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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 196

TODD HOLLEY,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
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

Appearances:

ANDREW C. FINE, ESQ.
THE LEGAL AID SOCIETY
Attorneys for Appellant
199 Water Street
New York, NY 10038

JOSHUA L. HABER, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 196, People v.
2 Holley.

3 MR. FINE: Yes, Your Honor. Andrew Fine
4 for the defendant, Mr. Holley.

5 This is another identification case in
6 which there's an issue of fundamental fairness
7 presented. And that is, if you have a Wade hearing,
8 should the judge have the opportunity to evaluate the
9 procedure that was conducted by looking at it? The
10 prosecution says no. The prosecution says there is
11 no duty on the part of the police to save and copy
12 and keep - - - keep a copy of a computerized photo
13 array that's generated by a computer - - -

14 CHIEF JUDGE LIPPMAN: Yeah, yeah, but were
15 there - - - were there other IDs in this case aside
16 from that - - - that one witness who - - - who looked
17 at the - - - what is it called, the - - - the photo
18 manager program?

19 MR. FINE: Yes, there were two witnesses -
20 - -

21 CHIEF JUDGE LIPPMAN: So what about them?
22 Why aren't - - - why - - - why isn't - - - they
23 weren't influenced by - - - by the - - -

24 MR. FINE: Well, first of all, Ms. Han,
25 Yoori Han, who did not see the photo array, did see

1 the line-up, which we contend independently is
2 suggestive and taints her in-court identification - -
3 -

4 CHIEF JUDGE LIPPMAN: What - - - what is
5 independent? What was wrong with the line-up?

6 MR. FINE: What was wrong with the line-up
7 was it was suggestive as a matter of law. That's our
8 argument in this case and - - -

9 CHIEF JUDGE LIPPMAN: Counsel, do you want
10 rebuttal time? It's - - -

11 MR. FINE: Yes, I'd like two minutes, Your
12 Honor.

13 CHIEF JUDGE LIPPMAN: Two min - - - keep
14 going, go ahead.

15 MR. FINE: Yes.

16 CHIEF JUDGE LIPPMAN: So what's wrong with
17 the line-up? Say it again.

18 MR. FINE: What's wrong with the line-up, I
19 mean, that - - - that's a separate part of our
20 argument, but - - -

21 CHIEF JUDGE LIPPMAN: Yes, but - - - but -
22 - - but again, if there's independent of the photo
23 manager, if you have good IDs that are not influenced
24 - - - even if you're right - - - by any
25 suggestiveness, why - - - why - - - why do you have a

1 case?

2 MR. FINE: Take - - - take a look at the
3 line-up, Your Honors, on pages A7 and A8.

4 CHIEF JUDGE LIPPMAN: Yeah, we've looked at
5 the line-up. What's wrong with it?

6 MR. FINE: What's wrong with the line-up is
7 that the defendant was the only person in the line-up
8 who - - - who was - - - who was basically within the
9 range that the photo manager selected initially,
10 which was the basis of the composite description
11 given by the eyewitnesses.

12 He was - - - it was - - - they were
13 collecting people between thirty - - - black men
14 between thirty and forty years old, between six foot
15 and six four. Our client was the only one who fit
16 within that - - - within those criteria. The only
17 person who was not either heavy or almost - - - or
18 much older than the defendant, was the person
19 standing next to him, and that person was twenty-two
20 years old, not thirty or forty years old.

21 CHIEF JUDGE LIPPMAN: You're saying as a
22 matter of law, the line-up was no good?

23 MR. FINE: There is no support in the - - -

24 CHIEF JUDGE LIPPMAN: Based on the photos
25 and the line-up?

1 MR. FINE: There is no support in the
2 record for the conclusion of the lower courts that
3 the line-up was not impermissibly suggestive. The
4 defendant actually does stand out like a sore thumb.
5 If you know what the criteria were, you know what the
6 identification criteria were that were given to the
7 police by the identifying witnesses - - -

8 CHIEF JUDGE LIPPMAN: But what's your - - -
9 what's your precedent that tells us that's a matter
10 of law, because you argue that - - - that he's - - -
11 he's skinnier than the others. Where - - - where
12 does - - -

13 MR. FINE: Not just - - - not just
14 skinnier, but the only person - - -

15 CHIEF JUDGE LIPPMAN: Why isn't it a mixed
16 question, the line-up?

17 MR. FINE: It is a mixed question
18 ordinarily, but when there's no support in the record
19 for the lower court's determination, this court has
20 the power to evaluate it as a matter of law.

