

To be argued by  
Patrick Michael Megaro  
(15 Minutes)

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# NEW YORK SUPREME COURT

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## APPELLATE DIVISION - SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK

A.D. Docket # 2014-07802

-against-

MAURICE BROWN,

Queens County Supreme Court  
Indictment # 2278/2013

Defendant-Appellant.

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### REPLY BRIEF FOR DEFENDANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : SECOND DEPARTMENT

-----X **Docket # 2014-07802**  
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MAURICE BROWN,

Defendant-Appellant

**STATEMENT  
PURSUANT TO  
CPLR § 5531**

Queens County  
Indictment # 2278/2013

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1. The indictment number in the court below was Indictment # 2278/2013
2. The full names of the original parties were the People of the State of New York against Maurice Brown.
3. This action was commenced in the Queens County Supreme Court, Criminal Term with the filing of Indictment # 2278/2013.
4. This is an appeal as of right from judgments of conviction for criminal possession of a controlled substance in the Third Degree, Penal Law § 220.16-1, criminal possession of a controlled substance in the Fourth Degree, Penal Law § 220.09-1, three counts of criminal use of drug paraphernalia in the Second Degree, Penal Law § 220.50, and unlawful possession of marijuana, Penal Law § 220.09, entered in the Supreme Court, Queens County, on August 5, 2014 under Indictment # 2278/13, and sentence thereon to an indeterminate term of imprisonment of 15 years imprisonment. (Honorable Barry Schwartz, J.S.C., at trial and sentence).
5. The Defendant-Appellant is appealing on the original record.

Dated: March 14, 2017

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PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : SECOND DEPARTMENT

-----X Docket # 2014-07802  
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MAURICE BROWN,

Defendant-Appellant

**CERTIFICATE  
OF COMPLIANCE**

Queens County  
Indictment # 2278/2013

-----X

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury pursuant to 22 NYCRR § 670.10.3(f):

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 1,285.

Dated: March 14, 2017

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PATRICK MICHAEL MEGARO

## **ARGUMENT IN REPLY**

In filing this Reply, Defendant-Appellant points out only those matters he believes warrants a reply. He does not waive any issue or legal argument proffered in his Initial Brief by not expressly responding or restating it in this Reply Brief. Further, Defendant-Appellant specifically reincorporates his Statement of Facts and Argument herein.

### **I. BOTH THE STATE AND DEFENDANT-APPELLANT AGREE DEFENDANT-APPELLANT HAD STANDING TO CHALLENGE THE SEARCH WARRANT.**

The People first argue that trial counsel's motion to controvert and affirmation in support of the motion to controvert were sufficiently plead to establish standing. That assertion is not supported by the pleadings. In the affirmation supporting the motion to controvert, he referred to the premises searched as "the defendant's house" and "the defendant's premises," but he did not support that conclusion with any factual basis. It has been long settled that "an affirmation containing only legal conclusions instead of the 'sworn allegations of fact' required by CPL 710.60(1) and (3)(b) is insufficient to warrant a suppression hearing." People v. Murray, 172 A.D.2d 437, 569 N.Y.S.2d 12, appeal withdrawn (1st Dept. 1991); People v. Kitchen, 162 A.D.2d 178 (1st Dept. 1990); People v. Holder, 149 A.D.2d 325, (1st Dept. 1989); People v. Covington, 144 A.D.2d 238, (1st Dept. 1988); People v. Ricks, 96 A.D.2d 788 (1st Dept. 1983); see also, People v. Washington, 106 A.D.2d

593 (2d Dept. 1984); People v. Roberto H., 67 A.D.2d 549 (2d. Dept. 1979)). Trial counsel's conclusion that the residence was Brown's did not establish a factual basis to support standing.

The People also appear to take the position that because Defendant-Appellant stated in his **omnibus motion** that Brown "was arrested inside his home" that the trial court should have taken that into consideration to determine the merits of the **motion to controvert**. (People's Brief p. 22-23). The People cite no authority for this proposition because none exist. CPL § 710.60(1) prescribes the requirements for suppression motion pleadings. It does not permit a litigant to exclude facts from its pleadings and argue on appeal that the court should have considered a prior pleading as a factual basis. The People's attempt at writing new law should be rejected.

