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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 101

RAMEE MCCULLUM,

Appellant.

-----

20 Eagle Street  
Albany, New York  
November 19, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 101, the People of  
3 the State of New York v. Ramee McCullum.

4 Good afternoon, counsel.

5 MR. LITMAN: Good afternoon, Your Honors, and may  
6 it please the court. My name is Benjamin Litman of counsel  
7 to Appellant Advocates, and I am here on behalf of the  
8 appellant, Ramee McCullum.

9 At the outset, I would like to reserve two  
10 minutes of my time for rebuttal.

11 CHIEF JUDGE DIFIORE: You may, sir.

12 MR. LITMAN: Thank you.

13 Your Honors, this appeal presents a single  
14 discrete issue of first impression, with significant  
15 ramifications for New York City's poorest residents. This  
16 court should decide that issue consistent with the  
17 prevailing rule and hold that occupants of an apartment  
18 like, but even more than most bailors - - -

19 JUDGE FEINMAN: All right. Well, before we - - -

20 MR. LITMAN: Yes.

21 JUDGE FEINMAN: - - - get to that, I'd like to  
22 discuss a threshold issue which deals with preservation and  
23 - - - I just want to make sure I'm understanding your  
24 argument correctly, which is that you're conceding that  
25 some of your arguments are not preserved but that there's



1 an exception to the preservation rule because you could not  
2 have raised these issues at trial. Is that in fact a  
3 correct understanding of your position?

4 MR. LITMAN: That is correct, Your Honor.

5 JUDGE FEINMAN: So how do you say that when, in  
6 the record, at page A263, we have - - - that was introduced  
7 at the hearing, the marshal's legal possession, you know,  
8 how do you say you couldn't have known at the time of the  
9 hearing?

10 MR. LITMAN: Your Honor, at least three reasons  
11 in response to that. So first, the context in which that  
12 document was submitted. This was a hearing that was  
13 focused almost exclusively on the question of standing.  
14 And again, there was a moment where the issue was about  
15 whether the eviction, which was what was presented by the  
16 People to have occurred, was in fact legal.

17 So there is this - - - there is this dispute as  
18 to whether the marshal or others had produced documentation  
19 to prove the legality of the eviction, and the suppression  
20 court allowed the People to reopen the hearing to produce  
21 such documentation. And again, in the hearing court's  
22 language, to produce the documentation that allowed the  
23 marshal to go and evict. And again, the Appellate Division  
24 understood it the same way, which was that the document was  
25 produced in the context of proving the legality of the



1 eviction.

2 JUDGE STEIN: But what would have prevented  
3 defense counsel from looking at that and saying, whoa, this  
4 wasn't an eviction at all; this is something completely  
5 different, and arguing - - - actually, I don't see why he  
6 couldn't argue - - - have argued a bailor-bailee  
7 relationship either way.

8 But - - - and just to take this one step further,  
9 let's even assume that there would be no way of knowing  
10 that, what about the fact that, when this was discussed in  
11 the trial, no objection was made, no request to reopen the  
12 - the suppression hearing?

13 MR. LITMAN: Sure.

14 JUDGE STEIN: So it seems to me that there were -  
15 - - there was at least one, if not more, opportunities to  
16 raise this issue, and then - - - so why would it fall  
17 within an exception to the preservation requirement?

18 MR. LITMAN: Sure, Your Honor, and I think you're  
19 asking two separate questions, if I can deal with the first  
20 one at the outset. So again, I was initially describing  
21 the context in which this document was introduced. And  
22 again, it was introduced in the context of proving the  
23 legality of what everyone understood to be an eviction.

24 What Your Honor was first asking about was the  
25 content of that document where it says "Marshal's legal



1 possession" at the top. As we set forth in our reply  
2 brief, the actual content, if you look at the language  
3 apart from the heading, it says the landlord has possession  
4 of these premises. Now, in an eviction, the landlord also  
5 has possession of the premises. The distinction between a  
6 legal possession and an eviction is possession over the  
7 property. So there's no mention whatsoever in the content  
8 of the notice - - -

9 JUDGE STEIN: Well - - -

10 MR. LITMAN: - - - about the property.

11 JUDGE STEIN: - - - in either case, though,  
12 somebody has possession of the tenant's property. It's  
13 either the marshal, or it's the landlord, or it's the  
14 storage facility, or it's something, right? So what  
15 difference does it make? Why couldn't that argument, which  
16 I understand is the primary argument you're raising now,  
17 have been made either at that point, or subsequent to that  
18 point, before we get to a verdict?

