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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-  
  
DONNELL BAINES,  
  
Appellant.  
-----

NO. 77

20 Eagle Street  
Albany, New York  
September 13, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1                   ACTING CHIEF JUDGE CANNATARO:    Seventy-seven,  
2                   People v. Baines.

3                   MR. NURSEY:    May it please the Court, Joseph  
4                   Nursey, representing Donnell Baines.    Your Honor, may I  
5                   reserve two minutes for rebuttal?

6                   ACTING CHIEF JUDGE CANNATARO:    Yes, Mr. Nursey.

7                   MR. NURSEY:    Donnell Baines' case presents two  
8                   fundamental issues of state and federal constitutional law,  
9                   the first being the validity of the search warrant for  
10                  Donnell Baines' home and the second being whether he was  
11                  properly allowed to proceed without counsel, without being  
12                  given adequate warnings, and without an unequivocal request  
13                  to represent himself.    I'd like first to address the  
14                  warrant issue.

15                  The invasion of a person's home is at the very  
16                  core of the federal and - - -

17                  JUDGE TROUTMAN:    Is the warrant issue preserved?

18                  MR. NURSEY:    Yes, Your Honor.    It's - - - it's  
19                  preserved in - - - in a couple of different ways.    The - -  
20                  - the first is in the omnibus motion that was made by the  
21                  original counsel in the case.    And in the omnibus motion,  
22                  he specific - - - he - - - he specifically argued that the  
23                  search warrant was constitutionally overbroad and that it  
24                  failed to describe with sufficient particularity the  
25                  property to be seized.    And then he goes on to talk about



1 the overbreadth on the seizure of a computer, CD-ROMs, and  
2 hard drives, and specifically says, "To allow detectives to  
3 seize these computers and then pore through all their  
4 files, with no allegation that the property was one,  
5 stolen; two, contraband; three, used or had been used to  
6 commit or conceal a crime; or four, constitute evidence of  
7 a crime, violates the - - - the CPL and the state and  
8 federal constitutional provisions". That's at A-70 of the  
9 appendix.

10 Then it went on to say, "Additionally, the search  
11 warrants were overly broad because they allowed unfettered  
12 discretion to the searcher" and specifically cited the  
13 court to People v. Bennett and - - -

14 JUDGE TROUTMAN: But with respect to the  
15 arguments that the defendant now makes on appeal - - -

16 MR. NURSEY: Yes.

17 JUDGE TROUTMAN: - - - you're saying that that  
18 which was stated in the omnibus motion is sufficient to  
19 make those arguments here - - -

20 MR. NURSEY: Yes. Yes. It's - - -

21 JUDGE TROUTMAN: - - - allowed to be reviewed by  
22 this court?

23 MR. NURSEY: Yes. It - - - it's - - - it's set  
24 out in pages 11 through 13 of our initial brief. But  
25 beyond that, Mr. Baines himself filed a motion to reargue



1 the - - -

2 JUDGE TROUTMAN: Can you - - -

3 MR. NURSEY: - - - the - - - the denial of the  
4 search warrant.

5 JUDGE TROUTMAN: Can preservation be established  
6 in a motion to reargue?

7 MR. NURSEY: Okay. Under CPL 470.05,  
8 preservation can be established in any time where the court  
9 is given the opportunity to - - - in - - - in a manner to -  
10 - - in which to make sure that the error does not occur.  
11 And this certainly gave the court the opportunity to  
12 realize that its initial decision upholding the validity of  
13 the warrant was in error and - - - and needed to be  
14 addressed.

15 And - - - and an important thing about Mr.  
16 Baines' motion to reargue, that - - - that motion to  
17 reargue was filed with the court on January 25th, 2012.  
18 And the court told the district attorney, if you want to  
19 respond to these motions, you have to respond by February  
20 15, 2012.

21 The district attorney in the trial court made no  
22 response whatsoever to the motion, didn't - - - didn't  
23 contest one - - - didn't contest Mr. Baines' arguments for  
24 why the motion was timely filed and didn't contest Mr.  
25 Baines' extensive arguments for why the - - - why the



1 warrant was invalid, which are the exact arguments that we  
2 are presenting to the court today. They didn't respond a  
3 word to it.

4 And I don't believe they should be heard now to  
5 argue that it's unpreserved when they had all the chance in  
6 the world. The trial judge gave them three - - - over  
7 three weeks to answer and to express why the issues were  
8 not preserved by Mr. Baines' motion to reargue.

9 JUDGE SINGAS: But the original omnibus motion  
10 didn't raise the issues that you're raising now concerning  
11 overbreadth - - -

12 MR. NURSEY: Not as specifically as Mr. Baines'  
13 did, certainly - - -

14 JUDGE SINGAS: Okay. But isn't that - - -

15 MR. NURSEY: - - - certainly not as specifically.

16 JUDGE SINGAS: Isn't that preservation if - - -

17 MR. NURSEY: Okay. They - - - it - - - they - -  
18 - the omnibus - - - the omnibus motion did refer the court  
19 to People v. Bennett. And People v. Bennett stands for the  
20 proposition that a - - - a motion that's facially in - - -  
21 oh, excuse me - - - a search warrant that's facially  
22 invalid cannot be cured by affidavit of the detective that  
23 is neither a - - - specifically incorporated into the  
24 search warrant nor attached to the search warrant at the  
25 time it was executed.



1           And he also argued about the overbreadth of the  
2 seizure of all the electronic data, all the electronic  
3 equipment and all of its contents. That was in the omnibus  
4 motion.

5           JUDGE SINGAS: Right, saying they weren't  
6 evidence of a crime, but not necessarily saying that it was  
7 because a specific crime wasn't mentioned in the warrant,  
8 which is the argument today.

