

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers Sealed)

-against-

No. 29

SEAN JOHN,

Appellant.

20 Eagle Street
Albany, New York 12207
February 10, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

DINA ZLOCZOWER, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
111 John Street, 9th Floor
New York, NY 10038

SHOLOM J. TWERSKY, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
350 Jay Street
Brooklyn, NY 11201

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 29, People v. Sean John.

3 Counsel, would you like rebuttal time?

4 MS. ZLOCZOWER: Four minutes, please.

5 CHIEF JUDGE DIFIORE: Four? You'll have
6 your four.

7 MS. ZLOCZOWER: May it please the court,
8 Dina Zloczower from Appellate Advocates for Appellant
9 Mr. Sean John. After he was arrested, handcuffed,
10 and placed in a police car, an officer entered the
11 basement of appellant's residence and searched a
12 closed container labeled Smith & Wesson without a
13 warrant or consent. Appellant had standing to
14 challenge that search. The People have not come
15 forward with a single reason why residents of a
16 multifamily brownstone don't enjoy the same kind of
17 privacy expectations that people who live in a
18 single-family home do.

19 JUDGE STEIN: Well, other people have
20 access who live there to their - - - to their
21 basement. That's - - - that's one difference between
22 people who own single-family homes. Why doesn't that
23 make a difference? How does - - - how does he show
24 an expectation of privacy to begin with in the
25 basement where, you know, there - - - there's no,

1 line?

2 MS. ZLOCZOWER: - - - with a basement that
3 was used for storage, the - - - the court below
4 found, that was - - - had a lock on it, that had a -
5 - - that was only accessible through the interior of
6 the building, as opposed to a large building where,
7 you know, there's a separate entrance for the
8 basement.

9 JUDGE STEIN: So you're saying you only
10 lose the expectation of privacy if it's open to the
11 world, to the public?

12 MS. ZLOCZOWER: Under the definition of
13 Powell by this court, privacy is when the - - - the
14 antithesis of privacy is when the public has access.
15 In a large apartment building with a lobby and - - -
16 and front doors that aren't locked, the public has
17 access. In this small building where the basement
18 was only accessible through the - - - through the
19 interior and only through the locked - - -

20 JUDGE ABDUS-SALAAM: But putting - - -
21 putting aside the privacy issue, counsel, is there -
22 - - was there consent given by the neighbor, who also
23 lived in the building, for the police to get into the
24 basement?

25 MS. ZLOCZOWER: The People concede that she

1 did not verbally consent, so that's number one. She
2 didn't specify what - - -

3 JUDGE ABDUS-SALAAM: What if she pointed
4 them - - -

5 JUDGE RIVERA: Expressly consent, not - - -
6 not - - -

7 MS. ZLOCZOWER: She did not expressly
8 consent.

9 JUDGE RIVERA: - - - something that she
10 said and - - - and her - - -

11 MS. ZLOCZOWER: Nothing she - - -

12 JUDGE RIVERA: - - - her actions might have
13 suggested consent.

14 MS. ZLOCZOWER: The People - - -

15 JUDGE RIVERA: You mean expressly said, go
16 into the basement, I let you go, I'm giving you
17 consent.

18 MS. ZLOCZOWER: That's correct.

19 JUDGE RIVERA: That's what you mean.

20 MS. ZLOCZOWER: That's correct. She did
21 not expressly consent, and the People are now arguing
22 that she implicitly consented. However, the officer
23 did not inquire at all of her as to whether or not
24 she - - -

25 JUDGE RIVERA: Did he need to?

1 MS. ZLOCZOWER: Yes - - -

2 JUDGE RIVERA: Did he need to based on what
3 she had already done and said? If he had already
4 determined that she's giving me consent, does he then
5 have to turn around and say, you are giving me
6 consent, correct?

7 MS. ZLOCZOWER: This court in Adams and
8 Gonzalez and in other cases has held unequivocally
9 that absent exigent circumstances or an emergency, a
10 police officer must acquire - - - inquire, even when
11 the person asserts an - - - an authority over the
12 premises. In Adams - - -

13 JUDGE FAHEY: Is there - - - is there - - -
14 isn't there a second part here, though? Let's - - -
15 let's assume for a second that there - - - that the
16 entry into the basement was allowable. The - - - the
17 question in my mind is - - - is was the search of the
18 - - - of the gun case allowable, and as I understand
19 it, this was an unlocked case marked "Smith &
20 Wesson". And I think the People rely on a - - - a
21 case called Sanders - - - which I might be wrong on
22 what the People are relying on, I don't want to
23 mischaracterize their argument - - - but it - - -
24 nonetheless, it seems to me that the law has moved
25 beyond Sanders and that - - - that the - - - a good

1 argument can be made here that the plain view
2 exception simple doesn't apply because this case - -
3 - the object in the case wasn't readily identifiable
4 by the case itself. I think that's where you should
5 be going.

6 MS. ZLOCZOWER: That's exactly right, Your
7 Honor. Even assuming he - - - the officer did
8 receive consent and he was lawfully inside the
9 basement, the gun inside the gun box was not in plain
10 view. It simply wasn't. This was a closed
11 container. There's no evidence, in fact, that it
12 could be locked.

