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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 56

ERIC IBARGUEN,

Appellant.

20 Eagle Street
Albany, New York
September 1, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 56, the
2 People of the State of New York v. Eric Ibarguen.

3 We'll wait until Counsel has an opportunity to
4 leave.

5 Good afternoon, Counsel.

6 MR. WELIKSON: Good afternoon, Your Honor. And
7 may it please the Court, Benjamin Welikson, on appellant,
8 Eric Ibarguen.

9 I'd like to reserve two minutes for rebuttal,
10 Your Honor.

11 CHIEF JUDGE DIFIORE: Yes, of course.

12 MR. WELIKSON: In this case, Mr. Ibarguen alleged
13 that he was a social guest having an intimate dinner at his
14 friend's home when the police burst inside unlawfully,
15 without a warrant, arrested him, and then searched the
16 residence.

17 The central question is whether these allegations
18 entitled him to a hearing to determine whether his
19 reasonable expectation of privacy was met.

20 CHIEF JUDGE DIFIORE: Let's focus on the motion
21 papers. As I read them, it appears that this defendant
22 only made a Dunaway claim in those motion papers. Would
23 you agree with that?

24 MR. WELIKSON: I think, Your Honor, that if you
25 read the factual recitation of the - - - of the motion,



1 counsel objected to the unlawful entry, which is also a
2 species of search and also objected to the unlawful arrest,
3 and may - - - also said that any evidence that was obtained
4 as a result, as the fruit of those unlawful violations,
5 would be - - -

6 CHIEF JUDGE DIFIORE: As a result of the arrest
7 that he claims was made without probable cause, correct?

8 MR. WELIKSON: I - - - I don't read it that
9 narrowly. Because, and if - - - if you look at page A-10
10 of the record, the second paragraph dis - - - resuscitates
11 the fact that there was an unlawful entry, as well, that
12 Mr. Ibarguen was complaining that he was - - -

13 CHIEF JUDGE DIFIORE: Well, I guess I'm having
14 trouble seeing how the defendant connects the Dunaway claim
15 and any property that is seized as a result of that arrest
16 to the execution of the search warrant in a third party's
17 home the following day.

18 MR. WELIKSON: Sure. So I mean, one thing to be
19 clear of, there is some evidence that went in just based on
20 the initial unlawful entry. There was testimony about some
21 of the glassines that were found in plain view directly
22 after the entry, so that also is subject to - - - to
23 suppression as a result. But counsel made clear that he
24 was - - -

25 CHIEF JUDGE DIFIORE: What was the evidence that



1 was admitted against him at the trial?

2 MR. WELIKSON: So in addition to that testimony,
3 there was the jacket and there was the twenty dollar pre-
4 recorded dollar bill.

5 CHIEF JUDGE DIFIORE: Seized pursuant to the
6 execution of the search warrant on the following day?

7 MR. WELIKSON: Right, but the warrant was
8 incorporated evidence that was obtained as a result of the
9 unlawful entry. If you look at the warrant application, it
10 specifically talks about the glassines, it specifically
11 talks about the show-up that followed, and so it's a fruit
12 of the initial unlawful entry, which is what Counsel was
13 objecting to.

14 CHIEF JUDGE DIFIORE: So does the reviewing
15 magistrate have the ability to excise that information out
16 and make a probable cause determination based on what's
17 left in the affidavit?

18 MR. WELIKSON: I think that is something that the
19 People could perhaps argue at the hearing. It wasn't the
20 basis of their objection below, and so it's open to - - -
21 you know, to being fleshed out in the hearing, but the case
22 is, there was some discussion of this not before this
23 Court, but in the Appellate Division. And our response to
24 that before the Appellate Division was cases like United
25 States v. Murray, and People v. Arnou in which a warrant



1 directly follows after unlawful entry creates a fact issue
2 about whether or not the reason they got, the police got
3 the warrant was because of the evidence obtained as a
4 result of the unlawful entry, and I think that applies
5 here.

6 It's also important to note that we'd have to
7 assume on this procedural posture appellant's allegations
8 as true, right. Mr. Ibarquen's allegations, and so from
9 his perspective, he pleads that he's simply sitting there
10 with his friends, having an intimate dinner when the police
11 suddenly burst in out of nowhere. So this idea that the
12 police were following him in and then directly got a
13 warrant afterwards, that's a factual dispute that would be
14 resolved with a hearing.

15 CHIEF JUDGE DIFIORE: How do we factor in the
16 fact that the defendant's grand jury testimony was
17 incorporated as a factual basis in the motions and that the
18 grand jury apparently disregarded his grand jury testimony?

19 MR. WELIKSON: I - - - well, it's not clear to me
20 that the - - - if the jury disregarded it.

21 CHIEF JUDGE DIFIORE: Well, he claimed he was not
22 the seller, correct? And they indicted him for the sale.

23 MR. WELIKSON: That's true. They found that
24 there was, I suppose, there was sufficient evidence to
25 sustain that - - - to sustain that initial burden, but



1 again, the allegations, including the grand jury testimony,
2 which is part of the record before the motion court, have
3 to be taken from the perspective of the appellant, so they
4 have to be assumed to be true, and in the grand jury
5 testimony, appellant stated he was there for dinner. He
6 was there the whole night. He received mail at the
7 premises, and - - -

8 JUDGE GARCIA: Counsel, can we go to that because
9 you didn't put an affirmation, right? Your client didn't
10 put an affirmation in. It's the grand jury testimony
11 that's the basis for standing, right?

