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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers under seal)

-against-

No. 219

CLIFFORD JONES,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

HEATHER K. SUCHORSKY, ESQ.
CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Appellant
One Liberty Plaza
New York, NY 10006

DAVID M. COHN, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Jones,
2 number 219.

3 Counsel, would you like any rebuttal time?

4 MS. SUCHORSKY: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes, go
6 ahead.

7 MS. SUCHORSKY: May it please the court, my
8 name is Heather Suchorsky from Cleary Gottlieb
9 representing Clifford Jones pro bono.

10 Mr. Jones alleged a legal basis for his
11 motion to vacate, and the statute required that, at a
12 minimum, a hearing be held. Not to do so was a - - -

13 CHIEF JUDGE LIPPMAN: Can we review the
14 court's discretion?

15 MS. SUCHORSKY: This was not a
16 discretionary determination.

17 CHIEF JUDGE LIPPMAN: No, no, but - - -

18 MS. SUCHORSKY: This is dictated by
19 statute. It was a legal error that this court should
20 weigh in on.

21 JUDGE SMITH: Well - - -

22 JUDGE READ: Has to be a hearing, and where
23 do you find that?

24 MS. SUCHORSKY: The statute says in Section
25 4, which the DA agrees - - - that's the subsection

1 we're dealing with here; 2 and 3 are not applicable.
2 If - - - unless any of those defects are present,
3 Section 5 says a court must hold a hearing before
4 resolving a motion.

5 JUDGE SMITH: Well, didn't - - - didn't we
6 say in - - - in Crimmins itself the - - - the - - -
7 the - - - the court did not hold a hearing, and we
8 said we couldn't review it. We then reviewed it, but
9 then we said - - - we - - - we said we couldn't
10 review it.

11 MS. SUCHORSKY: The court in Crimmins said
12 that this court cannot weigh the new evidence against
13 the trial evidence in - - -

14 JUDGE SMITH: Yeah, but Crimmins was a - -
15 - Crimmins was a case in which the motion was denied
16 without a hearing.

17 MS. SUCHORSKY: Correct, and in Crimmins it
18 said the decision to hold a hearing is discretionary.
19 But that must be read in line with the statute. The
20 statute is clear: the decision to hold a hearing is
21 not always discretionary.

22 JUDGE SMITH: So what makes it
23 undiscretionary here and discretionary in Crimmins?

24 MS. SUCHORSKY: It's discretionary if any
25 of those defects in Section 4 are present.

1 JUDGE SMITH: You mean it's non-discretion
2 - - - oh, it's discretionary if the - - -

3 MS. SUCHORSKY: It's discretionary to hold
4 it. The legislature allowed a court to hold a
5 hearing in an abundance of caution, but it does not
6 allow a court to refuse to hold a hearing if none of
7 those are present.

8 JUDGE SMITH: And what is - - - what is the
9 defect you say that was present in Crimmins and is
10 not present here?

11 MS. SUCHORSKY: A court, I think could fair
12 - - - they didn't specify, but I think you could
13 fairly say they did not allege a legal basis for that
14 motion, which is what it - - -

15 JUDGE SMITH: But you - - - but - - - but
16 you acknowledge that that's not what Crimmins says?

17 MS. SUCHORSKY: Crimmins says the decision
18 to hold a hearing is discretionary. I'm saying that
19 cannot be - - -

20 JUDGE SMITH: So you - - - you're saying
21 that if they - - - that if they thought it was
22 discretionary, they must have found one of these
23 statutory defects - - -

24 MS. SUCHORSKY: Correct.

25 JUDGE SMITH: - - - even though they didn't

1 say so.

2 MS. SUCHORSKY: The court must have been
3 speaking in line with the statute.

4 JUDGE SMITH: I - - -

5 MS. SUCHORSKY: So that means that one of
6 those defects was present in Crimmins.

7 JUDGE SMITH: I mean, this is - - - let - -
8 - let me - - - you seem reluctant to take on
9 Crimmins, and I can understand why, but isn't
10 Crimmins a problematic case? I mean you're here
11 saying this doesn't make sense unless they were
12 thinking something they didn't say.

13 MS. SUCHORSKY: No, I'm saying that
14 Crimmins must be right in line with the statute.
15 We're talking about a statute the legislature enacted
16 for defendants who may have been wrongly convicted to
17 at least have the opportunity to clear their name.
18 The legislature - - -

19 JUDGE SMITH: Do - - - would you - - - do -
20 - - would you think that Crimmins might - - - might -
21 - - might be something that we ought to reconsider in
22 the age of DNA?

23 MS. SUCHORSKY: I certainly think that, if
24 you think Crimmins says hearings are always
25 discretionary, that has to be reconsidered in light

1 of the statute. We're not suggesting you overrule
2 Crimmins. We're saying - - -

3 JUDGE SMITH: Why not?

4 MS. SUCHORSKY: We're saying you can
5 clarify Crimmins, that hearings are discretionary if
6 any of those problems under 4 are present. None of
7 them were present in this case, and a hearing was
8 required.

