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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 10

HAO LIN,

Respondent.

20 Eagle Street
Albany, New York
January 11, 2017

Before:

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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 10, People of the
3 State of New York v. Hao Lin.

4 Counsel.

5 MS. BRUFFEE: Thank you, Your Honor; Anthea
6 Bruffee for the appellant. I would like to reserve two
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: Yes, of course.

9 MS. BRUFFEE: The introduction at trial of
10 Officer Mercado's testimony about the administration and
11 results of a breath test with regard to the defendant's
12 blood alcohol content did not violate the defendant's right
13 of confrontation. And it didn't violate the defendant's
14 right of confrontation because the People didn't elicit
15 from him any statement or report by the unavailable witness
16 that was offered for its truth. The testifying witness was
17 present for the entire administration of this breath test.
18 He saw the operator, Officer Harriman, push the button. He
19 saw the defendant blow into the Intoxilyzer machine - - -

20 JUDGE STEIN: Well, is it necessary for purposes
21 of the confrontation clause that he be able to verify each
22 of the thirteen points of the checklist, and - - - and if
23 so, did he do that?

24 MS. BRUFFEE: It wasn't necessary, Your Honor.
25 And he didn't do that because he - - - he didn't - - - he

1 testified, Mercado testified on examination, ironically by
2 defense counsel, that he did not observe - - - he couldn't,
3 from his vantage point behind the video machine, he
4 couldn't see the display on the machine, which would have
5 demonstrated that the Intoxilyzer solution was at the
6 correct temperature. But he did testify that if it - - -
7 if there was something wrong with the solution the machine
8 wouldn't operate. He also testified, based on his
9 expertise, that if something was wrong with the machine
10 there would be an error sound. He was familiar with that
11 sound, and he didn't hear it. So - - -

12 JUDGE FAHEY: But weren't there other elements to
13 the test too? And Judge Stein had mentioned the thirteen-
14 point checklist, but there was the observation of the
15 defendant - - -

16 MS. BRUFFEE: Yes.

17 JUDGE FAHEY: - - - for a twenty-minute period
18 before, and then he didn't verify the solution temperature
19 is proper, enter any info, see the printouts from the
20 aborted tests, none of that stuff was done.

21 MS. BRUFFEE: Yeah. Well, he did obser - - - he
22 was present for the twenty-minute observation. So that - -
23 -

24 JUDGE FAHEY: He did observe him during that
25 period?

1 MS. BRUFFEE: He did observe him during that
2 period. But - - -

3 JUDGE FAHEY: I see. That's not part of the
4 videotape, though.

5 MS. BRUFFEE: No. It was part of his testimony.

6 JUDGE FAHEY: Oh, was it? Okay.

7 MS. BRUFFEE: So - - - but that really, the
8 Appellate Term, it's sort of a red herring because we - - -
9 the confrontation clause requires that any testimonial
10 statement that's admitted at trial, the person who made
11 that statement has to be available for the defendant to
12 cross-examine, to confront. And here, unlike Bullcoming or
13 the case that the Appellate Term relied on, no testimonial
14 statement was elicited through Mercado of Officer Harriman.
15 The printout was entirely mach - - - machine generated.
16 Harriman pushed the button, the printout came out of the
17 machine, and Mercado testified from his firsthand
18 observation that this was the printout that had come out.
19 He saw the printout come out, and he testified in court
20 this is the one that came out, and it was admitted into
21 evidence. It's People's Exhibit 8, which is reproduced in
22 our appendix.

23 JUDGE FAHEY: Was - - - wasn't there an
24 allegation by defense counsel, one of the objections, that
25 the reason that the officer wasn't present? It had

1 something to do with some impropriety with other testing
2 before, and he left the department and went to Boston after
3 that?

4 MS. BRUFFEE: Well, that was totally hearsay and
5 unsubstantiated. The testimony by - - -

6 JUDGE FAHEY: But you could see why you would
7 want to cross-examine somebody on that issue.

8 MS. BRUFFEE: Of course, you would certainly
9 cross-examine, and he was free to call him. But if no
10 testimonial statement of Officer Harriman is admitted, it's
11 not a right of confrontation problem.

12 JUDGE RIVERA: But - - - but isn't the point of
13 the printout all that testimony about going through the
14 checklist, how this machine works, my expertise that I've
15 done this before? Is - - - isn't that what makes the
16 printout meaningful?

