To be argued by Clea Weiss
Time requested: 15 Minutes

APL-2024-00129

Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

***Respondent*,**

-v-

SAMUEL SHAW,

***Appellant*.**

APPELLANT'S BRIEF

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Preliminary Statement

Samuel Shaw appeals by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of that court, dated July 26, 2024. The Appellate Division modified a judgment of the Monroe County Court (Hon. Vincent M. Dinolfo), rendered August 16, 2019, upon a jury verdict convicting Mr. Shaw of murder in the first degree (two counts), murder in the second degree (two counts), attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree (three counts). The modification reversed those parts convicting Mr. Shaw of murder in the second degree under counts 3 and 4, dismissed those counts, and directed that the sentences imposed on counts 7 and 8 run concurrently with the sentences imposed on counts 1, 2, 5, and 6.

Justice E. Jeannette Ogden dissented, and she would have further modified the judgment by granting suppression and dismissing count 9 of the indictment. On September 16, 2024, Justice Ogden granted Mr. Shaw leave to appeal to this Court. Mr. Shaw has no codefendants. There is no related litigation.

This Court has jurisdiction to review the claims raised in this appeal (*see* CPL 470.35 [1]; 450.90 [1]). The issues raised in Points I–III were preserved by trial counsel's arguments in the motion papers and following the suppression hearing (A: 140–141, 145, 711–712). The issue raised in Point IV regarding harmless error analysis need not be preserved in the trial court.

Questions Presented

1. Samuel Shaw spent the night at Christina McCoy's apartment. Did he have a privacy interest in Ms. McCoy's apartment when he was arrested the following day while he was still in her apartment?

2. Did the SWAT team violate the United States and New York Constitutions when, after a month of investigation and without any arrest warrants or search warrants, it surrounded Ms. McCoy's apartment and ordered all the occupants out at gun point, handcuffing them, and taking them into custody?

3. Did the Appellate Division undertake the correct legal analysis to determine whether Ms. McCoy's consent to search her apartment was both voluntary and attenuated from the constitutional violation which preceded it?

4. When Ms. McCoy gave consent to search her apartment while still in handcuffs in the back of a patrol vehicle, was that consent given as an act of her own free will?

5. Is the question of attenuation presented for review when the People have not preserved the claim that Ms. McCoy's consent was attenuated from the preceding constitutional violations?

6. If that question is reviewable, was Ms. McCoy's consent attenuated from the preceding constitutional violations?

7. When searching Ms. McCoy's apartment pursuant to her purported consent, law enforcement found "the gun that committed the murders," as shown by later forensic testing. Was the failure to suppress that gun a harmless error in this murder prosecution?

Statement of Facts

On the evening of July 21, 2018, members of Monroe County's Special Weapons and Tactics ("SWAT") team descended on Atkinson Court, an eight-unit, townhouse-style apartment complex located in the City of Rochester (A: 619–620, 680).[1] Members of the team rode in a BearCat, an armored vehicle, and they smashed through a fence with the vehicle before jumping out in the backyard and surrounding the building (A: 543–545, 560). Fifteen members of the SWAT team were on scene alongside additional uniformed officers who arrived in vans (A: 543–544, 560). The SWAT team members wore body armor and camouflage tactical clothing; they carried assault weapons; they looked like "soldiers" (A: 542, 561). The SWAT team quickly surrounded the building and began giving verbal commands for everyone to exit from two different apartments (A: 513–515, 534, 546). Their target was Samuel Shaw, and the SWAT team intended to arrest him (A: 493–495; 518–520).

Law enforcement had been tracking Mr. Shaw for weeks after he had been identified as the lead suspect on the morning following a

[1] Page references preceded by "A" are to the consecutively paginated, three-volume Appendix.

shooting in which two people died and one was severely injured (A: 504–505). Law enforcement was using a cell site simulator device to track Mr. Shaw's cellphone (A: 539). There was no arrest warrant, however. Officers made a deliberate decision, for "tactical reasons," to forgo a warrant because they wanted to interrogate Mr. Shaw before the right to counsel attached (A: 493, 505, 575–576).[2] From their tracking, the SWAT team knew that Mr. Shaw had arrived at the apartment 18 hours earlier (A: 511, 574). The lessee of the apartment, Christina McCoy, had picked up Mr. Shaw in her car, and after getting pizza together, they returned to the apartment and were intimate with each other (A: 632–634). Mr. Shaw then spent the night, sleeping at Ms. McCoy's apartment (A: 633). Mr. Shaw stayed at Ms. McCoy's apartment until his arrest, the following evening (A: 653).

Around 8:45 p.m. that evening, Mr. Shaw heard the SWAT team arrive, and he looked out of a window and made eye contact with Investigator Salvatore Amato, one of the SWAT team members who had ridden inside the BearCat armored vehicle to the back of the building (A:

[2] The right to counsel attaches once criminal proceedings have commenced, and in New York, under CPL 120.20, criminal proceedings must be instituted before an arrest warrant may be issued (*see People v Jones*, 2 NY3d 235, 240 [2004]).

533, 544–545). Investigator Amato testified that, after he saw Mr. Shaw through the window and recognized who he was, he started shouting commands at Mr. Shaw like, "come on out, house is surrounded . . . come out empty handed, come out with your hands up" (A: 533–534). Mr. Shaw guided Ms. McCoy and her 16-year-old cousin into the laundry room, for their safety (A: 620–621). He then exited the house, holding a liquor bottle and a cigarette (A: 534–535). Ms. McCoy testified that she heard someone shout, "Get down asshole" (A: 622), as two officers took Mr. Shaw into custody "using force" (A: 170, 518–519).

Then, SWAT team members entered the apartment and told Ms. McCoy and her cousin to exit the laundry room; they took them into custody (A: 622–623). Ms. McCoy testified that the police came and got them from the laundry room, ordering her and her cousin to "come out with [their] hands up," and lay face down on the floor at gun point (A: 622–623). The police cuffed Ms. McCoy's hands behind her back (A: 639). The officers put Ms. McCoy in the back of a patrol car, in handcuffs (A: 640). Her cousin was separated from her (A: 623). Five residents of a neighboring apartment building were also taken into custody (A: 170). After all the residents of both apartment buildings were in custody, the

SWAT team performed protective sweeps in both apartments (A: 603–604). And after the protective sweeps, Investigator Amato entered Ms. McCoy's apartment again and walked upstairs (A: 548, 552). He later testified that he did this in order to confirm which window he had seen Mr. Shaw through (A: 548, 552).

Ms. McCoy remained handcuffed in the back of a patrol car for about five to seven minutes (A: 624). At that point, Lieutenant Naser Zenelovic, the commanding officer of the tactical unit, began talking to her (A: 567–568). Body-worn camera footage—admitted as Defense Exhibit B at the May 7–8, 2019 suppression hearing—captures part of Lt. Zenelovic's conversation with Ms. McCoy. Although the exact content of the video was contested in the County Court proceedings, in the video and in accord with County Court's findings of fact, Lt. Zenelovic can be heard to tell Ms. McCoy, "Listen, all I'm worried about is I know we've got a gun in there. Okay, and that's all I'm worried about" (A: 208–209; Defense Hearing Exhibit B). Thereafter, Ms. McCoy purportedly consented to a search of her apartment (A: 235–236). At the hearing, she testified that law enforcement removed the handcuffs at the time she signed the consent to search form (A: 641). She also testified, "They let

me come outside and stand outside the car after I signed the order to search" (A: 625). At the direction of Lt. Zenelovic, officers then searched her apartment, and a firearm was found in a toilet tank in the bathroom (A: 672–684).

After Mr. Shaw's arrest and interrogation, he was charged in a nine-count indictment as follows:

Count	Crime Charged	Date of alleged incident
1	Murder in the first degree – Penal Law § 125.27 (1) (a) (vii) and (b) – as to William Gibson	June 20, 2018
2	Murder in the first degree – Penal Law § 125.27 (1) (a) (vii) and (b) – as to Anthony Robertson	June 20, 2018
3	Murder in the second degree – Penal Law § 125.25 (1) – as to William Gibson	June 20, 2018
4	Murder in the second degree – Penal Law § 125.25 (1) – as to Anthony Robertson	June 20, 2018
5	Attempted murder in the second degree – Penal Law §§ 110.00, 125.25 (1) – as to Alia Nunez	June 20, 2018
6	Assault in the first degree – Penal Law § 120.10 (1) – as to Alia Nunez	June 20, 2018
7	Criminal possession of a weapon in the second degree – Penal Law § 265.03 (1) (b)	June 20, 2018
8	Criminal possession of a weapon in the second degree – Penal Law § 265.03 (3)	June 20, 2018
9	Criminal possession of a weapon in the second degree – Penal Law § 265.03 (3)	July 21, 2018

(A: 13–16).

