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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 62

REGINALD GOLDMAN,

Respondent.

20 Eagle Street
Albany, New York
September 10, 2020

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 the
2 calendar is number 62, the People of the State of New York
3 v. Reginald Goldman.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Counsel?

6 MR. MCIVER: May it please the court. Robert
7 McIver, on behalf of appellant, The Bronx District
8 Attorney's Office.

9 May I reserve two minutes for rebuttal?

10 CHIEF JUDGE DIFIORE: You may, sir, and please
11 try to keep your voice up.

12 MR. MCIVER: Yes, Your Honor. The notice
13 discussion in Abe A. related to the unique circumstances of
14 that case and does not create a right to an adversarial
15 search warrant application for an incarcerated defendant.

16 The proof of this is in Abe A., both in terms
17 that it concerned the right to be left alone and then
18 placed the discussion of notice only in the initial
19 intrusion.

20 JUDGE RIVERA: But where does Abe A., or for that
21 matter, if you can point me to any case, does it suggest
22 that the right to be left alone would not encompass the
23 seizure of bodily material, a bodily intrusion?

24 MR. MCIVER: I think - - -

25 JUDGE RIVERA: Where, anywhere, would I find



1 that?

2 MR. MCIVER: Particularly in the form of cases
3 that - - - that we cite, such as Sechrist, that indicate
4 that the first level of the analysis is removed when an
5 individual is already in lawful custody. Now, even
6 assuming that the - - -

7 JUDGE RIVERA: Yes, you want to be left alone so
8 that you're not stopped or seized. I - - - I'm not
9 disagreeing with you that of course that encompasses the
10 right to be left alone, but I'm not really clear why the
11 right to be left alone doesn't include a bodily intrusion.

12 MR. MCIVER: I think that the response to that is
13 that the second step here, whether the notice applies
14 throughout, is still satisfied by the issuance of the ex
15 parte search warrant application. That would be consistent
16 with C.P.L. Article 690.

17 JUDGE RIVERA: Well, I don't think that's what
18 Abe A. says, right? What Abe A. says is you have these
19 basic essential tenets of due process, which are notice and
20 the opportunity to be heard, and then as it's going
21 through, in the first step, with respect to the seizure of
22 the individual, that that has a particular standard, right,
23 probable cause, that applies. And as it's going through
24 the second step, as in the search and seizure of the
25 individual's bodily materials, that that has an additional



1 multi-faceted factor test that you have to go through to
2 ensure the propriety of that type of intrusion.

3 I'm not really clear, other than this, kind of,
4 structural argument you're making, that you're only
5 mentioning opportunity to be heard and notice in this first
6 provision and not the second. You read it that way, that
7 that must be what Abe A. entailed. But it strikes me that
8 really what Abe A. is doing is saying these are the basic
9 tenets, they always apply to a request for a search
10 warrant, and - - - but if you want bodily materials, you've
11 also got to satisfy this multi-factor test.

12 MR. MCIVER: So there's two responses to that.
13 The issue in Abe A., the notice provision was required by
14 such circumstances of that case, which differ significantly
15 from the case at hand. With respect to the fundamental - -
16 -

17 JUDGE RIVERA: Well, isn't Abe A. just saying
18 that if there are no exigencies then - - - then of course
19 you have to provide notice and an opportunity to be heard.
20 You're not arguing in this case there were exigencies, are
21 you?

22 MR. MCIVER: No, we're not.

23 JUDGE RIVERA: Okay.

24 MR. MCIVER: With respect to the - - - my
25 response to that is that with respect to fundamental tenets



1 of the Fourth Amendment, there is no more fundamental tenet
2 than the issuance of an ex parte search warrant
3 application, that that is the core protection with respect
4 to exigency. Issues of exigency typically apply to
5 situations in which the People are seeking to avoid the
6 issuance of the ex parte search warrant application, such
7 as Missouri v. McNeely where the issue was: is there
8 sufficient enough exigency where the People could obtain
9 blood draws or buccal swabs without going the - - - the
10 typical route. Here we embraced that.

11 And with respect to the idea that the
12 invasiveness of this procedure would create the right to
13 the adversarial search warrant application. I think the
14 invasiveness, in the case of - - -

15 JUDGE RIVERA: Well, how is government put in a
16 worse position by providing notice and an opportunity to be
17 heard with respect to the type of intrusion itself and
18 whether or not it violates the Constitution?

19 MR. MCIVER: Well, by providing notice and an
20 opportunity to be heard, we would be exposing potential
21 witnesses in nascent investigations to an individual who
22 would be able to peak behind the curtain of an adversary -
23 - - of a search warrant application - - -

24 JUDGE GARCIA: But counsel - - -

25 JUDGE RIVERA: But why isn't that true when



1 they're at liberty?

