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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 130

TAWOND LEACH,

Appellant.

20 Eagle Street
Albany, New York 12207
May 29, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

YVONNE SHIVERS, ESQ.
LEVITT & KAIZER
Attorneys for Appellant
40 Fulton Street, 23rd Floor
New York, NY 10038

THOMAS M. ROSS, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
Renaissance Plaza
350 Jay Street
Brooklyn, NY 11201

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 130?

2 (Pause)

3 MS. SHIVERS: Good afternoon, Your Honor,
4 Yvonne Shivers for appellant Tawond Leach.

5 CHIEF JUDGE LIPPMAN: Go ahead, counsel.
6 You want any rebuttal time, counsel?

7 MS. SHIVERS: Oh, a minute.

8 CHIEF JUDGE LIPPMAN: A minute, go ahead.

9 MS. SHIVERS: I'll reserve a minute.
10 Your Honor, Mr. Meach - - - Mr. Leach met
11 his burden of establishing standing by establishing
12 that he resided in the apartment, and in the absence
13 of any evidence that the spare bedroom was - - -

14 JUDGE SMITH: How - - - how - - - how do we
15 know that he was occupying the whole apartment rather
16 than just one room in it? I mean - - -

17 MS. SHIVERS: Well, his grandmother
18 testified that she - - - that he lived with him - - -
19 that - - - that he lived with her. In fact, she
20 initially testified that both Derek and Tawond lived
21 with her, so - - -

22 JUDGE ABDUS-SALAAM: Did he have a key?

23 JUDGE GRAFFEO: He didn't have a key,
24 though. That's a little strange, isn't it?

25 MS. SHIVERS: Well, that concerned the

1 Appellate Division as well. He didn't have a key,
2 and we don't know why he didn't have a key.

3 JUDGE ABDUS-SALAAM: Well, how old is this
4 defendant?

5 MS. SHIVERS: I'm sorry?

6 JUDGE ABDUS-SALAAM: At the time, how old
7 was he?

8 MS. SHIVERS: I believe he was - - -

9 JUDGE ABDUS-SALAAM: He's a teenager,
10 right?

11 MS. SHIVERS: I think he was in his late
12 teens. He might have been eighteen, but I think it
13 was seventeen or eighteen, something like that.

14 JUDGE ABDUS-SALAAM: And his grandmother
15 testified she was the only one with a key.

16 MS. SHIVERS: She said she was the only one
17 who had a key to the apartment.

18 JUDGE ABDUS-SALAAM: But there are other
19 grandchildren coming in and out, also.

20 MS. SHIVERS: I mean, what the key - - -
21 what the lack of a key establishes is that he can't
22 come into the apartment when someone's not there.
23 But it doesn't really establish his ability to access
24 every room within the apartment when he's there.

25 CHIEF JUDGE LIPPMAN: What's - - - what's

1 the difference between this and Ponder?

2 MS. SHIVERS: The difference between this
3 and Ponder is that in Ponder, the defendant only
4 occasionally spent the night in the apartment.
5 Whereas in this case, it's clear that Tawond lived in
6 the apartment with his grandmother. There was the
7 testimony of the grandmother that he lived there.
8 There was the testimony of - - -

9 JUDGE SMITH: But they never - - - they
10 never ask the grandmother, can he go anywhere he
11 wants in the apartment? Is he allowed into the spare
12 room?

13 MS. SHIVERS: No, they didn't ask him that,
14 Your Honor, but - - -

15 JUDGE SMITH: And it's his burden. I mean,
16 why - - - why - - - why shouldn't, you know - - - how
17 hard is it, if he has the free run of the apartment,
18 why can't they prove it?

19 MS. SHIVERS: Your Honor, I think really
20 that - - - that comes to the question is, what is the
21 defendant's burden in proving standing? And I think
22 in a case where the defendant proves that he lives in
23 the apartment, he doesn't have to then prove that he
24 has access to each and every room in the apartment.
25 He doesn't have to prove that he has access to the

1 bathroom, for example, or the living room, for
2 example - - -

3 JUDGE SMITH: No, but aren't - - - but on
4 this record - - -

5 MS. SHIVERS: - - - or the kitchen.

6 JUDGE SMITH: I mean, I - - - on this
7 record, couldn't - - - couldn't an inference be drawn
8 either way, or at least, aren't both inferences
9 possible, that he's really - - - that he's living - -
10 - that he's a member of the family, just - - - yeah,
11 just like my kids or your kids living in our houses.
12 They can go anywhere they want, or he's a houseguest
13 who has a room. And if it could be either way,
14 aren't we bound by what they found below?