12 MR. WELIKSON: The grand jury testimony provides
13 a lot of the facts. Counsel did put in his own, like
14 Counsel's affirmation - - -

15 JUDGE GARCIA: Right.

16 MR. WELIKSON: - - - based on information and
17 belief, but yes, that's correct.

18 JUDGE GARCIA: So I read the grand jury testimony
19 as saying he was having dinner with friends in their
20 apartment. That's the extent - - - the intimate part with
21 friends comes from, I think, the motion papers, but then
22 the other one is he used the address for his mail because
23 he's always at work when the mail comes, and it's tampered
24 with. And I think that was in response to why did you give
25 this address when you don't really live there. So those



1 two things under the standard that I think that you are - -
2 - articulate, but we have a case, Ortiz, which you talk
3 about in your brief, and in Ortiz, where we found no
4 standing, and again it's a different posture, but I don't
5 think it matters in this context, the undisputed facts were
6 that defendant had more than a casual contact with the
7 apartment since both his girlfriend and his daughter lived
8 there. And we said no basis for standing. So my question
9 is, are you arguing that because of the Minnesota, those
10 cases from Minnesota in the Supreme Court, this Ortiz is no
11 longer the way we need to approach standing?

12 MR. WELIKSON: No, I don't think you need to go
13 that far. I - - - I will note that Ortiz was decided
14 before Carter, so the court didn't have the benefit of
15 Carter when making that decision, but all Ortiz does is
16 it's an example of this Court's limited power of factual
17 review after a full - - - after fact - - - factual findings
18 made from a full evidentiary hearing. A hearing, I'll add,
19 that Mr. Ibarguen did not get here.

20 JUDGE GARCIA: I - - - I agree, but the finding
21 was no standing, and we said that was okay, but if we had
22 accepted those facts, right, as found, but still said those
23 were sufficient for standing, we would have reversed. So I
24 don't think the standard there is really what's key.

25 MR. WELIKSON: Well, Your Honor, did - - - you



1 did not need to accept the facts that the defendant
2 testified to because there was a hearing. All - - - all
3 this Court did in Ortiz was affirm the factual finding by
4 the lower courts that Mr. Ortiz had a, quote, relative
5 tenuous ties to the apartment. That's the only factual
6 finding that's made in the opinion.

7 JUDGE GARCIA: But based on testimony, as Judge
8 Smith points out, it was uncontested that his girlfriend
9 and his daughter lived there.

10 MR. WELIKSON: Sure, so at a hearing it could be
11 that the fact finder does not find those allegations
12 credible. They could be tested through the adversary
13 process, through cross-examination, and perhaps, if Mr.
14 Ibarquen had his chance, he could be believed or he could
15 not be believed. But that's all that Ortiz did. And - - -
16 and so - - - and this is - - -

17 JUDGE GARCIA: So I guess the point then would
18 be, at least one of your points, would be we still approach
19 it that way, which is more of a multifactor test than we
20 just look to see if you're not a trespasser. Right?

21 MR. WELIKSON: That's right. Yes.

22 JUDGE GARCIA: Okay.

23 MR. WELIKSON: So what we - - - I - - - I know
24 that my colleague on the other side of the aisle does try
25 to paint us as if we're asking for a bright-line rule, and



1 we are not. We do believe that there has to be some
2 indicia of connection, and that's exactly what Carter and
3 Olson teach, so Carter and Olson - - -

4 JUDGE RIVERA: Okay. So let me ask you this. So
5 I think you're saying eventually to succeed on the motion,
6 you'd have to make that out. Is that the same standard
7 that you think applies for purposes of the grant of the
8 hearing? Because you said the question before us is
9 whether or not he should have been granted a hearing.

10 MR. WELIKSON: Correct.

11 JUDGE RIVERA: Is it a different threshold just
12 to grant the hearing?

13 MR. WELIKSON: I think that the - - - the
14 threshold to grant the hearing is - - - is merely if it
15 frames a factual issue. So I don't think it has to be as,
16 perhaps as fulsome as what would need to be made out after
17 the hearing, but - - -

18 JUDGE RIVERA: So you got to have some basis for
19 that. Okay. So is the basis here, I was sitting down
20 having dinner, or is the basis, I leave my mail with them,
21 or is the basis both, or is there something else?