17 MS. BRUFFEE: It - - - that has to do with the
18 printout's foundation, and the People provided a
19 knowledgeable - - - a knowledgeable expert who was - - -
20 who had expertise and was certified in the operation of
21 this machine. So the defendant had - - -

22 JUDGE RIVERA: But then the other part is the
23 observations, right?

24 MS. BRUFFEE: Yes. And - - -

25 JUDGE RIVERA: He said he's experienced, he knows

1 the protocols - - -

2 MS. BRUFFEE: Yes.

3 JUDGE RIVERA: - - - he understands the
4 procedure. He's used this machine in the past.

5 MS. BRUFFEE: Yes.

6 JUDGE RIVERA: I grant that, all of that. But
7 then the question is the observations, which are what - - -
8 you're getting these questions about what is it that he
9 observed. If - - - if we disagreed with you and said there
10 - - - that the Appellate Term was right that there - - -
11 there weren't the observations that you're arguing are
12 there, do you lose?

13 MS. BRUFFEE: No.

14 JUDGE RIVERA: Why not?

15 MS. BRUFFEE: No. Because - - -

16 JUDGE RIVERA: That's what I'm not understanding.
17 Why not?

18 MS. BRUFFEE: - - - this is a right of
19 confrontation claim. This is not a compulsory process
20 claim. They're claiming that we, the People, introduced
21 into evidence a testimonial statement, which is what
22 Crawford says the confrontation clause is violated by.
23 What are they saying we introduced? We introduced a
24 printout. There's no statement of Officer Harriman in that
25 printout.

1 JUDGE STEIN: So you're distinguishing that from
2 the cases in which there is some sort of a report that is
3 completed - - -

4 MS. BRUFFEE: Correct.

5 JUDGE STEIN: - - - by a human being based on
6 something else.

7 MS. BRUFFEE: Absolutely.

8 JUDGE STEIN: Not something that comes directly
9 out of a machine, which you say has a different - - -

10 MS. BRUFFEE: Absolutely. And I'll give you two
11 examples.

12 JUDGE STEIN: Why - - - why - - - why is that
13 different then?

14 MS. BRUFFEE: Bullcoming.

15 JUDGE STEIN: Uh-huh.

16 MS. BRUFFEE: In Bullcoming, the Supreme Court
17 had a - - - a blood test where the - - - the, for want of a
18 better word, the People or the State introduced against the
19 defendant a forensic report with regard to that blood test.
20 The analyst who had compiled, certified, all those things,
21 that report was not called. A substitute analyst was
22 called who had absolutely no contact with the test at all
23 which, of course, is very different from this case where we
24 had our witness who observed the whole test and had
25 expertise in it. But the difference is that in Bullcoming

1 that report was made by the analyst. The analyst certified
2 it. Here, Officer Harriman didn't make this printout.
3 Officer Harriman did certify it, but that certification,
4 which is reproduced in respondent's appendix 1, was never
5 admitted into evidence. So - - -

6 JUDGE STEIN: So - - - so you're saying that if
7 Mercado wasn't there at all - - -

8 MS. BRUFFEE: Correct.

9 JUDGE STEIN: - - - he could testify to the
10 foundation for this document - - -

11 MS. BRUFFEE: Yes.

12 JUDGE STEIN: - - - and that would be
13 sufficient?

14 MS. BRUFFEE: That would be sufficient but
15 somebody would have to, of course, testify to having seen
16 the test occur because - - -

17 JUDGE STEIN: Okay.

18 MS. BRUFFEE: - - - there would have to be some
19 firsthand observation of the test. But - - -

20 JUDGE STEIN: So here we have Mer - - - I'm just
21 - - - I'm trying to understand your response to Judge
22 Rivera's question. Here Merc - - - Mercado happens to be
23 that person. He does both.

24 MS. BRUFFEE: He was - - -

25 JUDGE STEIN: So somebody would have had to do

1 that but not Mercado?

2 MS. BRUFFEE: Yes.

3 JUDGE STEIN: Is that what you're saying?

4 MS. BRUFFEE: Yes. Mercado, in this case, was
5 the best possible person because he had - - - he was an - -
6 - an expert in this machine, and he personally observed the
7 whole process. And he saw the printout come out.

8 JUDGE STEIN: So could you have thirteen
9 different people testify that they observed each one of
10 those thirteen things on the - - - the checklist?

