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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 145

LERIO GUERRERO,

Appellant.

20 Eagle Street
Albany, New York 12207
September 08, 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:

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1 CHIEF JUDGE DIFIORE: Appeal number 145,
2 the People v. Lerio Guerrero.

3 MR. GARBER: Good afternoon. My name is
4 Glenn Garber, and I represent appellant, Lerio
5 Guerrero. I would request two minutes for rebuttal,
6 if I could have it?

7 CHIEF JUDGE DIFIORE: You may, Mr. Garber.

8 MR. GARBER: Thank you. This is an appeal
9 before this court based on leave that was granted by
10 a justice of this court.

11 And I'm going to start with a quote from
12 People v. Perez. It's a 1994 case out of this court.
13 And this is the quote: "Section 6 of Article I of
14 the State Constitution guarantees individuals the
15 right to indictment by a grand jury before being
16 tried for an infamous crime. That requirement,
17 rooted in the belief that the public should have a
18 check against the potential abuse of power by those
19 vested with the prosecutor - - - prosecutorial
20 authority of the state is a matter of public
21 fundamental rights fixed by the Constitution, not one
22 of policy, expedience, or convenience as a district
23 attorney or judge may see it."

24 That quote puts into focus the problem that
25 is presented in this appeal. Here, and - - - and

1 just to kind of back up a little bit, that - - - the
2 right to a grand jury, although notice is a big thing
3 that gets discussed in the briefs here, this is not a
4 problem with notice. This is a problem with
5 presenting sufficient evidence to a grand jury
6 linking the defendant to the crime.

7 JUDGE STEIN: Is that - - - does that
8 survive a plea?

9 MR. GARBER: That does survive a plea. And
10 I believe that the law is clear that that type of an
11 error, the identity of a defendant, a critical piece
12 of evidence that is lacking in a grand jury
13 proceeding, is one of constitutional dimension, and
14 is fundamental, and that survives a guilty plea.

15 JUDGE PIGOTT: What should the DA have
16 done, in your view?

17 MR. GARBER: In this case?

18 JUDGE PIGOTT: Yeah.

19 MR. GARBER: Well, what the DA - - - the DA
20 should have done was, they should have, first of all,
21 indicted the case - - - I mean, within the five-year
22 period of time. Okay? And then once the - - - it -
23 - - okay, and then they should have went back and
24 presented the case to a grand jury again, after the
25 defendant got arrested and they were able to make a

1 link. Whether - - -

2 JUDGE FAHEY: So let - - - so let me ask
3 this. So you can indi - - - you're not arguing that
4 you can't have a John Doe indictment?

5 MR. GARBER: I'm not - - - that's the
6 notice problem. I mean, I do think there's issues
7 with that. But I mean, the law is fairly clear that
8 that's okay, and that may start - - -

9 JUDGE FAHEY: So let me take the next
10 logical step, then. So what's the difference between
11 a John Doe indictment and substituting a DNA
12 indictment, then?

13 MR. GARBER: Okay. The problem here is
14 it's - - - it's not a facial issue.

15 JUDGE FAHEY: Um-hum.

16 MR. GARBER: What happened is, is - - - and
17 there's sort of a number of moving parts here. So
18 you have the amendment to the indictment. And I'm
19 putting the statute of limitations issue aside for a
20 moment, because it's - - -

21 JUDGE FAHEY: Which is really all that's in
22 front of us, is the amended indictment, not the
23 original indictment?

24 MR. GARBER: Well, correct. Well, I - -
25 I'm not sure. I think they're - - - the whole

1 package is in front of you. What you have is a DNA
2 indictment that is then re-upped or put back into
3 play by this amendment. And it's the matter of the
4 amendment that probably is the key problem here.
5 Because instead of going - - -

6 JUDGE STEIN: So if - - - if it had never
7 been amended and - - - and we were just talking about
8 a statute of limitations problem, you - - - you
9 wouldn't be arguing that the DNA indictment was
10 insufficient?

11 MR. GARBBER: Well, the argument below was
12 that it was insufficient. And People v. Martinez,
13 which is, I guess, the only key case in New York out
14 of the First Department, says there's no notice
15 problem. So I don't know if we would be making that
16 argument.

17 But here, what happens is, the amendment,
18 that's the issue that gets preserved, and that's what
19 I was trying to tee up with that quote.

20 JUDGE RIVERA: I - - - I - - - correct me
21 if I'm misunderstanding your argument. I thought
22 your argument is you've got this John Doe indictment,
23 and now they want to amend it to connect the
24 defendant - - - to identify the defendant as the
25 person who was previously called "John Doe", because

1 it's based on this DNA identifier. And that's all
2 well and good. The DA could do that. But they can't
3 do that through this kind of hearsay - - -

4 MR. GARBER: That's exactly right.

5 JUDGE RIVERA: - - - evidence that they
6 used here.

7 MR. GARBER: I mean, and - - -

8 JUDGE RIVERA: Okay. So now we're going to
9 get back to Judge Fahey's question. What should they
10 have done - - - or Judge Pigott - - - what should
11 they have done other than use this hearsay evidence?

