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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

GEORGE TSINTZELIS,  
  
Appellant.

NO. 17

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27 Madison Avenue  
New York, New York  
February 12, 2020

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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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, Counsel.

2 MR. MURAKAMI TSE: Good afternoon. Tomoeh  
3 Murakami Tse for George Tsintzelis. I'd like to reserve  
4 two minutes for rebuttal, please.

5 CHIEF JUDGE DIFIORE: Okay.

6 MS. MURAKAMI TSE: Two minutes for rebuttal,  
7 please?

8 CHIEF JUDGE DIFIORE: Right.

9 MS. MURAKAMI TSE: This was a case where the only  
10 evidence linking my client to the theft was the OCME's  
11 conclusion that his DNA matched the crime scene evidence.  
12 But Mr. Tsintzelis was unable to challenge that conclusion,  
13 because he was never given access to the data that was used  
14 to arrive at that conclusion, data that he was entitled to  
15 under CPL 240.20(1)(c). That - - -

16 JUDGE STEIN: Well, it - - - it - - - it has to  
17 be a document, a written document, right?

18 MS. MURAKAMI TSE: Yes, Your Honor.

19 JUDGE STEIN: Okay, and it has to be under the  
20 control of the People - - -

21 MS. MURAKAMI TSE: No, Your Honor.

22 JUDGE STEIN: - - - or - - - or they have to make  
23 a good-faith effort to get it, right?

24 MS. MURAKAMI TSE: Yes.

25 JUDGE STEIN: Tho - - - okay, those - - -



1 MS. MURAKAMI TSE: Well - - - well, no, CPL  
2 240.20(1)(c) provides that upon a defendant's demand to  
3 produce, the People "shall disclose" any written report or  
4 document concerning a scientific test in a criminal  
5 proceeding, which was made by or at the request or  
6 direction of a public servant - - -

7 JUDGE FAHEY: And that's the key for you, isn't  
8 it?

9 MS. MURAKAMI TSE: - - - engaged in law  
10 enforcement activity - - -

11 JUDGE FAHEY: Made at the request of?

12 MS. MURAKAMI TSE: Exactly. The - - - so what  
13 respondent does here is it's conflating the 240.20(1)(c)  
14 analysis with the 240.40 analysis, under which control and  
15 possession is relevant, and that's what the Appellate  
16 Division here decided on, 240.40. It did not address our  
17 claim that it was a 240.20(1)(c) violation. It was silent  
18 on that.

19 And here, what Mr. Tsintzelis sought was the  
20 written test generated during DNE - - - DNA testing  
21 conducting by the OCME at the behest of the NYPD and the DA  
22 to prosecute him in this criminal action. As such, the  
23 prosecution was required to produce the electronic raw  
24 data. And by electronic raw data, what I mean is the .fsa  
25 file, which is akin to a .doc file that you look at when



1           you're looking at a Microsoft Word document on a computer  
2           screen.

3                   JUDGE FEINMAN:   So what would you have done if  
4           you - - - if you had that fsa file?  What would you have  
5           done with it?

6                   MS. MURAKAMI TSE:  Well, defense counsel made  
7           clear that he - - - well, you - - - you could have first  
8           used it to cross-examine the People's one DNA witness that  
9           they put forward.  It's as if - - - here, Mr. Tsintzelis  
10          didn't have - - -

11                   CHIEF JUDGE DIFIORE:  Counsel, what form does it  
12          come in?  If you were to get it, describe for us what it  
13          looks - - - what it looks like, the written report.

14                   MS. MURAKAMI TSE:  Oh, so the - - - the data here  
15          is the direct result, the unedited, unadulterated, unbiased  
16          result that comes out of the - - - the machine - - -

17                   CHIEF JUDGE DIFIORE:  What does that look like?  
18          Is that code?

19                   MS. MURAKAMI TSE:  No, it's - - - it's - - - it's  
20          a colorful, on-screen image that gets - - -

21                   JUDGE FEINMAN:  So - - - so - - - so it's the  
22          graphs with the peaks and valleys before - - -

23                   MS. MURAKAMI TSE:  Prior to - - -

24                   JUDGE FEINMAN:  - - - before taking out the - - -  
25          the - - - ASCII, I - - - I'm not sure - - -



1 MS. MURAKAMI TSE: Yeah, before - - - well - - -

2 JUDGE FEINMAN: - - - I'm pronouncing it - - -

3 MS. MURAKAMI TSE: Even before that, it's before  
4 the - - - it's the - - - it's the direct result that comes  
5 out of the machine before it goes through the OCME software  
6 machine.

7 JUDGE RIVERA: It's the first round of the - - -

8 MS. MURAKAMI TSE: Exactly. You see - - -

9 JUDGE RIVERA: - - - computer information that's  
10 unedited by anybody.

11 MS. MURAKAMI TSE: Exactly. It's - - -

12 JUDGE RIVERA: Untouched. So I understood your  
13 argument to have been, at least in part, that if you had  
14 the raw data, then going - - - defense counsel would have  
15 made a decision - - -

16 MS. MURAKAMI TSE: Precisely.

17 JUDGE RIVERA: - - - in - - - in consultation  
18 with an expert as to how to proceed with this data - - -

19 MS. MURAKAMI TSE: Exactly.

20 JUDGE RIVERA: - - - including cross-examination,  
21 as you've already said - - -

22 MS. MURAKAMI TSE: Exactly.

23 JUDGE RIVERA: - - - but potentially putting  
24 their - - - your own expert on the stand.

25 MS. MURAKAMI TSE: Exactly. One, you needed it



1 to cross-examine. I mean, whether or not we put forward  
2 our own expert - - -

3 JUDGE RIVERA: So why - - - why couldn't - - -  
4 why couldn't an expert do that without the raw data, with  
5 anything else that you had available?