19 MR. LITMAN: Yes, Your Honor. I'll deal with the  
20 suppression hearing first, and then I'll go to trial, which  
21 I understand is your other question. So with respect to  
22 the suppression hearing, there is a distinction with a  
23 difference between an eviction and a legal possession.  
24 There is a judicially-blessed administrative regulation  
25 which governs the conduct of marshals in New York City, and



1 that is the handbook - - - handbook of regulations that we  
2 cite throughout our brief.

3 JUDGE STEIN: But how do you say that affects the  
4 issue of the - - - the bailment?

5 MR. LITMAN: Well, we don't concede that there  
6 would necessarily be a bailment in the context of eviction  
7 - - - of an eviction because the regulations provide for a  
8 bailment only in the context of a legal possession.  
9 They're silent as to whether a bailment is created in an  
10 eviction. And again, even if there were a bailment in the  
11 context of an eviction, as the People recognize, there  
12 would be different - - - different bailees, seriatim, as  
13 they put it, starting with the marshal, then to the moving  
14 company, and finally with the storage company such that - -  
15 -

16 JUDGE STEIN: Yeah, but he knew his property was  
17 in the apartment, right? Okay. So doesn't - - - if there  
18 is going to be a bailment, wouldn't it at that point be on  
19 the part of the landlord?

20 MR. LITMAN: Well, again, this - - - the break-in  
21 and the subsequent search occurred almost immediately after  
22 the legal possession was effectuated. So I don't think the  
23 fact that it occurred so close in time would have tipped  
24 off defense counsel to realize that this was necessarily a  
25 legal possession.



1           Now, with respect to what I was mentioning in  
2 terms of the seriatim nature of the bailees, to the extent  
3 that a bailment were created in the context of an eviction,  
4 it's important because one of the exceptions that we point  
5 out in our brief, when bailors do not have a reasonable  
6 expectation of privacy is when the bailee is an agent of  
7 the government.

8           So in that case, as the People concede, with an  
9 eviction, the marshal would at least be one of the bailees  
10 seriatim. So yes, there would - - - to the extent there's  
11 a bailment, it's much more attenuated than in the case of a  
12 legal possession. And you, arguably, have the situation  
13 where an agent of the state is one of the bailees which  
14 falls into this exception where the reasonable expectation  
15 of privacy is diminished.

16           Now, if I can transition to the point that - - -  
17 the second point Your Honor raised, which is: put aside  
18 the hearing, what about a trial once this issue of legal  
19 possession is definitely raised by the marshal? And as we  
20 explain in our brief, the reason that defense counsel was  
21 not - - - did not fail to preserve it by not moving to  
22 reopen, when that option was available to him, is because  
23 the preservation rule requires - - - 470.05(2) requires  
24 that the issue be raised at the time or at any subsequent  
25 time when there is an opportunity of effectively changing



1 the same.

2 Again, on our appeal, we're contesting the fact  
3 that the suppression court did not issue any findings of  
4 fact and conclusions of law. But it's inarguable that the  
5 suppression court ruled on the merits.

6 So defense counsel was stuck with the fact that  
7 there was a ruling on the merits such that - - -

8 JUDGE FEINMAN: Wait a minute. People move to  
9 reopen suppression hearings during trials all the time.  
10 You have two cops in a radio motor patrol car, only one  
11 gets called at the suppression hearing, you go to trial,  
12 you've had a ruling, and the second cop is now called at  
13 the trial and says something very different than the first  
14 cop, you know, the windows weren't tinted, or they were  
15 tinted and I couldn't see in. You don't have an obligation  
16 to move to reopen even though there's already been a  
17 ruling?

18 MR. LITMAN: No, Your Honor, I think those are  
19 distinguishable circumstances. The example Your Honor was  
20 giving, as I understand it, applies to a merits decision on  
21 the merits of a suppression claim.

