 It's not just - - - there's two requirements here.
7 It's that you're so far removed because of the
8 largeness or the size of the building; there's great
9 distance, and not only that, you lack access. That's
10 when the exception applies. Not in this case. This
11 case - - - sorry.

12 JUDGE PIGOTT: When - - - when I looked at
13 the pictures, you know, and you've got - - - and
14 you've got this deli, and - - - but down the street,
15 it looked like on the first floor of every single
16 building, there was a - - - there was a business.

17 MS. PRINC: Yes.

18 JUDGE PIGOTT: And every single one of them
19 is an apartment house.

20 MS. PRINC: Exactly, Your Honor.

21 JUDGE PIGOTT: So everybody - - - I mean,
22 if - - - if you go in to - - - to rob the bank,
23 you've robbed - - - you've - - - you've committed
24 burglary of a dwelling?

25 MS. PRINC: Well, I don't think that's

1 unfair because you have notice. The - - - the point
2 of - - -

3 JUDGE PIGOTT: So your answer is yes. I
4 mean, that - - -

5 MS. PRINC: Yes.

6 JUDGE PIGOTT: - - - that there is no way
7 that you can - - - that you can burgle a building in
8 the City of New York as long as there's - - - as long
9 as they're in an apartment building.

10 MS. PRINC: And you shouldn't. You should
11 be on notice that this where - - - I'm sorry; my time
12 is - - - I'm just going to - - - the statute has a
13 broad application to deter this type of behavior.
14 You should not enter a building where people live.
15 People in this building are entitled to feel safe at
16 night. Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you.

18 Ms. Lee, if the - - - the building is
19 predominantly residential, why does it matter that
20 there's no internal communication there? I'm not
21 following.

22 MS. LEE: Well, again, I mean, I think part
23 of what the court highlighted in McCray, in addition
24 to the language about it being large, what the other
25 formulation was that it shouldn't be deemed a

1 burglary of a dwelling where the intruder, you know,
2 neither comes nor readily can come near to anyone's
3 living quarters.

4 CHIEF JUDGE DIFIORE: The building's
5 predominantly residential.

6 MS. LEE: Right, but he can't - - - from
7 this basement, which is not accessible to the deli
8 and not accessible to the apartment buildings, he's
9 not - - - he's not - - - cannot readily come within
10 context of someone's living quarters. It's just not
11 possible. I mean, to the extent that McCray is
12 saying we have to consider whether or not there's
13 this possibility for confrontation or special danger
14 to the residents, it has to mean - - - it has to be
15 about access. I might -

16 JUDGE GARCIA: I - - - I disagree with
17 that, because - - - yeah, it's partially about
18 access, and if you have access, I think generally
19 you're going to lose, although on your argument - - -
20 although McCrary (sic) - - - McCray left that open,
21 right, in terms of it could be large enough that even
22 if you had access, I think, the language was, is this
23 a very close case, because it was a hotel.

24 But if you have access, I think you lose,
25 unless it's, you know, the Hilton. So if - - - then

1 you have to go to remoteness. So your argument, it
2 seems to me, really hinges on - - - to get back to -
3 - - I think what Judge Stein and I were asking about
4 earlier - - - is remoteness versus largeness, right?
5 Is this just how many stories or is it a block? Is
6 it half a block or is it something else?

7 And to me, it seems like there's a
8 something else there, going back to some of these
9 factors you were talking about, especially the 1878
10 case, that there's a family-owned business, and
11 they're sleeping next door, although they didn't have
12 access. So access alone - - - I mean, Quinn, they
13 didn't have access and it was still a burglary. So
14 that isn't a determinative.

15 But what is remote? How are we to define
16 remote? I mean, again, getting back to large in - -
17 - in different parts of the state will mean very
18 different things, so how do we define remote?

19 MS. LEE: Right. Remote certainly can't be
20 defined solely as a matter of what is the size of the
21 building. It has to be looked at in the context of
22 the location that's being burglarized, and the - - -
23 you know, its connection to the - - - the apartments,
24 because, again, what the court's looking for is what
25 is the likelihood that this is - - - this is the

1 scenario that's going to create that kind of
2 confrontation with the residents that we're concerned
3 about.

4 Here, with this basement, it's not
5 connected to the apartments. It's - - - there's no -
6 - - both not connected physically or - - - or in
7 other - - - in the other way to the - - - the
8 residents. This is - - - hits that category of this
9 is not what the burglary statute is about. And it's
10 hard to imagine - - - I mean, if it's all of this - -
11 -

12 JUDGE STEIN: Well, wouldn't - - - wouldn't
13 it be relevant - - - again, and - - - and it appears
14 maybe we don't have the - - - the information that we
15 need here. But wouldn't it be relevant if - - - if
16 one of the residents is going to his or her apartment
17 and the door to access that apartment is within feet
18 of the door down to the - - - down to the cellar?

19 MS. LEE: That would present a clo - - - a
20 closer case, but I think the other problem still even
21 with that scenario - - -

22 JUDGE RIVERA: Oh, wait. How is that?

23 MS. LEE: So - - -

24 JUDGE RIVERA: Isn't a person still outside
25 on a public street?

1 MS. LEE: Well, that's what I was going to
2 say, but the - - - the re - - - the problem with that
3 analogy is that in any - - - any interaction that
4 anyone could have with Mr. Joseph would be on a
5 public sidewalk, and so the fact that the public
6 sidewalk is near someone's front door, that's - - -
7 you know, it's not a trespass and it doesn't convert
8 it into a burglary. And so the concern about
9 confrontation obviously might be greater, but where
10 the residents of the building are indistinguishable -
11 - -

12 JUDGE STEIN: So we have a public ac - - -

13 MS. LEE: - - - from a passer - - -

14 JUDGE STEIN: So we have a public access
15 exception, is that - - -

16 MS. LEE: Well, it's not about public
17 access, but it's again burglary's about trespass, and
18 the fact that I'm walking down this street and I live
19 in this building and I see a burglar; you're walking
20 down the street and you see a burglar as well, that's
21 not - - - it's still not a burglary of a dwelling.
22 My status as a resident, when I'm walking down the
23 street is indistinguishable from a passer-by and
24 that's not what the burglary statute is intended to
25 address.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUDGE DIFIORE: Thank you.

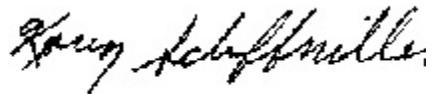
MS. LEE: Thank you.

(Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Ronel Joseph, No. 154, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 21, 2016