6 MS. MURAKAMI TSE: Because all we had was the  
7 printed files that are the end result of OCME's analysis -  
8 - -

9 JUDGE RIVERA: Because it's already edited?

10 MS. MURAKAMI TSE: - - - and conclusion. Yes,  
11 it's already edited.

12 JUDGE RIVERA: So there's no way for the expert  
13 to work back?

14 MS. MURAKAMI TSE: There's no way. It's printed.  
15 It - - - you need - - - and the OCME expert testified that  
16 you need the .fsa files to see the edits - - -

17 CHIEF JUDGE DIFIORE: So I'm - - - I'm a little  
18 confused.

19 MS. MURAKAMI TSE: - - - that were removed.

20 CHIEF JUDGE DIFIORE: Just clear this up for me.  
21 So you're seeking the raw electronic data?

22 MS. MURAKAMI TSE: Yes.

23 CHIEF JUDGE DIFIORE: And when that gets printed  
24 out, does the expert pick it up and read it?

25 MS. MURAKAMI TSE: When that gets printed out?



1 No. What we're asking for is the .fsa file, which is the  
2 digital file - - -

3 CHIEF JUDGE DIFIORE: Okay, so then what do you  
4 do - - -

5 MS. MURAKAMI TSE: - - - the computer files.

6 CHIEF JUDGE DIFIORE: - - - with the digital fi -  
7 - - what does your expert do with the digital files?

8 MS. MURAKAMI TSE: So it would use a soft - - -  
9 the software program, like the one OCME has.

10 CHIEF JUDGE DIFIORE: And the digital - - -

11 MS. MURAKAMI TSE: You know, it's widely  
12 available.

13 CHIEF JUDGE DIFIORE: And counsel said that?

14 MS. MURAKAMI TSE: Yeah, counsel said he had it  
15 on his computer.

16 CHIEF JUDGE DIFIORE: No propriety interest  
17 specific - - -

18 MS. MURAKAMI TSE: No, no, it's available in open  
19 source, which is that it's available - - - accessible to  
20 the public free of - - - at - - - at free - - - for free.  
21 So - - - and - - - and - - - and any expert we would hire  
22 would've certainly had access to that software.

23 JUDGE RIVERA: Your expert could then make  
24 decisions about how that expert might or might not - - -

25 MS. MURAKAMI TSE: Exactly.



1 JUDGE RIVERA: - - - have edited that data?

2 MS. MURAKAMI TSE: Yes. If we have - - - yes,  
3 exactly. It's as if here, Mr. Tsintzelis was forced to  
4 cross-examine a - - - a witness who says I saw defendant on  
5 the video, without the actual video. Had he had that  
6 video, he could have said, oh, is that shadow over - - - in  
7 the upper right-hand corner, is that who you're referring  
8 to - - -

9 JUDGE STEIN: So - - -

10 MS. MURAKAMI TSE: - - - as my client?

11 JUDGE STEIN: - - - if we agree with you - - -

12 MS. MURAKAMI TSE: Uh-huh.

13 JUDGE STEIN: - - - unlike, say, Brady  
14 information, we don't know whether this would be helpful to  
15 your client or not, right? So why wouldn't the remedy to  
16 the discovery violation be go back, get your discovery, and  
17 then if you feel you have enough to make a motion to set  
18 aside the verdict, you do that, and then maybe get a new  
19 trial?

20 MS. MURAKAMI TSE: Because I think what you look  
21 at here - - - because here, the DNA evidence was the only  
22 evidence that was linking my client to the offense - - - to  
23 the theft here. And - - -

24 JUDGE STEIN: Yeah, but if your expert - - -

25 MS. MURAKAMI TSE: Yes?





1 JUDGE STEIN: - - - determines that it was  
2 perfectly, you know, reliable and valid, and - - - and  
3 there's no problem with how it was done, then - - - then  
4 why shouldn't it be admissible?

5 MS. MURAKAMI TSE: Because it's unfair to put the  
6 burden on the wrong party to establish the difference  
7 between the data that he was deprived of and the printed  
8 file, because that's the whole problem, right. Because we  
9 were never given the data.

10 JUDGE GARCIA: Well, couldn't you view that - - -  
11 as Judge Stein was saying, in a Brady case, we have a test  
12 to determine you didn't get the Brady material. There is a  
13 test, a different test - - -

14 MS. MURAKAMI TSE: Sure, sure.

15 JUDGE GARCIA: - - - about how that would have  
16 affected the trial. What would we not do that with a  
17 discovery error?

18 MS. MURAKAMI TSE: So - - - so here, Your Honor,  
19 so I think the - - - you do do that. I think what you do  
20 here is just like any other case. You know, you look at  
21 the si - - - you look at the error and - - - and analyze  
22 whether or not that error was ha - - - harmless. And here,  
23 what you do is you look at the significance of the role  
24 that the DNA evidence played in this case, not whether the  
25 .fsa file would have been significantly different from the



1 printed file, because we can't know that.

2 JUDGE RIVERA: But I - - - I'm - - - I thought  
3 that this line of questioning to you was, you're assuming  
4 that the raw data is going to show that there is - - - was  
5 something erroneous or inappropriate or that can be  
6 successfully challenged, which respect to what OCME's  
7 analyst did. And so I thought the question to you, and if  
8 it wasn't, so I'll put the question to you, was why  
9 shouldn't the remedy just be give you - - - if - - - if the  
10 court were to agree that one could get access to this data  
11 - - - just get the data and then you can see how you might  
12 have use it, and then make an appropriate argument that  
13 indeed he data would have shown something useful to the  
14 defense.