22 MR. WELIKSON: May I respond Your Honor?

23 JUDGE RIVERA: Yes. Please.

24 MR. WELIKSON: The basis comes out of Carter and
25 Olson, which - - - the basis comes out of Carter and Olson,



1 which essentially made the distinction based on the
2 relationship between guest and host, so there's - - -
3 there's a spectrum, a business host, business guest does
4 not need privacy, right, because commercial transactions
5 don't require privacy to be engaged in. In the words of
6 Carter, the defendants were merely there on business
7 premises. It wasn't a home to them. The overnight guest
8 does get privacy because of the nature of the activity.
9 You cannot be an overnight guest unless you feel a sense of
10 security and privacy, and social guests share that same
11 thing because you can't meaningfully engage and be social
12 with your host unless you feel free - - -

13 JUDGE RIVERA: But doesn't that mean then that if
14 you're invited, as I understood your briefing, you're
15 invited for dinner, that's enough.

16 MR. WELIKSON: I think if the only fact in
17 isolation is you're invited for dinner, and we don't know
18 anything else, that would be a tough question. I'm not
19 sure what would happen. The Court doesn't need to go this
20 far, but here, you're invited for dinner - - - and I used
21 the word intimate because there's only three people in the
22 house - - - you are - - - Mr. Ibarquen was friends, right,
23 a socially - - - a socially recognized relationship as this
24 Court talked about in Rodriguez, which demonstrates
25 acceptance into the household, right, because to engage in



1 socially meaningful discourse, one has to be accepted into
2 the household and share the privacy that the host shares
3 with you. Things like worshipping together, talking
4 politics, being romantically intimate - - -

5 JUDGE RIVERA: So if you had never been invited
6 to dinner, this is the very first time, is that enough to
7 get you the hearing?

8 MR. WELIKSON: Yes. If - - - if you are invited
9 to dinner by friends.

10 JUDGE RIVERA: Yes, I know he called them
11 friends, yes.

12 MR. WELIKSON: Yes, then I would say that's
13 enough, but we have even more here because the mail is also
14 a significant factor.

15 JUDGE RIVERA: And then - - - that to get the
16 hearing does that mean that then you - - - in your view,
17 does that mean that then at the hearing you have to go
18 beyond that showing? Let's say you establish that, invited
19 - - - they're friends, I was invited for dinner, it was
20 just the three of us, do you have to go further than that?

21 MR. WELIKSON: I mean, I think that there's - - -
22 you probably need to show that you were there for some
23 extended amount of time. Here he says the whole night.
24 There could be some exploration by the People about whether
25 or not this is a legitimate friendship. When did you meet?



1 You know, how long have you known each other? That could
2 be hashed out.

3 CHIEF JUDGE DIFIORE: And would the scope - - -
4 and would the scope of that privileged status, let's call
5 it, extend to the following day?

6 MR. WELIKSON: It - - - well, I think that you
7 cannot - - - it cannot be that the evidence is suppressed
8 because the defendant is arrested and removed from the
9 home, and then as a result of that happenstance no longer
10 has standing to object. You have to take the evidence
11 found on the assumption that he was there with his friends,
12 and the incriminating evidence was in the common area right
13 next to him. It's no different if I come in with a friend,
14 you know, after a political rally, and I bring some
15 pamphlets with me. And the - - - the police, all of
16 sudden, burst in, disrupt our conversation, and start
17 rifling through my political pamphlets. Under the People's
18 theory, I would not be able to object to that. And that
19 can't be right for a free society.

20 JUDGE CANNATARO: Well, if he still had the
21 standing to object, then why didn't he somehow attack the
22 probable cause that led to the warrant as opposed to
23 challenging his arrest, which is what he did in his motion
24 at A-10?

25 MR. WELIKSON: He did challenge probable cause



1 for the warrant, Your Honor, because he specifically said I
2 was in the house the whole time. He denied having any
3 engagement with the drug transaction. He said I wasn't
4 there. I had nothing to do with this. They were looking
5 for some other guy.

6 JUDGE SINGAS: Counsel, was there a motion to
7 controvert the search warrant?

8 MR. WELIKSON: No, again, but that's because his
9 objection was to the unlawful entry and to the fruits that
10 were derived from the unlawful entry, so - - -

11 JUDGE SINGAS: Can I ask a follow-up question on
12 the pleadings because under Mendoza, do you think you've
13 satisfied Mendoza with those allegations? You've given us
14 a lot of facts, but the pleadings were very bareboned and
15 conclusory, so how are we supposed to view that in light of
16 Mendoza, which says basically that the defendant is the
17 person with the information. He has it. He has to put it
18 on paper so that he can meet his burden, which is a heavy
19 burden under Mendoza and Burton to get that hearing. How
20 is that satisfied here?

21 MR. WELIKSON: I - - - I - - - I think it's
22 definitely satisfied under Mendoza. I want to push back a
23 little bit on the characterization of the heavy burden
24 because all we have to do is frame a factual issue that
25 survives summary judgment, but here - - - in Mendoza if - -



1 - if someone was arrested on the streets and claims that
2 arrest was illegal, all they have to say was, I was doing
3 nothing wrong on the streets. We're not talking about a
4 buy and bust, right; we're talking about just all of a
5 sudden arrest on the street. I was doing nothing wrong,
6 and the police say, yes you were, that's a factual issue
7 that's in dispute. And here, the factual issue in dispute
8 is whether or not he has a connection to the residence such
9 that he has a reasonable expectation of privacy was
10 impaired upon.

