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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 97

PETER AUSTIN,

Appellant.

20 Eagle Street
Albany, New York
September 7, 2017

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 next matter on the
2 calendar is appeal number 87, the People of the State of
3 New York v. Peter Austin.

4 Counsel.

5 MR. ZENO: Good afternoon. My name is Mark Zeno,
6 and I represent appellant, Peter Austin. I'd like to
7 reserve two minutes of rebuttal.

8 CHIEF JUDGE DIFIORE: You may, Mr. Zeno.

9 MR. ZENO: Thank you. I plan to argue both
10 points today, but I'd like to begin with the confrontation
11 clause point. In People v. John, this - - -

12 JUDGE GARCIA: Before you get to - - - I'm sorry,
13 counsel.

14 MR. ZENO: Sure.

15 JUDGE GARCIA: Before you get to that, could you
16 talk a little bit about how this argument is preserved?

17 MR. ZENO: How it's preserved, sure. When it
18 came clear that Criminalist O'Connor was going to be
19 testifying, defense counsel objected to the admission of
20 DNA testimony without calling the appropriate witnesses.
21 And then there followed a colloquy about which witnesses
22 were necessary to be called. Defense counsel cited
23 Melendez, cited Williams v. Illinois, referred to the fact
24 that O'Connor was only the supervisor on two of the tests,
25 two of the three tests, and essentially said that he was

1 the wrong witness to be calling or an inadequate witness to
2 be calling under the confrontation clause.

3 JUDGE WILSON: So, counsel, you're referring to
4 the portions at 936, maybe, through 939 of the record, I
5 think. And let me ask you this, the way this starts out
6 with the court, you know, for the first couple pages, the
7 court is identifying three laboratory reports. These are
8 documents. And at least, you know, one reading of this is
9 that Mr. Sandleitner's objections were to the introduction
10 of the reports. And when he cites Bullcoming and Melendez
11 and so on, those are cases about the admissibility of
12 reports. And then what happens after that is the court
13 ultimately doesn't - - - am I correct that none of these
14 reports were actually admitted into evidence?

15 MR. ZENO: That's correct.

16 JUDGE WILSON: And then what happens after that
17 in the trial is that Mr. O'Connor is qualified as an expert
18 without objection from Mr. Sandleitner and then testifies
19 as an expert. And sometimes Mr. Sandleitner makes
20 objections and sometimes those are sustained and sometimes
21 they're overruled. But if there's something that you can
22 point me to in addition or different from what's the pages
23 I just mentioned where there's an objection on
24 confrontation clause grounds to O'Connor's expert
25 testimony, I'd like to see that.

1 MR. ZENO: Well, you're - - - you're looking at
2 the correct pages, Your Honor, but I - - - I read the - - -
3 I read those objections differently.

4 JUDGE WILSON: Okay.

5 MR. ZENO: I think that when the objection - - -
6 counsel stated he was objecting on Melendez-Diaz grounds,
7 and he said that the prosecutor was attempting to elicit
8 testimony from witnesses who not be call - - - called and
9 was trying to get around that problem by calling a
10 criminalist to testify as a supervisor. And perhaps
11 defense counsel could have been more precise, but when he
12 was objecting to this witness testifying as a supervisor, I
13 mean that was certainly an adequate objection to put the
14 court on notice that he was an inadequate witness,
15 particularly because this case was tried before People v.
16 John was decided where these precise rules were laid out.
17 He was objecting to the - - - to the criminalist testifying
18 as a supervisor. And - - -

19 JUDGE WILSON: For the purpose of admitting the
20 reports or for any purpose at all?

21 MR. ZENO: Well, the - - - for the purpose of
22 admitting the evidence, whether it came in by virtue of the
23 report or came in by virtue of his live testimony, he was
24 objecting to the admission of the evidence. It's the
25 evidence, whether it came in through a report or whether it

1 came in through a live witness. He was saying that you
2 needed someone who was qualified to testify, and a
3 supervisor was inadequately qualified.