15 MS. MURAKAMI TSE: Because - - - because any  
16 reasonable doubt about the OCME's analysis would have  
17 exculpated my client completely. It's not a case like in  
18 Lopez-Mendoza, which this court heard about two years ago,  
19 in 2017, where there was a - - - other evidence as to my  
20 client's identity. There was no surveillance video. There  
21 was no - - -

22 JUDGE RIVERA: So I think the point is, without  
23 the raw data, you don't know that there's a problem.

24 MS. MURAKAMI TSE: We don't know because we never  
25 had the data.



1 JUDGE FAHEY: All right, but it's - - - it's  
2 still for - - -

3 CHIEF JUDGE DIFIORE: Is the raw data relevant  
4 here? Isn't this a single-source profile, very high  
5 quality, high DNA, taken from blood, sixteen loci, two  
6 alleles at each of the loci, I could go on and on? How is  
7 - - - how is the data that you seek here, how is that  
8 relevant and how do - - - how would that even change  
9 anything for a sample of that purity or pristineness?

10 MS. MURAKAMI TSE: Because we're - - - because  
11 the - - - the - - - because our claim is that we were  
12 deprived of the only thing that would show the edits and  
13 would challenge this supposedly pristine result. There was  
14 a - - - now, as this court said in People v. John, you  
15 know, the neccess - - - which was also a pristine sample,  
16 what this court said in John is that the necessary data for  
17 DNA testing analysis is the computer imaging from the  
18 software used by analysts for calling the alleles. That's  
19 what we wanted here.

20 JUDGE GARCIA: I'm - - - I'm sorry. You  
21 mentioned Sean John, and - - - and I know your light is up,  
22 but with the Chief Judge's permission, could you address  
23 the - - - the - - - the confrontation issue?

24 MS. MURAKAMI TSE: Yes. So there's two  
25 confrontation issues here. One is the confrontation



1 violation that results from Mr. Tsintzelis not having  
2 gotten the electronic raw data, without which he could not  
3 cross-examine the expert witness. And separately, there  
4 was a confrontation violation in the Sean John sense,  
5 because this OCME tech - - - analyst was not the person who  
6 meets the Sean John test. And John is clear - - -

7 JUDGE FEINMAN: But doesn't the analyst say that  
8 she, you know, used his or her independent analysis on the  
9 raw data, and I mean - - -

10 MS. MURAKAMI TSE: No - - - if I may, so - - -

11 JUDGE FEINMAN: Yeah, well, what was the  
12 analyst's actual testimony?

13 MS. MURAKAMI TSE: So the - - - the analyst's  
14 actual testimony was extremely limited as to the actual  
15 testing, going to the buccal - - - her testimony as to the  
16 crime scene evidence was that it - - - it was tested for  
17 the presence of blood, you know, we were able to amplify it  
18 once we learned that we had a DNA profile, we uploaded it.  
19 As to the buccal swab, it was even more limited. The  
20 prosecutor asked, "What did you receive for testing?" And  
21 then the analyst said, "We received an oral swab from  
22 George Tsintzelis." That's at page 304 of the appendix.  
23 The prosecutor then asked, were you able to - - -

24 JUDGE FEINMAN: Hadn't she also reviewed the  
25 electronic file? That's at 314 in the record. And she's



1 also listed as a reviewer on the edit table - - -

2 MS. MURAKAMI TSE: So - - -

3 JUDGE FEINMAN: - - - for the testing of the oral  
4 swab.

5 MS. MURAKAMI TSE: So - - -

6 JUDGE FEINMAN: That's at 499 and 500. So - - -

7 MS. MURAKAMI TSE: That - - - that's not enough.

8 John is clear. The prosecutor needed to put someone on the  
9 stand who looked at the raw data, the .fsa files, and  
10 either made the edits or was in a position to determine  
11 that the edits were proper.

12 JUDGE GARCIA: And that's the key, right?

13 MS. MURAKAMI TSE: And you can't point to - - -

14 JUDGE GARCIA: That's the key, is you're looking  
15 at the raw data, or you described earlier as the pre-edited  
16 format - - - right, and checking to see that raw data  
17 against the final graph or - - -

18 MS. MURAKAMI TSE: Exactly, exactly. And if you  
19 take - - -

20 JUDGE FAHEY: Well, if can then - - - slow - - -  
21 slow down. If - - - if it's - - -

22 Is it all right? Do you mind?

23 CHIEF JUDGE DIFIORE: Yes.

24 JUDGE FAHEY: Yes? Okay.

25 The way the understood it and the way in - - - in



1 Judge Garcia's question is, is if it would allow the expert  
2 to challenge what should or should be not labeled as an  
3 allele. And the labeling of the - - - by doing that, by  
4 looking at the raw data, then you can test the accuracy of  
5 the chart with the actual data. That's what I understood  
6 to be the purpose of the discovery request, right?

7 MS. MURAKAMI TSE: Exactly.

8 JUDGE FAHEY: And - - - and it's not inculpatory  
9 or exculpatory. It is what it is. So it doesn't really -  
10 - - it's not Brady material, and it's clearly exculpatory.  
11 So the only real question for us is, is it mandatory, the  
12 disclosure, right?