The charges in the first eight counts stemmed from the shooting that had occurred a month earlier. The shooting took place in a Rite Aid

parking lot adjacent to Classic's Bar and Grill on Thurston Road in the City of Rochester. The bar was hosting a party, and the parking lot was crowded with people hanging out for the evening (T: 1097–1099, 1107). Two men, Anthony Robertson and William Gibson, were the apparent targets of the shooting, and they were sitting in a sedan in the parking lot. They both died. A woman, Alia Nunez, was seated in the passenger seat of the next car over. She was struck and severely injured, becoming paraplegic. One of the Rite Aid's security cameras captured the entire incident, although without great clarity (People's Trial Exhibit 80 at 01:12:25–01:12:45). Both Ms. Nunez and Jahmiir White, a man who had been standing on the far side of the vehicle that Ms. Nunez was in, identified Mr. Shaw as the shooter on June 21st, 2018, the day after the shooting (A: 215–220). The People's theory of the case was that Mr. Shaw was seeking revenge on individuals who had previously robbed him of jewelry and fired a gun at him outside of a restaurant called Antonetta's (A: 188, 195, 211).

The two eyewitness identifications were supported by forensic evidence derived from the gun which was seized after Mr. Shaw's arrest. Specifically, a forensic firearms examiner testified about his examination

of bullets recovered from the shooting (A: 1474–1503). He concluded that the firearm found in Ms. McCoy's apartment was the firearm that shot those bullets (A: 1503). The People also presented evidence that Mr. Shaw's fingerprints were on an empty Smith & Wesson 9mm box that had been located in a car, and that the firearm found in Ms. McCoy's apartment had the same serial number as the empty box (A: 1017–1029, 1146–1147, 1565). As the People would later argue in closing, "This is the gun that committed the murders at 670 Thurston" (A: 1566).

Mr. Shaw was initially represented by assigned counsel. Following motion practice, County Court ordered *Huntley* and *Wade* hearings, which were held on December 4, 2018. After those hearings, but before any decision on suppression, Mr. Shaw's family helped him retain counsel. County Court granted the request of Mr. Shaw's new attorneys to reopen the *Huntley* hearing and invited them to renew the motion for suppression of the firearm recovered from Ms. McCoy's apartment.

In the renewed motion (A: 134–173),[3] Mr. Shaw alleged that he had been an overnight guest at Ms. McCoy's apartment and had a privacy

[3] Exhibit L (A: 171), attached to the renewed motion, was a CD containing body-worn camera footage (A: 143). This exhibit was identical to that which was admitted at the May 7–8, 2019 hearing as Defense Exhibit B.

interest in her apartment, thus having "standing" to challenge the search of that location under the Fourth Amendment (A: 140–141). He also alleged that at least 31 law enforcement officers from different agencies had converged upon Ms. McCoy's apartment and ordered all individuals out of the apartment (A: 141). In the *Payton* section of his motion, Mr. Shaw discussed how law enforcement ordered him to exit the house as a strategy to arrest him without an arrest warrant (A: 144–145). Mr. Shaw specifically alleged that a *Payton* violation had occurred and argued that the firearm that was found in Ms. McCoy's apartment must be suppressed as a direct and unattenuated result of the *Payton* violation (A: 144–145).

Mr. Shaw also addressed the voluntariness of Ms. McCoy's consent. He alleged that law enforcement coerced Ms. McCoy into giving consent to search the apartment by telling her, "Listen, all I'm worried about is that I know we found a gun in your apartment" and, "You don't want to get arrested tonight, do you?" (A: 143).[4] Mr. Shaw argued that Ms. McCoy only signed the consent to search form after being confronted about a gun

[4] In the trial court proceedings, the parties disputed exactly what Lt. Zenelovic said to Ms. McCoy (A: 713–715).

being found in her apartment, and that the gun had already been found during an illegal search that occurred prior to the consent (A: 143).

The People responded to Mr. Shaw's renewed motion, arguing that Mr. Shaw did not have a reasonable expectation of privacy in Ms. McCoy's apartment such that he could challenge the search (A: 180–182). They further argued that Mr. Shaw abandoned the firearm when he left it inside when he was ordered out of the house by the SWAT team (A: 182). The People also argued that there was no *Payton* violation because Mr. Shaw was taken into custody outside Ms. McCoy's apartment (A: 183–184). The People did not argue that, even if there were a *Payton* violation, the ensuing consent search was attenuated from the *Payton* violation. The People also did not respond to Mr. Shaw's argument that the consent was involuntary, but argued that Mr. Shaw had "no standing to challenge her consent or the nature of it" (A: 182).

The reopened *Huntley* hearing was held on May 1, 2019 (A: 482–524). County Court also granted a hearing on standing and suppression, and that hearing was held on May 7 and 8, 2019 (A: 525–722). At the suppression hearing, People presented the testimony of five officers who participated in Mr. Shaw's arrest and the subsequent search, as well as

the testimony of Ms. McCoy. The defense presented the testimony of an investigator and Mr. Shaw.

In oral argument following testimony, Mr. Shaw's attorney elaborated on his theory of the *Payton* violation, explaining that because Mr. Shaw was ordered out of the residence under coercive circumstances, it was "an arrest under *Payton*" (A: 711–712). Both parties also addressed whether Mr. Shaw had a privacy interest in Ms. McCoy's apartment (A: 711, 717–718). The People argued that a *Payton* violation had not taken place because Mr. Shaw "voluntarily walked out" of the house (A: 718). They also reiterated their argument that Mr. Shaw did not have standing to challenge the voluntariness of Ms. McCoy's consent (A: 719). The People did not argue that the consent was attenuated from any constitutional violation that might have preceded it.

County Court ultimately denied suppression, finding that Mr. Shaw did not have either a subjective or objective privacy interest in Ms. McCoy's apartment (A: 205–208). County Court also rejected Mr. Shaw's argument that being coerced out of the home could constitute a *Payton* violation (A: 209). The court concluded that Ms. McCoy validly consented to the search of the apartment and that the evidence did not suggest that

law enforcement had conducted a search or found the gun in the bathroom before obtaining consent (A: 208–209).

The case preceded to a jury trial. Over the course of three weeks, the People presented their case through eyewitnesses, law enforcement, medical examiners, and forensic technicians. The defense did not put on a case. On the second day of deliberation, the jury returned a verdict finding Mr. Shaw guilty as charged (T: 1286–1288). Mr. Shaw was sentenced to life in prison without the possibility of parole on counts 1 and 2, with lesser sentences imposed on the remaining counts.[5]

On his appeal to the Appellate Division, Fourth Department, Mr. Shaw argued, among other things, that the trial court had erred in not granting his motion to suppress the firearm that was found in the house. The Fourth Department agreed with Mr. Shaw to the extent of finding that Mr. Shaw did have standing to contest the legality of his arrest and the search of the house and that a *Payton* violation had occurred (A: 7). The panel majority, however, found that Ms. McCoy's consent to search

[5] The Appellate Division modified the judgment on the law to have two lesser sentences run concurrently with the life without parole sentences, but rejected Mr. Shaw's request to reduce the life without parole sentences to parole-eligible life sentences as a matter of discretion in the interest of justice (A: 4–10).

the house was voluntary and thus concluded that the trial court "properly refused to suppress the gun recovered from the residence" (A: 8).

Hon. E. Jeannette Ogden dissented. She concluded that Ms. McCoy's consent was not voluntary (A: 9). But, Justice Ogden wrote that even if the consent was voluntary, "I would conclude that the consent was not sufficiently attenuated from the *Payton* violation. Contrary to the position taken by my colleagues, voluntariness is not dispositive on the issue of attenuation" (A: 9). Justice Ogden concluded that the trial court erred in denying Mr. Shaw's suppression motion (A: 10), and granted leave to appeal to this Court (A: 2).