22 JUDGE FAHEY: I'm having the same problem,  
23 though, because if the argument is he couldn't have known,  
24 therefore it couldn't have been preserved, but then at  
25 trial clearly did know, in the way I understand your





1 argument, so therefore even if it's a losing argument, you  
2 have an obligation to make a preser - - - some effort at  
3 preservation, and I don't see it here.

4 MR. LITMAN: Your Honor - - -

5 JUDGE FAHEY: I'm having a hard time finding it  
6 anyway.

7 MR. LITMAN: Again, Your Honor, the standard,  
8 under 470.05(2), is that you have to raise the issue if  
9 there is an opportunity of effectively changing the same,  
10 meaning the prior decision. Here there was no - - - there  
11 was no opportunity to change the prior decision if defense  
12 counsel had moved to reopen on the grounds of standing  
13 because defense counsel was stuck with the fact that the  
14 suppression court had ruled on the merits.

15 JUDGE STEIN: But the suppression court didn't  
16 say - - - and this is one of your objections,  
17 understandably - - - what the decision was based on. And  
18 it seems to me that the Appellate Division disagreed with  
19 you and seemed to suggest that it implicitly made the  
20 decision based upon standing. So without - - - we don't  
21 know. So how - - - how can you say that - - - that it was  
22 too - - - too late.

23 MR. LITMAN: Well, again, I - - -

24 JUDGE STEIN: Maybe it was on standing, so you  
25 move to reopen and you go back and find out.



1 MR. LITMAN: Your Honor, I think the point is  
2 that it was as to both. That's - - - that's the point that  
3 we make in our brief, which is the only language that the  
4 court provided the suppression - - -

5 JUDGE STEIN: You're making that assumption now.  
6 Does that really explain why you wouldn't make the motion  
7 to preserve the argument once you hear the evidence - - -  
8 you see the evidence at the trial?

9 MR. LITMAN: Yes, I don't think we're making that  
10 assumption now. I think anyone at the time, having gone  
11 through that suppression hearing, where almost the entire  
12 focus was on standing - - - again, it was standing and then  
13 there was - - - there was a reopening of the suppression  
14 hearing on the issue of standing. And then again, the  
15 court - - - the only language the court issued in terms of  
16 a ruling is that the defense has not met its burden and the  
17 People has met - - - have met their burden.

18 So clearly, that language applied to standing,  
19 and it also applied to the merits. So at trial, when this  
20 issue comes up with respect to a legal possession, defense  
21 counsel is stuck with that ruling and did not have an  
22 opportunity of effectively changing the same.

23 JUDGE WILSON: I just want to try and - - -

24 MR. LITMAN: Yes.

25 JUDGE WILSON: - - - if I might, Chief?



1 MR. LITMAN: Yes.

2 JUDGE WILSON: - - - clear up exactly where you  
3 are claiming that there's standing, expectation of privacy.

4 MR. LITMAN: Yes.

5 JUDGE WILSON: So there's a Tupperware with some  
6 bullets in it; you're not claiming any expectation of  
7 privacy as to that?

8 MR. LITMAN: Nothing in plain view, correct.

9 JUDGE WILSON: Okay. So - - - okay, so that  
10 might make it easier. You're also not claiming an  
11 expectation of privacy as to the room itself?

12 MR. LITMAN: Correct.

13 JUDGE WILSON: You're not claiming any  
14 expectation of privacy as to the two guns that are on a  
15 shelf in plain view.

16 MR. LITMAN: Correct.

17 JUDGE WILSON: And not as to a - - - another gun  
18 that is also in plain view in, like, a blue glove or  
19 wrapper or some kind of thing like that.

20 MR. LITMAN: Correct.

21 JUDGE WILSON: You are claiming an expectation of  
22 privacy as to a gun that's in a brown or a black box,  
23 single gun.

24 MR. LITMAN: Yes.

25 JUDGE WILSON: And as to four guns that are in a



1 larger case that has a picture of a forest on the outside.