21 CHIEF JUDGE LIPPMAN: What about McBride?
22 Does that - - - you know, what about McBride, the
23 case?

24 MR. FINE: There - - - there are cases in
25 which the court has held that a line-up is - - - that

1 a line-up is not reviewable. This is not such a
2 case, because we have a situation here where the
3 line-up is suggestive as a matter of law.

4 There is no way to evaluate this line-up if
5 you know what the - - - this - - - this - - - the
6 features were that were given to the police by the
7 identifying witnesses and you look at this line-up,
8 you'll see that the defendant is thirty-two years
9 old. He's skinny. The only other skinny person in
10 the line-up is number 4. Number 4 is ten years - - -
11 ten years younger than the defendant - - -

12 JUDGE FAHEY: Yeah, but they're seated.
13 See - - - you got them seated. The - - - the
14 clothing they're wearing - - - we've looked at the
15 photographs. Our problem, of course, is we have
16 black and white photos in our - - -

17 MR. FINE: It also does not - - - does not
18 - - -

19 JUDGE FAHEY: But it doesn't solve your
20 legal problem. I want to take a st - - - a want to
21 take a step back. I know you want to talk about the
22 line-up, but I want to talk about the - - - the photo
23 management system. I think the Appellate Divisions
24 all agree that failure to preserve the array creates
25 a rebuttable presumption.

1 MR. FINE: Yes.

2 JUDGE FAHEY: All right. So that being the
3 case, isn't the pres - - - so I'm assuming - - -
4 let's say - - - let's say we - - - let's say we did -
5 - - this is a - - - a suggestive - - - it's rebutted
6 - - - it's - - - it's suggestive in - - - in that
7 clearly they can preserve the computer records, and
8 that doesn't seem to be a - - - a difficult problem.

9 Why isn't the detective's testimony enough
10 to - - - to really rebut the presumption?

11 MR. FINE: Because the detective did not
12 input into the - - - into the computer the
13 appropriate criteria to evaluate the photo array,
14 number one. Number - - - I mean, we - - - first of
15 all, we contend as a threshold that the entire array
16 should have been duplicated regardless, because there
17 is no legitimate reason - - -

18 JUDGE FAHEY: That's - - - that's okay.
19 But I just want you to - - -

20 MR. FINE: Yes.

21 JUDGE FAHEY: - - - just answer my
22 question.

23 MR. FINE: Assuming - - - assuming that the
24 - - - assuming that the - - - there is no absolute
25 duty to preserve the array - - - assuming that

1 there's an inference of suggestiveness that the
2 People are trying to overcome, the reason that they
3 didn't overcome it here, in addition to the fact that
4 there are only twelve photographs that were actually
5 put out before the witness - - - before the witness
6 made the identification. Only twelve, not seventy -
7 - -

8 JUDGE FAHEY: Well - - -

9 MR. FINE: - - - not eighty.

10 JUDGE FAHEY: Yeah, but she looked at 132,
11 I thought.

12 MR. FINE: She worked at - - - she looked
13 at - - -

14 JUDGE FAHEY: Whatever.

15 MR. FINE: - - - there - - - there's a
16 dispute as to how many she looked at. But once you
17 look at the defendant's photograph and identify that
18 person as the perpetrator, it sticks in your mind.
19 There's - - - there's scientific research that has
20 demonstrated something called the "commitment
21 effect."

22 JUDGE STEIN: So - - - so you're saying
23 that in any situation where the witness happens to
24 pick out someone in the first few photographs, that's
25 - - - that's going to be presumptively suggestive?

1 MR. FINE: Yes, absolutely, Your Honor.

2 There has to be - - -

3 JUDGE STEIN: How many - - - how many does
4 it have to be? Does it have to be 20, does it have
5 to be 50, does it have to be 150? When does it not
6 become presumptively suggestive?

7 MR. FINE: Well, let - - - let - - - there
8 are two answers to that. My main answer is, if you
9 have the technological ability to - - - to press copy
10 file and print, there's no justification for not
11 allowing the judge at - - -

12 CHIEF JUDGE LIPPMAN: So you're saying - -
13 - you're saying, if they had pressed copy file and
14 print, and she had made the identification in the
15 first twelve pictures, that could be okay, right?

16 MR. FINE: Sure. If the - - - if the judge
17 had the opportunity to look at the two pictures and
18 determine that there was no suggestiveness, that
19 would be fine.

20 CHIEF JUDGE LIPPMAN: So - - - so my point
21 is - - - so are you arguing that if you don't press
22 copy fi - - - file and print, that's dispositive?

23 MR. FINE: That's our - - - that's one of
24 our arguments. Our - - - our - - -

25 CHIEF JUDGE LIPPMAN: It's an absolute - -

1 - an absolute requirement.