Summary of Argument

In adopting the Fourth Amendment, the Framers of the United States Constitution established the "right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures" (US Constitution, 4th Amendment). Their purpose in adopting the amendment was to defend "the privacies of life against arbitrary power," and "a central aim of the Framers was to place obstacles in the way of a too permeating police surveillance" (*Carpenter v United States*, 585 US 296, 305 [2018] [internal quotation marks and citations omitted]).

The text of the Fourth Amendment would be rendered meaningless and its purpose defeated if it is held to permit what happened in this case: a SWAT team crashing through a fence in a BearCat armored vehicle and surrounding a townhouse to order all of the residents out at gunpoint and make a warrantless arrest in the absence of exigent circumstances. The police conduct in this case is offensive to American notions of privacy and ordered liberty.[6]

The purported consent given by Ms. McCoy was neither voluntary nor attenuated from the constitutional violation that was still ongoing—she was in handcuffs in the back of a police car—at the time law enforcement requested that consent. The search undertaken on the authority of that purported consent was invalid. The exclusionary rule, meant to deter the unlawful conduct of the SWAT team in this case, must be applied.

The failure to exclude the firearm found in Ms. McCoy's apartment

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[6] The use of militarized forces like SWAT teams to conduct domestic policing is generally a departure from the ideals of the Framers, who, following their experience with the British army, were skeptical of the creation of a standing army or the use of the army in civilian law enforcement (*see generally* Laura Withers, *How Bearcats Became Toys: The 1033 Program and Its Effect on the Right to Protest*, 84 Geo Wash L Rev 812 [2016]; Radley Balko, *Rise of the Warrior Cop, How Did America's Police Become A Military Force on the Streets?*, ABA Journal [July 2013]; Bruce Chadwick, *Law & Disorder: The Chaotic Birth of the NYPD*, 25 [2017]).

impacted the entire verdict in this case: the People relied heavily on the forensic evidence to show that the gun found in the apartment was linked to Mr. Shaw and was the gun that committed the murders. Because the error in denying suppression of the gun was not harmless, this case should be reversed and remitted for a new trial.

Point I: Mr. Shaw had an expectation of privacy in Ms. McCoy's apartment.

The Fourth Department correctly found, contrary to County Court, that Mr. Shaw had standing to challenge the search of the house because of his status as an overnight guest in Ms. McCoy's home pursuant to *Minnesota v Olson* (495 US 91 [1990]) (A: 7). The Supreme Court's decision in *Minnesota v Olson* created a per se rule that overnight guests have an expectation of privacy in their host's home (*see* 495 US at 98–99; 6 Wayne R. LaFave, Search & Seizure § 11.3 [b] [6th ed Oct 2022 update]). This rule applies to Mr. Shaw because he was a current overnight guest at Ms. McCoy's home. He had slept there the night before and remained at her home, with her permission, until the time that the SWAT team forced them all out (A: 200–201; 629–635). His privacy interest in Ms. McCoy's home extended to the common areas of the home, including the only bathroom in the home, which was shared by all (A:

619, 703, 710). Because Mr. Shaw had a reasonable expectation of privacy in Ms. McCoy's home, he has standing to contest his warrantless arrest and the warrantless search of the apartment under the United States and New York Constitutions (*see United States v Osorio*, 949 F2d 38, 41–42 [2d Cir 1991]).

Mr. Shaw preserved these contentions in the proceedings before the trial court by arguing that he had standing under *Minnesota v Olson* (A: 140–141, 711). The People preserved their contentions that he did not having standing (A: 181–183, 716–718), and County Court expressly ruled on the issue (A: 205–208). Thus, there are no impediments to this Court's review of this issue.

Point II: The SWAT team violated the United States and New York Constitutions' guarantee against unreasonable searches and seizures in numerous ways as they laid siege to Ms. McCoy's apartment, arrested its occupants, and entered the home multiple times without any warrants.

The Fourth Department also correctly found, contrary to County Court, that Mr. Shaw's constitutional rights were violated when the SWAT team coerced him and Ms. McCoy out of her home (A: 7). The "ultimate touchstone of the Fourth Amendment is reasonableness" (*Lange v California*, 594 US 295, 301 [2021] [internal quotation marks

and citations omitted]). The facts of this case lend themselves to a common-sense analysis of reasonableness. Here, the Rochester Police Department, after identifying Mr. Shaw as a homicide suspect a month earlier, chose to forgo obtaining a warrant from a neutral magistrate. They assembled a team of over a dozen SWAT officers, dressed in military fatigues and carrying assault rifles. They drove an armored vehicle over a fence and damaged property as they laid siege to a townhouse-style apartment building and ordered the residents of two apartments out at gunpoint. There were no exigent circumstances. Such a scenario sounds like what we would expect in a police state without civil liberties, not Rochester, New York. The average American citizen can recognize that this was unreasonable action for the police to take without a warrant. The doctrine discussed below shows why it was unreasonable as a matter of law, not just unreasonable as a matter of common sense.

"At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (*Kyllo v United States*, 533 US 27, 31 [2001] [internal quotation marks and citations omitted]). In the absence of exigent circumstances, the government may not enter a home without a

warrant to conduct an arrest; the rule from *Payton v New York* (445 US 573, 590 [1980]) draws "a firm line at the entrance to the house." Unreasonable governmental intrusions, however, can take different forms; the firm line to the house can be breached by conduct other than physical entry (*see Kyllo*, 533 US at 32–34 [warrantless use of a thermal-imaging device from outside a home to detect areas of high heat inside a home violated the Fourth Amendment]; *United States v United States Dist. Court for Eastern Dist. of Mich.*, 407 US 297, 313 [1972] [Supreme Court has "refused to lock the Fourth Amendment into instances of actual physical trespass"]). Police conduct such as shouting at occupants, knocking on doors and windows, shining flashlights into a home, and pointing guns at a home can all disturb an occupant's refuge in essentially the same way that it is disturbed by an actual physical entry into the dwelling. Even if the occupant remains within the private space of the dwelling and does not exit, these police tactics, occurring entirely outside the dwelling, violate an occupant's privacy rights.

The Fourth Amendment and the rule from *Payton* were violated in this case when Mr. Shaw was seized inside the apartment by the SWAT team as it used overwhelming official authority to compel him to exit the

home (*see United States v Allen*, 813 F3d 76, 85 [2d Cir 2016] ["across the threshold arrests" violate the Fourth Amendment]). The tactics of the SWAT team, detailed above and including Investigator Amato shouting at Mr. Shaw to "come on out, house is surrounded . . . come out empty handed, come out with your hands up" (A: 534), clearly communicated to Mr. Shaw that "he was not at liberty to ignore the police presence and go about his business" (*Kaupp v Texas*, 538 US 626, 629 [2003] [internal quotation marks and citations omitted]; *see also United States v Mendenhall*, 446 US 544, 553 [1980] ["a person is 'seized'" when by "a show of authority, his freedom of movement is restrained"]; *People v Bora*, 83 NY2d 531, 534 [1994] ["Under New York law, one may be seized if the police action results in a significant interruption of the individual's liberty of movement"] [internal quotation marks, brackets, and citation omitted]).

As the Second Circuit and other courts have recognized, law enforcement can violate *Payton* without physically entering the home (*Allen*, 813 F3d at 81). *Payton* violations have been found in circumstances similar to those of this case, such as:

- Where four police officers, with guns drawn, forcefully knocked on the door, pointed their guns at the man who answered the door, and ordered him to exit with his hands in the air (*see United States v Saari*, 272 F3d 804, 808 [6th Cir 2001]).

- Where a SWAT team surrounded a house with machine guns pointed at the windows and ordered the occupants to leave the house backwards with their hands raised (*Sharrar v Felsing*, 128 F3d 810, 820 [3d Cir 1997], *abrogated on other grounds by Curley v Klem*, 499 F3d 199, 210 [3d Cir 2007]).

- Where a SWAT team surrounded a house, pointed rifles at the home, and ordered the defendant and his wife to exit (*United States v Maez*, 872 F2d 1444, 1450–1451 [10th Cir 1989]).