11 MS. BRUFFEE: You could. But this is not a
12 confrontation issue. This is more a foundational issue.
13 The thirteen things on the checklist had to do with whether
14 the - - - the - - - the machine is reliable. You can have
15 the defendant - - -

16 JUDGE ABDUS-SALAAM: So are you saying, counsel,
17 that whenever a machine produced a printout, that would not
18 be a confrontation issue?

19 MS. BRUFFEE: Yes. As long as somebody with a -
20 - - with enough expertise and firsthand knowledge is
21 available to be cross-examined on the machine's
22 reliability, and we certainly had that here. I mean the -
23 - - Mercado was cross-examined by the defense on how the
24 test was conducted and, as I said before, the one issue
25 with regard to the - - - the heat of the solution was

1 brought out by defense counsel. So how can you say that
2 his right of confrontation was - - - was violated? It's -
3 - - it - - - I think the defendant is bringing up
4 foundation and compulsory process and maybe even
5 sufficiency but is not bringing up a confrontation claim.

6 CHIEF JUDGE DIFIORE: Thank you.

7 MS. BRUFFEE: Because there was no statement.

8 CHIEF JUDGE DIFIORE: Thank you.

9 Counsel.

10 MS. FABIANO: Good afternoon, Your Honors. My
11 name is Denise Fabiano, and I'm here for respondent Hao
12 Lin. There were two testimonial statements here. You have
13 the printout, and you have Harriman's statement at the end
14 of the video saying it's 0.252. Their testimonial - - -
15 the print off testimonial, as is the statement - - -

16 JUDGE GARCIA: But who - - - who can testify as
17 to the printout, his test - - - the machine's not going to
18 testify, right? So - - -

19 MS. FABIANO: No. It's Harriman's statement.

20 JUDGE GARCIA: Right.

21 MS. FABIANO: That - - - that machine printout,
22 first of all, it not entirely machine generated, make no -
23 - - make no mistake. There is human in - - - interaction
24 with the machine and human input into this testing process.

25 JUDGE GARCIA: So it's a human who is going to

1 testify as to that - - -

2 MS. FABIANO: Of course.

3 JUDGE GARCIA: - - - printout.

4 MS. FABIANO: Of course.

5 JUDGE GARCIA: And it's someone who has some
6 familiarity or has observed something in this process, so
7 why doesn't this qualify?

8 MS. FABIANO: Because Mercado is simply an
9 insufficient witness. Once - - - this - - - this printout
10 - - -

11 JUDGE GARCIA: Under which case is he an
12 insufficient witness?

13 MS. FABIANO: Well - - -

14 JUDGE GARCIA: It's not in Bullcoming to require
15 anything else.

16 MS. FABIANO: Right. Well, John says - - - your
17 - - - this - - - this court's opinion in Sean John says you
18 cannot be a conduit for the actual tester.

19 JUDGE FAHEY: Yeah. But it says - - -

20 JUDGE GARCIA: But even that opinion says you
21 don't have to call every witness - - -

22 MS. FABIANO: No.

23 JUDGE GARCIA: - - - for every step.

24 MS. FABIANO: And the - - - and the beauty of
25 this type of case is you only have one witness who's - - -

1 who's observing it. The video cameraman is observing
2 everything. So if he - - - he had witnessed the twenty-
3 minute observation period to make sure he hadn't belched,
4 if he - - -

5 JUDGE RIVERA: So your complaint is he's - - -
6 he's missed one or more of these thirteen steps.

7 MS. FABIANO: He has missed - - -

8 JUDGE RIVERA: Not that he could not have done
9 it.

10 MS. FABIANO: Right.

11 JUDGE RIVERA: So - - -

12 MS. FABIANO: He could have done it. I - - - I
13 would have no - - - I - - - I would go so far as - - -

14 JUDGE GARCIA: Why isn't that an argument that
15 you have to watch every step - - -

16 MS. FABIANO: I'm sorry?

17 JUDGE GARCIA: - - - which no court has ever
18 said. Why is that an argument that you have to bring in an
19 observer - - -

20 MS. FABIANO: Right.

21 JUDGE GARCIA: - - - for every step of this
22 process?

23 MS. FABIANO: I'm not saying that, either. I'm
24 saying that when you have a testimonial statement here
25 accusing a defendant, proving an essential element of the

1 crime, that it's directly accusatory, that we have to be
2 able to test the reliability of that conclusion.

