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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DRURY DUVAL,

Appellant.

NO. 10

20 Eagle Street
Albany, New York
January 7, 2021

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 10, People of the
3 State of New York v. Drury Duval.

4 (Pause)

5 CHIEF JUDGE DIFIORE: Good afternoon, counsel.
6 This is appeal number 10, The People of the State of New
7 York v. Drury Duval. Counsel?

8 MR. HANEY: Good afternoon, Your Honors, and may
9 it please the court. Hunter Haney for appellant Drury
10 Duval. May I reserve two minutes for rebuttal?

11 CHIEF JUDGE DIFIORE: Yes, of course, sir.

12 MR. HANEY: Thank you.

13 In the often dangerous exercise of executing no-
14 knock searches, the Fourth Amendment's particularity
15 requirement plays a critical role in ensuring the safety of
16 both law enforcement and the citizen by providing notice of
17 the searchers' authority and limiting their discretion.

18 In this appeal - - -

19 JUDGE GARCIA: Counsel - - - may I ask a question
20 - - -

21 MR. HANEY: - - - there was - - -

22 JUDGE GARCIA: - - - Chief? May I ask a - - -

23 CHIEF JUDGE DIFIORE: Judge Garcia.

24 JUDGE GARCIA: So I'm having a little bit of
25 difficulty understanding what the challenge is here. So



1 let's just - - - and I know some of this is sealed, but
2 let's speak hypothetically.

3 If you have a search warrant signed by a judge,
4 probable cause, to search a home, and in that home, a
5 multigenerational family is living. So there may be a
6 bedroom someplace. There may be, you know, the target of
7 the investigation's bedroom on another floor. You have a
8 warrant to search the house. Would you say that warrant is
9 invalid?

10 MR. HANEY: What is the text of that warrant,
11 Your Honor?

12 JUDGE GARCIA: Yeah, there's gun dealing going
13 on. There was a buy made. Somebody went in the house,
14 they waited in the living room, they went upstairs, they
15 bought a gun, they come out. Present it to the judge: I
16 went into this home, I - - - you know, somebody met me,
17 they brought me upstairs, I bought a gun.

18 MR. HANEY: Well, the question in this - - -

19 JUDGE GARCIA: There's gun dealing going on here;
20 I get a search warrant for the home.

21 MR. HANEY: Sure, Your Honor.

22 So the question in this case is whether the no-
23 knock warrant to search Mr. Duval's apartment building
24 failed to particularize the unit specifically.

25 JUDGE GARCIA: But it's - - - you're - - - you're



1 claiming it's a building - - - an apartment building. But
2 let's say that's my warrant. It's a home; it's a house;
3 maybe it looks like a brownstone from the outside. But I
4 go in, maybe it's a multifamily house so - - -
5 multigenerational family. There are different family
6 members living in different places.

7 But why would that warrant, in my case, be
8 invalid?

9 MR. HANEY: Well, to the extent that the warrant
10 only describes a bare address with the phrase, for example
11 "a private residence", that's defective, because it's
12 vague, and it fails to specify the (audio interference) - -
13 -

14 JUDGE GARCIA: So in getting the warrant, you
15 have to establish - - - if I get a warrant for 25, you
16 know, Maple Street, I have to establish that 25 Maple
17 Street is a single-family home when I get the warrant?

18 MR. HANEY: It has to be - - - it has to be
19 specified on the face of the warrant whether or not the - -
20 - the dwelling is multi- or single-family, or something
21 more than the bare description of "private residence",
22 which really only describes noncommercial.

23 JUDGE FEINMAN: So what - - - what - - -

24 MR. HANEY: It says - - -

25 JUDGE FEINMAN: - - - is the - - - Chief, if I



1 may?

2 CHIEF JUDGE DIFIORE: Yes.

3 JUDGE FEINMAN: What is your basis - - - like
4 either in statute or case law - - - for saying that it
5 actually has to say a private residence or a single-family
6 home, you know, or some other descriptor?