4 CHIEF JUDGE DIFIORE: I thought the objection
5 related to the calibration of the machine?

6 MR. ZENO: Well, counsel took a very broad
7 position. Again, this was a pre-John case before this
8 court laid down some very specific rules about which
9 witnesses were required to testify. Counsel was saying you
10 need - - - needed to bring in all the witnesses. That's
11 the all witnesses rule, which is referred to John and
12 rejected. You needed to bring in all these witnesses.
13 Every stage of the - - - every stage of the testing you
14 needed to have a witness testify. And before this court
15 decided John, it was unclear whether that was necessary or
16 not. But the fact that he asked that they bring in all the
17 witnesses didn't - - - didn't waive an objection to at
18 least bringing in one necessary witness, the one that - - -
19 necessary witness who either was the person that called the
20 alleles, as this court talked about in John, or that - - -
21 or that performed an independent review of the data.

22 JUDGE FEINMAN: Well, so looking at the three
23 reports, can it not be said that Mr. O'Connor performed the
24 same review of the raw data that - - - for the buccal swab
25 that he did for the crime scene DNA? And can't we infer

1 that from the fact that he initialed all of those pages and

2 - - -

3 MR. ZENO: Well - - -

4 JUDGE FEINMAN: - - - and on those pages he's
5 listed as the analyst?

6 MR. ZENO: He did initial all the pages. There
7 was no testimony as to what his initials meant. We do have
8 his testimony about exactly what he performed with regard
9 to the post-arrest swab, and that's at page 1004 and 1005
10 of the record. And when he is being examined by the
11 prosecutor during direct examination, the prosecutor asks
12 him: "Did you analyze the DNA profile in this particular
13 case?" Answer: "I reviewed the DNA profile in this case."
14 Question: "And when you reviewed it, what did you do with
15 it?" Answer: "I looked at the DNA profile, the string of
16 numbers," which is the DNA profile, "and compared it to the
17 - - - to the other two reports." He compared the string of
18 numbers. And that's the box score that the court talked
19 about in - - - in John. He compared the numbers that had
20 been prepared by others.

21 JUDGE GARCIA: And it seems a hard argument to
22 make that you can get around what we say is a confrontation
23 clause violation in John by just not admitting the report
24 and what he seems to do in his testimony, to me, is rely on
25 it and refer to it throughout his testimony. Because it

1 seems the harm in John wasn't the report. It was the
2 potential for tampering or contamination that might be
3 there if you didn't call someone who was actually involved
4 in a critical stage of the DNA analysis.

5 MR. ZENO: Right. And - - - and I think that
6 John anticipated that. John talked about Williams v.
7 Illinois where - - - where exactly that happened. In
8 Williams v. Illinois, they didn't admit the reports as
9 here, and they called a witness who basically testified to
10 conclusions based on those reports. And in Williams v.
11 Illinois, the - - - the dissent specifically pointed out
12 New York Law, People v. Goldstein, and said what you're
13 doing here is unlawful. Courts in states like New York
14 don't allow it. And then when this court decided John, it
15 reaffirmed that rule that it doesn't matter how that data
16 comes in, doesn't matter how those conclusions come in,
17 whether it's through a report or whether it's through a
18 live witness. The - - - it's the evidence that's the
19 problem. It's the potential for tainted evidence, tainted
20 conclusions, in that evidence that's the problem.

21 JUDGE RIVERA: So, counsel, let's say we agree
22 with you. Do we have to reach the adverse inference issue?

23 MR. ZENO: Not if you agree on this point.

24 JUDGE RIVERA: Okay.

25 MR. ZENO: But I see - - - I see my time is

1 running out, but so let me - - - let me turn to that - - -

2 JUDGE RIVERA: You will turn to that. Okay.

3 MR. ZENO: - - - inference point. In People v.
4 Handy this court ruled that regardless of whether evidence
5 is technically discoverable, if it has been requested by
6 the defense with reasonable diligence, the prosecutor must
7 take whatever steps are necessary to ensure that that
8 evidence will be available to the defense. Here - - -

9 JUDGE FEINMAN: Now even the dissent in applying
10 Handy seems to require that the defense act with some
11 reasonable diligence in - - - in making the demand. What's
12 your basis for saying that the - - - the defense got it - -
13 - the majority got it wrong in saying that there was
14 reasonable diligence by the defense?