9 JUDGE PIGOTT: One of the problems in all
10 of these is that there is 8,000 of them, and - - -
11 and every defendant, every - - - everyone who is in
12 Attica and every place else is innocent. And they -
13 - - and they tell you that. And they tell you that
14 in 440s, and they say, you know, I have a witness
15 that I - - - I didn't get a chance. My lawyer wasn't
16 listening to me. I was in another state. There - -
17 - there's all kinds of things and - - - and each one
18 of those, if you just read it, you know, you could
19 say that that's a prima facie showing that - - - that
20 - - - that he may be innocent. So you have to sort
21 of sort them out.

22 And - - - and in this case, I guess the
23 sorting out came when - - - when there's only a
24 certainly amount of DNA testing that did not
25 establish, in their view, in the - - - in the - - -

1 in the court's view that - - - that - - - that you
2 may - - - that - - - that he may be in - - - innocent
3 or - - - or guilty of some - - - or the - - - the
4 judgment would have been more favorable, and they - -
5 - they relied on the eyewitness. Now, how do we get
6 around that? How do we say well, you can't just rely
7 on the eyewitness, and three out of eighteen is
8 enough? Where - - - where do we get off saying that
9 the Appellate Division's wrong here?

10 MS. SUCHORSKY: Right, I think that the
11 issue, aside from, you know, not following the
12 statute which requires hearings in certain cases, is
13 that the court applied the long - - - or the wrong
14 standard in assessing whether we had alleged a legal
15 basis. What the court did in determining that was
16 basically just resolved our motion on the papers and
17 said oh, because I could do so, therefore, no hearing
18 is required.

19 JUDGE SMITH: Well, you're - - - you're - -
20 - you're say - - - you're saying the court can't say
21 I assume that everything you say in your papers is
22 true, and I give you every fair inference, and that's
23 not enough; goodbye. They can't do that?

24 MS. SUCHORSKY: There are two problems with
25 that. First, the standard the court applied here

1 was, it said, I give you every inference in your
2 favor, and I'm going to determine would you win. It
3 cannot be would you win. It has to be could you win.
4 If the court is asking would you win, that means a
5 court can, at the initial stage, weigh your evidence
6 and use its discretion to decide - - -

7 JUDGE SMITH: Okay, and what - - - what's -
8 - -

9 MS. SUCHORSKY: - - - if you get a hearing.

10 JUDGE SMITH: I mean, I can sort of
11 understand the - - - I don't know, the - - - the
12 difference - - -

13 MS. SUCHORSKY: Hearing - - -

14 JUDGE SMITH: - - - between would you win
15 and could you win is a little odd when it's the - - -
16 when the factfinder himself is making the decision,
17 isn't it?

18 MS. SUCHORSKY: There are mixed cases on
19 this. It's not clear exactly what a legal basis is.
20 The court cited People v. - - - People v.
21 Satterfield. The - - - the People say People v.
22 Satterfield. People v. Ferraras is two years later
23 and says, could you win if your allegations were
24 true.

25 The second problem is that the court did

1 not take our allegations as true when it made that
2 determination. It resolved issues in dispute between
3 Mr. Jones and the People about the probative value of
4 the evidence against us and then said oh, I'm viewing
5 it all in your favor; so it's fine. But the court
6 was not viewing the evidence that way. The court - -
7 - the - - - even the First Department - - -

8 JUDGE SMITH: The - - - the - - - you're
9 talking about the - - - the - - - you're talking
10 about the 440 court? The Appellate Division didn't
11 do that; did they?

12 MS. SUCHORSKY: Even the Appellate Division
13 did bec - - -

14 JUDGE SMITH: Well, where did - - - where -
15 - - where did they resolve - - -

16 MS. SUCHORSKY: The trial court did,
17 clearly, throughout its opinion. And the First
18 Department, it seems, tried to correct that by
19 saying, I'm viewing it all in your favor. But there
20 are two places where the court relies on
21 representations the People made, some of which were
22 attributed to experts in their initial papers - - -

23 JUDGE SMITH: Whi - - - which court?

24 MS. SUCHORSKY: I'm talking about the First
25 Department.

1 JUDGE SMITH: What - - - yeah.

2 MS. SUCHORSKY: The First Department said
3 with respect to the hairs, "They were not all of the
4 same color. Only eight of the hairs were curled, so
5 there is good reason to believe the hairs did not all
6 come from the same individual." The issue of whether
7 someone can have slightly different colored or
8 textured hairs when these discrepancies are so small,
9 anyway - - - there's one hair labeled as dark; one
10 labeled golden brown to dark at the other end, once
11 it's viewed under a microscope - - - in 1981 they're
12 all listed as dark so - - -

13 JUDGE PIGOTT: Well, they went farther.
14 They said some of them were longer than what the - -
15 - the People - - -

16 MS. SUCHORSKY: Correct.

17 JUDGE PIGOTT: - - - felt they ever had. I
18 mean what - - - at what point does - - - I guess you
19 said that's what a hearing is for.

20 MS. SUCHORSKY: Exactly, and if - - - I
21 mean, if you look in the record there's photos of the
22 hairs. I mean they're so tightly curled, some of
23 them. I imagine when you stretch them out they do
24 grow in length. But again, yeah, we didn't have a
25 hearing to even sort of any of this out.