15 MS. SHIVERS: Well, I don't think below the
16 court found at all that he was a houseguest. I think
17 that - - -

18 JUDGE SMITH: Well, fou - - - that it was -
19 - - well, found that - - - found that he failed to
20 meet his - - - could they - - - could they not be
21 read as saying that they - - - that he failed to make
22 his - - - meet his burden of proving that he was more
23 than a houseguest?

24 MS. SHIVERS: I think that certainly the
25 trial court - - - and the Appellate Division agreed -

1 - - found that Tawond was actually living in the
2 apartment and not a houseguest. A resident, which
3 implies that he's not merely someone who's visiting
4 from time to time.

5 JUDGE RIVERA: But isn't it possible - - -
6 isn't it possible the person who has the key, who is
7 the tenant, could keep him out of any room she chose
8 to keep him out of? Couldn't she actually keep him
9 out of the apartment? Couldn't she tell him you have
10 to leave right now?

11 MS. SHIVERS: Well, of course, she could do
12 that even if he had a key.

13 JUDGE RIVERA: Where's the expectation,
14 though? I don't understand what - - -

15 MS. SHIVERS: I mean, she could do that if
16 he had a key. She could ask for her key back. She's
17 the one who's on the lease. But there's nothing that
18 requires that a person - - - only a person who is on
19 the lease or who owns the apartment, who pays the
20 rent, has an expectation of privacy.

21 JUDGE RIVERA: Well, where's the
22 expectation if she can ex - - - exclude him from the
23 premises at any time?

24 MS. SHIVERS: Because she - - - she's on
25 the lease. She can do that whether he has a key or

1 he doesn't have a key - - -

2 JUDGE GRAFFEO: Did - - -

3 MS. SHIVERS: - - - but that doesn't make
4 him any less of a resident of the apartment, who has
5 a reasonable expectation of privacy - - -

6 JUDGE GRAFFEO: Did anyone present any
7 testimony as to who the clothing belonged to that was
8 in the spare bedroom?

9 MS. SHIVERS: There was no evidence as to
10 who the clothing belonged to. The evidence was that
11 the room was a spare bedroom, used - - - she used it
12 for whenever - - -

13 JUDGE GRAFFEO: But could the court - - -

14 MS. SHIVERS: - - - someone visited and no
15 one was visiting at the time.

16 JUDGE GRAFFEO: But could the court draw
17 the inference that it wasn't his clothing, or he
18 would have said my clothing was in the room?

19 MS. SHIVERS: I - - - I don't think so. I
20 think the only thing that can be drawn from the
21 evidence that was presented at the hearing is that
22 she used it for her grandkids when they visited, but
23 no one was visiting at the time. She didn't remember
24 the last time anyone was using the bedroom as a
25 visitor, and it was simply a spare bedroom.

1 JUDGE PIGOTT: Are we drawing a distinction

2 - - -

3 MS. SHIVERS: There was no lock on the
4 door, in contrast to cases - - - I can't remember the
5 other case, where even the owner might not have an
6 expectation of privacy if there had been a lock on
7 the door and they were renting it to the tenant.

8 JUDGE GRAFFEO: But doesn't a mixed
9 question of jurisdiction take care of this issue?

10 MS. SHIVERS: I'm sorry?

11 JUDGE GRAFFEO: Under the Jose case, we
12 said it's a mixed question of law and fact, these
13 issues of expectation of privacy. Why doesn't that
14 take care of this case?

15 MS. SHIVERS: Because in this case, Your
16 Honor, I think we - - - we're talking about the
17 burden of proof that a defendant has. And in terms
18 of the burden of proof, I think the rule, I suppose,
19 that I'm spouting, is that when a person is a
20 resident in the apartment, unless there's evidence
21 that they are barred from any area in the apartment,
22 they presumably have access to the entire apartment.

23 JUDGE PIGOTT: Is this a two-part analysis,
24 then? In other words, you're arguing, like we said
25 in Rodriguez, you want to get in the courthouse door

1 here. You want - - - you want to say I have standing
2 now to challenge it, and you never got it there, and
3 you want to say that because he lived there, his
4 clothes were there, he had a family relationship
5 there, he does have standing. Now we can discuss
6 whether or not there was an expectation of privacy in
7 that room?

