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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 62

NATASCHA TIGER,

Respondent.

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20 Eagle Street  
Albany, New York  
April 26, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is appeal number 62, the People of the  
3 State of New York v. Natascha Tiger.

4 Counsel.

5 MR. MIDDLEMISS: Good afternoon, Your Honor.

6 CHIEF JUDGE DIFIORE: Good afternoon.

7 MR. MIDDLEMISS: Robert Middlemiss on behalf of  
8 the People. The People would reserve two minutes of  
9 rebuttal time.

10 CHIEF JUDGE DIFIORE: Of course.

11 MR. MIDDLEMISS: This case demonstrates precisely  
12 why the framework developed by the Second Department in  
13 People v. Hamilton is entirely inappropriate in the case of  
14 guilty pleas. In - - - in People v. Caldavado, this court  
15 held that two expert witnesses and the defendant's  
16 statements could not, under any proper standard of proof,  
17 establish the defendant's actual innocence. In this case,  
18 on the other hand, the Appellate Division inexplicably held  
19 that the defendant's self-serving statements inconsistent  
20 with both her confessions and her plea allocution supported  
21 solely by a single expert testimony were capable of  
22 establishing her actual innocence. Clearly, that - - -

23 JUDGE RIVERA: What's the standard for granting  
24 the hearing?

25 MR. MIDDLEMISS: According to - - - well,



1 according to the Appellate Division it requires a prima  
2 facie showing of the defendant's ability to establish by  
3 clear and convincing evidence their actual innocence.

4 JUDGE GARCIA: And where is that in the statute?

5 MR. MIDDLEMISS: It's not, Your Honor. It's not.  
6 The - - - that's precisely why the Second Department  
7 apparently found it necessary to develop its own scheme in  
8 terms of - - -

9 JUDGE FAHEY: Well, it's also because it's - - -  
10 it's not statutory, it's constitutional, right?

11 MR. MIDDLEMISS: That - - - that was their  
12 holding in Hamilton. Yes, Your Honor.

13 JUDGE FAHEY: Right. What's your position on - -  
14 - are you only arguing for a plea line that - - - you're  
15 not arguing against the concept of actual innocence; is  
16 that correct?

17 MR. MIDDLEMISS: The - - - the concept of actual  
18 - - - actual innocence as factual innocence?

19 JUDGE FAHEY: Right.

20 MR. MIDDLEMISS: Yes, it's certainly not unheard  
21 of that some defendants are factually innocent. In fact,  
22 in the case of guilty pleas certainly defendants are  
23 factually innocent.

24 JUDGE FAHEY: Well, then - - - I'm sorry. My  
25 question wasn't clear. Would you agree that an actual



1 innocence claim, a freestanding actual innocence claim  
2 could be brought if there wasn't a guilty plea?

3 MR. MIDDLEMISS: The - - - yes.

4 JUDGE FAHEY: And that's the position of the  
5 Fourth Department, I believe.

6 MR. MIDDLEMISS: That - - - that appears to the  
7 decision of all the departments, Your Honor.

8 JUDGE FAHEY: Okay.

9 MR. MIDDLEMISS: The - - - the issue is not  
10 before the court, and we are not - - -

11 JUDGE FAHEY: So it's just the plea is a cut-off  
12 is - - - is what you're saying?

13 MR. MIDDLEMISS: Yes, Your Honor. Yes, Your  
14 Honor. This case deals solely with the defendant's guilty  
15 plea. The issue of the trial claim or the appropriate  
16 trial standard is not before the court. If the court, as a  
17 related matter, wants to address how the - - - the plea - -  
18 - an appropriate plea standard which necessarily involves  
19 the fact of the plea itself would differ - - - be different  
20 from the trial standard that's certainly up to the court.

21 JUDGE FAHEY: Could we avoid it - - -

22 MR. MIDDLEMISS: Certainly.

23 JUDGE FAHEY: - - - in this case?

24 MR. MIDDLEMISS: Absolutely, Your Honor.

25 JUDGE STEIN: What - - - what would be the remedy



1 for someone who - - - who pleaded guilty and - - - and  
2 subsequently had definitive proof that they were innocent?

3 MR. MIDDLEMISS: A proper remedy, as with any  
4 plea remedy, would be the - - - the vacatur of the  
5 conviction. The - - -

6 JUDGE STEIN: What would be the basis then for  
7 vacating a conviction?

8 MR. MIDDLEMISS: It would certainly be covered  
9 under one - - - any meritorious claim of actual innocence  
10 would necessarily be covered under one of those statutory  
11 sections.

12 JUDGE GARCIA: Like DNA?

13 MR. MIDDLEMISS: Like DNA.

14 JUDGE GARCIA: Like DNA for a plea, right?

15 MR. MIDDLEMISS: Yes, Your Honor.

16 JUDGE GARCIA: Right.

17 MR. MIDDLEMISS: And - - - and the DNA is  
18 explicit. But even entirely independent of the DNA the - -  
19 - a claim of innocence can certainly lend greater support  
20 to something else, although not an absolute necessity. In  
21 terms of - - -

22 JUDGE GARCIA: Ineffective assistance claim,  
23 perhaps?

24 MR. MIDDLEMISS: Yes, precisely.

25 JUDGE GARCIA: And there is one here? Is there



1 an ineffective - - -

2 MR. MIDDLEMISS: There is, Your Honor. And it  
3 was - - - the defendant was provided a hearing by the  
4 Second Department, and that part of the Appellate Division  
5 decision is not currently before this court.

6 JUDGE STEIN: Well, what - - - what does  
7 "judgment obtained in violation of the constitutional right  
8 of defendant" mean in 440.10?