- Where police had completely surrounded a trailer with their weapons drawn and ordered the defendant through a bullhorn to leave the trailer and drop to his knees (*United States v Al-Azzawy*, 784 F2d 890, 893 [9th Cir 1985]).

This Court addressed a related circumstance in *People v Garvin* (30 NY3d 174 [2017]), considering non-coercive warrantless arrests conducted at the threshold of a defendant's home. In each of the opinions addressing the arrest, members of this Court made clear that the rule of *Garvin* addressed situations where a defendant *voluntarily* came to their front door and stepped into the threshold, noting that a different rule might apply to coercive situations where a defendant is compelled to come to their door or exit their house (*see* 30 NY3d at 181 ["police may not compel a suspect to open a door"]; *id.* at 209 [Rivera, J., dissenting] [citing federal cases addressing coercive arrests]; *id.* at 213, 219 [Wilson, J.,

dissenting] [differentiating between noncoercive and coercive means to conduct an arrest]). Unlike the circumstances in *Garvin*, this case presents a clearly coercive situation where Mr. Shaw submitted to the authority of the officers by exiting the apartment.

Some courts have adopted the doctrinal theory of "constructive entry" to explain why the *Payton* rule is violated by law enforcement using coercive means to order a suspect to exit their home (*see generally* Steven B. Dow, *"Step Outside, Please": Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 New Eng L Rev 7 [2010]; *see e.g. Saari*, 272 F3d at 809–810; *People v Trapp*, 335 Mich App 141, 157–168, 966 NW2d 420, 429–435 [Mich Ct App 2020]). Under this theory, when law enforcement officers coerce a suspect out of their home, those coercive tactics are viewed as equally intrusive as an actual physical entry and therefore violate the *Payton* rule. There remains debate about the degree of coercion necessary to rise to the level of a constructive entry (*see e.g. United States v Reeves*, 524 F3d 1161, 1171 [10th Cir 2008, Tymkovich, J., concurring] ["Under the majority's formulation, . . . any 'show of force' that induces a suspect to leave the home—whether or not excessively coercive—is tantamount to formal arrest regardless of the circumstances.

I would take a more nuanced, totality of the circumstances approach, and would not deem every show of force as equivalent to a formal arrest"]).

By contrast, the Second Circuit declined to adopt the constructive entry doctrine in *Allen* (813 F3d at 81). Instead, the Second Circuit focused its analysis on the location of the suspect when they are arrested (*see id.* at 86; *see generally* Steven B. Dow, *Muddling Through the Problem of Constructive Entry: Comments on United States v. Allen, 813 F.3d 76 (2d Cir. 2016), and Warrantless Doorway Arrests*, 79 U Pitt L Rev 243 [2017]). The *Allen* court held that *Payton* is violated when officers outside a home place a defendant who is inside the home under arrest, even in the absence of coercion (813 F3d at 85–86). This is arguably a broader rule than the constructive entry doctrine which does require some level of coercion. As the Second Circuit held in *Allen*, if "the rule of *Payton,* and the fundamental Fourth Amendment protection of the home on which it is based, are to retain their vitality, the rule must turn on the location of the defendant, not the officers, at the time of the arrest" (813 F3d at 85). Citing *United States v Mendenhall* (446 US 544 [1980]), the Second Circuit concluded that the defendant in *Allen* was arrested while still in his home because he did not feel free to refuse the demands of

police officers: "By advising Allen that he was under arrest, and taking control of his further movements, the officers asserted their power over him *inside his home*" (813 F3d at 86 [emphasis in original]).

Here, whether measured under either of these approaches, the *Payton* rule was violated by the SWAT team's conduct in this case. By surrounding the house with over a dozen SWAT officers and an armored vehicle, pointing assault rifles at the home, and issuing verbal commands to exit the house, the SWAT team seized Mr. Shaw and compelled him to comply with their commands to exit the house. This compulsion constituted a constructive entry into the home (*see Maez*, 872 F2d at 1451), and it resulted in Mr. Shaw being under arrest while still in the home (*see Allen*, 813 F3d at 86). Notably, both Mr. Shaw and Ms. McCoy were subject to the same law enforcement conduct and both of their Fourth Amendment rights were violated.

Even if this Court were to determine that the Fourth Amendment was not violated by the SWAT team's conduct in this case, the conduct would still be unlawful under article 1, § 12 of the New York Constitution. As this Court has held, New York's prohibition against unreasonable searches and seizures extends more protection to New Yorkers in the

context of *Payton* violations because of the *Payton* rule's interaction with our State's indelible right to counsel rule (*see People v Harris*, 77 NY2d 434 [1991]). Officers in New York have a strong incentive "to violate *Payton* . . . because doing so enables them to circumvent the accused's indelible right to counsel" (*id.* at 440). That incentive is reflected in the testimony of the lead investigator in this case, who explained that no arrest warrant was sought because it is "understood" in the Rochester Police Department's major crimes division that they forgo arrests warrants "for tactical reasons" so they may interrogate suspects (A: 575–576). The SWAT team's conduct in this case was illegal under the New York Constitution as well as under the Fourth Amendment.

Mr. Shaw preserved his challenge to his arrest under both the New York and United States Constitutions (A: 145, 711–712). The People argued that Mr. Shaw's arrest was legal (A: 183–184, 718). And, County Court expressly ruled on the issue (A: 209). There are no impediments to this Court's review of the legality of Mr. Shaw's arrest.

Point III: Ms. McCoy's consent was neither voluntary nor attenuated from the constitutional violation which preceded it.

Ms. McCoy's purported consent to search her apartment was given while she was handcuffed in the back of a police car after she and Mr. Shaw had both been forcibly arrested and removed from her home by over a dozen officers carrying assault weapons and dressed in military garb. She testified that officers removed the handcuffs at the time she signed the consent to search form (A: 641), and that, "They let me come outside and stand outside the car after I signed the order to search" (A: 625). Defense Hearing Exhibit B from the suppression hearing shows Ms. McCoy's demeanor at the time that Lt. Zenelovic was talking to her and eliciting her consent. She was crying and understandably upset. It also shows the car surrounded by law enforcement officers. Ms. McCoy's consent was involuntary and it was not attenuated from the *Payton* violation that immediately preceded it.

A. The Fourth Department's analysis of whether Ms. McCoy's consent was valid to permit the search of her apartment was flawed.

The majority memorandum in this case made multiple errors in its analysis of whether Ms. McCoy's consent to search was valid to permit

the search of her apartment. Initially, the majority treated the voluntariness of Ms. McCoy's consent as dispositive of the question of attenuation, writing "a tenant's valid consent can attenuate any initial illegality" (A: 7 [internal quotation marks, brackets, and citations omitted]). But, the question is whether the consent is, itself, attenuated from prior illegality, not whether the consent is a factor that attenuates a search from prior illegality (*see People v Banks*, 85 NY2d 558, 563 [1995] [analyzing whether consent was attenuated from illegal detention]; *United States v Fox*, 600 F3d 1253, 1260 [10th Cir 2010] ["The district court clearly erred in suggesting that Ms. Chiles's voluntary consent itself was an intervening circumstance. Her consent is not in itself an intervening event which could remove the taint of the prior illegal seizure"]; *State v Lane*, 726 NW2d 371, 380–381 [Iowa 2007] ["we find the appropriate inquiry in a consent case to be whether the *consent* was obtained through exploitation"] [emphasis in original]).

Established law in this state, federally, and nationwide shows that in order to justify a warrantless search on the basis of consent, the government must prove both that the consent was voluntary and that it

was not a fruit of any previous constitutional violation. As Professor Wayne R. LaFave has written,

> "While there is a sufficient overlap of the voluntariness and fruits tests that often a proper result may be reached by using either one independently, it is extremely important to understand that (i) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality."