15 MR. ZENO: Well, they made a - - - the defense
16 made a demand in December of 2010 for all of the evidence,
17 which would have included this bloody receipt.

18 JUDGE FEINMAN: And then how long did it go by -
19 - -

20 MR. ZENO: And in - - -

21 JUDGE FEINMAN: - - - unresponded to before the
22 defense woke up and said that - - -

23 MR. ZENO: In June of 2011 - - -

24 JUDGE FEINMAN: - - - I need that?

25 MR. ZENO: - - - there was a status conference

1 where the court directed completion of discovery, and when
2 the case moved for trial the following year, sixteen months
3 later, before jury selection started the defense
4 specifically again asked for all the - - - the evidence
5 from which the DNA was derived and the court said to the
6 prosecutor deal with it. Five days later, it still hadn't
7 been dealt with when - - - when Hurricane Sandy made
8 landfall and the evidence was destroyed. That was still an
9 outstanding request. So in the middle of jury selection,
10 after the - - - the court had directed the prosecutor to
11 turn over the - - -

12 JUDGE FAHEY: See, that's why I'm wondering why -
13 - - why would Handy apply since the destruction of the
14 evidence wasn't by - - - wasn't lost by an agent of the
15 state - - -

16 MR. ZENO: Right.

17 JUDGE FAHEY: - - - or destroyed by an agent.

18 CHIEF JUDGE DIFIORE: To follow up on that, what
19 would the adverse inference be that would be drawn?

20 MR. ZENO: Well - - -

21 CHIEF JUDGE DIFIORE: What's - - - what's the
22 adverse inference?

23 MR. ZENO: - - - the adverse inference is that
24 from - - - from the - - - that the jury was permitted to
25 draw the inference that the evidence would not have been

1 favorable to the prosecution. That - - -

2 CHIEF JUDGE DIFIORE: That the scientific testing
3 that was performed?

4 MR. ZENO: Well - - - no. That - - - well,
5 ultimately, the scientific testing. If the - - - if this
6 bloody receipt had been contaminated or there was proof of
7 contamination in the way it had been stored, that might
8 have affected the test - - - the ultimate testing.

9 JUDGE RIVERA: But isn't that argument that
10 they'd have to be deciding that because the People dragged
11 their feet, the - - - the evidence was adverse to them?
12 And that's - - - that's not what these cases turn on,
13 right? It's the failure to actually turn over the evidence
14 or that it's destroyed and now you can't turn it over.

15 JUDGE FAHEY: Right.

16 MR. ZENO: That's - - -

17 JUDGE FAHEY: Well, as to - - -

18 JUDGE RIVERA: As to opposed to they dragged
19 their feet, maybe that day they would have turned it over
20 but now Sandy hit and it's impossible to access the
21 material, even if it still exists.

22 MR. ZENO: Well, that's right. Well, they - - -
23 this case is distinguishable from Sandy [sic] because it
24 was not an - - - not an affirmative act of destruction of
25 the evidence. But it was destroyed - - -

1 JUDGE FAHEY: I guess the question for us is is
2 this an act of God? It seems like we're going to have more
3 hurricanes. This may be more of a question that we may
4 have to deal with more often, all of us.

5 MR. ZENO: Well - - -

6 JUDGE FAHEY: So that being the case - - - or is
7 it an act of the State?

8 MR. ZENO: Well, it's - - -

9 JUDGE RIVERA: Or as a follow up on that, do - -
10 - do you get this adverse inference if the People of - - -
11 only drag their feet two months?

12 MR. ZENO: Well, that's not this case, and
13 dragging - - - that - - - that would be a question for the
14 court. Here we have a period of multiple years where the -
15 - - where the People drag their feet. And - - - and
16 getting back to your - - - sort of the original question is
17 we'd be asking for - - - for the jury to be permitted to
18 infer from the fact that they delayed this disclosure for
19 two years or delayed producing the evidence for two years
20 that from that fact the jury would be permitted to infer
21 but not required to infer that the - - - that the evidence
22 wasn't favorable.

