COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers Sealed)

-against-

No. 127

STEVEN HENDERSON,

Appellant.

PEOPLE,

Appellant,

-against-

No. 128

NNAMDI CLARKE,

Respondent.

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20 Eagle Street
Albany, New York 12207
September 06, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

LEILA HULL, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant Henderson
111 John Street, 9th Floor
New York, NY 10038

ANN BORDLEY, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent Kings County
350 Jay Street
Suite 20
Brooklyn, NY 11201

ANN BORDLEY, ESQ.
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415

WILLIAM G. KASTIN, ESQ.
APPELLATE ADVOCATES
Attorneys for Respondent Clarke
111 John Street, 9th Floor
New York, NY 10038

CHIEF JUDGE DIFIORE: The first two matters on the calendar starting with appeal number 127, People v. Steven Henderson.

Counsel.

MS. HULL: Good afternoon. I'd like to reserve three minutes for rebuttal, please. May I reserve three minutes for rebuttal, please?

CHIEF JUDGE DIFIORE: You have three minutes.

MS. HULL: Leila Hull from Appellate Advocates representing appellant Steven Henderson. Had counsel challenged one dispositive adjournment, it should have resulted in dismissal in this case, and that is a clear-cut error. Counsel needed to say that the - - - that the People hadn't proven due diligence with respect to obtaining DNA testing of all relevant evidence in this case. This was an - - - this was an obvious omission because the People's obligation to establish due diligence, even when they're seeking an exception for extraordinary circumstances, is well established under this court's case law. Counsel should have made the argument because the People never, at multiple adjournments and in their response papers, never even tried to demonstrate that they acted with due diligence in

making a request for testing of all relevant evidence.

JUDGE GARCIA: This is a direct appeal, right, counsel?

MS. HULL: Yes.

JUDGE GARCIA: Why isn't this a 440 motion? I mean why do we have a record when we're going to go back in and reconstruct these arguments and their response, arguments that were never made, and rule that it's a 30.30 violation?

MS. HULL: Because all counsel had to do was to hold the People to their burden. There - - - you don't need any further information. The People have to establish in the first instance, affirmatively, that they acted with due diligence and they never demonstrated that at all here.

CHIEF JUDGE DIFIORE: But, counsel, is it your argument that the People must submit for testing every bit of forensic evidence to be developed in the case at the same time, up front?

MS. HULL: In a case like this one, where there are multiple perpetrators, so the scope of what counts as necessary testing is broader than maybe where there is one suspect where the semen samples, for example, would have been dispositive. That's a

different type of case than when you have here we've got multiple perpetr - - - suspected perpetrators up to, I believe, six or possibly more. And you have a complainant whose narrative has changed within the first few days of the incident. In that case - - - in this case, the scope of what's necessary - - - necessary to be tested is broader, and that was obvious here. And what is clear is that the People wanted a second bite of the apple.

JUDGE STEIN: But how do we know that the motion would have been dispositive? And don't we have to know that in order to fall under the - - - the one error rule? For - - - for example, might there not be a question about, I can think of several, but about whether the - - - the lack of the DNA affected the People's readiness or whether they could have, in fact, gone forward, whether there was enough evidence in the record or enough evidence to go forward and establish a prima facie case without it?

MS. HULL: Well, I think we have to - - - you can in this case because if you look at the adjournments, the reason why the People were not ready on - - - on August 13th, just want to make sure the dates are right, was because the OCME's report

wasn't final. That's their stated reason for not being able to proceed at that point. So yes, we can in this case - - -

JUDGE FAHEY: But - - - but that doesn't get to the - - - to the heart of the question, I think, that Judge Stein raised which is that this may be a substantive error. Is it a dispositive error? Will it change the outcome?

MS. HULL: Yes. Because - - -

JUDGE FAHEY: How so?

MS. HULL: Because, again, the People have to establish due diligence. It's their burden. And when they don't - - - this is an element to being able to obtain the exclusion. And when they don't, at all, in - - - either in their appearances on the record - - - and again, this court's case law has been very clear. The People have the burden of establishing at the adjournments or in their response papers conclusively that they're entitled to the adjournment, to - - - to an exclusion. And when they do not make that necessary record, they are charged the time. This Court has said that in Stirrup, it has said it in Cortes, and if I'm mispronouncing the names, I'm sorry, and I believe also in Washington, where that's a case again about an investigation and

People needing to demonstrate credible and vigorous efforts to move their investigation along.

This is analogous to that. And here, the People never made any attempt. What they tried to do was to take DNA and use it as a blank check to get an exclusion under an exceptional circumstance, and even if you have DNA, it's not a blank check. You have to show that you made the request for all necessary testing, and it was the People's burden to do that. And the People are the only people - - - sorry, the only - - - the only party to have that - - - have this information.

JUDGE FAHEY: So let's take it a step further. The serial testing, is that an event that is even in control of the People? Are you alleging that it is? Because OCME doesn't appear to, in my mind, be in control of the People.

MS. HULL: The People are in control of what is in - - - what they're requesting to be tested.

JUDGE FAHEY: Well, yes. That's a factual issue, right? And doesn't OCME control the sequence of the testing that would then take place?

MS. HULL: Well, the People would, again, need to demonstrate that. And here it - - - what we

do know is that they haven't done so. And a reasonable reading of the record, the only reasonable reading of the record, is that the People thought that once the semen - - - semen samples were tested that's it, because they adjourned ready for a final conference. They were ready to proceed. That - - -

CHIEF JUDGE DIFIORE: Was that not a responsible approach on the part of the People to test the semen sample first, and if that came out the way I'm sure they were hoping it were to come out, not to move to the next extraordinary expensive step of conducting additional forensic testing?

MS. HULL: Not in a case like this where there were multiple perpetrators. It's foreseeable from the outset that the semen samples may not link, physically tie, all of the suspects to this incident, so not in this case. I agree with you, if this was a case where there was a single - - - single perpetrator and the semen test would be dispositive, yes, and then they could seek additional testing just to strengthen their own case in some way. But that - - - they shouldn't seek an exclusion for that. But it - - - not in this type of a case where you've got - - - the People should have known from the outset that the scope of necessary testing is broader.

Their failure to establish that - - - that they made the request so that OCME would kind of consider all of the - - - all of the physical evidence, which would have been gathered in the same - - - you know, in the same rape kit, this is all available to OCME at the same time and that there isn't this round, this like preliminary result versus the final result.

JUDGE RIVERA: What - - -

JUDGE ABDUS-SALAAM: Is that - - - is that the rule that you would suggest that we adopt that there has to be a request that would show due diligence, or are you looking for something more like some sort of document or documented evidence that a request was made?

MS. HULL: At a bare minimum, they need to establish when the request was made. And because it shows to the extent the time line, whether they're asking for - - - if they're asking for it in a reasonable time period. And it - - - it's the People's burden to do so, and they have not met it here. And the record indicates that they didn't make that request before knowing the results of the semen tests.

JUDGE RIVERA: Can - - - can I go back to

your answer to the Chief Judge related to the serial testing? So are - - - are you taking the position, then, that there might be cases, I know you're taking the position this is not the case, but there might be cases where it would be an appropriate choice for the DA's office to do DNA testing in stages, the first stage proves negative, doesn't give them the results they wanted, so they go and test something else?

