

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,

-against-

No. 26

OLIVER BERRY A/K/A CHRIS TUCKER,

Appellant.

20 Eagle Street
Albany, New York 12207
February 09, 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:

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

RONA I. KUGLER, ESQ.
QUEENS DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
125-01 Queens Blvd,
Kew Gardens, NY 11415

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next, number 26 on
2 the calendar, People v. Oliver Berry, also known as
3 Chris Tucker.

4 Good afternoon, Ms. Horwitz.

5 MS. HORWITZ: Good afternoon, Your Honors.

6 CHIEF JUDGE DIFIORE: Would you like some
7 rebuttal time?

8 MS. HORWITZ: Three minutes, Your Honor,
9 for rebuttal.

10 CHIEF JUDGE DIFIORE: Very well.

11 MS. HORWITZ: Erica Horwitz from Appellate
12 Advocates for Appellant Oliver Berry. In an effort
13 to impermissibly bolster what was otherwise a one-
14 eyewitness ID case, the People called a man who had
15 been arrested at the scene, knowing full well from
16 his own attorney that he would invoke the Fifth
17 Amendment, that he would disavow a prior statement
18 that implicated the defendant, and he would testify
19 that he didn't see the shooting. The People called
20 him anyways - - - they called him, and from the
21 moment he took the witness stand, they started
22 impeaching him using every tactic imaginable.

23 JUDGE GARCIA: Counsel, would there be a
24 difference if he didn't invoke the Fifth Amendment;
25 if he just was called to testify and told this other

1 story? What's the difference there?

2 MS. HORWITZ: I'm sorry, I don't - - -

3 JUDGE GARCIA: So - - -

4 MS. HORWITZ: He wouldn't have - - -

5 JUDGE GARCIA: He didn't invoke because
6 here - - - maybe I'm reading the record wrong, but he
7 invokes the Fifth Amendment, right?

8 MS. HORWITZ: Yes, Your Honor.

9 JUDGE GARCIA: Several times, or a number
10 of times, and either the judge overrules the
11 assertion and directs him to answer, or the People
12 offer immunity; is that right?

13 MS. HORWITZ: Yes, your - - - but, Your
14 Honor, the jury is - - - the case law is pretty
15 settled here. You can't call a witness just to
16 invoke the Fifth Amendment. This was a witness who
17 had a legitimate Fifth Amendment privilege, as it's
18 known - - -

19 JUDGE GARCIA: To some extent, right?
20 Because some of the answers are directed by the
21 judge.

22 MS. HORWITZ: Yes, but the judge - - -
23 there was an objection to the judge probing this at
24 all. We have to remember that nobody is in the dark
25 here as to who this witness is and what he's going to

1 say. This is a re-trial. You have the same
2 prosecutor, you have the same trial judge. You now
3 have a counseled former - - - someone who had
4 previously been arrested and taken into custody and
5 he says, my understanding is that he's going to
6 testify about what the defendant looked like and he's
7 going to say that this is - - - that this picture
8 represents what the defendant looked like at the
9 time.

10 JUDGE GARCIA: But the harm here is that
11 the prior statement comes in, right? That's the - -
12 - the complaint.

13 MS. HORWITZ: Well, there's more than that,
14 Your Honor. I mean, but it starts with the Fifth
15 Amendment and the court is - - -

16 JUDGE GARCIA: But put aside the Fifth
17 Amendment for a second. They invoke the Fifth
18 Amendment, the testimony comes in one way or another.
19 He either is directed to answer or he gets immunity
20 for it. Right? So the complaint then is the prior
21 statements brought in to impeach.

22 MS. HORWITZ: Well, certainly, that was
23 very powerful and improper impeachment. But the way
24 that it starts with the - - - the People used as
25 inferences - - - and they used it in summation - - -

1 that the jury should consider the fact that this is a
2 witness who is trying to hide something. He's taking
3 the Fifth Amendment, and there is this back and
4 forth, and until he's directed to answer, he doesn't
5 say anything. The implication, not only he's trying
6 to protect himself, but he's trying to protect his
7 friend because, of course, the very first thing that
8 the prosecutor does when this witness takes the stand
9 is go into how close their friendship is.