9           MR. NURSEY: Okay. At the - - - in the - - - in  
10 the original omnibus motion, the - - - the counsel did  
11 argue that - - - that a valid warrant does require a - - -  
12 it does require a - - - a - - - a particular crime being  
13 alleged. A valid warrant requires the allegation of a  
14 particular crime. Again, didn't do it with the  
15 extensiveness that Mr. Baines did it, but it was said in  
16 the omnibus motion. And the - - - and - - - and when you  
17 look at the court's decision on the omnibus motion, the - -  
18 - the - - - the court extensively relied - - - relies on  
19 the affidavit of the detective to find the warrant valid,  
20 rather than on what was on the face of the warrant itself.

21           JUDGE GARCIA: Is your position that you always  
22 need the crime or only in certain circumstances?

23           MR. NURSEY: I know there are federal decisions  
24 that have said you don't specifically need to, like, cite  
25 the crime and - - - and - - - and chapter and verse of the



1 penal law or whatever. The - - - the - - - there has to be  
2 something that limits the behavior of the police officer.

3 It's a - - -

4 JUDGE GARCIA: Well, I'm - - - I'm thinking more  
5 of the federal cases, and I think they're federal, that say  
6 you may need it; it depends on how specific your warrant  
7 is. So if you say, I want such and such a computer or I  
8 want such and such an item, that limits the discretion of  
9 the searching officer, right? I'm going to go in and I'm  
10 going to take X.

11 If it's vague, then putting the crime in the  
12 warrant or incorporating the charge into the warrant will  
13 limit the discretion of the searching agent in terms of  
14 what they can take, but not always required. It's kind of  
15 a balancing, looking at what's required - - - what the  
16 warrant says and whether that's enough or does it need to  
17 be informed by other outside - - -

18 MR. NURSEY: If you look at the search warrant in  
19 this case - - -

20 JUDGE GARCIA: Well, but I'm - - - I'm asking you  
21 what's your position? Is your position that always, all  
22 the time, it has to be there? Or it depends on - - -

23 MR. NURSEY: My position is this court should  
24 adopt the rule that the crime should always be stated.

25 But even if this court's not willing to go to



1 that extent, if you look at the specific search warrant in  
2 this case, there's not a clue on the face of that warrant.  
3 Nowhere on the face of the warrant does it tell the police  
4 officers what crime they're looking for evidence of.

5 JUDGE GARCIA: Would that matter if I said, go  
6 into this apartment and find X? That's what the - - -  
7 that's what it says on the warrant. I give that to a  
8 police officer. They go into the apartment and they find  
9 X, a specific item.

10 MR. NURSEY: If it was just a - - -

11 JUDGE GARCIA: Would it matter then?

12 MR. NURSEY: If it was just a specific item,  
13 there are - - - there are some cases that talk like if the  
14 warrant says, go seize a gun or go seize heroin - - -

15 JUDGE GARCIA: No, but if's it not a - - -

16 MR. NURSEY: You know that -- you know those - -  
17 -

18 JUDGE GARCIA: - - - per se crime to possess it -  
19 - -

20 MR. NURSEY: Okay.

21 JUDGE GARCIA: - - - let's say?

22 MR. NURSEY: Okay. But - - -

23 JUDGE GARCIA: But I just say, go seize a copy  
24 of, you know, "Rebecca". Like, go seize this item. And  
25 you - - -





1 MR. NURSEY: Okay.

2 JUDGE GARCIA: - - - go in the apartment and you  
3 have that warrant. There's the copy of the book on the  
4 desk. You take it and you go and you voucher it. What - -  
5 - what's wrong with that warrant?

6 MR. NURSEY: Okay. If it just said, go seize X,  
7 it might be said that that specifically directed the  
8 behavior of the police officers who conducted the search  
9 and informed the subject of the search what they were  
10 invading their home for. Okay.

11 But when you have a - - - like this that says  
12 seize every single piece of electronic equipment you can  
13 find in the house and then after you seize it - - - it's  
14 not just getting your hands on the hardware, the computers  
15 and the phones and everything else. But after you seize  
16 it, you can then search every single piece of data that's  
17 on these phones.

18 JUDGE GARCIA: But what if you can seize it and  
19 you can see specific notebook computer X, version 23, you  
20 seize that and then later you get a warrant to look at the  
21 contents?

22 MR. NURSEY: Okay. They - - - the - - - the - -  
23 - the - - - in this case, the July 15th warrant authorized  
24 both the seizure of the - - - the hardware and the ability  
25 to go and take all the data off of the - - - off of the



1 hardware, every single thing stored on the digital  
2 equipment.

3 JUDGE WILSON: Could I - - - could I ask you to  
4 turn to the other issue for a moment?

5 MR. NURSEY: Yes.

6 JUDGE WILSON: And particularly what I'd like to  
7 know about is what - - - what period of - - - during what  
8 period of time you believe Mr. Baines was deprived of  
9 counsel without the proper cautions being taken - - -

10 MR. NURSEY: All right.

11 JUDGE WILSON: - - - and what the remedy ought to  
12 be.

13 MR. NURSEY: Okay. The period of time is from  
14 the - - - the November 3rd, 2010 where the court relieved  
15 his assigned counsel all the way to just barely a month  
16 before trial when he accepted counsel for trial. And it  
17 covers the entirety of the pre-trial hearings in this case.

18 As far as remedy, he was deprived counsel or did  
19 not have counsel at the grand jury. And before that  
20 happened on November 3rd, he received absolutely no  
21 warnings, none whatsoever, about proceeding pro se.

22 JUDGE TROUTMAN: At the November - - - at the  
23 time that the court relieved counsel - - -

24 MR. NURSEY: Yes?

25 JUDGE TROUTMAN: - - - just prior to the second



1 grand jury - - -

2 MR. NURSEY: Yes, Your Honor?

3 JUDGE TROUTMAN: - - - did the court, at that  
4 time, when they were on the record, indicate that it was  
5 deeming the defendant to be pro se or did the court say  
6 we're going to address that later; I'll give you a new  
7 attorney, but we'll address it later?