(4 Wayne R. LaFave, Search & Seizure § 8.2 [d] [6th ed Oct 2022 update] [emphasis in original].) Cases from this Court confirm that this is the rule in New York. In *Matter of Leroy M.* (16 NY3d 243 [2011]) and *People v Borges* (69 NY2d 1031 [1987]), this Court analyzed whether consent to search, conceded to be voluntary in both cases, was attenuated from prior illegality. Inasmuch as voluntariness was conceded in both cases, the fact that this Court went on to analyze attenuation indicates that New York follows the majority rule—that both voluntariness and attenuation must be proven (*see e.g. United States v Cordero-Rosario*, 786 F3d 64, 76, 76 n 7 [1st Cir 2015]; *State v Unger*, 356 Or 59, 73 [2014] [en banc]; *United States v Murphy*, 703 F3d 182, 190 [2d Cir 2012]; *Fox*, 600 F3d at 1257–1260; *United States v Alvarez-Manzo*, 570 F3d 1070, 1077 [8th Cir 2009]; *Lane*, 726 NW2d at 380; *United States v Washington*, 387 F3d 1060, 1072,

1072 n 12 [9th Cir 2004]; *United States v Robeles-Ortega*, 348 F3d 679, 681 [7th Cir 2003]; *United States v Lopez-Arias*, 344 F3d 623, 629 [6th Cir 2003]; *Harris v Commonwealth*, 266 Va 28, 34 [2003]; *cf. Brown v Illinois*, 422 US 590, 604 [1975] [voluntariness of a statement is a "threshold requirement" before the analysis of attenuation]).

The majority memorandum, beyond failing to separately analyze voluntariness and attenuation, contains other errors that call into question the validity of its adjudication of Mr. Shaw's contentions. For example, the memorandum states:

> "The factors we review in order to determine whether a person's consent to search is voluntary include "the temporal proximity of the consent to the arrest, the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the [person] was aware [they] could decline to consent, and particularly, the purpose and flagrancy of the official misconduct" (*People v Borges*, 69 NY2d 1031, 1033 [1987])."

(A: 7.) But *Borges* is a case about attenuation, not about voluntariness. Thus, the Fourth Department's voluntariness analysis was predicated upon the wrong factors.

The court went on, seemingly, to meld the two analyses into one, hybrid analysis that centered on voluntariness as the dispositive factor, writing:

> "Although the tenant's consent was given close in time to defendant's arrest, the tenant was not the subject of that arrest and, in any event, temporal proximity 'is not dispositive of attenuation' (*Matter of Leroy M.*, 16 NY3d 243, 247 [2011], *cert denied* 565 US 842 [2011]). The officers took time to inform the tenant about the situation, and the evidence at the suppression hearing established that they were expressing a belief that a gun might be in the residence and did not 'intentionally misle[a]d her into giving consent to search' (*People v Sweat*, 170 AD3d 1659, 1660 [4th Dept 2019]). Moreover, at the hearing, the tenant testified for the prosecution that she voluntarily consented to the search out of a desire to have a gun removed from her residence, where a minor child resided. The tenant never claimed, in or out of court, that her consent to search was anything but voluntary, and we reject defendant's contention that the tenant's testimony at the hearing is unworthy of belief. We thus conclude that the court properly refused to suppress the gun recovered from the residence."

(A: 8.) While the first sentence of this paragraph addresses temporal proximity, one factor in an attenuation analysis, the majority never reached a conclusion as to whether or not the consent was attenuated from the constitutional violations that preceded it. Justice Ogden was correct to note, in her dissent, that the majority treated voluntariness as "dispositive on the issue of attenuation" (A: 9). The majority

memorandum incorrectly treated Ms. McCoy's consent as a dispositive, intervening factor (*see Fox*, 600 F3d at 1260). Between using the incorrect factors for its voluntariness analysis and failing to truly undertake an attenuation analysis in the first place, the majority memorandum did not properly determine whether or not suppression of the firearm found in Ms. McCoy's house is required. The use of an incorrect standard of review is an error of law reviewable by this Court (*see Borges*, 69 NY2d at 1033 ["where, as here, the lower courts have applied an incorrect legal standard, an issue of law reviewable by this court is presented"]). At a minimum, the Appellate Division's erroneous standard of review requires remittal for reconsideration.

B. A correct analysis shows that Ms. McCoy's consent was not valid to permit the search of the apartment.

1. Voluntariness.

i. Reviewability.

Defense counsel argued that Ms. McCoy's consent was not voluntary, preserving this issue for this Court's review (A: 712–716). The People contended that it was voluntary (A: 718–719), and County Court found that the fruits of the search were admissible pursuant to the consent (A: 208–209). To the extent that County Court's decision did not

expressly find that Ms. McCoy's consent was voluntary, it is possible that CPL 470.15 (1), which bars an appellate court from determining a question of law on a basis not decided adversely to the appellant by the trial court, would bar a determination of this issue on appeal (*People v LaFontaine*, 92 NY2d 470, 473–474 [1998]; *see also People v Concepcion*, 17 NY3d 192, 195 [2011]). If this Court were to find that County Court did not determine whether Ms. McCoy's consent was voluntary, Mr. Shaw would request remittal to County Court.

ii. At a minimum, this Court should remit to the Appellate Division for a determination of voluntariness under the correct standard.

The question of the voluntariness of consent ordinarily presents a mixed question of law and fact for this Court (*see People v Thatch*, 71 NY2d 906, 907 [1988]). But, a determination of whether the Fourth Department used the correct standard to analyze voluntariness is a question of law reviewable by this Court (*see Borges*, 69 NY2d at 1033).

Here, the majority memorandum expressly analyzed voluntariness by reference to the factors used to analyze attenuation. The attenuation factors cited by the majority were,

> ""the temporal proximity of the consent to the arrest, the presence or absence of intervening circumstances, whether

> the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the [person] was aware [they] could decline to consent, and particularly, the purpose and flagrancy of the official misconduct.'"

(A: 7, citing *Borges*, 69 NY2d at 1033.) By contrast, voluntariness is determined from the totality of circumstances, and the types of factors a court would analyze to determine whether a consent is voluntary are:

- whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest, including such considerations as the number of officers present and the extent to which they physically restrained the consenter;
- the personal background of the consenter, including their age and prior experience with law enforcement authorities;
- whether the consenter offered resistance or assistance to the police; and finally,
- whether the police advised the consenter of their right to refuse consent.

(*see People v Gonzalez*, 39 NY2d 122, 128–130 [1976]; *Schneckloth v Bustamonte*, 412 US 218, 225–228 [1973]).

While there is some overlap between these two analyses, they are necessarily different. Because the majority's analysis of voluntariness was fundamentally flawed, this Court should, at a minimum, remit to the Appellate Division for reconsideration of Mr. Shaw's claim using the

correct standard of review (*see Borges*, 69 NY2d at 1033–1034 [remitting for a new decision in accordance with the correct principles of law]).

iii. Alternatively, this Court should reverse because there is no record support for the Fourth Department's determination that Ms. McCoy's consent was voluntary.

If this Court determines that the Fourth Department's decision on voluntariness is reviewable, it should find that the majority's conclusion that Ms. McCoy's consent was voluntary lacks record support. The Fourth Department majority wrote in this case that "at the hearing, the tenant testified for the prosecution that she voluntarily consented to the search out of a desire to have a gun removed from her residence, where a minor child resided" (A: 8). But, a review of Ms. McCoy's testimony at the hearing reveals that this is incorrect (A: 613–654).

Contrary to the Fourth Department's conclusion, Ms. McCoy did not know there was a gun in her house until after the search. On direct examination, she testified,

> "A. They let me come outside and stand outside the car after I signed the order to search. And then like it was some commotion going on, like, I don't know if it was, like, my neighborhood. I don't know. But they, people were making a commotion. So they had me get back in the car. And then I set in the car for a little while. I think maybe the investigator came back out and talked to me for a second. But shortly after

that, I ended up leaving to come downtown because they told me they had found something in my home.

Q. Okay. Did they tell you what they found?

A. When I got down to the station they told me they had found a weapon, a gun.

Q. Did they tell you that before you went downtown?

A. They told me they had found something. But when I had got downtown, that's when they told me they found the gun."

(A: 625–626.) She echoed this on cross-examination, testifying that she had not heard there was a gun in her house before being taken to the Public Safety Building downtown and giving a statement to two investigators (A: 644). She also testified that she did not own a gun and did not see anyone bring a gun into her home (A: 628). The only reason she had to believe there might be gun in her house was Lt. Zenelovic telling her, "I know we've got a gun in there" (A: 208; Defense Hearing Exhibit B), something he told her in order to persuade her to consent to the search.