13 MS. MURAKAMI TSE: And this court said in DaGata  
14 that it is. And - - -

15 JUDGE FAHEY: Okay - - -

16 JUDGE GARCIA: But I'm sorry; we were talking  
17 about something different - - -

18 MS. MURAKAMI TSE: Oh.

19 JUDGE GARCIA: - - - I think. I was talking to  
20 you about the Sean John confrontation issue - - -

21 MS. MURAKAMI TSE: Yes, if I could - - -

22 JUDGE GARCIA: - - - in terms of what the test  
23 was with the oral data, not the discovery issue, but what -  
24 - -

25 MS. MURAKAMI TSE: Yeah, here this - - -



1 JUDGE GARCIA: - - - what the independent  
2 analysis would have been.

3 MS. MURAKAMI TSE: - - - this analyst's testimony  
4 was like Austin and - - - and John. You know, did you - -  
5 - the prosecutor said, "Were you able to develop a full DNA  
6 profile?" "Yes." "Did the profile match?" "Yes." "How  
7 did you compare the files?" "I visually compared the DNA  
8 profile of the string of numbers from each." That's at A-  
9 305.

10 JUDGE RIVERA: Did she explain what a reviewer  
11 does?

12 MS. MURAKAMI TSE: No. So there's was no - - -  
13 so going - - - so you can't point for the first time on  
14 appeal to this court, and say, look, there, on one page of  
15 an exhibit, it is says reviewer. There, confrontation  
16 clause, no issue there; no John violation.

17 JUDGE GARCIA: I think the Sean John dissent  
18 tried to do that.

19 MS. MURAKAMI TSE: She didn't testify as to what  
20 a reviewer does.

21 I'm sorry, what?

22 JUDGE GARCIA: I think the Sean John dissent  
23 tried to do that.

24 MS. MURAKAMI TSE: Oh, yeah, you can't point to -  
25 - - you can't rely on titles. Confrontation clause is not



1 about titles and labels. Thank you.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 Counsel?

4 MR. BLIRA-KOESSLER: May it please the court,  
5 Bruce Blira-Koessler for the Office of the Queens County  
6 District Attorney, Melinda Katz. Good afternoon, Your  
7 Honors.

8 I - - - sorry.

9 JUDGE FAHEY: So - - - so can - - - can I ask  
10 this to - - - to pick up on a question of - - - right - - -  
11 right where Judge Garcia was. Let's go to the  
12 confrontation-clause question, all right.

13 MR. BLIRA-KOESSLER: Okay.

14 JUDGE FAHEY: It - - - it seems there were two  
15 tests or there were two methods by which the crime scene  
16 DNA is being compared to the defendant's DNA. One is the  
17 state databank; is that right?

18 MR. BLIRA-KOESSLER: There was a brief mention  
19 during the trial testimony from that - - -

20 JUDGE FAHEY: Just so I have it in my head. So -  
21 - - so state databank, and then of course, the buccal swab,  
22 right?

23 MR. BLIRA-KOESSLER: The buccal swab comes after  
24 that, correct.

25 JUDGE FAHEY: Right. So how did the evidence go





1 in as to the state databank?

2 MR. BLIRA-KOESSLER: Well, there was testimony -  
3 - - I mean, the defense objected to the mention of the  
4 defendant's NYSA (ph.) number, so all that really came out  
5 was that there was a match. And then the testimony  
6 progressed to the next phase of testing which was the  
7 buccal swab, and then the criminalist who participated in  
8 both the testing and - - - or - - - or rather the editing  
9 of the final DNA profile from the crime scene sample, as  
10 well as the defendant's buccal sample brought everything  
11 together, and said that everything matched.

12 JUDGE GARCIA: But did she - - - did that analyst  
13 participate in that final editing stage in the Sean John  
14 sense, in terms of a confrontation qualification? So was  
15 it that final stage of calling the alleles that's discussed  
16 in the - - - in the Sean John case?

17 MR. BLIRA-KOESSLER: Right. Well, you know, one  
18 - - - one thing that's consistent about OCME reports, both  
19 at the time of Sean John and now, is that when you look at  
20 every editing table, there are two designations on top, one  
21 for an analyst and one for a reviewer. And I think this  
22 court deemed that pretty significant, just that fact that  
23 somebody's listed there.

24 Now, in Sean John, the person -- or none of the  
25 people listed there testified at trial, and the witness



1 actually said, I didn't participate in the editing process.

2 JUDGE GARCIA: But I think - - -

3 MR. BLIRA-KOESSLER: This - - -

4 JUDGE GARCIA: - - - there was a notation that  
5 that analyst was a reviewer.

6 MR. BLIRA-KOESSLER: Right, but she wasn't listed  
7 on the reports as a reviewer. It was two other people. A  
8 separate person was listed as an analyst, and another  
9 person was listed as a reviewer.

10 JUDGE RIVERA: What's - - - so what's the - - -  
11 what's the evidence in this case as to what a reviewer  
12 does?

13 MR. BLIRA-KOESSLER: Well, first of all, let me  
14 just - - -

15 JUDGE RIVERA: Or this reviewer did, because  
16 that's all we're concerned about.

17 MR. BLIRA-KOESSLER: Right. Well, just in a  
18 preliminary sense, when you only have those two  
19 designations on the report, the analyst and the reviewer, I  
20 - - - I think the only reasonable conclusion - - - and - -  
21 - and this is the edit table, and editing was defined in  
22 the record. So if there are the - - - if - - - if those  
23 are the only two designations, and she's listed as one of  
24 the people that participated in that editing process, which  
25 this court deemed to be the most important part of the



1 process, the only conclusion you can draw - - -

2 JUDGE RIVERA: So it wouldn't say she's an editor

3 - - -

4 MR. BLIRA-KOESSLER: Excuse me?

5 JUDGE RIVERA: - - - as opposed to a reviewer?

6 MR. BLIRA-KOESSLER: Didn't catch the first part.

7 JUDGE RIVERA: I'm still not - - - I - - - I  
8 don't understand sort of the - - - the natural, common-  
9 sense designation or - - - or definition you're coming up  
10 with. I mean, I - - - I'm having trouble understanding  
11 what a reviewer does or this reviewer did when she doesn't  
12 explain that.