1 JUDGE SMITH: You - - - your - - - your - -
2 - your basic position is that if there's any - - -
3 any way the defendant could imaginably win, the court
4 has to have a hearing?

5 MS. SUCHORSKY: No, no. My position on a
6 legal basis is that it de - - - it means looking at
7 could you win; and I think that means, is it
8 plausible that you would win. I don't think it means
9 any possibility; I don't think that was the
10 legislature's intent. And I'm only talking about one
11 section - - -

12 JUDGE SMITH: We can - - - we can review
13 plausibility?

14 MS. SUCHORSKY: I think that you can tell
15 the courts, this is what a legal basis means under
16 the law and you better - - -

17 JUDGE SMITH: I mean does - - - does - - -

18 MS. SUCHORSKY: - - - apply it correctly.

19 JUDGE SMITH: Should - - - does - - - does
20 the court - - - does the - - - does the courts below
21 have no discretion in deciding what's plausible and
22 what's not plausible?

23 MS. SUCHORSKY: I think the court needs to
24 look at the facts and determine what's plausible.
25 But I think when it's a plausibility standard, it

1 removes the fact that it's always discretionary,
2 which is more in line - - - which contradicts the
3 statute. The decision to hold a hearing cannot
4 always be discretionary, so the legal basis standard
5 - - -

6 JUDGE SMITH: Well, it could - - - well, it
7 - - - it could - - -

8 MS. SUCHORSKY: - - - must have meaning.

9 JUDGE SMITH: - - - always be discretionary
10 if we - - - if - - - if there were such a thing as
11 abuse of discretion. We could say it's
12 discretionary, but you went too far. What's wrong
13 with that?

14 MS. SUCHORSKY: That's what - - - that's
15 how you deal with the four 440 motions. So I think -
16 - - I'm not suggesting you review all these cases,
17 but I'm saying when there's a clear error of law,
18 when the lower courts misapply the law, hold you to
19 too high of a standard - - -

20 JUDGE SMITH: I mean aren't - - - I mean, I
21 guess what I'm saying is aren't you going to a lot of
22 trouble to avoid simply saying to us, what if
23 Crimmings didn't exist? Well, the obvious thing to
24 say - - - this was an abuse of discretion to deny a
25 hearing?

1 MS. SUCHORSKY: I mean I - - - I wouldn't
2 fight with you that - - - that - - - that that's
3 correct. I'm just saying you don't have to overrule
4 Crimmins if you don't want to.

5 May I continue?

6 CHIEF JUDGE LIPPMAN: No, I think you're
7 finished, counsel - - -

8 MS. SUCHORSKY: Okay.

9 CHIEF JUDGE LIPPMAN: - - - until your
10 rebuttal.

11 MS. SUCHORSKY: Okay.

12 CHIEF JUDGE LIPPMAN: Thank you.

13 MR. COHN: Good afternoon, Your Honors,
14 David Cohn for the People.

15 CHIEF JUDGE LIPPMAN: Counsel, why
16 shouldn't we direct a hearing here? Isn't that the
17 most logical thing to do?

18 MR. COHN: Your Honor, what the Appellate
19 Division did here rendered - - -

20 CHIEF JUDGE LIPPMAN: Unless we know that
21 it's - - - it's false what - - - what they're
22 alleging, why wouldn't you send it to a hearing under
23 the statute?

24 MR. COHN: Your Honor, two issues. Okay,
25 first, the Appellate Division took everything that

1 the defendant alleged as true. The Appell - - -
2 Appellate Division said very clearly, taking as true,
3 that those three out of the eighteen hairs that were
4 tested from this bloody hat - - -

5 JUDGE SMITH: She - - - she - - - she says
6 that they - - - that - - - that a possible inference
7 from the facts is that all those hairs did come from
8 the same - - - I guess except for the cat's - - - did
9 come from the same person. Why - - - why - - - why -
10 - - why isn't she entitled to that inference?

11 MR. COHN: Your Honor, it's not within this
12 court's review power to determine inferences that may
13 be drawn from the facts, and - - - and maybe I should
14 back up and - - -

15 JUDGE SMITH: Well, what can - - - you - -
16 - you're saying we - - - can we review this decision
17 for abuse of discretion or not?

18 MR. COHN: No, Your Honor, in fact - - -

19 JUDGE SMITH: So what can we review it for,
20 anything?

21 MR. COHN: Your Honor, under Crimmins, and
22 under the cases that follow Crimmins, this court has
23 no reviewing power whatsoever.

24 JUDGE SMITH: So when - - - so we - - - so
25 we're wasting our time sitting here. We should just

1 go on to the next case?

2 MR. COHN: Absolutely, Your Honor. That -
3 - - that - - - that is exactly what Crimmins says,
4 and - - - and - - -

5 JUDGE SMITH: Isn't - - - isn't that a - -
6 - isn't that - - - isn't that kind of a bad position
7 to put this court in? We - - - we're, you know - - -
8 we - - - we - - - we review a lot of things, but a
9 guy says I'm innocent, and you abused your discretion
10 in denying me a hearing on that. And you're saying
11 oh, forget about it, that - - - that's not within
12 your power to review?

13 MR. COHN: Well, first, the defendant has
14 not alleged that he's innocent. He's alleged that
15 there's some tangential DNA evidence, which he claims
16 casts a reasonable doubt about his conviction, but he
17 is - - - he is not alleging before this court that he
18 is innocent.