13 JUDGE FAHEY: Well, so - - -

14 MS. ZLOCZOWER: And the - - - it - - - the
15 - - - the gun was simply not visible to the officer
16 when he entered the basement. And the People are
17 relying on the fact that the - - - that there was a
18 label on this box, on this - - - on this blue box
19 that was not transparent, that said "Smith & Wesson",
20 and they equate "Smith & Wesson" with rendering this
21 gun visible.

22 JUDGE RIVERA: What if it had said "Sean
23 John's gun"?

24 MS. ZLOCZOWER: You know, even if it had
25 said "Sean John's gun" the officer would not be able

1 to see the gun. It's as simple as that. Plain view
2 doctrine requires that the contents be visible, and
3 the contents in this case simply wasn't. The label
4 didn't render it visible. The Supreme Court in
5 Walter held that labels simply don't do that. And so
6 even if she - - - even if she did consent, even if
7 consent could be implied, the officer could not know
8 what was inside the container until he looked inside.
9 And - - -

10 JUDGE FAHEY: The second - - -

11 JUDGE RIVERA: Your argument is about the
12 seizure - - - excuse me, about the search, not the
13 seizure. Do you concede that he could have seized
14 the box and then got a warrant?

15 MS. ZLOCZOWER: At most, Your Honor, he
16 could seize the box. At most, he had probable cause
17 to seize the box. There was absolutely no reason why
18 he couldn't wait for a warrant to open it. Time
19 wasn't of the essence here. As I said earlier, the
20 defendant had already been arrested. He was, in
21 fact, handcuffed and in the police car. There was
22 plenty of time to wait for a warrant.

23 JUDGE FAHEY: The second part of your
24 argument is a very interesting argument about the - -
25 - the DNA evidence and - - - and who has to come in

1 and testify and that and the expert testimony. Just
2 - - - just to go for that for a second, because what
3 strikes me is - - - is that first off, it - - - it
4 seems like the Williams case in the Supreme Court is
5 very difficult for us to apply, and I'm not sure it
6 says what you say it says.

7 But the other part of that is - - - is - -
8 - and more importantly, as a policy matter, most of
9 the exonerations that take place in New York State of
10 what - - - within the last few years, there have been
11 a record number - - - are based, at least in part, on
12 DNA evidence. And if as a policy we are going to say
13 that DNA evidence would not be admissible unless we
14 could produce every analyst who had handled the DNA
15 raw data to put it together before an expert could
16 come and testify, it seems to me that we would be
17 severely hamstrung in any case more than a few years
18 old because people move on, they're in various place.
19 It's - - - it would be difficult for the defendants,
20 the person who had been wrongfully accused, to be
21 able to compile the people necessary to put that DNA
22 evidence in. And wouldn't the policy implications of
23 what you're arguing work against your side of the - -
24 - of the v. or the defendant's side of - - - of the
25 argument?

1 MS. ZLOCZOWER: No, Your Honor. The
2 Supreme Court has refused to prize convenience over
3 the Constitution. And also - - - also to various - -
4 -

5 JUDGE FAHEY: Well, no, I don't - - - I
6 don't think we're talking about convenience over the
7 Constitution. We're not talking about that, because
8 here we're talking about the compilation of data and
9 then the analysis of data. Experts analyze it,
10 technicians compile it. And Judge Sotomayor talked
11 about that distinction, a relatively experienced
12 jurist at that point who had done a lot of criminal
13 work, and it - - - it seemed to be a rational
14 distinction. And so the problem I had with - - - of
15 course, Williams is a parallelism in - - - in and of
16 itself, and - - - and our - - - and our decision that
17 came out at the same time, in Carcione (ph.), pointed
18 to the same kinds of problems, but more importantly,
19 the fundamental problem of the wrongfully convicted
20 would be undermined by the policy that you're
21 advocating.

22 MS. ZLOCZOWER: DNA evidence has the
23 ability to both inculpate and exculpate. That
24 doesn't mean that it's not subject to cross - - -
25 that the analysts who conduct the - - - the testing

1 aren't - - - shouldn't be subject to cross-
2 examination.

3 JUDGE FAHEY: So you wouldn't see this as
4 an extension at all of what would be required to be
5 admissible?

6 MS. ZLOCZOWER: No, Your Honor. This is -
7 - - no, no, Your Honor.

8 JUDGE FAHEY: I see.

9 MS. ZLOCZOWER: Quite the contrary. In
10 fact, any witness who makes observable facts is
11 subject to - - - to cross-examination. This court
12 has held that - - -

13 JUDGE FAHEY: But what about in cases - - -
14 this isn't exactly a fair question but - - - so if
15 you - - - if you're not comfortable with it, don't
16 worry about it, don't answer it, but it seems to me
17 that - - - that data that's compiled in DNA evidence
18 is quite often compiled in a manner that was referred
19 to as a double blind. In other words, the
20 technicians working on it don't know what exactly
21 they're working on. In - - - in that situation, it
22 seems to preserve the integrity of the compilation of
23 the data. Normally that's done with DNA evidence and
24 then it's put together by an analyst at the end. But
25 would you say that - - -

1 MS. ZLOCZOWER: The - - - the - - -

2 JUDGE FAHEY: - - - that those people
3 should still be examined, they should still verify
4 the work they did?

5 MS. ZLOCZOWER: Absolutely, Your Honor.
6 The record evidence in this - - -

7 JUDGE ABDUS-SALAAM: What is - - - what is
8 the testimonial value of that information, I
9 collected the DNA? What is that? It doesn't say,
10 and this DNA matched your client. It only says I
11 collected the DNA.