12 MR. GARBER: I don't know what they - - -

13 JUDGE RIVERA: Because that's the crux of
14 your argument. Right?

15 MR. GARBER: Under these circumstances?

16 JUDGE RIVERA: Yes.

17 MR. GARBER: I don't know what they could
18 have done. Okay? Because here it's - - - it's
19 twelve-and-a-half years - - -

20 JUDGE RIVERA: Did they need to bring - - -

21 MR. GARBER: - - - so what they - - -

22 JUDGE RIVERA: - - - in - - - did they need
23 to bring in the person who matched the DNA or someone
24 who had matched the DNA?

25 MR. GARBER: They needed to bring in - - -

1 okay. The affida - - - the affirmation by the
2 prosecution that says - - - and I think I have it
3 right here; it's page 121 of the Appellate Record - -
4 - says, I spoke - - - and I'm going to summarize
5 because of time. Okay? I spoke to this police
6 officer; he recovered a cigarette butt from Mr.
7 Guerrero, and the DNA swab was taken from that.

8 Then I spoke to someone from the OCME who
9 tested that and then made a comparison between the
10 profile on that cigarette butt and the crime scene
11 evidence.

12 JUDGE RIVERA: So is that who they needed
13 to bring into the grand jury?

14 MR. GARBER: They needed to bring - - -
15 that's evidence. That's DNA. It may be very strong
16 evidence. It may be - - - you know, there would have
17 gotten an indictment, you know, no matter what
18 prognosis, bad for a no true bill there, but they
19 have to do it. And - - -

20 JUDGE RIVERA: But why - - - why can't they
21 just go with the hearsay, and that's something you
22 can challenge at trial?

23 MR. GARBER: Because it's - - - it's an
24 identification. So it's akin to - - - and there was
25 a quote from the trial counsel on this - - - it's

1 akin to - - - you know, we have a description of the
2 - - - of the perpetrator, and then they arrest the
3 defendant a few months later, and then instead of - -
4 - you know, and then a line-up's done. And then the
5 defendant is picked out of the line-up. And instead
6 of putting that line-up evidence into the grand jury
7 to make the link, they put in an affidavit that says
8 I viewed a line-up and that line-up showed that the
9 defendant was picked out.

10 It's the same - - - I mean, DNA evidence is
11 - - -

12 JUDGE GARCIA: This is a motion to amend,
13 right? They're not in front of the grand jury. Or
14 am I reading that wrong?

15 MR. GARBER: Well, the amend - - - what - -
16 - what effectively happened was the motion to amend
17 circumvented this critical part of a grand jury
18 proceeding.

19 JUDGE GARCIA: Right. So I thought your
20 argument was that should have - - - what they should
21 have done was go in the grand jury with this and - -
22 -

23 MR. GARBER: Well, they - - - okay.

24 JUDGE GARCIA: But they didn't. But they -
25 - - is your argument that even if this is a proper

1 motion to amend, that this is not sufficient to
2 support it?

3 MR. GARBER: Well, it can never - - - I
4 hope I'm getting the question properly. This can
5 never have been a proper motion to amend based on the
6 way they did it. They would have - - - because of
7 the nature of the evidence - - -

8 JUDGE GARCIA: Okay.

9 MR. GARBER: - - - and linking the
10 defendant to the crime scene, you've got evidence
11 from the defendant, his Buccal swab and DNA profile.
12 You've got the rape kit.

13 JUDGE GARCIA: I understand the evidence -
14 - -

15 MR. GARBER: You've got to make that link.

16 JUDGE GARCIA: - - - I understand. I
17 understand.

18 MR. GARBER: You can't do it - - -

19 JUDGE GARCIA: - - - I understand the
20 evidentiary issue. But so let's go back to an
21 earlier question on you indicted under Joe Smith. It
22 turns out that's an alias; it's actually Joe Jones.
23 I make a motion to amend. I'm the prosecutor. I
24 make a motion to amend. I have hearsay establishing
25 that actually this alias belongs to Joe Jones. They

1 grant the motion to amend.

2 Would that be the same problem? Do you
3 have a problem here because it's DNA?

4 MR. GARBER: I have a problem here because
5 the DNA becomes the identifying piece of evidence
6 that links - - -

7 JUDGE GARCIA: Joe Jones, Joe Smith - - -

8 MR. GARBER: - - - the defendant to the - -
9 -

10 JUDGE GARCIA: - - - was the identifying
11 evidence there, and at trial, the People are going to
12 have to prove actually Joe Jones and Joe Smith are
13 the same person. But it doesn't mean they have to
14 put nonhearsay evidence in to amend the indictment.

15 MR. GARBER: Well, that - - - that's a
16 technical problem with the face of the indictment
17 that has nothing to do with the fundamental proof.

18 JUDGE GARCIA: I'm not Joe Jones. I have
19 no knowledge - - - I don't know who that is.

20 MR. GARBER: Well - - - okay.

21 JUDGE GARCIA: I'm not DNA sequence
22 whatever. I don't know who that is either.

23 MR. GARBER: But if - - - and I - - - it's
24 a way you look at this, I guess, if you say look, a
25 DNA profile is akin to a human being, and an

1 identification of that human being without making the
2 link between the defendant's DNA and the DNA from the
3 crime scene - - -

4 JUDGE GARCIA: It was an alias.

5 MR. GARBER: - - - which is what they
6 argue, then you're basically saying you know what?
7 That form of evidence, DNA match, okay, we can take
8 judicial notice of it and we could - - - we don't
9 need to go before a grand jury. We don't need to
10 prove that connection. And you're tampering with the
11 - - - the function of the citizens, which is to put
12 their imprimatur of yes, this case can go forward,
13 because we are a fact-finder, we've seen it - - -