8 MS. SHIVERS: I would say that he has
9 standing because he has an expectation of privacy to
10 the entire apartment.

11 JUDGE PIGOTT: Well, all right. And that -
12 - -

13 MS. SHIVERS: And it - - -

14 JUDGE PIGOTT: That would get you to - - -
15 to at least the hearing part as to whether or not
16 that gun was suppressible. In other words, I can see
17 where he can come in - - - the court could have said,
18 he's got standing; he lives there. Now the question
19 is, does he have - - - you know, did the police have
20 probable cause to find the gun, and did he have a
21 reasonable expectation of privacy, not in the room
22 he's in, but in a room that was - - -

23 MS. SHIVERS: No, I'm talking about the
24 extra room.

25 JUDGE PIGOTT: Right, right.

1 MS. SHIVERS: Yeah. I mean, I think the
2 court - - - he doesn't have standing in the extra
3 room if there's any - - - any evidence that he's
4 barred from that room.

5 JUDGE PIGOTT: But do - - - is he - - -

6 MS. SHIVERS: He automatically has, I
7 think, has an expectation of privacy in that room,
8 and in every room in the apartment - - -

9 JUDGE PIGOTT: Well, I - - - well, I guess
10 that's my point.

11 MS. SHIVERS: - - - because he resides
12 there.

13 JUDGE PIGOTT: In - - - in my view, or - -
14 - or what I'm trying to get at is, we talk about
15 expectation of privacy in the space. I think that's
16 what the Appellate Division said. Are we slicing it
17 that thinly that we say you have standing to - - - to
18 challenge the su - - - you know, to - - - to move to
19 suppress something found in the apartment because you
20 are a resident of the apartment? And then the
21 question becomes where was the gun found - - -

22 MS. SHIVERS: Where - - - yeah, exactly.

23 JUDGE PIGOTT: - - - and was there a
24 reasonable expectation of privacy?

25 MS. SHIVERS: I understand what you're

1 saying, Your Honor. I think you can't parse it.

2 JUDGE PIGOTT: You can or cannot?

3 MS. SHIVERS: You cannot parse it in just
4 that way.

5 JUDGE READ: So it's the - - - it's the
6 same ques - - - is one question not a two-part
7 analysis or inquiry, as Judge Pigott was posing?

8 MS. SHIVERS: I don't think it is. I don't
9 think it is, unless - - -

10 JUDGE READ: So in - - - in your view, the
11 standing and the expectation of privacy are woven
12 together?

13 MS. SHIVERS: Correct. And I don't - - - I
14 think that - - -

15 JUDGE GRAFFEO: Wouldn't the defendant be
16 better with the two-part? At least they could make
17 the argument if they're found to have standing; at
18 least they could go in and make the argument.

19 MS. SHIVERS: I'm sorry, maybe I'm
20 misunderstanding. I think in this case, the court
21 didn't find - - - found that he didn't have standing,
22 so he didn't reach - - -

23 JUDGE PIGOTT: So they won't listen to him.

24 MS. SHIVERS: - - - the main issues.

25 JUDGE SMITH: Doesn't - - - doesn't

1 standing turn on expectation of privacy?

2 MS. SHIVERS: Yes.

3 JUDGE PIGOTT: Well, except - - - I mean,
4 look at Ponder. You know, it - - - it's conceivable
5 - - - I know it didn't happen, but in - - - in Ponder
6 they could have said you've got standing, but you
7 don't - - - you had no expectation of privacy in the
8 washing machine in the basement. That - - - that
9 would have been a reasonable decision, it seems to
10 me.

11 Here, it could similarly be the same. It's
12 your apartment; it's where you live, so you do have,
13 you know, standing to challenge a search, but if they
14 find the gun in a place where you are never allowed,
15 then you had no expectation of privacy there, and
16 therefore, we're not going to suppress the gun.

17 MS. SHIVERS: Well - - -

18 JUDGE PIGOTT: You didn't like that.

19 MS. SHIVERS: I guess I'm not understanding
20 the distinction - - -

21 JUDGE PIGOTT: Okay.

22 MS. SHIVERS: - - - in finding standing and
23 - - -

24 JUDGE SMITH: Do - - - do you read the
25 Rakas case as saying that standing and expectation of

1 privacy are the same thing?