2 MR. LITMAN: Correct.

3 JUDGE WILSON: Okay. I got it.

4 JUDGE FEINMAN: The closed containers.

5 MR. LITMAN: Yes, which has a special primacy in  
6 Fourth Amendment jurisprudence.

7 Thank you, Your Honors.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 Counsel?

10 MR. NEUBORT: May it please the court. My name  
11 is Solomon Neubort, and I represent the People.

12 The defendant could have moved to reopen 70 - - -  
13 CPL 70 - - - 710.40, subdivision (4), provides: "If after  
14 a pre-trial determination and denial of the motion the  
15 court is satisfied, upon a showing by the defendant, that  
16 additional pertinent facts have been discovered by the  
17 defendant which he could not have discovered with  
18 reasonable diligence before the determination of the  
19 motion, it may permit him to renew the motion before trial  
20 or, if such was not possible, owing to the time of the  
21 discovery of the alleged new facts, during trial."

22 So the defendant could have moved to reopen  
23 during trial. In fact, on appeal to the Appellate  
24 Division, the defendant claimed that trial counsel was  
25 ineffective for failing to do just that, for failing to



1 move to reopen the suppression hearing at trial. So now  
2 the defendant is retracting that argument and saying,  
3 whatever I said to the Appellate Division was wrong.

4 JUDGE RIVERA: So then is the Appellate Division  
5 decision all on interest-of-justice jurisdiction, reached  
6 an unpreserved question - - -

7 MR. NEUBORT: I think that - - -

8 JUDGE RIVERA: - - - or a unpreserved claim;  
9 excuse me.

10 MR. NEUBORT: Yes, I think that the - - -

11 JUDGE RIVERA: Does it say that anywhere?

12 MR. NEUBORT: It doesn't, but this court is not  
13 bound by what the Appellate Division - - -

14 JUDGE RIVERA: No, I understand that; I'm asking  
15 you.

16 MR. NEUBORT: No, I don't believe that they said  
17 that they would - - -

18 JUDGE RIVERA: They did start their opinion by  
19 saying we are presented with a novel question of first  
20 impression.

21 MR. NEUBORT: That is correct, Your Honor.

22 JUDGE RIVERA: It seems a bit odd, if you think  
23 it's not preserved, to reach that question.

24 MR. NEUBORT: I can't speak for the Appellate  
25 Division, but I could urge this court not to reach an



1 unpreserved.

2 Now, again, the Appellate Division also has  
3 interest-of-justice jurisdiction and so they reach  
4 unpreserved claims in - - - in that interest. So they did  
5 have to review that claim, regardless, even if it was  
6 unpreserved. But this court may not. And so this court  
7 should not go on to consider the merits.

8 JUDGE FEINMAN: But even if you - - - putting  
9 aside what happened at the trial, aren't they, arguably, on  
10 notice through the exhibit that I was referencing before?  
11 And don't they, as part of their burden in preparing for  
12 this hearing and making these arguments, have some duty to  
13 understand what transpired and how evictions happen in New  
14 York City? I mean this whole legal possession developed  
15 out of changes to how evictions are handled.

16 MR. NEUBORT: Absolutely, Your Honor. I was just  
17 pointing out that, at the very latest, by the time of  
18 trial, he could have moved to reopen. But certainly at the  
19 time of trial, he had the document - - - at the time of the  
20 suppression hearing, he had already the document, and it  
21 plainly stated that this was a legal possession.

22 And the defendant is trying to have it both ways.  
23 On the one hand he says that the People refer to it as an  
24 eviction when in fact it was a legal possession. But then  
25 when shown a document that says that it was a legal



1 possession, now tries to have it the other way and say,  
2 well, legal possession could mean an eviction. You can't  
3 have it both ways. So either he rises from the claim that  
4 the word "eviction" is - - -

5 JUDGE RIVERA: It is hard to read the record  
6 without seeing that no one at the suppression hearing  
7 thought that this was an eviction, as opposed to a partial  
8 eviction with - - -

9 MR. NEUBORT: I would just point out, Your Honor,  
10 that what happens in New York City is that the judge issues  
11 an eviction order; it's an eviction. There's an order for  
12 eviction. Then the marshal comes to the premises and gives  
13 the landlord - - -

14 JUDGE FEINMAN: I don't know if that's exactly  
15 correct, frankly, based on my experience sitting in civil  
16 court. I think the judge issues a judgment on the special  
17 proceeding, you know, on the petition, and then the actual  
18 order of eviction becomes a ministerial function that flows  
19 from the judgment. You know, a judge never actually signs  
20 a warrant of eviction.