13 MR. BLIRA-KOESSLER: Well - - -

14 JUDGE RIVERA: And the - - - and she wasn't asked  
15 that, I think, so that's the problem.

16 MR. BLIRA-KOESSLER: I don't believe that - - -  
17 that the definition of a reviewer came out in the record.  
18 It has been defined in other cases, and I think that the  
19 reports may be clear that the OCME uses a process, a very  
20 redundant process.

21 JUDGE RIVERA: What if it said I'm a reader?

22 MR. BLIRA-KOESSLER: Said that - - -

23 JUDGE RIVERA: What if it said a reader?

24 MR. BLIRA-KOESSLER: This is on the actual report  
25 itself?



1 JUDGE RIVERA: If it said reader, yeah.

2 MR. BLIRA-KOESSLER: Well, you know, when - - -  
3 when you compare those two terms, read doesn't mean you're  
4 necessarily understanding what you're reading. If you're  
5 reviewing, that implies, I think, a certain amount of  
6 exercise of independent judgment on the data. You are  
7 reviewing somebody else's work to make sure they got it  
8 right. And she did define the editing process.

9 JUDGE RIVERA: So the point is, what are you  
10 looking at to review?

11 MR. BLIRA-KOESSLER: Well, if her name is on the  
12 edit table, and that's the final stage where the artifacts  
13 are taken out and the alleles are called, then she's  
14 obviously focusing on those calls, on those edits, which  
15 are in the electropherogram, and I - - - I'd just like to  
16 point out something before I forget, because I - - - the -  
17 - - the idea of the electropherograms came up, and one  
18 thing that you have to realize, this goes to the raw data  
19 point, the electropherograms are a photograph of the raw  
20 data. Now, the labels under the graphs can be edited, but  
21 the actual peaks are not edited out.

22 So you have the - - - you have the actual charts.  
23 You have the actual graphs. You have to take - - -

24 JUDGE RIVERA: You can't zoom in and out, right?

25 MR. BLIRA-KOESSLER: Excuse me?



1 JUDGE RIVERA: Can you zoom in and out?

2 MR. BLIRA-KOESSLER: No, and that came up at  
3 trial, whether the digital - - -

4 JUDGE RIVERA: So does that a make a difference  
5 that you cannot zoom in and out?

6 MR. BLIRA-KOESSLER: I don't think in the context  
7 of this particular case, it makes a difference because,  
8 again, he had somebody before him - - - the defendant had  
9 somebody before him who actually participated in the  
10 process. So he could have asked about the edits, the size  
11 of artifacts, and what seemed to be artifacts in - - - on -  
12 - - on the electropherogram, but he didn't.

13 He asked at one point, well, you know, this  
14 particular chart, what's the highest range, what's the  
15 lowest range, how high is this peak. And then he asked  
16 about tiny little peaks that look like artifacts, but then  
17 he stopped short. He didn't ask anything about the size of  
18 those tiny little peaks.

19 Now, if their claim now is that their right to  
20 challenge the final calls, the edits, was impaired because  
21 they didn't have the raw data, well, you had somebody  
22 before you who could have answered these questions, be - -  
23 - because she actually worked on these profiles. But they  
24 stopped short. And I bring that up just to show that this  
25 right-to-present-a-defense claim, it - - - it really goes



1 nowhere. They had other options available to them.

2 JUDGE RIVERA: I - - - I'm sorry. Am I  
3 misunderstanding you? Are you saying she testified that  
4 she looked at the raw data?

5 MR. BLIRA-KOESSLER: Meaning the - - - the  
6 criminalist? No, she - - - she - - - she didn't testify  
7 she went back to the raw data. And in fact, in - - - in  
8 our papers, we have - - - in our papers in opposition, we  
9 have the fact that the criminalists never go back to the  
10 raw data, and that's actually corroborated. It's not in  
11 this case; can I - - - can I mention Velez briefly?  
12 Because there was an affidavit in that case by the former  
13 special counsel to the OCME - - -

14 JUDGE FEINMAN: But each case falls on its own  
15 record.

16 MR. BLIRA-KOESSLER: I know; I know, but the - -  
17 -

18 CHIEF JUDGE DIFIORE: Counsel, why don't you back  
19 up to the discovery issues?

20 MR. BLIRA-KOESSLER: Sure. So - - - any  
21 particular aspect I should start with, because - - -

22 JUDGE FEINMAN: Well, I have a question.

23 MR. BLIRA-KOESSLER: Sure.

24 JUDGE FEINMAN: Why is it creating a document to  
25 just copy, you know, the fsa file?



1 MR. BLIRA-KOESSLER: Well, it's not so much just  
2 the copying. It's not like there's one or two files and  
3 you go to the Xerox machine and you scan them in. The 0 -  
4 - - this is according to what the OCME was telling us at  
5 the time. Today it's different. But back then there were  
6 so many of these little files spread out throughout their  
7 servers, that it would literally take them a month to put  
8 this together.