9 MR. MIDDLEMISS: The - - -

10 JUDGE STEIN: As, you know, the subcategory?

11 MR. MIDDLEMISS: Just that, Your Honor. It - - -

12 JUDGE STEIN: What does that mean? No, well,  
13 what does it mean?

14 MR. MIDDLEMISS: The - - - the defendants have a  
15 recognized constitutional right to due process, certainly.  
16 They - - -

17 JUDGE STEIN: So due process, what, in - - - in  
18 the trial or plea proceedings? Is that - - -

19 MR. MIDDLEMISS: In all proceedings, Your Honor,  
20 certainly. Certainly.

21 JUDGE STEIN: And that's - - - and that's what  
22 it's limited to. Is - - - is that your argument?

23 MR. MIDDLEMISS: Yes, Your Honor. Yes, Your  
24 Honor. Things - - -

25 JUDGE STEIN: Well, contrary to what the



1 Appellate Division said here, right? Aren't they saying  
2 that that is the subdivision under which this freestanding  
3 innocence claim falls?

4 MR. MIDDLEMISS: They are, Your Honor. They are.

5 JUDGE STEIN: Okay. So I'm trying to - - -

6 MR. MIDDLEMISS: What - - -

7 JUDGE STEIN: I'm trying to determine - - -

8 MR. MIDDLEMISS: The way that the statute is  
9 written, (h) is clearly intended to - - - to provide a  
10 fallback position to adequately cover a number of claims  
11 such as ineffective assistance of counsel. In the instance  
12 - - - in the case of guilty pleas, though, claims of actual  
13 innocence or any other due process claim are adequately  
14 addressed by sections such a 1(a) and 1(b) - - - 1(d), I  
15 believe, which provides for instances in which they are not  
16 in fact knowing, intelligent, and voluntary for any number  
17 of reasons. Whether it is, in the case of 1(h),  
18 ineffective assistance of counsel or an impediment to the  
19 capacity of the defendant or in instances - - - we pointed  
20 to this court's decision in People v. Plunkett.

21 JUDGE RIVERA: So let me just understand this  
22 line of your analysis. Is - - - is your point that if - -  
23 - if the grounds by which defendant is arguing for the  
24 hearing based on actual innocence doesn't fit any of the  
25 other categories but it's constitutionally based then they

1 can proceed on 1(h)?

2 MR. MIDDLEMISS: No, Your Honor. Our position is  
3 that any meritorious claim of actual innocence - - -

4 JUDGE RIVERA: Yes.

5 MR. MIDDLEMISS: - - - in the instance of a  
6 guilty plea - - -

7 JUDGE RIVERA: Yes.

8 MR. MIDDLEMISS: - - - would necessarily as a  
9 matter of law fall - - - fall under one of the existing  
10 categories.

11 JUDGE RIVERA: It would never not fall under  
12 those categories?

13 MR. MIDDLEMISS: Correct, Your Honor.

14 JUDGE RIVERA: Okay. And this one falls under  
15 which category, the - - -

16 MR. MIDDLEMISS: This - - -

17 JUDGE RIVERA: - - - ineffective assistance?

18 MR. MIDDLEMISS: Yes. Yes. In so - - - insofar  
19 as the Second Department has stated that the defendant is  
20 entitled to a hearing on that issue, the - - - that - - -  
21 that is the decision.

22 JUDGE RIVERA: Given - - - given the standard for  
23 ineffective assistance, if the court concludes that in this  
24 case that lawyer wasn't ineffective does this defendant  
25 then have any recourse?

1 MR. MIDDLEMISS: Certainly, Your Honor. Then the  
2 matter would be restored. The - - - the guilty plea  
3 conviction would be vacated. Indeed, that's the entire - -  
4 -

5 JUDGE RIVERA: No, no, no. If the court  
6 determines that given the standard that applies to  
7 ineffective assistance, which you must agree is quite a  
8 high one, that this lawyer under these circumstances wasn't  
9 ineffective what relief would the defendant have? What  
10 recourse?

11 MR. MIDDLEMISS: The plea would be vacated and  
12 the matter would be entirely restored. The - - - as with  
13 any other - - - as with any other involuntary plea. The -  
14 - -

15 JUDGE GARCIA: I think, counsel - - -

16 JUDGE FEINMAN: I think - - - yeah.

17 JUDGE GARCIA: - - - what she's saying is if you  
18 lose the ineffective assistance claim here, if the  
19 defendant loses and now the conviction stands and the claim  
20 remains actual innocence, is there another avenue for this  
21 defendant having lost that motion?

22 MR. MIDDLEMISS: If - - - if the hearing had been  
23 denied on the issue of actual innocence?

24 JUDGE GARCIA: Or they go and they lose.

25 MR. MIDDLEMISS: On the issue of ineffective



1 assistance?

2 JUDGE GARCIA: Yeah, or they lose.

3 MR. MIDDLEMISS: Then the evidence clearly wasn't  
4 sufficient to meet that standard and would not be  
5 sufficient to meet any meaningful standard.

6 JUDGE STEIN: Could they get an executive pardon,  
7 perhaps?

8 MR. MIDDLEMISS: Well, perhaps. Perhaps. The -  
9 - - but obviously that would be a matter for the governor  
10 and not for the courts.

11 JUDGE FAHEY: You know, one of the problems  
12 analytically with the People's proposal, it's rational but  
13 what I wonder is are we creating two categories of  
14 convictions, one where you have certain rights - - -

15 MR. MIDDLEMISS: Well - - -

16 JUDGE FAHEY: Let me just finish my thought. And  
17 under a jury trial, you'd have certain rights to challenge  
18 a free - - - bring a freestanding claim of actual innocence  
19 if we went that way. But in another, in a guilty plea,  
20 which we've never drawn a distinction between those  
21 convictions before, you would not have that right.

22 MR. MIDDLEMISS: The - - - the way that the  
23 Appellate Division set forth its standards essentially  
24 necessitates that. It is in fact an equal opportunity.

25 JUDGE FAHEY: You see the next challenge - - -



1 MR. MIDDLEMISS: In the interest of - - -

2 JUDGE FAHEY: Do you see the next challenge would  
3 immediately, I think, if - - - if I had someone who was a  
4 plea and they have a good argument for actual innocence I'd  
5 say you can't create two different - - - that wouldn't be  
6 constitutionally - - - that wouldn't pass constitutional  
7 muster to do that.

8 MR. MIDDLEMISS: This - - - this standard is the  
9 same in name only. In the instance of a guilty plea the  
10 plea essentially does away with the need for any trial  
11 evidence.