2 MR. FINE: But our secondary - - - our
3 secondary - - - our backup argument here is that when
4 you have a situation in which you have the person - -
5 - the police officer who determines which photographs
6 are going to be in the array does not input one of
7 the composite portions - - - important composite
8 portions - - - of the description given by the
9 identifying witnesses, in this case, namely that the
10 person was skinny, and leaves that out - - -

11 JUDGE PIGOTT: How do you - - - how do you
12 decide that? I - - - you know, I think back in the
13 old days when they had the big picture books, you
14 know, and you flipped through. You wouldn't want - -
15 - you wouldn't want that. I mean, that's just
16 showing everybody.

17 So put yourself in the position of the
18 police and any - - - not in your case, but in - - -
19 in the next case, what do they do? They got this - -
20 - this system that's supposed to be pretty - - -
21 pretty sharp. It's got 3,000 pictures in it or
22 something. You wouldn't want them to show all 3,000
23 pictures, because that might be influential in one
24 way or another. You wouldn't want them to show six,
25 because that would be, you know, trying to influence

1 the - - - what's the - - - what's the - - - what are
2 the police supposed to do when they trying to find -
3 - -

4 MR. FINE: We're - - - we're not
5 criticizing the manner in which the police show the
6 array to the witness; we're ma - - - we're - - -
7 we're contesting the manner in which the police
8 officer generated the array in the first place.

9 JUDGE PIGOTT: Right, so - - - so - - - so
10 if he - - - how should he generate an array if he has
11 3,000 possible pictures?

12 MR. FINE: Well, he shouldn't have had
13 3,000 possible pictures, because if he'd input thin
14 frame or thin build - - -

15 JUDGE PIGOTT: Well, no, you're - - - now
16 you're - - - you - - - you're saying that it's okay
17 to use the computer then. You're not - - - they - -
18 - they - - -

19 MR. FINE: That's - - - that's fine. But
20 when you have a composite description, there is no
21 justification for not inputting into the computer
22 every important element of that composite
23 description, which in this case includes thinness.
24 The officer admitted he could've typed in - - -

25 JUDGE PIGOTT: Well, let me - - - let me -

1 - - let me follow up on that. I - - - you know, my
2 definition of thin - - - you're thin. Aren't you
3 happy about that?

4 MR. FINE: I - - - I - - - I plead - - - I
5 plead - - -

6 JUDGE PIGOTT: You would dispute that.

7 MR. FINE: - - - not guilty to that
8 allegation.

9 JUDGE PIGOTT: So how did - - - I mean, you
10 - - - you - - - you've got - - - how do you decide
11 stuff like that? How do you decide tall? How do you
12 decide - - -

13 MR. FINE: Well, the computer has criteria
14 for evaluating body type and - - - and the officer
15 admitted that. He could have input so - - - a
16 basically a thin - - - a thin build into the computer
17 - - -

18 JUDGE PIGOTT: Can you put in a fat build?

19 MR. FINE: - - - and it would have
20 eliminated fat people from the computer.

21 JUDGE PIGOTT: Could he have put in - - -
22 but that's the point. I mean, your "thin" and my
23 "thin" aren't the same.

24 MR. FINE: Yeah. I mean, there's no such
25 thing as a perfect array - - -

1 JUDGE PIGOTT: Right.

2 MR. FINE: - - - but this would have made
3 the array unquestionably much fairer than it would
4 have been unnecessarily otherwise. In these twelve
5 photographs that the witness saw, there may have been
6 four or five people who were obese. There may - - -

7 JUDGE RIVERA: Right. But can't - - - but
8 your - - - your point is that that particular
9 characteristic matters because it is actually
10 displayed in the array. It's obvious from the array.
11 Because if it's a characteristic that you can't tell
12 from the array, it wouldn't matter.

13 MR. FINE: Well, our - - - our - - -

14 JUDGE RIVERA: The characteristics that are
15 shown.

16 MR. FINE: Well, the - - - the array that
17 would have contained pictures only of skinny people
18 was not - - - was not preserved in this case. We're
19 not saying that the array would have to include fat
20 people in order to be suggestive. We're saying that
21 the police officer has an obligation to - - - to
22 input into the - - - into the computer all of the
23 criteria that were given by the witnesses.

24 CHIEF JUDGE LIPPMAN: Counsel, but let me
25 come back to the point before. If the line-up was

1 okay, it doesn't matter, right?

2 MR. FINE: Okay, but - - -

3 CHIEF JUDGE LIPPMAN: They both have to be
4 - - - in order for you to win, both the array has to
5 be bad and the line-up's bad, because there were
6 people who didn't see the master program, right?