23 JUDGE FAHEY: But was this - - -

24 CHIEF JUDGE DIFIORE: Thank you, sir.

25 JUDGE FAHEY: Oh, I'm sorry.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. WHITE: May it please the court, Matthew
3 Benjamin White for the District Attorney of Bronx County,
4 Darcel D. Clark. Your Honors, to take up with the adverse
5 inference point, defense did not exercise reasonable
6 diligence in asking for the property.

7 JUDGE STEIN: Well, let's assume for the moment
8 that - - - that they did. I think probably everyone agrees
9 that it wasn't their fault that the hurricane contaminated
10 where this was stored and that there was nothing improper
11 about where it was stored or how it was stored or anything
12 like that. The issue to me boils down to they did delay
13 for a very extensive period of time, and as a result of
14 which the evidence is no longer there. So somebody has to
15 bear, you know, the - - - the brunt of that, if you will.
16 Either the defendant is harmed by the fact that this
17 happened and allows the jury - - - the inference allows the
18 jury to decide that, yes, it wasn't their fault - - - the
19 hurricane wasn't their fault but had they complied with
20 their obligations, this never would have happened, and, you
21 know, maybe there's a reason they didn't comply with their
22 obligations versus if nothing - - - if there is no
23 permissive inference instruction then - - - you know, then
24 this - - - this unanticipated loss falls on the shoulders
25 of the defense and the - - - and the prosecution is sort of

1 scot-free on having failed to comply with their discovery
2 obligations. That was a little long-winded, but I think
3 you get what I'm saying.

4 MR. WHITE: Yes, Your Honor. But with respect, I
5 - - - I take issue with the premise that there was an undue
6 delay on the part of the People.

7 JUDGE STEIN: Well, obviously, I think that would
8 have to be - - - that would have to be the premise.

9 MR. WHITE: And - - - and there's no evidence in
10 the record to support that. Notably - - -

11 JUDGE STEIN: Well, what if - - - what if there
12 was? What if there was?

13 MR. WHITE: What if there was?

14 JUDGE STEIN: Yes. What if there was? So - - -
15 so, you know, then you got this balance. So what - - - you
16 know - - -

17 MR. WHITE: Well, again, I take - - -

18 JUDGE STEIN: - - - why wouldn't - - -

19 MR. WHITE: I take issue with the premise, but
20 assuming there was then because it was a once-in-a-lifetime
21 meteorological phenomenon, I think in this case that an
22 adverse inference would not be required.

23 JUDGE STEIN: Well, what if it wasn't a
24 hurricane? What if it was a robbery?

25 MR. WHITE: If someone broke into - - -

1 JUDGE STEIN: A burglary?

2 MR. WHITE: - - - the police warehouse - - -

3 JUDGE STEIN: Yep.

4 MR. WHITE: - - - and stole the property?

5 JUDGE STEIN: Yep.

6 MR. WHITE: Well, in that case arguably - - -

7 JUDGE STEIN: Or what if it was a fire or, you
8 know, any number of things, a flood?

9 MR. WHITE: Well, Your Honor, I mean it - - -
10 it's sort of a hypothetical far removed from this
11 situation. I mean we are talking about an act of God. We
12 are talking about a once-in-a-lifetime event.

13 JUDGE STEIN: No. I understand that just assume
14 that something happens that is not the People's fault, that
15 the event that results in the loss of the evidence is not
16 the People's fault. I think that's the point.

17 MR. WHITE: Well, if - - -

18 JUDGE STEIN: But - - - but had they been timely
19 in their disclosure, the stuff wouldn't have been there.
20 It would have been in the hands of the defense.

21 MR. WHITE: Your Honor, I - - - if we did delay,
22 and I - - -

23 JUDGE STEIN: I understand. I understand.

24 MR. WHITE: - - - we did not. And if, say, a
25 robber broke into the warehouse and stole the property and

1 if somehow this robber was, you know, some kind of super
2 robber that, you know, the police were somehow negligent or
3 not negligent in - - - in stopping him, arguably, an
4 adverse inference in that unique situation might be
5 warranted. But we need not go that far. This is a case
6 where notably the bill and demand is not in the record. So
7 you - - - Your Honors had actually no idea what property
8 was requested, and I would submit to Your Honors that the
9 property at issue here was not discoverable under CPL
10 Section 240.20. Under that section, the only property that
11 is - - -

12 JUDGE RIVERA: But - - -

13 MR. WHITE: - - - discover - - -

14 JUDGE RIVERA: But I thought the judge ordered
15 you to turn it over.

16 MR. WHITE: The judge ordered us to comply - - -

17 JUDGE RIVERA: So I don't know that that's your
18 strongest argument, right?

19 MR. WHITE: Well, Your Honor, the judge ordered
20 us to comply with our discovery obligations. This was not
21 property that was discoverable as of rights.