3 JUDGE GARCIA: Right.

4 MS. FABIANO: That's the confrontation violation.

5 JUDGE GARCIA: Right. But the issue is what do
6 you need to satisfy that?

7 MS. FABIANO: You need a sufficient surrogate
8 witness who witnessed the essential steps that go to the
9 reliability of that test.

10 JUDGE GARCIA: So your argument is they missed an
11 essential step, not that they just missed some steps?

12 MS. FABIANO: Right. And that's my argument
13 here. I'm not saying which of those steps would be
14 essential.

15 JUDGE ABDUS-SALAAM: - - - which step? Yeah.

16 MS. FABIANO: I can't tell you that. I - - - we
17 don't have a sufficient record here, and we don't need to
18 go that far here. What we do know is that two steps were
19 missed, two steps that Mercado said were integral, that
20 were essential to the integrity of the reliability of the
21 test. He testified to that. And he didn't - - -

22 JUDGE STEIN: And he testified as to the
23 observations he made - - -

24 MS. FABIANO: Right.

25 JUDGE STEIN: - - - which would establish those

1 steps. It may not have been the exact same way, but he - -
2 - he was present, and he said I - - - this is how I know
3 from being there. This is what I saw, this is what I saw,
4 this is what I didn't see, and this is what I didn't hear.

5 MS. FABIANO: Right.

6 JUDGE STEIN: And based on my experience that
7 means this.

8 MS. FABIANO: First of all, I don't think that
9 that's entirely accurate. He did - - - he missed - - - he
10 did not see the crucial twenty minutes. He admitted he
11 wasn't watching him. He wouldn't have known if he belch -
12 - - burped silently. He said I didn't hear anything. I
13 wasn't watching him the whole time. It wasn't - - -

14 JUDGE STEIN: Well, he said he was - - - that it
15 wasn't necessary to have your eyes fixed on him - - -

16 MS. FABIANO: No.

17 JUDGE STEIN: - - - for every bit of those
18 twenty minutes.

19 MS. FABIANO: He did not say that. He said that
20 was not my job. You do need to watch him for twenty
21 minutes. That is an essential step.

22 JUDGE STEIN: So if - - - -

23 MS. FABIANO: Because if he belches, burps
24 silently, regurgitates.

25 JUDGE STEIN: So if the person responsible

1 sneezes and turns his or her head and - - - and takes their
2 eyes off of the subject for, you know, whatever number of
3 seconds, that may mean that then - - - then the test is no
4 longer reliable?

5 MS. FABIANO: Well, that's what we would want to
6 confront on. The - - - did - - - what, you know, how much
7 did you see? We want to make sure - - -

8 JUDGE STEIN: I thought - - - I thought Mercado
9 said - - -

10 MS. FABIANO: We want to make sure that he didn't
11 do that.

12 JUDGE STEIN: I thought Mercado said I would have
13 known if he had vomited, if he burped, if he had eaten
14 something if, you know, whatever, by - - - by the amount of
15 time I was watching and - - - and listening.

16 MS. FABIANO: No. I don't see how that's
17 possible. He said I was present in the room. I did not
18 watch him the whole time.

19 JUDGE STEIN: Well, but you - - - but you could
20 cross-examine on that.

21 MS. FABIANO: He said I did not watch him the
22 whole time. Yes. But Harriman was tasked. He's the one
23 who initialed that step. He did, theoretically, I hope,
24 watch him the entire twenty minutes.

25 JUDGE RIVERA: Yes. But if Mercado had - - - had

1 - - -

2 MS. FABIANO: If he had - - -

3 JUDGE RIVERA: Let's say we disagree with you, if
4 he had then that issue goes away.

5 MS. FABIANO: Yes.

6 JUDGE RIVERA: Okay. So did the Appellate Term -
7 - -

8 MS. FABIANO: The Appellate Term found - - -

9 JUDGE RIVERA: - - - find that he had not
10 watched him the twenty minutes?

11 MS. FABIANO: No. The Appellate Term didn't
12 reach that specific step. They - - - they built it on the
13 thirty-four degrees, which, I would also submit, the
14 machine would not shut down if the temperature were not
15 thirty-four degrees.