10 JUDGE PIGOTT: But isn't all that true?

11 MS. HORWITZ: What, excuse me?

12 JUDGE PIGOTT: Isn't all that true?

13 MS. HORWITZ: That - - -

14 JUDGE PIGOTT: I mean, it's not like the DA
15 was trying to get something out of this witness that,
16 you know, was a lie or that was overblown, or
17 whatever; he was not under any prosecution at all,
18 he's - - - he's invoking the Fifth Amendment as to
19 everything except his middle name, and - - - and the
20 Judge is saying, you got to answer that question, and
21 they're giving immunity when it's close - - -

22 MS. HORWITZ: Except - - - except this - -
23 -

24 JUDGE PIGOTT: - - - and all he did was
25 tell the truth.

1 MS. HORWITZ: But in this case, Your Honor,
2 the court has held in Burg and other cases, you can't
3 - - - I mean, he's forced to answer questions without
4 immunity for which he does have a Fifth Amendment
5 privilege, some of these are without - - -

6 JUDGE PIGOTT: Well, he didn't; that was
7 kind of the point. I mean, you say you have a Fifth
8 Amendment right not to incriminate yourself, not to
9 not testify. So if they say, you know, are you
10 sitting in a chair, you can't say, I invoke my Fifth
11 Amendment rights not to - - - you know, against
12 incrimination. Obviously you're sitting in a chair,
13 so you've got to answer that question.

14 And it seemed to me as I went through this,
15 the Judge was telling him, answer the questions that
16 are not incriminating. The guy - - - you know, I
17 don't want to call him recalcitrant, but for some
18 reason he decided he wanted to do what he did, and
19 then when he was given immunity, he testified,
20 presumably, to the truth. What's the problem?

21 MS. HORWITZ: Well, they say it - - - the
22 People insist that he did not testify to the truth;
23 they force him to - - - to testify, they call - - -
24 call him knowing full well - - - and this happened in
25 Russ; this case is really on all fours with Russ - -

1 - and - - - in which one of the witnesses takes the
2 Fifth Amendment - - -

3 JUDGE PIGOTT: I get that.

4 MS. HORWITZ: - - - and is given immunity.
5 I'm sorry.

6 JUDGE PIGOTT: Yeah, I get that part when -
7 - - you know, when you know the only reason you're
8 calling somebody is to do that, is to say obviously
9 he's guilty because he's - - - you can't do that.
10 But that was not the purpose here. The purpose - - -
11 this - - - he wasn't in any jeopardy whatsoever, they
12 had already arrested him, questioned him, and found
13 out that he wasn't the shooter.

14 MS. HORWITZ: Well, they could have charged
15 him, there's no statute of limitations on murder,
16 Your Honor; he was obviously - - - at least he had
17 accomplice liability. I mean, he's - - -

18 JUDGE PIGOTT: I didn't - - - I didn't see
19 that either, I - - -

20 MS. HORWITZ: Well, he's - - - when the
21 witness - - - the surviving witness says he sees them
22 originally, they're standing 100 feet away. Then the
23 police, who hears shots, see two men in the middle of
24 the street, at the car, shooting; he's standing right
25 next to the shooter - - - assuming he isn't the

1 shooter; I mean, he says he's not the shooter, but
2 the police - - - and then they are running together
3 side by side.

4 JUDGE STEIN: Well, he gave a statement,
5 though, and the police let him go, so - - -

6 MS. HORWITZ: Well, first they - - - the
7 other - - - the - - - yes, when he gives the
8 statement implicating our client, they release him,
9 and the DA in this case makes a lot of hay of that.
10 Really, what - - -

11 JUDGE STEIN: But even defendant's witness
12 says that - - - I'm sorry, no, the witness that was
13 in the car says that it wasn't him.

14 MS. HORWITZ: Well, it says he is with the
15 shooter and the police arrested him anyway.

16 JUDGE RIVERA: He says he's not the
17 shooter.

18 MS. HORWITZ: He's not the shooter, he's
19 with the shooter.

20 JUDGE RIVERA: But he's with the shooter.

21 MS. HORWITZ: And they arrest him anyway,
22 and they take him in, and handcuffs, and they hold
23 him for a significant amount of time, and they give
24 him his Miranda warnings, and they interrogate him,
25 and then he implicates the defendant, and then they

1 release him, and none of this should have come in
2 front of the jury.