19 JUDGE SMITH: Well, if he could - - - yeah,
20 okay, but if he could pro - - - but if - - - yeah, if
21 - - - if - - - if he could prove that he had noth - -
22 - that he never wore that hat, that would - - - yeah,
23 you - - - you could be excused for thinking maybe
24 he's innocent?

25 MR. COHN: Well, he is alleging that three

1 out of eighteen hairs found from a hat which was
2 found on the ground by a civilian - - -

3 JUDGE SMITH: Suppose he had eighteen - - -
4 suppose he had eighteen for eighteen.

5 MR. COHN: If he was eighteen for eighteen
6 obviously, that would have been a - - - a more
7 difficult case for the lower courts.

8 JUDGE SMITH: Okay, but - - - but we
9 couldn't - - -

10 JUDGE PIGOTT: But here's - - - here's what
11 - - -

12 JUDGE SMITH: - - - we couldn't touch it?

13 MR. COHN: Not under Crimmins, Your Honor.
14 Crimmins said that the Constitution - - - and there's
15 not a matter of statute - - -

16 JUDGE SMITH: Is - - - is - - - is - - -
17 should we reconsider Crimmins if it - - - if it - - -
18 if - - - if it puts us in a position like that?

19 MR. COHN: Your Honor, Crimmins makes
20 sense. The - - - the reason for the Crimmins rule is
21 that it's an inherently fact-based determination in
22 weighing new evidence against the - - -

23 JUDGE SMITH: Yeah, there are - - - there
24 are a million inherently fact-based determinations
25 that we leave to the lower courts, but we review them

1 for abuse or for - - - or - - - or for record
2 support. I mean if - - - yeah, he - - - you're - - -
3 you're saying that if - - - if - - - if the courts
4 below decide that we don't look at DNA because we - -
5 - we think DNA is witchcraft, this court is powerless
6 to review that?

7 MR. COHN: Well, Your Honor, if the - - -
8 the court below did something which was clearly
9 illegal or which was perhaps clearly at odds with the
10 record - - -

11 CHIEF JUDGE LIPPMAN: Well, they didn't
12 direct - - - they didn't direct a hearing that they
13 should have under the statute. Why can't we review
14 that?

15 MR. COHN: Well, Your Honor, all I - - -
16 all I can tell you is what this court has said in
17 Crimmins - - -

18 JUDGE PIGOTT: But you didn't - - - you
19 didn't say - - -

20 MR. COHN: - - - which is that is within
21 the unlimited discretion.

22 JUDGE PIGOTT: At the - - - at the - - - at
23 the Supreme Court level, the - - - the papers that
24 the People put in I - - - I thought were really
25 problematic. And there was - - - there was - - -

1 I'll call it testimony - - - saying we've got - - -
2 we've got DNA experts who - - - who controvert this.
3 We've got - - - this does not - - - this does not
4 establish the - - - that the DNA is - - - says what
5 they say it does, and there's allusions to DNA
6 experts, but it's all hearsay.

7 MR. COHN: Well - - -

8 JUDGE PIGOTT: And - - - and the lawyer
9 that wrote the affidavit never alleged that she was
10 at the trial or there's no witnesses that came. If
11 she had simply said read what they say and they're
12 not entitled to a hearing, it would have been clear.
13 But they - - - the People loaded it up with an awful
14 lot of extraneous material, it seems to me.

15 MR. COHN: You - - - Your Honor, first the
16 Appellate Division, and - - - and even the trial
17 court, even - - - even Justice Yates did not rely on
18 the People's - - - any conclusions reached by the
19 People's experts in issuing their decisions.

20 JUDGE PIGOTT: So why did - - - why did you
21 put them in?

22 MR. COHN: The - - - we put them in because
23 to allege - - - we made the allegations. Now, if the
24 - - - if Justice Yates had determined that a hearing
25 was necessary - - -

1 JUDGE SMITH: It - - - it - - - it looked
2 like - - - it looked like when they wrote that
3 affidavit you were expecting a hearing.

4 MR. COHN: It's possible that a judge might
5 have ordered a hearing, and it's certainly a response
6 of what - - -

7 CHIEF JUDGE LIPPMAN: Especially when the
8 eyewitness evidence here is not very strong.

9 MR. COHN: Sorry, the - - - the evidence -
10 - - yeah, the - - - the - - -

11 CHIEF JUDGE LIPPMAN: Yeah, what's strong
12 about it? You got a - - - a witness who admits to
13 being on drugs at the time when she makes the - - -
14 the - - - the - - - the identification. Why wouldn't
15 you hold a hearing here?

16 MR. COHN: You - - -

17 CHIEF JUDGE LIPPMAN: Why - - - why
18 wouldn't you - - - in the interest of actually
19 knowing, why wouldn't you hold a hearing? Unless you
20 know that what they're saying is false, why wouldn't
21 you hold a hearing?

22 MR. COHN: Well, unless you know, Your
23 Honor, that what they're saying is not going to get
24 you a reasonable probability of a different verdict.
25 This was - - - and as Justice Yates and the Appellate

1 Division said, this was a very strong eyewitness
2 identification.

3 CHIEF JUDGE LIPPMAN: I don't - - - I - - -
4 from what you have in the record, I don't know why
5 you say that, that it's a very - - - a - - - a strong
6 eyewitness case.