2 MS. SHIVERS: Yes.

3 JUDGE ABDUS-SALAAM: Wouldn't that also be
4 the same with the Love case from the Fourth
5 Department?

6 MS. SHIVERS: I think Love supports our
7 position in that basically what the court found was,
8 because a person resided in the apartment, you don't
9 parse and decide that they have standing in one room
10 or another. They have standing as to the entire
11 apartment - - -

12 CHIEF JUDGE LIPPMAN: But Ponder was
13 different?

14 MS. SHIVERS: - - - unless there's evidence
15 that - - -

16 CHIEF JUDGE LIPPMAN: But Ponder was
17 different?

18 MS. SHIVERS: I think Ponder was different
19 because the defendant didn't - - -

20 CHIEF JUDGE LIPPMAN: Because he wasn't
21 there all the time.

22 MS. SHIVERS: - - - live there.

23 CHIEF JUDGE LIPPMAN: That's the distinct -
24 - -

25 MS. SHIVERS: He came occasionally.

1 CHIEF JUDGE LIPPMAN: That's what makes
2 this case different?

3 MS. SHIVERS: I think so, yes.

4 CHIEF JUDGE LIPPMAN: And in this case
5 you're saying standing is the same as expectation?

6 MS. SHIVERS: Well, yes.

7 JUDGE ABDUS-SALAAM: Well, how much
8 reliance do you think the court in Ponder put on the
9 use of the washing machine or the basement? Was use
10 a real issue there, or was it just residence, not
11 being - - -

12 MS. SHIVERS: I think it had it more to do
13 with residence, the fact that this person was an
14 occasional visitor, and the - - - I - - - if I
15 recall, the testimony was specifically that he never
16 did use the basement, and he never did have any
17 reason to use the washing machine.

18 JUDGE SMITH: But if - - - but if he lived
19 there every day of his life, but never used the
20 basement and never used the washing machine, would he
21 have had stand - - - would he have had standing?

22 MS. SHIVERS: Well, if the evidence had
23 been that he was barred from using the spare bedroom,
24 I think he would not have had standing, but had - - -
25 there wasn't any such evidence. Here it was really

1 sort of left open, so - - -

2 CHIEF JUDGE LIPPMAN: So once you live
3 there, basically you have a right to the expectation
4 throughout the apartment. That's your position?

5 MS. SHIVERS: Unless there's evidence that
6 there's some restriction on some area in the
7 apartment.

8 JUDGE GRAFFEO: If the grandmother kept the
9 spare bedroom locked, that would be a different
10 situation?

11 MS. SHIVERS: That would be a different
12 case.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. SHIVERS: A different case.

15 CHIEF JUDGE LIPPMAN: You'll have your
16 rebuttal.

17 MS. SHIVERS: Thank you.

18 CHIEF JUDGE LIPPMAN: Let's hear from your
19 adversary.

20 MR. ROSS: May it please the court, Thomas
21 Ross, Kings County District Attorney's Office for the
22 respondent.

23 CHIEF JUDGE LIPPMAN: Counsel, counsel, why
24 - - - why, if he lives there, doesn't he have an
25 expectation of privacy in the entire apartment,

1 without, again, some specific evidence that shows he
2 was barred from a certain part of it?

3 MR. ROSS: Well, first of all - - -

4 CHIEF JUDGE LIPPMAN: Why isn't that the
5 logical inference to make?

6 MR. ROSS: Well, when you have a premises
7 where several different people live in that premises,
8 he - - - they don't have - - - necessarily have the
9 expectation of privacy in the other's bedroom, like
10 he wouldn't have an expectation of privacy in his
11 grandmother's bedroom. He probably wouldn't have an
12 expectation of privacy in the spare room while one of
13 the other grandchildren was there.

14 JUDGE PIGOTT: But could he argue it? In
15 other words, could he say, I live here and I - - -
16 and I want to - - - and I want to discuss this - - -
17 this gun they found and - - - and they took it out of
18 the place where I live.

19 MR. ROSS: That's exactly - - - that's why
20 it should be the defendant's burden, because other -
21 - -

22 JUDGE PIGOTT: No, I mean, let's assume he
23 said that. I mean, this is where I live.

24 MR. ROSS: If he said that he actually
25 makes some use of the spare bedroom - - -

1 JUDGE PIGOTT: No, no, no, the apartment.

2 MR. ROSS: Oh, oh.

3 JUDGE PIGOTT: I'm sorry. I'm fighting for
4 my two-part - - -

5 MR. ROSS: Oh, the apartment.

6 JUDGE PIGOTT: I was fighting for my two-
7 part theory - - -

8 MR. ROSS: Oh.

9 JUDGE PIGOTT: - - - that it's his
10 apartment. He lives there. That's where - - -
11 that's where he votes from. That's where he - - -
12 that's where he goes when he comes back and forth
13 from work and whatever, and that's where his clothes
14 are, et cetera. And if they came in and they took
15 this gun, wouldn't then the question be, all right,
16 you've got standing; you can talk about this. Let's
17 see whether or not this gun ought to be suppressed
18 because you had a reasonable expectation of privacy
19 where it was found.