2 MR. MCIVER: What?

3 JUDGE RIVERA: Why isn't that true when they're
4 at liberty?

5 MR. MCIVER: Well, I think that the issuance of
6 an ex parte search warrant would also apply to an
7 individual at liberty, and I would direct the court's
8 attention to People v. Casadei. I think that that's one of
9 the issues with respect to the notice discussion in Abe A.
10 if it relates to the such circumstances of this case. In
11 1985, three years later, this court cited to Matter of Abe
12 A., and specifically said: "It is clear that a search
13 warrant may validly be issued to obtain a blood sample in
14 the event of a violation of the Penal Law."

15 So we can read Abe A. consistent with People v.
16 Casadei and consistent with nationwide practice, including
17 Kalakosky, out of Washington, that directly addressed the
18 issue in this case. And - - -

19 JUDGE GARCIA: But counsel, can I ask you a
20 question?

21 MR. MCIVER: Sure.

22 JUDGE GARCIA: If you, your office, had a suspect
23 who's out, not - - - not incarcerated, and you wanted to
24 take a DNA swab, what would the procedure be that you would
25 follow?



1 MR. MCIVER: I think typically - - - if we had
2 obtained a search warrant in that situation?

3 JUDGE GARCIA: Now you're deciding what do I need
4 to do, so what do you need to do to get that DNA swab?

5 MR. MCIVER: Obtain an ex parte search warrant
6 application, and send detectives out to find the
7 individual. Whether they bring him into custody simply by
8 saying we have a search warrant, here's the search warrant,
9 sir, you can look at it, and then obtain the buccal swab,
10 or if they were to find the individual and then satisfy De
11 Bour for that initial intrusion, if the individual had
12 engaged in, you know, a vehicle stop. That was - - -

13 JUDGE GARCIA: And when you hand them the search
14 warrant, you just hand them the sheet that's the search
15 warrant, right, not the supplementing affidavits or
16 anything?

17 MR. MCIVER: The signed order from the court,
18 correct, Your Honor.

19 JUDGE GARCIA: All right.

20 JUDGE WILSON: So does Abe A. have no effect on
21 anything you do?

22 MR. MCIVER: I think Abe A. has to be consistent
23 with Casadei, and so Abe A. is limited to the circumstances
24 contemplated in that case. To the extent that it created -
25 - -



1 JUDGE WILSON: But I guess what I'm asking is do
2 those circumstances ever come up in your - - - in real
3 life, or is Abe A. just something that you never have to
4 pay attention to?

5 MR. MCIVER: I think, in Abe A., the Manhattan
6 District Attorney's Office went about it in a particular
7 way, and we decided to go the - - - the ex parte search
8 warrant application, and I don't think that those are
9 mutually exclusive as long as you're looking at Casadei and
10 indicating that a search warrant would satisfy all
11 applicable Fourth Amendment - - -

12 JUDGE FAHEY: But don't you have to break down
13 the components of elementary due process in a particular
14 way for you to effectively comply with Abe A.? So we have
15 notice, which was given; opportunity to be heard, which it
16 was, the lawyer spoke here; and but - - - and then there's
17 the adversarial hearing. And that's really the question
18 here - - -

19 MR. MCIVER: Correct.

20 JUDGE FAHEY: - - - isn't - - - isn't it?

21 MR. MCIVER: Yes.

22 JUDGE FAHEY: All right. So the adversarial
23 hearing, I think, is - - - is more problematic. But I
24 don't see - - - I see how the People complied with the
25 first two prongs here. And the question for us, really, as



1 I see it, is the adversarial hearing, and elementary due
2 process does not require an adversarial hearing. It's not
3 the same as an opportunity to be heard.

4 MR. MCIVER: That's my understanding as well,
5 Your Honor, and I would also - - - I don't mean to answer a
6 question with a question. I understand - - -

7 JUDGE FAHEY: Go ahead. Knock me out.

8 MR. MCIVER: How does an adversarial search
9 warrant application - - - how does my opponent's rule work
10 for a suspect who is not represented by counsel? I don't
11 have the answer to that question. I don't know if it would
12 be pro se, if we would be appointing counsel for somebody
13 who is a mere suspect. I think that's a significant
14 expansion upon a relatively casual notice provision,
15 limited to the circumstances of Abe A., by the text of that
16 very case.