MS. HULL: I would caution that there is a category of cases where that would be - - - that would be appropriate. But the one example that I can think of is when the - - - they know from the outset the semen test is going to be a dispositive one, that they can't, you know - - - and that - - - and so that would be the one place where I would agree that that might be a circumstance where you can - - - you can test. But - - -

JUDGE RIVERA: Is that - - - is that where the defendant agrees but says it's on - - - it's consensual sex? When - - - when is that case, other than the example I just gave?

MS. HULL: I think it's a question of the number when you're not looking at ID.

JUDGE RIVERA: Okay.

MS. HULL: And that's what this case is

about. This is about physically tying our suspect, you know, to our client to this case. That's - - - so what - - - when ID is not at issue, then I - - - I don't - - -

JUDGE RIVERA: You're saying when there's more than one perpetrator involved in the sexual assault or the rape that that - - - that's when you will always have to test - - - test all DNA, all samples?

MS. HULL: All relevant evidence. Where - - - where there's a - - - there's a likelihood that the - - - that the semen samples, a specific category, isn't going to cover everyone. And the People knew this from the outset because at - - - at the January - - - at the January appearance they're talking about this may link one or two others. There is up to six possible perpetrators in this case, so they knew from the beginning that this couldn't cover everyone. And then by definition that means it could not necessarily cover this - - - this appellant. I'm - - - I'm sorry.

JUDGE GARCIA: I'm - - - I'm still having trouble with the posture of this case and why it isn't Brunner because it's an ineffective assistance motion, and you're asking us to rule on serial DNA

testing, an issue that was never raised below, right. And in order for it to be ineffective it has to be a dispositive motion that would have been made, and here we're arguing this novel issue in front of this bench. So how do that - - - how does that fit? I - - - I don't understand. Isn't this really a 440 motion?

MS. HULL: No, because even though we're talking about DNA, the People's obligation to not string out the process of investigating their - - - investigating their case has been well established by this court's case law. This court would never question the - - - charging the People when they tested, for example, for fingerprints, testing one finger at a time. They would - - -

CHIEF JUDGE DIFIORE: Would it not be helpful to know whether the OCME had certain protocols for the acceptance of submission of DNA testing evidence, if it's - - - if there's a prioritization assigned?

MS. HULL: Regardless of that, the People should still have to establish that they made credible and vigorous efforts, that's this court's language, to obtain - - - to even to - - - in - - - in dealing with OCME's own priorities, that they

sought testing of all of the necessary evidence.

JUDGE GARCIA: And maybe they would have if he had - - - if the counsel had made the motion below.

MS. HULL: They had multiple opportunities to make this. They were asked from - - -

JUDGE GARCIA: But this argument wasn't specifically raised. That's why we're here on an ineffective claim, right?

MS. HULL: Absolutely, but the People - - - it's the People's burden to establish the record. All counsel had to do was say the People haven't met their burden. Based on that, this - - - then there should have been a dismissal. So in light of the fact that all - - - that's the single argument that counsel needed to make, that's why this case is the antithesis to Brunner.

JUDGE GARCIA: So your argument would be once you do that, any argument with respect to why they didn't make the record is - - - is okay, we can consider that?

MS. HULL: Well, they had a chance. The point of - - - the point of a burden-shifting framework is to give the People their opportunity, and they had it.

JUDGE GARCIA: Right. But that's - - -

MS. HULL: They had it multiple times here.

JUDGE GARCIA: - - - a different issue than it's not preserved, right? So we've said this isn't preserved. There's no argument it's not preserved here. So - - - but that doesn't mean that the People didn't have the burden to come forward and make your record for you on an argument that wasn't presented?

MS. HULL: No, because the argument would have been presented only in the reply. That's the only moment where counsel would have been able to say - - - because they would have seen what the basis of the exclusion was. And that's - - - at that point, counsel says you know what; you didn't meet your burden. That's the moment where - - - that's the moment when that - - - that argument would be presented.

JUDGE GARCIA: Maybe there would have been a hearing or maybe there would have been further inquiry by the judge or maybe there - - - in a colloquy or maybe we would have a further developed record, which really would be the subject of a 440 motion.

MS. HULL: I know I'm past. Can I just make one, and I'll be done? If you - - - the point

here is when you've got - - - if you look at the Jan - - - the June 24th adjournment, the People, once they know the results of the semen testing, they - - - they adjourn for a - - - they agree to adjourn for a final conference. There is no outstanding request. They're not suggesting that there's going to be ongoing testing. This is the moment where they believe everything is final. It's after that that this changes. That's why this is unreasonable, and thank you for your patience.

CHIEF JUDGE DIFIORE: Thank you.

Counsel.

MS. BORDLEY: Good afternoon. My name is Ann Bordley, and I represent the respondent. Defendant's claim of ineffective assistance of counsel is meritless on this record. Trial counsel reasonably chose not to challenge the excludability of the fifty days from June 24th to August 13th for three reasons, only one of which involves the exceptional circumstances in the due diligence provision of 30.30(4)(g).

The first reason is a very simple and straightforward 30.30 exclusion. In the People's answer the People said that on June 24th defense counsel made a request for some additional paperwork.

And then on August 13th, 2009, the record shows the People provided additional discovery. So that's a discovery exclusion under 30.30(4)(a), so this exceptional circumstances, DNA testing, none of that even matters, and it's something the defense attorney would have known about. And so the defense attorney may not have chosen to contest this because he knew that the People were right, in fact, that this was a regular discovery delay. And for that reason alone, this claim is meritless.

There's a second reason. The second reason is that there is - - - that part of this delay for this period was the production of the DNA report with respect to the semen samples. Now the record shows that there were three different DNA reports that were produced during the course of the pretrial proceedings, but this refers to the first one about the semen testing. And this is the one that defense - - - the defense attorney particularly wanted because the results did not connect his client to the crime. And so at one point on August 13th, the court specifically asked defense counsel well, you know the result, you know it doesn't link to your client. Do you still want the report? And defense attorney said yes. He did see - - - want to see that report. And

those documents are excludable under 30.30(4)(a), again, as a discovery request. He's entitled to it as a matter of discovery. He's entitled to the raw - - - the raw data that the medical examiner's office developed.

And in addition, in this particular case he wanted to see the final report. He wanted to see the medical examiner's office's final report. And in fact, during the defense case, the defense attorney, they introduced it in the form of a stipulation, but he in - - - did introduce evidence of the DNA results of the DNA testing in this case.

And - - - and I know the defense attorney, in their brief they argue that, well, it took too long for the medical examiner's office to produce its report. But the Appellate Division has held that delays by third parties generally are not counted against the People for purposes of 30.30(4)(a). And in evaluating the effective assistance of counsel, this court has emphasized that you do look at what he Appellate Division case law is. The court considered that in Brunner and in Baker and in Verona (ph.).

JUDGE PIGOTT: You get the impression sometimes that whatever the DA delay is that it - - - it's understandable but if the defense does it it's

not. I don't understand why if the - - - if the medical examiner's got problems, why that - - - that inures to the benefit of the DA. You're supposed to be ready for trial when you indict the darn thing, and you ought to be going. We're talking about a case in 2009 that's now up here seven years later, and we're arguing over days that occurred a long time ago. And it just seems to me that an exceptional circumstance would be something other than a delay by an - - - by a medical examiner or someone else. That's kind of routine. And I would think, at some point, you would either move to compel the medical examiner to decide it, to get you the stuff, or try the case without it.