7 MR. FINE: Well, there are - - - there are
8 three witnesses in this case.

9 CHIEF JUDGE LIPPMAN: Yes.

10 MR. FINE: The witness who saw the array -
11 - -

12 CHIEF JUDGE LIPPMAN: The two others who
13 didn't see the - - - the master program.

14 MR. FINE: If the witnesses see the array -
15 - - saw the array, it's eliminated. We're down to
16 two witnesses.

17 CHIEF JUDGE LIPPMAN: Right. So if the
18 line-up is good, you lose, right?

19 MR. FINE: No, if the line-up is good, we
20 don't lose, because - - -

21 CHIEF JUDGE LIPPMAN: Why not?

22 MR. FINE: - - - because we have only two
23 witnesses left, and one of those two witnesses, Ju
24 Eun Lee, made no prior pre-trial identification at
25 all, the - - - the issue which - - - which was being

1 discussed in a previous argument. There were - - -
2 there were - - - there were months that went by be -
3 - -

4 CHIEF JUDGE LIPPMAN: So you can't just
5 have it at trial.

6 MR. FINE: You can't just basically say she
7 is fine, and she - - - her identification is
8 reliable.

9 CHIEF JUDGE LIPPMAN: Okay, what about the
10 third witness?

11 MR. FINE: The third witness, Yoori Han,
12 made an in-court identification but was exposed to
13 the suggestive line-up. You're dealing with - - -

14 CHIEF JUDGE LIPPMAN: Right, but I asked
15 you if the line-up was good, can you win?

16 MR. FINE: Yes, because the errors were not
17 harmless. In this case, there was no evidence
18 against the defendant other than identification
19 testimony. This - - - this crime occurred in
20 Manhattan. The officer had to go to Brooklyn and to
21 Bedford-Stuyvesant, to a homeless shelter, to arrest
22 the defendant. When he arrested him, he apparently
23 was not wearing any of the clothing that was
24 described by the witnesses as - - - as had been worn
25 by the perpetrator.

1 JUDGE PIGOTT: He probably hurt himself,
2 though, when - - - you know, after he - - - after he
3 did the purse-snatching that he came back and tried
4 to assault the defendant - - - I mean, at least - - -
5 at least they had two shots at him getting his ID
6 right.

7 MR. FINE: I'm not sure what you're asking,
8 Your Honor.

9 JUDGE PIGOTT: Didn't he - - - did - - -
10 when they went to - - - when they went to report the
11 possible purse-snatching - - -

12 MR. FINE: Yes, yes, the perp - - -

13 JUDGE PIGOTT: - - - didn't he come back?

14 MR. FINE: The perpetrator came back, yes.

15 JUDGE PIGOTT: Yeah.

16 MR. FINE: If it was the defendant, the
17 perpetrator came back.

18 CHIEF JUDGE LIPPMAN: Okay, okay, counsel.

19 MR. FINE: Okay.

20 CHIEF JUDGE LIPPMAN: You'll have your
21 rebuttal.

22 MR. FINE: Thank you.

23 CHIEF JUDGE LIPPMAN: Let's hear from your
24 adversary.

25 MR. HABER: May it please the court, Joshua

1 Haber for the People.

2 CHIEF JUDGE LIPPMAN: Counselor, don't you
3 have an obligation to produce these pictures, the - -
4 - the master program? Copy it and give it up? Why -
5 - - why is that - - - why is that so difficult to do?

6 MR. HABER: First of all, in terms of
7 whether we had a legal obligation here to - - -
8 whether the police had a legal obligation to save and
9 produce these photos, there is not a single court - -
10 -

11 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
12 doesn't it make common sense that you have a - - -
13 that you have that obligation?

14 MR. HABER: No, Your Honor. And that's
15 because of the - - -

16 CHIEF JUDGE LIPPMAN: No, you don't? You
17 have it at your disposal and you're not giving it in
18 to - - - isn't it a basic issue of fairness?

19 MR. HABER: No, Your Honor, because when
20 we're talking about the specific procedure used here,
21 a canvassing array - - -

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. HABER: - - - the inherent nature of
24 that array is inherently nonsuggestive for the
25 important fact - - -

1 JUDGE PIGOTT: Well, you say that, but that
2 - - - that's our point, I think, is the People want
3 to say, well, it's totally nonsuggestive. We are so
4 good at this that believe me, we're right, and
5 therefore, there - - - you know, there's no reason
6 for us to save what we showed to the - - - to the
7 witness.