8 MR. NURSEY: What the court specifically said was  
9 the court discharged the attorney. And then it said, we'll  
10 take up the question of whether a new attorney is going to  
11 represent you or whether you're going to be pro se and that  
12 person is going to ask his legal advisor; we can take it up  
13 the next day. And - - -

14 JUDGE TROUTMAN: So at that point, arguably, the  
15 court has not made a decision that the defendant may  
16 proceed pro se. In fact, the court says 18-B will be  
17 contacted to provide you with a new attorney.

18 MR. NURSEY: Okay. If you look at what happened  
19 after, it becomes clear that he was without counsel at that  
20 moment and from all moments on because - - -

21 JUDGE TROUTMAN: But isn't it up to the court to  
22 make a determination as to whether a person is pro se or  
23 not, if they have a legal advisor or an attorney?

24 MR. NURSEY: Okay.

25 JUDGE TROUTMAN: It's the court's decision.



1 MR. NURSEY: Okay. The quick answer to that is  
 2 on November 3rd, the - - - the court made the statements I  
 3 just talked about. On November 4th - - - when there was no  
 4 Donnell Baines there because he was already sent to the  
 5 grand jury - - - on November 4th, the court adjourned until  
 6 November 17th and said it's for grand jury action. When  
 7 they came back, they - - - they were never in the court  
 8 between November 3rd and November 17th. When they came  
 9 back into the court on November 17th, the court said, on  
 10 the record - - - it's the first time he's seen Donnell  
 11 Baines since November 3rd - - - said on the record, Mr.  
 12 Baines is still representing himself. There's no still - -  
 13 -

14 JUDGE TROUTMAN: So isn't - - -

15 MR. NURSEY: - - - except for November 3rd,  
 16 Judge.

17 JUDGE TROUTMAN: Shouldn't - - - isn't there an  
 18 argument that that simply supports the fact that the court  
 19 forgot to revisit it at that point and that the argument -  
 20 - - a more - - - a better argument is that from that point  
 21 going forward, the defendant was deemed pro se?

22 MR. NURSEY: No, Your Honor, because if you look  
 23 at what happened at the grand jury, when he came into the  
 24 grand jury, the attorney - - - the attorney who was with  
 25 him was introduced as his legal advisor. Every - - -

1 JUDGE TROUTMAN: Can a statement without a court  
2 directive deem him to be pro se? Can that statement alone  
3 deem him pro se without the court having - - -

4 MR. NURSEY: Okay.

5 JUDGE TROUTMAN: - - - having, at that time, not  
6 made a pronouncement - - -

7 MR. NURSEY: Okay.

8 JUDGE TROUTMAN: - - - or a determination that he  
9 was, in fact, pro se?

10 MR. NURSEY: It meant that he was without counsel  
11 in front of the grand jury and nobody should have proceeded  
12 at that point when he was without counsel and there had not  
13 been a colloquy to determine whether he could go forward  
14 with the calendar - - -

15 JUDGE TROUTMAN: How was he without counsel?

16 MR. NURSEY: He - - - the - - - the - - - the  
17 district attorney herself said this person's here as his  
18 legal advisor.

19 JUDGE TROUTMAN: Can the district attorney, by  
20 that introduction, cause that attorney to be a legal  
21 advisor and not an attorney?

22 MR. NURSEY: No. The district attorney doesn't  
23 make that determination. But - - -

24 JUDGE TROUTMAN: And you agree that up to that  
25 point, the court had not so made that determination?



1 MR. NURSEY: Up to that point, the court had  
 2 discharged his previous attorney and there had been no new  
 3 - - - new attorney assigned. He was without an attorney.  
 4 And any district attorney who walked into that grand jury -  
 5 - - she was a present - - - she was present when - - -

6 JUDGE TROUTMAN: So the person he went in with,  
 7 from the 18-B list, got there because the court sent him  
 8 there, correct?

9 MR. NURSEY: And he understood he was sent there  
 10 as legal advisor. Everybody understood that. When - - -  
 11 when - - - and at that point, the district attorney would  
 12 have had an obligation to say wait a minute.

13 JUDGE TROUTMAN: So there's no requirement that  
 14 the court make a determination?

15 MR. NURSEY: If he's - - -

16 JUDGE TROUTMAN: So at that point, it's just  
 17 based on the representation that the person was a legal  
 18 advisor?

19 MR. NURSEY: If he's at a critical stage of the  
 20 proceeding and he does not have counsel, he has been - - -  
 21 he has been deprived of his right to counsel, that  
 22 proceeding becomes a nullity.

23 And getting back to Your Honor's question of  
 24 remedy, if the grand jury proceeding is a nullity, there  
 25 can be no indictment. And with no indictment, there could



1 not be any subsequent proceedings. The - - - it - - - the  
2 indictment needed to be dismissed. And then the  
3 prosecution could have gone to the court and asked leave to  
4 present to a different - - - to another grand jury.

5 ACTING CHIEF JUDGE CANNATARO: Thank you,  
6 Counsel.

7 JUDGE WILSON: Let me ask you - - - give me one  
8 more question, if you don't mind.

9 ACTING CHIEF JUDGE CANNATARO: Go ahead, one  
10 more.

11 JUDGE WILSON: So let me ask you - - -

12 ACTING CHIEF JUDGE CANNATARO: You have one - - -

13 JUDGE WILSON: I'm sorry. One more question.  
14 Let me ask you the following: suppose we assume that the  
15 judge, when he made the 18-B - - - when he requested to get  
16 someone from 18-B, believed he was appointing the - - - Mr.  
17 - - - I think it was Levine; I've forgotten his name - - -  
18 as his lawyer, as his attorney, not as a - - - let's just  
19 assume that.