22 JUDGE RIVERA: But - - - but he set out what he
23 wanted and that's what the judge ordered, right?

24 MR. WHITE: Well, there are two - - -

25 JUDGE RIVERA: Did he not say I want all the DNA

1 - - -

2 MR. WHITE: But if you're not entitled to it,
3 Your Honor, then why would we - - -

4 JUDGE RIVERA: But if the judge ordered it.

5 MR. WHITE: But if - - - if the judge - - -

6 JUDGE RIVERA: Isn't that where we are here?

7 MR. WHITE: The judge did not - - - no judge ever
8 specifically ordered that this property be turned over.

9 JUDGE RIVERA: Um-hmm.

10 MR. WHITE: No judge ever ordered that, Your
11 Honor.

12 JUDGE RIVERA: But what did the judge order be
13 turned over then?

14 JUDGE FEINMAN: I'm sorry.

15 JUDGE RIVERA: I'm sorry. What did, in your
16 opinion, the judge order to be turned over?

17 MR. WHITE: The judge ordered us to turn over the
18 - - - the discovery that the defense was entitled to.

19 JUDGE RIVERA: Never mentioned anything specific
20 about DNA either in response to a request or some statement
21 from the prosecutor related to the DNA evidence?

22 MR. WHITE: Your Honor, the only evidence in the
23 record related to this - - - appears at page A-54. It's
24 the first day of trial when defense counsel says, Your
25 Honors, I haven't seen the physical evidence yet, but the

1 prosecutor's been very accommodating. I'm sure we'll make
2 arrangements. Five days later, Sandy strikes. Under those
3 circumstances where defense counsel has waited two years to
4 look at this property - - -

5 CHIEF JUDGE DIFIORE: Was there ever any
6 discussion about making arrangements to have the evidence
7 tested?

8 MR. WHITE: No. In fact, defense counsel
9 specifically stated he did not want to test this evidence.
10 And so - - -

11 JUDGE FEINMAN: So your position, bottom line, is
12 that they didn't exercise reasonable diligence?

13 MR. WHITE: Yes, Your Honor.

14 JUDGE FEINMAN: Now I want to go back to the
15 confrontation clause which you haven't addressed and give
16 you a chance to do that - - -

17 MR. WHITE: Yes, Your Honor.

18 JUDGE FEINMAN: - - - because I think you would
19 agree we don't need to reach the adverse inference issue if
20 this case is resolved on John in favor of the defendant.

21 MR. WHITE: Correct. But the issue is not
22 preserved, Your Honor. The objection that defense counsel
23 is pointing out to occurred on the last day of a month-long
24 trial. The last day right before the witness was about to
25 testify, not for the first time, but for the second time,

1 right. So clearly the objection is not timely. And also,
2 I submit to Your Honor that the objection was not made with
3 any kind of precision. You're dealing here with a very
4 complicated area of jurisprudence, three different DNA
5 reports where up to six analysts might be required for each
6 report, so we're talking about eighteen potential
7 witnesses.

8 JUDGE GARCIA: But is the objection made before
9 the testimony he objects to is given? So what does it
10 matter if it's the last day or the first day? I mean he
11 objects before the testimony is made.