11 JUDGE CANNATARO: But both Mendoza and 710.60 ask
12 for sworn factual allegations. And what's in the motion is
13 this legal term of art, lawful invitee, and there - - -
14 there are numerous cases that stand for the proposition
15 that lawful invitee doesn't give you the expectation of
16 privacy that you're arguing for today. So the question
17 arises why not say guest at dinner, instead of lawful
18 invitee?

19 MR. WELIKSON: Well, I will concede that defense
20 counsel could have been a little bit more fulsome in his
21 original motion, but he referenced the grand jury
22 testimony, and the grand jury testimony was before the
23 motion court, and the People understood what the
24 significance was. On page A-16, they say a person who is
25 over for dinner with friends who receives mail at the



1 premises is not entitled to a reasonable expectation of
2 privacy. So that fact issue was clearly put before the
3 motion court. The exact same thing we're arguing now, and
4 the motion court denied the motion based on that record.
5 So I think the facts were clearly put forth for this
6 resolution to be made.

7 JUDGE GARCIA: Counsel, I have a - - - a
8 question, and it's not this case, but you know, just
9 looking at what our rule might be or how we might approach
10 it, and I'm curious about how you would approach it. So
11 let's say different scenario. The allega - - - the
12 affirmation comes in. I go to dinner regularly. I'm a
13 guest. I've known these people a long time. I'm in the
14 dining room at least once or twice a week. While the
15 defendant's in the dining room, the police come in with a
16 search warrant. They search the office, seize a computer.
17 And on the computer is evidence of the defendant's
18 commercial fraud. Standing to challenge the search of the
19 study.

20 MR. WELIKSON: Yes, so I think that's a different
21 case. I mean it's - - - I think the guest in that - - -
22 the usual social guest probably doesn't have access to the
23 computer in the study, so unless they have some pleading or
24 some showing to show that they regularly use the computer
25 and therefore had an expectation of privacy, it's really no



1 different - - -

2 JUDGE GARCIA: Let's say it's in the desk. Maybe
3 computer is a bad example because it's - - -

4 MR. WELIKSON: Sure.

5 JUDGE GARCIA: - - - a little bit different, but
6 in the desk. So I guess the bottom line question would be
7 would there be some limit within the residence as to what
8 you would have an expectation of privacy or is it, you
9 know, anything there once I'm in that dining room
10 regularly?

11 MR. WELIKSON: Yes, so okay. I think as a guest
12 you have the right to object to the entry and what's
13 derived as a result of the entry because you have the right
14 to feel secure - - -

15 JUDGE GARCIA: Which I understand is your
16 argument here.

17 MR. WELIKSON: Right.

18 JUDGE GARCIA: I understand that.

19 MR. WELIKSON: In terms of the search, I think
20 that our rule would realistically be the guest can object
21 to, you know, the common areas where the guest has access
22 to typically, which would include the bathroom, which is
23 where some of the evidence was found here. I - - - I think
24 that I would have a harder case if it was a study because
25 that's like Rakas, right? That's the "casual visitor,"



1 which really the court was trying to express the fact that
2 the person who doesn't have the guest who's never in the
3 basement doesn't have a reasonable expectation of a search
4 of the basement. So that's I think would be more along the
5 lines of the question you're asking.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 Counsel?

8 MR. CASTELLANO: May it please the court, John
9 Castellano for the Office of Melinda Katz.

10 Your Honors, in this case, these - - - these
11 pleadings were the barest of barebones pleadings. At no
12 point does the defendant even cite Payton. At no point
13 does he move to controvert the search warrant that was
14 obtained after the People entered.

15 JUDGE GARCIA: But counsel, isn't his argument,
16 in fairness, maybe it's not the most artfully drawn motion
17 paper, but you came through the door - - - I understand you
18 dispute this. But you came through the door, it was an
19 illegal entry into this apartment, you saw heroin, you used
20 that to get a search warrant; it's the fruit of the
21 poisonous tree.

22 MR. CASTELLANO: I understand the allegations,
23 but, in fact, he's got to state under 710.60 a ground for
24 relief. He never even invokes Payton as to the unlawful
25 entry itself. He never cites any cases for that matter.



1 But just, if the factual scenario alone is enough to
2 preserve it, we've really gone a long way from at least
3 having to make some type of legal argument in support of
4 his - - - in support of his ground. And - - -

5 JUDGE SINGAS: But why aren't those facts enough,
6 if true, that he was there for a social purpose, he
7 receives mail at the location? Why isn't that enough for a
8 hearing, and why wouldn't the better practice just be to
9 grant the hearing?