17 CHIEF JUDGE DIFIORE: Counsel, can I ask - - -

18 JUDGE RIVERA: But the question is - - -

19 CHIEF JUDGE DIFIORE: Can I ask a question,
20 please? Piggybacking on Judge Garcia's question, expanding
21 on that example, if you had a suspect in a homicide, and
22 you had information - - - probable cause to believe this
23 guy is the one who did it, and information that he had a
24 bullet that was related somehow to the shooting, and you
25 wanted to get at that evidence, what would your office do



1 in that circumstance?

2 MR. MCIVER: So this - - -

3 CHIEF JUDGE DIFIORE: How would you proceed to
4 bring him to - - - to collect that evidence?

5 MR. MCIVER: So this is the bullet that's lodged
6 in the individual - - -

7 CHIEF JUDGE DIFIORE: In the suspect.

8 MR. MCIVER: I think the procedure would be
9 generally dictated by cases like State v. Crowder and
10 Martin. They're, admittedly, not New York cases, but they
11 were cited to in this. And I think that we address that in
12 our initial brief that I think the procedure there is to
13 obtain a court order, at which we would demonstrate the
14 three prongs of Abe A., and then give that to the defendant
15 and allow the defendant to challenge it after the issuance
16 of the order but prior to the execution. And I think that
17 is what happened in State - - -

18 CHIEF JUDGE DIFIORE: So the suspect would have
19 an opportunity to be heard with respect to the nature of
20 the intrusion into the body; isn't that what Abe A. is all
21 about?

22 MR. MCIVER: When there is a significant enough
23 possibility - - -

24 CHIEF JUDGE DIFIORE: Yes.

25 MR. MCIVER: - - - of harm, yes. I think that



1 Winston v. Lee and Crowder and Martin allow for that, but
2 it's far removed from buccal swabs in the case in hand.
3 And I would also - - -

4 JUDGE STEIN: And along those lines, I'd like to
5 ask a slightly different question. So in King which, by
6 the way, involved a warrantless search - - -

7 MR. MCIVER: Yes.

8 JUDGE STEIN: - - - for DNA - - -

9 MR. MCIVER: I didn't mean to interrupt - - -
10 Maryland v. King?

11 JUDGE STEIN: I'm sorry, yes, Maryland v. King.

12 MR. MCIVER: Yeah, sorry.

13 JUDGE STEIN: Yes. It involved the statute, and
14 the statute provided a variety of conditions and
15 limitations on the use of the DNA once it was collected.
16 We have things like that in - - - in our executive law,
17 right? Do - - - do those limitations apply here, and were
18 they - - - were they imposed? Were any limitations imposed
19 by the search warrant here?

20 MR. MCIVER: Your Honor, I have to be honest with
21 you; I don't know the answer to that question. I know
22 that, to the extent that my adversary raises policy
23 concerns with what happens to these samples, they would be
24 - - - to the extent that they haven't been addressed by the
25 legislature, it would be best left for them, without



1 creating adversarial search warrants that would be
2 inconsistent with the application of C.P.L. Article 690.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 Counsel?

5 MS. MITTER: Good afternoon, Your Honors, and may
6 it please the court. My name is Alexandra Mitter, and I
7 represent respondent, Reginald Goldman.

8 I'd like to - - - to pick up, sort of, shortly
9 where we left off, which is what happens when the State
10 wants to take a person who has just been - - - who's been
11 charged with no crime, and who is walking on the street,
12 and they want to take a bullet out of him. And that
13 situation is so outrageous that my adversary has to agree
14 that notice and an opportunity to be heard are required.
15 But nothing in Abe A. says that there's any distinction
16 between that scenario and the scenario in which you want to
17 - - -

18 JUDGE GARCIA: Counsel?

19 MS. MITTER: - - - want to take someone's blood.

20 JUDGE GARCIA: Counsel, do you want, in this
21 situation - - - going back to Judge Fahey's question, is
22 what you're asking for here the opportunity to be heard on
23 the basis of the search warrant probable cause
24 determination?

25 MS. MITTER: Yes, Your Honor, I believe that Abe



1 A. makes it quite clear that all three parts of the
2 stringent standard that it was laying out needed to be
3 addressed with a notice and opportunity to be heard. My -
4 - - my adversary, sort of, has turned notice into a
5 courtesy to avoid a perp walk, but for centuries, notice
6 has always been a means to an end, and that - - -

7 JUDGE GARCIA: Well, you would still be heard on
8 the nature of the intrusion, right?

9 MS. MITTER: Sure, and that did not happen here.
10 SO if - - - if that's - - - if that's where we're going,
11 that did not happen here that, you know - - -

12 JUDGE GARCIA: But there seems - - - again, along
13 the lines of what Judge Fahey was saying, a very big
14 difference between that and giving over an affidavit for a
15 search warrant, for understandable reasons, right? So how
16 would you square that - - - I mean, wouldn't - - - really
17 essentially you're putting them in a position of we have to
18 give up sources and other things in order to get a DNA
19 swab.