8 MR. HABER: It's not - - -

9 JUDGE FAHEY: Yeah, you create - - - you've
10 created a situation where your presumptions can't - -
11 - can't be tested. If you say that the system itself
12 is inherently insures against this, then you say that
13 this can't be tested in a court of law, and that - -
14 - that can't be what we're here for. We're here to -
15 - - we're here to make sure that everybody gets to
16 test the alleged facts.

17 MR. HABER: The issue is not the system, in
18 other words, the photo manager system. The - - - the
19 - - - the issue is the point at which the
20 identification is occurring in terms of the
21 investigation. The concept inherent in
22 suggestiveness, decades worth of case law teaches us,
23 starts with the premise that the police have a
24 suspect in mind. You go back to Wade. You go to
25 this court's rulings in Chipp and so forth. The

1 police always have a suspect in mind.

2 And therefore, when they create an array or
3 a line-up around that particular suspect, of course a
4 court wants to look at the fillers that were
5 surrounding that suspect.

6 JUDGE FAHEY: Because of - - - because of
7 computer sophistication now, you can have a profile
8 in mind even though you may not have a suspect in
9 mind, and that may be what we're dealing with here.
10 And because of the way the data is gathered now, you
11 can do that. So shouldn't that be available to the
12 other side?

13 MR. HABER: If there were any evidence in
14 this case that the police had a profile of somebody
15 in mind, I would agree with you, Your Honor.

16 JUDGE FAHEY: Well, they did. They had a
17 profile of a guy of - - - of a tall, skinny, African-
18 American male with a particular age range and a
19 particular body weight. So they did have a profile
20 in mind, and that's why - - - that's why, when you
21 look at the line-up, if it's not suggestive, then
22 they roughly met that. The same thing would apply to
23 a photo array. Why not turn that over to both sides?

24 MR. HABER: Well, the biggest problem that
25 we have in this case, really, is a lack of a record,

1 okay.

2 JUDGE FAHEY: Okay, so - - -

3 MR. HABER: The defendant - - -

4 JUDGE FAHEY: - - - let's talk about - - -

5 let's talk about a rule then for future records.

6 Should we require that they need to be turned over?

7 That even if - - - even if - - - shouldn't we say

8 that we don't, like the other Appellate Division

9 says, you've created a rebuttable presumption. And

10 that you - - - you can respond. I asked the other

11 side about whether or not the detective's testimony

12 was sufficient to do it, but nonetheless, shouldn't

13 he be able to do that?

14 MR. HABER: No, Your Honor. Again, there
15 should not be a rebuttable presumption when there is
16 a canvassing array like the one that occurred here.

17 First for the - - -

18 JUDGE FAHEY: If the record isn't
19 preserved, I'm talking about.

20 MR. HABER: I'm sorry?

21 JUDGE FAHEY: If - - - it's only a
22 rebuttable presumption if the record isn't preserved?

23 MR. HABER: Yes; again, I would strongly
24 encourage Your Honors not to require a - - - a
25 rebuttable - - - rebuttable presumption if a

1 canvassing array of hundreds or thousands of photos
2 are not preserved.

3 JUDGE STEIN: Can I - - - can I ask you a
4 question? If - - - if it was to be saved and - - -
5 and printed - - - save, file, print, whatever - - -
6 would it come out in the same order as it was shown
7 to the witness?

8 MR. HABER: Again, getting back to what I
9 was saying in response to Judge Fahey's question,
10 there's no record here. There is just no record in
11 this case. The defendant asked - - -

12 JUDGE STEIN: So we don't know - - - you're
13 saying we don't know the answer.

14 MR. HABER: We don't know. We don't know.
15 The defendant could - - -

16 JUDGE RIVERA: On that, let - - - let - - -
17 let me follow up on - - -

18 MR. HABER: Yes.

19 JUDGE RIVERA: - - - this question that I -
20 - - other than we don't know here, the point is, is -
21 - - is the capacity there to print it out that way?

22 MR. HABER: We don't know in this case.

23 JUDGE RIVERA: No, no, no, no.

24 MR. HABER: Yes.

25 JUDGE RIVERA: I'm not asking about this

1 case.

2 MR. HABER: Yes.

3 JUDGE RIVERA: I'm asking as a general
4 course, if you're using this kind of a system, are
5 you saying you ca - - - you are not able to print it
6 out in the order in which it was shown? There's no
7 way to show pages or numbers for each of them?

8 MR. HABER: My understanding is that today
9 in 2015 - - -

10 JUDGE RIVERA: Yeah.

11 MR. HABER: - - - using a photo-manager-
12 type program, that the police still do not print out
13 pages of - - - 500 pages of color photographs - - -

14 JUDGE PIGOTT: That - - - that's begging
15 the question. Let's assume - - -

16 MR. HABER: But they do - - - sorry.

17 JUDGE PIGOTT: Let's assume for a minute
18 that they showed her fifteen. Can't you preserve the
19 fifteen and say these are the fifteen we showed her
20 and then she picked out number 7 and that's the
21 defendant and here we go? Conceivably?