But for the defendant, particularly if they're in - - - if they're in custody and there's a presumption of innocence, to sit there because everybody just says well, you know, he's going to take his time or she's going to take her time and all of this time goes, and all of a sudden, you know, we're - - - here we are arguing a case that's seven years old.

MS. BORDLEY: Well - - -

JUDGE PIGOTT: And I'm wondering where the speedy trial comes.

MS. BORDLEY: Well, first, Your Honor, I would like to defend the medical examiner's office. They worked very diligently and tried to speed up the amount of time taken by DNA testing. DNA testing has expanded - - -

JUDGE PIGOTT: But that would not be exceptional circumstances. It's just the way things go. And I - - - I would think that you would have that pre - - - pre-indictment, wouldn't you?

MS. BORDLEY: It - - - it takes a very long time to do this kind of testing. I would note, in this particular case, they - - -

JUDGE PIGOTT: No, did you understand my question?

MS. BORDLEY: They - - -

JUDGE PIGOTT: Wouldn't you have that pre-indictment?

MS. BORDLEY: No. You don't always have it pre-indictment, - - -

JUDGE PIGOTT: Not always. But why - - - I mean, do you understand my point? I - - - I - - -

MS. BORDLEY: But you - - -

JUDGE PIGOTT: It just gets troubling that - - - you know, and here the - - - the judge did a, you know, pretty extensive job of saying these

eighty-three days, these twenty-one, it's like a matrimonial. That's not what we're supposed to be doing. We're saying six months this case is thrown out of court because it's not ready. Now if there's a reason why it's not ready, it ought to be exceptional. And I'm not sure that delay in a - - - in a normal course of - - - of a medical examiner or anyone else is exceptional.

MS. BORDLEY: If the defense attorney had raised this claim pretrial or if they were raising this claim now on a 440 motion, we would have the medical examiner's office come in. They would testify, and they would explain all of their efforts to speed up - - -

JUDGE RIVERA: But didn't you need to explain that?

MS. BORDLEY: Well, not if - - -

JUDGE RIVERA: You're the one who's saying it's excludable. Why - - - why aren't the People - - - why isn't that the People's burden - - -

MS. BORDLEY: Well - - - well, Your Honor - - -

JUDGE RIVERA: - - - to explain that?

MS. BORDLEY: This - - - this period was exclu - - - the particular period at issue was

excludable, partly for discovery reasons.

JUDGE RIVERA: I understand.

MS. BORDLEY: Partly for the DNA report.

JUDGE RIVERA: But let's just stick with the DNA.

MS. BORDLEY: But with respect to the DNA, remember, there's the DNA report on the semen samples, and then the results of the testing of the fingernail scrapings. They represent two different issues because if you look at this, they had the DNA profile in the semen samples by the time of the arraignment on the indictment. I think that's, in fact, very, very quick that by the time - - - that time. But then they had to get the - - - the buccal swab from the defendants and then they had to develop the - - - the DNA - - - DNA profile from that and do the comparison and do the report. And - - -

JUDGE FAHEY: As I - - - as I understand the argument, it's not - - - it's not the first run, the semen run of the DNA testing. It's the sequential testing that's being - - -

MS. BORDLEY: Well - - -

JUDGE FAHEY: - - - attacked here.

MS. BORDLEY: Well, actually, for the three different reasons, again, you have this discovery

that's unrelated to DNA. You have the DNA report on the semen samples, and that's related to the semen samples. It's only when you get to this third argument, our third fallback argument, where we say, yes, you should exclude for exceptional circumstances the time for the fingernail scrapings. Now the record shows that we promptly requested DNA testing. We know we've got them already doing a DNA profile by the time of defendant's arraignment on the indictment. Now - - -

JUDGE FAHEY: So why - - - why - - - look, and it comes down, why'd you wait so long on the fingernail scrapings?

MS. BORDLEY: That - - -

JUDGE FAHEY: Why did you wait so long on the fingernail scrapings?

MS. BORDLEY: I'm - - - I'm stuck here because of the record because if they raised it in a 440 motion, we would show, of course, the DA's office always wants prompt DNA testing, especially in a case like this. We had seven perpetrators. We had only two under arrest.

JUDGE RIVERA: But isn't that the point? So why don't you get to that. Isn't that the point? You're saying that's your burden to come forward with

that to begin with so why isn't it your burden because that's obviously your position? Why isn't it?

MS. BORDLEY: If - - - if the defense had come in, we would have responded about what happens when we give over a - - - a rape kit to the medical examiner's office.

JUDGE RIVERA: You're saying under the statute it is not your burden to put that information forward?

MS. BORDLEY: I - - - I think that if - - -

JUDGE RIVERA: Or it's only your burden if they raise it?

MS. BORDLEY: I think if the defense - - -

JUDGE RIVERA: And do you agree that if they had raised it you would have had to come forward with that information?

MS. BORDLEY: Yes, I think it would have been - - -

JUDGE RIVERA: Do you agree, then, that your initial response was insufficient - - -

MS. BORDLEY: No.

JUDGE RIVERA: - - - under the statute?

MS. BORDLEY: No. I don't agree our initial response is. I think defendant - - - this

court has held in Luperon and in Beasley and in countless cases about how the preservation works in this context. Defense attorney only has to make a very simple one-page request for it. We come back with a response. Then the defense comes in with their specific objections, and we start focusing on the particular periods. Had the defense attorney said this at that time, we would have come in and we would have said, basically, we - - -

JUDGE ABDUS-SALAAM: Counsel, are we - - -

MS. BORDLEY: - - - were not responsible for the delay. We asked for the rape kit to be tested. The medical examiner's office does what it does under its scientific protocols.

JUDGE ABDUS-SALAAM: Counsel, are we collapsing these two arguments? As I understand it, the defense is arguing primarily that his counsel was ineffective because he didn't make an argument that you - - - that the People had not met their burden. And you seem to be talking now about the burden but not in connection with ineffective assistance of counsel. You're - - -

MS. BORDLEY: Yes.

JUDGE ABDUS-SALAAM: - - - talking about it generally. So - - -

MS. BORDLEY: I was trying to respond to the question asked, yes.

JUDGE ABDUS-SALAAM: - - - you can respond - - - you can - - -

MS. BORDLEY: The particular issue here is whether defense counsel was ineffective, and we can't evaluate that on direct appeal, at least with respect to the DNA testing. Because we - - - you have not heard what we would have to say on this subject. And if defense attorney files a 440 motion, we will then present evidence from the medical examiner's office where you will hear them give facts and statistics about the huge number of DNA tests they are called upon to do, about their very, very diligent efforts to speed up that process. But on some occasions, in some cases, that's going to take longer.

JUDGE STEIN: I want to go back just a minute because you talked about other discovery - - -

MS. BORDLEY: Yes.

JUDGE STEIN: - - - and a period of time in which you say that defense counsel had requested further discovery. I was unable to see where on the record - - -

MS. BORDLEY: Yes.

JUDGE STEIN: - - - that request was made.