20 MR. NURSEY: Uh-huh.

21 JUDGE WILSON: Okay? And let's suppose that the  
22 attorney believed he was the legal advisor.

23 MR. NURSEY: Yes.

24 JUDGE WILSON: Where does that leave Mr. Baines  
25 in terms of whether he is represented by counsel or not?



1 MR. NURSEY: He's not represented by counsel. If  
2 - - - if - - - if no one is there saying, I'm the attorney  
3 representing Mr. Baines and the prosecutor knows that, she  
4 - - - she had an obligation to say whoa, stop here, let's  
5 go to the court and get the colloquy done and see if you  
6 can represent yourself here. It wasn't done. She just - -  
7 - she - - - she - - - she introduces this person as legal  
8 advisor and then goes ahead and - - - and - - - and you  
9 know, tells Mr. Baines, okay.

10 Then she -- then the worst possible thing that  
11 could have happened for him happened. He - - - she reads  
12 the - - - the charges that are to be presented to the grand  
13 jury and he says, I take my Fifth Amendment right, I won't  
14 testify. So what the grand jury sees is he comes in, says  
15 I'm going to testify, want to give my statement. The DA  
16 confronts him with what the crimes being considered are and  
17 he says, I'm out of here, I take my Fifth Amendment right,  
18 and I'm leaving.

19 ACTING CHIEF JUDGE CANNATARO: Thank you.

20 MR. NURSEY: Thank you.

21 JUDGE SINGAS: Can you start there at the pro se  
22 discussion, please?

23 MR. WU: Sure. Absolutely. So I'll take this in  
24 two parts.

25 Steven Wu for the People.





1           One is that defendant was represented by counsel  
2           at the grand jury presentation. The Appellate Division - -  
3           -

4           JUDGE TROUTMAN: And at the time that he appeared  
5           before the grand jury, had the court ruled - - -

6           MR. WU: No. Absolutely not.

7           JUDGE TROUTMAN: - - - that he would be pro se?

8           MR. WU: No. At the November 3rd hearing, the  
9           court made absolutely clear that it was not deciding  
10          whether to grant the pro se representation request and was  
11          just assigning an 18-B attorney to be his counsel. And  
12          then - - -

13          JUDGE TROUTMAN: So what about the claim that  
14          because there were representations made at the grand jury -  
15          - - and it did say "legal advisor" - - - the thing should  
16          have been interrupted and they should have gone back before  
17          the judge?

18          MR. WU: Well, I think there are a few things to  
19          say about that. One is that the record is, at best, mixed  
20          here. Mr. Levine, the lawyer who was appointed here, said  
21          at an appearance on November 8th in criminal court that he  
22          was representing Mr. Baines in supreme court. That was the  
23          statement - - -

24          JUDGE WILSON: That was on - - -

25          MR. WU: - - - from the lawyer himself.



1 JUDGE WILSON: That was on a different  
2 indictment, right?

3 MR. WU: It was a different indictment.

4 JUDGE WILSON: In front of a different judge?

5 MR. WU: But he was referencing his  
6 representation of Mr. Baines in this proceeding.

7 JUDGE WILSON: Well, how do we know that?

8 MR. WU: Well, because he was appearing in  
9 criminal court to dispose of an earlier misdemeanor charge  
10 that was arising out of some of the same actions here.

11 JUDGE WILSON: So is possible that he believed he  
12 was the attorney for Mr. Baines in that action, but was a  
13 legal advisor in the other action?

14 MR. WU: I think that's not a fair understanding  
15 of that because that action was taking place in criminal  
16 court. That's what the appearance was. And what he said  
17 when he appeared there was, I am representing Mr. Baines in  
18 supreme court, which was this proceeding. So these are two  
19 different courts at the same time. And the criminal court  
20 action was being disposed of because it was superseded by  
21 this indictment. And that's a statement from Mr. Levine.

22 The representation about being a legal advisor in  
23 front of the grand jury, that came as a question from the  
24 ADA to the defendant. And the defendant just said yes.  
25 Mr. Levine himself did not represent that he was just a



1 legal advisor then, as opposed to his counsel.

2 JUDGE WILSON: But he didn't - - - he didn't say  
3 anything? He didn't say he was his attorney? He didn't  
4 correct the DA?

5 MR. WU: I mean, it's a - - - he didn't say  
6 anything in response to that particular exchange. It's not  
7 clear he heard it. It - - - he definitely appeared there.  
8 And he was advising the defendant during that time, during  
9 that time.

10 So I think the - - -

11 JUDGE TROUTMAN: And after that, is it correct  
12 that there was discussion about defendant having the  
13 opportunity to confer with Mr. Levine?

14 MR. WU: Correct.

15 So at a - - - at a December 22nd appearance in  
16 front of Justice Wiley, there was a much longer colloquy at  
17 that time - - - and that was really before any substantive  
18 proceedings had taken place - - - about whether he  
19 understood his rights, whether he understood the perils of  
20 proceeding pro se. Justice Wiley specifically flagged the  
21 dangers of going pro se before trial when an attorney is  
22 needed to know the details of criminal procedure. And only  
23 after then, did Justice Wiley confirm fine, you are going  
24 to go pro se. And we agree that from that point onward, he  
25 was representing himself with a legal advisor.



1 JUDGE TROUTMAN: Justice Wiley or Justice  
2 Pickholz?

3 MR. WU: Justice Wiley was in December 2010.  
4 Justice Pickholz did another pro se inquiry in April of  
5 2012.

6 JUDGE TROUTMAN: But it was done in an arguably  
7 piecemeal fashion; would you agree?

8 MR. WU: No to this degree. The People's  
9 position is that Justice Wiley's colloquy in December 2010  
10 was adequate for purposes of allowing him to represent  
11 himself. It targeted the problems. It asked defendant  
12 multiple times if he was aware of the dangers. And  
13 defendant made absolutely clear, absolutely clear his  
14 desire to go pro se.