10 MR. CASTELLANO: Well, as Your Honor indicated,
11 you have to judge the sufficiency of the allegations in
12 support of a motion by, not only by what the defendant
13 says, but - - - but by what the defendant could have said
14 in light of his access to information. In this case, the
15 defendant had ample access to information about the
16 premises where he was arrested and could have made
17 allegations with regard to multiple factors that this Court
18 specifically pointed to in People v. Rodriguez that laid
19 out the test there and multiple factors that other courts
20 have looked to both before and after the Olson and Carter
21 decisions in determining whether or not the defendant has
22 standing. That includes, for example, whether or not the
23 defendant ever, at any point in time, stayed overnight.
24 And that fact alone distinguishes this case from every
25 federal case that the defendant relies upon.



1 JUDGE RIVERA: He's not - - - he agrees with you
2 on that. He's not making that argument. That's not even
3 in dispute. There's no assertion, and he makes none that
4 if that were the case he should've gotten a hearing. His
5 whole point, the only reason the case is here is because
6 no, he's not staying overnight, hasn't stayed overnight,
7 and then makes those assertions that he's just there for
8 dinner, and - - - and the people who live there he has an
9 arrangement with them so that his mail is delivered there.
10 That's it. What else did he need to say other than cite
11 cases?

12 MR. CASTELLANO: Right, but he - - - what he
13 needs - - -

14 JUDGE RIVERA: To get a hearing, what else did he
15 need to say?

16 MR. CASTELLANO: What he needed to say is he
17 needed to allege some measure of control over the premises,
18 and the reason that I say that is because in Olson when
19 Olson is talking about - - -

20 JUDGE RIVERA: What does that mean?

21 MR. CASTELLANO: I'm sorry.

22 JUDGE RIVERA: Measure of control? I - - - I
23 want to know what that means. Measure of control. You're
24 a guest; what kind of control does a guest have?

25 MR. CASTELLANO: Well, an overnight guest,



1 according to the Supreme Court in Olson - - -

2 JUDGE RIVERA: But he's not an overnight guest,
3 so that's the question.

4 MR. CASTELLANO: Right.

5 JUDGE RIVERA: You could certainly take the
6 position that nobody but an overnight guest can have
7 standing; I don't know if you're going to win on that, but
8 if that's your position, that's your position, but if
9 you're something short of that, then what does that mean
10 control?

11 MR. CASTELLANO: What that means is that some
12 access to and expectation of privacy in the premises as a
13 whole. So if I'm an overnight - - -

14 JUDGE RIVERA: The premises as a whole - - -

15 MR. CASTELLANO: I'm sorry?

16 JUDGE RIVERA: - - - or the areas that area, as
17 he argues, common, the typical ones. The basis here is I
18 had dinner there, and I leave my mail there.

19 MR. CASTELLANO: The premises as a whole, and the
20 reason that I say that is because if you take a look at
21 Olson, and there's really only - - - Olson is the central
22 case here because Carter is a case that denies standing.
23 So if you take a look at Olson, and you look at what it
24 deems to be legally significant about an overnight guest,
25 what it says is, in part - - - there are two things - - -



1 one of them is when the host is asleep, the guest
2 effectively has unrestricted access to the premises. They
3 say that; it's unlikely that the guest is going to have any
4 restrictions, as a practical matter on their conduct. And
5 as a result, they have what the Court describes as a
6 measure of control over the premises. That's exactly the
7 phrase that they use. A measure of control over the
8 premises.

9 JUDGE RIVERA: So then is your position that the
10 Supreme Court has said the only people who have standing
11 are those who are overnight guests?

12 MR. CASTELLANO: No, absolutely not, Your Honor.
13 But you have to - - -

14 JUDGE RIVERA: Okay, so now we're short of that.

15 MR. CASTELLANO: Sorry?

16 JUDGE RIVERA: If you're short of that - - - I'm
17 trying to ask you to please address what you mean by
18 control when it's not an overnight guest. If you are,
19 again, if your position is you got to be an overnight
20 guest, so be it. If that is not your position, you just
21 said so, then what would be the kind of control a social
22 guest would need to have?

23 MR. CASTELLANO: A social guest would need to
24 have or need to allege in this case in order to obtain a
25 hearing that they had access to or control over, but at

1 least, at the very least, access to areas of the premises
2 that an ordinary social guest wouldn't have. If I'm
3 sitting down for dinner with somebody, that doesn't
4 necessarily imply that I can go wandering into the bedroom
5 or even that I can go wandering into the - - -

6 JUDGE CANNATARO: So really - - -

7 JUDGE RIVERA: They're only asserting the area
8 where he was having dinner and the bathroom.

9 MR. CASTELLANO: I'm sorry?

10 JUDGE RIVERA: They're only asserting the area
11 where they're having dinner and the bathroom. They're not
12 talking about any bedroom.

13 MR. CASTELLANO: Right. Absolutely. I
14 understand - - -

15 JUDGE RIVERA: Would a person who's invited for
16 dinner, who says they also leave their mail there, but I'm
17 happy to stay with just the dinner, does that person have
18 control, under your scenario, of where they're seated for
19 dinner, that immediate surrounding area, and the bathroom?