MS. BORDLEY: The prosecutor, in their answer, said that there was this additional request, and then on the August 13th, on the record on August 13th there is just a general reference of an open file discovery being provided, and that's all that it says. But that would be okay, especially - - - well, this court in Berkowitz said that you decide the 30.30 motion at the time - - - 30.30 motion at the time the 30.30 motion is made. You don't have to decide it on each and every adjourn date, litigate 30.30. But in particular, the Second Department has also very - - - upheld in a case called People v. Robinson, which is cited in my brief, said you don't actually - - - the fact that the prosecutor didn't mention the reason for the adjournment on the adjournment date doesn't matter if the record otherwise supports the prosecutor's explanation.

JUDGE STEIN: But I thought the - - - the prosecutor said we have more discovery for the defendant - - -

MS. BORDLEY: Yeah.

JUDGE STEIN: - - - not necessarily in response to any particular request, meaning that there - - - that an adjournment was due to that request.

MS. BORDLEY: Yes. But - - -

JUDGE STEIN: That's what I don't see any support for.

MS. BORDLEY: Yes, but the prosecutor did allege it as part of their answer. And here's the sworn allegation of fact by a prosecutor, which the defense attorney has not disputed, and it's something in defense attorney's knowledge, so he could have disputed that. If he said no, no, I didn't make that request, or you should have given me that stuff earlier, I was just making the request because you hadn't turned it over, all that could have been raised. But significantly, in this case defense attorney never did challenge it, and the presumption has to be it's because he had a reason not to challenge it.

And if defen - - - and if the defense disagrees, they can bring a 440 motion, and then we can have the defense attorney testify about his reasons for not challenging this period. And the People can put in more evidence about what steps they took about the DNA testing and how the medical examiner's office in New York City handles DNA tests. Because you can't make that decision about what was reasonable and what is a reasonable delay with - - -

JUDGE PIGOTT: I - - - I understand that. I guess it's - - - my - - - my question is more the plaintiff won in the sense that if they're so busy, what do you do? I mean there's a six-month statute of limitations here or a speedy trial statute, and - - -

MS. BORDLEY: I - - -

JUDGE PIGOTT: - - - and my thought is what's exceptional about the fact that you say it happens all the time? And so you, defendant, even though you've got six months, you really have a year-and-a-half because the OCME is so far behind and we haven't gotten the tests ordered yet so the six months is meaningless. I know that's not what you mean, but I'm - - - I'm just asking myself, you know, why is it an exceptional if you say that's the way it is? It's not exceptional then.

MS. BORDLEY: Well - - - well, first, I would break down some of this time. Some of this time that we're saying DNA is - - - part of this time is the motion practice where we seek to get a DNA sample from the defendant, and that's just motion practice. That also falls under 30.30(4)(a). And you also have the DNA reports. And the defense attorney can waive his right to the report. He can

say I have the results, I don't need the report, let's not delay the case for the report. In this case, he very much wanted the report. So in fact, the DNA testing time's a little bit shorter. In a lot of cases, DNA testing can be faster. Sometimes, it becomes very obvious that they're not going to get a DNA profile from the samples they have.

JUDGE STEIN: Do you concede that you were not ready for trial without the fingernail DNA results?

MS. BORDLEY: I - - - I don't know necessarily, but I think it - - - I don't think - - - for this particular period, we're only arguing exclusions and - - - and so we think the exclusions would be establi - - - that we have sufficiently established this under the exclusions so that you don't have to reach the readiness issue. And also because the readiness law has changed a little bit from what it was when this occurred, and so that may also be a - - - that's also sort of a factor.

CHIEF JUDGE DIFIORE: Counsel, perhaps I didn't hear the answer that you gave to Judge Fahey's question. Why wouldn't the prosecution submit everything up front to the OCME?

MS. BORDLEY: I - - - I'm sort of limited

to the record here. But of course we do. We want all this information. It only helps us. You know, if - - - again, in our particular case, if the DNA results link to the two defendants we have under arrest, these cases are much stronger. If it doesn't - - -

JUDGE FAHEY: But - - - but - - -

MS. BORDLEY: - - - it's going to identify another perpetrator.

JUDGE FAHEY: Slow down. But you didn't.

MS. BORDLEY: No - - -

JUDGE FAHEY: And there's no - - - we're not arguing that the DNA testing here was sequential, that the semen was tested first and the fingernail samples afterwards, right? So - - -

MS. BORDLEY: That's what the ME's office decided, but that's not what the district attorney's office asked them to do, and there's a huge difference. That is a third party. They make their own decisions based on their evaluation as forensic scientists. If you ask a prosecutor, they want everything tested immediately the day before yesterday. What we can get from the medical examiner's office is slightly different, and their criteria and how they decide to test things - - -

JUDGE RIVERA: But - - -

JUDGE ABDUS-SALAAM: Are you saying - - -

MS. BORDLEY: - - - is different.

JUDGE RIVERA: On the - - - on the record all the DA had mentioned initially was the semen. What - - - well, how does the record support this position that of course you asked for everything up front?

MS. BORDLEY: Well - - - well this goes to our background problem. This is really a 440 claim because nobody raised this issue.

JUDGE RIVERA: I guess we're back to isn't it your burden to when you say these dates are excludable or these days are excludable and it's because there's DNA testing, we asked for it, we were diligent - - -

MS. BORDLEY: Yes.

JUDGE RIVERA: - - - we did the following but we're waiting?

MS. BORDLEY: Then it's up to the defense attorney to go and say wait a second, I'm disputing that, and okay, now we're going to come forward with additional evidence. There also is true - - -

JUDGE RIVERA: You're disputing what? If you - - - if you said I asked for everything, this is

the date I asked for it, we're waiting, what - - - what are they disputing? We're waiting?

MS. BORDLEY: No. That the way - - - the way that we had established it that we made a duly diligent req - - - request for it. And also, it can be true since all of our requests go to the medical examiner's office, the defense bar in Brooklyn is somewhat familiar with it. So they know what some of these answers are. They can also call the medical examiner's office. So they know; they're more familiar with the procedures. Again, it's not on the record here.

JUDGE RIVERA: Call - - - call OCME to find out the status of - - -

MS. BORDLEY: And they can also - - -

JUDGE RIVERA: - - - this testing?

MS. BORDLEY: Yeah, and they can also find out who - - - who made that decision. You can look at their current manual, which is online, it's from 2015. And it says fingernail scrapings will not be done unless a supervisor has specifically signed off on that request. Now here we're talking about 2009 and we would go - - -

JUDGE PIGOTT: All right. I - - -

MS. BORDLEY: - - - and this is their

policy.

JUDGE PIGOTT: Ms. Bordley, I - - - I promise this is it, but that's - - - that's why it's not exceptional. You know that the ME says we're not doing these, so you need an order from the judge saying do these. And I know you're going to say it's not in the record and that's why we ought to have a 440 - - -

MS. BORDLEY: Yes.

JUDGE PIGOTT: - - - which is a very good argument. But I - - - I just get confused that it's not exceptional.