12 MS. ZLOCZOWER: I'll answer that question
13 in just a moment. I'll just answer Judge Fahey's
14 question which is that this - - - the record evidence
15 here establishes that the analysts did know the
16 identity of - - - of my client, so they did not
17 operate under a veil of ignorance. They - - - they
18 full - - - were fully aware of the - - - of the
19 charges against my client and of his role as a
20 suspect.

21 In terms of the testimonial nature of the -
22 - - of the evidence, the record evidence here
23 includes comparisons of DNA - - - of the DNA profile.

24 JUDGE ABDUS-SALAAM: But that's the
25 analysts. I'm talking about the other - - - my

1 understanding is you want everybody involved in this
2 to be available for cross-examination, correct?

3 MS. ZLOCZOWER: Yes, Your Honor.

4 JUDGE ABDUS-SALAAM: So what is the
5 testimonial value of having someone say, I - - - I
6 collected the DNA, when that person is not saying,
7 and the DNA that I collected matched your client?

8 MS. ZLOCZOWER: What the - - - what - - -
9 what the confrontation clause requires is not that
10 the evidence be reliable, but that reliability be
11 tested through cross-examination. We want to know
12 what this analyst actually did. The record - - -

13 JUDGE STEIN: Well, as a practical purpose
14 here, the - - - the evidence shows that - - - that
15 these - - - these analysts collected - - - you know,
16 they - - - they did little pieces and they did a lot
17 at once and - - - and that - - - as a practical
18 matter, it seems to me that you wouldn't get anything
19 out of cross-examining these people because they
20 would have no recollection whatsoever of having done
21 this particular test.

22 MS. ZLOCZOWER: Your Honor, all sorts of
23 factual witnesses can come to the stand and say, I
24 can't remember. That's not - - - doesn't stop us
25 from being - - - that we must cross-examine them.

1 These analysts here, their work involved human
2 judgment. We need to test whether the work was done
3 properly, and the only way to do that in our system
4 is through cross-examination.

5 CHIEF JUDGE DIFIORE: So each of the
6 forensic scientists testing, is that testimonial in
7 your view, each one of those in - - - along the
8 chain?

9 MS. ZLOCZOWER: Let me just clarify that
10 we're not asking that the People come up with ten of
11 the analysts. It's the - - - it's the - - - the
12 People who decide to test this evidence with ten
13 people. We're not - - - we're not asking to bring up
14 everyone. It's their decision. Their burden is
15 really created by them because they decide that ten
16 people must do these tests.

17 JUDGE RIVERA: You're saying they have an
18 alternative?

19 MS. ZLOCZOWER: They do have an
20 alternative.

21 JUDGE RIVERA: That they could have - - -
22 they could retest.

23 MS. ZLOCZOWER: Precisely, Your Honor.
24 Justice Sotomayor in the concurrence in Bullcoming
25 discussed that, Justice Ginsberg discussed it. In

1 fact, defense counsel here suggested that Ms. Hyac
2 (ph.) retest the sample and come back and testify as
3 to her own personal knowledge as - - - as to what she
4 did so that there could be a proper assessment of
5 whether the work was done correctly.

6 JUDGE RIVERA: That won't get you to - - -
7 I'm sorry. I know you have a red light, with the
8 Chief Judge's permission, just this one question.

9 CHIEF JUDGE DIFIORE: Of course.

10 JUDGE RIVERA: It - - - it strikes me that
11 what your - - - I - - - I get that point, but that
12 doesn't get you to what I thought was your other
13 issue, which is the possibility of incompetence and -
14 - - or - - - and not intentional, or of just human
15 error through the raw data collection process because
16 you've already got the DNA. All you're asking is for
17 someone to now actually compare it and review it as
18 opposed to just take someone else's numbers and
19 compare it. But you can't have that anymore because
20 the DNA's already been collected. So you're - - -
21 you're willing to concede that that part, you can't
22 cross on?

23 MS. ZLOCZOWER: Actually, the person who
24 collected the DNA from the gun sample testified.
25 That was a police officer and the person - - -

1 JUDGE RIVERA: Well, in this case but - - -

2 MS. ZLOCZOWER: Yes.

3 JUDGE RIVERA: - - - talking about the rule
4 that you're asking us to adopt.

5 MS. ZLOCZOWER: The rule I'm asking you to
6 adopt is that when DNA is tested for the purpose of
7 evidence at trial, the people who did the actual
8 testing are the ones that have to come to court.

9 CHIEF JUDGE DIFIORE: Every scientist in
10 the chain that participates in the process?

11 MS. ZLOCZOWER: Every scientist in the
12 chain, but it is the People's doing that it requires
13 ten analysts to come and - - - and test. That's not
14 something that, you know, I'm asking them - - - I'm
15 not asking them to have ten people test the evidence.
16 But what the rule does require is that the people who
17 are involved or the single analyst who is involved
18 must come and testify. The People have not shown, by
19 the way, why it requires ten people - - -

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 Counsel.