21 MR. NEUBORT: You're correct, Your Honor, but  
22 that order permits an eviction, and then it becomes the  
23 landlord - - -

24 JUDGE FEINMAN: That is true.

25 MR. NEUBORT: I'm sorry; I stand corrected, but



1 then the landlord has the option of proceeding, pursuant to  
2 the authority that would allow for a full eviction, to then  
3 opt for a partial eviction. And in this case he opted for  
4 a partial eviction.

5 And going to the merits of the claim, as part and  
6 - - - as part and parcel of the creation of this bailment,  
7 there had to be a full inventory taking by the marshal.

8 JUDGE STEIN: But is that the same as a search of  
9 closed containers? Isn't - - - isn't this inventory a  
10 general inventory of property and also to make sure that  
11 there's nobody in the apartment that's remaining?

12 MR. NEUBORT: I would like to read what it says  
13 in the quote from the Marshals Handbook that's approved by  
14 the Appellate Division. It says: "All marshals are  
15 required to prepare a written inventory of all items  
16 contained in the premises of any tenant to be convicted."  
17 And I'll skip to a little bit further, and it says: "All  
18 valuables, such as money, jewelry, negotiable instruments,  
19 et cetera, should be inventoried even when the items are  
20 small enough to fit into a carton. Any valuables which, in  
21 the marshal's opinion, need to be safeguarded, should also  
22 be inventoried. The inventory should reflect that  
23 valuables are being safeguarded. To safeguard these items,  
24 the marshal" - - -

25 JUDGE STEIN: First of all, it doesn't talk about





1 going into closed containers, but also there was testimony  
2 here by the marshal herself that that's not how they  
3 generally did that.

4 But leaving that aside, even assuming everything  
5 you say is true, could there still not be a Fourth  
6 Amendment issue or a right here to what's contained in  
7 these closed containers? In other words, you have to go  
8 get a warrant before you can open them. You can take them,  
9 you can seize them, you can, you know, say what you seize  
10 there. It just seems to me that - - - that this - - - that  
11 these - - - this manual doesn't necessarily deprive a  
12 tenant who is being evicted of all rights in all property.

13 MR. NEUBORT: Well, first, Your Honor, given that  
14 there's the diminished expectation of privacy because  
15 there's going to be a full inventory, and it does allow to  
16 even search for such things as jewelry and cash and to  
17 inventory it, and therefore there is that diminished  
18 expectation of privacy. And this court, in *People v.*  
19 *Natal*, said that where the - - -

20 JUDGE WILSON: Well, could they have - - -

21 MR. NEUBORT: - - - defendant was arrested - - -

22 JUDGE WILSON: Could they have searched  
23 somebody's phone for the contents of the phone, if it was  
24 there?

25 MR. NEUBORT: No, Your Honor, because that



1 wouldn't be part of the inventory that the marshals even  
2 conceivably wouldn't be able to say I'm inventorying the  
3 content of a hard drive.

4 JUDGE FEINMAN: Well, let's say it's all in a  
5 safe box - - -

6 JUDGE RIVERA: But she testifies the main point  
7 of this is to ensure that there's no one still in - - - on  
8 the premises, and that's why she's looking in closets,  
9 that's why she's looking around to ensure no one else is on  
10 the premises. So why - - - why are you opening a small box  
11 to do that?

12 MR. NEUBORT: Well, first of all, Your Honor, the  
13 law doesn't depend on what the marshal - - - this  
14 particular marshal's understanding - - -

15 JUDGE RIVERA: No, but I thought - - -

16 MR. NEUBORT: - - - of the law.

17 JUDGE RIVERA: - - - your argument was, in part,  
18 that the defendant in this case would have - - - actually,  
19 you're calling it a diminished expectation, but I think  
20 you're really saying no expectation of privacy given that,  
21 at least from - - - at the initiation of this eviction  
22 process, there is a government official, a marshal, who is  
23 doing an inventory search.

24 MR. NEUBORT: Correct, Your Honor.

25 JUDGE RIVERA: I know you have another argument



1 related to the officer once they come. That's a different  
2 story.