MS. BORDLEY: I - - - I would suggest there are two remedies. A court could send the case out to trial, denies an adjournment, send it out, and say you're going to try it without the DNA testing. And if you've done the DNA testing and you don't have the report defense counsel's entitled to, I'm going to bar the DNA evidence. They could do that if they wanted to. They could also issue an order to the medical examiner's office. I would suggest that would be difficult because all of the judges would be issuing these orders all the time and the poor medical examiner's office wouldn't know what they could do. But - - -

CHIEF JUDGE DIFIORE: Thank you.

MS. BORDLEY: Thank you.

CHIEF JUDGE DIFIORE: Counsel.

MS. HULL: I know I went over, so I hope I still have three minutes.

CHIEF JUDGE DIFIORE: You may.

MS. HULL: Okay. So can I just quickly address the non-DNA discovery argument? This is a post-readiness case. You're looking at the DA's delay alone under (3)(b), so even if there is other discovery, which I believe - - - I agree with Judge - - - Judge Stein that the record does not support that there is a specific request for additional discovery, and I'd also note that the date for completion of open file discovery had passed. That was March 2009, so that had passed already. So even if the DA is handing over other discovery that's not reasonable or not a basis for the exclusion, and defense counsel would have known that that date, the March '09 date, is in his initial 30.30 motion.

JUDGE PIGOTT: You concede preservation's an issue, right?

MS. HULL: I'm raising this as ineffectiveness. I absolutely concede that the argument here isn't preserved.

JUDGE PIGOTT: Because, honestly, I - - - you know, as - - - as Ms. Bordley points out, you make the motion saying speedy trial and then they say here are the answers, and - - - and you've got to preserve a complaint about a specific time.

MS. HULL: Yes.

JUDGE PIGOTT: Which surprises me because it would - - -

MS. HULL: Well - - -

JUDGE PIGOTT: Go ahead.

MS. HULL: This - - - this court's case law is very clear about counsel needing - - - if the People - - - if the People identify a basis for the exclusion, defense counsel has to reply and say what factual legal impediments prevent or bar the exclusion from applying. That is - - - all counsel had to do here was to say they didn't even say due diligence, they just said DNA or they pointed to discovery, which doesn't apply.

JUDGE RIVERA: So you agree with the People it's not their burden up front?

MS. HULL: No. It's their burden in their response papers or it's their burden - - - I mean it's their burden throughout the process and certainly, at the end in their response papers.

Again, look at the fact that you've got the judge and you have defense counsel asking the People about the status of these - - - of the DNA testing for at least three adjournments. By the time it gets to their response, they've had four bites at this apple, and they didn't say a word.

JUDGE RIVERA: So I'm sorry. So is your - - - is your argument, then, that - - - that counsel is ineffective for failing to point out they had not met their burden or for failing to meet his own burden?

MS. HULL: For replying and - - - and pointing out - - - supplying the court with a legal reason, a legal basis, to dismiss. That's - - -

JUDGE PIGOTT: Could you do that orally?

MS. HULL: Could I do that orally?

JUDGE PIGOTT: Yeah.

MS. HULL: Yes.

JUDGE PIGOTT: And so why do we know that it's not preserved? I - - - I can see these papers going in front of a judge and there being oral argument not on the - - - not on the record in which the defense lawyer say, judge, look at this, this isn't exceptional. The - - - the ME's late as usual. That's not exceptional at all. I win.

MS. HULL: Well, we don't have - - - we don't even have that argument said anywhere.

JUDGE PIGOTT: Right, which is what Ms. Bordley is saying why ought to have a hearing.

MS. HULL: But that's why counsel is ineffective.

JUDGE PIGOTT: Okay.

JUDGE GARCIA: Right. But if - - - going back - - - may I, Judge?

CHIEF JUDGE DIFIORE: Of course.

JUDGE GARCIA: Going back to the earlier point that you were just discussing in our clear procedure for preserving, wouldn't it be at that point that this issue would have been explored on the record? And we don't have that record so we're trying to reconstruct what their arguments would be, what counsel's arguments would be there. And isn't that really a 440 motion?

MS. HULL: Not when you've got a rec - - - not when you have the People agreeing that there is a final - - - agreeing to a final conference once they have the semen results because of having been asked because that point, in their mind all necessary testing is final. It's complete. It's only after that that there is a discussion of additional tests.

In light of that, no, you don't - - - we don't need any further information. They didn't make - - - and - - - and the fact that they didn't come back when the court asks we've been waiting, counsel - - - you know, prosecutor, we've been waiting since May for these results and this is in August. And the prosecutor simply says additional testing. That's it. Doesn't explain that they asked for - - - when they asked for it or didn't demonstrate their due diligence.

JUDGE GARCIA: Wait. But I know we're over - - -

MS. HULL: I'm sorry.

JUDGE GARCIA: - - - but you're pointing to things are in the record and they're there, but they're not in the format of this argument and a response. So we're reconstructing from different parts of a transcript what might be the answers to a motion, had it been made - - -

MS. HULL: Had counsel - - -

JUDGE GARCIA: - - - properly made.

MS. HULL: Sorry. Had counsel simply said again - - - and I know I've said this a hundred times, I'm very sorry. If counsel had said the People hadn't met their burden and the court denied

the motion and this went up on appeal, it would have been reversed. It should have been reversed under this court's case law, under McKenna, under Anderson, under all of these cases where the People have to establish that they acted reasonably. They would have - - - this would have resulted in a dismissal.

JUDGE GARCIA: But those are cases where we had a record to make those determinations.

MS. HULL: That's - - - but even under Washington, for example, where you have the People simply saying investigation and not demonstrating their credible and vigorous efforts, that's where you find fault. You find fault with the prosecutor not demonstrating those things affirmatively.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. HULL: Thank you.

CHIEF JUDGE DIFIORE: Next, appeal number 128, People v. Nnamdi Clarke.

Counsel.

MS. BRODT: Good afternoon; Sharon Brodt from the Office of Richard A. Brown for the People. I'd like to reserve two minutes for rebuttal, if I may.

CHIEF JUDGE DIFIORE: Two minutes?

MS. BRODT: Two minutes, please. Okay. In

this case, there were exceptional circumstances demonstrated by the People because this is an unusual case. And I start with the fact that exceptional circumstance is a fact-specific issue for each and every case. This is a DNA case where, subsequently, the Second Department has determined that the People did not diligently request the defendant's DNA to match against the sample that they have from a crime scene - - -

JUDGE GARCIA: Just to go to that point right away, I mean isn't this the flipside of the case we were just hearing? I mean this is a fact-specific question. We're not going to - - - I mean are - - - are the parties asking us to put a rule in that DNA testing never counts against the People's time or it always counts against the People's time? I mean it's really a case-by-case fact-specific inquiry. So what would we do here with it?

MS. BRODT: Precisely, Your Honor. And what we're asking the court to do is two things. One of them is to determine that due diligence is determined by the facts of the case. And in this case, the Appellate Division simply erred - - - errored in finding that under the very unique facts, that don't even exist anymore - - - unfortunately, it

doesn't have a specific impact going forward because the circumstances that existed here, and I'll get to them in a minute, don't exist anymore. But in general, that due diligence is very fact-specific and that due diligence can be demonstrated in different ways. And it's not determined, as the defense would have it, by what the People could have done but what they should have done under the circumstances.

CHIEF JUDGE DIFIORE: So how was due diligence demonstrated here?