14 JUDGE RIVERA: If - - if - - if they had -
15 - - if they had identified the defendant originally
16 and wanted to use DNA before the grand jury, could
17 they have done it through hearsay or would they have
18 had to have called these people to be - - - let's say
19 they know it's the defendant and now they want to
20 connect - - - they want to use this DNA as part of
21 the evidence - - -

22 MR. GARBER: I - - -

23 JUDGE RIVERA: - - - they present to the
24 grand jury?

25 MR. GARBER: If they've already made a

1 sufficient factual link between the crime scene
2 evidence and the defendant - - -

3 JUDGE RIVERA: Yes.

4 MR. GARBER: - - - say the defendant is the
5 perpetrator for this crime through, let's say, ID - -
6 -

7 JUDGE RIVERA: Yeah.

8 MR. GARBER: - - - okay, I don't know why
9 they would need to then put in hearsay DNA evidence.

10 JUDGE RIVERA: So originally - - -

11 MR. GARBER: But I don't think they could
12 do that.

13 JUDGE RIVERA: Um-hum.

14 MR. GARBER: I mean - - -

15 JUDGE RIVERA: I'm saying - - - let's start
16 with the first grand jury or the grand jury that
17 heard this and - - - and issued the indictment,
18 right?

19 MR. GARBER: Yes.

20 JUDGE RIVERA: So let's say the prosecutor
21 wants to - - - has - - - knows it's the - - - or
22 thinks it's the defendant, that's the person they
23 want charged, has the DNA, they want to present that
24 also to the grand jury. So my question was, could
25 they have done it the way they've done it here - - -

1 MR. GARBER: No.

2 JUDGE RIVERA: - - - in the amendment, or
3 would they have had to have called in the person who
4 has compared the DNA and the police officer with the
5 cigarette - - -

6 MR. GARBER: They would have had - - -

7 JUDGE RIVERA: - - - butt? That's my
8 question.

9 MR. GARBER: I think the answer is they
10 would have to do it through live testimony just like
11 they would any other form of identification.

12 JUDGE RIVERA: Um-hum.

13 CHIEF JUDGE DIFIORE: Thank you, sir.

14 JUDGE FAHEY: So - - -

15 CHIEF JUDGE DIFIORE: Oh.

16 JUDGE FAHEY: - - - so the defendant uses a
17 false name. You go in, you bring a motion to
18 substitute the - - - the accurate name - - - the DA
19 does. That's unquestionably allowed under our
20 jurisprudence?

21 MR. GARBER: A false name under our
22 jurisprudence?

23 JUDGE FAHEY: Right.

24 MR. GARBER: That is considered to be a
25 technical defect to the face of the indictment, not

1 the underlying proof.

2 JUDGE FAHEY: Right, the underlying - - -
3 but we're not talking here about - - - we're talking
4 about DNA as an identifier. DNA is certainly a
5 better identifier than a name. So that's the problem
6 with the logic - - - with the logic of your argument.

7 I understand your argument the other way,
8 which is that you're basically saying he wasn't
9 indicted by the grand jury at all on this proof.
10 That - - - that's the side of the argument - - -

11 MR. GARBER: Not Guerrero. Okay. A DNA
12 profile was indicted as a - - -

13 JUDGE FAHEY: Was indicted, but not
14 Guerrero.

15 MR. GARBER: - - - first step. It's a half
16 indictment came down against a DNA profile, but the
17 link - - - the evidentiary link, the identification
18 procedure, which happens to be DNA here, the match,
19 okay, was not presented to a grand jury in an
20 appropriate way, and the State - - - or the
21 prosecution, essentially just put it through without
22 going to the citizens, which is the grand jury, and
23 that's the function - - -

24 JUDGE ABDUS-SALAAM: So I think I - - -
25 your underlying argument, counsel, on the name thing,

1 is that Sheila Abdus-Salaam was indicted, whether the
2 name used was Sheila Abdus-Salaam or Sheila Blow or,
3 you know, Sheila whoever, or a different name. But
4 the person Sheila Abdus-Salaam was indicted, but not
5 DNA - - - not with the DNA. Is that - - - is that
6 basically your argument?

7 MR. GARBER: Well, I think - - - I hope I'm
8 getting this right, because - - - the - - - the name
9 does not matter that much.

10 JUDGE ABDUS-SALAAM: Right.

11 MR. GARBER: As long as they bring the
12 right defendant - - -

13 JUDGE ABDUS-SALAAM: That's what I mean.

14 MR. GARBER: - - - to trial - - -

15 JUDGE ABDUS-SALAAM: Right.

16 MR. GARBER: - - - the notice requirement
17 has been satisfied. The name is not that relevant.
18 That's a facial issue. Due process is not violated,
19 because now the defendant knows these are my charges.
20 I'm in court. Whatever my name is really doesn't
21 matter here, I'm going forward and fighting these
22 charges.

23 This is different. This is a fundamental
24 piece of evidence that has to go before a fact-
25 finding grand jury and it hasn't. And I know I'm

1 over my time. I apologize.