With regard to the signed consent form, the People elicited the following testimony from Ms. McCoy:

"Q. I am going to show you what's in evidence, it's two pages that are photographs. This is No. 8. Do you recognize that picture?

A. Yes.

Q. And what's that a picture of?

A. A search warrant.

Q. It's a consent form, consent to search?

A. Yes.

Q. Whose signature is this?

A. Mine.

Q. Did you read that prior to signing it?

A. Yes.

Q. Did you agree to let the law enforcement people go in your home?

A. Yes.

Q. Did they promise anything in exchange for your signature?

A. No.

Q. Did they threaten you in order to get your signature?

A. No."

(A: 624.) Ms. McCoy's testimony is not, as the Fourth Department concluded, dispositive evidence that "she voluntarily consented" (A: 8). Instead, Ms. McCoy's testimony that she was not threatened or promised anything to give consent is just as consistent with someone yielding to "overbearing official pressure" (*Gonzalez*, 39 NY2d at 130), as it is with giving consent as "a free exercise of the will" (*id.*). And here, every single factor under *Gonzalez* supports a conclusion that Ms. McCoy's consent was merely her compliance with the overbearing official pressure engendered by the SWAT team raid.

First, at the time she gave consent, she was in custody, surrounded by officers, as she sat in the back of a patrol car. She had just been subject to a gunpoint arrest in her own home, where she was forced to lie face down on the floor and have her hands handcuffed behind her back. The handcuffs were not removed until the officers needed her to sign the consent to search form, and she was not allowed to exit the back of the patrol vehicle until after she signed the consent form (A: 623, 625, 641). Lt. Zenelovic testified that Ms. McCoy was not free to leave at the time that she gave consent (A: 592, 596–597).

The circumstances of her arrest were particularly stressful. Ms. McCoy testified that she "just remembered being scared" during the SWAT team raid (A: 622). She recalled that the SWAT team walked her and her cousin out of the laundry room and laid them on the floor, testifying, "They had, like, guns to us. And then a officer came and grabbed me and my little cousin" (A: 623). She and her cousin were separated from each other (A: 623). Because Ms. McCoy was physically restrained, in custody, and surrounded by at least five police officers at the time of her consent, the first factor discussed in *Gonzalez* weighs

heavily in favor of finding that Ms. McCoy's consent was not voluntary. As this Court wrote,

> "True, custody or arrest alone does not necessarily preclude voluntariness. Custody, or, more compellingly, the immediate events of an arrest, especially a resisted arrest, do, however, engender an atmosphere of authority ordinarily contradictory of a capacity to exercise a free and unconstrained will.
>
> This is especially true when the individual in custody or under arrest is confronted by a large number of police agents. Moreover, the fact that a defendant was handcuffed has been considered a significant factor in determining whether his apparent consent was but a capitulation to authority. Submission to authority is not consent."

(*Gonzalez*, 39 NY2d at 128–129 [internal citations omitted].)

Next, with regard to Ms. McCoy's age and prior experience with law enforcement, Ms. McCoy was a 25-year-old mother of two young children (A: 158, 618). If she had any prior experience with law enforcement, the People failed to present any evidence of that at the suppression hearing. Because it is the People's "heavy burden" (*Gonzalez*, 29 NY2d at 128) to prove the voluntariness of consent, the lack of evidence on this factor weighs in favor of finding that Ms. McCoy did not have any prior experience with law enforcement, amplifying the stress of the circumstances in which she found herself.

With regard to whether Ms. McCoy offered resistance or assistance to the police, her demeanor as shown on Defense Hearing Exhibit B, where she is crying, and her testimony that she was "scared" (A: 622), offers the best evidence of whether Ms. McCoy was resisting or assisting the police. Mr. Shaw would submit that she was neither actively resisting or assisting—instead, she was understandably terrified and therefore complying with what law enforcement requested of her.

Lastly, it is undisputed that Ms. McCoy's consent was requested, not offered (A: 567–568). The People offered no evidence that Ms. McCoy was informed of her right to refuse consent. The People failed to meet their burden on this factor as well.

There is simply no record support for the Fourth Department's conclusion that Ms. McCoy's consent was voluntary. Every factor indicates that Ms. McCoy's consent was not "the product of a free and unconstrained choice" (*Gonzalez*, 39 NY2d at 129; *see People v Freeman*, 141 AD3d 1164, 1165 [4th Dept 2016], *revd on dissenting op of Whalen, P.J. and Troutman, J.*, 29 NY3d 926 [2017] ["we are required to indulge every reasonable presumption against the waiver of constitutional rights guaranteed by the Fourth Amendment"]).

> "[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in *Boyd v United States*, 116 US 616, 635:
>
> 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

(*Schneckloth v Bustamonte*, 412 US at 228–229.) The Fourth Department's finding that Ms. McCoy's consent was a true act of her own free will was wrong and was predicated upon a faulty reading of the record. The circumstances in which Ms. McCoy purported to give consent were coercive as a matter of law. If this Court reviews the merits of this issue, it should reverse the denial of Mr. Shaw's motion to suppress the fruits of the search.

2. Attenuation.

i. Reviewability.

Mr. Shaw expressly argued in his motion papers that the unattenuated fruits of his illegal arrest, including the firearm recovered in the search, should be suppressed, writing, "Upon information and belief, as a direct and unattenuated result of the defendant's unlawful arrest, the police obtained certain evidence in the form of statements and a firearm" (A: 145). Under this Court's precedent, Mr. Shaw's motion papers were sufficient to shift the burden onto the People to demonstrate that Ms. McCoy's consent was obtained in a manner that was attenuated from the illegal arrests that preceded it. In *Borges*, this Court wrote:

> "When a defendant challenges the admission of evidence obtained by a consensual search, claiming the consent was the product of an illegal arrest, the burden rests on the People to demonstrate that the consent was acquired by means sufficiently distinguishable from the arrest to be purged of the illegality."

(69 NY2d at 1033 [internal quotation marks and citations omitted]; *see also People v Conyers*, 68 NY2d 982, 983 [1986].)

The People, however, never argued that Ms. McCoy's consent was attenuated from the illegal arrests. They did not address this issue in their motion papers, arguing only that there was no Fourth Amendment

violation (A: 180–185). Nor did they address it in their post-hearing oral argument before County Court (A: 716–720). Even before the Fourth Department, the People never argued that Ms. McCoy's consent was attenuated from the prior violation (*see* Respondent's Brief in *People v Shaw,* KA 20-00239). Relying only on their assertion that there had been no illegal arrest, the People never argued in the alternative that the search was legal even though the arrest was illegal.

Because the People have never argued that Ms. McCoy's consent was "acquired by means sufficiently distinguishable from the arrest to be purged of the illegality" (*id.*), any contention they raise before this Court regarding attenuation would be unpreserved (*see People v Hurdle*, 106 AD3d 1100, 1104 [2d Dept 2013] ["The People's attenuation argument is unpreserved for consideration upon appeal"]; *People v Phillips*, 225 AD2d 1043, 1043 [4th Dept 1996] ["People's alternate theory that the search of defendant's vehicle was attenuated from the unlawful stop" was unpreserved]; *People v Clark*, 149 AD2d 720, 721 [2d Dept 1989] ["The People's attenuation theory, which was not raised at the hearing, is unpreserved for appellate review"] [citation omitted]; *United States v*

Hernandez, 847 F3d 1257, 1262 [10th Cir 2017] ["the government has waived its attenuation argument"]).

"Here, because the People failed to preserve the issue, the Appellate Division erred in entertaining it" (*People v Hunter*, 17 NY3d 725, 728 [2011]). This Court should simply suppress the firearm—which was identified in Mr. Shaw's motion papers as an unattenuated fruit of the illegal arrest—if it agrees with the Fourth Department that there was a *Payton* violation in this case (*see People v Ryan*, 12 NY3d 28, 31 n * [2009] [declining to consider the People's unpreserved arguments]; *compare id.* at 31–31 [remitting to consider People's preserved arguments regarding attenuation]; *see also People v Parris*, 83 NY2d 342, 350–351 [1994]; *see generally Nardone v United States*, 308 US 338, 341 [1939]).