MS. BRODT: Okay. So what happens here is there is a cop shoot, so there are crime scene swabs all over the place and what they are is off guns, all right. And at the time, and this is what makes it unique and not the case anymore, it was very rare to get samples, DNA samples, off of guns. The reason they existed in this case was for two reasons - - - was, I'm sorry, for one reason which is that it was low copy DNA, it was a very small sample off skin cells that - - - not typical at the time, not semen, not serological, not blood, not any of the things that one would expect to yield DNA.

So two things happened: First, there was an unusual type of DNA being collected and - - - or being derived by the OCME, and second, that the OCME

had a protocol, which also doesn't exist anymore, in - - - of not - - - of not notifying the People unless there was a match. Because this defendant happened not to be in the system, there was no match. And this case, because of that, is extremely unique, and we are saying that - - - we're not saying that if it were a rape kit that had been tested, as in the other case, the People wouldn't have had a burden, if they didn't get a result after a certain amount of time, to say - - -

JUDGE ABDUS-SALAAM: So, Counsel, let me - - - let me understand what you are saying. You're saying that because this was something that was new at the time, that the People didn't have some sort of burden to follow up with the OCME to get any kind of result from - - - or whatever the OM - - - OCME was going to say about the swabs that were taken?

MS. BRODT: That's exactly what I'm saying. What I'm saying is that, for example, if it were a rape kit or if there were blood collected, the People - - - the prosecutor would have been on notice that if somehow OCME didn't contact us after a certain amount of time, something was wrong. We needed to call.

JUDGE PIGOTT: Why then - - - why then when

you - - - when he was arraigned, did you say you were ready for trial?

MS. BRODT: At the time, we had two gun - - - the case was - - - the case also changed posture in the middle of the case when the first gun was suppressed. And that changed the nature of our case.

JUDGE PIGOTT: But you're - - - you're - - -

MS. BRODT: We were going to try it without - - -

JUDGE PIGOTT: - - - either ready for trial or you're not. I - - - and you know, part of this - - - and I didn't ask on the - - - on the first case, don't the police do this stuff? I mean why - - - why isn't the police taking stuff to the - - - to the medical examiner and asking it be tested and then bring it to you? I mean there's statutes of limitations that aren't even close. And then it's - - - then it is ready and then it goes to you, the lawyers, and then you can - - - you can move it ahead. For you to assume the burden of a further investigation and then attribute that - - - and then delay the whole case - - - I mean I - - - I keep looking at these things. This is an almost-ten-year-old case that's in front of us now, but that's

another issue, I guess. But the delays are incredible.

MS. BRODT: Okay, Your Honor. There are a number of things here, and at a risk of going off my topic, first of all, the police did do the testing and did deliver it to OCME.

JUDGE PIGOTT: So you were ready at arraignment. You - - - when it was indicted, you could - - -

MS. BRODT: When - - - when we announced ready - - -

JUDGE PIGOTT: - - - you could have picked a jury that day and this case would have been over.

MS. BRODT: Precisely. Had the first gun not been suppressed, we were never intending to look at DNA. So that was one thing that also changed, and the court noted that in its decision.

JUDGE STEIN: But even after it was suppressed, did you need the - - - the finger - - - the - - - I'm sorry, not the - - - the new type of DNA?

MS. BRODT: We - - -

JUDGE STEIN: Did you need that in order to proceed?

MS. BRODT: We didn't absolutely need it.

We could have proceeded without it. But 30.30 law - - - and - - - and let me address the question that was asked before. First of all, at the risk of diverting from this argument, 30.30 is not a - - - a statute meant to get a defendant to trial, over the sacrilege here.

CHIEF JUDGE DIFIORE: It's not intended - - -

MS. BRODT: To get a defendant to trial within six months. That's not actually what 30.30 is. Constitutional speedy trial is what looks out for a defendant not sitting forever in jail unfairly. The People can lose a case - - -

JUDGE RIVERA: Well - - - well it's - - - it's to prevent prosecutorial dilatory conduct.

MS. BRODT: Precisely.

JUDGE RIVERA: So what - - - why are you not dilatory here when you don't even ask?

MS. BRODT: Okay. If - - - if I may say - - -

JUDGE RIVERA: Um-hum.

MS. BRODT: - - - as the court knows, we can lose a case off one day. We can - - - we have a - - - we can be ready - - -

JUDGE RIVERA: Yeah.

MS. BRODT: - - - within 183 days where there's 182 days in the six-month stretch and we can lose a case. So it's clearly not about the absolute speed about which defendant goes to trial, but it is about us being ready, us being not dilatory. And again, readiness has a certain definition. It's somewhat up in flux right now because of Sibblies and because of the cases that are currently on appeal from the Sibblies issue. But it has never meant - - - trial readiness has never meant that the People have to forego collecting additional evidence during the pendency of the case.

JUDGE ABDUS-SALAAM: Counsel, can - - -

MS. BRODT: It means - - -

JUDGE ABDUS-SALAAM: Can you tell me when did the People - - - I think in your papers you say that the OCME faxed in May something about results from the - - - well, that they had a new test that they could do, the LCN test. Now when did your office or when did the People ask the OCME about the results that had been - - - the sample that had already been provided?

MS. BRODT: Okay. And - - - and that's one of the key questions because - - - and I'm low on time, but one of the key question is that because the

defendant's DNA had yielded some sort of result well before, and OCME had that result, it is not a hundred percent clear from the record, but it is at least inferable from this record that the reason OCME faxed us that letter in May was based on our request. That was when we req - - - we - - -

JUDGE FAHEY: Well, the problem - - - the problem is is I thought in February 2008 OCME issued a report. That was five months before OCME's report became final in 2008. And the pros - - - now the prosecutor knew about this and he reached out to OCME five months after that in May of 2009.

MS. BRODT: No.

JUDGE FAHEY: You're shaking your finger. No?

MS. BRODT: No. I'm - - - I'm saying OCME had a report but they did not notify us of that.

JUDGE FAHEY: So - - - so let me - - -

MS. BRODT: And the date on that repo - - -

JUDGE FAHEY: - - - stop you. Just stop. What - - - if you asked the question nine months later, why didn't you ask the question a year before? What - - - what took you so long?

MS. BRODT: That's the - - -

JUDGE FAHEY: You know.

MS. BRODT: It's - - - it's not quite a year, but that's the key question. Why did we ask in May?

JUDGE FAHEY: Well, so tell me the answer.

MS. BRODT: All right. And the answer is we don't know a hundred percent from this record. And here's why we're recommending among - - -

JUDGE FAHEY: Wasn't that - - - is the argument that we're having right now, is that a preserved argument?

MS. BRODT: It's not preserved by the defense but we didn't rely on preservation for the following reason: The - - - the record is a little bit murky, as 30.30 records tend to be.

JUDGE FAHEY: The - - - the reason I ask about preservation is the only thing I see as - - - as preserved is - - - is that - - - that the People's argument that they shouldn't be expected - - - that they should be expected to request a DNA sample during plea negotiations. That's the only thing that actually seems to be clearly preserved for appellate review. It seems like everything else is unpreserved, right?