7 MR. HANEY: I - - - I think it comes from a
8 variety of sources, predominantly dating back to this
9 court's decision in Rainey, which indicated that the - - -
10 the designation of a building is something of really acute
11 state interest in this state, especially in light of the
12 multitude of - - - of multi-unit dwellings - - -

13 JUDGE FAHEY: Does that - - -

14 MR. HANEY: - - - in the state.

15 JUDGE FAHEY: Judge, can I ask a question on that
16 point on Rainey?

17 CHIEF JUDGE DIFIORE: Judge Fahey.

18 JUDGE FAHEY: And then I'll back off.

19 As - - - as I understood Rainey, Ra - - - Rainey
20 was at 529 Monroe Street. I know the area roughly. I live
21 - - - it's in the city of Buffalo. It's common in Buffalo
22 for there to be two-family houses. In - - - in the city
23 itself, quite - - - quite often, you have three family
24 houses or three-apartment houses.

25 But the way I understood Rainey was the



1 comparison was drawn between Rainey, which was a - - - a
2 nor - - - a central Buffalo double house - - - was the
3 comparison was drawn with an apartment building in the
4 analysis that was given there.

5 I didn't think - - - that issue, though, was
6 preserved in Rainey. Here, I didn't think the multiple
7 dwelling unit issue was actually preserved. Was it
8 preserved?

9 MR. HANEY: It was absolutely preserved by the
10 motion to controvert, which specifically alleged the lack
11 of particularity of the warrant, because the warrant
12 described the premises only as a private residence, arguing
13 that that was vague, and then on top of that - - -

14 JUDGE FAHEY: Well - - - well, okay - - -

15 MR. HANEY: - - - failed to - - -

16 JUDGE FAHEY: - - - I understand the
17 particularity argument. But to say "particularity" isn't
18 the same as saying this is a multiple-dwelling unit;
19 there's more than one unit here. Did they say that?

20 MR. HANEY: The - - - the - - - the motion to
21 controvert - - -

22 JUDGE FAHEY: I wasn't clear. That's why I'm
23 asking you.

24 MR. HANEY: Yes.

25 JUDGE FAHEY: I'm sorry, go ahead.



1 MR. HANEY: It - - - it - - - it was clearly
2 alleged in the motion papers in both the affirmation and
3 the - - -

4 JUDGE FAHEY: Okay.

5 MR. HANEY: - - - the memorandum of law. And - -
6 -

7 CHIEF JUDGE DIFIORE: So - - -

8 MR. HANEY: - - - A-35 - - -

9 CHIEF JUDGE DIFIORE: - - - so you're saying - -
10 -

11 MR. HANEY: - - - through 36 - - -

12 CHIEF JUDGE DIFIORE: - - - you're saying that -
13 - - you're saying that the information in those documents
14 are sufficient to controvert the - - - is that what - - -
15 is that what you're suggesting that - - -

16 MR. HANEY: At the - - -

17 CHIEF JUDGE DIFIORE: - - - that - - -

18 MR. HANEY: - - - at the very least, for - - -
19 yes, Your Honor. At the very least it - - - it should have
20 warranted a hearing. That's consistent with the broad
21 variety of - - - of - - - of precedent as well as the
22 Appellate Divisions, that have held hearings on actually
23 much more scant allegations than - - -

24 CHIEF JUDGE DIFIORE: Were there any sworn
25 allegations - - -



1 MR. HANEY: - - - what - - -

2 CHIEF JUDGE DIFIORE: - - - were there any sworn
3 allegations of fact regarding the internal setup of that
4 particularly described location?

5 MR. HANEY: Yes. So Mr. Duval - - -

6 CHIEF JUDGE DIFIORE: Where - - - where were
7 those? Where were those, sir?

8 MR. HANEY: So at - - - at A-35 to 36, Mr. Duval
9 provided documentary tro - - - proof as well as a sworn
10 affirmation from counsel making clear there were three
11 family units in the building.