3 MR. NEUBORT: Yes, there's that argument as well.  
4 But - - -

5 JUDGE RIVERA: Yes.

6 MR. NEUBORT: - - - aside for that, in the  
7 creation of a bailment, the court - - - the Supreme Court  
8 in Rawlings v. Kentucky held that where the - - - there was  
9 this short duration of a friendship between the defendant  
10 and someone who he dumped his drugs into her purse. And  
11 the police came and asked her to dump out the contents of  
12 her purse, and she did, that there was no expectation of  
13 privacy, given the nature of the relationship between the  
14 defendant and the holder of the purse.

15 And the same thing here whereas the Appellate  
16 Division accurately described, this was a reluctant  
17 bailment where the - - - there were two choices for the - -  
18 - for the landlord.

19 JUDGE RIVERA: But even in an involuntary  
20 bailment the bailee is still responsible.

21 MR. NEUBORT: Responsible, but it's not  
22 responsible - - -

23 JUDGE RIVERA: Well, for the - - -

24 MR. NEUBORT: - - - for protect - - -

25 JUDGE RIVERA: - - - for the property - - -



1 MR. NEUBORT: For the property, but not for  
2 protecting the - - -

3 JUDGE RIVERA: - - - or not creating damage.

4 MR. NEUBORT: Sorry, but not for protecting the  
5 privacy interests of the bailor.

6 JUDGE RIVERA: No, but this is a question of what  
7 are reasonable expectations of privacy. I understand that  
8 point that you're making; I'm not saying it's not without  
9 some - - - some punch to it. But this is about defendant's  
10 reasonable expectation of what he, subjectively, and what  
11 society, objectively, are willing to recognize.

12 MR. NEUBORT: I would just like to just finish  
13 with a policy - - -

14 JUDGE FAHEY: Before you finish - - -

15 MR. NEUBORT: I'm sorry.

16 JUDGE FAHEY: - - - are you conceding standing?  
17 Forgetting about whether or not - - - it seems to me clear  
18 in my mind that the marshals manual doesn't supersede the  
19 Fourth Amendment, but are you just conceding standing, in  
20 and of itself?

21 MR. NEUBORT: No, Your Honor, I'm arguing that  
22 there was - - -

23 JUDGE FAHEY: And that's because of preservation?

24 MR. NEUBORT: Aside from preservation, I'm  
25 arguing that there was no standing.



1           But defendant makes much about the policy of the  
2           - - - with regard to the indigent community. But if this  
3           court were to put its thumb on the scale and say that with  
4           a full eviction there is no Fourth Amendment protection,  
5           there is no requirement by the marshal or the storage house  
6           to protect the defendant's privacy interests, but that a  
7           landlord does have to protect the privacy interests of the  
8           tenant, that would - - - that's a rule flowing from  
9           bailment which would mean that the landlord would have to  
10          protect the privacy interests throughout and so, during  
11          that thirty-day period, the landlord wouldn't be able to  
12          show the apartment to prospective tenants because, under  
13          the law of bailment, the landlord would be required to  
14          protect the - - -

15                 JUDGE RIVERA: Well, they might be able to show  
16          the apartment, but that doesn't mean they're going to open  
17          boxes for the prospective tenant to look inside.

18                 MR. NEUBORT: But given that the landlord would,  
19          under the law of bailment - - - if this court rules that -  
20          - - that under the bailment there's a duty to protect the  
21          privacy interests, then tenants shouldn't - - - then  
22          prospective tenants shouldn't be able to go into the  
23          apartment at all. And putting the thumb on that scale  
24          wouldn't be a terrible outcome for the indigent community  
25          because then landlords would opt for full evictions over



1 partial evictions, which the defendant, in his brief,  
2 argues extensively, would be a terrible outcome for the  
3 indigent community. And so, for policy reasons, that  
4 should not happen.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 Mr. Litman?

7 JUDGE RIVERA: Counsel, can you just clarify what  
8 were the bailment arguments that I know in your brief you  
9 say are the only ones that were, given the record,  
10 available to counsel? What are you saying are the  
11 arguments that indeed were made?