MS. BRODT: No, no. There's more to that. There's - - - there's more - - - one of the things

the prosecutor argued that there's oral argument that preserves additional information at various adjourn dates. There is argument about the fact that defense attorney was not conceding that he would go forward with this low-copy DNA, for example - - - I see my time has expired, if I may just finish - - - DNA - - - but he was not conceding that and therefore, we would either have to do a Frye hearing or wait for the results of the other Frye hearing. There were other arguments preserved.

But if I may quickly go to the core thing, one of the remedies we're asking for here is a hearing that perhaps should have been ordered by the 30.30 judge below. It's not unusual for the Appellate Division to remand for a hearing where they say due diligence should - - - should have been further explored. They did that recently in another case in Queens about producing a defendant, what was our due diligence. So all I'm getting to here is one of the reasons we're asking for a hearing as a remedy is precisely that, it's unclear why we asked. We - - - I have additional knowledge that I can't - - - you know, it's not part of the record. But - - - but we can speculate about some reasons, including the fact that now LCN DNA was becoming more common. They were

recovering stuff from guns.

JUDGE FAHEY: The problem - - - the problem with that argument, listen, is is that scientific advances in DNA testing have been going on all the time. You have to deal with it. That's the bottom line.

MS. BRODT: Right.

JUDGE FAHEY: That's your obligation. You can't tell someone they got to sit in jail for six more months while you develop the protocol to - - - to address scientific evidence that's your responsibility to bring forward. It's an impossible situation to try someone under.

MS. BRODT: Correct, Your Honor. And that's why we're saying it's the combination of two things, the fact that it was new and therefore, the prosecutor would not have known to request it, and the fact that - - -

JUDGE FAHEY: So the - - -

MS. BRODT: - - - there was this protocol.

JUDGE FAHEY: So the reason he didn't request it I guess it was nine months earlier when - - - when he really could have practically, is because it was new, in essence?

MS. BRODT: We don't know a hundred

percent, but that may be one of the reasons.

JUDGE FAHEY: I see.

MS. BRODT: There are other reasons, as well.

JUDGE STEIN: Related question to that is the question of due diligence a mixed question of law and fact?

MS. BRODT: It - - - I believe it might be. And - - - and the issue here is should the Appellate Division, perhaps, have remanded for a hearing. Certainly, this court - - - unfortunately, it's not one where there's a sufficient record to uphold the Appellate Division's decision, even if it's a mixed law - - - question of law and fact because, in this particular case, there are issues that need to be resolved.

JUDGE FAHEY: Yeah, and law and fact. I - - - see, that's another one. I thought that was just raised in the reply brief. It wasn't raised earlier, I didn't think.

MS. BRODT: What? I'm sorry.

JUDGE FAHEY: Your contention that it may be a mixed question of law and fact. You cite Luperon, I think, and that was only raised on reply.

MS. BRODT: It may well be, Your Honor. I

don't recall. But we're not - - - we weren't so much relying on it. We were more relying on the idea that, perhaps, this is - - - the remedy here is a hearing. So - - - and that we did raise in the main brief.

JUDGE FAHEY: Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel. Counsel, what about your adversary's argument that the prosecution is a dynamic ongoing event and that the need or the perceived need to test evidence develops through the process?

MR. KASTIN: Well, in a - - - in a vacuum maybe that's correct, but there has to be an endpoint. Otherwise, what is the point of 30.30? You can't have the People wait until the eve of trial in May 2009 and say, hey, you know what, there was a gun tested. Let me find out what those results were. This incident occurred in November 2007. Within three months, the OCME had a report saying from the swab that DNA was found on the gun. That is in February of 2008.

Fifteen months go by. Fifteen months before the People finally reach out to the OCME and they say what's going on with the gun swabs? And we

know that because the People acknowledge it in their brief on page 6. They say that it was apparently pursuant to the prosecutor's query. And when we look at the facts from the OCME sent to the People, which is on appendix page 133, it says "as per request." That's dated May 13th, 2009. So on the eve of trial, the People decide let's start the DNA process now, and that is why they failed to show due diligence.

JUDGE ABDUS-SALAAM: And do we know whether that LCN DNA test was available before May 2009?

MR. KASTIN: It - - - it's unclear from the record, but I don't think it matters. The due diligence doesn't shift based upon technological advances. They knew that this gun - - - the swabs had been sent to the OCME. And the People raise - - -

JUDGE ABDUS-SALAAM: What - - - what if, counsel, in March-April 2008, after the OCME's report came out in February, the prosecutor called the OCME's office and they provided these results but then later on it became clear that there was a new test that could have been conducted to find out about the DNA results? Would that change anything?

MR. KASTIN: It would change something. Well, that would be in a year in advance from when

they actually did. So yes, that would show more due diligence than they did here. But waiting more than a year after that initial report - - -

JUDGE ABDUS-SALAAM: So it's only if they - - - they only need to request something? Whether that request results in anything or not, they just - - - they just have to show that they made some effort to - - -

MR. KASTIN: They have - - -

JUDGE ABDUS-SALAAM: - - - find out what the DNA result was?

MR. KASTIN: As this court said in Washington, they have to show vigorous activity. This is hardly vigorous activity. This is no activity. The People put forward all these different grounds for why there were delays. For example, they say the suppression ruling. The suppression ruling changed everything. It changed the entire case. The suppression ruling suppressed the gun that was discarded first. The suppression ruling had no effect on the crux of the case. The majority of the counts on the indictment concerned the unsuppressed gun. So if the People knew that was the focus of the case, there's no reason why the suppression ruling should have delayed requesting the DNA swabs. In

addition - - -

JUDGE GARCIA: Counsel, I'm sorry. I'm - - - I'm still kind of back at what are we really being asked to review here? Because it really does seem - - - the Appellate Division found this was not excusable or exceptional circumstances based on a whole variety of facts, which you were just getting into some of them. So I - - - I'm puzzled, somewhat, by what are we supposed to do with that ruling, I mean, as a matter of law? I mean they looked at this, we've talked about mixed question, and I don't understand what are we supposed to review? Are we supposed to make a rule that says it's never excludable, it's always excludable, or is this really something that we don't reach?

MR. KASTIN: No, Your - - - Your Honor, I think that the court should - - -

JUDGE GARCIA: By the way, that's a softball question.

MR. KASTIN: I welcome any. So I think - - - I think this court should issue a rule saying that in a DNA case, it is the prosecutor's responsibility to show due diligence in vigorously pursuing the DNA evidence.

JUDGE PIGOTT: That's the law now, isn't

it?

MR. KASTIN: It is the law now but - - -

JUDGE PIGOTT: So why do we have to say it again?

JUDGE GARCIA: Right.

MR. KASTIN: Well, I think some prosecutor's office need a - - - issue.

JUDGE PIGOTT: Because I think Ms. Brodt's right to some extent. You know, it's funny when you read these cases and it says when they address speedy trial they say, well, it's six months and they say in this case, 182 days, in this case, 183. Because it's a loose - - - she's right. It's not - - - you know, it's not some Constitutional thing. It's - - - it's six months, and the six months ebbs and flows depending on which six months are in there.

MR. KASTIN: The calendar, correct.

JUDGE PIGOTT: So it gives you the impression, on the whole, get the darn thing done, but there is some play.

MR. KASTIN: Well, sure. And speedy trial itself has certain exemptions that are pretty broad, motion practice, discovery, things like that.

JUDGE PIGOTT: Right.