9 JUDGE GARCIA: Counsel, you mentioned today is  
10 different in - - - in a number of ways, right. So today  
11 this would be - - - I guess you're going to more easily  
12 accessible or collected, but it's also required that you  
13 disclose it, right?

14 MR. BLIRA-KOESSLER: Under - - - under the new  
15 law.

16 JUDGE GARCIA: The new law.

17 MR. BLIRA-KOESSLER: Under - - - I believe it's  
18 245.20 (1) (j)

19 JUDGE FEINMAN: 245.20 (1) (j).

20 JUDGE FAHEY: Is that - - - that right?

21 MR. BLIRA-KOESSLER: Sub (j). Correct, Judge.  
22 Yes, today - - -

23 JUDGE STEIN: So if you were required to disclose  
24 it back then, could - - - could this have come together so  
25 it would have been more easily - - - as I understand it,



1 basically, it was a matter of collecting information in a  
2 run, right - - -

3 MR. BLIRA-KOESSLER: In - - - in many runs,  
4 because, yeah, as - - - as I understand, this data is  
5 spread out throughout numerous runs.

6 JUDGE STEIN: Well, that's not clear, but it - -  
7 - it - - - obviously there is a method by which OCME can  
8 collect that data, because they're not doing it. I - - - I  
9 realize we didn't know that then, but how much - - - how  
10 much weight on that? And did OCME say that or did the - -  
11 - the People say that? I mean, where'd that information  
12 come from?

13 MR. BLIRA-KOESSLER: Well, I mean, it's coming  
14 from conversations with the OCME. That's not information  
15 we can really come up with on our own.

16 JUDGE RIVERA: But how is - - - how is that  
17 different from documents that are spread across - - - old  
18 school now - - - a bunch of different file cabinets,  
19 perhaps some went to storage in another state. How - - -  
20 how is that different from perhaps the challenges to doing  
21 that?

22 MR. BLIRA-KOESSLER: Well, you know, that - - -  
23 that issue was sort of addressed in Matter of Sacket v.  
24 Bartlett. Now, that's not a case from this court. It's a  
25 - - - I believe, a Third Department case. I don't think





1 this court has ever disagreed with Bartlett's reasoning. I  
2 don't think any other appellate court has disagreed with  
3 Bartlett's reasoning. And there, the request was for every  
4 felony case tried in a certain county since 1975, the name,  
5 gender, and race of each and every juror who was excused by  
6 peremptory challenge, who sat on the jury, together with  
7 the name of the defendant, docket number, and whether the  
8 juror was challenged by the prosecution or defense.

9 Now, that would have - - -

10 JUDGE STEIN: Yeah, but this isn't similar to  
11 that, is it? I mean, this is one - - - one case.  
12 Information on one case in various different places.  
13 That's all.

14 MR. BLIRA-KOESSLER: Right, but that - - - that  
15 request essentially requires the same thing. It may take  
16 longer - - -

17 JUDGE FAHEY: But this is not - - - this is - - -  
18 this isn't some huge, onerous requirement. It's - - - it's  
19 - - - in every commercial case I ever was involved in,  
20 there were documents all over the place; we had to chase  
21 them down, and sometimes hundreds of thousands of them. I  
22 mean, this stuff would all be discoverable in any  
23 commercial action. It's only here that we're arguing in a  
24 com - - - in a criminal case under what's discoverable by  
25 statute.



1           How do you get around - - - this - - - this  
2 information is require - - - created at the request of the  
3 People. So - - - and - - - and that's - - - the way I read  
4 the statute, it seems to be very difficult to not say this  
5 isn't mandatory, this disclosure, right.

6           MR. BLIRA-KOESSLER: Well - - -

7           JUDGE FAHEY: I - - - I don't really understand.  
8 What am I missing? Tell me what I'm missing here. It  
9 seems that 240.20(1)(c) says, it made at the request of the  
10 person "whom the prosecutor intends to call as a witness."  
11 It seems relatively straightforward to me, the - - - the  
12 language there.

13          MR. BLIRA-KOESSLER: Well, when you read that in  
14 conjunction of - - - with 240.20(2), I think it becomes a  
15 little clearer.

16          JUDGE FAHEY: Well, no, 240.20(2) is an entirely  
17 different situation. That is stuff that is not mandatory  
18 discoverable, and so you got to get a subpoena for it. And  
19 then there are certain rules that apply there. And that's  
20 a separate conversation. I agree with you. But here,  
21 we're talking about what's subject to mandatory discovery,  
22 not what's subject to discretionary, subpoena-like  
23 discovery.

24          MR. BLIRA-KOESSLER: I mean, I would just  
25 reiterate our main arguments in that respect. A, it not



1 being a document. B - - -

2 JUDGE FAHEY: Yeah, so the problem - - - no, see,  
3 the problem is - - - no, I got your arguments. The problem  
4 is, is I'm just - - - I had the same argument with my law  
5 clerks. Trust me; you're not the only one who feels this  
6 way, all right. I'm having a difficult time in my own mind  
7 resolving how there is - - - how one - - - how one  
8 supersedes the other, how the discretionary right to a  
9 subpoena for things that aren't mandatory discoverable  
10 would any way limit your mandatory right or your right to  
11 discovery that's mandatory.

12 And here, the way I read this language is - - -  
13 just forget about the subpoena for a moment - - - you have  
14 to say this was made at the request of a person whom the  
15 prosecutor intends to call a witness, right? That's why it  
16 was made, this stuff.

17 MR. BLIRA-KOESSLER: Right, but it's - - - it's -  
18 - -

19 JUDGE FAHEY: Okay, so if it's made for that  
20 reason, which is clear, then it's ma - - - it's just  
21 subject to mandatory discovery unless there's something  
22 within that section 1 of the statute, that relates to  
23 mandatory discovery that I'm missing.