12 The motion papers themselves, the memorandum of
13 law, also makes clear that the building was multi-dwelling.
14 That's at A-43, where counsel states - - -

15 JUDGE STEIN: So counsel - - -

16 MR. HANEY: - - - the building is - - -

17 JUDGE STEIN: - - - is any - - - counsel's
18 affirmation doesn't constitute sworn allegations of fact,
19 do they? What - - - what I - - - I mean, what I was
20 looking for is, in - - - in the affidavit of the mother and
21 - - - and things like that, I couldn't find any allegation
22 specifically saying that they were separate units in that
23 building. The only - - - the closest - - - and - - - and -
24 - - - and it's alleged that the mother was the owner. She
25 certainly would know, and - - - and anybody living there

1 would know.

2 I - - - all I saw was that's she was living on
3 the first floor and the defendant was living on the third
4 floor. There's - - - it - - - it almost struck me as being
5 intentionally vague.

6 So how do you take that sort of allegation and -
7 - - and make it into a specific sworn allegation that would
8 entitle you to a hearing?

9 MR. HANEY: So if I could just back up a little
10 bit? The - - - this pleading defect that Your Honor's
11 getting at has never been asserted until this point in the
12 litigation. It's been waived.

13 Mendoza is very clear on that point. And it
14 specifies a very important reason why the prosecution has
15 to identify any sort of par - - - particular issue with the
16 language in an omnibus pleading, and that's that the
17 defendant needs an opportunity to be able to cure, at that
18 point.

19 Also, this sort of litigation occurs very early
20 on in a criminal case. The defendant has very little
21 information, especially in a case like this. It's really
22 important that the prosecution be required, as Mendoza
23 says, to - - - to make these - - - these arguments during -
24 - - before the trial court.

25 JUDGE FEINMAN: But - - -



1 MR. HANEY: But going more - - -

2 JUDGE FEINMAN: Chief, if I may?

3 CHIEF JUDGE DIFIORE: Judge Feinman.

4 JUDGE FEINMAN: Mendoza is talking about a
5 situation where you don't have access to the information.
6 I think the point of Judge Stein's question is, we've got
7 Mom and the defendant and the - - - this other family in
8 the middle, between the two layers, who are in the
9 building. They have access to the information. They know
10 what is going on. This is not a situation - - -

11 MR. HANEY: And - - -

12 JUDGE FAHEY: - - - in a - - - like Mendoza,
13 where you don't have access to the information.

14 MR. HANEY: Well, that would have been an
15 appropriate argument for the prosecution to potentially
16 raise before the omnibus court. But they did not, so that
17 again, the defense - - - the defense counsel could
18 potentially cure any defect.

19 But defense counsel was never put on notice. And
20 this court has always - - -

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

22 MR. HANEY: - - - taken a permissive approach - -
23 - I'm sorry.

24 JUDGE WILSON: Chief Judge, I have a quick
25 question - - -



1 CHIEF JUDGE DIFIORE: Judge Wilson.

2 JUDGE WILSON: - - - if I might?

3 As I read the Appellate Division, it's saying at
4 a minimum that it believes that the motion court made a
5 factual finding that this was a single-family residence,
6 and perhaps the Appellate Division itself is either
7 affirming or making that same finding.

8 If you assume that's true, how do we get past
9 that?

10 MR. HANEY: Well, the Appellate Division majority
11 made a number of factual and legal errors that are apparent
12 from the record, making clear that the conclusion to deny
13 suppression was (audio interference). First of all - - -

14 JUDGE WILSON: Is there no - - - is there no
15 support in the record for the factual finding that this is
16 a single-family residence?