22 MR. TWERSKY: Good afternoon. My name is
23 Sholom Twersky, and I represent the respondent.

24 Regarding - - -

25 JUDGE RIVERA: So - - - so why - - - why

1 follow a process where you need so many people along
2 the way? Is that - - - is that the - - - I know that
3 [Hy'-ack], I think that's the way her name is
4 pronounced - - -

5 MR. TWERSKY: Yes.

6 JUDGE RIVERA: - - - does testify that this
7 is normal course, this is regular protocol. But is
8 there another way to do this that avoids this
9 problem?

10 MR. TWERSKY: Your - - - Your Honor, I'm
11 not a scientist. I can only rely on what she
12 testified to.

13 JUDGE RIVERA: Yes, I understand.

14 MR. TWERSKY: But she said that there were
15 only 150 analysts who work at OCME and they have
16 8,000 cases a year. There is no way that they'd be
17 able to - - - to deal with that volume unless they
18 parsed out to - - - separately, to all these
19 different analysts, where they're doing - - - they're
20 batching the samples because that's the only way they
21 can do it.

22 JUDGE RIVERA: Well, why doesn't the
23 alternative work? In the few cases - - -

24 MR. TWERSKY: Yes.

25 JUDGE RIVERA: - - - where you're going to

1 need the DNA but the DNA is going to be in dispute or
2 there's a reason that you've got to have one person,
3 as she's arguing, to go through it all, why not then
4 in those cases do the retesting? Why isn't that a
5 viable option? I understand the finance issue. I
6 understand the convenience. But those are not going
7 to get you over the constitutional rights.

8 MR. TWERSKY: Well, yeah, but there's one
9 other issue that's - - - that's even more important
10 and that's the reliability of the testing, the
11 validity of the testing. They - - - one of the
12 things Ms. Hyac talked about was with the exemplar,
13 that was with the defendant's DNA, that they need to
14 do - - - they do duplicate testing, and if you look
15 at the - - - if you look at the appendix, you'll see
16 all these lists, DUP, DUP, DUP. They literally are
17 having different analysts testing the exact same
18 exemp - - - not the same one, but another cut of the
19 defendant's DNA to see if they come out the same.
20 That's one of the internal controls that they do in
21 order to make sure that the results are valid.

22 JUDGE RIVERA: I see your point, because
23 her point is I want to get to all of them and - - -
24 and figure out if there's human errors or what they
25 did along the way and I do that through cross. But

1 your point is well, they do this so many times; if
2 they're all coming up with the same result, that gets
3 you a standard of reliability that the court should
4 recognize.

5 MR. TWERSKY: Exactly, but, you know, just
6 to keep in mind that testimonial is not the nec - - -
7 necessarily the same thing as reliable. The - - -
8 the courts have rejected that as being - - - as being
9 synonymous. Testimonial has a very specific
10 definition, and this court has held in Brown and
11 Meekins that these DNA analy - - - analysis reports
12 are not testimonial. OCME - - -

13 CHIEF JUDGE DIFIORE: Counsel, is it your
14 position that the DNA report relating to the DNA on
15 the gun is not testimonial?

16 MR. TWERSKY: The only report that's
17 testimonial is the report of Ms. Hyac saying, this
18 DNA profile from the gun and this - - - and
19 defendant's DNA, I compared it and it's a match. All
20 the other individual testing that leads her to that
21 conclusion is not testimonial.

22 JUDGE RIVERA: Then you insulate all of
23 that, don't you, and if there's error along the way,
24 she never - - - she never gets to cross it.

25 MR. TWERSKY: Your - - - Your Honor, this -

1 - - this court said in Meekins that just because
2 there might be procedural problems with DNA analysis
3 doesn't mean it's testimonial. What makes it
4 testimonial is number one, was it a law enforcement
5 official who was doing it? In Rawlins it was, in
6 Meekins it wasn't. It - - - it wasn't here because
7 OCME's not a law enforcement agency. Was the
8 statement being made to a law enforcement official
9 like a statement made as a result of police
10 interrogation? No, it was from one analyst to
11 another analyst and then finally - - -

12 JUDGE RIVERA: Is her only recourse to get
13 to the - - - I think the point she's trying to make
14 to somehow get access to this DNA and have an
15 independent DNA test and put on her own expert to say
16 you're wrong?

17 MR. TWERSKY: Your Honor, the - - - the
18 assumption that Ms. Hyac or these - - - I mean, Ms.
19 Hyac was - - - she literally signed the bottom of
20 every single page in both of those reports. She was
21 reviewing every single thing they were doing. She
22 wasn't observing it, but she reviewed the results.
23 And - - - and the fact is, these analysts, because of
24 their volume, because of the batching, they're doing
25 twenty to sixty at a time. They're going to come in

1 a year later at trial and they're going to be able to
2 tell you and remember exactly what they did in any
3 particular case, or are they going to rely on their
4 reports and say - - -

5 CHIEF JUDGE DIFIORE: Counsel, did Mr. John
6 get the opportunity to cross-examine the person who
7 said that his DNA was found on that gun?