24 MR. BLIRA-KOESSLER: Well, I'll - - - I'll answer  
25 that in two parts. Number one, we complied with the



1 statute by disclosing the FB reports. Now, the FB reports  
2 are not nothing. They have those original  
3 electropherograms. They have the - - -

4 JUDGE FAHEY: Yeah, but that - - - I - - - I  
5 accept that, and - - - and I accept the good faith of the  
6 prosecutor's office here, by the way. That's - - - that's  
7 not really the question. These are not really difficult  
8 questions. But the - - - the real question is, should - -  
9 - should this have been subject to mandatory discovery?

10 MR. BLIRA-KOESSLER: No, because again, going  
11 back to what I was just saying, they had the FB reports.  
12 And essentially requiring us to disclose something from - -  
13 - that's in the hands of a non-law-enforcement agency - - -

14 JUDGE FAHEY: But you don't - - - you don't - - -  
15 you don't - - -

16 MR. BLIRA-KOESSLER: - - - that we don't get our  
17 hands on, it's almost an impossible burden - - -

18 JUDGE FAHEY: You don't get to make the call, if  
19 it's mandatory discovery. It's not discretionary. It's  
20 not your choice. You're stuck with it. You got to turn it  
21 over.

22 MR. BLIRA-KOESSLER: Judge, if - - - if they're  
23 telling us we can't do this, it's going to take us a month  
24 to - - - I mean, what - - - what are we supposed to do in  
25 that situation?



1 JUDGE FEINMAN: Take a month and do it.

2 JUDGE FAHEY: Yeah.

3 MR. BLIRA-KOESSLER: Well, but this is the OCME,  
4 which we don't control. It's not part of the DA's Office.

5 JUDGE FAHEY: No, but they're certainly - - -  
6 certainly, if - - - if you came in and said, Judge, I  
7 request - - - requested this from OCME and they denied my  
8 request - - - the OCME is a branch of the City of New York.  
9 I recognize they're not part of the prosecutor's office;  
10 they have a different responsibility, but nonetheless, none  
11 of that was done here, so.

12 JUDGE STEIN: Is there anything in the record  
13 that would indicate that any - - - that any attempt was  
14 made to - - - to get the information, the data, from OCME?

15 MR. BLIRA-KOESSLER: Well, in our response, that  
16 basically lays our opposition based upon conversations with  
17 the OCME. I don't know if we make a separate request in  
18 every single case at that time. We basically would go with  
19 that response, because that was the OCME's position.

20 JUDGE STEIN: Well, what you said was it would be  
21 a burden to do it. You didn't say that - - - that OCME  
22 wouldn't do it. You said this is a burden; we shouldn't  
23 have to do it.

24 MR. BLIRA-KOESSLER: But - - -

25 JUDGE STEIN: We shouldn't - - - they shouldn't



1 have to do it. We shouldn't have to get it. That's what  
2 you said I - - - as I understand it.

3 MR. BLIRA-KOESSLER: But, you know, if somebody's  
4 telling you, like, look, it's going to take a month to put  
5 this together; we have 8,000 cases. We cannot do this in  
6 every - - - I mean, that's effectively a no. And beyond  
7 that, you know, there's - - - there's just so much that we  
8 can get from the OCME.

9 JUDGE WILSON: The thing that's a little unfair  
10 about, though, is that you were able to put it together for  
11 the - - - your use.

12 MR. BLIRA-KOESSLER: For the?

13 JUDGE WILSON: For your - - - for your own use,  
14 you were able to put this together. And then you're  
15 denying the defense the ability to have the same thing that  
16 you had at one point to be able to challenge it. Doesn't  
17 that seem a bit unfair?

18 MR. BLIRA-KOESSLER: Maybe. Maybe I'm not  
19 following your question, that we had what exactly at one  
20 point?

21 JUDGE WILSON: You had - - - you had the raw data  
22 put together in a form that you could use it.

23 MR. BLIRA-KOESSLER: Well, we asked them to do  
24 the testing.

25 JUDGE WILSON: Yeah.



1 MR. BLIRA-KOESSLER: Which led to the raw data,  
2 which led to the FB reports, which were disclosed. But the  
3 FB reports reflect the raw data. That's the important  
4 takeaway.

5 JUDGE STEIN: After they - - -

6 JUDGE FEINMAN: Well, were they in fact edited?  
7 I thought the testifying criminalist said that the FB file  
8 that - - - that it was edited, be - - - and - - - and it  
9 appears that in the edit tables, that some of that data - -  
10 - you know, maybe I'm misunderstanding the record, but - -  
11 -

12 MR. BLIRA-KOESSLER: We - - - I mean, it goes  
13 through ed - - - but again, the peaks are not edited.

14 JUDGE FEINMAN: It seems somewhat inconsistent.

15 MR. BLIRA-KOESSLER: The little labels can be  
16 edited. Excuse me?

17 JUDGE FEINMAN: It seems somewhat inconsistent to  
18 say, on the one hand, you got the fact that they got the  
19 FB, but it's also edited, so they don't need the raw data.

20 MR. BLIRA-KOESSLER: But - - - but all the edits  
21 are laid out in an edit table. So you know exactly what's  
22 being taken out. There's - - - it's - - - it's very  
23 transparent. Nothing is being hidden. It's all there in  
24 the FB reports.