17 MR. HANEY: The record that's - - - that's
18 available to Mr. Duval, without question. The - - - the
19 majority suggests, for example, that - - - that the records
20 show that - - - that Mr. Duval's bedroom (audio
21 interference) floor, but that was entirely misleading,
22 given the fact that - - - that the allegations in the
23 affidavit very clearly state that Mr. Duval lived on the
24 third floor apartment, the mother lived in an apartment.

25 And then of course, in the pleading you have the



1 allegation - - - specific allegation regarding the tenants
2 who are not related to the family, in the second-floor
3 apartment.

4 The - - - the other premise for the majority's
5 conclusion was that there was a check found in a downstairs
6 kitchen. But the record avail - - - again, available to
7 Mr. Duval, only says - - - suggests that the check was
8 recovered from - - - after a search of the third-floor
9 apartment at A-57.

10 The majority makes this - - -

11 JUDGE RIVERA: Judge, if I may ask - - -

12 MR. HANEY: - - - confusing - - -

13 JUDGE RIVERA: - - - a follow-up here?

14 CHIEF JUDGE DIFIORE: Judge Rivera.

15 JUDGE RIVERA: So counsel - - - thank you.

16 So counsel, is your argument with this response
17 to Judge Wilson's question that those submissions at least
18 on their face suggested that as a matter of law, unless the
19 prosecutor came forward with something else - - - as a
20 matter of law, established that this was not a home where
21 just either one family, him and his mom and whoever these
22 other people are on the second floor, are somehow
23 connected, or it's a multigenerational family, or - - - or
24 several people are living there but they don't live there
25 in separate units, all areas of the house are sort of



1 common other than the bedroom, and available to everyone;
2 is that the position that you're taking as opposed to as
3 Judge Wilson was arguing, which I think is a compelling
4 point he's making - - - that isn't there really just a fact
5 determination that's here, and that's not something that we
6 can address?

7 MR. HANEY: Our primary argument is as a matter
8 of law, there was - - - there were sufficient (audio
9 interference) in the motion to controvert that were
10 effectively uncontroverted by the prosecution, because of
11 their reliance on unincorporated materials, as they cannot
12 permissibly do under Groh.

13 But our secondary argument is that at least a
14 hearing was required on the basis of the attorney
15 affirmation, the HPD documents that were appended, the
16 Appellate Division's reasoning - - -

17 JUDGE RIVERA: Yes, that's what I'm not
18 understanding. What's going to happen at the hearing?
19 What more is going to - - -

20 MR. HANEY: The hear - - -

21 JUDGE RIVERA: - - - occur at the hearing?

22 MR. HANEY: The hearing, as many Appellate
23 Division decisions bear out, which have looked at cases
24 after a hearing, as well as this court's decision in
25 Rainey, I think, also alludes to, would assess whether the



1 officers knew or should have known whether the - - - the
2 dwelling was multi-unit.

3 So you would be able to take officer testimony
4 and you'd be able to argue these details, these quibbles
5 with the facts, that my - - - my adversary attempts to - -
6 - to draw out in their - - - in their briefing.

7 But - - - but really, what they're trying to
8 argue is that somehow the defendant needs to provide
9 definitive or dispositive proof in - - - proof in order to
10 get a hearing. But that's just not the standard under
11 710.60.

12 JUDGE WILSON: Chief, I'm sorry. I have one more
13 question now that counsel has mentioned Groh.

14 CHIEF JUDGE DIFIORE: (Nodding yes).

15 JUDGE WILSON: So I perhaps understand Groh
16 differently from you. But the way I read Groh, it applies
17 to a situation where a warrant, on its face, lacks
18 specificity. This warrant looks to me quite specific. It
19 says an address, and here's the address of what's to be
20 searched.

21 If it was - - - if it lacked specificity, Groh
22 then says you can't turn to unincorporated documents. But
23 this warrant looks specific. You're not arguing that it
24 isn't specific. You're arguing that it's wrong.