15 JUDGE TROUTMAN: Did - - - did it make clear that  
16 the defendant wouldn't get to do his motions over, the  
17 court witness system, et cetera? Those are the dangers  
18 that he faced by representing himself?

19 MR. WU: Correct. Justice Wiley said - - - well,  
20 let me - - - let me amend that a little bit. Justice Wiley  
21 said there are dangers with going pro se because you don't  
22 understand criminal procedure; a lawyer does. The judge  
23 did say you can file whatever you want and was very lenient  
24 to defendant, allowed him to file his motions. So there  
25 was not any restriction placed on defendant for his



1 decision to go pro se versus being represented by counsel.  
2 So to that degree, he did warn him of those dangers.

3 JUDGE TROUTMAN: Did the judge ever explain the  
4 difference between a legal advisor and an attorney?

5 MR. WU: The - - - the question came up in  
6 December and Justice Pickholz revisited it a little bit  
7 later. And - - - and part of the issue was that defendant  
8 himself had asked a couple of questions about the  
9 difference between the two because what he wanted - - - and  
10 this is why his request to go pro se was unequivocal - - -  
11 what he wanted was the ability to make decisions on his  
12 own. He did not want to be controlled by his lawyer. And  
13 I think what both Justice Wiley and Justice Pickholz said  
14 was if you want to do that, you represent yourself, all  
15 right? A lawyer otherwise will have some control over  
16 certain decisions, like appearing before the grand jury,  
17 and certain decisions, like which motions to file.

18 JUDGE RIVERA: Well, wasn't - - - wasn't the  
19 point in November when the judge was allowing the  
20 opportunity for defendant to have another - - - a  
21 conversation - - -

22 MR. WU: Right.

23 JUDGE RIVERA: - - - with a different lawyer to  
24 see if perhaps a different lawyer might agree with  
25 defendant's, let me call it, decision that he wanted to



1 appear before the grand jury?

2 MR. WU: Yes, that is correct. And we don't know  
3 when that conversation took place or whether it did. What  
4 we know is that Mr. Levine was appointed after the November  
5 3rd conference.

6 JUDGE RIVERA: Well, something had to take place  
7 that he's in the grand jury.

8 MR. WU: Correct. Well, some - - - something  
9 took place and then he appeared with Mr. Baines in front of  
10 the grand jury. Mr. Baines decided to testify and then  
11 pleaded the Fifth. So it - - - it - - -

12 JUDGE RIVERA: So either this attorney is  
13 representing him and agrees with defendant that he should  
14 be testifying or he's not his attorney, or he's a legal  
15 advisor, let's stick with that phrase, and the defendant  
16 has gone forward pro se to appear before the grand jury.  
17 Isn't that the only real option you have when you - - -

18 MR. WU: Right.

19 JUDGE RIVERA: - - - look at the record? There's  
20 not another way to look at that.

21 MR. WU: Well, and the record here supports the  
22 Appellate Division's finding that what happened was Mr. Lee  
23 - - - Levine was representing him, apparently persuaded by  
24 Mr. Vain - - -

25 JUDGE RIVERA: Is that a finding of fact?



1 MR. WU: - - - Mr. Baines to appear. Excuse me?

2 JUDGE RIVERA: Is that a factual finding?

3 MR. WU: So I - - - it is a factual finding the  
4 Appellate Division made. And it's supported by the record  
5 here because, at - - - at worst, at worst, there is a mixed  
6 question of fact - - -

7 JUDGE RIVERA: Uh-huh.

8 MR. WU: - - - about exactly what Mr. Levine's  
9 status was. And it's supported to say that he was his  
10 attorney - - -

11 JUDGE GARCIA: Okay.

12 JUDGE RIVERA: Right.

13 JUDGE GARCIA: Counsel - - -

14 MR. WU: - - - rather than his legal advisor.

15 JUDGE GARCIA: - - - I'd like to go back to  
16 something you just said where he made clear he wanted to go  
17 pro se because he said he wanted to make the decisions  
18 himself. So if we get a case in the future and the  
19 defendant's arguing, I clearly said I wanted to go pro se  
20 because I said I wanted to make these decisions myself, you  
21 would say yes, that defendant's right, and that triggered  
22 on the duty of - - - on the part of the judge to inquire  
23 and to do all the things we say that a judge has to do when  
24 someone unequivocally says they want to go pro se? I  
25 wouldn't want to make that decision myself.



1 MR. WU: I don't think it's that simple. I'm  
2 really - - - I'm really summarizing a longer discussion,  
3 which is part of the pro se colloquy here between the judge  
4 and the defendant, where defendant made clear what he  
5 wanted to do. The judge was explaining many of the things  
6 that you want to do can and should be done by an attorney,  
7 the attorney will file your motions, the attorney will help  
8 you with whatever. And the defendant still said, knowing  
9 all of that, that he wanted to go pro se. So the - - - I'm  
10 really, maybe mistakenly, summarizing too - - - too  
11 simplistically a much longer conversation between the judge  
12 and the defendant here.

13 But I - - - I'd like to return, if I could, to  
14 the warrant question - - -

15 JUDGE RIVERA: Yes, please.

16 MR. WU: - - - before I run out of time. So this  
17 court should reject defendant's challenge of the July 15th  
18 warrant for three reasons. One, it wasn't preserved below.  
19 Two, the warrant, with or without Detective Turk's  
20 affirmation or affidavit, was sufficiently particular. And  
21 third, any defect was harmless in any event because of the  
22 other evidence in this case.