20 MR. CASTELLANO: That have - - - they have - - -
21 just like anyone who's legitimately on the premises, they
22 have an expectation of privacy in their immediate area, in
23 their person, in their clothes, in any belongings that they
24 brought, in their grabbable area. But that doesn't mean
25 they have an expectation of privacy in the premises as a



1 whole, and that's what's really key here, and I think
2 that's what the Supreme Court is getting at in Olson, I
3 think it's what - - -

4 JUDGE RIVERA: I misunderstood you. I thought
5 you were saying they would also have control over the
6 immediate area of where they're located and any other area
7 that one would deem reasonable for a guest to have access
8 to. So I misunderstood you.

9 MR. CASTELLANO: A guest - - - as I said, I think
10 an expectation of privacy in that immediate area, but not
11 an expectation of privacy in the premises as a whole, and I
12 think that's what's key. I think that's what the courts
13 getting to in Olson.

14 JUDGE CANNATARO: Let me ask you hypothetically,
15 if the guest arrived at dinner, and the host said to him,
16 dinner will be ready in a minute. Why don't you leave your
17 jacket in the bedroom? Put it on the bed, and we'll start
18 eating right away. Would that give you a measure of
19 control over the bedroom?

20 MR. CASTELLANO: No, I don't think it would, Your
21 Honor. And I don't think that would be even enough as an
22 allegation because what that is saying is there's some
23 level of access, but there's no real expectation. I don't
24 expect that I'm going to be able to, for example, exclude
25 others from the bedroom or to have any say in who comes and



1 goes into that bedroom. Maybe every other guest who comes
2 I say why don't you go into the bedroom and leave your
3 jacket there. So there's really no inference or necessary
4 inference of an expectation of privacy in the bedroom under
5 those circumstances.

6 JUDGE RIVERA: Well, not exactly. The access is
7 limited. It's for a particular purpose, not for anything
8 else.

9 MR. CASTELLANO: Exactly. For a particular
10 purpose. It's not the type of general expectation in the
11 premises itself that I think the Court is getting to, and I
12 think in Rodriguez, for example, a lot of the factors that
13 this Court elicits or - - - or lists have to go to the
14 interest in the premises as a whole. So in other words,
15 when - - -

16 JUDGE RIVERA: So when you say, just to be clear
17 - - -

18 MR. CASTELLANO: Sure.

19 JUDGE RIVERA: - - - the premises as a whole.
20 Let's say it's an apartment. You mean the entire
21 apartment, every part of that apartment. Is that what you
22 mean?

23 MR. CASTELLANO: I mean more than one or two
24 rooms. So for example, yes, you would have to have - - -

25 JUDGE RIVERA: Well, then that would mean that



1 every dinner guest, unless their host walks them through
2 parts, or says to them, you've got free rein, would never
3 have standing.

4 MR. CASTELLANO: There are many different types
5 of dinner guests, right. You can have somebody who this is
6 their first time, and as far as we know in this case, he
7 doesn't allege he was ever over there any time as a dinner
8 guest - - -

9 JUDGE RIVERA: Correct. You're correct.

10 MR. CASTELLANO: - - - if you're the fiftieth
11 time there as a dinner guest, and you've gone into the
12 bedroom before, and you've taken a nap there, or you've
13 been alone in the apartment there before, these are all
14 factors that all of these courts look to, that would be
15 different, right. If you're alone on the premises - - -

16 JUDGE RIVERA: Why isn't that something to
17 explore at a hearing?

18 JUDGE CANNATARO: Yeah.

19 MR. CASTELLANO: Because you have to establish in
20 the first place under 710.60 the factual allegations that
21 make out your entitlement to relief. And he does not make
22 any allegation, and you go through all of the other
23 allegations - - -

24 JUDGE RIVERA: What if he said I had access to
25 where we were sitting, the bathroom, and the bedroom? What



1 if he said that - - - and the kitchen?

2 MR. CASTELLANO: That would - - -

3 JUDGE RIVERA: I went up and got a bottle of
4 wine.

5 MR. CASTELLANO: I'm sorry. Which rooms are we
6 talking about?

7 JUDGE RIVERA: What if he asserts that? Is that
8 enough to get him a hearing?

9 MR. CASTELLANO: No, absolutely not. If he said,
10 on the other hand - - -

11 JUDGE RIVERA: Okay. Well, why not? Why not?

12 MR. CASTELLANO: Sorry? Because it doesn't show
13 that - - - that exercise either, that measure of control
14 over the premises, or even had access to the premises as a
15 whole, or that interest in the premises as a whole.

16 JUDGE RIVERA: You mean because it's a
17 conclusory, self-serving assertion? Is that why?

18 MR. CASTELLANO: I'm sorry?

19 JUDGE RIVERA: I - - - I'm saying, if he asserts
20 I was sitting at dinner. I had access. My host told me, I
21 have access to the bathroom, I went into the kitchen, I had
22 access to the kitchen. I also went into the single bedroom
23 that was located. If he said that, does that give you
24 enough for a hearing?

25 MR. CASTELLANO: I'm sorry. Did you say to the



1 single bedroom?