8 MR. TWERSKY: He - - - Mr. John got a - - -
9 got an opportunity to cross-examine the person who
10 took the sample from the gun, he got an opportunity
11 to cross-examine Ms. Hyac, who took the samples once
12 they were received by OCME and cut them up and put
13 them into test tubes, and then he got an opportunity
14 to cross-examine Ms. Hyac who said that she saw - - -
15 that based on the reports of this DNA sample from the
16 defendant and the DNA sample from the crime scene,
17 they are a match.

18 JUDGE GARCIA: And just to make sure I have
19 the answer to the Chief Judge's question, so there
20 was an opportunity to cross the custodial witnesses?
21 I took the gun, I took the swab, and I put it into
22 the - - -

23 MR. TWERSKY: There was an opportunity to
24 cross-examine those witnesses. That's correct.

25 JUDGE ABDUS-SALAAM: And Ms. Hyac, you said

1 that she signed off on each page, and does that mean
2 that she actually performed the analysis or - - -

3 MR. TWERSKY: No, no.

4 JUDGE ABDUS-SALAAM: So what - - - what
5 does it mean that she signed off on the - - -

6 MR. TWERSKY: She testified that the way it
7 works is they all get the same training. She had
8 done every single one of those type of procedures
9 herself so when she looked over their data and their
10 reports - - - and by the way, if you look at - - - if
11 you look at the reports themselves, you see witness
12 with an initial, you see interpreting analyst with -
13 - - with an initial. These are all these internal
14 controls to make sure that all these results are
15 reliable, that she was signing off to see, did she
16 agree with the results that these analysts were
17 coming up with.

18 But she was the only one to compare them
19 and determine that there was a match, and that's why
20 it's her testimony that's testimonial because she was
21 the only one that was actually directly linking the
22 defendant to the crime.

23 JUDGE RIVERA: So - - -

24 MR. TWERSKY: And that's what testimoniality
25 is.

1 JUDGE RIVERA: So let me ask you about this
2 Exhibit 7 approved by a Eugene Lene (ph.), I think is
3 what it says.

4 MR. TWERSKY: What - - - what page is that,
5 Your Honor, in appendix?

6 JUDGE RIVERA: Appendix 704. "Forensic
7 biology case file table."

8 MR. TWERSKY: This is the comparison chart
9 that Ms. Hyac prepared where she is preparing - - -
10 where she is comparing the - - - the results of the
11 defendant's DNA, the exemplar, to the DNA sample
12 taken from the gun swabs.

13 JUDGE RIVERA: So at the top, when it says
14 "approved by" and then it has a name which is not her
15 name - - -

16 MR. TWERSKY: So that - - -

17 JUDGE RIVERA: - - - what role did he play
18 in this?

19 MR. TWERSKY: So and - - - I'll - - - I'll
20 just - - -

21 JUDGE RIVERA: Yeah.

22 MR. TWERSKY: Before I answer that, you see
23 on the bottom right? That's - - - that's her hand -
24 - -

25 JUDGE RIVERA: Yes. No, I see that.

1 MR. TWERSKY: - - - and when you see that -
2 - - right.

3 JUDGE RIVERA: That's - - - I understand.

4 MR. TWERSKY: He approved her, or it's he
5 was on a higher level than her, so even she had to
6 get her result approved and reviewed. That's how
7 many layers of - - - of review they do at the OCME to
8 - - - to try to ensure the reliability of these
9 results.

10 JUDGE RIVERA: So then this is her
11 handiwork?

12 MR. TWERSKY: That's correct.

13 JUDGE RIVERA: She chose these numbers, she
14 put in these numbers - - -

15 MR. TWERSKY: That's correct.

16 JUDGE RIVERA: - - - and then sent it to
17 the person who's named at the top and he reviewed and
18 - - - and has this "approved by".

19 MR. TWERSKY: That's correct. That's
20 correct.

21 JUDGE GARCIA: Coun - - - counsel, what
22 about the laboratory report? Did that go into
23 evidence, this laboratory report dated October 1st,
24 2010? I think it's 647 of your appendix.

25 MR. TWERSKY: Just one second, Your Honor.

1 Yes, that came in - - - that came into evidence, and
2 to the extent, like in Meekins, that it's unclear who
3 the source of this was - - - now the fact is, it is
4 the same date as Ms. Hyac's comparison where she drew
5 the conclusion and let everyone know that there was a
6 match, so there is an excellent chance that this
7 simply was just sort of parroting what she had
8 determined. But to the extent that it's unclear from
9 this lab report, just like they said in Meekins, this
10 would be harmless error, this one page. This could
11 not - - - this is simply cumulative. It could not
12 have made a difference to the jury.

13 JUDGE GARCIA: It's certainly testimonial,
14 though, right?

15 MR. TWERSKY: I'm sorry?

16 JUDGE GARCIA: It's a testimonial report,
17 right? It says I found a match.

18 MR. TWERSKY: We - - - that's correct.
19 Like I said, there's - - - there's an - - - the
20 presumption is that the only person it came from was
21 Ms. Hyac because she was the one to make the
22 determina - - - determination of the match, but in
23 Meekins you had the exact same thing where you had an
24 e-mail just confirming the match, unclear what the
25 source was. So I'd be glad to say that it's simply

1 harmless error and that it could not have made a
2 difference, particularly in light of the argument we
3 made in our brief as to the overwhelming evidence in
4 this case, but even more importantly, in terms of her
5 testimony was the - - - was the testimonial testimony
6 and that's why her testimony had to be subject to
7 cross-examination.