While remittal is inappropriate where the People have failed to preserve any arguments to address on remittal, as an alternative argument, Mr. Shaw would submit that remittal to County Court is the minimum necessary relief. Here, because County Court found no *Payton* violation, it had no occasion to consider the attenuation doctrine (A: 209). CPL 470.15 (1) thus barred the Fourth Department from affirming the

denial of suppression on the basis of its (doctrinally flawed) attenuation analysis.

ii. Mr. Shaw may claim that Ms. McCoy's consent was a fruit of his illegal arrest.

Mr. Shaw may claim that the consent of a third party, Ms. McCoy, was a fruit of his illegal arrest. This case is not like *People v Henley* (53 NY2d 403 [1981]), where this Court held that a defendant whose constitutional rights were never violated could not seek suppression of the fruits of an invalid consent search because the consent was the result of a constitutional violation committed only against that third party consenter.[7] Here, unlike *Henley*, the constitutional violation was against Mr. Shaw; it can also be framed as against Mr. Shaw, Ms. McCoy, and the 16-year-old cousin jointly.

This Court has addressed a similar circumstance in *People v Banks* (85 NY2d 558 [1995]), where law enforcement conducted a traffic stop of a vehicle with two people inside. The defendant in that case was the passenger in the vehicle, and he had a possessory interest in the vehicle because he had rented it. Because law enforcement illegally extended the

[7] It is noted that other jurisdictions have permitted defendants to challenge whether a third party's consent was attenuated from that third party's own illegal detention (*see United States v Cellitti*, 387 F3d 618, 623 [7th Cir 2004]).

traffic stop, this Court held that the defendant and the driver were subject to an "inseparable illegal detention" (85 NY2d at 561). Although the driver had voluntarily consented to the search of the vehicle, this Court suppressed the fruits of the search because the "consent to search was obtained during or immediately after that extended detention and without any intervening circumstances" (*id.* at 563). Like *Banks*, all of the occupants of Ms. McCoy's apartment were jointly seized when the SWAT team surrounded the house, ordered them out at gun point, handcuffed them, separated them, and placed them in the back of patrol cars. Thus, like the defendant in *Banks*, Mr. Shaw may contest whether Ms. McCoy's consent was valid to authorize the search of the apartment in which he had a privacy interest.

This Court's holding in *Banks* accords with numerous other jurisdictions which have found that defendants may contest the validity of consents given by third parties when those consents are the fruits of constitutional violations committed against the defendant alone, or against the defendant and the third party jointly (*see Maez*, 872 F2d at 1453–1456, 1453 n 11 [where defendant and his wife were both in the home during a constructive entry *Payton* violation, defendant could

contest whether his wife's consent to search the home was tainted by his illegal arrest]; *United States v Valentine*, 539 F3d 88, 91, 96 [2d Cir 2008] [where defendant was illegally arrested, he could contest whether the consent given by his wife to search their shared home was attenuated from his arrest, although the wife was not the direct victim of any Fourth Amendment violation]; *Lane*, 726 NW2d at 378 [where only defendant's rights were violated—at a neighbor's garage—he could contest whether his girlfriend's later consent to search their home was attenuated from that prior illegality]; *United States v Vega*, 221 F3d 789, 801 [5th Cir 2000], *abrogated on other grounds by Kentucky v King*, 563 US 452 [2011] [defendant Izquierdo, whose Fourth Amendment rights were violated, could contest the consent given by co-defendant Vega because the attenuation "analysis applies even when, as here, the person who gave consent was not the person whose constitutional rights were violated"]; *see also United States v Oaxaca*, 233 F3d 1154, 1156 [9th Cir 2000] [where defendant was illegally arrested in his family's garage, he could contest the later consent given by his sister to search the family home]; *Leroy M.*, 16 NY3d at 247 [where law enforcement illegally entered family home's vestibule, defendant could contest the consent given by his sister to enter

further into the home]; *see generally* 6 Wayne R. LaFave, Search & Seizure § 11.4 [6th ed Nov 2024 update]). Thus, Mr. Shaw's contention in his motion papers that the firearm found as a result of the consent-search must be suppressed as an unattenuated fruit of his illegal arrest was properly raised (A: 144–145).

iii. Ms. McCoy's consent was not attenuated from the constitutional violation which preceded it.

If this Court were to address the merits of the attenuation issue, it would find that Ms. McCoy's consent was not attenuated from the preceding constitutional violations. Thus, the fruits of the search, namely the firearm, must be suppressed under the United States and New York Constitutions. While application of the attenuation doctrine has sometimes been termed a mixed question of law and fact (*see People v Bradford*, 15 NY3d 329, 333 [2010]), this Court can address attenuation as a matter of law, much as it did in *Leroy M.* (16 NY3d at 247), when the hearing testimony establishes as a matter of law that evidence was derived by exploitation of an initial illegality.

In New York, to decide whether voluntary consent is attenuated from prior illegality, courts consider a variety of factors, including:

> "'the temporal proximity of the consent to the [illegal police action], the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the defendant was aware he could decline to consent, and particularly, the purpose and flagrancy of the official misconduct'"

(*Leroy M.*, 16 NY3d at 246, quoting *Borges*, 69 NY2d at 1033).[8]

"Such factors enable the court to decide 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'" (*Leroy M.*, 16 NY3d at 246, quoting *Brown* 422 US at 599). In this case, each of the factors support a finding that Ms. McCoy's consent was acquired by exploitation of the SWAT team's intentional and illegal tactics.

The first factor, temporal proximity, strongly cuts against a finding of attenuation. Ms. McCoy's consent to search was given mere minutes

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[8] Federal courts often cite to the factors elucidated in *Brown v Illinois* (422 US at 603–604), to analyze whether a consent is attenuated: (1) the temporal proximity between the Fourth Amendment violation and the grant of consent to search; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the officer's Fourth Amendment violation (*see e.g. Alvarez-Manzo*, 570 F3d at 1077; *accord Fox*, 600 F3d at 1260; *United States v Snype*, 441 F3d 119, 132 [2d Cir 2006]). In *Borges* and *Leroy M.*, this Court has cited three additional factors alongside those from *Brown*.

after the SWAT team ran over a fence in their armored vehicle, laid siege to her home with military weapons and gear, and forcibly removed Mr. Shaw and her from her apartment (A: 199). She was still in police custody—not free to leave according to Lt. Zenelovic (A: 592, 596–597)—and still in handcuffs in the back of a patrol car when her consent was first sought. Mr. Shaw was still in custody too. The Fourth Amendment violations were ongoing at the time of Ms. McCoy's consent (*see United States v Cellitti*, 387 F3d 618, 623 [7th Cir 2004] ["When consent to search is given by a person who remains illegally detained, the government is unlikely to meet its burden of showing that the consent was sufficiently attenuated from the illegality"]).

The second factor—the lack of intervening circumstances—also cuts against a finding of attenuation. "[O]nce improperly initiated police conduct is established, a directly ensuing consent to search will be deemed invalid as a matter of law" (*People v Packer*, 49 AD3d 184, 188 [1st Dept 2008], *affd* 10 NY3d 915 [2008]). There were no intervening circumstances between the SWAT team siege of Ms. McCoy's home, the forced removal of her and Mr. Shaw from the home, and the elicitation of consent when Ms. McCoy was still in the back of the patrol car. Lt.

Zenelovic, who elicited her consent was dressed in military "BDUs," ("battle dress uniform"), just as the SWAT team was (A: 593). Under this factor, it is also worth noting that the consent to search was sought for the same location which was the site of the previous illegal seizures.

Next, the purpose of the illegal seizures and the coincident elicitation of consent in this case was to obtain the fruits of the search. As Lt. Zenelovic testified, he had seen video surveillance of Mr. Shaw from five days prior to the arrest which he believed showed Mr. Shaw with a gun (A: 570). When Lt. Zenelovic listened to Defense Hearing Exhibit B, which captures him beginning to elicit Ms. McCoy's consent, he testified that, "what I was doing there is explaining why I thought there was a gun in the apartment" (A: 581), and that, when speaking to Ms. McCoy, he "said words to the effect of, I know that he brought a gun into your house" (A: 608). Here, Lt. Zenelovic's testimony is strong evidence that the illegal seizures were undertaken for the purpose of arresting Mr. Shaw and seizing the firearm which they believed Mr. Shaw to be carrying. This third factor strongly militates against a finding of attenuation.