12 JUDGE FAHEY: But you have to - - -

13 MR. MIDDLEMISS: And in the case - - -

14 JUDGE FAHEY: Slow down one second. I - - - I  
15 just want you to address my question which is do you think  
16 we would be creating two different categories of  
17 convictions, and if not why not?

18 MR. MIDDLEMISS: You would not, Your Honor,  
19 because the - - -

20 JUDGE FAHEY: Okay.

21 MR. MIDDLEMISS: - - - standard - - - the  
22 standard that they claim to have applied is the same in  
23 name only. It needs to be two different clearly  
24 articulated standards only insofar as it applies to  
25 everything underlying the conviction. In the case of a



1 guilty plea, the conviction is invariably supported by the  
2 plea itself. In the case of a trial, as they identified in  
3 Hamilton, the issue is addressed to specific aspects of the  
4 case against him like in Caldavado when the issue they  
5 attempted to raise was the expert opinion.

6 In this case, there certainly was an expert  
7 opinion. There certainly were statements which the  
8 defendant has characterized in her motion. But ultimately  
9 - - - ultimately the conviction is based not on trial  
10 evidence but the plea itself, and the plea itself must have  
11 the same weight and strength as the trial evidence. That  
12 requires a different standard than what they have  
13 identified in this case. If the standard in Hamilton is  
14 appropriate then it is appropriate, but it must be a  
15 standard that is equal in implementation in the case of a  
16 guilty plea. This is simply not enough, and the failure to  
17 do that - - -

18 JUDGE RIVERA: Well, I'm - - - I'm not clear.  
19 Then what should be the standard? I thought you were  
20 arguing it shouldn't be the Hamilton standard. What - - -  
21 what do you say is the standard by which to weigh that - -  
22 -

23 MR. MIDDLEMISS: The Hamilton standard they refer  
24 to as clear and convincing evidence.

25 JUDGE RIVERA: Yes.



1 MR. MIDDLEMISS: I can't give you a name for the  
2 plea standard, but it certainly must be clear and  
3 convincing evidence plus, because in the instance of - - -  
4 the clearly identified instance of DNA if they - - -

5 JUDGE FEINMAN: How about overwhelming evidence  
6 of actually innocence?

7 MR. MIDDLEMISS: I - - - I cannot articulate the  
8 standard, Your Honor. It simply needs to be - - -

9 JUDGE FEINMAN: Well - - -

10 MR. MIDDLEMISS: - - - significantly higher so  
11 that - - - so that the plea allocution retains the same  
12 weight and efficiency and absolute - - - absolute value as  
13 a trial verdict. Defendants are necessarily regularly told  
14 prior to entering their pleas that the consequence of a  
15 plea is the same as a consequence after trial.

16 JUDGE FEINMAN: Okay. So - - -

17 MR. MIDDLEMISS: And if - - - if like - - -

18 JUDGE FEINMAN: So let me ask you this, though,  
19 would it be different if it was an Alford plea and you  
20 didn't actually have any factual allocution in the plea?

21 MR. MIDDLEMISS: Different in what sense, Your  
22 Honor? It - - - Alford pleas are regularly treated the  
23 same as any other plea. In the case of - - - in essence in  
24 terms of the - - - the strength of the case against her  
25 motions attempt to impose a degree of collateral estoppel



1 essentially saying that some other civil jury rejected - -  
2 - rejected entirely distinct testimony addressing distinct  
3 issues from this witness and therefore that shouldn't carry  
4 the same weight against her as it did in eliciting the  
5 guilty plea to begin with.

6 Any appropriate standard would not allow for that  
7 sort of thing. And the fact that an Alford plea would  
8 involve a different allocution should not affect its  
9 weight. This court has regularly treated Alford pleas  
10 precisely the same as any other plea. There - - - there  
11 have been a number of cases in which - - - in which  
12 defendants have entered Alford pleas and subsequently come  
13 back and moved to withdraw their plea. In - - -

14 JUDGE STEIN: Can I just clarify - - -

15 MR. MIDDLEMISS: In People V. Alexander - - -

16 JUDGE STEIN: - - - something - - -

17 MR. MIDDLEMISS: I'm sorry.

18 JUDGE STEIN: We're - - - we're talking here  
19 about what the standard would be. That - - - that assumes  
20 that there is an appropriate available claim here, right,  
21 that - - - that a person can have a guilty plea set aside  
22 on a claim of freestanding - - -

23 MR. MIDDLEMISS: If - - -

24 JUDGE STEIN: Right?

25 MR. MIDDLEMISS: If there were a freestanding



1 claim - - -

2 JUDGE STEIN: Okay.

3 MR. MIDDLEMISS: - - - then the standard would be  
4 higher. I would submit - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. MIDDLEMISS: Thank you, Your Honor.

7 CHIEF JUDGE DIFIORE: Thank you.

8 Counsel.

9 MR. INGRASSIA: Good afternoon. May it please  
10 the court, John Ingrassia, Larkin, Ingrassia &  
11 Tepermayster, Newburgh, New York for respondent Natascha  
12 Tiger.

13 JUDGE STEIN: If we recognize a freestanding - -  
14 - well, that's what we're all calling it, a freestanding  
15 claim under subdivision (h), right, then what are we - - -  
16 aren't we eliminating all of the specific requirements of  
17 the other 440.10 grounds?

18 MR. INGRASSIA: No, I - - - I don't believe we  
19 are.

20 JUDGE STEIN: Well, but if anybody can come in  
21 and say I'm actually innocent, I'm - - - and here's - - -  
22 here's my proof, whatever it may be, maybe it's newly  
23 discovered, maybe - - - you know, maybe it's something  
24 else. But - - - and so I'm entitled to a hearing if I've  
25 met whatever the standard is, right, then - - - then why



1 would anybody come in and - - - and meet the requirements  
2 of newly-discovered evidence, that it couldn't have been  
3 discovered before and - - - you know, and all of those  
4 things? What's the point of those?