20 MS. MITTER: So I think there's a couple of
21 points in response to that. To the extent that the
22 prosecutor, in any particular case, has concerns about
23 giving up sources or concerns about flight, things that
24 appellant sort of raised as broad concerns generally, they
25 are perfectly entitled to make those exigencies plain at

1 the time and perhaps proceed ex parte under those
2 circumstances. But the idea that there might be
3 exigencies, generally, certainly doesn't give the
4 prosecutor license to ignore what Abe A. requires.

5 JUDGE GARCIA: But it's not an exigency - - -
6 we're using exigency, I think, in a different way here.
7 Exigent, to me, is something's going to be destroyed, and
8 you're rushing it.

9 MS. MITTER: Right.

10 JUDGE GARCIA: I don't think that has anything to
11 do with this case. But I think it seems an unusual process
12 to give access to a search warrant affirmation - - -
13 affidavit, which you don't get in any other situation - - -
14 and granted, this is different - - - based on a DNA swab.

15 MS. MITTER: So this is different, and this is an
16 extraordinary situation, and I think that is the - - - that
17 is the premise of Abe A., which is it set out a clear test,
18 when you want to invade the body, when you want to take
19 evidence from the thing that we hold most dear, notice and
20 an opportunity to be heard are required. This court called
21 it an elementary tenet of due process. And so, you know, I
22 mean, this is fundamentally different than searching a cell
23 phone.

24 JUDGE WILSON: it sounds as if what you're
25 arguing is that the intrusion is not measured just by the



1 mechanic - - - what - - - how difficult is the mechanical
2 process, but what is being obtained by it as well. Is that
3 a component of the intrusion?

4 MS. MITTER: I think it's both of those things.
5 I think they can be considered together. You know, what is
6 being taken from our body is not only private as a, you
7 know, part of our body, the thing that we hold most sacred,
8 but DNA contains every piece of information that - - -

9 JUDGE STEIN: But hasn't - - - hasn't - - -

10 MS. MITTER: - - - a human being could possibly
11 want to know about us.

12 JUDGE STEIN: Hasn't the Supreme Court said that
13 taking DNA is less intrusive than taking a blood draw?

14 MS. MITTER: Well, so I think what's important to
15 note here that in Abe A. this court was not concerned about
16 the level of intrusiveness and in fact acknowledged that
17 the blood draw at issue in Abe A. was, quote, "hardly less
18 routine than taking one's temperature". But the point was
19 not the level of intrusiveness; the point was that it was
20 invading the body. And it's - - - it's - - -

21 JUDGE STEIN: I guess my point is that, you know,
22 Abe A. - - - I don't remember exactly what year ago - - -
23 year it was decided, but it's a pretty old case, and
24 there's been - - - there's been some Supreme Court
25 jurisdiction on this issue since then and - - - and as far

1 as I know, there's been no argument made that our state
2 standard should be any more onerous than what - - - how the
3 Supreme Court analyzes the Fourth Amendment. So aren't we,
4 sort of, guided by what the Supreme Court has said since
5 Abe A.?

6 MS. MITTER: Well, so a few points in response to
7 that. I think as a - - - as a practical matter, Abe A.
8 could be read as - - - as applying the state's constitution
9 in Abe A. itself. I - - - you know, it didn't distinguish
10 as between the state and federal constitution. And the
11 vast majority of the, quote, unquote, "developments" that
12 my adversary has cited, that cite these NTIDs in other
13 states, those existed at the time that Abe A. was decided,
14 and this court cited those procedures and said we don't
15 have that statute here, we're not going to make a statute
16 for the legislature; our constitution, our law requires
17 more procedural due process. And so I think - - -

18 CHIEF JUDGE DIFIORE: So are you asking us to
19 create a state due process right here?

20 MS. MITTER: I'm not asking this - - - this court
21 to create something that doesn't already exist. I think
22 what exists in Abe A. is - - - has not been changed by
23 subsequent developments in the law, I guess, is the easiest
24 way to put it. I don't think appellant has cited to any
25 Constitute - - - you know, any Supreme Court cases that



1 have arisen since Abe A. was decided that cast any question
2 on the validity of the holding in Abe A., which is - - -

3 JUDGE RIVERA: So is there any point in time when
4 they could proceed ex parte, under your reading of Abe A.
5 and the federal constitution and maybe the state
6 constitution, that - - - that the government can proceed ex
7 parte - - -

8 MS. MITTER: Well, I think - - -

9 JUDGE RIVERA: - - - to get an order for the
10 search - - - for the seizure of the individual, perhaps,
11 and the search and seizure of bodily materials?