22 JUDGE RIVERA: And this is the first page
23 of the fifteen, and this is the second page of the
24 fifteen, and this is first photo - - -

25 MR. HABER: You're saying - - -

1 JUDGE RIVERA: - - - of the total in the
2 fifteen pages.

3 MR. HABER: May - - - may I just ask for a
4 clarification question? Are you - - - are you asking
5 whether she - - - the witness only sees fifteen
6 photos or sees fifteen and then sees another sixty
7 like happened in this case, or another eighty that
8 happened in this case? The point is that when you
9 have a canvassing array where a witness is looking at
10 100, 200 photos, of course, every single photo that
11 that witness looked to - - -

12 JUDGE PIGOTT: But what you're saying is -
13 - -

14 MR. HABER: - - - is relevant.

15 JUDGE PIGOTT: You're saying to the court,
16 we can overwhelm you. We can - - - we can tell you
17 that there are these thousands of pictures and
18 therefore, Judge, you can't asked us whether we were
19 being fair or not. And I know you don't want to make
20 that argument.

21 What I'm asking is, there must be some
22 process - - - let's assume this was a gun, okay. And
23 the issue - - - the issue was a gun. And you didn't
24 keep any of the ballistics information. You said,
25 well, it's all done on computers now, we - - - but we

1 can tell you this is the gun, this was the
2 ammunition, this is the number of bullets that were
3 fired, and the bullets match the gun, and the gun
4 fits, and - - - where's the information for that?
5 Well, we don't have it. Well, that's a problem.

6 And he says, well, why? We have a
7 computer. It does a great job. It said - - - and -
8 - - and when I thought about that, I thought, well,
9 now what you're relying on is - - - is - - - is a
10 hearsay statement from an officer who's saying, well,
11 whoever did the test - - - whoever ran the computer -
12 - - did it right and therefore, this is the gun.

13 And here we're saying, here's a police
14 officer, ran the thing, she was sitting there. He's
15 the one testifying to the accuracy of the photo array
16 and we don't have the photo array.

17 MR. HABER: But in this case, it wasn't
18 that the detective was testifying to the accuracy or
19 inaccuracy of a particular identification. It was
20 really similar to all of the mug shot book cases that
21 pre-date this case, to all of the street canvassing
22 cases, where the police have a witness in the back of
23 their patrol car, drive around a neighborhood, and
24 ask that witness to see if they see anybody on the
25 sidewalk who they identify.

1 That's the kind of case that we're dealing
2 with here. It's not impor - - -

3 JUDGE RIVERA: No, no, no. It is not like
4 driving around the streets, right, because first of
5 all, the photo array is suggesting that that person
6 somehow may have a criminal history, whether - - -
7 for whatever reason - - - as opposed to going on the
8 street and just seeing people on the street.

9 Plus, as you've already said, despite the
10 fact that this pool may be limited to a particular
11 category or perhaps some characteristics that fit a
12 great deal of people, right - - - thin, African-
13 American male, of a certain age group, and a certain
14 height fits a lot of people potentially.
15 Nevertheless, you have narrowed the field. So it - -
16 - it's not like going around on the street.

17 MR. HABER: And because the field is
18 narrowed, I would actual argue that a photo manager
19 procedure is more protective of defendant's rights,
20 because you're not looking at people on the sidewalk
21 where maybe you have one tall, African-American
22 person walking down the street next to a bunch of
23 white people. The fact that the photo manager system
24 allows for a canvassing-type identification - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but there's no

1 way to hold you accountable, I think that's the
2 questions that we're saying. It can't just be
3 because you say it that this is best system, it's
4 totally nonsuggestive, it's great. Maybe it is. But
5 there's no way to check on what you're saying. It's
6 a very one-sided approach that says, we're the
7 prosecutor, we're the police, we know what we're
8 doing, don't bother us.

9 JUDGE FAHEY: It's - - - I have to say,
10 too, it's - - - I think when you come into court, you
11 assume a - - - a lack of computer sophistication on
12 most of the judges' parts, but it's - - - and that's
13 pretty much true, generally for all of us, but I
14 don't know. I can go back and check every single
15 page of my computer on what I looked at, and it seems
16 to me that you ought to be able to do that at the end
17 of any photo array. You print out the list. You
18 keep it. You got it.