16 JUDGE STEIN: Where's the proof of that in the
17 record?

18 MS. FABIANO: Well, we only have Mercado's
19 statement that the machine would shut - - - shut down if
20 something improper occurred. Okay. That's a very generic
21 statement. I'm going to submit to you the - - - the record
22 doesn't indicate that it would shut down. We have a blank
23 space for the technician to fill in. Not just a yes, it
24 was thirty-four degrees. What was the temperature? You
25 have to fill it in, thirty-four degrees. That's number

1 one.

2 JUDGE RIVERA: But if he testifies it shuts down,
3 and I know that because it makes a noise, I didn't hear
4 that noise, why isn't that enough?

5 MS. FABIANO: It theoretically could be. That
6 didn't happen here.

7 JUDGE RIVERA: Why didn't it happen here?

8 MS. FABIANO: I don't know. It wasn't elicited.

9 JUDGE RIVERA: Well - - -

10 MS. FABIANO: He didn't say that.

11 JUDGE RIVERA: You're saying the testimony would
12 not allow that inference that that's what he's testifying
13 to?

14 MS. FABIANO: I don't believe it does. And I
15 don't believe the machine would shut down under those
16 circumstances, and I'm going to refute that.

17 JUDGE RIVERA: What's - - - what's the point of
18 the testimony about a sound that indicates - - -

19 MS. FABIANO: Because there - - -

20 JUDGE RIVERA: - - - that the machine has
21 aborted? Why - - - why would he testify to that?

22 MS. FABIANO: Because there are other things that
23 would make it shut down, insufficient airflow, improper
24 blowing, tongue in - - -

25 JUDGE RIVERA: But the testimony is at the time

1 when he's being asked about the temperature.

2 MS. FABIANO: He was being asked about the
3 chemical solution, the composition of the chemical
4 solution.

5 JUDGE RIVERA: No. There's two different
6 sections. There's testimony on the solution, there's
7 testimony on the temperature. The temperature is the one
8 where he's talking about the sound.

9 MS. FABIANO: I think it's equivocal, Your Honor.
10 I think if you reread it, I do think it's equivocal. I
11 think - - -

12 JUDGE RIVERA: If we disagree with you do you
13 lose?

14 MS. FABIANO: Okay. No.

15 JUDGE RIVERA: Why not?

16 MS. FABIANO: Because I - - - we still have the
17 twenty-minute observation period.

18 JUDGE FAHEY: So - - - so your rule is then it's
19 a 100 percent rule. If they miss anything at all, they're
20 out - - -

21 MS. FABIANO: No.

22 JUDGE FAHEY: Because the langu - - - let me
23 finish. The language in Sean John is a little different.
24 It says conducted, witnessed, or supervised. It doesn't
25 say you must see every single element of every single test.

1 The policy implications of that - - - of that kind of rule
2 would be absurd.

3 MS. FABIANO: Absolutely.

4 JUDGE FAHEY: So - - - so you're not arguing
5 that. So why is this not simply a weight question in - - -
6 in terms of the analysis that has to be placed on the
7 evidence that's offered?

8 MS. FABIANO: It goes to his sufficiency as a
9 surrogate witness. Not to the weight. Because otherwise
10 you could have somebody come in and say guess what?

11 JUDGE FAHEY: So - - -

12 MS. FABIANO: I didn't see any of the twenty
13 minutes. I didn't see anything.

14 JUDGE FAHEY: Oh, so we translate your - - - your
15 principle to a - - - a DNA setting, say. Do they have - -
16 - does then the supervisor there have to witness every
17 single test for the full period of time otherwise it's not
18 admissible?

19 MS. FABIANO: Obviously, the DNA setting is much
20 more complicated.

21 JUDGE FAHEY: I - - - I realize that we're - - -

22 MS. FABIANO: And it involves many more analysts.

23 JUDGE FAHEY: It's - - - it's - - - well, I give
24 you that. It's - - - certainly, it's not - - -

25 MS. FABIANO: I guess, off the top of my head, I

1 would argue that it certainly need - - - that - - - that
2 they do need to call the people who witnessed the - - - any
3 - - - the aspects that go to the reliability of the test
4 results.

5 JUDGE FAHEY: You read Sean John as saying that,
6 that - - - that we would have to do that?

7 MS. FABIANO: No, no.

8 JUDGE FAHEY: So let's say you'd have to bring
9 five or six people in?

10 MS. FABIANO: No.

11 JUDGE FAHEY: Okay.

12 MS. FABIANO: Sean John says that you have to
13 call somebody who witnessed, supervised, or made an
14 independent analysis on their own. But you cannot act as
15 conduit for the person who should be test - - - or who - -
16 - the out of court - - - the per - - - the nontestifying
17 witness.