8 Your Honor, before my time is up just to
9 get to the - - - briefly to the Fourth Amendment
10 issue, clearly it's the defendant's burden to
11 establish standing. He couldn't establish standing
12 in a common basement. It was shared with - - - by at
13 least one other tenant. We don't know who lived on
14 the third floor. There could have been - - - she
15 could have gone into the basement, she could have had
16 visitors going into the basement. The - - - the door
17 - - -

18 JUDGE STEIN: So your view is that whenever
19 an area is open to more than one person who's maybe
20 not a member of your household or whatever, then it's
21 - - - there's no expectation of privacy.

22 MR. TWERSKY: That would - - - that would
23 be our position, Your Honor. And - - - and we have
24 even more - - -

25 JUDGE RIVERA: Shared entrance. Why - - -

1 why can't it be slightly diminished on the fact that
2 you recognize someone else, the other tenant in this
3 brownstone, also gets to walk into that basement?

4 MR. TWERSKY: At - - - at best, Your Honor,
5 a diminished expectation of privacy.

6 JUDGE FAHEY: So if it - - -

7 MR. TWERSKY: But still - - -

8 JUDGE FAHEY: So if it's a shared basement,
9 could they go in and go through every single box in
10 the basement?

11 MR. TWERSKY: Your Honor, it - - - it
12 depends on what the basement looks like. Are there
13 any delineations between the - - - the different
14 tenants.

15 JUDGE FAHEY: So in other words, it would
16 be the uniqueness of this box, not the basement that
17 we're talking about?

18 MR. TWERSKY: That's right. That's right.
19 And just to - - -

20 JUDGE FAHEY: So the plain view exception -
21 - -

22 MR. TWERSKY: Yeah.

23 JUDGE FAHEY: - - - you would argue,
24 applies here?

25 MR. TWERSKY: Well, first of all, with the

1 - - -

2 JUDGE RIVERA: So wait a minute; let's go
3 back to that.

4 MR. TWERSKY: Okay.

5 JUDGE RIVERA: So you're say - - - if she's
6 the one who gives consent, does that mean she's only
7 consenting to whatever's in the basement - - -

8 MR. TWERSKY: Right, we're - - -

9 JUDGE RIVERA: - - - that belongs to her?

10 MR. TWERSKY: - - - we're not saying that
11 her consent allowed the police to open - - - to open
12 his box. That's - - - we're saying that her consent
13 - - - which was absolutely implicit and there's
14 really no - - - it's very persuasive in terms of the
15 - - - the contact between she and the officers that
16 this was knowing and voluntary consent when she
17 called the officers over, she told them I saw him
18 bringing something downstairs, something was in his
19 hand; and then she tells them exactly how to access
20 that location. So clearly, that gave them the
21 consent. But in terms of the plain view, Your Honor
22 - - -

23 JUDGE FAHEY: Yeah.

24 MR. TWERSKY: - - - first of all, I - - - I
25 want to make sure - - -

1 JUDGE FAHEY: Concerned about the box.
2 This - - - this is not a box - - - except for the
3 name on there and - - - and I don't think the case
4 law really supports your position exactly that "Smith
5 & Wesson" allows you to open up the box.

6 MR. TWERSKY: But before I argue the
7 merits, Your Honor - - -

8 JUDGE FAHEY: Um-hum.

9 MR. TWERSKY: - - - this claim is not
10 preserved for this court's review. They did not
11 argue - - -

12 JUDGE FAHEY: Well, you know, I thought
13 about that. The problem with that argument was - - -
14 is that the Appellate Division seemed to have gotten
15 it so they seem to implicitly - - - implicitly
16 decided stand - - - that - - - that he did have
17 standing to raise the issue as to the box.
18 Therefore, there's no Concepcion problem. Therefore,
19 we're stuck with it; we've got to address it.

20 MR. TWERSKY: Well, Your Honor, but in
21 terms of the - - - it's a little bit unclear exactly
22 what they were ruling on, whether it was standing - -
23 -

24 JUDGE FAHEY: Um-hum.

25 MR. TWERSKY: - - - or - - - or simply the

1 plain view doctrine, but the fact is that the
2 defendant, under 470.05(2), he had - - - the court
3 has to either be notified of - - - of their claim
4 that the defendant, if he had the authority to go
5 into the basement, he didn't have the authority to
6 open the box. The - - - never - - - the - - - the
7 defendant never notified the court of that issue and
8 that court never expressly decided whether the
9 defendant had the right to open the box or not.

10 Because that's - - - the defendant was only
11 talking about getting into the basement, the - - -
12 the police had no right to get into the basement, so
13 this issue - - - that's why none of this about
14 whether it's immediately apparent or not was even
15 discussed down below at the - - - at the hearing
16 court level because the hearing court didn't have an
17 opportunity to address it and that's why this - - -
18 it's beyond the review powers of this court.