3 JUDGE PIGOTT: You make it - - - you make
4 it sound like - - - isn't that what they're supposed
5 to do? I mean, if somebody is dead, you know, they-
6 - - they arrest somebody, they give him his Miranda
7 warnings - - -

8 MS. HORWITZ: No, that's what they're
9 supposed - - - but, Your Honor, at this trial - - -

10 JUDGE PIGOTT: Then they let him go because
11 he says it was the other guy, so they say, okay,
12 you're gone, and they go pursue the other guy. And
13 then they find the other guy and they put him on
14 trial, and they - - -

15 MS. HORWITZ: Well, there are - - - it's
16 long settled - - - they know, the People - - - and
17 this case is on all fours, as I said, with Russ, in
18 which this court held that as in Fitzpatrick, you
19 can't call a witness knowing that he's not going to
20 support, or she's not going to support, your case
21 simply to get in an otherwise inadmissible damaging
22 statement.

23 JUDGE GARCIA: But isn't that point not
24 that they're going to take the Fifth, it's that
25 they're going to lie, right? Because there's a

1 different rule, you can't call someone you know
2 they're going to take the Fifth, as I understand it,
3 and then argue they wouldn't answer, they wouldn't
4 answer, what are they hiding. But your rule is - - -
5 because that would mean anytime someone says they're
6 going to take the Fifth, then you can never call
7 them, but what happens here is, the People's argument
8 is they lie. It's not that the fact that they take
9 the Fifth leads to these things, right. Isn't there
10 a difference here? It's not the Fifth Amendment here
11 that's the problem for this witness, it's that he's
12 immunized or he's directed to answer and then he
13 lies.

14 MS. HORWITZ: Well, he's not - - -

15 JUDGE GARCIA: So the People would have to
16 make the two-step jump. One, that he's going to be
17 directed to answer - - - we're going to - - - or
18 three steps. Or were going to immunize, and he's
19 going to lie, and then were going to get the
20 statement in, right?

21 MS. HORWITZ: Well, there were different -
22 - - different means of trying to impeach the witness.
23 They used a whole series of things. I mean, the
24 first was simple bias, and you're not supposed to
25 show bias by your own witness, and defense counsel

1 objected on those grounds. Then they move into the
2 Fifth Amendment and the established law in this state
3 says you can't call him. They didn't give him
4 immunity before, and the understanding with his
5 lawyer was that they were going to ask some very
6 limited questions. The People claimed they had - - -
7 they acted in good faith. If they had acted in good
8 faith, they would have asked four questions. They
9 would have asked in the areas that defense counsel
10 thought - - - Mr. Kirven's counsel thought they were
11 going to ask. They would say, did you know the
12 defendant, Oliver Berry, in July of 2002? Yes. Does
13 this picture represent the way he looked at that
14 time? Yes. Is this - - - to show your acquaintance,
15 is this his - - - did you have his phone number in
16 your address book? Yes. Is this it? And he would
17 have been off the stand. They said those were the
18 legitimate areas of inquiry and they admit that his -
19 - - his - - - that he had a privilege at least as to
20 four of the seven times he invoked. Then even though
21 he did not - - - the court has made clear that a
22 witness has to affirmatively damage the People's
23 case. Not simply not support it, not help the
24 People's case, not give as good testimony as they - -
25 - as they hope, before they impeach with the prior

1 inconsistent statement.

2 JUDGE STEIN: Let me ask you about that.
3 There's one bit of his testimony that I - - - I think
4 at least creates a close question on that, and that
5 is his testimony that only one shot was fired.

6 MS. HORWITZ: Well, they called him, Your
7 Honor, in order to be, basically, an identification
8 witness. This - - - they had already called - - -
9 the only witness they called had been a crime scene
10 officer who testified there were seven shells found
11 at the scene. And this is witness that clearly
12 doesn't remember - - - it was really inconsequential
13 whether or not he - - - whether he heard one shot or
14 several. Even after he's pinned down by the
15 prosecutor to say one, the Prosecutor refers to
16 several shots, what did you hear, what did you do
17 when you heard the shots, and he responds - - - the
18 witness himself refers to shots.

19 It didn't affirmatively damage the
20 People's case on who fired those shots, and that's
21 why they called him, and they'd had already
22 established by - - -

23 JUDGE STEIN: Well, but if they established
24 who fired the shots, then doesn't it damage their
25 case as to the - - - the charges of the attempted

1 murder and - - -

2 MS. HORWITZ: Well, they had all the
3 ballistics evidence, that wasn't really - - - I mean,
4 they can't sort of try and catch a witness and tie
5 him down on an incons - - - on a fact - - -

6 JUDGE RIVERA: You say regardless of
7 whether he's said one shot, the evidence was
8 otherwise, so it wouldn't of mattered; is that what
9 you're saying?