25 MR. HANEY: No, I'm not - - -



1 JUDGE WILSON: And so I'm not sure - - -

2 MR. HANEY: - - - arguing - - -

3 JUDGE WILSON: - - - how Groh applies to this
4 circumstance.

5 MR. HANEY: We are arguing, despite my
6 disagreement with Your Honor's narrower reading of Groh,
7 that - - - that this still fails - - - this warrant still
8 fails under Groh, because the - - - the phrase "private
9 residence" is just impermissibly vague. All it indicates
10 is that the premises are noncommercial, and it really
11 doesn't actually establish whether the magistrate intended
12 the search of one apartment, despite the warrant's broader
13 scope, which is exactly the - - - the concern raised in
14 Groh.

15 There's no other limiting language such as the
16 name of the subject, the description of the area searched,
17 as you saw in the - - - the prior case on the calendar,
18 there - - - where there was a physical description of the -
19 - - of the home to be searched.

20 This is a bare-bones - - - in this case, it's a
21 very bare-bones description of the property at issue. And
22 especially in a state like New York - - -

23 JUDGE STEIN: What if the - - -

24 MR. HANEY: - - - where - - -

25 JUDGE STEIN: - - - what if it clearly was a



1 single-family residence? Would - - - would the - - - would
2 the warrant be sufficient if that were the - - - the - - -
3 the facts?

4 MR. HANEY: No. And - - -

5 JUDGE STEIN: In other words, there was no
6 question - - -

7 MR. HANEY: - - - it would need to designate - -
8 - it would need to designate at least - - - it would need
9 to have some detail to at least establish that the
10 magistrate approved of the - - - the search of the entirety
11 of that single-family dwelling.

12 Some more detail, like this is a house, as in
13 Rainey, or as in the - - - the previous case on the
14 calendar. There's no description of even that. A private
15 residence really actually doesn't say anything about the
16 place that's being searched.

17 JUDGE STEIN: So - - -

18 MR. HANEY: And I think a lot of this - - -

19 JUDGE STEIN: - - - what are the ma - - -

20 MR. HANEY: - - - bear that out.

21 JUDGE STEIN: - - - what are the magic words? So
22 "this is a house" is okay, but a "private residence" is not
23 okay?

24 MR. HANEY: A - - - a single-family dwelling or a
25 house, or a description of the house as - - - describing



1 the overall property, the locations of the parcel itself,
2 that we see in most search warrants.

3 JUDGE WILSON: So - - - so - - -

4 MR. HANEY: Even (audio interference) - - -

5 JUDGE WILSON: - - - I'm sorry, Chief. Once
6 more.

7 CHIEF JUDGE DIFIORE: Judge Wilson.

8 JUDGE WILSON: So - - - so 1022 East 211 Street,
9 a private residence, clearly marked 1022, is, in your view,
10 not specific enough to get a warrant?

11 MR. HANEY: That's correct, Your Honor.

12 CHIEF JUDGE DIFIORE: Okay.

13 MR. HANEY: At - - -

14 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
15 you, counsel.

16 Counsel?

17 MR. ANDERSEN: Yes, good afternoon, and may it
18 please the court, Paul Andersen for the People.

19 To address Judge Fahey's question of what was
20 preserved, the motion counsel made here was moving
21 essentially for a Franks/Alfinito hearing, in which he said
22 - - - in which counsel was arguing that not only was this a
23 multi-unit dwelling, the officers - - - the applying
24 detectives should have known this or made the application
25 either in reckless disregard for the truth or made



1 perjurious allegations.

2 And so to get there, it's not simply enough to
3 say that this is a multi-unit dwelling, you should also
4 allege things that would put the officers or the detectives
5 on notice that t his is a multiple-unit dwelling.