20 MR. ROSS: No, the reasonable expectation
21 of privacy is coexistent with standing, so if he
22 didn't have a reasonable expectation of privacy in
23 that particular room, he could - - -

24 JUDGE SMITH: I think what you're saying -
25 - - you mean - - - and you're not saying that the

1 distinction is - - - would be illogical. You're
2 saying that the courts haven't drawn it.

3 MR. ROSS: They haven't drawn it, no.
4 Standing is tied up with the - - -

5 CHIEF JUDGE LIPPMAN: So it's a one-part
6 test in your - - -

7 MR. ROSS: It's a one-part test.

8 JUDGE GRAFFEO: Why isn't this - - -

9 JUDGE READ: So you agree with your
10 adversary about that, at least?

11 MR. ROSS: If he could show a reasonable
12 expectation - - - now, a reasonable expectation has
13 two components to it, one of them is a subjective
14 component which asked, did the defendant actually
15 exhibit an expectation of privacy in the - - -

16 CHIEF JUDGE LIPPMAN: But what about if he
17 just lives there and there's no evidence that he's
18 barred from that area that in general use, putting
19 aside the grandmother's bedroom. But let's say, he
20 lives in the house and no one says he doesn't have
21 access to every part of the apartment. Standing and
22 expectation of privacy?

23 MR. ROSS: No, he does - - - he would still
24 fail.

25 CHIEF JUDGE LIPPMAN: Why - - - what - - -

1 how do we parse this, or how do you make that
2 decision?

3 MR. ROSS: Because he - - - just - - -

4 CHIEF JUDGE LIPPMAN: Ponder is different,
5 right?

6 MR. ROSS: Right, that's different, because
7 someone was there - - -

8 CHIEF JUDGE LIPPMAN: So how, in this case,
9 do we make that determination? He lives there. No
10 one says he can't go into all these other areas. How
11 do - - - why does he not have an expectation of
12 privacy?

13 MR. ROSS: Because there's still no
14 inference just from the fact that he lives there that
15 he uses that room or that he has ever been in that
16 room.

17 JUDGE ABDUS-SALAAM: Well, counsel - - -

18 JUDGE GRAFFEO: Then why is - - - why is it
19 different from - - -

20 JUDGE ABDUS-SALAAM: - - - what about the
21 Love case where - - -

22 JUDGE GRAFFEO: Go ahead.

23 JUDGE ABDUS-SALAAM: What about the Love
24 case where the person stayed in the basement, but the
25 contraband was found in two bedrooms upstairs and it

1 was determined that he had standing to challenge the
2 search of the two bedrooms upstairs because he lived
3 there?

4 MR. ROSS: If you read the Love case, it
5 specifically says that the evidence showed that the
6 defendant had free access to the entire apartment.
7 And moreover, that it was the defendant who chose to
8 sleep in the basement, not to sleep upstairs.
9 There's no evidence in this case that the defendant
10 had free access to the entire apartment.

11 JUDGE SMITH: Are you - - - are you saying
12 that in this - - - well, I guess, we ought to stick
13 to this case - - - are you saying that as a matter of
14 law, this guy had no expectation of privacy? Or are
15 you saying it's a mixed question?

16 MR. ROSS: Well, it's a mixed question, and
17 as long as there's ample support in the records to
18 support the hearing court's findings - - -

19 JUDGE SMITH: Doesn't even have to be
20 ample, just has to be supported in the records.

21 MR. ROSS: It just has to be supported,
22 yes. Here there is ample support, but as long as
23 there is support in the record, then it's only if the
24 hearing court erred as a matter of law - - -

25 JUDGE GRAFFEO: Are - - - are you saying

1 that the defendant's proof here was inadequate - - -

2 MR. ROSS: Yes, it's - - -

3 JUDGE GRAFFEO: - - - or - - -

4 MR. ROSS: It's the defendant's proof is -

5 - - it was inadequate. The defendant - - -

6 JUDGE SMITH: Or the court below found it

7 to be.

8 JUDGE GRAFFEO: So - - - so if - - - if

9 there had been some additional proof - - -

10 MR. ROSS: Right. If the - - -

11 JUDGE GRAFFEO: - - - he may have met the

12 threshold for expectation of privacy?

13 MR. ROSS: Yes. He might have. If the

14 grandmother would have sa - - - testified that, yes,

15 he goes into the bedroom and keeps some of his

16 clothes in there. But there was no testimony as to

17 whose clothes they were.

18 JUDGE PIGOTT: What about - - - what about

19 his bedroom?

20 MR. ROSS: What about his bedroom?

21 JUDGE PIGOTT: Yeah.

22 MR. ROSS: There was testimony that there

23 was a - - - a dresser - - -

24 JUDGE PIGOTT: But if the gun had been

25 found there?