19 And - - - and so - - - you know, so - - -
20 so not to do that then creates a presumption that
21 you've - - - you've destroyed the array or the
22 sequence that they came in and therefore you can
23 rebut that presumption, but nonetheless, it
24 challenges it.

25 MR. HABER: But it - - - for the same

1 reason that a court has never apply - - - never
2 applied a rebuttable presumption in the case of a mug
3 book, okay, the same concept applies here. You're
4 talking about tens of thousands - - -

5 JUDGE RIVERA: No, but here's - - - here's
6 the dif - - - here's the difference. So the officer
7 gets up and says, I collected fifty pictures. Your
8 Honor, counsel, they looked like this. I collected
9 them. I don't need to show them to you; believe me,
10 that's what they looked like. Is that good enough?

11 MR. HABER: Yes, because in People v.
12 Rahming decided by this court, that's exactly what
13 happened. The photo - - - the police officer in that
14 case showed a box of sixty to seventy photos to a
15 witness. The court specifically observed that in
16 that case, the People did not produce those photos at
17 the hearing. Nonetheless, overall, based on the
18 totality of the circumstance, this court held that
19 that ID procedure was not inherently suggestive and
20 didn't - - - and did not apply any presumption.

21 JUDGE PIGOTT: We also had a - - -

22 MR. HABER: And the same rule holds here.

23 JUDGE PIGOTT: We also had a case and it
24 was a civil case involving someone who got beat up in
25 a prison, and they - - - they video everything.

1 They've got - - - they've got hundreds, if not,
2 thousands of videos. This one got destroyed. We
3 thought that there should be a presumption that it
4 was destroyed because it was not favorable to the - -
5 - I think in that case the County or the State. Were
6 we wrong?

7 I mean, should we have said, well, you
8 know, there's thousands of them. Why - - - you know,
9 if they say what happen happened, why are we to say,
10 well, you've got to have a tape, you know, that was -
11 - - that would have shown it and you didn't and
12 therefore there's a presumption against you.

13 MR. HABER: Again, I just want to step back
14 and focus on the point at which the investigation is
15 taking place here. And the - - - the really minimal
16 threshold of potential suggestiveness we're talking
17 about, compared to the burden that we're also talking
18 about in terms of making the State turn over and save
19 tens of thousands of - - -

20 CHIEF JUDGE LIPPMAN: What - - - who knows
21 what - - -

22 MR. HABER: - - - who knows how many
23 gigabytes - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but - - -

25 MR. HABER: - - - pages that the defendant

1 could have made a record about and failed to.

2 CHIEF JUDGE LIPPMAN: But this great burden
3 in the age of modern technology, are you serious that
4 this is such a big deal?

5 MR. HABER: A hundred percent, Your Honor.
6 We're talking about tens - - -

7 CHIEF JUDGE LIPPMAN: Where does it say
8 that, that it's - - - that it's such a big deal to -
9 - - as your adversary says, push the button, and - -
10 - and you have it? How - - - how do we know what
11 you're saying is accurate?

12 MR. HABER: We don't, and the reason for
13 that is because the def - - -

14 CHIEF JUDGE LIPPMAN: If you don't, why are
15 we - - - why are we accepting what you're saying?

16 MR. HABER: We don't have the - - - we
17 don't have that information because it was
18 defendant's burden here to create such a record if he
19 wants to rely on that kind of argument. And we don't
20 have that record.

21 JUDGE PIGOTT: Oh, I don't know. I - - - I
22 think you're - - - you're - - - I - - - I don't know.
23 You're saying that they've got the burden to show
24 somehow that be - - - because you showed them
25 pictures that somehow they were - - - they were not

1 suggestive or they were suggestive?

2 JUDGE FAHEY: Taking it one step further,
3 you've got - - - she identified three photos - - - I
4 think Sylvie, her name is - - - in - - - in - - -
5 among 132. It's just - - - it's just hard for me to
6 see how - - - how there's any burden being created by
7 the People to preserve that. And how can they do
8 that since you're the one who has all the
9 information? You got to preserve it. No one else
10 can preserve it.

11 MR. HABER: No, the argument that they have
12 to make is that there was no law saying that we had a
13 presumption to preserve in this case. To the extent
14 that - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we're
16 talking about - - -

17 JUDGE FAHEY: I - - - I didn't see - - -
18 I'm reading the Fourth - - - I'm reading the - - -
19 the Appellate Division cases a little differently
20 than you on that, but that's all right.

21 CHIEF JUDGE LIPPMAN: And we're talking
22 about maybe we should create - - - maybe we should
23 make the rule that you - - - because it's not fair
24 that you don't produce it. That's the whole basis of
25 the argument that we've been going around in circles

1 for the last five minutes.