7 MR. COHN: Well - - -

8 CHIEF JUDGE LIPPMAN: She admits to being
9 under daze - - - when she's identified - - - she
10 admits to being under the influence of drugs.

11 MR. COHN: Your Honor, but there was no
12 impairment of her abilities. It was - - - the jury
13 heard her testify at trial. It was a fifteen-minute
14 encounter in broad daylight.

15 JUDGE SMITH: The - - - the - - - the - - -
16 there is reason to think, isn't there, that she's a
17 pretty good observer?

18 MR. COHN: Absolutely, Your Honor, and she
19 gave very, very detailed descriptions. She gave
20 detailed descriptions of the defendant's - - -

21 JUDGE READ: That's, what, the chipped
22 tooth and every - - - or the - - -

23 MR. COHN: The chipped tooth and the - - -
24 the space between the teeth.

25 JUDGE SMITH: But didn't - - -

1 JUDGE RIVERA: I gue - - - but I guess,
2 counsel, I - - - I thought their point was they - - -
3 they dispute that this is a - - - a very good
4 eyewitness testimony, but they argue that there's
5 other evidence that might make a juror sit back and
6 say hmm, let me think twice about that.

7 MR. COHN: Well, Your Honor - - -

8 JUDGE RIVERA: Maybe - - - maybe - - -
9 maybe the drugs - - - maybe the fact that she was on
10 heroin really did make a difference.

11 MR. COHN: Well, Your Honor, what they're
12 proffering here is new DNA evidence, and what both
13 courts below - - - what Justice Yates and what the
14 Appellate Division said is that even accepting that
15 those three hairs, three of the eighteen that they
16 tested - - - and they could have tested all eighteen.
17 They choose to test only - - -

18 JUDGE PIGOTT: No, they couldn't and - - -
19 and because - - - at - - - at - - - at least no one
20 controverted the fact that this was destructive, and
21 - - - and they were saying that they can't do all
22 eighteen because then the evidence is gone. And - -
23 -

24 MR. COHN: Well - - -

25 JUDGE PIGOTT: - - - one of the questions I

1 was going to ask, why wouldn't the DA get together
2 with them and say let's - - - let's share our DNA
3 testing?

4 MR. COHN: Well, Your Honor, actually, we
5 gave their lab all eighteen hairs. As far as I know,
6 Your Honor, their lab is still in possession of all
7 eighteen hairs. They could have tested all of them
8 if they had wanted to. Now, if they're saying that -
9 - -

10 JUDGE PIGOTT: Did - - - did you
11 misunderstand my question? I said if they did, the
12 evidence would be gone.

13 MR. COHN: Well, Your Honor, then they have
14 to make a choice. They're the ones who have the
15 burden of - - - of demonstrating that there's a
16 reasonable probability of a different verdict.

17 JUDGE PIGOTT: Couldn't the People - - -
18 couldn't the People - - - couldn't the People - - -
19 when - - - when they got that and realized that
20 that's probably true, say let's share our DNA stuff.
21 We can sit - - - we can go shoulder-to-shoulder and
22 see whether this DNA works on all eighteen without
23 destroying all the evidence in it?

24 MR. COHN: Your Honor, our lab - - - the
25 medical examiner's office, which is an excellent DNA

1 lab - - -

2 JUDGE PIGOTT: Right.

3 MR. COHN: - - - they said that these hair
4 samples were too old, too small, and too degraded.

5 JUDGE PIGOTT: Not in this case, they
6 didn't; did they?

7 MR. COHN: Yes, they did.

8 JUDGE PIGOTT: I - - - I didn't see an
9 affidavit to that effect.

10 MR. COHN: Actually, it's - - - it's in our
11 answer to the 440, Your Honor. The medical exam - -
12 -

13 JUDGE RIVERA: Is that your - - - your - -
14 - is that counsel's affidavit?

15 MR. COHN: It - - - it was counsel's - - -
16 it was an Assistant District Attorney's sworn
17 affirmation. They sent it to the - - - they sent all
18 eighteen hairs to the New York State Medical
19 Examiner's Office.

20 JUDGE PIGOTT: No, no, no, no. No, wait, I
21 - - - I don't mean to misunderstand this, but one of
22 the things that I had suggested before was that the
23 only thing you submitted was a - - - was a hearsay
24 affidavit from an attorney who said, you know, I
25 guess I've talked to DNA people or something, and I

1 thought that was an issue. Are you saying that if I
2 go back to the record, there are sworn affidavits
3 from the DNA people in - - - in Manhattan?

4 MR. COHN: There - - - there's a sworn
5 affirmation from the Assistant District Attorney - -
6 -

7 JUDGE PIGOTT: No, no, I - - -

8 MR. COHN: - - - who's an officer of the
9 court.

10 JUDGE PIGOTT: Excuse me, excuse me, Mr.
11 Cohn. I - - - I wanted to ask if, with respect to
12 the experts - - -

13 MR. COHN: Yes.

14 JUDGE PIGOTT: - - - if there's a sworn
15 expert affidavit?

16 MR. COHN: No, there is not, Your Honor.

17 JUDGE PIGOTT: Okay.

18 MR. COHN: There is - - - there is not, and
19 there's actually no requirement that we do that in
20 order to - - - we don't have the burden of going
21 forward here, and - - - and - - -

22 JUDGE SMITH: But you - - - but you - - -
23 but you admit that - - - that the - - - the denial of
24 a hearing can't rest on that proffer?