2 JUDGE RIVERA: Yes. Say there's only bedroom.
3 I'm mean there's two people. I'm going to assume there's
4 one bedroom.

5 MR. CASTELLANO: If he said he had access to all
6 of that - - -

7 JUDGE RIVERA: Yes.

8 MR CASTELLANO: - - - and we're talking about a
9 single night guest, potentially, I suppose.

10 JUDGE RIVERA: Well, dinner guest. I didn't say
11 they were staying overnight. Again, that's not the
12 question on the table.

13 MR. CASTELLANO: I'm sorry?

14 JUDGE RIVERA: It's just a dinner guest.

15 MR. CASTELLANO: It's a dinner guest, a one-time
16 dinner guest who's told that they have access to the entire
17 apartment?

18 JUDGE RIVERA: Yes, that's his assertion.

19 MR. CASTELLANO: Right. I guess it would - - -

20 JUDGE RIVERA: Would that be enough to get to a
21 hearing?

22 MR. CASTELLANO: I guess it would depend on who
23 else is in the premises and has that type of access. That
24 would affect your expectation of privacy.

25 JUDGE RIVERA: Why does it matter if the host is



1 telling you you do?

2 MR. CASTELLANO: I'm sorry?

3 JUDGE RIVERA: If his assertion is the host told
4 me I could go into each of those rooms, why does it matter
5 if the host tells anybody else they can?

6 MR. CASTELLANO: Because that - - - that affects
7 your expectation of privacy there, right. If it's a party,
8 and there are thirty people in the study or whatever room
9 that we're talking about, your expectation of privacy is
10 affected by who else is present.

11 So in - - - in this social - - - this idea, I
12 know that the defendant kind of disavowed this idea that a
13 social guest automatically has an expectation of privacy,
14 but it's in his brief, it's in his main brief. I can cite
15 you seven different places where it is, it's in his reply
16 brief. He says the determinative factor in the test is
17 whether he is a social guest. In fact, he says all nine
18 members of the Supreme Court have decided that the
19 determining factor is whether you are a social guest. A
20 social guest rule would be contrary to both the reasoning
21 and the results of this court.

22 JUDGE RIVERA: Well, let's say we disagree with
23 him as a per se rule but that - - -

24 MR. CASTELLANO: Sorry?

25 JUDGE RIVERA: But that as he conceded earlier, I



1 believe, in response to a question from Judge Garcia, that
2 it is a multifactor test.

3 MR CASTELLANO: That is - - -

4 JUDGE RIVERA: That his point is merely
5 concluding, oh you were a social guest or you were a casual
6 visitor because you were a social guest. That's where he
7 says that's the per se rule in the other direction, and
8 that's not permissible. This is a multifactor analysis,
9 and I think you're agreeing that you're looking at all of
10 these factors what's access, what's control, so if we're
11 both sort of in the same ballpark there, what is it that's
12 missing from his motion?

13 MR. CASTELLANO: What's missing from his motion
14 is any allegations with regard to those factors in
15 Rodriguez and those other factors that the other courts
16 have looked at like was he ever there overnight, was he
17 ever there alone, what was his access to the apartment in
18 and out, did he have a key, could he even come over
19 unannounced, for example. What was his access when he was
20 inside the apartment? Could he deny anyone access to the
21 apartment? Could he exclude anyone? Did he ever ask to
22 exclude anyone from the apartment? All of those things.

23 And more importantly, just finally, if I may, the
24 - - - the mailbox issue. Getting your mailbox - - -
25 getting your mail there. In an ordinary case, it might be



1 important because it would be an indication that the person
2 resides there, at least part of the time, resides there.
3 In this case, the defendant specifically disavows that in
4 his grand jury testimony. So he says, I do not live there.
5 As an accommodation, he never tells us when he goes there
6 to collect his mail, does he put his hand in the - - - in
7 the mailbox and fish it out, does he go to the front door,
8 does he ever cross the threshold? If he crosses the
9 threshold, is it for thirty seconds to thirty minutes? He
10 never gives us the answers to those questions.

11 JUDGE WILSON: Don't those sound like good
12 reasons to have a hearing?

13 MR. CASTELLANO: Those - - - in the first place,
14 what he has to do is establish that entitlement to relief.
15 And all he's done is said, I - - - I go over and I pick up
16 my mail there. So as an example, if I get Amazon packages
17 every day, and people are taking things off my stoop, and
18 therefore, I go to my neighbor, and I say you've got a
19 fenced in yard, so could I have all my packages delivered
20 to you? And they say absolutely. That doesn't show that I
21 have an expectation of privacy inside their premises.
22 There's something that's fundamentally lacking there, and
23 that's - - - that's what the problem with the defendant's
24 pleadings are in this case.

25 JUDGE RIVERA: But it does suggest a relationship



1 with the homeowner, and that's something to consider. And
2 again, why doesn't that get you, as Judge Wilson was
3 asking, get you past that hurdle just to a hearing, not the
4 ultimate conclusion, just for purposes of a hearing.