12 MR. LITMAN: The arguments that were - - -

13 JUDGE RIVERA: Not regarding bailment, excuse me,  
14 regarding the propriety of the search.

15 MR. LITMAN: You're asking about the merits  
16 arguments?

17 JUDGE RIVERA: Yes, yes, yes.

18 MR. LITMAN: Yes, there were merit - - - merits  
19 arguments made after the standing arguments, which again,  
20 took up the bulk of the hearing. The merits arguments  
21 concerned whether the police officer, after having arrested  
22 the trespasser, which was the husband of the tenant of  
23 record, whether after arresting that man upstairs the  
24 officers were - - - or the officer was within his right to  
25 go down to the bottom of the apartment and search the two



1 separate bedrooms. And then there were additional  
2 arguments made about moving - - -

3 JUDGE RIVERA: About the closed containers. And  
4 then what are the arguments that were made with respect to  
5 standing?

6 MR. LITMAN: Yes, the arguments that were made  
7 with respect to standing were all made under the assumption  
8 that this was an eviction. So the arguments were made  
9 that, A, it was not a legal eviction, because I think there  
10 was a concession made - - -

11 JUDGE FEINMAN: Wasn't there also a question by  
12 the court about whether your client was admitting  
13 possession or ownership of the gun, and they maintain that  
14 they didn't, which could only say, you know, I don't have  
15 standing because I'm not asserting a possession or  
16 ownership interest in this property?

17 MR. LITMAN: I don't recall that, Your Honor.

18 JUDGE FEINMAN: You don't recall that - - -

19 MR. LITMAN: I apologize.

20 JUDGE FEINMAN: - - - that colloquy with the  
21 court at the suppression hearing? All right. I'll go  
22 back and check the record.

23 JUDGE RIVERA: So what were the standing  
24 arguments that were made?

25 MR. LITMAN: Yes, the standing arguments were



1 that the eviction was not legal, that even if it were legal  
2 it did not - - -

3 JUDGE RIVERA: It was not signed by a judge?  
4 What was the argument - - -

5 MR. LITMAN: Yes, I think that was essentially  
6 the argument.

7 JUDGE RIVERA: Okay.

8 MR. LITMAN: And also that it would not have  
9 applied to my client because he was not there at the time  
10 and was not aware of what was going on as opposed to the  
11 tenant of record.

12 JUDGE WILSON: So as to the closed containers - -  
13 -

14 MR. LITMAN: Yes.

15 JUDGE WILSON: - - - why does your argument, your  
16 Fourth Amendment argument as to the standing, depend on  
17 whether this is an eviction or a legal possession, or does  
18 it?

19 MR. LITMAN: It does. So again, I think what my  
20 opposing counsel mentioned at the end was that we are  
21 asking the court to rule that in an eviction there is no  
22 reasonable expectation of privacy. That question is not  
23 before this court.

24 JUDGE WILSON: Even in the closed containers?

25 MR. LITMAN: That question is not before this





1 court. What we're saying is that, in the context of a  
2 legal possession, by regulation, there is a bailment  
3 created. And again, the bailment in this circumstance is  
4 not a reluctant bailment; it's a chosen bailment by the  
5 landlord who anticipates that the landlord-tenant  
6 relationship will be resumed. This is not a step - - -

7 JUDGE WILSON: You're really saying there may or  
8 may not be a difference, and you're just not going to  
9 answer whether there is, in your view.

10 MR. LITMAN: We absolutely believe there's a  
11 difference. There's a difference because the regulations  
12 provide for a difference. And also, in practice, we know  
13 that the number of legal possessions outnumber the number  
14 of evictions by forty-four to one. In 2017, which were the  
15 most recent numbers we had when we wrote our brief - - -

16 JUDGE WILSON: So what if in an eviction they  
17 could open the containers?

18 MR. LITMAN: It's - - -

19 JUDGE WILSON: That is, there'd be no standing,  
20 no expectation of privacy in the containers at that time?

21 MR. LITMAN: Again, that issue is not before the  
22 court. We - - -

23 JUDGE WILSON: I understand that, but I'm trying  
24 to ask you - - -

25 JUDGE GARCIA: It's not before the court also



1 because you never raised it. So if we never decided it, I  
2 thought you were telling us in eviction it's not an issue;  
3 that's why you didn't move below based on an eviction. So  
4 you're saying we've never decided that. Why didn't you  
5 move on that ground if you thought it was an eviction?  
6 Right? If you're saying we don't have to decide that  
7 today, it's an open issue - - -

8 MR. LITMAN: Right.

9 JUDGE GARCIA: - - - right, why didn't you close  
10 it? Why didn't you move under the eviction law saying this  
11 is a closed container; I was evicted.