5 MR. INGRASSIA: I think the answer to that - - -

6 JUDGE STEIN: Or DNA or anything?

7 MR. INGRASSIA: Yeah, I think the answer to that  
8 question is multifaceted. Innocence, actual factual  
9 innocence is freestanding, and actual innocence takes the  
10 form of many different shapes and forms. Some could be  
11 exoneration - - -

12 JUDGE STEIN: Well, that's the point. The - - -  
13 the legislature has given us this very detailed scheme of  
14 on what bases and grounds you can come in and prove that  
15 you were not guilty, that you were innocent. And - - - and  
16 that may be because your lawyer didn't do right by you or  
17 there's DNA evidence to show that - - - that you're  
18 innocent, or there's other kinds of evidence that shows  
19 you're innocent. It lays it all out.

20 MR. INGRASSIA: Well - - - well, I believe, Your  
21 Honor, in and of itself an ineffective assistance of  
22 counsel claim can be brought under 440.10(1)(h) which in  
23 this case is precisely what happened, but we also brought  
24 that application under 440.10(1)(h) as a freestanding  
25 actual innocence claim because the legislature does not

1 delineate what type of constitutional violation has to be  
2 attendant with that proper motion.

3 JUDGE STEIN: Let me ask what I asked your  
4 adversary.

5 MR. INGRASSIA: Sure.

6 JUDGE STEIN: What does that mean, "A judgment  
7 obtained in violation of the constitutional rights of  
8 defendant"? To me that - - - that says that something was  
9 constitutionally wrong in the way that that judgment was  
10 arrived at, not something that comes up afterwards.

11 MR. INGRASSIA: So I would answer that question  
12 there are many different forms of constitutional error.  
13 You could have a Brady violation where a prosecutor  
14 willfully withholds Brady material. I believe the Fourth  
15 Department just held about a month ago - - - I believe it  
16 was the Wilson case, I just read it this morning - - - that  
17 a failure to turn over a Brady material as part of a guilty  
18 plea survived that guilty plea - - -

19 JUDGE STEIN: Okay. And that's - - -

20 MR. INGRASSIA: Okay. That's one violation.

21 JUDGE STEIN: So it's prejudgment, though.

22 MR. INGRASSIA: Right, understood.

23 JUDGE STEIN: I'm talking about the language of  
24 the statute.

25 MR. INGRASSIA: But if we accept the premise - -



1 - I go back to my initial assessment. If we accept the  
2 premise that innocent people falsely confess to crimes that  
3 they did not commit, and even the DA concedes that in their  
4 reply brief - - -

5 JUDGE STEIN: All the time.

6 MR. INGRASSIA: - - - we also have to accept the  
7 premise that those very same factually innocent people  
8 falsely admit their guilt to crimes that they did not  
9 commit. And if that happens - - -

10 JUDGE RIVERA: Yes, but isn't her - - - her whole  
11 argument here that the reason for that is because of the  
12 ineffectiveness of her lawyer?

13 MR. INGRASSIA: I think - - -

14 JUDGE RIVERA: Isn't that really - - - when you  
15 drill down that's why she says I ended up taking this plea?

16 MR. INGRASSIA: She took the plea because of her  
17 advice of her attorney, yes. But also because she was  
18 unaware of the existence of a pathology report taken from  
19 this child at Westchester Medical Center - - -

20 JUDGE RIVERA: But doesn't that track back to  
21 failures of her lawyer?

22 MR. INGRASSIA: Indeed, it does, but it doesn't  
23 have to be completely married with that. So  
24 hypothetically, if I may, this is just one example where  
25 you have an ineffective assistance of counsel also with a



1 freestanding actual innocence claim. The two are not  
2 mutually exclusive. And nowhere under 440, I would  
3 respectfully submit, does a litigant, a defendant, a  
4 convicted individual have to choose under what theory. It  
5 might fit multiple theories. You have exonerated people  
6 for DNA evidence, exonerations through recantation,  
7 exoneration through newly-discovered evidence which I know  
8 there's a definition - - -

9 JUDGE GARCIA: Counsel, the - - - counsel, I'm  
10 sorry - - -

11 CHIEF JUDGE DIFIORE: What would you characterize  
12 this as?

13 MR. INGRASSIA: If we use the term newly-  
14 discovered evidence, this court has defined that. CPLR  
15 440.10 talks about it has to be after trial. Here, and I  
16 think we cite this in our brief, the evidence always  
17 existed. We don't know the reasons why it was not made  
18 part - - - and there's no bad faith here alleged on the  
19 district attorney's part. The materials turned over to  
20 defense counsel, the subpoenaed records from Westchester  
21 Medical Center, apparently just omitted the several-page  
22 biopsy - - - pathology report from the biopsy. Why that  
23 was omitted nobody knows, and that - - - that's a separate  
24 - - -

25 JUDGE GARCIA: But, counsel - - - counsel, this



1 whole scheme goes to, you know, the newly-discovered  
2 evidence builds in an after trial provision, and part of  
3 that is because by pleading guilty you give up a lot of  
4 rights in exchange for this deal. And now the Government  
5 has a guilty plea, and you have whatever arrangement you've  
6 made in terms of a - - - the plea in the sentence. You can  
7 wait five years, ten years, Government witnesses can die.  
8 They never had an opportunity to put their case on, and now  
9 you come in with what essentially to me seems like a  
10 freestanding do-over claim.

11 Now I want my trial, and the Government has never  
12 had a chance to put on their case. And ten years later you  
13 come in with I have this pathology report, I have this  
14 civil testimony, and it seems the whole intent of 440 is to  
15 get away from that. So they do distinguish between pleas  
16 and guilty pleas and trials for the - - - for that very  
17 reason. So in many ways you give up many things when you  
18 plead guilty in order to get the benefit of the bargain,  
19 and that's reflected in the statute.

20 And it seems to carve out in (h) as a  
21 freestanding actual innocence claim just gives you the  
22 right to wait after a guilty plea a certain amount of time  
23 and come in with material that doesn't even meet a newly-  
24 discovered evidence standard, which you have to go to trial  
25 to get, and have essentially a do-over trial. The trial



1           you forfeited.