25 MR. COHN: We are saying that the reason

1 review it?

2 MR. COHN: That's true, Your Honor.

3 CHIEF JUDGE LIPPMAN: Even if - - - even if
4 Judge Pigott's hypothetical is right, we - - - we
5 couldn't review it. Now, if that's the case, why
6 don't we just overrule Crimmins, if you're saying
7 that's because of Crimmins?

8 MR. COHN: Well, Your Honor, I - - - I
9 believe that the Crimmins rule is a good one. If - -
10 - if this court wishes to overrule Crimmins, of
11 course it has the right to.

12 JUDGE SMITH: Under - - - under your - - -
13 under your view of Crimmins, we couldn't review it if
14 Mother Teresa and all her nuns were swearing that
15 this guy had an alibi?

16 MR. COHN: Well, it's very possible that -
17 - - that the judge didn't - - - found some reason why
18 those - - - those affirmations were not enough. I
19 wouldn't know what the particular evidence would be.

20 CHIEF JUDGE LIPPMAN: So the answer is yes,
21 we could not review it, even if Mother Teresa and
22 whoever else - - -

23 MR. COHN: That is the clear answer under
24 Crimmins.

25 CHIEF JUDGE LIPPMAN: Is that - - - is that

1 the law that we want? Is that the precedent that we
2 want to follow here?

3 MR. COHN: Well, Your Honor, in Crimmins,
4 this court says - - -

5 CHIEF JUDGE LIPPMAN: No, no. I asked you
6 is that good?

7 MR. COHN: I - - -

8 CHIEF JUDGE LIPPMAN: Is that something we
9 should be following? If that's what you're hinging
10 what we're doing and why he can't get a hearing here,
11 why wouldn't you just overrule that case? Doesn't
12 sound like something we'd want to rely on.

13 MR. COHN: Well, I think at the time this
14 court decided Crimmins and - - - and - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but now is now.

16 MR. COHN: Well, if this court believes in
17 stare decisis and believes in precedent, at the court
18 this - - - at the time this court decided Crimmins,
19 the court thought these determinations - - -

20 CHIEF JUDGE LIPPMAN: What year was
21 Crimmins?

22 MR. COHN: I believe it was in the - - - it
23 was either '70s or '80s; I don't remember.

24 CHIEF JUDGE LIPPMAN: Yeah, but in light of
25 - - -

1 MR. COHN: It was 19 - - -

2 CHIEF JUSTICE LIPPMAN: I think Judge Smith
3 asked you before, with all the advances in DNA, does
4 it make any sense today?

5 MR. COHN: Your Honor if - - - if there - -
6 - if this court wanted to carve out a principle for
7 an extreme case where - - - where there was a - - - a
8 compelling evidence that somebody was innocent, and
9 for some reason - - -

10 JUDGE SMITH: Isn't - - - isn't - - - isn't
11 abuse of discretion just another way of saying
12 extreme case?

13 MR. COHN: And perhaps, and Your - - - Your
14 Honor, if - - - if this court were to go that way,
15 this is not an extreme case. This is a case where
16 you have marginal DNA evidence, and the courts below
17 look - - -

18 JUDGE SMITH: So you're - - - so you're - -
19 - so you're arguing in the alternative that
20 discretion was not abused?

21 MR. COHN: Yes, yes, Your Honor.

22 JUDGE RIVERA: What - - - why is it
23 marginal DNA evidence?

24 MR. COHN: It's marginal DNA evidence for -
25 - - for multiple reasons, Your Honor.

1 JUDGE RIVERA: Um-hum.

2 MS. SUCHORSKY: First, it's - - - as I - -
3 - I mentioned there's only three out of eighteen
4 hairs. We don't know how many other people's hairs
5 might have gotten in this hat. We don't even know
6 whether the defendant was wearing hair extensions and
7 might not have even had his hair. We - - - we don't
8 - - - we don't know how many people handled this hat.
9 We don't know how many people's hairs adhered to the
10 hat while it was sitting on the ground soaked in
11 blood. We're - - - it's not clear from the record,
12 as the Appellate Division pointed out, where exactly
13 on the hat these hairs came from and where the
14 hatband was on the hat.

15 JUDGE SMITH: Of course not - - - a lot of
16 not clears doesn't do it when reasonable doubt is
17 supposed to go to the defendant.

18 MR. COHN: But, Your Honor, actually,
19 that's at trial. This is post-trial in the 440
20 context.

21 JUDGE SMITH: Well, but - - - but the
22 question is - - - but the question is whether - - -
23 whether it was likely to have produced a - - - what
24 was it, likely to have produced a different result,
25 something like that?

1 MR. COHN: A probability of a different
2 result.

3 JUDGE SMITH: Probability of a different
4 result, but the question on which the result would
5 have been different is reasonable doubt.