12 MR. LITMAN: That's a fair point, but again, we  
13 don't know that in an eviction there is in fact a bailment  
14 created.

15 JUDGE FAHEY: It wouldn't be the same thing,  
16 though because, you know, the distinction between the  
17 premises and the - - - and the property, if you had moved  
18 under the eviction, which is clearly preserved, we would be  
19 dealing with much more of the substantive issues rather  
20 than struggling with the preservation issue.

21 MR. LITMAN: Understood. But again, we don't  
22 know for sure that an eviction creates a bailment. To the  
23 extent it does, it's much more attenuated.

24 JUDGE GARCIA: I know that. If you had raised it  
25 and everybody thought it was an eviction, we might have



1           some grounding on what was this, what did the marshal  
2           reasonably expect to do. We could have gotten into all of  
3           those issues, and we would be reviewing that record instead  
4           of speculating on what would the marshal do if it was a  
5           box, if it was a jewelry box. We don't know any of that  
6           because none of this was fleshed out by the court.

7                     But I have a basic question, And I'm really just  
8           asking for information. There is a discussion of your  
9           client having a lock on the door and this expect - - - is  
10          that anywhere in the record at the suppression hearing?

11                    MR. LITMAN: No. No, that comes up at the trial.

12                    JUDGE GARCIA: So the argument really at the  
13          suppression hearing was: this eviction isn't legal.

14                    MR. LITMAN: Correct.

15                    JUDGE GARCIA: So he never calls the cousin or  
16          whoever to come in and say any of that. So even that isn't  
17          in the record in the suppression hearing.

18                    MR. LITMAN: Not at the suppression hearing. It  
19          comes out at trial. And again, we're not arguing for  
20          standing as to the bedroom. We're arguing for standing as  
21          to closed containers which, again, have a special primacy  
22          within the Fourth Amendment. That's all we're asking for,  
23          and I think it's important for this court to contrast that  
24          with the position that the People are taking which is that  
25          no one, not my client, not any of the 20,000 other people



1 in New York every year - - -

2 JUDGE STEIN: Was that your argument - - -

3 JUDGE RIVERA: But I guess some of the questions  
4 are - - -

5 JUDGE STEIN: Was that your argument below?

6 JUDGE RIVERA: But I guess some of the questions  
7 are - - -

8 MR. LITMAN: Yes.

9 JUDGE RIVERA: - - - whether you could have - - -  
10 your client could have argued or counsel could have argued  
11 that, regardless of whether or not it's an eviction or a  
12 legal possession, they're closed containers, and there's a  
13 reasonable expectation of privacy in the closed containers  
14 regardless of how - - - how the marshal ends up at that  
15 apartment.

16 MR. LITMAN: Yes, Your Honor makes a good point.  
17 And again - - -

18 JUDGE RIVERA: Well, other colleagues have made  
19 that point. I'm just repeating - - -

20 MR. LITMAN: Yes, but - - -

21 JUDGE RIVERA: - - - what they have said.

22 MR. LITMAN: - - - defense counsel - - -

23 JUDGE RIVERA: So the question is: why wasn't  
24 that argument made?

25 MR. LITMAN: It was made in the context of the



1 merits. As we were discussing before, there was this  
2 cascading argument, so to speak, in terms of how the cop  
3 gets from upstairs to downstairs, how he gets from the  
4 threshold of the bedroom to inside the bedroom, how he  
5 moves from one place in the bedroom to the other, so on and  
6 so forth, until you get to the closed containers. So yes,  
7 the argument could have made - - - been made in the context  
8 of standing.

9 JUDGE RIVERA: But on the merits, was it based on  
10 expectation of privacy, given the relationship, or based on  
11 they're closed containers, they're not - - - you can't open  
12 them just because you see the closed containers.

13 MR. LITMAN: I believe it was the latter, Your  
14 Honor.

15 JUDGE RIVERA: Okay.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. LITMAN: Thank you, Your Honors.

18 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of The People of the State of New York v. Ramee McCullum, No. 101, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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