2 JUDGE RIVERA: May I ask?

3 CHIEF JUDGE DIFIORE: One more question.

4 JUDGE RIVERA: Thank you. So then just to
5 clarify. So then your point sort of in these
6 hypotheticals about the different name or a false
7 name, is your point that that - - - that that is that
8 there's something defective in the identifier, but in
9 the DNA, their position is there's nothing defective
10 in the identifier, they're simply linking to a
11 person?

12 MR. GARBBER: I'm - - - I'm saying - - -

13 JUDGE RIVERA: Um-hum.

14 MR. GARBBER: - - - okay, they're saying
15 that the identifier itself - - - I believe this is
16 their argument. This was not their argument below.
17 But this is their argument in this court. That
18 identifier is enough. That DNA indictment is so
19 specific that it's akin to - - -

20 JUDGE RIVERA: But the point is that the
21 identifier is correct as opposed to in the other - -
22 -

23 MR. GARBBER: It may be.

24 JUDGE RIVERA: - - - what I'm saying is, in
25 these other hypotheticals, I - - - I thought in part

1 you were arguing that the identifier has a defect
2 that's technical, and that's what you're correcting
3 versus the identifier is accurate. It's got to be -
4 - - someone has that DNA. Let me try it that way.

5 Someone has that DNA. And maybe at trial
6 your - - - your client is going to say, well, that's
7 not my DNA. But - - - but you're saying the grand
8 jury's got to decide whether or not, based on the
9 evidence they have - - - and you're saying it's not
10 through hearsay, it should believe testimony - - -
11 this DNA for whoever the first grand jury said that's
12 the person who needs to be brought up on these
13 charges, is this person. That's the live - - -

14 MR. GARBER: Correct.

15 JUDGE RIVERA: - - - testimony you want.

16 MR. GARBER: And that - - -

17 JUDGE RIVERA: As opposed to a defect in
18 the identifier initially.

19 MR. GARBER: It's a de - - - but it's a
20 defect of factual proof.

21 JUDGE RIVERA: Um-hum.

22 MR. GARBER: Okay?

23 JUDGE RIVERA: Okay.

24 MR. GARBER: So it's not a facial problem
25 with the indictment.

1 JUDGE RIVERA: Um-hum.

2 MR. GARBER: Okay? The in - - - I mean, at
3 least we're not arguing that it is. We're arguing
4 that it's a defect in the - - - there's a gap in
5 proof here.

6 And this was a developing thing. This was
7 not - - - this was a rolling thing that was happening
8 throughout the United States. And now they're
9 repealing the statutes of limitations in these cases
10 to obviate this and other problems. So - - -

11 CHIEF JUDGE DIFIORE: Thank you, sir.

12 Counsel?

13 MS. CHANDA: May it please the court,
14 Malancha Chanda for the People.

15 JUDGE GARCIA: Counsel, before you start,
16 could you - - - I'm sorry to interrupt you.

17 MS. CHANDA: Sure.

18 JUDGE GARCIA: But could you help shed some
19 light on this difference between I indict under John
20 Doe, it turns out the person is John Smith - - -

21 MS. CHANDA: Right.

22 JUDGE GARCIA: - - - and later on I come in
23 for a technical indictment and I want to link John
24 Smith to the John Doe alias, what's the difference in
25 the - - -

1 MS. CHANDA: There is no difference. There
2 - - - there's no meaningful difference. They - - -
3 it really turns on whom the grand jury intended to
4 indict. And this court has held that in *People v.*
5 *Bogdanoff*, has recognized that who - - - who is the -
6 - - what is the identity or who is the person the
7 grand jury intended to indict.

8 And if the name was incorrect because - - -
9 as in *Ganett*, a case I cited in my brief, in that
10 case the police officer didn't know his correct name
11 but said this is the guy who sold me heroin on a
12 specific date, and then later it comes out that, no,
13 that guy's name is different, you could do it by a
14 motion to amend with extraneous evidence, that that's
15 acceptable.

16 JUDGE GARCIA: Can you do it the other way?
17 Can you move to amend to add an alias?

18 MS. CHANDA: I'm sorry, amend - - -

19 JUDGE GARCIA: Can you move to amend to add
20 an alias?

21 MS. CHANDA: Sure. Because that - - - and
22 that's developed through extraneous proof that you
23 find out by birth records or arrest records that the
24 defendant has used another name, and you put that in
25 to the indictment.

1 JUDGE GARCIA: So the first name is the
2 correct name, the correct identifier. Joe Smith is
3 the name, but you find out this person's using the
4 name Joe Jones. You can file an amendment to add the
5 Joe Jones?

6 MS. CHANDA: I would assume it's a/k/a also
7 known as Joe Jones alias.

8 JUDGE PIGOTT: This motion to amend is on
9 notice?

10 MS. CHANDA: I'm sorry?

11 JUDGE PIGOTT: The motion to amend - - -

12 MS. CHANDA: Yes.

13 JUDGE PIGOTT: - - - was on notice?

14 MS. CHANDA: Yes. And - - -

15 JUDGE RIVERA: But the question here is how
16 you present this so that you can connect this
17 defendant to the identifier, right? Because it is
18 not like those other cases. The identifier you say
19 is not defective. It's not wrong.