2                   MR. INGRASSIA: I think again to answer that  
3 question you have to look at the underlying facts of each  
4 specific case.

5                   JUDGE FAHEY: Yeah, but - - - but we can't do  
6 that - - - we have to - - - we will to some degree but,  
7 really, there's a quote from a case, Hansen, I think they  
8 said the plea should not be used as a device for a  
9 defendant to avoid a trial while maintaining a claim of  
10 factual innocence.

11                  MR. INGRASSIA: That's correct.

12                  JUDGE FAHEY: And it - - - I think that's what  
13 they said. And that's really - - - if factual innocence  
14 can survive a plea, then the very premise of guilty pleas,  
15 admission of the crimes, will be undermined because what  
16 we're saying is the admission may be false. And we - - -  
17 we maintain that option all the time to say that this  
18 admission may be false. It - - - it seems to go to the  
19 very heart of our system.

20                  MR. INGRASSIA: Right.

21                  JUDGE FAHEY: I mean ninety-seven percent of our  
22 - - - of our cases are resolved by pleas, so you're going  
23 to say that all those pleas are not final and they never  
24 will be final.

25                  MR. INGRASSIA: They are final unless and until



1 they're vacated based upon a high standard as set forth - -  
2 -

3 CHIEF JUDGE DIFIORE: So let's get there - - -  
4 let's assume we're there. Since there's no trial record  
5 when someone enters a guilty plea, what do you propose?  
6 How does the 440 court examine and compare and weigh the  
7 conflicting testimony? What - - - what, what does the  
8 court do?

9 MR. INGRASSIA: I think the court would actually  
10 have to hear evidence. Obviously, the defendant - - -

11 CHIEF JUDGE DIFIORE: A new trial? Is that what  
12 we're doing?

13 MR. INGRASSIA: There would be an evidentiary  
14 hearing. The defendant would actually have to present  
15 evidence of a high caliber of a clear and convincing  
16 nature, which is a very high standard of proof. And let's  
17 not forget the district attorney's office will have the  
18 right to confront, to cross-examine any evidence that the  
19 defendant puts forth, present - - -

20 CHIEF JUDGE DIFIORE: And what's the standard?  
21 What's admissible at that hearing? Does anything go?

22 MR. INGRASSIA: I - - - I believe any type of  
23 relevant evidence would be admissible. That - - - that's a  
24 question I actually hadn't thought of.

25 JUDGE STEIN: What happens at the end of the



1 hearing?

2 MR. INGRASSIA: I'm sorry?

3 JUDGE STEIN: What happens at the end of the  
4 hearing?

5 MR. INGRASSIA: The judge would have to make a  
6 determination - - -

7 JUDGE STEIN: Of what?

8 MR. INGRASSIA: - - - of whether - - -

9 JUDGE STEIN: Whether - - -

10 MR. INGRASSIA: - - - the defense has met its  
11 burden by clear and convincing evidence.

12 JUDGE STEIN: To what? To get a new - - - to get  
13 a trial, in this case not a new trial but to get a trial?

14 MR. INGRASSIA: Well - - -

15 JUDGE STEIN: To - - - to back to the pre-plea  
16 status or what?

17 MR. INGRASSIA: Under - - -

18 JUDGE FAHEY: What - - - what would the remedy  
19 be? Would you dismiss the indictment or would they get a  
20 new trial?

21 MR. INGRASSIA: It would be dismissal of the  
22 indictment under - - -

23 JUDGE FAHEY: That's what you're seeking?

24 MR. INGRASSIA: - - - Hamilton and Tiger.

25 JUDGE STEIN: So essentially you've pled guilty,



1           okay. And now you're coming back and say but I'm really  
2           not guilty, and here's my proof. And I have to prove that  
3           by clear and convincing evidence. I don't have to prove it  
4           to a jury or - - - there's no jury here. There's - - -

5                       MR. INGRASSIA: Correct.

6                       JUDGE STEIN: - - - a court, right.

7                       MR. INGRASSIA: Correct.

8                       JUDGE STEIN: And so instead of the trial that  
9           the People were entitled to have and you were entitled to  
10          have, we're going to have a bench trial based on clear and  
11          convincing evidence. How is that - - - how does that fit  
12          within our system?

13                      MR. INGRASSIA: I think it fits within the system  
14          because this court has held time and again if you go back  
15          to the forfeiture doctrine and what is waived and was not  
16          waived, claims relating to the integrity of the criminal  
17          justice system are not waived. And I would respectfully  
18          submit - - -

19                      JUDGE STEIN: Well, that may be but that doesn't  
20          mean that we wipe this slate clean and we have a whole  
21          different basis for determining guilt or innocence.

22                      MR. INGRASSIA: I - - -

23                      JUDGE GARCIA: When the Government hasn't had a  
24          chance to put their proof on. So at least if you have a  
25          trial you're weighing what the Government proved beyond a



1 reasonable doubt against this material you're going to  
2 produce at a hearing. Here witnesses may have died in the  
3 interim, maybe ten years later. You waived all of that and  
4 now you're coming in and saying I want a clear and  
5 convincing trial so I can prove that the indictment should  
6 be dismissed.

7 CHIEF JUDGE DIFIORE: If it were a multi-count  
8 indictment and the defendant pled guilty to one count of  
9 the indictment in satisfaction of all the charges, what  
10 happens to those other counts? Does the People get a - - -  
11 get an opportunity to - - -

12 MR. INGRASSIA: I would - - - I would suggest if  
13 the - - - all the counts relate to the actual innocence as  
14 being proffered then the indictment would be - - - the  
15 indictment would be fatal. However, if there's counts that  
16 are separate and apart but joined in that indictment then  
17 obviously those counts where actual innocence has not been  
18 established would survive and the defendant would be  
19 brought to trial in that regard.

20 CHIEF JUDGE DIFIORE: And the - - - the  
21 prosecutor would be trying that case five years later, ten  
22 years later, whenever it was?

23 MR. INGRASSIA: Depending on the facts, but if  
24 there's no actual innocence in that regard then, yes, that  
25 would be - - - that would be the case. My - - -



1 JUDGE RIVERA: So if we disagree with you here  
2 about the ways she might present this claim of actual  
3 factual innocence she still has the ineffective assistance  
4 claim, right?