10 MS. HORWITZ: It really didn't matter, they
11 tied him down to that - - -

12 JUDGE RIVERA: He's not quite sure of what
13 his recollection is.

14 MS. HORWITZ: It was really a pretext; it
15 was an inconsequential mistake.

16 JUDGE FAHEY: But didn't he testify on - -
17 - didn't he testify on the key question of
18 identification? Wasn't he asked whether or not - - -
19 did you see the defendant fire a gun? And he said,
20 no?

21 MS. HORWITZ: He said - - - they started
22 out by saying they've been told he wasn't going to -
23 - - he was going to say he didn't see the shooting,
24 and he testifies did you see a white car, which is
25 what was shot at, no. Did you see the defendant

1 shoot at a white car? Which is an improper - - - and
2 he says, no.

3 JUDGE FAHEY: Well, now, okay. So he
4 didn't see the defendant fire a gun at the car.
5 Isn't that inconsistent with his prior statement?

6 MS. HORWITZ: Well, the first question, I
7 mean, what he's really saying is he didn't see
8 anything - - - he didn't see the shooting - - - he
9 doesn't see the - - - the first question is, did you
10 see a white car? No. Did you see the defendant
11 shoot at a white car? No. And on cross - - - and
12 they've been told - - - I mean, I think the DA's
13 formulating at this rate because the DA's been told
14 he's going to say he never saw the shooting. He was
15 told beforehand the defense counsel said he made
16 abundantly clear he would testify that he did not see
17 the shooting, and under the case law here, that's
18 considered neutral testimony.

19 JUDGE FAHEY: So the correct way to do
20 this, then, would be what? To do what was maybe in
21 Vargas, where you take the testimony ahead of time
22 and then the court makes rulings on it outside the
23 presence of the jury, and then you go forward from
24 there? Because otherwise, it's just what Judge
25 Garcia said, that you get to decide whether or not

1 you could even - - - you have to come in and testify.
2 The mere threat to use the Fifth Amendment means you
3 don't have to testify. That can't be the rule were
4 going to - - - that can't be our rule.

5 MS. HORWITZ: In Russ - - - in Russ, they
6 asked her beforehand; she said she didn't see it, and
7 they called her anyway. Here, a lawyer represented
8 he's going to say he didn't see it, he's going to
9 disavow the statement - - -

10 JUDGE FAHEY: Nonetheless, nonetheless, I
11 think you're going to - - - it's going to be hard for
12 us to create a rule that says, you threaten to use
13 the Fifth Amendment and we don't - - - and we're not
14 going to ask you any questions.

15 MS. HORWITZ: Well, this goes far beyond
16 the Fifth Amendment, Your Honor, they used every - -
17 - he was ridiculed, it was released, it was used for
18 its truth over and over; the whole implication - - -
19 they had a police officer testify to say basically,
20 yes, I released him, because the police believed it
21 and it was used in summation that way, and there was
22 no way, as defense counsel argued, that the jury
23 could possibly confine it to credibility.

24 JUDGE ABDUS-SALAAM: Counsel, I see your
25 light is on, but I just have one (indiscernible)

1 MS. HORWITZ: Yes, of course.

2 JUDGE ABDUS-SALAAM: You haven't addressed
3 the expert.

4 MS. HORWITZ: Yes, I planned to.

5 JUDGE ABDUS-SALAAM: I really - - - I
6 really would like to hear something about that and
7 maybe Chief Judge will let you do it in rebuttal, but
8 I just wanted to - - - something.

9 MS. HORWITZ: May I address it very
10 briefly, Your Honor?

11 CHIEF JUDGE DIFIORE: You can do it now.

12 MS. HORWITZ: Now, rather than in rebuttal?

13 CHIEF JUDGE DIFIORE: Yeah.

14 MS. HORWITZ: It was clear in May of 2009,
15 when this trial was held, the courts in New York and
16 around the country had held that the negative eaffect
17 of stress on the accuracy was an accepted phenomenon,
18 that it had a negative impact. And 2016,
19 Massachusetts had said there's near consensus on
20 this.