12 MR. WHITE: He - - - no. He - - - well, as I
13 said, the witness testified previously - - -

14 JUDGE GARCIA: But to - - -

15 MR. WHITE: - - - and he - - -

16 JUDGE FEINMAN: The judge could always strike it
17 if it turns out it was wrongly allowed.

18 MR. WHITE: Right. But - - -

19 JUDGE GARCIA: And then there - - - is there
20 additional testimony after he makes the objection on this
21 issue?

22 MR. WHITE: The - - - yes. But the objections
23 are misplaced because the objections are related to the
24 crime scene reports. They're not relate - - - and - - -
25 and those counsel concedes are not testimonial on appeal,

1 right. Counsel's issue on appeal is that we should have
2 called the analysts for the DNA buccal swab that was taken
3 from the defendant later. Defense counsel never asked for
4 that witness to be called. Okay. He - - - he said that we
5 had to produce the witnesses who calibrated the machines
6 and - - - and the court said no. The People are not
7 required to produce all witnesses, which is exactly what
8 this court said in John. The People are not required to
9 produce all witnesses related to a DNA report, and so
10 there's no precision in the objection. We had no - - - the
11 court was not alerted to the particular error at issue, and
12 that's why no court has ever ruled on this issue in this
13 case. Not the trial court, not the First Department, and I
14 submit that Your Honors should not be the first to rule on
15 this issue in this very complicated area of jurisprudence.

16 JUDGE FEINMAN: Is there anything in the record
17 that shows Mr. O'Connor performed more analysis of the raw
18 data of the buccal - - - or buccal as you're pronouncing,
19 so I don't know which is correct - - - swab than the
20 analyst in - - - in John?

21 MR. WHITE: Yes, Your Honor. I mean at page A-
22 984 of the record, Mr. O'Connor talks about the standard
23 testing that he does when he writes up a DNA report. And
24 he states that: "After all the testing is done and all of
25 the data is compiled in the case file, in the case folder

1 everything is put. I reviewed every test that was done,
2 every control that was involved, and all of the data that
3 was finally found, and I made a determination of a DNA
4 profile." So clearly he's taking responsibility for the
5 DNA profile, and the DNA profile at issue in this case was
6 essentially machine generated. If you look at the DNA
7 report that counsel takes issue with on appeal, you can see
8 at - - - and this is at A-1263, the electropherogram
9 essentially sets forth the alleles as they appear on the
10 allele table at A-1260, right. And it's - - - and it's an
11 exact match. And then when you look at the edit table on
12 A-1262, they refer to four samples that were edited in that
13 batch of twenty-five that was tested, but it's not our
14 sample. So this is a situation where the alleles are
15 essentially machine generated.

16 JUDGE GARCIA: And isn't that case - - - that was
17 the case in Sean John. I mean that fight's been lost.

18 MR. WHITE: Your Honor, with due resp - - - I
19 disagree because I believe - - -

20 JUDGE GARCIA: All of them are generated by a
21 machine, and the point is it's who's doing that.

22 MR. WHITE: No. No. No. Your Honor, with - - -
23 with due respect, the - - - the gun swab in Sean John was
24 edited. It was edited.

25 JUDGE GARCIA: It was edited for certain peaks

1 and - - -

2 MR. WHITE: For peaks. I'm - - - I'm just saying
3 to the extent - - - and this is why the preservation issue
4 is so important, Your Honors, because you're - - - there's
5 no guidance for the court. There's no record for the
6 court.

7 JUDGE GARCIA: Peaks and editing that was done in
8 there only served to reinforce the point of the majority in
9 that case, which was there's a potential for things to be
10 manipulated in some way at this stage, and that's why you
11 need the person who actually performed it rather than a
12 machine printout that an expert then can compare to a
13 different machine printout.

14 MR. WHITE: Your Honor, this is a - - - an
15 argument we don't need to have because it's not preserved.

16 JUDGE RIVERA: Okay. What should - - - what
17 should counsel have said to preserve this argument? What's
18 missing from - - -

19 MR. WHITE: What's missing is he should have said
20 - - -

21 JUDGE RIVERA: - - - that colloquy?

22 MR. WHITE: I'm sorry to interrupt.

23 JUDGE RIVERA: Yeah. No problem.

24 MR. WHITE: He should have said, Your Honor, the
25 DNA buccal swab profile is testimonial and we need to hear

1 from the analyst who did the typing.

2 JUDGE FAHEY: So - - -

3 JUDGE RIVERA: If he's said it's a violation of
4 Supreme Court cases on this and cited the cases, would that
5 have been enough?