12 MS. MITTER: I think where there is no exigency -
13 - - and here I'm speaking to Judge Garcia's sense of
14 exigency, the exigency as to the evidence itself - - -
15 where there is no exigency, notice and an opportunity to be
16 heard are required unless the People can come forward with
17 some specific, fact-specific circumstance.

18 CHIEF JUDGE DIFIORE: So counsel, what would you
19 - - - so you get notice and opportunity to be heard that
20 they want to take a buccal swab, they want to take his DNA
21 by buccal swab, you come to court, what is it that the
22 judge needs you to assist on?

23 MS. MITTER: Well, so I think there's a lot of
24 things that are - - - are aided by having two - - - two
25 parties there with, you know, competing interests. I mean,



1 that's how we get to the truth. And here, for example,
2 Aguilar Fanelli (ph.) was definitely not the - - -

3 CHIEF JUDGE DIFIORE: Does the judge need your
4 assistance on his or her determination of whether probable
5 cause exists?

6 MS. MITTER: I believe it applies as to all
7 three, and I think - - -

8 CHIEF JUDGE DIFIORE: Huh?

9 MS. MITTER: As to the whole - - - two-thirds of
10 the standard goes to, sort of, the second part of the
11 intrusion.

12 CHIEF JUDGE DIFIORE: Okay.

13 MS. MITTER: But this court didn't, sort of,
14 break it down as between those two, and - - - and the only
15 thing, you know, my adversary points to is the specific
16 placement of the paragraph, which I don't think is a fair
17 reading.

18 CHIEF JUDGE DIFIORE: And then does the judge
19 need your assistance on the nature of that intrusion, the
20 taking of the buccal swab from the cheek?

21 MS. MITTER: I mean, I think, you know, it's
22 going to vary by - - - by circumstance. I think in a
23 situation where it's a - - - a buccal swab, perhaps less
24 factual development is going to be required on the
25 intrusiveness of the search. But I think on that second



1 step, the reason that the buccal swab will perhaps lead to
2 - - - there's a reason to believe that the buccal swab will
3 lead to evidence that is incriminating. I think that's an
4 incredibly important thing that having an adversarial back
5 and forth will go to. I mean, for example, here DNA being
6 on the passenger seat of a car sounds good on its face, but
7 then you learn that my client had been in that car on half
8 a dozen other occasions - - -

9 JUDGE RIVERA: What about the concern - - -

10 MS. MITTER: - - - in the week-and-a-half before.

11 JUDGE RIVERA: What about the concern of
12 revealing a confidential informant.

13 MS. MITTER: I don't mean to make light of that
14 concern; I think it's a valid concern. But it has to be
15 made in a particular situation. The People are welcome to
16 make that showing, and here they said there wasn't one. So
17 it - - - it's hard - - - it's hard to, kind of, think
18 prospectively about when they will choose - - -

19 JUDGE FAHEY: Can I take a step back for one
20 second? A typical warrant, not a bodily intrusion warrant,
21 a typical warrant, you don't get the - - - the supporting
22 papers and the application, right?

23 MS. MITTER: Correct.

24 JUDGE FAHEY: We're all in agreement on that.
25 There's either witness tampering or flight risk, so for



1 those reasons, you don't get those things. Here you've got
2 somebody who's incarcerated, right? And I understood your
3 argument to be, at the trial court level, that - - - that
4 the defendant did get notice, did get an opportunity to be
5 heard, but that it wasn't meaningful because he wasn't
6 provided with the papers that were supporting the
7 application, and I - - - and what that says to me is that
8 he wasn't able to cross-examine on those. Is that correct?
9 Do I have that correct?

10 MS. MITTER: That's absolutely correct. He was
11 allowed - - -

12 JUDGE FAHEY: All right.

13 MS. MITTER: - - - to be heard on his opportunity
14 to be heard, and then the court said I - - - I don't know
15 why you're here; please go away. So that's hardly an
16 opportunity to be heard in the due-process constitutional
17 sense of the word.

18 JUDGE FAHEY: All right. So that being the case,
19 I'm wondering how the right that doesn't exist in any other
20 circumstance would exist in this circumstance, particularly
21 when you are given notice and opportunity to be heard and
22 you are already incarcerated. I - - - I'm confused how
23 this is a - - - a meaningful right that you want to
24 exercise. I get if I'm defense counsel I want to do it
25 because I want discovery, I want to know what's going on



1 here. But when the People are conducting an investigation,
2 and that's what this, in essence, is why should you be
3 provided with that?