21 JUDGE ABDUS-SALAAM: So is this an abuse of
22 discretion, is that what you're saying?

23 MS. HORWITZ: Yeah, the court, I mean - - -

24 JUDGE ABDUS-SALAAM: And this, is it - - -
25 was it harmless?

1 MS. HORWITZ: Certainly not, Your Honor,
2 because this court has expressed concern about
3 allowing such testimony to correct misconceptions
4 about factors that lay people hold. And here - - -

5 JUDGE STEIN: Well, she - - - the expert
6 was allowed to talk about a lot of things about - - -

7 MS. HORWITZ: Things - - -

8 JUDGE STEIN: - - - about the effect of the
9 gun and a whole lot of things that to me sound like
10 stress, even though that word wasn't perhaps used.

11 MS. HORWITZ: Yes, but then - - -

12 JUDGE STEIN: What else would - - - would
13 she had testified to that really didn't come in to
14 evidence?

15 MS. HORWITZ: Well, all the evidence - - -
16 I mean, this is a DA who started. This was the big
17 issue at the first trial, that when you're under
18 great stress - - - and in voir dire in this case, the
19 DA voir dire tried to elicit the absolute
20 misconception that stress engraves the memory on your
21 mind, that strong emotions - - -

22 JUDGE STEIN: But what stress other than
23 the stress that was testified to about, about the gun
24 and the other circumstances - - -

25 MS. HORWITZ: Yeah, but the District

1 Attorney gets assurances from the jury before the
2 evidence starts that strong emotion will increase
3 accuracy. That's never corrected, there - - -
4 everybody - - - it's in fact opposite, the absolute
5 opposite of scientific studies that it impairs - - -
6 impairs - - -

7 JUDGE STEIN: Was those scientific studies
8 did - - - were they accepted at - - -

9 MS. HORWITZ: Yes.

10 JUDGE STEIN: You said that there was - - -
11 you know, that it was - - - it was pervasively known
12 at that time.

13 MS. HORWITZ: Well, there were five cases
14 that this court has cited that had been decided
15 before this trial. Lots and lots of cases since,
16 they all applied to this case. The studies go way
17 back; they're Federal cases from the 70s and 80s.

18 JUDGE FAHEY: So - - - so we wouldn't need
19 a Frye hearing is what you're saying.

20 MS. HORWITZ: No.

21 JUDGE FAHEY: It doesn't need to go back
22 for a Frye hearing, they need to be allowed to
23 testify against the identification.

24 MS. HORWITZ: On standing, and the defense
25 counsel - - - the defense expert, the jury never

1 heard expert testimony about the studies that show -
2 - -

3 JUDGE STEIN: Did defense counsel offer
4 this - - - make a proffer of what these studies were
5 or what would - - - what would be shown?

6 MS. HORWITZ: Well, defense counsel put it
7 as its number one subject that he wanted the expert
8 to testify, but - - - and then he - - -

9 JUDGE STEIN: I know, but did he offer the
10 court a basis, I mean, we're talking about all of
11 these cases, and all of these studies - - -

12 MS. HORWITZ: Defense counsel said she - -
13 - I'm sorry, Your Honor,

14 JUDGE STEIN: Yeah.

15 MS. HORWITZ: She said she can testify
16 about all the statistics and everything about it the
17 same way they did about the weapon focus. I mean,
18 they - - - the People had their expert come in.

19 JUDGE RIVERA: When did the dispute come up
20 - - - when did the People - - - when - - - at what
21 point do the People indicate to defendant - - -

22 MS. HORWITZ: Oh, when the judge - - -

23 JUDGE RIVERA: - - - oh, all of a sudden I
24 have a problem with the stress evidence.

25 MS. HORWITZ: Not until the judge - - - not

1 until the judge said, I won't allow it.

2 JUDGE RIVERA: Before that, the
3 understanding - - -

4 MS. HORWITZ: The day before the judge - -
5 - the DA said, well, the expert can't testify about
6 something about a lineup, and they didn't like the -
7 - - but everything else is fine, it's allowed under
8 LeGrand. And they clearly prepared their expert to
9 testify to that; he kept on trying to sneak stress
10 into it. So it was the day before - - - says all of
11 this is allowed under LeGrand, the other stuff, but I
12 don't like - - - and objected to one thing in
13 particular, and then the next day when the judge
14 says, well, there's a Westchester case, the DA says,
15 oh, yes; no good, no good.

16 CHIEF JUDGE DIFIORE: Thank you.

17 MS. HORWITZ: I'm sorry. Thank you for the
18 extra moments.

19 CHIEF JUDGE DIFIORE: You're welcome.

20 MS. KUGLER: Good afternoon, Your Honors.
21 May it please the court, I'm Assistant District
22 Attorney Rona Kugler. I represent the office of
23 Richard A. Brown, Queens County District Attorney.