19 But even so, Your Honor, this wasn't simply
20 a label. I understand the picture of the case did
21 not go into evidence at the hearing, but based on the
22 officer's testimony, he said, that's the same box
23 that my gun came in. So what do we glean from that?
24 This was a box that's - - - that was created by the
25 Smith & Wesson - - -

1 JUDGE RIVERA: So if it didn't have - - -

2 MR. TWERSKY: - - - manufacturer.

3 JUDGE RIVERA: So if it didn't have the
4 label, nothing on it that says Smith & Wesson, and
5 the officer goes and - - - and looks at it and says,
6 that looks just like my gun box so it must have a
7 gun, is that okay?

8 MR. TWERSKY: That would be a harder
9 question.

10 JUDGE RIVERA: Well, what makes it harder?

11 MR. TWERSKY: Because the question is
12 what's immediately apparent and who's the eyes that
13 we're talking about, is it only the experienced
14 officer? In this case, we don't have to limit it to
15 that because Smith & Wesson - - - in Brooklyn, that's
16 a very - - - that's a very well-known gun
17 manufacturer.

18 JUDGE RIVERA: Yeah, but you might use the
19 box for other purposes, right?

20 MR. TWERSKY: That's true, Your Honor, but
21 it doesn't have to be - - - my opponent keeps talking
22 about it wasn't transparent. It doesn't have to be
23 transparent. It has to be immediately apparent. And
24 the fact is, if you have a - - - a Smith & Wesson box
25 that comes from Smith & Wesson - - -

1 JUDGE RIVERA: Um-hum.

2 MR. TWERSKY: - - - and is blue - - -

3 JUDGE RIVERA: Um-hum.

4 MR. TWERSKY: - - - and is sitting there in
5 an open area of a basement, the defendant has no
6 standing.

7 JUDGE RIVERA: Do they make anything other
8 than guns?

9 MR. TWERSKY: I'm sorry?

10 JUDGE RIVERA: Do they put anything else in
11 these Smith & Wesson boxes that are not guns, not
12 weapons? Do they put anything else together?

13 MR. TWERSKY: I mean, I'm not aware of
14 that. If you - - - again, it didn't come out at the
15 hearing - - -

16 JUDGE RIVERA: Um-hum.

17 MR. TWERSKY: - - - but if you see the
18 picture from the trial, you'll see that in the bottom
19 of it it's literally the shape, the - - - the gun has
20 to sort of fit into the bottom of the box.

21 JUDGE FAHEY: And they put the ammo - - -

22 MR. TWERSKY: This was a gun box.

23 JUDGE FAHEY: They put the ammo in them,
24 too, usually.

25 MR. TWERSKY: That's right. And - - - and

1 ammo, as was in - - - as was in this case.

2 JUDGE FAHEY: Right.

3 MR. TWERSKY: But, Your Honor, in terms of
4 Arkansas v. Sanders, I mean, that footnote 13 talks
5 about a gun case.

6 JUDGE FAHEY: Yeah, the problem with it the
7 case is dated. I - - - I don't think that footnote
8 13 is applicable anymore. But I understand your
9 argument. Thank you.

10 MR. TWERSKY: Right. The fact is there had
11 been subs - - - there had been other federal courts
12 and other courts that have adopted it.

13 JUDGE RIVERA: Can I - - - can I ask you,
14 if it says "Smith & Wesson", let's assume it's got
15 exactly what he has and he adds another label to it
16 that says "Sean John's poker cards." Can you open
17 it?

18 MR. TWERSKY: Same box, it just - - -

19 JUDGE RIVERA: Same box, Smith & Wesson
20 label is still on it. Mr. John adds another label to
21 it. Let's say he's got a collection of these boxes
22 and he wants to make sure he knows that this box has
23 his poker cards. Can the police officer open it?

24 MR. TWERSKY: Harder question, Your Honor.
25 I would say yes. I would say yes because if the

1 nature of the box itself - - - you don't need it to
2 be transparent. According to the cases, it looks
3 like you need probable cause to believe that there's
4 contraband inside the box based on its exterior. So
5 maybe - - -

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. TWERSKY: Thank you very much.

8 JUDGE STEIN: Counselor, before you get
9 right into - - -

10 MS. ZLOCZOWER: Okay.

11 JUDGE STEIN: - - - the substance of your
12 argument, there - - - there's just one thing I want
13 to clarify with you. As I read your papers, it
14 doesn't - - - it looks like you're only asking for a
15 retrial on the weapon possession charge, not the
16 menacing charge; is that correct?

17 MS. ZLOCZOWER: That's correct, Your Honor.

18 JUDGE STEIN: And - - - and does that mean
19 your client affirmatively wouldn't want a new trial
20 on the menacing charge?

21 MR. TWERSKY: No, Your Honor. But the
22 menacing charge involves a display of a weapon and
23 the issues we're raising here don't go to that issue.

24 JUDGE STEIN: Okay.

25 MS. ZLOCZOWER: But we are asking a remand

1 for resentencing as to that issue.