6 MR. COHN: The question - - - it would have
7 been whether this old evidence - - - and - - - and -
8 - a - - - a defendant does - - -

9 JUDGE SMITH: But the question - - - the
10 question - - - the question is whether these three
11 hairs would have been enough to create a reasonable
12 doubt.

13 MR. COHN: Right, Your Honor, and - - - and
14 that's a - - - it's a - - -

15 JUDGE RIVERA: And the scraping; it's not
16 just the hairs, right?

17 MR. COHN: Your - - - sorry, Your Honor?

18 JUDGE RIVERA: And the scraping, the - - -
19 the DNA regarding the scraping.

20 MR. COHN: The - - - the fingernail
21 scraping, right.

22 JUDGE RIVERA: What about that?

23 MR. COHN: So there were seven fingernail
24 scrapings that survived from - - - from the victim -
25 - - from the murder victim. Six of them, there was

1 no useful DNA. One fingernail scraping, there's a
2 small amount of DNA recovered from it that did not
3 belong to the defendant.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 Thanks, counsel.

6 Let's have rebuttal.

7 MS. SUCHORSKY: Just to be clear, Your
8 Honors are not wasting your time by hearing this
9 case. I'd like to go back to the point I was making
10 earlier that the First Department also relied on
11 representations the People made that were in dispute
12 between the People and Mr. Jones. It wasn't just the
13 trial court.

14 So the First Department relied on hair
15 color, hair texture, to say these probably didn't
16 come from the same people. And actually, the first
17 time that the DA makes that argument is the trial
18 court in her affirmation - - - I think it's at A-79
19 in the record, and it's in a paragraph where she
20 mentions Dr. Baum (ph.), which the court - - - trial
21 court and the First Department said we can't rely on
22 those experts. So she makes this argument in a
23 paragraph from one of her experts.

24 Second, with the fingernail scrapings the
25 court said - - - fully - - - First Department fully

1 adopted the People's two different positions on the
2 fingernails. They said, on the one hand, no evidence
3 of scraping, so not probative, and on the other hand
4 - - - scratching, sorry - - - even though there's
5 clear evidence of struggle in this record and - - -
6 the prosecutor himself at trial says struggle so many
7 times in that trial transcript - - -

8 JUDGE SMITH: But is it - - - but couldn't
9 - - - is it unreasonable for the courts below to have
10 looked at the case this way: you have a - - - a - -
11 - a witness - - - I grant you she's a drug addict and
12 a prostitute who used heroin that day. She also has
13 a very impressive ability to observe. She described
14 the clothing in incredible detail. She - - - she has
15 the gapped teeth; she has the chipped tooth. She - -
16 - she went through four - - - she went through
17 hundreds and hundreds and hundreds of pictures and
18 didn't pick out anybody until she saw this guy's
19 picture. She had fifteen minutes with a good - - -
20 of good opportunity to see him. She - - - and the -
21 - - and the courts below said I'm sorry. I don't
22 care how good your evidence is on three hairs in the
23 hat; it's not going to do it because somebody else
24 could have worn the hat. Why is that an abuse of
25 discretion?

1 MS. SUCHORSKY: Well, first of all, this is
2 not going to all your points, the ID. This is not a
3 strong ID. At trial the prosecutor himself stopped
4 the trial the day before it was done to do a second
5 lineup and says in the record, on the chance that we
6 might have the wrong person - - - because this a
7 single eyewitness ID. The jury struggled with the ID
8 at trial. They requested to see photos of the
9 lineup. They requested to see the multiple
10 descriptions she gave.

11 JUDGE SMITH: Maybe you're - - - maybe
12 you're really saying there's - - - there's no such
13 thing as a single-witness ID that's all that strong?

14 MS. SUCHORSKY: I'm - - - yeah, and I'm
15 saying when you make the legal basis standard so
16 discretionary that a court can always rely on the
17 trial evidence to say there's no hearing needed,
18 that's how you get an opinion where a ID five months
19 after the fact on drug use with inconsistent
20 descriptions is strong.

21 JUDGE SMITH: Isn't it - - - isn't - - -
22 wouldn't it be different if you had eighteen hairs
23 and they were all - - - and yeah - - - yeah, they - -
24 - I - - - I guess maybe my real question is what are
25 you saving the other fifteen for?

1 MS. SUCHORSKY: Well, this has been touched
2 on, but the People, from the beginning, disputed that
3 testing these hairs would ever be probative because,
4 as they say, though only in their affirmation, that
5 the OCME said these hairs weren't suitable for
6 testing. They - - - they wouldn't test the hairs, so
7 we tested them. But the People continue to say it's
8 never going to be viable, and the testing destroys
9 the sample.

10 JUDGE SMITH: Okay, well, they - - -
11 they're gon - - - they - - - you're - - - they - - -
12 they're - - - they're going to say whatever you don't
13 want them to say. They're going to make you
14 miserable whatever it is. Why - - - why are you
15 worrying about what they say? Why don't you just - -
16 - you know, why - - - yeah, what - - - why not test
17 all eighteen unless, of course, you're worried that
18 you might get a match, which would be a problem.