24 The People here properly called Kevin
25 Kirven as a witness despite his attorney's warning

1 that Kirven intended to invoke the Fifth Amendment.
2 As the court stated in *Namet v. United States*, the
3 prosecution, the People are need not accept at face
4 value every assertion of an attempt to claim
5 privilege.

6 JUDGE PIGOTT: Was there a reason you
7 didn't grant him immunity?

8 MS. KUGLER: There were a few reasons why
9 the People did not give entire transactional
10 immunity, but rather question by question. First of
11 all, it was to avoid overly brought immunity.

12 JUDGE PIGOTT: What's wrong with overly
13 brought immunity? I mean, you're not going to
14 prosecute him. It would seem to me it would have
15 been an easy thing to do and then you can ask him all
16 the questions you want.

17 MS. KUGLER: Well, you know, Your Honor,
18 before this witness came to - - - before we started
19 the trial, the prosecutor had met extensively with
20 Mr. Kirven. And his story, even at that point, was
21 all across the board; it was in one direction, it was
22 another, they really didn't know what was going to
23 come in their mouth - - - out of his mouth when he
24 got to testify. And based on that, it was prudent
25 for the prosecutor to actually decide after each

1 question, determine - - -

2 JUDGE RIVERA: Apparently the one you
3 thought that was accurate and truthful was the
4 original statement. Because that's the one you kept
5 asking about, right?

6 MS. KUGLER: Yes, Your Honor, we had every
7 reason to believe.

8 JUDGE RIVERA: Okay, so then if you don't
9 think he's involved, why not give him the
10 transactional immunity? And if the witness says
11 that's not the shooter, why aren't you giving him
12 transactional immunity?

13 MS. KUGLER: Well, although that would have
14 been a possibility, we're not required to do that,
15 it's not an appropriate - - -

16 JUDGE RIVERA: I don't - - - the question
17 is, what did you think you might still prosecute him
18 on?

19 MS. KUGLER: Well - - -

20 JUDGE RIVERA: Is there - - - let me put it
21 another way; is there something you still could have
22 prosecuted him on, apart from perjury?

23 MS. KUGLER: Apart from perjury?

24 JUDGE RIVERA: Sure.

25 MS. KUGLER: As far as I see on the record,

1 it doesn't look like there was anything else. Well,
2 I mean, actually yes, Your Honor; there actually
3 absolutely is. Because there could have been some
4 sort of accomplice liability that we were unaware of,
5 and Mr. Kirven could have brought something out. We
6 have no information about that, I'm not saying that
7 we did, but he was present - - -

8 JUDGE STEIN: But that makes it speculative
9 and it just - - - you know, the point is made that
10 you can't - - - you can put a witness on that you
11 know is going to invoke the Fifth Amendment. I mean,
12 it's a constitutional right, you have a right to do
13 it and it just seemed to me, you know, why this
14 piecemeal approach that every time he says something,
15 you know, that to a jury would sound like you don't
16 like, you'll say, okay, we'll give you immunity for
17 that, and then he invokes again, and he invokes
18 again, and it just seemed very troubling. For a jury
19 to be put in that position seemed difficult to me; I
20 just didn't know why you did it.

21 MS. KUGLER: Well, Your Honor, the one
22 thing that you said, though, you said that we knew;
23 we really didn't know. It was his attorney's
24 statement that he intended to. We really didn't know
25 - - -

1 JUDGE PIGOTT: No, what I - - - what I was
2 saying is you were just making - - - while we weren't
3 really sure, you know - - - well, of course you were
4 sure. You knew you weren't going to indict him, you
5 knew you weren't going to - - - you knew you were
6 going to use him as a witness, and then in using him
7 as a witness, you knew you were going to confront
8 this and I would have thought that somebody would
9 have said, by the way, if he invokes the Fifth
10 Amendment, we got an issue here, you know. And
11 somebody decided that incremental Fifth Amendment
12 invocations are okay.

13 MS. KUGLER: Well, that's just - - - our
14 office decided to confer, but the law states that
15 we're entitled to grant immunity as a question-by-
16 question basis.

17 JUDGE STEIN: Didn't - - - didn't you also
18 say that you were afraid that he was going to, you
19 know, take the blame for his friend and then nobody
20 would get convicted?