23 On preservation, the omnibus motion by the  
24 defendant did not flag, in any way, the specific objections  
25 raised here. One, it did not complain about considering





1 the affidavit with the warrant. And two, it didn't object  
2 to the - - -

3 JUDGE WILSON: Well, it said the warrant - - -

4 MR. WU: - - - absence of the crime.

5 JUDGE WILSON: It said the warrant on its face  
6 was not sufficiently specific, right?

7 MR. WU: It - - - it - - - it did not. It did  
8 not. So this - - - this is the - - - this is the critical  
9 point for the preservation argument. The argument made in  
10 the omnibus motion actually relied on the fact that the  
11 affirmation talked about the crime of kidnapping because  
12 the particularity argument made by the defendant below was  
13 that there wasn't a showing that the items listed in the  
14 warrant had anything to do with the crime of kidnapping.  
15 And then that's why the - - -

16 JUDGE WILSON: The omnibus motion says, and I  
17 think counsel had quoted it, "It was constitutionally  
18 overbroad and they failed to describe, with sufficient  
19 particularity, the property to be seized."

20 MR. WU: Well, so that's on page 68, which is, I  
21 think fairly described - - -

22 JUDGE WILSON: Well, it's - - - yeah.

23 MR. WU: - - - boilerplate legal language for it.  
24 On pages 69 and 70, in talking about the July 15th warrant  
25 specifically, because there are a couple of warrants - - -



1 JUDGE WILSON: That's actually on page 53. 68 is  
2 a different statement that also helps with preservation.

3 MR. WU: Well, I apologize.

4 But - - - but in talking about the July 15th  
5 warrant specifically, the argument that defendant was  
6 making was that the allegation of kidnapping does not  
7 support any search for these items because these items were  
8 not used for the kidnapping.

9 JUDGE WILSON: That's an additional argument he  
10 made. But there's - - -

11 MR. WU: Okay.

12 JUDGE WILSON: There's a blanket claim that on  
13 its face, it's not particular.

14 MR. WU: I - - - I - - - I - - -

15 JUDGE WILSON: Does he have to cite Groh to  
16 preserve Groh?

17 MR. WU: The defendant has to do two things here  
18 in order to make these arguments here. One is to complain  
19 about considering the affidavit in conjunction with the  
20 warrant.

21 JUDGE WILSON: Well, wait a minute.

22 MR. WU: Defendant does not say that.

23 JUDGE WILSON: Wait a minute. Wait a minute.

24 Why - - -

25 MR. WU: It does not say that in the motion.



1 JUDGE WILSON: So in your view, it's not  
2 sufficient for him to say the affidavit on its face is not  
3 sufficiently particular and for the People to come back and  
4 - - - not the affidavit, I'm sorry, the warrant on its face  
5 - - - and for the People to come back and say wait, the  
6 affidavit supplements the warrant, which I don't think they  
7 said - - -

8 MR. WU: The People did not say that because the  
9 - - -

10 JUDGE WILSON: Right?

11 MR. WU: - - - the omnibus motion did not make  
12 that argument. See I - - - so here - - - so here's what  
13 happened, I think if you look at the argument specifically  
14 about the July 15th warrant - - -

15 JUDGE WILSON: Uh-huh.

16 MR. WU: - - - the defendant says the items here  
17 were not used for purposes of a kidnapping. And that is  
18 why the judge, in determining this omnibus motion, didn't  
19 address the issues of incorporation or reference or  
20 attachment - - -

21 JUDGE WILSON: Well, I think he did.

22 MR. WU: - - - but instead said - - -

23 JUDGE WILSON: He relied on the affidavit.

24 MR. WU: Excuse me?

25 JUDGE WILSON: Almost - - - he - - - he relied on



1 the text in the affidavit - - -

2 MR. WU: Correct.

3 JUDGE WILSON: - - - over and over and over.

4 MR. WU: Because - - - because he thought his  
5 task was to establish whether, contrary to defendant's  
6 arguments in the omnibus motion, there was support for  
7 these items being used for the kidnapping. And that's what  
8 the judge held in the omnibus motion.

9 JUDGE RIVERA: Then why isn't that reaching the  
10 issue?

11 MR. WU: Because - - -

12 JUDGE RIVERA: Why isn't that good enough - - -

13 MR. WU: It's - - -

14 JUDGE RIVERA: - - - for preservation?

15 MR. WU: Because it's not addressing the  
16 objection, which is you can't consider the affirmation at  
17 all or the affidavit at all. And that's the argument  
18 that's being made here, is the affidavit should just be  
19 ignored for purposes of considering the sufficiency of the  
20 warrant.

21 And the separate problem too, which was that  
22 there - - - there was not a specific objection to the fact  
23 that the warrant didn't include the specific crime, again  
24 because the defendant below made arguments about the crime  
25 from the - - - from the affirmation here.



1                   JUDGE GARCIA: But couldn't you take that  
2 argument to be - - - if you had put in your search warrant,  
3 you know, go get handcuffs or ties or - - - you could  
4 assume from that, okay, you know, we pretty much understand  
5 what we have to get and it's, you know. But putting these  
6 broad categories of those things in there without saying  
7 they were related to a kidnapping, they don't shout, hey,  
8 this is what you have to get. They're - - - they're not  
9 specifically described enough without the charge to know  
10 what you should take.

11                   MR. WU: So I think that would be generous  
12 interpretation of the omnibus motion. But if - - - if I  
13 could briefly address just the merits of that argument?  
14 Because even without the affirmation here, which again only  
15 contained the crime, the warrant was sufficiently  
16 particular on its face as well. Much of the language here  
17 was about specific physical items often identified with  
18 great particularity, such as a phone with a certain color,  
19 a bag with somebody's name on it, a birth certificate  
20 belonging to one of the victims in this case. There's no  
21 need for a crime to be listed in order for police to be  
22 able to identify those items and to be restricted in which  
23 items they can - - - they can obtain.