1 MR. ROSS: If the gun had been found in his
2 bedroom, then, yes, he would have had a reasonable
3 expectation of privacy.

4 JUDGE PIGOTT: No, I'm - - - I'm still
5 going back to my first one; he would have had
6 standing.

7 MR. ROSS: He would have had standing, yes.

8 JUDGE PIGOTT: So why doesn't he have
9 standing when he says this is the apartment I sleep
10 in? I don't - - - I - - - I'm just trying to get him
11 in the courtroom door.

12 MR. ROSS: Okay.

13 JUDGE PIGOTT: Besides the apartment door.

14 MR. ROSS: But just because you have a
15 reasonable - - - just because you live in a
16 particular premises, doesn't mean you have a
17 reasonable expectation of privacy to each and every
18 part of that premises.

19 JUDGE PIGOTT: I agree; I agree. But
20 shouldn't you have the right to make that argument?
21 In other words, to say, this in my apartment; this is
22 where I live. I now want to argue suppression,
23 without the court saying, you haven't established
24 standing - - - even though it's your apartment, and
25 it's where you live - - - because we have

1 predetermined that the area where we found the gun is
2 - - - you did not have a reasonable expectation for
3 that.

4 In other words, we're kind of making the
5 finding and then saying, therefore, there's no
6 standing. When we ought to be saying, yes, you have
7 standing, but we then find that that - - - that you
8 didn't have a reasonable expectation of privacy in
9 this one room.

10 MR. ROSS: Well, the court didn't make any
11 predetermination that the defendant didn't have
12 standing in - - - in this room. The court just heard
13 the evidence and heard the evidence of the
14 grandmother that said, the grandmother goes into this
15 room every day, but she doesn't testify - - -

16 CHIEF JUDGE LIPPMAN: Counsel, so where do
17 you draw the line between the Love-like situation - -
18 - the Love case - - - and this situation? What - - -
19 where's the line - - - what do you need to show? You
20 mean, if you live in an apartment full time, and
21 let's say - - - let's say, for the sake of argument,
22 you've lived there many years. You have to
23 demonstrate that you have access to each and every
24 room? You have to put in affirmative proof that you
25 have access to each and every room in that apartment,

1 or can you make an inference that you live there full
2 time, and this is where you live, so you know, that
3 you - - - you do have access, without someone saying,
4 oh, yes, he goes into this room and that room and the
5 other one. Where do you - - - how do you parse that?
6 Where - - - where - - - how do you make that
7 decision?

8 MR. ROSS: Well, just the fact that someone
9 says that they live at a particular premise,
10 obviously there's a reasonable expectation in their
11 bedroom. You can also draw the inference in the
12 common rooms, such as the living room, the kitchen,
13 the bathroom, the - - -

14 JUDGE ABDUS-SALAAM: But why isn't an
15 unlocked guestroom like the common rooms, like the
16 kitchen, living room, and so on? It's open to
17 everyone?

18 MR. ROSS: Because there's no evidence to
19 show that he ever even went there. There's no reason
20 to infer that he ever went there. At least - - -

21 JUDGE SMITH: If he never - - - if he never
22 went there, but was free to go in there, wouldn't
23 that be enough?

24 MR. ROSS: But you know, under the
25 reasonable expectation, the - - - there's still the

1 subjective component.

2 JUDGE PIGOTT: If the gun had been found in
3 his room - - -

4 MR. ROSS: Yes.

5 JUDGE PIGOTT: - - - and the grandmother's
6 the defendant and not him. Does she have - - - does
7 she have standing to challenge the search?

8 MR. ROSS: That's a closer question,
9 because it is her apartment, but I would think, no,
10 that she wouldn't have a reasonable expectation of
11 privacy in his particular bedroom.

12 JUDGE SMITH: You mean - - - you mean, I -
13 - - I don't have a reasonable expectation of privacy
14 in my - - - in my kids' bedroom?

15 MR. ROSS: Well, the - - - you - - - the
16 defendant here was more than just a - - - a small
17 child, he was, you know, seventeen.

18 JUDGE SMITH: Even - - - even when they
19 grow up - - - I mean, am I - - - it's my apartment; I
20 would think I have a reasonable expectation of
21 privacy in the whole thing.