6 And as Judge Stein pointed out, it does seem like
7 counsel specifically wobbled on the edge to make sure that
8 - - - to try to nearly insinuate that it's multiple-unit,
9 but never made the next step - - -

10 JUDGE FAHEY: No - -- Judge, may I just - - -
11 I'd interrupt you for one - - -

12 CHIEF JUDGE DIFIORE: Judge Fahey.

13 JUDGE FAHEY: - - - second?

14 One of the things that struck me in looking at
15 this case is there was no search of the second floor living
16 quarters or -- depending on what point you take - - -
17 apartment. But that issue was unpreserved, and no one
18 really raised that, I don't think. Was that ever brought
19 up?

20 MR. ANDERSEN: Your Honor, it was not. There was
21 no Garrison claim that, as counsel concedes, that's a
22 separate constitutional issue. There was no claim that the
23 officers were unreasonable in how they executed the
24 warrant. It was - - -

25 JUDGE FAHEY: The way I understood they executed



1 the warrant was that they - - - they - - - they - - -
2 whoever was living on the second-floor apartment they just
3 saw the person and they didn't search that area and they
4 went up to the third floor.

5 And that jumps out to me to say, well, okay, if
6 there's some proof in the record on that or that issue was
7 preserved, then you might be able to argue multiple
8 dwelling. But I don't think there was.

9 MR. ANDERSEN: Well, Your Honor, it's important
10 to know that those allegations are from defendant. So he's
11 narrowly alleging this unreasonable conduct that, oh, no,
12 my second-floor neighbor could have been - - - his rights
13 could have been violated, but they - - - he doesn't allege
14 that they actually were.

15 That - - - so while he does suggest that it's
16 multiple-unit, it's once again, under Franks/Alfinito, was
17 the detect - - - should the detective had known that or the
18 - - - was the detective disregarding the nature.

19 JUDGE FAHEY: I see. Thank you.

20 MR. ANDERSEN: Yes, Your Honor. And as to the
21 argument of whether it's facially insufficient, a private
22 residence; and by its plain meaning and by this court's own
23 use of the term, signals that it's a single-family.

24 And especially when repeating the building
25 number, again, saying a private residence clearly marked as



1 - - - and then repeating the number - - - leaves no doubt
2 to the executing officer that the magistrate authorized the
3 search of this entire building, which the magistrate
4 thought was a single-family residence.

5 And looking at the papers below, the - - - the
6 search warrant application, Groh really doesn't apply here,
7 because there's a difference between arguing whether a
8 warrant is defective and then - - - or using papers to cure
9 a defect.

10 So here, of course the court can look at
11 underlying papers to see whether there's a defect in the
12 warrant. And that's exactly what motion counsel below
13 asked the court to do. Please look at these papers; see if
14 there was probable cause for the whole building, and maybe
15 we'll get a hearing on it here.

16 JUDGE WILSON: So Chief, I have a couple
17 questions, if I might?

18 CHIEF JUDGE DIFIORE: Please.

19 JUDGE WILSON: Counsel, Mr. Duval is at something
20 of a disadvantage in being able to controvert the basis for
21 the warrant, because it's sealed, and he couldn't get that
22 material. Would you agree with that?

23 MR. ANDERSEN: Yes, Your Honor.

24 JUDGE WILSON: Okay. So isn't - - - could he
25 have made some sort of a showing to get a hearing that



1 might have entitled him to some form of redacted or summary
2 or some - - - some sort of information like that, in your
3 view?

4 MR. ANDERSEN: No, Your Honor. But in the end,
5 counsel did move to reargue to try to get something
6 similar, and they - - - he - - - the People v. Castillo
7 motion to see whether that would be unsealed - - - would be
8 able to be unsealed.

9 But once again, when the People responded with -
10 - - in page A-73 of the record - - - that the materials
11 will demonstrate that the - - - that the building is a one-
12 family unit, defense counsel could have been like, okay,
13 this wasn't a mistake where they left off the unit, they
14 think this is what happened, defense counsel could have
15 moved to - - - or asked for an opportunity to file a reply,
16 asked the - - - the mother to take pictures of the house,
17 show the indicia, and then put in her affidavit these
18 pictures as how - - - or how the house looked on the date
19 the warrant was executed. It's a fair and accurate
20 depiction. Create that issue of fact, create that issue of
21 fact that, oh, on the outside of the house, an officer
22 should have known this, and therefore he - - - there must
23 have been an allegation made in reckless disregard for the
24 truth or under perjury.