5 MR. CASTELLANO: Right, it doesn't get - - -
6 well, first of all, again, he's got to establish that
7 entitlement to relief to get the hearing, to be entitled to
8 the hearing in the first place, right? And - - - and like
9 I say, the absence of all of these factors or any
10 indication as to all of these factors that would actually
11 show an expectation of privacy inside the premises, his
12 pleadings were not sufficient. They were the barest of
13 barebones two sentence pleadings that did not make out his
14 claim.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.
16 Counsel?

17 MR. WELIKSON: Your Honor, the People's
18 conception of the test is far out of step with
19 jurisdictions throughout the nation and legal commentators.
20 It's - - - the test is not a measure of control. It's
21 about our reasonable expectations of privacy. Overnight
22 guests have them because the nature of the activity of
23 sleeping overnight requires that they be able to feel
24 secure and they have a sense of privacy and that they,
25 therefore, expect the host is sharing that with them.



1 The same is true for social guests. Think of the
2 home. The home is the place where we can retreat to be
3 with ourselves, but it has a broader function. It is the
4 place, perhaps the only place, where we can be together
5 with our chosen intimates.

6 JUDGE RIVERA: Yeah, but he does have a point,
7 and I believe Judge Singas asked you about this before,
8 that the strongest facts that would be in favor of your
9 client are solely within the knowledge of your client.
10 This is the person who knows the nature of the relationship
11 with the host. This is the person who knows whether or not
12 the host said you can go here, you can go there, you can do
13 this. This is the person who knows whatever arrangement he
14 has with those people regarding the mail. He knows where
15 the mailbox is located. He knows if he's ever gone in to
16 the house if his arrangement is I get home late, please
17 take it out of the mailbox, hold it inside. I'm going to
18 come in and chat with you about it. He's the one who knows
19 all those things. And everybody is very busy; I get that.
20 It - - - it is a few sentences more in the motion. Why - -
21 - why is - - - why does that not carry the day, even for a
22 hearing, just for purposes of getting a hearing?

23 MR. WELIKSON: Because the issue is whether the
24 pleadings frame the factual issue. Whether it can be
25 determined - - - determined on summary judgment that



1 there's no possible way Mr. Ibarguen had a reasonable
2 expectation of privacy, and here being with friends and
3 sitting down to a meal. Think about a meal. When we're
4 eating together, you know, it's the way we get to know each
5 other. It's the way we celebrate our connections with
6 people. And I also want to touch on the mail. The mail is
7 a significant factor here because first of all storage of
8 possessions at a place is regularly relied on by courts to
9 demonstrate a reasonable expectation of privacy, but mail
10 is very powerful because there's a lot of sensitive
11 correspondence that we receive - - - we get in the mail.

12 JUDGE RIVERA: Yeah, that was an interesting
13 point you made. What about his point that there has to be
14 an expectation of privacy in the whole area?

15 MR. WELIKSON: Yeah, to be honest, Your Honor,
16 I'm not exactly sure what that means even. The - - - the
17 point of the reasonable expectation of privacy is that can
18 you enjoy the guest's - - - can you enjoy the host's
19 company? Can you be social with the - - - the host and not
20 expect someone to burst in and disrupt you? I think we all
21 would agree that if we're sitting down to dinner with
22 friends, we don't expect that to happen. We don't expect
23 the policy to burst in all of a sudden and start rifling
24 through our papers.

25 JUDGE GARCIA: But that - - - that, even under



1 our theory, wouldn't be enough. Right? Or you're not
2 arguing that's enough here. You don't need to. But if you
3 just said I was sitting down to dinner, the police burst
4 in, no mail. That's just a I'm not trespassing kind, I
5 mean, it's I'm having dinner, but I was an invited guest
6 role.

7 MR. WELIKSON: Sure. I think the mail is very
8 helpful to us. It would be a tougher case without the
9 mail. In - - - in our view, I think that if sitting down
10 to dinner with a friend, and I was there all night, I think
11 is still enough, and certainly enough to satisfy the
12 threshold requirement for a hearing.

13 JUDGE GARCIA: Now, if you alleged I was sitting
14 down to dinner, and this goes to, I think, some of the
15 questions my colleagues are asking, if you just put in an
16 affidavit and client says I was sitting down to dinner, is
17 that enough to get you a hearing so we could explore the
18 dinner?

19 MR. WELIKSON: If - - - I think that fact - - -
20 fact in isolation is probably not enough, but - - - but the
21 collection of sitting down to dinner with a friend; there
22 the whole night; I live down the block; I receive mail,
23 which probably means I'm over a lot. That's enough.

24 And I think if this court and the Supreme Court
25 both recognize that we have a reasonable expectation of



1 privacy in our public movements, right? Because they give
2 a window into the intimacies of our life. The same exact
3 logic holds here. Because the home is the place where we
4 can have those privacies. We can be together. We can talk
5 politics. We can worship together. We can be romantically
6 intimate. And if we allow - - - if we impair the ability
7 of the home to be that space for us where we can share our
8 intimacies with each other, then we have significantly
9 impaired the ability of the home to be that pinnacle of
10 privacy that the constitution expects.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 (Court is adjourned)

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

I, Michelle S. Walker, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Eric Ibarquen, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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