22 JUDGE PIGOTT: Sometimes you can't get them
23 out. I'm kidding.

24 In the Ramos case - - -

25 JUDGE RIVERA: Is there anything short of

1 locking the bedroom door that the grandmother would
2 have done that would have been shown that he did not
3 have expectation in that room - - -

4 MR. ROSS: Well, the grandmother - - -

5 JUDGE RIVERA: - - - an expectation of
6 privacy?

7 MR. ROSS: The grandmother could have just
8 said he's not allowed in that room. But the - - -
9 but the thing is to show - - - it's not up the People
10 to show that the defendant was excluded from this
11 room.

12 CHIEF JUDGE LIPPMAN: Yeah - - - yeah, but
13 - - - but - - - I guess my question I come back to,
14 because I asked you before.

15 So your test is, you have to go room by
16 room and show, with proof, that you have access to
17 that room in order to have a reasonable expectation
18 of privacy? Even if you live there.

19 Assume that you've lived there forever.
20 This is your home. You live there. You still have
21 to - - - you always have to go, room by room, and
22 saying I have access to each of those rooms, because,
23 you know, even - - - let's say there's testimony
24 that, oh, yeah, he was frequently in this - - - this
25 room, that room, and that room, but there's no

1 testimony that he was frequently in the other room,
2 the other room, and the other room. You have to go
3 room by room; is that the rule? I'm trying to get -
4 - - what's a manageable rule that would apply to this
5 case and other cases?

6 MR. ROSS: I wouldn't go as far as - - -
7 you say that, you know, room by room - - -

8 CHIEF JUDGE LIPPMAN: So what is it? What
9 is the rule?

10 MR. ROSS: But what is - - - you take the
11 nature of the room. If it's a common room - - - like
12 I say, the kitchen, the bathroom - - - you can infer
13 that the de - - - that everybody on that particular
14 premises uses that - - -

15 CHIEF JUDGE LIPPMAN: So your rule is if
16 there's no one's - - - if it's not obviously a common
17 room, and it - - - but it doesn't have anyone's name
18 on it, you have to say, I'm in that room.

19 MR. ROSS: That's - - - that's correct.

20 CHIEF JUDGE LIPPMAN: I'm not saying it's
21 bad. I'm asking you, trying to just figure out what
22 is the - - - the rule that you're suggesting.

23 MR. ROSS: Yes, it is up to the defendant
24 to show - - -

25 JUDGE SMITH: Would that - - - would that -

1 - - are you saying the sa - - - that would be true -
2 - - suppose in this case, it was not his grandmother,
3 but his mother, and it's the ho - - - and it's the
4 home she brought him home to when he - - - she - - -
5 he was born, and he's lived there his entire life.
6 You're saying you - - - you - - - he still has to - -
7 - he has to testify or somebody has to testify as to
8 which rooms he's allowed into before he's met his
9 burden?

10 MR. ROSS: Well, when - - - when it's not a
11 common room or it's a room where there's no apparent
12 - - - he has no apparent connection to, I mean, he
13 could have done this - - -

14 JUDGE SMITH: Well, didn't - - - could - -
15 - yeah, but didn't you go into the guestrooms in the
16 house where you grew up? I mean, isn't that - - -
17 isn't that sort of a normal expectation?

18 MR. ROSS: But still the unreasonable
19 expectation of privacy. Defendant has to exhibit
20 some sort of expectation in that particular place.
21 And even if the defendant may have walked into the
22 room, you know, on - - - on occasion, and seen what
23 it looks like, but the fact that he never used it - -
24 -

25 JUDGE SMITH: If you're - - - if you're - -

1 - if you're in your own home - - - if you're in your
2 own home, and you wander into a guest room, do you
3 really - - - even - - - even one you don't usually go
4 into, have you lost your expectation of privacy?

5 MR. ROSS: Pardon me, you go into a room,
6 wait, that you don't use - - -

7 JUDGE SMITH: You know, yeah, yeah, yeah,
8 let's say, you're in your own home, place where - - -
9 wherever you lived.

10 MR. ROSS: Yes.

11 JUDGE SMITH: Imagine there's a room in
12 there that you've - - - somebody - - - it had been
13 used for storage for fifteen years; you've never been
14 in there. You wander in one day. Have you lost your
15 expectation of privacy?

16 MR. ROSS: Well, you - - - you would never
17 have had an expectation of privacy - - -

18 JUDGE SMITH: Really?

19 MR. ROSS: - - - in - - - in this
20 particular room that you've never used.

21 JUDGE SMITH: Of course, if he never used
22 it, the gun wouldn't have been there. But - - -

23 MR. ROSS: No, but this to me - - - this -
24 - - you've got to - - - this all has to be evaluated
25 in the fact that it is the defendant's burden to

1 establish standing. So again, a - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but it's
3 exactly the point that Judge Smith just made. Let's
4 say you go in there and you put the gun there,
5 because it's your home. And you've lived here
6 forever - - - for your life. Why wouldn't you have a
7 reasonable expectation that no one's going to come in
8 there and - - - and be able to - - - to search it
9 just like this, and take the gun and use it against
10 you? Why - - - why isn't that a reasonable
11 expectation of privacy that one might have?