20 MS. CHANDA: Right.

21 JUDGE RIVERA: The identifier is right.

22 MS. CHANDA: Right.

23 JUDGE RIVERA: We don't know is - - - who
24 is the person - - - we can't find this - - -

25 MS. CHANDA: This - - -

1 JUDGE RIVERA: - - - person who has this -
2 - -

3 MS. CHANDA: Matches the - - -

4 JUDGE RIVERA: - - - unique DNA.

5 MS. CHANDA: Right.

6 JUDGE RIVERA: Aha, now we found him many
7 years later and now we want to, of course - - -

8 MS. CHANDA: Right.

9 JUDGE RIVERA: - - - proceed against this
10 person.

11 MS. CHANDA: Right.

12 JUDGE RIVERA: Right?

13 MS. CHANDA: Under the CPL 200.70, that
14 says when there are variances in proof that deal with
15 names of persons or places, you can do it by
16 amendment at any time before or at trial. And that's
17 what was done here. This motion to amend - - -

18 JUDGE RIVERA: Yeah, but isn't - - - I take
19 it the People's point is really, you can only do this
20 at trial, and that's where this - - - this is where
21 the rubber hits the road.

22 So he wants to say, you've got to use live
23 testimony, because the grand jury needs to observe
24 them and make a - - - make their decision based on
25 that, not on hearsay and so-and-so told me this, and

1 so-and-so told me they did that. That's his point,
2 which is not about the defectiveness of the initial
3 identifier.

4 MS. CHANDA: Well - - - and correct me if
5 I'm wrong, Your Honor - - -

6 JUDGE RIVERA: Are he - - - I don't think
7 he's sitting around saying that the DNA is defective
8 in the sense it's not accurately identifying the
9 perpetrator. He's not saying that at this point.

10 MS. CHANDA: I think he's saying it's
11 insufficient proof on my understand - - -

12 JUDGE RIVERA: That connects him to the - -
13 - that connects to the defendant.

14 MS. CHANDA: Right. And in this case,
15 putting aside the fact that he pled guilty and he
16 admitted that the DNA profile belonged to him, what
17 happened was there was testimony that this DNA could
18 belong to only one of a trillion people, and that's
19 200 worlds. So now you - - -

20 JUDGE RIVERA: Yeah, but I don't think
21 that's his argument. His argument is you could do
22 that, you've just got to do that with live testimony.
23 He's not challenging that, right?

24 MS. CHANDA: Um - - -

25 JUDGE RIVERA: Let's say we hold against

1 you. What would you do? What - - - what will happen
2 the day after this comes down if we agree with him,
3 you can't do this through this kind of hearsay
4 motion?

5 MS. CHANDA: Well, I - - -

6 JUDGE RIVERA: What would the DA's office
7 do?

8 MS. CHANDA: Well, I think we are barred by
9 the statute of limitations.

10 JUDGE RIVERA: No, no. Not in his case.

11 MS. CHANDA: Oh, sorry.

12 JUDGE RIVERA: As a general matter, moving
13 forward with these DNA John Doe - - -

14 MS. CHANDA: Um-hum.

15 JUDGE RIVERA: - - - to the extent you need
16 them, that, you know, you've got these statute of
17 limitations problems?

18 MS. CHANDA: Sure. I mean, in - - - in
19 this case or similar cases, with DNA that involved
20 rape or criminal sex acts, I think the federal
21 legislature has abolished the statute of limitations,
22 so presumably we have a much longer time - - -

23 JUDGE RIVERA: You don't have to concern
24 yourself with it that way. Okay.

25 MS. CHANDA: - - - to - - -

1 JUDGE ABDUS-SALAAM: But even in this - - -
2 in this case, counsel, you say, then it's over. If
3 you had good cause, wouldn't you be able to re-
4 present the case to the grand jury?

5 MS. CHANDA: Well, yes, because the statute
6 of limitations technically has not expired with
7 respect to a number of these charges. So we would be
8 able to do that.

9 JUDGE PIGOTT: Well, the reason I asked
10 about notice is, it seems to me that the problem gets
11 cured that way. If - - - if I came in and said that
12 was not my cigarette butt, or if I came in and said I
13 don't know where you got this; you must've picked up
14 the wrong file and associated it with the wrong DNA -
15 - -

16 MS. CHANDA: Right.

17 JUDGE PIGOTT: - - - that's - - - that is
18 aired before the court, before you're allowed to do
19 the amendment, right?

20 MS. CHANDA: Right. And in this case, I
21 believe, the only objection was that it was an
22 improper procedure by doing it by the motion. There
23 was nothing going to the substance of whether it was
24 not his DNA or there - - - there was a problem with -
25 - - with obtaining the DNA. That my understanding is

1 not been granted and it would have been fine to
2 proceed with the DNA indictment with the profile.

3 JUDGE RIVERA: Let me ask you, if you would
4 again clarify this. If it's just an error in the
5 name - - -

6 MS. CHANDA: Sure.

7 JUDGE RIVERA: - - - just an error in the
8 name - - -

9 MS. CHANDA: Yes.

10 JUDGE RIVERA: - - - what's the supporting
11 documentation for the motion.

12 MS. CHANDA: You're talking theoretic - - -
13 just in the abstract, not in this case?

14 JUDGE RIVERA: Not in this case.

15 MS. CHANDA: Right.

16 JUDGE RIVERA: Because it's not about the
17 name. There is no name.

18 MS. CHANDA: Because there was no error
19 here.

20 JUDGE RIVERA: Well, there's John Doe, but
21 there's an identifier.

22 MS. CHANDA: I would assume that there is
23 some documentation about through what search or
24 discovery led the police to the proper name.