18 JUDGE ABDUS-SALAAM: What would you say, counsel
19 - - -

20 CHIEF JUDGE DIFIORE: Well, then what is it
21 exactly that Officer Harriman would have provided that - -
22 - that Officer Mercado wasn't - - - wasn't able to.

23 MS. FABIANO: That he saw that the temperature
24 was thirty-four degrees and that he observed this defendant
25 for the requisite twenty minutes to ensure the reliability

1 of the actual test result, which is what our right to
2 confrontation - - -

3 JUDGE ABDUS-SALAAM: Counsel, what do you think -
4 - -

5 MS. FABIANO: - - - promises us.

6 JUDGE ABDUS-SALAAM: - - - Justice Sotomayor
7 meant in her concurring opinion in Bullcoming when she
8 said: "It would be a different case if, for example, a
9 supervisor who observed an analyst conducting a test
10 testified about the results or report about such results."
11 Meaning that that person would be a sufficient surrogate,
12 so how is Mercado different from that?

13 MS. FABIANO: Mercado is different because what
14 Sotomayer's saying, what - - - and I'm not quibbling with a
15 surrogate witness can testify. They just have to be an
16 adequate surrogate witness.

17 JUDGE ABDUS-SALAAM: Why isn't Mercado?

18 MS. FABIANO: Someone that we can actual confront
19 on the essential steps that go to the reliability of this
20 test.

21 CHIEF JUDGE DIFIORE: And Mercado's not adequate
22 because he didn't have constant eyes on defendant?

23 MS. FABIANO: That is the rule for the
24 admissibility of these tests. That's what goes to the
25 reliability of the test results. That's what - - - they

1 prove the case with this - - - this number.

2 JUDGE RIVERA: Well, you're claiming, too, you're
3 claiming the twenty minutes and you're claiming the
4 temperature.

5 MS. FABIANO: Both. Both. So what we have here,
6 we have these - - -

7 JUDGE ABDUS-SALAAM: So what - - - what would you
8 suggest that we decide regarding what a DUI testing unit
9 has to do? There has to be somebody videotaping as well as
10 somebody else watching for the twenty minutes or what?

11 MS. FABIANO: I - - - I don't - - - I'm not
12 saying that the videotaper can't be - - - Mercado could
13 have been that witness. He could have been that witness.
14 He just missed a couple things here. Going forward, if you
15 want to be able to call, particularly where we're raising
16 the - - - the reason why this tester left off - - - left
17 the office. We're - - - we bas - - - we argued or alleged
18 that this tester left because he had improperly conducted
19 IDTU tests. And obviously, Mercado can't testify to that,
20 as well. He can't testify to this person's - - - you know,
21 the integrity of this test result. And that's what we have
22 a right to confront on. And I'm going to go so far as to
23 say - - - well, I'm sorry. Let me back up. The thirty-
24 four degrees, I just want to get back to that. There's - -
25 - on the simulator solution certificate that was - - -

1 JUDGE RIVERA: Let me ask you this. If the
2 Appellate Term didn't refer to the twenty minutes, why
3 can't we assume that they concluded that his testimony was
4 sufficient? Are we bound by that?

5 MS. FABIANO: No. We're not bound by their
6 rational. And it could - - -

7 JUDGE RIVERA: Are you saying that's not a fact-
8 finding on its own?

9 MS. FABIANO: No. And an omission is not a fact-
10 finding. And you only need one of those things. So they
11 could - - - you know, they - - - whatever one they reached,
12 they, and the other one you are certainly free to consider.
13 But I just want to just finally say this case is unlike any
14 other case because law enforcement is the one that did the
15 testing here. It's not an outside private lab. This is -
16 - - is obviously a testimony on very accusatory because we
17 do - - - this is the only case that I'm aware of where law
18 enforcement - - - or, I mean, of the - - - the
19 confrontation clause cases where law enforcement actually
20 did this - - - this test.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 What about counsel's argument about their
23 inability to get to the meat of this thread that Officer
24 Harriman had some integrity issues with respect to - - - to
25 the performance of those tests?