2 Couple things; the first thing is, contrary
3 to Mr. Twersky's assertion, Ms. Hyac, in fact, did
4 not generate Exhibit 26 - - - Exhibit 7. If you look
5 at the record on A-36, she is asked, "Do you
6 recognize Exhibit 7?" And she says "Yes." "What is
7 that?" And she says, "This is actually a page out of
8 the file. And it is basically a table of the results
9 for the DNA testing." This Exhibit 7 was generated
10 by the analysts who did not come and testify. It is
11 exactly why we need them to come appear.

12 JUDGE RIVERA: Is that that analy - - - is
13 that the person named at the top where it says
14 "approved by" or we don't know?

15 MS. ZLOCZOWER: We don't know, Your Honor.
16 We don't know.

17 JUDGE ABDUS-SALAAM: Did she ever say that
18 she didn't generate it? She said it's from the file,
19 but did she say I didn't generate it?

20 MS. ZLOCZOWER: She said that it was - - -
21 she says that she didn't generate the documents in
22 the file. She's not specifically asked as to Exhibit
23 7, but if you look at the - - - if you actually look
24 at the exhibit, you can compare it to - - - if you
25 give me one second - - - if you look at the record,

1 page 704, which is Exhibit 7, and then compare it
2 with page 668, they're identical and Ms. Hyac said
3 she did not generate page 668. And is asked whether
4 she - - - you know, where Exhibit 7 is from and she
5 says it's from the file. She just simply didn't
6 generate this record.

7 JUDGE RIVERA: I'm sorry, what page did you
8 give on the record where she says - - -

9 MS. ZLOCZOWER: Well, on the record it's A-
10 326.

11 JUDGE RIVERA: A-326, thank you.

12 MS. ZLOCZOWER: Yes, Your Honor. As to the
13 - - - as to the notion that, you know, OCME has to -
14 - - has to analyze 8,000 samples, other jurisdictions
15 have adopted the Supreme Court law on this issue - -
16 - West Virginia, Delaware, the Eleventh Circuit, all
17 these jurisdictions present the - - - the analysts
18 who actually did the testing and their system hasn't
19 broken down. I don't see why that would happen in
20 New York.

21 JUDGE RIVERA: Is there alternative there
22 also to do a retest if the analysts and/or the
23 several analysts are not available?

24 MS. ZLOCZOWER: I don't know whether these
25 jurisdictions actually make that possible, but the -

1 - - the analyst who testified here said that the
2 OCME, as a matter of course, preserves the sample, so
3 there's no reason that those can't be retested in New
4 York.

5 The internal controls my colleague was
6 talking about in fact indicate that - - - that this
7 is subject to error. That's why there are internal
8 controls and that's why we need to cross-examine the
9 analysts. As to - - -

10 JUDGE RIVERA: Well, what makes that raw
11 data collection testimonial, though?

12 MS. ZLOCZOWER: Well, the - - - when you
13 say raw data collection you mean the actual taking of
14 the sample - - -

15 JUDGE RIVERA: These analysts that you're -
16 - - I'm sorry. Let me make it easier. These
17 analysts that you say should have been called or
18 should have been available to trial defense counsel
19 to cross-examine.

20 MS. ZLOCZOWER: These DNA reports reflect
21 observable facts that Ms. Hyac didn't observe but
22 that these analysts observed. They then communicated
23 their observations in the reports. These
24 observations accuse my client of a crime - - - crime.
25 They make them testimonial. And the fact that he was

1 a suspect before the testing even happened makes it
2 testimonial.

3 JUDGE RIVERA: But it doesn't matter
4 whether they realize that that's how it may be used?

5 MS. ZLOCZOWER: Someone made a comparison,
6 other than Ms. Hyac, based on Exhibit 7, comparing
7 these two samples and - - - and - - -

8 JUDGE STEIN: But - - - but you're
9 suggesting that we should have a different result
10 here. They're testimonial if - - - if there was a
11 suspect identified but not if they weren't?

12 MS. ZLOCZOWER: I'm saying that any - - -
13 when the purpose, the primary and sole purpose, is to
14 use the evidence at trial, the evidence is
15 testimonial. That's Crawford 101.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. ZLOCZOWER: May I just respond to one
18 or two issues from the Fourth Amendment?

19 CHIEF JUDGE DIFIORE: I'm going to give you
20 one more minute.

21 MS. ZLOCZOWER: Okay. I think preservation
22 is key here. This issue was - - - was preserved.
23 The court below ruled that the officer equated the
24 Smith & Wesson box with a gun and so it was
25 appropriate for him to seize it. Those are the words

1 of the court, so the court is - - - the - - - the
2 court below equated the - - - the box with the gun
3 and felt that those were one and the same thing.
4 They simply aren't. The gun was in a closed
5 container.

6 As to the issue of the Smith & Wesson
7 label, if my Nike shoebox at home stores my
8 correspondence, I can't go to my friend's house and
9 say I have a Nike shoebox, so your Nike shoebox in
10 your home also contains correspondence. That simply
11 goes to the officer's probable cause to seize the
12 item on the basis of him actually having the same box
13 doesn't mean that he can open it.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

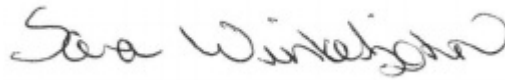
15 (Court is adjourned)

16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Sean John, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 14, 2016