25 But that didn't happen here. And so there really



1 - - - while there is some - - - that slight disadvantage
2 that they don't know exactly why the People thought it was
3 a sing - - - or why the officers thought it was a single-
4 family unit, there was still plenty of opportunity to
5 demonstrate that anyone looking at this house should have
6 known that it wasn't a single-family unit.

7 And if Your Honors have - - - have no further
8 questions, I'll yield my time.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. ANDERSEN: Counsel.

11 CHIEF JUDGE DIFIORE: Counsel, your two minutes
12 of rebuttal.

13 MR. HANEY: Briefly, Your Honor. I'd just like
14 to go back to the question of - - - of whether this motion
15 was adequately substantiated.

16 It was more than adequately substantiated to at
17 least warrant a hearing under the permissive approach that
18 this court has always taken with respect to omnibus
19 motions.

20 The - - - the prosecutor below clearly understood
21 that the argument (audio interference) was making was that
22 this was a three-unit dwelling and that he was attempting
23 to controvert the - - - the motion on that basis.

24 At A-73 that's exactly what the prosecutor is
25 arguing, that it was not, in fact, a - - - a three-unit



1 dwelling, based on the unincorporated materials. And so
2 the - - - the prosecutor didn't advance the pleading
3 defect, because that's the only plausible understanding of
4 the moving papers.

5 And just returning very quickly to Judge Stein's
6 earlier question about what counsel can affirm or - - - or
7 has to affirm. It doesn't have to be - - - the court has
8 never required it to be exact. The statute specifically
9 allows for a motion to be solely based on counsel's
10 affirmation.

11 710.60(1) allows it to be based on information
12 and - - - or personal knowledge. My adversary is basically
13 proposing a standard that counsel, at the very early stages
14 of a case has to go out and get personal knowledge of all
15 of these details in order to - - - in order to get a
16 hearing on an omnibus motion. But that is a completely
17 unworkable and impractical standard.

18 As to the - - - the issue of the Franks/Alfinito
19 hearing, that's a - - - that's a standard that's applicable
20 to probable cause. My adversary cites no case that
21 requires the defendant to allege perjury on the part of an
22 - - - of an appli - - - applying officer, in order to make
23 a particularity challenge. And it honestly makes no sense,
24 because cause challenge is only directed - - - is directed
25 to the cor - - - the incorporating papers, whereas a



1 particularity challenge is solely addressing the warrant.

2 So all that Mr. Duval needed to allege, as he did
3 in this case, at A-44 and 45, is that the officers know - -
4 - could have - - - he argued specifically that they could
5 absolutely ascertain the nature of the property, and - - -
6 at two locations in his omnibus motion. And that was more
7 than sufficient to get a hearing.

8 Finally, as to Judge Fahey's question to the
9 execution, that was - - - that argument was also more than
10 adequately preserved by the moving papers.

11 Basically, counsel - - - my - - - my colleague on
12 the other side is - - - is conflating counsel's overbreadth
13 analysis with his reasonableness analysis. But there - - -
14 there's a distinct discussion in the moving papers of
15 overbreadth separately from the information about the
16 actual execution of the warrant.

17 There's no plausible reason (audio interference)
18 argument about the reasonableness of the execution (audio
19 interference) presenting (audio interference) of the (audio
20 interference) Garrison (audio interference).

21 And again, under Mendoza, this court - - - and
22 the motion court was required to read the papers
23 permissively, so as to allow the defendant to obtain a
24 hearing.

25 Unless there are further questions - - -



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. HANEY: - - - thank you.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Drury Duval, No. 10, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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