MR. KASTIN: But here, because the People

waited for months and months before they even inquired, it's clearly not due diligence.

JUDGE GARCIA: So if we have the rule, as Judge Pigott was just saying, and the Appellate Division applied it to these facts, what more is there for us?

MR. KASTIN: An affirmance, Your Honor. That's what I would ask for. Because that's - - - it's well - - -

JUDGE GARCIA: That's the ultimate softball.

MR. KASTIN: Well, yes. It's well established that based upon the case law the People failed to show due diligence.

JUDGE RIVERA: So is there due diligence if - - - if they inquire, let's even be generous, if they inquire weekly and it's three years later and they still don't have results?

MR. KASTIN: Yes. That would show due diligence. That's showing some effort. That's showing vigorous activity to - - -

JUDGE RIVERA: They're not responsible for any delay on the OCME side under the statute because the statute is focused on them and their conduct?

MR. KASTIN: That's correct. That's what

the statute is about. 30.30 is intended to be a statute where it encouraged the People to show diligent prosecution, eliminating obvious - - -

JUDGE PIGOTT: Well, you'd be making the argument that you can't just ask and after the - - - and after you don't get an answer after three requests you ought to bring a motion. You would say it's not due diligence to send them twelve consecutive monthly letters.

MR. KASTIN: Well, yes. If it went on for three years and all they're doing is making a phone call and nothing's happening, yes, I don't think that reaches the level of due diligence. It changes.

JUDGE RIVERA: That was the question.

MR. KASTIN: That wasn't a question.

JUDGE RIVERA: No, that was the question.

MR. KASTIN: Well, it was - - - if they - - - if they are cont - - - my point was if they are continuously active, continuously in contact with OCME and continuously trying to move the prosecution along.

JUDGE RIVERA: But, yes, as Judge Pigott's already pointing out, does there come when mere inquiry, and I think as Judge Abdus-Salaam was suggesting before, is not going to be enough if,

indeed, the OCME is taking time that, from the defendant's perspective - - -

MR. KASTIN: Yes.

JUDGE RIVERA: - - - is too long?

MR. KASTIN: Yes, absolutely. I - - - I didn't mean to be too - - -

JUDGE RIVERA: We need to address that here?

MR. KASTIN: Well, in this case, it wouldn't even reach that level. So I don't know if this is the proper case - - -

JUDGE RIVERA: No inquiry, um-hum.

MR. KASTIN: - - - to address it. I think this case should declare, again, the rule that when the People fail to show any effort, it clearly does not meet due diligence.

I want to touch quickly on the fact that the People's argument that they say this wasn't traditional DNA. It's irrelevant. It's clearly irrelevant. We can't have a sliding scale of what constitutes due diligence based on scientific advances. The People knew the gun was tested for swabs. That alone, it doesn't matter what evidence - - -

JUDGE STEIN: But - - - but I thought due

diligence was a - - - and maybe you don't agree with this, is a sui generis inquiry, it depends on the circumstances. So why couldn't the suddenly new availability of some scientific process constitute extraordinary circumstances?

MR. KASTIN: Because - - - because in this case they made no effort - - -

JUDGE STEIN: I'm not talking about this case.

MR. KASTIN: Okay.

JUDGE STEIN: I'm talking about I thought I heard you say that it - - - it can't be a sliding scale, so my question was why not? Why can't be that considered, in appropriate circumstances, to be exceptional?

MR. KASTIN: When - - - my reference to sliding scale was - - - was more in the sense of because there is a new technology, we drop the ball altogether. That's - - - that's not permissible.

JUDGE STEIN: Well, let's just assume that they were inquiring and inquiring and - - - and prodding and prodding to get - - - to get this DNA and then they find out that - - - suddenly, they find out that there's this new process and so they want it.

MR. KASTIN: But - - - but the OCME had done that in February. They had discovered this but the People just - - - what - - - the fact that the People, they People are claiming that because there was this new technology they don't have to inquire at all, and that can't be the rule.

JUDGE STEIN: No, no., but that's not my point.

MR. KASTIN: Okay.

JUDGE STEIN: My point is what if they were inquiring and then came to find out that there was this new process?

MR. KASTIN: That - - - that would be fine. If they were inquiring, they were showing due diligence. But here they were not.

Unless the court has any further questions, I ask for an affirmance.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. KASTIN: Thank you.

CHIEF JUDGE DIFIORE: Ms. Brodt.

MS. BRODT: Here's why this is actually not as simple as affirming where there is some factual dispute and Appellate Division seems to have resolved it against us. This is the unique situation where we didn't just not inquire, we didn't inquire because we

relied upon a protocol of the OCME, that we believed was in place, that was a protocol they set up. We relied on it, in part, because the technology was new, so we had no reason to believe that we should be inquiring.

And that's my point about due diligence, that due diligence, because it's fact-specific, because it depends on the circumstances of the case - - - normally, again, my example of if it were a rape kit or blood and we sat - - - we - - - we knew it was tested, we didn't hear from OCME, and we sat on it for a year and three months, that would be a very different circumstances from thousands of guns that are being swabbed and nothing - - - we - - - we didn't - - -

CHIEF JUDGE DIFIORE: So the prosecutor has no obligation to keep current with the new technology and what's being done in the forensic science labs?

MS. BRODT: Of course the prosecutor has an obligation. But here's the thing. The thing is at that point it was so new that it didn't - - - it almost didn't exist in terms of what OCME was reporting to us. What happened was it did become, probably one of the things that - - - again, it's speculation because the record is not clear on this,

one of the things that may have kicked off the inquiry was the fact that now it was becoming known that there was some results coming off of guns. And we saw that there - - - we did have a voucher. We always have the police voucher that showed that it'd been swabbed, and we looked at it and we said, wait a second, maybe there are results. It's not clear what prompted the prosecutor, but for some reason, she called and she got the results. It's - - - again, the point I'm trying to make is that it's very fact-specific, and on this record, the fact finding by the Appellate Division was incorrect. And that's why we're asking this court, at the very least, to remand it for a hearing.

JUDGE GARCIA: There's really very little facts in the Appellate Division opinion, but what they do do, by their decision, is say they looked at all these things, they looked at it's a new science. And as Judge Stein was getting at, there may be circumstances, but they decided these weren't those circumstances, where this was excusable. So, really, what we would be doing is just looking at those facts and saying no, under these facts that it is excusable.

MS. BRODT: Well - - - well this court does

have that level of factual review power of looking at the facts and saying that the results - - - that the - - - I'm sorry, that the conclusion of the Appellate Division that this time - - - that we did not show due diligence is not supported by the unique circumstances of this case, and therefore, their - - - it - - - it would be just unfair to ask the prosecution to have a due diligence requirement under - - - I'm sorry, we always have a due diligence - - - to have met that by what the Appellate Division was requiring of us.

CHIEF JUDGE DIFIORE: Thank you, counsel.

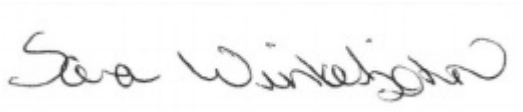
MS. BRODT: Thank you, Your Honor.

CHIEF JUDGE DIFIORE: Thank you, all.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Steven Henderson, No. 127, and People v. People v. Dru Allard, No. 128 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 8, 2016