5 MR. INGRASSIA: Oh, she does. That's right.

6 JUDGE RIVERA: What would be the different - - -  
7 let me say this, let's say there's two separate hearings.  
8 What - - - what's the difference in evidence at these two  
9 different hearings?

10 MR. INGRASSIA: Well, ineffective assistance  
11 would be the defense burden by a preponderance of the  
12 evidence. The actual innocence claim freestanding would be  
13 this clear and convincing. In this case - - -

14 JUDGE RIVERA: But I'm saying what would be  
15 presented? Is there something different that is going to  
16 be presented? Again because as I understand her argument  
17 it's - - - this all falls on the failings of her lawyer.

18 MR. INGRASSIA: In - - - in this case, I think  
19 the two claims are married in that the pathology report  
20 that was never secured is in fact the ineffective  
21 assistance of counsel. I would lastly point out to the  
22 court that if in fact - - - and I think Judge Stein you  
23 asked Mr. Middlemiss this question, if there is no  
24 statutory relief for a factually innocent person to bring a  
25 post-conviction remedy adopting the district attorney's

1 theory, then as I see it there's only two possibilities.  
2 The first is through a prosecutor's conviction integrity  
3 review committee to review, the second through some type of  
4 executive pardon and clemency. Neither one, however, is  
5 subject to any type of judiciary review. And given the  
6 fact that this court has held time and again - - -

7 JUDGE RIVERA: See, but this is where I keep  
8 having problems with - - - with your argument because  
9 doesn't she have that ineffective assistance claim? I mean  
10 there are other defendants who argue ineffective assistance  
11 and may very well also be taking the position I am  
12 innocent, but they're focused on that ineffective  
13 assistance claim. And I'm - - - I'm just not clear how  
14 this particular defendant or someone in her position would  
15 not find appropriate recourse through that type of relief  
16 that's already provided for.

17 MR. INGRASSIA: She does have recourse. I go  
18 back to my argument, however, that 440.10 does not limit  
19 the type of recourse that's available to any type of  
20 defendant.

21 JUDGE STEIN: Well, what about the fact that we  
22 and the - - - the Supreme Court have held that there's no  
23 constitutional right to any appeal or any collateral attack  
24 on - - - on a judgment or conviction? So how - - - how do  
25 you get beyond that to say - - -



1 MR. INGRASSIA: You get beyond that, I would  
2 respectfully submit, that a factually innocent person is  
3 subjected to due process, cruel and unusual punishment  
4 violations because their innocence have to supersede. And  
5 this court consistently said that any type of errors or  
6 claims dealing with the integrity of the criminal justice  
7 system is not abandoned or waived by a guilty plea, the  
8 forfeiture doctrine. And I would respectfully submit in  
9 our age of exoneration, Chief Judge DiFiore's bold  
10 proclamation regarding new orders to counsel - - - every  
11 new time I get a case in arraignment we get those new  
12 orders to counsel. It recognizes that this is epidemic.  
13 False confessions exist and innocent people - - -

14 JUDGE STEIN: But that goes to the process  
15 leading up to the conviction, doesn't it really?

16 MR. INGRASSIA: But it doesn't end, Your Honor,  
17 based upon. I would ask this question - - -

18 JUDGE RIVERA: But see, here, again is my - - -  
19 my difficulty with that. Trying to respond to Judge Stein,  
20 I thought your argument and what you briefed and the  
21 position that she's taken is yes, there's a due process  
22 violation but you're also arguing that she's denied her  
23 constitutional right to - - - to counsel through this  
24 ineffective assistance of counsel claim. But since there's  
25 already a mechanism by which she can present that, she



1 can't go through (h) is sort of my response to that.  
2 That's again why I - - - I don't want to be redundant here  
3 with this questioning - - -

4 MR. INGRASSIA: It's okay.

5 JUDGE RIVERA: - - - but that's why I'm having  
6 difficulty with your position.

7 MR. INGRASSIA: Understood. I - - - I think put  
8 another way perhaps my reading of the district attorney's  
9 arguments, specifically in the reply brief, is that if a  
10 person pleads guilty they may have a freestanding actual  
11 innocence claim but it first has to fall under either some  
12 type of fraud or duress on the part of the court or the  
13 prosecutor in inducement of the plea, DNA evidence  
14 exonerating or ineffective assistance of counsel. Maybe  
15 I'm misreading that, but that was my take on it.

16 My position is, as I said in the beginning of the  
17 argument, is that innocence is innocence. It takes many  
18 different facets. It could be witness recantation. It  
19 could be false identification. It could be a Brady  
20 violation. It could be a multitude of reasons. It's  
21 freestanding and it's actual innocence. And I would submit  
22 that if a person - - - I asked myself this question this  
23 past Sunday afternoon as I was preparing for this argument  
24 in my office. If an innocent person, an actual factually  
25 innocent person pleads guilty, are they actually guilty or



1 are they innocent? In a legal sense, they're guilty.  
2 They've been convicted. But in an intellectual de facto  
3 sense they are innocent.

4 JUDGE STEIN: But - - - but if you have dueling -  
5 - - conflicting expert testimony, if you have recanting  
6 witnesses, all of that has to do with credibility and a  
7 whole host of - - - of human things. How do we ever really  
8 know if somebody is factually innocent? I mean and - - -  
9 and I mean didn't - - - didn't the Supreme Court say in - -  
10 - in *Herrera v. Collins* that, "Due process doesn't require  
11 that every conceivable step be taken no matter what cost to  
12 eliminate a possibility of convicting an innocent person"?