25 JUDGE RIVERA: Is that an affidavit by the

1 person, or is that the ADA's affirmation? What is
2 the supporting documentation you put in?

3 MS. CHANDA: I would assume it could be an
4 affirmation and documentation concerning criminal
5 history records. Maybe defendant wants to say this
6 is my name, this - - - and I want to affirm that I am
7 not the person who was charged.

8 JUDGE RIVERA: Let's assume they're not
9 doing that.

10 MS. CHANDA: Okay, right. But the People
11 will put in an affirmation, probably supported with
12 documentation, do a search of what - - -

13 JUDGE RIVERA: So here there's only
14 hearsay, there's not affidavits attached?

15 MS. CHANDA: I believe it's just an
16 affirmation.

17 JUDGE RIVERA: Yeah. Why - - - why not do
18 the affidavits here if you might do them - - - if you
19 might use these other supporting documentation, if
20 it's just a name problem?

21 MS. CHANDA: I'm sorry, I'm - - -

22 JUDGE RIVERA: Would that perhaps resolve
23 this? Let's say - - - let's say the court thinks
24 that well, you can't use hearsay for that - - - in
25 that way. Right? You want - - - forget the live

1 testimony for one moment. We just don't like this
2 saying so-and-so told me so-and-so. Right?

3 MS. CHANDA: Right. I have to go back - -
4 -

5 JUDGE RIVERA: The under oath statement in
6 writing.

7 MS. CHANDA: Um-hum.

8 JUDGE RIVERA: Is there a - - -

9 MS. CHANDA: I believe there was basis - -
10 -

11 JUDGE RIVERA: - - - reason you couldn't do
12 that if you're doing supporting documentation for
13 other kinds of John Doe indictments? Or am I
14 misunderstanding the whole process?

15 MS. CHANDA: The main thing is, like
16 extraneous evidence - - -

17 JUDGE RIVERA: Um-hum.

18 MS. CHANDA: - - - is permitted, it doesn't
19 - - -

20 JUDGE RIVERA: Um-hum.

21 MS. CHANDA: - - - the statute certainly
22 doesn't limit the type of evidence, it just says the
23 extraneous evidence to make nonsubstantive changes in
24 variances of proof, as with a name - - -

25 CHIEF JUDGE DIFIORE: Counsel, how did this

1 indictment effectively charge this defendant and put
2 him on notice?

3 MS. CHANDA: I'm sorry, how did it - - -

4 CHIEF JUDGE DIFIORE: Effectively charge -
5 - -

6 MS. CHANDA: - - - set forth - - -

7 CHIEF JUDGE DIFIORE: - - - him and - - -

8 MS. CHANDA: It set forth each of the
9 charges and specified the charges and set forth all
10 the elements and the facts supporting those material
11 elements, and provided him with notice. And
12 presumably, when he was arraigned on it is when he
13 had notice of the charges against him. And he's not
14 contesting that he had notice of the charges against
15 him. And the indictment fulfilled its jurisdictional
16 requirements by providing that notice.

17 Whether a specific type of - - - a form of
18 the caption it's not a jurisdictional issue, and so
19 it's not before this court, because of his guilty
20 plea. And again, the grand jury testimony
21 established that this DNA which was taken from - - -
22 from the victim, couldn't have belonged to anyone but
23 one out of a trillion people in this world, which
24 there's only five billion people - - -

25 JUDGE RIVERA: Right, but in - - - but in

1 this case, the grand jury did not have an opportunity
2 to assess your evidence that links the defendant to
3 his identifier. Is that correct?

4 MS. CHANDA: Again, the grand jury - - -

5 JUDGE RIVERA: If you - - -

6 MS. CHANDA: - - - intended to - - -

7 JUDGE RIVERA: - - - if you had new - - -

8 well, the answer is yes, correct?

9 MS. CHANDA: Well, yes. No, the grand jury
10 intended to indict a specific person.

11 JUDGE RIVERA: No, I understand that. But
12 - - - but - - -

13 MS. CHANDA: And that linked - - -

14 JUDGE RIVERA: - - - that grand jury did
15 not have the opportunity to assess your linking
16 evidence, correct?

17 MS. CHANDA: But it was not required under
18 CPL - - -

19 JUDGE RIVERA: I'm not - - - it's just a
20 yes or no.

21 MS. CHANDA: No.

22 JUDGE RIVERA: Okay. That's fine.

23 MS. CHANDA: Okay.

24 JUDGE RIVERA: All right. So let me ask
25 you this. It was a question I asked him before - - -

1 MS. CHANDA: Um-hum.

2 JUDGE RIVERA: - - - and I've gone past the
3 time, if the Chief Judge will - - -

4 CHIEF JUDGE DIFIORE: Yes.

5 JUDGE RIVERA: - - - just allow me this one
6 question. So let's say you had linked him up before
7 the indictment, but you were going to present this
8 DNA evidence to the grand jury. You would have done
9 that with - - - with live testimony, with the human
10 beings that connect him?

11 MS. CHANDA: I - - -

12 JUDGE RIVERA: Or would you not have done
13 that?

14 MS. CHANDA: Do you mean that would we have
15 presented just what we did in this case, even if we
16 had made - - - made the match?

17 MS. CHANDA: If you had - - - right. If
18 you had the DNA?

19 MS. CHANDA: I would - - - I would not
20 under - - - I can't understand why we would not put
21 evidence of that match in before the grand jury.