19 MS. SUCHORSKY: No, because we're worried
20 about destroying the only evidence left in a thirty-
21 year-old case.

22 JUDGE SMITH: What are you saving them for?

23 MS. SUCHORSKY: We asked the court to hold
24 a hearing to resolve the issues about the testing - -

25 -

1 JUDGE SMITH: What are you saving the - - -

2 MS. SUCHORSKY: - - - before we tested them
3 all.

4 JUDGE SMITH: What are you sav - - - what -
5 - - what are you going to do with those fifteen hairs
6 you've so carefully conserved?

7 MS. SUCHORSKY: We would love for them to
8 be tested. We would just not like to test them and
9 have it be worth nothing. We constantly, throughout
10 - - -

11 CHIEF JUDGE LIPPMAN: That come out of the
12 - - - the hearing, that the other hairs would be
13 tested; is that what you're saying?

14 JUDGE RIVERA: Is your argument that the
15 court would reject this kind of testing, so you don't
16 want to waste your time on it?

17 MS. SUCHORSKY: No, no, no. We're saying
18 that the People held us - - - constantly said, you
19 know, this won't be viable. So before the - - - the
20 court didn't ever dig into these issues and resolve
21 the issues whether - - -

22 JUDGE SMITH: Yeah, but - - - but aren't
23 they going to be a lot - - - but aren't they a lot
24 more persuasive saying that when they talk about
25 three hairs than if they were talking about all

1 eighteen?

2 MS. SUCHORSKY: Certainly, but we offered
3 for the People - - -

4 CHIEF JUDGE LIPPMAN: But would the other
5 fifteen be - - - be tested as a result of the
6 hearing? Is that what you're arguing, you have a
7 hearing - - -

8 MS. SUCHORSKY: Yes.

9 CHIEF JUDGE LIPPMAN: - - - test all the
10 hairs at that point.

11 MS. SUCHORSKY: Yes.

12 CHIEF JUDGE LIPPMAN: Is that what - - -
13 the point that you're making?

14 MS. SUCHORSKY: We always offered for the
15 People to do confirmatory testing. They declined
16 because they wanted to keep us in a heads-I-win-
17 tails-you-lose situation - - -

18 CHIEF JUDGE LIPPMAN: But - - -

19 MS. SUCHORSKY: - - - where we can't test
20 all the hairs without destroying the evidence, but
21 they can still say oh, look, they didn't test all the
22 hairs, so it's not meaningful. We asked the court to
23 hold a hearing to resolve issues related to the
24 testing.

25 CHIEF JUDGE LIPPMAN: So you want the whole

1 thing to be looked at?

2 MS. SUCHORSKY: We want a complete, factual
3 record before a decision is made.

4 CHIEF JUDGE LIPPMAN: As - - - as to what
5 happened with the testing, the three, the fifteen,
6 whatever?

7 MS. SUCHORSKY: Absolutely.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. SUCHORSKY: We want a complete record.

10 CHIEF JUDGE LIPPMAN: Thank you.

11 JUDGE RIVERA: I'm sorry, can I just - - -

12 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
13 Rivera.

14 JUDGE RIVERA: I am just - - - I'm not
15 understanding - - -

16 MS. SUCHORSKY: Okay.

17 JUDGE RIVERA: - - - this argument. So are
18 you saying that if the court grants a hearing, that
19 then you're going to go and test the fifteen?

20 MS. SUCHORSKY: I'm saying that if we held
21 a hearing, a court could - - - we could put the
22 experts forward - - -

23 JUDGE RIVERA: Okay.

24 MS. SUCHORSKY: - - - we could - - - they
25 could sort out the issues of mitotyping's results and

1 whether testing these hairs is viable. And then - -
2 - if it's - - - if the - - - if the court is
3 satisfied that it's vi - - - viable, then we can test
4 the rest of the hairs.

5 CHIEF JUDGE LIPPMAN: Okay, Judge Abdus-
6 Salaam.

7 JUDGE SMITH: Really, you're asking the
8 court to decide whether they test those other fifteen
9 hairs? Isn't that really - - - isn't that an argu -
10 - -

11 MS. SUCHORSKY: We're just asking the court
12 to - - -

13 JUDGE SMITH: - - - isn't it usually the
14 advocate who makes that call?

15 MS. SUCHORSKY: Certainly, but we're asking
16 the court to resolve an issue that was never resolved
17 before we do so.

18 CHIEF JUDGE LIPPMAN: Okay, Judge Abdus-
19 Salaam.

20 JUDGE ABDUS-SALAAM: My question's about
21 the hairs, too. If you lose now, and those hairs
22 still exist, could you test them; and if the test
23 results were similar to the three, would you be able
24 to bring another hearing - - - a request for another
25 hearing?

1 MS. SUCHORSKY: We could bring another 440,
2 but I believe the standard is quite difficult - - -
3 that you could, under Section 2, just dismiss the - -
4 - the motion because we could have technically
5 brought it before. So that's - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MS. SUCHORSKY: - - - a possibility we're
8 concerned of. Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks, counsel.
10 Thank you both; appreciate it.

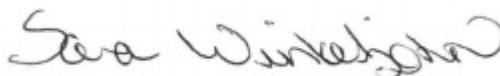
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Clifford Jones, No. 219 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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