4 MS. MITTER: Well, because Abe A. says that you
5 should be provided with that.

6 JUDGE FAHEY: No, it doesn't exactly say that.
7 It outlines the parameters, and then it's for us to decide
8 which circumstances we apply them to.

9 MS. MITTER: It's - - -

10 JUDGE FAHEY: Go ahead.

11 MS. MITTER: In Abe - - - if you're not done,
12 Your Honor, please - - - please continue.

13 JUDGE FAHEY: I'm sorry; if it's all right with
14 the judge, go ahead.

15 MS. MITTER: No, in Abe A., this court said that
16 where there is no exigency concern as to the evidence
17 itself, which is the case for DNA - - - you can't change
18 that - - - that it is an elementary tenet of due process
19 that the suspect be given the notice and opportunity to be
20 heard before the intrusion.

21 JUDGE FAHEY: All right. And you had that here,
22 though. Now we're talking about the next level. We're
23 talking about an adversarial hearing that requires turning
24 over evidence. You just - - - that - - - going back to the
25 distinction I was trying to draw before. There's a



1 distinction between opportunity to be heard and what you're
2 asking for here. You had an opportunity to be heard.

3 MS. MITTER: I - - - I disagree that we had an
4 opportunity to be heard here.

5 JUDGE FAHEY: I see. So - - -

6 MS. MITTER: I guess that's the difference.

7 JUDGE FAHEY: So it just wasn't a meaning - - -
8 you were heard, but it wasn't meaningful because you didn't
9 have access to - - -

10 MS. MITTER: All he was able to argue is that I
11 think I should be allowed to argue this on the merits, and
12 that's not being heard.

13 JUDGE RIVERA: Well, didn't Abe A. cite to Matter
14 of Barber, from the Second Department, which indeed ordered
15 an adversarial hearing?

16 MS. MITTER: It did, indeed, and it's worth
17 noting that an adversarial hearing was what happened in Abe
18 A. Mr. Jon L. was given a motion on notice, he showed up
19 in court, and they had an argument about it. And so the
20 idea that something less than that is required I don't
21 think is supported by the text in Abe A.

22 JUDGE STEIN: But it seems to me that Abe A. now
23 has been subject to varying interpretations. Personally,
24 the way I view it is - - - is that it wasn't addressing the
25 situation of a suspect in custody. It was addressing the

1 situation of someone who was at liberty. And that was - -
2 - that was the situation that it - - - and the context in
3 which it - - - it set forth its rules, so I don't know that
4 we can know what the intention would have been for this
5 circumstance in which the suspect was in custody.

6 MS. MITTER: So I think, in that situation, where
7 the suspect is in custody, at the bare minimum, you need
8 notice and opportunity to be heard as to the second and
9 third prongs of the stringent test that Abe A. set out.

10 JUDGE STEIN: Well, that's your argument, but
11 that isn't necessarily what Abe A. was saying.

12 MS. MITTER: Well, you know, I mean, Abe A.
13 wasn't addressed with - - - wasn't presented with precisely
14 these circumstances, but I think the core of Abe A., the
15 motivating distinction that this court was drawing in Abe
16 A. is that where searches are being done to the thing that
17 we hold most dear, notice and an opportunity to be heard is
18 required. Otherwise someone can be taken out of Rikers
19 Island, sent over to Bellevue, have that bullet taken out
20 of them, and if there's, as it turns out, no bullet there,
21 the People's argument is that, well, they can sue the City,
22 they can - - - they can bring a civil suit.

23 JUDGE RIVERA: Yeah, why isn't a suppression - -
24 -

25 MS. MITTER: But that's a non - - -



1 JUDGE RIVERA: Why isn't a suppression hearing or
2 the civil remedies good enough?

3 MS. MITTER: Well, if something inculpatory isn't
4 found, they've invaded your body for no reason, and there
5 is no suppression hearing. And the idea that a civil suit,
6 getting money from the City after your constitutional
7 rights have been violated, after you've been cut open on a
8 table without being - - - you know, without being given the
9 opportunity to be heard, the idea that you could sue the
10 City seems to me, sort of, a non-solution to a problem of
11 my adversary's making by their, sort of, contortion of Abe
12 A.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. MITTER: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. MCIVER: Just briefly, Your Honor. With
17 respect to challenging the nature of the buccal swab, I do
18 want to draw the court's attention to the subsequent motion
19 practice in which counsel noted, on appendix cite 43, at
20 paragraph 6, that he was only challenging the reasonable
21 cause aspect. And then on page 52, only challenged prongs
22 one and two of Abe A. So in terms of the opportunity to
23 challenge the nature of the procedure, he was only
24 concerned with reasonable cause. He was only concerned
25 with the testimony. With respect to - - -



1 JUDGE RIVERA: Yeah, but that's still - - - that
2 still begs the question about whether or not a suppression
3 hearing is good enough. I mean, I think the point that was
4 - - - that she was trying to make was that the constitution
5 is protecting pre-deprivation, not post-deprivation in this
6 way, and that that's what Abe A. recognized. So whatever
7 arguments counsel may have made after the fact is still not
8 addressing the point of what, if anything, should have been
9 the opportunity for counsel and defendant before the bodily
10 intrusion, which is the point of Abe A. What do you do
11 before, what do you do to justify the issuance of an order
12 to invade someone's body?