22 JUDGE RIVERA: The grand jury. So you
23 would have called someone from OCME - - -

24 MS. CHANDA: Right.

25 JUDGE RIVERA: - - - and a police officer

1 who's got the cigarette butt - - -

2 MS. CHANDA: And explain - - -

3 JUDGE RIVERA: - - - whatever the - - -

4 whatever way - - -

5 MS. CHANDA: Exactly.

6 JUDGE RIVERA: - - - you would have chosen

7 to link that.

8 MS. CHANDA: Sure.

9 JUDGE RIVERA: Correct. Okay. Thank you -

10 - -

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MS. CHANDA: If we had that, yes. And

13 unless there are any other questions? Okay.

14 CHIEF JUDGE DIFIORE: Thank you.

15 MS. CHANDA: Thank you.

16 CHIEF JUDGE DIFIORE: Mr. Garber, get back

17 to Judge Garcia's question. You have a witness in

18 the grand jury who affirmatively misidentifies the

19 defendant by name - - - it's the right defendant - -

20 - affirmatively misidentifies him, calls the person

21 Jim Johnson. The DA - - - the indictment charges Jim

22 Johnson. The police go out and pick up Jim Johnson.

23 They run his rap sheet. It turns out it's John

24 Jones.

25 The People move to amend the indictment to

1 reflect the appropriate name. How does that differ
2 from what we have here?

3 MR. GARBER: That's - - - in that situation
4 there's no doubt that the person who was - - - let's
5 say, identified in the precinct and who is being
6 brought into court under the indictment by the wrong
7 - - - is the same person. They've already made the
8 sufficient link.

9 So there's no doubt - - -

10 CHIEF JUDGE DIFIORE: Outside of the grand
11 jury's presence?

12 MR. GARBER: No, it would have been done
13 inside the grand jury's pre - - - I'm assuming in
14 that scenario an identification has already been done
15 of - - - are you saying - - - well, how was the
16 identification in that case done, through - - -

17 JUDGE GARCIA: But they've already done
18 that part through the DNA.

19 MR. GARBER: With a photograph.

20 JUDGE GARCIA: No, no, no. With the DNA,
21 because they've already gone in and said to the grand
22 jury, I'm - - - I suspect, that this DNA profile
23 matched this evidence. So they've indicted that
24 profile the way you say and the Chief I think is
25 getting at - - - the Chief Judge - - - they indicted

1 Joe Jones. Because it's the equivalent of that
2 initial testimony that you're saying is missing here,
3 but it's the equivalent of that initial testimony: I
4 saw Joe Jones commit this crime. This is probable
5 cause to believe Joe Jones committed this crime.

6 They went in a grand jury and they said
7 this is probable cause. I'm assuming they proved to
8 the grand jury whatever - - - the standard. This is
9 - - - this is DNA profile X, and they indicted DNA
10 profile X, just like they indicted Joe Jones.

11 Later, they find out DNA X has this name
12 and they amend the indictment, the same way later
13 they find out Joe Jones is actually Joe Smith in the
14 - - -

15 MR. GARBER: But it - - -

16 JUDGE GARCIA: You're confusing the second
17 link with the first indictment, is my problem with
18 what you're answering to the question.

19 MR. GARBER: Well, in the Joe Jones situ -
20 - - there will would have been an identification of a
21 human being, whatever that human being's name is.

22 JUDGE GARCIA: So it's the fact that it's a
23 number - - -

24 MR. GARBER: But why is it - - -

25 JUDGE GARCIA: - - - versus a name?

1 MR. GARBER: But why is the DNA profile
2 from the rape kit, okay, the same as an identifying -
3 - - that's definitely the guy. Okay? That's
4 definitely the guy who we haven't found yet. Okay.

5 That's - - - if you go back to the first -
6 - -

7 JUDGE STEIN: Why isn't the DNA profile,
8 "the guy" that we have in here? That's the question.

9 MR. GARBER: Well, I don't think that you
10 can - - - that the court then takes judicial notice
11 of the fact that a DNA profile can only mean one
12 person out there in the world - - -

13 JUDGE STEIN: But that was test - - -

14 MR. GARBER: - - - and that's - - - we're
15 done. We're done.

16 JUDGE STEIN: - - - that was testified to
17 the - - - to the grand jury, that one in however many
18 billion - - -

19 MR. GARBER: Yeah, it's still DNA evidence.
20 Okay? That DNA evidence may be challenged - - -

21 JUDGE ABDUS-SALAAM: Counsel - - -

22 MR. GARBER: - - - at a trial or at some
23 other proceeding.

24 JUDGE ABDUS-SALAAM: Yeah, could they have
25 gone to - - -

1 MR. GARBER: But the court - - -

2 JUDGE ABDUS-SALAAM: - - - trial - - -

3 could the People have gone to trial without amending
4 the indictment? Couldn't they have gone to trial
5 without amending the indictment?

6 MR. GARBER: Not without linking the
7 defendant to the crime.

8 JUDGE ABDUS-SALAAM: Well, they can link
9 him at the trial.

10 JUDGE GARCIA: Right.

11 JUDGE ABDUS-SALAAM: Couldn't they link him
12 at the trial.

13 MR. GARBER: They'd link him through the
14 DNA.

15 JUDGE ABDUS-SALAAM: Right.

16 MR. GARBER: They say that the D - - -

17 JUDGE ABDUS-SALAAM: At the trial.

18 MR. GARBER: But the - - - but that's the
19 identification at the trial that has to be done.
20 They're acknowledging they have to do it at the
21 trial, but they don't have to do it to the grand jury
22 for some reason?