The People then argued that **Brown had standing** which trial counsel established through its pleadings and cited People v. Scully to support that he had standing in this matter. (People's Brief p. 23). Because the People have now conceded that standing existed and that the trial court erred by ruling Brown lacked standing, Brown need not address the merits of standing as standing is no longer contested. See People v. Cureaux, 147 A.D. 2d 493, 493 (2d Dept. 1989) (where the trial court denied Defendant's motion to suppress cocaine because it was in plain view, but the People conceded on appeal that the cocaine was not in plain view, and

the Second Department remitted the matter for a new suppression hearing because of the People's concession)).

## II. THE DARDEN HEARING WAS REQUIRED.

The People contend that probable cause existed and there was no need for a Darden hearing. It argued that because the trial court ruled that **Brown did not have standing**, there was no basis to request a Darden hearing. (People's Brief p. 24). Given that the People conceded there was standing, advancing this argument is incredible. The People clearly admit Brown had standing and used that as the basis to argue trial counsel "provided effective representation" in support of its standing argument. (See People's Brief p. 23). The fact that Brown had standing does not support the People's probable cause argument so it made an abrupt reversal of its position. Such flip-flopping of arguments demonstrates the People's inability to provide a cohesive position on Brown's challenge to the search warrant. Brown clearly had standing, and this Court should reject the People's argument that the Trial Court's holding that standing did not exist is a reason to end the probable cause inquiry.

The People also argued that the Darden hearing was unnecessary because probable cause for the search warrant was established through independent police observations and it relied on People v. Crooks, 27 N.Y.3d 609, (N.Y. 2016). (People's Brief p. 25). Crooks is distinguishable from the instant matter. In Crooks,



during each controlled buy, the confidential informant (CI) had a transmitter that recorded and provided officers with a live audio feed throughout each transaction. Id. at 611. Officers were able to listen to the conversations as the transactions transpired. Id. During the second buy, where officers were listening live, the Defendant called the CI to change the location of the sale and officers observed the CI go to the new location and meet the Defendant. Id. They watched the Defendant leave his apartment, get into a minivan, drive to the new location, meet the CI on the street and engage in the transaction. Id.

The ability of officers to listen live was an integral part of the Court of Appeal's holding. The Court held that, "the recordings constitute extrinsic proof of the informant's existence, to assure that he or she was not imaginary." Id. at 615. Brown argued in its Initial Brief the necessity of a Darden hearing to determine the veracity, reliability, and basis of knowledge for the search warrant. (See Brown's Initial Brief p. 15). The Court in Crooks was able to determine the reliability of the CI **because of** the recordings. Crooks' holding paralleled the language in Darden:

The question as to when and in what manner, if at all, identity of the informer and verification of his communication should be established calls for a sensitive and wise balancing of the rights of the individual defendant and the interests of the public. Such a procedure as we have described would be designed to protect against the contingency, of legitimate concern to a defendant, **that the informer might have been wholly imaginary and the communication from him entirely fabricated.**

People v. Darden, 356 N.Y.S. 2d 582, 586 (1974).

In the instant matter, the CI was not recorded. Officers watched the CI walk to a building and walk back to the officer. The only evidence to support the search warrant was the CI's unaccompanied actions that were not recorded. The trial court's decision stated:

[T]he search warrant affidavit shows that the confidential informant went to the specified premises on two dates, and on each date purchased cocaine from an individual whom he identified as being defendant. Accordingly, Judge Morris had ample evidence on which to reasonably conclude that the confidential informant was credible and that probable cause existed to issue the warrant.

Trial Court's Order p. 3.

This case did not raise sufficient grounds for probable cause to deny a hearing. [W]here 'there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer,' it would be 'fair and wise' for the People to 'be required to make the informer available for interrogation before the Judge.'" People v. Edwards, 95 N.Y.2d 486, 492 (2000)(quoting Darden at 181).

In Crooks the trial court also held a Mapp hearing which permitted the Court of Appeals to review "the exhibits and testimony regarding the detectives personal observations concerning both controlled drug buys." Crooks at 615. There is not a record to review in this case because the trial court did not grant a hearing.

Brown seeks this matter to be remanded for a hearing.

## **CONCLUSION**

For the reasons set forth above, Brown's convictions should be reversed and dismissed, or in the alternative, a new trial ordered, and this matter should be remanded to the Queens County Supreme Court for further proceedings on the Indictment.

Dated: March 14, 2017

Respectfully submitted,

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PATRICK MICHAEL MEGARO