6 MR. WHITE: It would not have been enough, Your
7 Honor. Because as I said there are three DNA reports, six
8 analysts per report, eighteen witnesses. We need to know
9 with some specificity who to call because theoretically we
10 could have - - - the objections could have been sustained,
11 his witnesses could have been called, and then he could
12 have turned around and said on appeal - - -

13 JUDGE RIVERA: Did the judge's decision - - - did
14 the judge's decision perhaps resolve the issue for purposes
15 of this preservation question?

16 MR. WHITE: No, Your Honor, because the judge's
17 ruling was that not all witnesses need to be called.
18 That's a very different proposition that the People don't
19 need to call anyone else. And again, this objection was
20 made on the last day of testimony on a month-long trial
21 where defense counsel had had the reports for over three
22 weeks.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. WHITE: Thank you, Your Honors.

25 CHIEF JUDGE DIFIORE: Mr. Zeno.

1 JUDGE FAHEY: What do you say about the objection
2 being on the last day of testimony?

3 MR. ZENO: Well, the objection was before the
4 evidence came in. I - - - I don't know of any rule of
5 evidence that requires you to make an objection at any
6 earlier point. The objection occurred before the
7 criminalist testified about the - - - his conclusions about
8 the DNA. I mean I don't even actually understand it's - -
9 - there are no - - - there's no timing requirement as long
10 as it's before the testimony comes in, and it was before
11 the testimony came in. It was when he learned that this
12 criminalist was going to testify about this evidence and he
13 objected. And I want to get back to preservation, but I -
14 - - I wanted to correct something that respondent said in
15 response to Judge Feinman's question asking about is there
16 any evidence in the record as to what type of supervision
17 or analysis he performed on this report? And counsel cited
18 to page 984 of the appendix and where O'Connor said that he
19 had reviewed every test that was done, every control, all
20 of that information, but he was specifically referring to
21 one of the other reports that we don't object to. If you
22 look at 984, question: "What role did you play in the
23 analysis of this particular piece of evidence under
24 FB0904107?" And that's one of the reports we're not
25 objecting to.

1 JUDGE GARCIA: And didn't - - - wasn't there also
2 a comment on Mr. O'Connor's role that the court made at A-
3 1047 saying: "Mr. O'Connor was ill prepared. Apparently,
4 all he did was to review what other people did"?

5 MR. ZENO: Absolutely. I mean - - - and he - - -
6 he testified to that with regard to this report. All he
7 did is review. All he did is create that box score, which
8 under John is inadequate. John made a very precise rule
9 and he doesn't fit within that rule.

10 JUDGE RIVERA: To be clear what - - - what is it
11 you are now raising as your confrontation clause claim?
12 What - - - what is it you're objecting to now?

13 MR. ZENO: That the evidence from the buccal swab
14 - - -

15 JUDGE RIVERA: Okay.

16 MR. ZENO: - - - that my client's DNA matched the
17 DNA from the - - - that was found on the bloody receipt at
18 the Bed and Bath store.

19 JUDGE RIVERA: So it's the testimony comparing?

20 MR. ZENO: It's the testimony comparing - - -

21 JUDGE RIVERA: Comparison testimony?

22 MR. ZENO: - - - and - - - but it's more than
23 that because it necessity brings in the testimony of the
24 criminalists who did not testify who produced the data that
25 - - - that O'Connor used to reach that conclusion. He was

1 relying on data of other criminalists who performed the
2 tests, edited the graphs, came up with the numbers, and he
3 just took that underlying number, put it in a box score,
4 and concluded they're the same. So to the extent that he
5 was allowed to testify that they were the same, we object
6 to that. And to the extent that he was allowed to
7 integrate that other testimony that was not admissible that
8 did not have a constitutional foundation, we object to that
9 as well.

10 JUDGE RIVERA: So not just the defendant's DNA
11 profile?

12 MR. ZENO: No. Just the defendant - - - just the
13 defendant.

14 JUDGE RIVERA: You're saying the - - - the DNA
15 from the crime scene also?

16 MR. ZENO: No. We - - - we do not object to that
17 - - -

18 JUDGE RIVERA: Okay.

19 MR. ZENO: - - - because under John that is not
20 testimonial because it was pre-accusatory.

21 JUDGE RIVERA: Oh, okay.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. ZENO: Thank you.

24 (Court is adjourned)

25