13 MR. INGRASSIA: Indeed, however, with that I  
14 don't believe this case is a case of dueling experts,  
15 contrary to what the district attorney says. In fact, in  
16 the civil case there were no expert witnesses presented by  
17 the defense and an unanimous civil jury found, despite  
18 hearing evidence of her confession, despite hearing  
19 evidence of her conviction - - -

20 JUDGE FAHEY: I thought Dr. Turkowski testified  
21 in the civil case.

22 MR. INGRASSIA: For the plaintiffs, correct.

23 JUDGE FAHEY: Right.

24 MR. INGRASSIA: And the jury no-caused  
25 unanimously.



1 JUDGE FAHEY: Right, so - - -

2 MR. INGRASSIA: My - - -

3 JUDGE FAHEY: - - - that would be against the  
4 defendant then? Turkowski gave the same theory, I'm  
5 assuming that he did?

6 MR. INGRASSIA: Right, but the jury rejected that  
7 is what I'm trying to say.

8 JUDGE FAHEY: That's correct. Right.

9 MR. INGRASSIA: And the defense did not - - - my  
10 understanding is the defense did not call any witnesses.  
11 But again, we have the pathology report that shows a  
12 diagnosis of toxic epidermal necrolysis. All of the  
13 original differential diagnoses by the five disciplines - -  
14 - emergency medicine, pediatrics, infection disease,  
15 dermatology, and burn services - - - on initial - - -

16 JUDGE GARCIA: Counsel, all of this could have  
17 been fleshed out at a trial. And when you say before you  
18 could have recantation of a witness, again, when you have a  
19 plea - - - if you didn't have a plea the People would have  
20 put on their case. They would have called that witness.  
21 They would have locked in testimony that you could have  
22 cross-examined. And then if later that witness recants you  
23 have that entire record. Now a witness who doesn't have to  
24 go through that - - - and it may be a witness who doesn't  
25 really want to testify. But it's the immediate aftermath,



1 they go, they testify.

2 Now later they feel bad about having to do that,  
3 they recant. It's harder. You don't have that testimony.  
4 You have a plea. Later they say, you know, I - - - I  
5 really wouldn't have testified to that. I didn't really  
6 mean that. Now where are the People? They haven't had an  
7 opportunity to call that witness. That witness - - - what  
8 are you weighing that against? And that's why this statute  
9 to me makes that difference between a plea of guilty and  
10 someone who goes to trial. Because what are you weighing  
11 these things against? Ten years later someone recants and  
12 a People's witness is dead and now you're going to have  
13 this clear and convincing hearing? I don't see - - -  
14 again, going back to the - - - where does that fit in this  
15 entire process that you get this in a freestanding clear  
16 and convincing hearing ten years later after you admitted  
17 guilt under oath?

18 MR. INGRASSIA: Again, each case is individual  
19 and I would respectfully - - -

20 JUDGE GARCIA: But we can't make an individual  
21 rule here, and everyone will be actually innocent until  
22 they get this hearing that says that by clear and  
23 convincing they haven't.

24 MR. INGRASSIA: The - - - well, they're not  
25 actually innocent until they prove it.



1 JUDGE GARCIA: Well - - - say they are. You  
2 don't - - - we don't say well, you're actually innocent so  
3 you get the hearing. You're going to come in and have the  
4 standing to get a hearing by claiming this, right?

5 MR. INGRASSIA: Correct. Correct.

6 JUDGE GARCIA: So that opens the door. We're not  
7 making a rule for only the people that really are actually  
8 innocent.

9 MR. INGRASSIA: Well, I would submit, Judge  
10 Garcia, that in that regard the trial court will be the  
11 initial gatekeeper as to - - -

12 JUDGE GARCIA: So they'll decide who's actually  
13 innocent so they get a hearing to determine if they're  
14 actually innocent?

15 MR. INGRASSIA: No, it could be - - - in our  
16 case, Judge Berry denied us a hearing. We sought leave on  
17 a 440 denial to the Appellate Division, granted leave, and  
18 that's, you know, the sequence we got here today. So the  
19 courts are free to deny an application if there isn't a  
20 sufficient factual showing in the moving papers. Again, I  
21 know I'm being redundant here, but when you ask the  
22 question that you just posed - - - and it's a valid point,  
23 I certainly concede that - - - freestanding actual  
24 innocence has to take priority, we would respectfully  
25 submit, because it's any type of conviction that's



1 constitutionally infirm- - - has to be afforded some type  
2 of collateral attack even after a guilty plea because it  
3 goes to the heart of the process.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.  
5 Counsel.

6 MR. INGRASSIA: Thank you very much.

7 CHIEF JUDGE DIFIORE: You're welcome.

8 MR. MIDDLEMISS: That's an excellent point that  
9 the - - - the plea defendant should be afforded an  
10 opportunity to - - - to come back if it goes to the heart  
11 of the process. In fact, they are. They are by specific  
12 sections of CPLR 440.10. The defense counsel mentioned  
13 Brady violations a couple of times. If you had a Brady  
14 violation that induced the guilty plea that would certainly  
15 provide the defendant a cause of action under 440.10(1)(b).  
16 That could easily be a misrepresentation. People v. Seeber  
17 from the Third Department involved a DNA tech who did not  
18 properly perform the testing and - - -

19 JUDGE RIVERA: What would be - - -

20 MR. MIDDLEMISS: - - - and the People - - -

21 JUDGE RIVERA: What would be her argument given  
22 this particular factual scenario? What would be her  
23 argument that her plea is not voluntary?

24 MR. INGRASSIA: The defendant has clearly argued  
25 ineffective assistance, that the failure to adequately



1 appraise the strength of the case on the part of defense  
2 counsel will provide her a hearing. The Second Department  
3 has agreed with that for whatever reason. The - - -

4 JUDGE RIVERA: So - - - so you concede that as a  
5 potential ground?

6 MR. MIDDLEMISS: That she is entitled to a  
7 hearing on it - - - on the ineffective assistance claim?  
8 Yes, we're not contesting that issue. That - - - that is  
9 the decision of the Appellate Division - - -

10 JUDGE RIVERA: No, that - - - that if indeed the  
11 attorney's ineffective, as they have described it, that  
12 that would result in the - - -

13 MR. MIDDLEMISS: That would be - - -

14 JUDGE RIVERA: - - - success on the claim that  
15 her plea was not knowing, voluntary.

16 MR. MIDDLEMISS: If the - - - if the attorney  
17 were ineffective - - - if she could establish that the  
18 attorney was ineffective, yes, that would demonstrate that  
19 the - - - like any other ineffective assistance of counsel  
20 claim. That's why it adequately provides relief because  
21 it's just the same as any other claim. And I - - - I  
22 wanted to -