23 JUDGE ABDUS-SALAAM: Well - - -

24 MR. GARBER: It's still a factual link.

25 JUDGE ABDUS-SALAAM: - - - if you - - - if

1 you agree that they could go - - - I mean, it may be
2 a risk, but with DNA probably not that huge a risk,
3 if - - - if the DNA - - - if they believe that this
4 cigarette matches the - - - the DNA that was
5 indicted, they could go to trial and try to prove
6 that.

7 MR. GARBER: Okay. There's also a chain of
8 custody problem here, by the way. And that's never
9 even addressed - - -

10 JUDGE ABDUS-SALAAM: Well, that's - - -
11 isn't that - - - isn't that an evidentiary - - -

12 MR. GARBER: - - - in the grand jury too.
13 But this is a conundrum.

14 JUDGE ABDUS-SALAAM: But isn't that an
15 evidentiary problem? That's my - - - that's the
16 genesis of my question here.

17 MR. GARBER: But - - - but - - -

18 JUDGE ABDUS-SALAAM: If they go to trial on
19 it, they have to prove their case.

20 MR. GARBER: But what evidence - - - I
21 think you're on dangerous ground, basically saying,
22 look, DNA is so powerful and the profile is to - - -

23 JUDGE PIGOTT: No, we're just saying - - -

24 MR. GARBER: - - - identifying that we
25 don't have to link it to a person - - -

1 You go in the grand jury, you indict under
2 an alias. You think it's the right name. You could
3 go through the entire trial and convict under the
4 alias, and you would still have been indicted by the
5 grand jury even though you come forward later and say
6 my real name isn't that.

7 MR. GARBER: Yeah, but there's sufficient
8 proof that that person - - -

9 JUDGE GARCIA: At trial.

10 MR. GARBER: - - - is the same guy on
11 trial.

12 JUDGE GARCIA: At trial. But - - - and
13 that's a trial issue.

14 JUDGE STEIN: Yeah.

15 JUDGE GARCIA: So here they did the same
16 thing. It's almost like just substitute an alias or
17 the real name for this DNA, and later you may learn
18 this defendant used an alias. I want to use that. I
19 move to amend.

20 The indictment has the right name in it.
21 It's not an error. But I want to add an alias. So I
22 move to amend and I add the alias. At trial, I'm
23 going to have to prove to this jury that you, who I
24 indicted under your real name, used this alias in
25 committing the crime.

1 Why is that different?

2 MR. GARBER: In that situation - - - and
3 I've been there may times where you say you're - - -
4 my client's name is wrong or the name is wrong, and
5 there's an amendment by consent; nobody even says
6 anything; it's a ministerial thing. No big deal.

7 This is different, because it's
8 identifying. And I think what - - - at the core of
9 this is, is that profile that is recovered from the -
10 - - the rape kit, is that akin to a human being?
11 Okay? Is that profile the same as a human being,
12 even though we know that - - -

13 JUDGE GARCIA: That's the issue of was the
14 original indictment good or not.

15 MR. GARBER: Yeah, but - - - but the - - -
16 and they amended it through that hearsay affidavit,
17 not like saying, you know, this is just a ministerial
18 thing and this is the guy. They actually put in the
19 chain of custody and all the other stuff to make - -
20 -

21 JUDGE ABDUS-SALAAM: But you're not - - -

22 MR. GARBER: - - - the link.

23 JUDGE ABDUS-SALAAM: - - - you're not - - -
24 counsel, you're not contesting that they could indict
25 the D - - - on the DNA number. You - - - you've

1 the match. But that doesn't mean that the citizens
2 don't pass on that critical factual piece in the
3 grand jury. Where do you draw the line? Can you
4 indict a picture? Can you indict a fingerprint? Can
5 you say those are enough?

6 JUDGE GARCIA: It's the original indictment
7 issue again.

8 MR. GARBER: Yep.

9 JUDGE GARCIA: Your - - - can you indict a
10 DNA profile is not the issue you have here.

11 MR. GARBER: We - - - but a fingerprint.
12 We - - - we - - - hearsay fingerprint linking the
13 defendant. Here's a picture through an affidavit.
14 That's enough to make the link. Where do you draw
15 the line? DNA, powerful. Prognosis is negative for
16 no true bill. Prognosis negative for acquittal. But
17 that doesn't mean that you just say, you know what,
18 I'm the prosecutor; I have DNA evidence; here's an
19 affidavit; scares everybody with the all the alleles
20 and everything; that's enough.

21 You don't have to go before the grand jury.
22 The citizens don't have to pass on it. We're okay
23 with that. I think it's a problem, because you have
24 to draw the line and say the grand jury is not just
25 about notice and avoiding double jeopardy so you know

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what you've been charged it. It's also the citizens considering evidence that links the defendant to the crime, and it's a check on governmental authority.

CHIEF JUDGE DIFIORE: Thank you, Mr. Garber.

MR. GARBER: And the statute of limitations problem I don't - - - oh, sorry. Sorry.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Lerio Guerrero, No. 145 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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