2 MR. HABER: Your Honor, there - - - this -
3 - - Judge Fahey, you asked this question in the prior
4 case. Is this the wrong case? To the extent this
5 court is thinking about making that kind of sweeping
6 rule that would affect literally hundreds of
7 thousands of investigations across this state, we
8 need a record to determine that.

9 JUDGE PIGOTT: I don't know if it's a
10 100,000, but then I don't care about megs when you're
11 talking about liberty interests. This guy did two
12 years and - - - let me finish - - - and that's one
13 thing. But if they're doing twenty-five to life, are
14 we going to say, well, wait a minute. You're asking
15 us to download twenty-five megs of stuff. You know,
16 he can do the time, and then we're okay. Next case.

17 MR. HABER: A burden obviously always has
18 to be considered relative to the protection that
19 we're talking about here. But because of the
20 inherent nature of this particular procedure, where
21 there is no suspect in mind beforehand, the level of
22 suggestiveness that we're afraid of here, where there
23 is no suspect, just doesn't rise to the level of at
24 this point creating that burden without a record.

25 CHIEF JUDGE LIPPMAN: Okay, counsel, we get

1 you. Let's hear from your adversary.

2 MR. HABER: Thank you, Your Honor.

3 MR. FINE: Judge Fahey was mentioning the
4 Appellate Division cases. My adversary is saying
5 that there are no Appellate Division cases
6 recognizing a presumption in this sit - - - in this
7 situation. That simply isn't correct.

8 Two cases in the Second Department, Dobbins
9 and Robinson. Dobbins, my adversary tends to
10 distinguish on its facts, and Robinson, he's arguing,
11 is wrongly decided. But these are two cases which
12 necessarily recognize the - - - the ease with which
13 this - - - this - - - these kinds of files can be
14 retained.

15 CHIEF JUDGE LIPPMAN: You agree there's no
16 - - - what we're arguing about - - - you agree
17 there's no Court of Appeals precedent on this issue.

18 MR. FINE: No, there is no Court of Appeals
19 precedent on this - - -

20 CHIEF JUDGE LIPPMAN: But you would
21 advocate that we do make that kind of a rule, right?

22 MR. FINE: Yes, my ad - - - I would
23 advocate that we do, because we have a situation here
24 where we have new - - - we have a - - - we have a
25 modern - - - we have modern technology and you

1 shouldn't go back to Rahming and look what the court
2 was thinking about in 1970.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. FINE: You should look at - - - you
5 should look at modern technology to - - - to
6 determine the answer to this question.

7 One very easy way to make it clear exactly
8 what the danger of misidentification is in this
9 situation and how preserving the array might help;
10 isn't it miraculous, from the People's perspective,
11 that they - - - they compiled over 3,000 photographs
12 of all of the people meeting the identification
13 criteria in the entire borough of Manhattan over a
14 period of four years, and this witness picked out our
15 client on the - - - on the second series of six
16 photographs.

17 CHIEF JUDGE LIPPMAN: It's possible, isn't
18 it, counselor?

19 MR. FINE: Yes, it's possible, but the
20 reason - - - what - - - what are the dangers here?
21 The dangers here are first of all, we had somebody co
22 - - - who was - - - who was obviously prepared to
23 identify someone - - -

24 CHIEF JUDGE LIPPMAN: All right, so you
25 want protection as to the suggestiveness that we can

1 check on what they're doing.

2 MR. FINE: Yes, but I just - - - just - - -
3 just continuing, she said - - - basically the officer
4 testified at the hearing that she - - - that he asked
5 the witness, can you ID the person before he showed
6 her the photograph?

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. FINE: She said she would. So she was
9 clearly ready to make an identification.

10 JUDGE PIGOTT: Well, you can - - - you can
11 get into the - - - that fencing all the time. That -
12 - - that's - - - that's when you get into mixed
13 questions of law and fact.

14 MR. FINE: But - - - but the other - - -
15 the other problem. While we don't have mixed - - -
16 we can't have a mixed question unless the lower
17 courts had an opportunity to evaluate the procedure
18 itself, and they didn't in this case.

19 But in - - - but in - - - but in this case,
20 you have a situation in which you have obviously the
21 potential that not only was the person ready to make
22 an identification, she may have been suggested to
23 make an identification. Maybe the defendant, who's -
24 - - who's only the twelfth person she saw, maybe he
25 was the only skinny person in the line-up.

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CHIEF JUDGE LIPPMAN: Okay, counselor.
We're going to take a look at it.

MR. FINE: Thank you.

CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Todd Holley, No. 196, was 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

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