25 JUDGE FEINMAN: Okay.



1 MR. BLIRA-KOESSLER: You know, it's - - - it's -  
2 - - it's a far different case than DaGata, where, you know,  
3 I think it was the FBI gave - - - you know, disclosed a  
4 letter - - - you know, it was called a report, but it seems  
5 like a letter - - - which basically said almost nothing,  
6 and then there were these fourteen pages of notes or  
7 whatever - - -

8 JUDGE RIVERA: So but - - - but if they want to  
9 hire an expert who might edit differently, they can't,  
10 correct?

11 MR. BLIRA-KOESSLER: Excuse me?

12 JUDGE RIVERA: If they want to hire an expert who  
13 might edit differently, they cannot do that, right? The  
14 expert couldn't do that?

15 MR. BLIRA-KOESSLER: Well, I mean, the expert  
16 could look at the FB reports.

17 JUDGE RIVERA: No, but could not themselves edit,  
18 or am I misunderstanding, because they can't zoom in and  
19 out, they can't otherwise do things that one would do, if  
20 you have the raw data to manipulate it in a particular way.

21 MR. BLIRA-KOESSLER: Well, they - - - they  
22 mention in their papers below, the defense attorney  
23 representing this client said, well, I have this computer  
24 program - - -

25 JUDGE RIVERA: Okay.





1 MR. BLIRA-KOESSLER: - - - on my terminal at  
2 work, called OSIRIS, and you know, I have some amount of  
3 training, and I might be able to do something with it. But  
4 what's not mentioned in those papers, because it's probably  
5 not true, is that he is not an expert in editing the data  
6 that comes out of the computer programs. And every single  
7 computer program that you have, whether it's the OCME's,  
8 whether it's OSIRIS, it doesn't matter, it always requires  
9 editing. You know, OSIRIS claims to require less editing,  
10 but it still requires editing. So you need an expert.

11 JUDGE RIVERA: Yes, that's what I'm asking you.  
12 If - - - if they had hired an expert and they only get the  
13 F - - - FB reports, could they have done any editing?

14 MR. BLIRA-KOESSLER: Editing - - -

15 JUDGE RIVERA: I - - - I understand your argument  
16 is you can look at it and know what editing has been done.

17 MR. BLIRA-KOESSLER: Right.

18 JUDGE RIVERA: So my question is, if an expert  
19 wanted to do some other different kind of editing - - -

20 MR. BLIRA-KOESSLER: Well, and that's - - -

21 JUDGE RIVERA: - - - they can't, correct, unless  
22 they have the raw data? Or am I misunderstanding?

23 MR. BLIRA-KOESSLER: An expert can look at the  
24 edits already made and say whether they agree or disagree  
25 with them, so I don't know if that answers your question.



1 JUDGE RIVERA: Right, but if they wanted to make  
2 their own, without raw data, they cannot do that, correct?

3 MR. BLIRA-KOESSLER: With - - - with the ed - - -  
4 no, they can still use the FB reports to do that.

5 JUDGE RIVERA: Okay.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MR. BLIRA-KOESSLER: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel?

9 MS. MURAKAMI TSE: Thank you, Your Honor.

10 Your Honor, this is what Mr. Tsintzelis got.  
11 It's on 501 - - - page 501 - - -

12 JUDGE RIVERA: Can you expert edit off the  
13 reports?

14 MS. MURAKAMI TSE: No, Your Honor, you know - - -

15 JUDGE RIVERA: Why not?

16 MS. MURAKAMI TSE: Because, you know, the  
17 prosecution's own witness from the OCME admitted that you  
18 needed the digital files to assess the OCME's conclusion.  
19 She admitted that the edits in the .fsa file are not  
20 visible on the printed version. You don't - - - you see  
21 the - - - that fact that the edits were made, but you don't  
22 know what the size of the peaks that were removed. The  
23 expert admitted that you don't have a number of things in  
24 the FB file, the printed file, that defense got, like the  
25 allelic ladders, like the size-standard charts that you

1 need to assess OCME's final conclusion, which is all that  
2 we got here.

3 And you know what we're talking about here is not  
4 a bunch of things that are spread out all over the  
5 computer. What we're talking about is a dozen or so .fsa  
6 files of one type, stored on OCME's forensic biology  
7 department's server, computer server, under a highly  
8 organized filing system, with a unique identifying number.  
9 All that was required was for - - - just like any other  
10 discovery - - - was to find the relevant files and turn  
11 them over.

12 And, you know, the - - - their - - - this is a  
13 simple search, and to suggest otherwise is really  
14 disingenuous. A trial court said, I've heard testimony of  
15 OCME analysts who actually do the production. They  
16 determined that, you know, that it's really a simple three-  
17 step downloading process that take about forty-five  
18 minutes, during which the analysts cab do other words.  
19 That's People v. Jones, People v. Gills - - - Gills.

20 And you know, the .fsa file - - - there's a .fsa  
21 file for each sample. So what you do, like the OCME - - -  
22 I'm sorry. The - - - you know, the OCME has published a  
23 protocol in 2017, not long after this case, for - - - for  
24 how to go about providing data to outside agencies, and  
25 that web address is referred to in our main brief on page



1 34, and it's also in the compendium of cited materials in  
2 the Velez case after this, but it says on page 3, that, you  
3 know, most electronic raw data may be found on the forensic  
4 biology network in the specific instrument folder. Use the  
5 browse button to locate the files.

6 This is a very simple search process, and that -  
7 - - the fact that the legislature, you know, clearly  
8 recognized in 245.20 that it was not burdensome - - -

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MS. MURAKAMI TSE: Thank you.

11 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. George Tsintzelis, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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