21 MS. KUGLER: Absolutely, Your Honor, that's
22 exactly what the ADA said at court; he could say I
23 did everything - - - regardless of the fact that we
24 have other evidence that would negate that, he - - -
25 there's nothing to stop him if we give him full

1 transactional immunity from getting up there and
2 stating, I did it, I shot him.

3 JUDGE RIVERA: The reasonableness of it is
4 pretty slim considering the rest of the evidence,
5 right? That's the whole point.

6 MS. KUGLER: Right. And Your Honor, as
7 well, you know - - -

8 JUDGE RIVERA: But wait, let me go back to
9 this question - - - this issue of - - - that you said
10 no, we weren't sure, we just had his attorney's
11 statement. Well, why isn't the attorney's
12 representation good enough?

13 MS. KUGLER: Well, Your Honor - - -

14 JUDGE RIVERA: If he is representing to
15 you, my client informs me of the following, why - - -
16 why is that not good enough? We often say that we
17 rely on the representations of counsel and we hold
18 the clients, too, at those representations of
19 counsel.

20 MS. KUGLER: Because human nature, people
21 change their mind, they change their stories, they do
22 it all the time on the stand, as he did here going
23 back and forth.

24 JUDGE FAHEY: Well, isn't it - - - I guess
25 it was the Russ case, right, that we were talking

1 about before, hope springs eternal, isn't that the
2 theory that the Judge out there-? It seems that - -
3 - in my mind, it seems like the procedure that was
4 followed here didn't make much sense, because
5 normally you would take these questions outside the
6 presence of the jury, and then determine where
7 immunity would be granted, and then the questions
8 where immunity was granted, then you can do those in
9 front of the jury and those questions could be asked.
10 Why wasn't that procedure followed here?

11 MS. KUGLER: Well, Your Honor, first of
12 all, the defense never asked for it at that trial.

13 JUDGE FAHEY: The People would have asked
14 for it, I would have thought, to protect his rights
15 too. You would have had an obligation also, it isn't
16 just their obligation; it's your obligation too. And
17 that's - - - that's one of the things I find
18 disturbing about it and I don't want you to get down
19 before you talk about the Frye issue too, so let's
20 not forget it, all right? Okay.

21 MS. KUGLER: Okay. I also want to point
22 out that there were many good faith reasons or bases
23 for the prosecutor to call Mr. Kirven. So beyond the
24 fact of his intent, there were many reasons that he
25 was legit - - - a legitimate witness and should have

1 been called in this case and it was necessary to call
2 him.

3 JUDGE RIVERA: Yes, but for very limited
4 areas, I mean, that's the whole point, right, of the
5 adversary - - - your adversary's point. Even she
6 concedes that there were these areas that you could
7 have explored and then you should have sat down;
8 that's her argument.

9 MS. KUGLER: Right.

10 JUDGE RIVERA: Why - - - why didn't you
11 have to sit down?

12 MS. KUGLER: Well, because he - - - he adds
13 so many other - - - we - - - first of all, as I said,
14 we had so many reasons to believe that once he got up
15 there and he took an oath, that he would tell the
16 truth, and he does have not - - -

17 JUDGE RIVERA: Well, that's very hard - - -
18 it's a very hard analysis for me to accept on your
19 part because he has an attorney making the statement
20 that that is not what is going to happen.

21 MS. KUGLER: But he does, Your Honor - - -
22 back to your question a moment ago about what could -
23 - - what could we legitimately bring from him. There
24 were other areas too, not just the address book, not
25 just his conversations with the detective Kirven

1 (sic). You know - - -

2 JUDGE RIVERA: Fuzzy, the name Fuzzy and so
3 forth.

4 MS. KUGLER: Right, and he corroborates
5 defendant's appearance on that date, he - - - he also
6 adds legitimacy to the identification that we have
7 from the surviving victim. The surviving victim, two
8 years later, picks out of a lineup the defendant, who
9 has altered his appearance, you know, and this
10 happens to be the same person who is friends with the
11 person that the police Kirven- - - that the police
12 apprehend fleeing from the scene.

13 So this is other very legitimate areas as
14 well that we were entitled to go into, and it was
15 reasonable to question him as well.

16 Let's see, right now, since Your Honor
17 mentioned the Frye hearing, I guess we'll move to
18 that at this point. And I want to explain - - -
19 start off by saying that the court properly exercised
20 its discretion here in precluding the expert to
21 testify - - - any expert testimony based on this very
22 discrete issue of stress in this case.