13 MR. MCIVER: I can appreciate that. I think it
14 goes to the idea that specialized procedural protections
15 are certainly not necessary in the case at hand because
16 counsel was not concerned with those specialized procedural
17 protections.

18 JUDGE FAHEY: Can I ask about - - - and I should
19 have asked both of you about this earlier, but the YouTube
20 video - - -

21 MR. MCIVER: Yes.

22 JUDGE FAHEY: - - - you're saying it was properly
23 authenticated?

24 MR. MCIVER: Correct.

25 JUDGE FAHEY: Tell me how.



1 MR. MCIVER: It was primarily because of the
2 testimony of Gayle, but I would also draw the court's
3 attention to appendix cite 1051. Defense counsel
4 affirmatively concedes that his client is singing in this.

5 JUDGE FAHEY: This case pre-dated Price, didn't
6 it?

7 MR. MCIVER: That's correct.

8 JUDGE FAHEY: The trial did itself. So
9 subsequent to Price now, what would you say now; do you
10 think it was properly authenticated under Price?

11 MR. MCIVER: I think that Price doesn't set a
12 standard that applies to the case at hand, because in Price
13 the People were attempting to use dominion and control as a
14 means of authenticating a photo. They were trying to show
15 this is an authentic photograph because it's from
16 defendant's social media. In the case at hand, this was
17 not being used for a way that was dependent upon his
18 control of the website.

19 JUDGE STEIN: And was it being used to prove the
20 truth of what was contained therein?

21 MR. MCIVER: I'm sorry.

22 JUDGE STEIN: Was it being used to prove the
23 truth of the matter set forth in the video?

24 MR. MCIVER: No, I - - - I think what it was
25 being used for was simply to demonstrate association with



1 the other individuals and then potentially motive, based on
2 what he was actually - - -

3 JUDGE RIVERA: Yeah, but to do that, that would
4 have to mean that the redacted video represents what the
5 camera observed, right?

6 MR. MCIVER: That's - - -

7 JUDGE RIVERA: You'd have to - - - you would have
8 to show that it's unaltered, and - - - and how did you do
9 that?

10 MR. MCIVER: Through the reasonable and
11 inferential linkages, both in terms of the nature, the
12 indicia of video, the indicia of authenticity inherent in
13 video, which is incredibly difficult to - - - to - - -

14 JUDGE FAHEY: Well, how about there's - - -
15 there's two things I'd look for here, either an expert
16 testimony that said it wasn't altered, right? That wasn't
17 here, though, right?

18 MR. MCIVER: Correct.

19 JUDGE FAHEY: Okay. Or a lot of times you'll
20 have - - - as with a photograph or something else, you'll
21 have a statement by a participant that it was a fair and
22 accurate representation of the event. That's usually what
23 you look for in an evidentiary matter. Was that given
24 here?

25 MR. MCIVER: No, and what this - - -



1 JUDGE FAHEY: All right. So if you didn't do
2 that, then how do you say that it was properly
3 authenticated?

4 MR. MCIVER: Through the circumstantial testimony
5 that - - - or through the circumstantial evidence in
6 Gayle's testimony that defendant was filming this and that
7 he - - - he was filming it the day after the shooting, and
8 then two weeks later it was uploaded. That plus defense
9 counsel's concession that his client is in the video.

10 JUDGE RIVERA: Yeah, but Gayle wasn't there, so
11 Gayle doesn't know for sure, right, that this is the video.
12 It's - - - Gayle thinks it is.

13 MR. MCIVER: But - - -

14 JUDGE RIVERA: - - - but doesn't know. There
15 might have been five videos made.

16 MR. MCIVER: And I think that - - -

17 JUDGE RIVERA: Or no videos made.

18 MR. MCIVER: - - - for the purposes of the
19 threshold determination, I think that this does get us to
20 that point because of the reasonable inferential linkages
21 that - - -

22 JUDGE RIVERA: Yeah, but you don't want to put
23 junk to the jury, right? You - - - there is a gatekeeper
24 function that the judge serves, and it's very clear from
25 Price, and the cases before Price, what that minimum



1 standard is. And part of it is to show that it's
2 unaltered.