12 MR. ROSS: Well, the expectation applies to
13 the place being searched, not the actual item itself.
14 If he's never - - -

15 JUDGE PIGOTT: Yeah, but - - - the point is
16 that he put the gun in there, because he says, nobody
17 ever goes in here.

18 MR. ROSS: But that - - - that could be
19 just like say, drug dealers on the street. They
20 might keep their stash in the tailpipe of a parked
21 car. You know, they don't have an expectation of
22 privacy in that parked car, and that's analogous to -
23 - -

24 JUDGE PIGOTT: A little different, yeah.

25 JUDGE ABDUS-SALAAM: It's on the street.

1 CHIEF JUDGE LIPPMAN: Anyway, thank you.
2 Let's go on to your adversary.

3 Answer the questions we've been asking to
4 your - - - your adversary. Now, your view is - - -

5 MS. SHIVERS: What was - - -

6 CHIEF JUDGE LIPPMAN: - - - you live in the
7 house, even if you're not in that room, hardly ever,
8 and you go in and you put the gun in there,
9 expectation of privacy?

10 MS. SHIVERS: I think so, and I think that
11 - - -

12 CHIEF JUDGE LIPPMAN: What's the rationale
13 - - -

14 MS. SHIVERS: - - - there's no further
15 burden - - -

16 CHIEF JUDGE LIPPMAN: What's the rule from
17 your perspective?

18 MS. SHIVERS: The rule from my perspective
19 is - - - is that there's no further burden on the
20 defendant in trying to establish standing than
21 establishing that he lived in the apartment, he was a
22 resident of the apartment, unless there is testimony
23 or evidence that he was restricted.

24 CHIEF JUDGE LIPPMAN: Or it's a Ponder
25 situation where you're only there once in a blue

1 moon.

2 MS. SHIVERS: If he's a resident, he's not
3 Ponder.

4 JUDGE PIGOTT: Well - - -

5 MS. SHIVERS: If he's Ponder, he's a
6 visitor.

7 JUDGE RIVERA: But - - - but if the
8 grandmother testifies that the room is for the
9 grandchildren, why - - - why doesn't that, at a
10 minimum, diminish his expectation of privacy?

11 MS. SHIVERS: Well - - -

12 JUDGE RIVERA: I mean, when the
13 grandchildren - - - is it your position that when the
14 grandchildren are there, he believes he can walk in
15 and out of that room?

16 MS. SHIVERS: He may be. It would really
17 depend - - - I mean, it would really depend - - -

18 JUDGE RIVERA: At any time, free movement.

19 MS. SHIVERS: - - - on a lot more evidence
20 than - - - or understanding of the situation than we
21 know.

22 JUDGE RIVERA: But isn't that different
23 from just a room that's just available and open, as
24 opposed to a room where the grandmother says, the
25 grandkids, when they come, this is their space?

1 MS. SHIVERS: Well, I don't - - - just
2 because it's a space that she uses for the grandkids,
3 doesn't mean - - -

4 JUDGE RIVERA: Bedroom.

5 MS. SHIVERS: - - - that he has no
6 expectation of privacy in the room. I mean, I think
7 in a typical house, where you have cousins in the
8 house, and you have a lot of family in the house,
9 people freely go from room to room. People freely
10 have access from room to room. And in the absence of
11 the grandmother being so strict with him that she
12 didn't say, you're not allowed in this room or put a
13 lock on the room, or anything like that.

14 JUDGE SMITH: But isn't - - - isn't her not
15 giving him the key some evidence that she restricted
16 him?

17 MS. SHIVERS: It could be that she wanted
18 him to obey a curfew. We - - - we really don't know,
19 but it doesn't show any evidence of him having
20 restrictions inside the house, inside the apartment
21 where he lived once he was in there, certainly. It
22 could be she didn't - - - he was careless with keys;
23 we just don't know.

24 CHIEF JUDGE LIPPMAN: By your rule in a
25 nutshell is, if you live there, and there's no

1 evidence you can't go into a particular room,
2 expectation of privacy.

3 MS. SHIVERS: That's right.

4 CHIEF JUDGE LIPPMAN: Okay. Thank you
5 both.

6 MS. SHIVERS: Thank you.

7 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v Tawond Leach, No. 130 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

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