24                   JUDGE GARCIA: There's one subsection, I think,  
25 in your brief at least, you concede is overly broad.



1 MR. WU: Correct. The very last one which is  
2 about any computer-related equipment. Before that one, a -  
3 - - a - - - a - - - only a couple of physical items were  
4 recovered, a router and a mouse, I believe. And none of  
5 them were used at the trial. So it doesn't - - - doesn't  
6 matter.

7 JUDGE GARCIA: Did nothing from - - - seized from  
8 that paragraph come in at trial?

9 MR. WU: No. It - - - well, it - - - I believe  
10 it was introduced at trial but not relied on for the  
11 prosecution.

12 And - - - and I want to be clear. There are some  
13 - - - there is some language in the earlier provisions  
14 about computer equipment, I think about cellular  
15 telephones. But all of those ended up being used just to  
16 seize particular physical items. Much of the content from  
17 the two laptop computers that were recovered from this  
18 warrant were recovered as a result of a subsequent warrant  
19 on July 28th that authorized the search of those computers  
20 for specific items. And so the content for those  
21 computers, as opposed to the physical fact of those  
22 computers, is - - - is just not at issue in this appeal.

23 JUDGE GARCIA: Is it clear from the record that  
24 they weren't viewed - - - that the content wasn't reviewed  
25 before the subsequent warrant was obtained?



1 MR. WU: Nothing in the record indicates that  
2 they were searched before. And the description of the need  
3 for the July 28th warrant, I - - - I think is fairly read  
4 to say a search hadn't been done because they were seeking  
5 judicial intermitter for a search of those computers for  
6 specific items on them.

7 ACTING CHIEF JUDGE CANNATARO: Thank you,  
8 Counsel.

9 MR. WU: Thank you.

10 MR. NURSEY: If I could jump quickly back into  
11 the counsel issue and a few of the dates that were  
12 mentioned? The - - - the 11/8/2010 proceeding in front of  
13 criminal court that Your Honors have already noted wasn't  
14 the same case, and secondly, if it - - - pages 2410 through  
15 2412 of the appendix. And if you look at that, you notice  
16 that Mr. Levine came in and says, I represent Mr. Baines in  
17 supreme court. I have no idea what he meant by that. I  
18 don't know if he was trying to say I'm legal advisor.

19 But what's important is they don't produce Mr.  
20 Baines until after he made that statement. If you look in  
21 the middle of page 2411 in the appendix, they don't produce  
22 Mr. Baines. He's not in the courtroom when - - - when Mr.  
23 Levine said that so he had no idea that was being said  
24 about him.

25 The - - - the - - - the - - - this guy's a - - -



1 a - - - and it's interesting the very next day or the very  
2 next time that Mr. Levine was in supreme court, he  
3 introduced himself as a legal advisor. He - - - the - - -  
4 this - - - he didn't introduce himself as - - - as being  
5 the person representing Mr. Baines.

6 JUDGE SINGAS: Doesn't this really beg the  
7 question that we don't really have a record that we could  
8 review with any intelligence what happened?

9 MR. NURSEY: It's - - - it says we - - - we have  
10 a record that doesn't - - - that shows he was not  
11 represented by counsel. That's what we have. We have a  
12 record where everybody was passing the buck. No one said,  
13 hey, let's have a - - - a - - - an affirmative statement.

14 I mean, before the grand jury, there was no  
15 colloquy about pro se, none whatsoever. And then he walked  
16 into the grand jury. Everybody understands in the grand  
17 jury that he's representing himself. And then the very  
18 next time he's in supreme - - - supreme court - - -

19 JUDGE TROUTMAN: Except there was a discussion  
20 prior to him going to the grand jury. In fact, it was  
21 precipitated by his insistence that he wanted to testify in  
22 the grand jury. The court gave him a new attorney and  
23 said, I'm going to revisit the pro se issue, but did not  
24 make a determination that the defendant was pro se before  
25 he went in that grand jury.





1 MR. NURSEY: The - - - the - - - the court did  
2 not say you're pro se. But when he walked into the grand  
3 jury, everybody there, including a representative of the  
4 government - - -

5 JUDGE TROUTMAN: And you're saying that's enough?

6 MR. NURSEY: I'm - - - I'm saying that's allowing  
7 him to proceed without counsel.

8 JUDGE TROUTMAN: Thank you.

9 MR. NURSEY: Thank you.

10 JUDGE RIVERA: Can you just address - - - your  
11 red light is on, just very quickly - - - the point that  
12 it's on the warrant, that any defect was harmless? Is he  
13 right? No harm no foul?

14 MR. NURSEY: No. The - - - the - - - the - - -  
15 the July 28th warrant, the authorities already had in their  
16 possession since July 15th all of the material that was  
17 seized, all of the electronic material that was seized.  
18 And they were authorized by the July 15th warrant to take  
19 every single bit of data that was stored in that electronic  
20 equipment. And we have no idea if they went into that  
21 equipment in between July 15th and July 28th. But it  
22 doesn't matter. They had already improperly seized it on  
23 July 15th. You can't fix it with the July 28th warrant.

24 JUDGE GARCIA: If it authorized the seizure of  
25 this specific computer, let's say hypothetically, you know,



1 this computer, they even have the serial number?

2 MR. NURSEY: Uh-huh.

3 JUDGE GARCIA: And it's just a seizure? That  
4 would be too vague? And they're not authorized to go into  
5 it. They have not gone into it. They're just authorized  
6 to seize it.