Fourth, it is undisputed that Lt. Zenelovic asked Ms. McCoy for her consent, she did not volunteer it (A: 567–568). And for the fifth factor, the record does not reflect whether Ms. McCoy was aware that she could decline to consent. Because it is the People's burden to demonstrate attenuation, this factor also cuts against a finding of attenuation.

The sixth and final factor cited in *Borges*, "the purpose and flagrancy of the official misconduct" (69 NY2d at 1031) is "particularly" relevant (*id.*; *accord Brown*, 422 US at 604). This factor also strongly supports finding no attenuation in this case. The conduct of the police was flagrantly illegal because it was intentional: the Rochester Police Department made a "tactical" decision to forgo seeking warrant because they did not want the right to counsel to attach (A: 493, 505, 576). RPD leadership, who made the decision not to seek a warrant, never informed the line officers on the SWAT team that there was no warrant. As one line officer testified, "Based upon assisting the SWAT team in the past, they've had warrants, and it was my assumption that there was a warrant, and I recently found out that there was not a warrant" (A: 510). Another line officer also testified that he "was under the assumption that there was a search warrant" (A: 519).

Under this factor, it is also noted that law enforcement damaged property when it drove an armored vehicle over a fence into the backyard as part of the SWAT team siege and that five occupants of a neighboring apartment (including children) were ordered out of their apartment at gunpoint and taken in custody just like Mr. Shaw, Ms. McCoy, and the sixteen-year-old cousin (A: 170, 544, 560, 595). The SWAT team's conduct terrified many innocent people. Ordering people out of their homes at gunpoint is not a tactic to be employed lightly. When law enforcement engages in this conduct, it should only be with prior court approval or in a true emergency.

New York's indelible right to counsel rule creates a strong incentive for officers to avoid seeking an arrest warrant so that they may interrogate a suspect. As far back as 1886, the Supreme Court noted the interaction between the Fourth and Fifth Amendments, writing,

> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment . . ."

(*Boyd v United States*, 116 US 616, 633 [1886]). This Court has also noted the "interplay" between search and seizure and New York's unique right

to counsel rules which give law enforcement "every reason to violate *Payton*" (*Harris*, 77 NY2d at 440). The intentional and tactical choices made by RPD in this case, designed to deny Mr. Shaw his right to counsel makes the illegal seizure in this case a particularly flagrant violation. It is exactly this kind of conduct that the exclusionary rule is meant to deter.

In conclusion, the illegality of the SWAT team's actions was not attenuated from the consent elicited from Ms. McCoy. The fruits of that search should be subject to the exclusionary rule pursuant to the Fourth Amendment of the United States Constitution and the New York Constitution.

Point IV: The erroneous denial of the suppression motion was not harmless.

A constitutional error, like the failure to suppress evidence, can sometimes be considered "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237 [1975]; *see Chapman v California*, 386 US 18, 23–24 [1967]). Under the constitutional harmless error standard, this Court first considers whether "the proof of the defendant's guilt, without reference to the error, is overwhelming" (*Crimmins*, 36 NY2d at 241; *see People v Ortega*, 40 NY3d 463, 478 [2023]). If the proof was

overwhelming, this Court then considers whether "there is a reasonable possibility that the error might have contributed to defendant's conviction" (*Ortega*, 40 NY3d at 478 [internal quotation marks, brackets, and citations omitted]). Overwhelming proof exists where

> "the quantum and nature of proof, excising the error, are so logically compelling and therefore forceful in the particular case as to lead the appellate court to the conclusion that 'a jury composed of honest, well-intentioned, and reasonable men and women' on consideration of such evidence would almost certainly have convicted the defendant"

(*Crimmins*, 36 NY2d at 241–242).

The People's evidence in this case rested on two pillars: eyewitness identification and forensics. Suppression of the firearm takes away the People's forensic evidence, which significantly weakens the People's case and vitiates any argument that remaining proof was overwhelming. Richard Hoepfl, a forensic firearms examiner, testified that the firearm possessed by Mr. Shaw in Ms. McCoy's apartment was the firearm that shot the bullets recovered from the scene of the murder (A: 1502–1503). He concluded the same with regard to the cartridge cases (A: 1502–1503). This was important evidence for the People—they called Mr. Hoepfl as their final witness at trial to leave the jury with his testimony as the last thing in their minds. And they closed on it, detailing Mr. Hoepfl's

testimony (A: 1560–1561), and arguing, "This is the gun that committed the murders at 670 Thurston" (A: 1566). The People also connected Mr. Shaw to that murder weapon with evidence of his fingerprints found on an empty Smith & Wesson 9mm box which matched the serial number as that on the firearm found in Ms. McCoy's apartment (A: 1017–1029, 1146–1147, 1565). Without this evidence, it cannot be said that a jury would certainly have convicted Mr. Shaw.

Importantly, suppression of the forensic evidence impacts the other pillar of the People's case: the eyewitness identifications. While defense counsel made challenges to the two eyewitness identifications, those challenges were not particularly credible to make in light of the forensic evidence that connected Mr. Shaw to the murders. For example, in closing, Mr. Shaw's attorney argued that Jahmiir White, one of the eyewitnesses, had merely seen Mr. Shaw raise his hand up, but had never seen a gun in Mr. Shaw's hand (A: 1532). When the jury has heard strong forensic evidence that the gun Mr. Shaw later possessed was the gun that committed the murders, this distinction in Mr. White's testimony is not meaningful. However, with an unidentified murder weapon, it becomes meaningful that one of the eyewitnesses never actually saw a gun in Mr.

Shaw's hands (A: 1004). After all, the parking lot was crowded and full of people attending Classic's Bar and Grill's "Bucket Twist Tuesday" event (A: 1006; People's Trial Exhibit 80). Without the forensic evidence, it could be argued that Mr. Shaw was present, but was not the man who committed the murders. The evidence that Mr. Shaw later possessed the murder weapon also undercut defense counsel's argument that illegally possessed guns frequently change hands as they are bought and sold on the street, another argument to counter fingerprint evidence that would support a theory that Mr. Shaw was merely present.

The other eyewitness identification, made by Ms. Nunez, was also subject to attack. She did not claim to see Mr. Shaw until after she had been shot and gravely injured (A: 830). The physical effects of sustaining a traumatic injury impact a person's ability to recall what they sensed in the immediate aftermath of the injury. Supporting the idea that Ms. Nunez's recall was impacted by her injury is that her testimony about seeing Mr. Shaw in front of her is inconsistent with evidence of the direction of the shooting, as defense counsel argued in closing (A: 1534).

These arguments about the weakness of Mr. White and Ms. Nunez's identifications could have had a lot more traction with a jury which had

not also heard that Mr. Shaw was later found in possession of the murder weapon, which all but confirms the identifications. These two aspects of the People's case were mutually reinforcing. Removing the forensic evidence not only subtracts that evidence from the case, but weakens and changes the nature of the remaining evidence. There is more than a reasonable possibility that the forensic evidence contributed to Mr. Shaw's convictions in this case. Without the forensic evidence, a dramatically different trial strategy could have been pursued. This Court should find that the failure to suppress the firearm was not harmless as to counts 1–8, and it should reverse and remit for a new trial on those counts. As to count 9, relating to possession of the firearm in Ms. McCoy's apartment on July 21, 2018, this count must be dismissed if the gun is suppressed—there is no other evidence supporting that count which would merit a new trial.

Conclusion

For all of the above reasons, this Court should reverse the judgment, grant suppression, dismiss count 9 of the indictment, and remit for a new trial on the remaining counts. Alternatively, this Court should either remit to County Court to determine voluntariness and attenuation pursuant to CPL 470.15 (1), or remit to the Appellate Division for a determination of both voluntariness and attenuation, using the correct standards.

Dated: January 30, 2025

Respectfully submitted,

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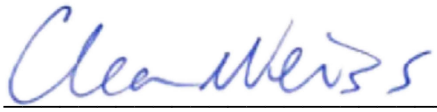

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