1 MS. BRUFFEE: Well, there is - - - according to
2 Officer Mercado, Officer Harriman left because his wife had
3 been transferred, and he moved to Connecticut. That's all
4 that there is in the record. There was an allegation made
5 by defense counsel, unsubstantiated, that there was a memo
6 floating around in - - - in The Legal Aid Society office or
7 in his office but was never produced. So we don't know.
8 But it's irrelevant to this issue because no statement by
9 Harriman was admitted into evidence in this case. So
10 basically, it's - - - what they're raising is a sufficiency
11 claim, an unpreserved sufficiency claim.

12 And Sean John dictum in this court's recent Sean
13 John decision actually supports our position. The People
14 aren't required to call on a - - - even where a DNA report,
15 which is testimonial, is admitted into evidence. Here,
16 there's no testimonial statement admitted into evidence.
17 But even in that case, testimony of an analyst with
18 requisite personal knowledge who has witnessed the case,
19 the - - - sorry, who has witnessed the test is sufficient
20 under the confrontation clause. So here, where Officer
21 Mercado personally observed everything, has expertise,
22 testified to his expertise, and to everything that
23 occurred, these deficiencies, alleged deficiencies, in his
24 testimony go to the weight. And in fact, this could have
25 been the same if Officer Harriman had been testifying.

1 JUDGE RIVERA: So if he had said no, I didn't
2 look at him for twenty minutes - - -

3 MS. BRUFFEE: That would go to - - -

4 JUDGE RIVERA: - - - could he have served as a
5 substitute?

6 MS. BRUFFEE: Well, he's not a substitute for
7 Harriman.

8 JUDGE RIVERA: Let's say we disagree with you on
9 that issue. Let's say we disagree with you on that issue.

10 MS. FABIANO: Let - - - let's assume that.

11 JUDGE RIVERA: And you need the substitute.

12 MS. FABIANO: For argument's sake, although I
13 disagree - - -

14 JUDGE RIVERA: You need a person, you need
15 Harriman and - - - yeah. That's what I'm asking you.

16 MS. BRUFFEE: - - - that he's a surrogate,
17 right.

18 JUDGE RIVERA: That's the hypothetical.

19 MS. BRUFFEE: But hypothetically, if he was a
20 surrogate, it would go to the weight of his testimony.

21 JUDGE RIVERA: If he didn't observe at all.

22 MS. BRUFFEE: Well, somebody else, Officer Nadal
23 (ph.) was also in that room.

24 JUDGE RIVERA: But let's say - - - but it's not
25 the testimony - - -

1 MS. BRUFFEE: If he had, we would have presented
2 his testimony.

3 JUDGE RIVERA: Excuse me, counsel.

4 MS. BRUFFEE: I'm sorry.

5 JUDGE RIVERA: He's the only person who's
6 testifying and he's asked did you watch him for twenty
7 minutes, and he says, no, I watched him for two. Can he be
8 a substitute?

9 MS. BRUFFEE: Well, that would be a much closer
10 case because then assuming he's a surrogate, he would need
11 to be able to verify the reliability of the test. I still
12 think it would go to the weight of his testimony. But
13 here, as I said, we don't have a surrogate, and we do have
14 somebody who observed. Therefore, the confrontation clause
15 - - -

16 JUDGE RIVERA: But isn't that a weight argument
17 if - - -

18 MS. BRUFFEE: - - - is not indicated.

19 JUDGE RIVERA: - - - if it was Harriman as
20 opposed to the substitute?

21 MS. BRUFFEE: No. Because Harriman's statement
22 was not admitted into evidence.

23 JUDGE RIVERA: I don't - - - I understand that.
24 Let's say Harriman, you - - - you weren't using a
25 substitute.

1 MS. BRUFFEE: It would go to the weight.

2 JUDGE RIVERA: You were trying to use Harriman,
3 and he said I didn't watch him for the full twenty minutes.

4 MS. BRUFFEE: That would go to the weight.

5 JUDGE RIVERA: Then it's the weight, you say.

6 MS. BRUFFEE: I mean we would have to prove our
7 case. This is a sufficiency argument, not a confrontation
8 argument.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. BRUFFEE: Thank you. For that reason, I
11 would ask for the Appellate Term's decision to be reversed.

12 (Court is adjourned)

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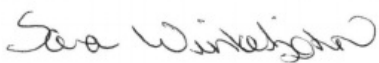
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Hao Lin, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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