7 MR. NURSEY: But that - - - yeah - - - that is a  
8 - - -

9 JUDGE GARCIA: Hypothetically.

10 MR. NURSEY: Hypothetically, if it all - - - all  
11 it said was, here is a specific computer, take this  
12 specific computer, and bring it back to the precinct?

13 JUDGE GARCIA: Right.

14 MR. NURSEY: Okay. And - - - and it doesn't have  
15 anything to do with it. Possibly that - - - you know, it's  
16 still got the Groh v. Ramirez problem. It still has it.

17 But that's a different situation than what  
18 happened here. They went in with a warrant that authorized  
19 them to take every single bit of data over - - - out of  
20 every single piece of electronic equipment that was seized.  
21 And they didn't come back and fix it, to - - - to the  
22 extent it was fixed on July 28th. We have no idea what  
23 happened with those.

24 JUDGE RIVERA: But I thought in part his  
25 argument, I may have misunderstood him, on the harmlessness



1 was that the - - - the prosecution didn't really rely on  
2 what was - - - what they concede was not particular, was  
3 overbroad.

4 MR. NURSEY: That - - - the - - - the - - - the  
5 - - - the sentence that they concede is overboard - - -

6 JUDGE RIVERA: Uh-huh.

7 MR. NURSEY: - - - is the sentence that  
8 authorizes taking computers.

9 JUDGE RIVERA: Uh-huh.

10 MR. NURSEY: And then after that - - -

11 JUDGE RIVERA: Uh-huh.

12 MR. NURSEY: - - - the warrant then says what you  
13 can do with the computers. And it - - - it - - - and  
14 what you can do with it is take every single bit of data  
15 that's in them.

16 JUDGE GARCIA: But I - - - I think what they're  
17 saying is the catchall computer phrase or line is  
18 overbroad, not the earlier language that specified certain  
19 devices, phones, and computers. I - - - I don't recollect  
20 so - - -

21 JUDGE SINGAS: Well, the earlier language just  
22 said two computers.

23 JUDGE GARCIA: So I think they're harmless errors  
24 and our argument is it's harmless to the extent we took  
25 things pursuant to the catchall because there was a cord



1 and a router.

2 MR. NURSEY: Okay. One thing - - -

3 JUDGE GARCIA: And although, those probably went  
4 in a bag; no one used them.

5 MR. NURSEY: You - - - you don't know what the  
6 police doing the seizure were thinking. They may have been  
7 thinking - - -

8 JUDGE GARCIA: But if it says - - -

9 MR. NURSEY: - - - we're taking this - - -

10 JUDGE GARCIA: - - - take X computer that's this  
11 serial number - - -

12 MR. NURSEY: But it - - -

13 JUDGE GARCIA: - - - and then there's catchall,  
14 you would think they took X computer with that serial  
15 number pursuant to the provision that said you can take X  
16 computer with this serial number.

17 MR. NURSEY: It - - - it didn't say X computer  
18 with a serial number. It said two laptops. It didn't give  
19 any further identifying - - -

20 JUDGE GARCIA: Didn't it give the make or  
21 something?

22 ACTING CHIEF JUDGE CANNATARO: Didn't give the  
23 manufacturer of the laptops?

24 MR. NURSEY: The - - - the - - - the second, the  
25 July 28th, did. This one just said two - - - two laptop



1 computers without any further identifying.

2 And - - - and - - - and - - - but again, it's - -  
3 - it's not the hardware we're talking about. It's what's  
4 inside the hardware. And - - - and - - - and they were  
5 authorized without any limitation, without any reference to  
6 any crime, that they - - - they were - - - they were  
7 authorized to go in and take, you know - - - you know, is -  
8 - -

9 JUDGE SINGAS: After filing a subsequent warrant  
10 though, correct?

11 MR. NURSEY: But we don't know that that's when  
12 they went in. It - - - it - - - it's very interesting.  
13 The prosecutor's witness who actually took the data out of  
14 the computer, Mr. Foramas (ph.), not once during his  
15 testimony did he state a date where he did it.

16 ACTING CHIEF JUDGE CANNATARO: Does that - - -  
17 does that not go to the record issues that were raised just  
18 a moment ago? Is it that the record here isn't very well  
19 developed in terms of whether there was this violation that  
20 you say?

21 MR. NURSEY: Well, if we're talking about the  
22 validity of a computer the - - - the - - - the prosecution  
23 has the burden in - - - in - - - in the initial stage to  
24 show that they were operating under a valid search warrant.  
25 That - - - some burden may shift to the defense after that,



1 but they have to show initially that they were operating  
2 under a valid search warrant. And if they went into those  
3 computers before July 28th, they didn't meet a burden of  
4 showing that they didn't go into them.

5 JUDGE GARCIA: And you're correct that - - - that  
6 it is two laptops, that the phone is described. I  
7 apologize.

8 JUDGE WILSON: I guess I thought your argument  
9 was a little bit simpler, which is if they'd broken into  
10 Mr. Baines' house without a warrant and taken the laptops,  
11 it doesn't matter if they get a - - - a later warrant to  
12 search the contents. And so going in with a warrant that  
13 is invalid - - - if it is, I'm not saying it is - - - but  
14 going in with an invalid warrant to get the laptops is no  
15 different than breaking into his home.

16 MR. NURSEY: Absolutely.

17 JUDGE WILSON: So I don't know what the second  
18 warrant really does here.

19 MR. NURSEY: And as - - - as Groh says,  
20 warrantless searches are presumptively unreasonable and a -  
21 - - and a search done without a valid warrant is  
22 unreasonable.

23 ACTING CHIEF JUDGE CANNATARO: Thank you,  
24 Counsel.

25 MR. NURSEY: Thank you.



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(Court is adjourned)

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

I, Jaymi D. Castleberry, certify that the foregoing transcript of proceedings in the Court of Appeals of Donell Baines v. The People of the State of New York, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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