3 MR. MCIVER: Well, I think that the - - - the
4 nature of - - - I think we get to that point primarily just
5 through the - - - the timing of the video, the nature of
6 the video, the details of the video, and defense counsel's
7 concession that his client is in the video.

8 And I direct the court's attention to Gray, to
9 Broomfield, to Pettway, to State v. Lamb; all of these
10 cases that reject a - - - a requirement that you either
11 call the creator or search the device, or obtain
12 certificates from the website. This court has never
13 required a rigid - - -

14 JUDGE RIVERA: No, that's true - - -

15 JUDGE FAHEY: Let me take you back to one - - -

16 JUDGE RIVERA: - - - you don't have to meet the
17 traditional - - - I agree with you, and certainly we've
18 said that in Price; you don't have to necessarily meet
19 those traditional approaches. The question is did the
20 proffered evidence here satisfy that minimum test that has
21 been set up. And again, it sounds to me like you're
22 saying, well, when you look at it, you know it's unaltered.
23 And I don't think that's - - - that's good enough. I don't
24 see how you do that.

25 MR. MCIVER: I think it is - - -



1 JUDGE FAHEY: Let me ask you something. Wouldn't
2 the proper analysis here would be you've got Detective
3 Flood, right? He establishes the web page accuracy.

4 MR. MCIVER: Um-hum.

5 JUDGE FAHEY: That's correct, right? And then
6 the link between the defendant's nickname and the video, is
7 that enough to show that defendant controlled? I - - - I
8 don't know if it is, but just posting it isn't the same as
9 controlling it. That - - - that can - - - that can be
10 shown by Flood's testimony.

11 So the real question then, I think - - - I think
12 you're on marginal grounds here with - - - in complying
13 with Price. So the question is, if the DNA evidence gets
14 in, that is then overwhelming, and that deals with the
15 underlying weakness of the YouTube video.

16 MR. MCIVER: I think, in terms of that, the
17 YouTube video was heavily redacted. It was a pleading
18 reference. Once you have DNA evidence connecting him to
19 the vehicle, that was - - -

20 JUDGE FAHEY: Right, that's the argument I just
21 gave you.

22 MR. MCIVER: That's correct.

23 JUDGE FAHEY: I understand that. I understand
24 that. All right.

25 JUDGE RIVERA: Yeah, but the DNA merely says he



1 was in the video - - - in the car, excuse me, which he was
2 several times before the date of the incident. So I'm
3 still troubled by - - -

4 JUDGE FAHEY: Judge - - -

5 JUDGE RIVERA: - - - that linkage.

6 JUDGE FAHEY: Judge Rivera's right; I got it at
7 seven times he was in the car before the shooting.

8 JUDGE RIVERA: And that came from your own
9 witness.

10 MR. MCIVER: That's correct. But ultimately, I
11 think that it harmonizes with the rest of the proof,
12 including the eyewitnesses to the shooting that
13 demonstrated that it was an individual wearing the shirt
14 and then you have the - - -

15 JUDGE RIVERA: Yeah, but nobody identified - - -
16 the only person who identifies him is the driver, who's got
17 some other issues, right, considering that he named someone
18 else, initially, in this cooperation agreement that he
19 reaches. And so there are other credibility issues related
20 to him, but there's nothing else.

21 Let me ask you this. And I see the light is off,
22 so it's my last question. Did - - - did the defendant
23 preserve, for purposes of this appeal, or - - - or can we
24 consider the relevancy of the video?

25 MR. MCIVER: I think that the relevancy and the



1 arguments with respect to the probative and prejudicial
2 aspect of that haven't been reached by the Appellate
3 Division yet.

4 JUDGE RIVERA: Okay.

5 MR. MCIVER: So it still has to be remanded for
6 that purpose. And - - -

7 JUDGE RIVERA: Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 JUDGE STEIN: And similarly, counsel, if we - - -
10 if we agree with you on the other issue about the notice
11 and opportunity to be heard, do we need to reach the issue
12 of the authentication of the video?

13 MR. MCIVER: I don't think you would necessarily
14 need to. If you agree with me, I think the court can reach
15 that. I don't know that it has to if it were to find it
16 harmless. But I think, ultimately, at some point, it has
17 to be remanded back to the Appellate Division for some kind
18 of determination of the issues remaining, which might
19 include harmlessness if the court sees fit.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. MCIVER: Thank you.

22 (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 The People of the State of New York v. Reginald Goldman, No. 62, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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