23 CHIEF JUDGE DIFIORE: Well, counsel, let's talk  
24 about for a second newly-discovered evidence in the context  
25 of this actual innocence claim for a person who has pled



1 guilty, the guilty plea was constitutionally obtained, she  
2 was properly counseled, we're not talking about DNA  
3 evidence. Is there any hypothetical that you can think of  
4 where that person who develops newly-discovered evidence  
5 after the guilty plea that proves that she is innocent  
6 would - - -

7 MR. MIDDLEMISS: The legislature has identified a  
8 single instance, DNA. The - - - the legislature has - - -

9 CHIEF JUDGE DIFIORE: Let's not talk about DNA.  
10 Let's talk about the person who is misidentified as the  
11 perpetrator of a crime. Based on that he or she pleads  
12 guilty to the crime, is sentenced, and then five years  
13 later someone comes forward and says I was at my window, I  
14 videotaped the whole crime, you got the wrong guy. Here -  
15 here is the videotape of the actual person. What do we say  
16 to the person who pled guilty based on the  
17 misidentification and now is incarcerated? Do we say - - -

18 MR. MIDDLEMISS: I think - - - thank you, Your  
19 Honor. I think Seeber is an excellent representation of  
20 that instance. In the event that solid evidence comes out  
21 later, it is entirely possible that it could be determined  
22 subsequently that it amounted to a misrepresentation of the  
23 case. I think if you have - - - if you have an expert who  
24 absolutely - - -

25 CHIEF JUDGE DIFIORE: Misrepresentation by who?



1 JUDGE FEINMAIN: Misrepresentation - - -

2 MR. MIDDLEMISS: The word intentional does not  
3 appear in the statute. The word intentional does not  
4 appear in the statute. People v. Seeber in the Third  
5 Department involved an instance in which there was a  
6 problem with the tech, the technician, that the People were  
7 not aware of at the time. But it affected the  
8 voluntariness of the defendant's plea. That is entirely  
9 understandable. It cannot - - - obviously cannot be said -  
10 - - common sense that that does not never happen.

11 JUDGE RIVERA: I thought you would have argued  
12 it's new - - - newly-discovered evidence. Is your position  
13 that that - - - what the Chief Judge has described - - -

14 MR. MIDDLEMISS: In this - - -

15 JUDGE RIVERA: - - - is evidence that could have  
16 been discovered with due diligence? Otherwise, doesn't it  
17 fit the newly-discovered evidence provision?

18 MR. MIDDLEMISS: In theory, that could fit the  
19 newly-discovered evidence provision, but it - - - it is two  
20 - - -

21 CHIEF JUDGE DIFIIORE: So then we have - - -

22 MR. MIDDLEMISS: - - - fundamentally different  
23 instances. It is two fundamentally different instances.  
24 Primarily because in the case of newly-discovered - - - it  
25 would be the same in the sense that both could be



1 potentially entitled to a new trial - - - a new trial  
2 because the - - - the only relief would be to vacate the  
3 plea. But that's - - - it is fundamentally different in  
4 the sense that there could well be a lot of newly-  
5 discovered evidence that would have made a potential - - -  
6 the potential difference in the trial because that is the  
7 standard for newly-discovered evidence.

8 And in the case of a guilty plea, evidence like  
9 this, an expert testimony that's inconsistent with another  
10 expert testimony cannot possibly establish by any  
11 meaningful standard, actual innocence. Whereas videotaped  
12 testimony, certainly DNA evidence, fundamental flaws in the  
13 People's evidence certainly could impact the voluntariness  
14 of the plea. It could amount to a misrepresentation. The  
15 word intentional does not appear in the statute. That  
16 would provide a form of relief, and the relief would be the  
17 same as any other proper post-plea 440. The matter would  
18 be restored as it was before, not absolutely vacated as the  
19 Second Department has inexplicably decided would be  
20 appropriate in cases like this.

21 JUDGE RIVERA: But - - - but indeed if they're -  
22 - - I understand your position here. You think the  
23 evidence doesn't show actual innocence. But in the  
24 hypothetical about the video, that - - - that does indeed  
25 show that the - - - someone else committed the crime.



1 MR. MIDDLEMISS: You - - -

2 JUDGE RIVERA: You would agree that the  
3 prosecutor would not proceed with such a case, correct?

4 MR. MIDDLEMISS: No, Your Honor. It would depend  
5 on the facts of the individual case. It may - - - there  
6 are - - there are several instances in which it would still  
7 be worthwhile to proceed. For example - - -

8 JUDGE RIVERA: And what would that be?

9 MR. MIDDLEMISS: If you had - - - if you had a  
10 defendant, there - - - the one issue in particular I wanted  
11 to get to and address was the significance of the Superior  
12 Court informations, instances in which the defendants enter  
13 into a plea to a single crime to satisfy whatever was  
14 charged without an indictment so that the evidence is not  
15 even presented to a grand jury. In those instances,  
16 they've been convicted of one single crime based on one  
17 single accusatory instrument.

18 In instances like that it is entirely possible  
19 that if they could produce evidence that demonstrated that  
20 they did not commit that crime they - - - they certainly  
21 would be unable to produce evidence that they - - - that  
22 they did not commit the additional crimes that that  
23 covered. But if it occurred well after it would be beyond  
24 the statute of limitations and they could not be prosecuted  
25 for the other crimes that they clearly and potentially



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undisputedly committed.

Similarly, if it was a single criminal transaction let's say the defendant was prosecuted for an assault for shooting someone. If it came out later that there was a videotape that showed that they were not the actual shooter but they still possessed the gun that clearly is a crime. And they certainly should be prosecuted for that regardless of whether or not they pled guilty to it in the first place.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MIDDLEMISS: Thank you.

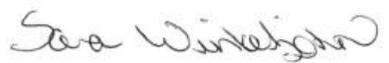
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Natascha Tiger, No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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