23 JUDGE FAHEY: Kind of a strange set of
24 circumstances. So where the court at first seems to
25 say that yes, the expert can testify as to all the

1 issues, and then after, I think, the People rested,
2 and - - - before - - - then the Court made a second
3 ruling afterwards and say, well, I've researched the
4 issue and I've changed my mind on this issue and I've
5 gone the other way on it, and limited it. And there
6 was - - - I think a Frye hearing was requested, I
7 don't know if one is really required now; it might
8 have been then because we're talking '09, I guess,
9 the first trial.

10 So - - - I've never seen that sequence of
11 circumstances where the Court would deny an expert to
12 testify at that point; it seems unusual.

13 MS. KUGLER: Well, in the issue - - - not
14 as that the Court denied the expert to testify, but
15 on this one discrete - - -

16 JUDGE FAHEY: Right, on - - - on
17 misidentification based on stress, right.

18 MS. KUGLER: Right. Well, I mean, there's
19 a few factors here and this case perhaps is a little
20 different than your standard. First of all, the
21 defendant failed in his burden to establish that this
22 was generally accepted in the scientific community.
23 He never made a formal - - -

24 JUDGE PIGOTT: You think it's generally
25 accepted that if somebody is under stress, that it

1 makes an indelible mark in their mind, that they
2 would never forget a face like that? You think
3 that's common knowledge?

4 MS. KUGLER: Well, Your Honor, there's two
5 prongs to this. Number one is, what was the proof
6 that he put before the judge that this was generally
7 accepted?

8 JUDGE PIGOTT: You think it's common
9 knowledge that people that are under stress and see
10 something like this would never forget a face?

11 MS. KUGLER: Well, then I have to move to
12 the second point; this isn't a stress case, Your
13 Honor.

14 JUDGE PIGOTT: Well no, well, the - - -
15 well, the point - - - the point I'm trying to make is
16 as the defendant is saying is that the DA in his - -
17 - in jury selection and everything else made a big
18 deal out of the fact that - - - that you're going to
19 remember a face when you're under stress. And now
20 they want to produce somebody that says that's not
21 true.

22 MS. KUGLER: Well, there's also the fact
23 that they didn't use that word "stress" in every
24 different point; as one of the other justices pointed
25 out, there are a lot of other areas that all - - -

1 that were allowed in that kind of fly around, or
2 hover around the same areas of stress, like flash - -
3 - flashbulb, gun focus - - -

4 JUDGE ABDUS-SALAAM: Was the People's
5 expert allowed to testify that there is a correlation
6 between stress and identification of witnesses?

7 MS. KUGLER: Your Honor, I don't believe
8 stress was an area that was permitted to go into in
9 this trial by either side. And that's because, first
10 of all, there - - - so going back, the court here was
11 entitled to go on the cases and the studies that were
12 in front of it; there were no studies. And we're - -
13 - we have to look at what the law was at that time
14 that was in front of that judge when we're making
15 this determination as to whether the court was
16 correct in limiting the area that the witness was
17 able to be questioned on.

18 And the - - - the evidence that was in
19 front of them, you know, was with no cases, no
20 statistics, no studies; just a midtrial application
21 for payment for witness that didn't have any case law
22 with it. So the Court was able to rely upon what it
23 understood as generally accepted at that time, and
24 this was not, in New York, generally accepted. And
25 the Court was entitled to rely upon that.

1 And in any event, the facts of this case
2 established that this wasn't - - -

3 JUDGE RIVERA: Well, they said that the day
4 before, the prosecutor took a different position and
5 put the defense in a very difficult, vulnerable
6 situation, and then the Court doesn't allow them to
7 proceed with a Frye hearing, to at least put forward
8 to the court what you say they failed to do because
9 they were under their understanding that there was no
10 problem with this expert's testimony in this
11 particular area.

12 MS. KUGLER: Well, there's two things with
13 that. First of all, the record - - - the prosecutor
14 doesn't go out and say, oh yes, I think we should do
15 this; the pro - - - the defense is talking about what
16 areas they're going to go into and the prosecutor
17 mentions as one of the areas that they're discussing,
18 they fill in one of the blanks and they used the word
19 stress. That's all that's said; it's not a full
20 discussion on the prosecutor saying, yes, we can
21 discuss stress here.

22 JUDGE RIVERA: Did you raise an objection
23 to any of the areas that the expert was going to
24 cover at that point?

25 MS. KUGLER: Some of the areas they were

1 discussing.

2 JUDGE RIVERA: Uh-huh.

3 MS. KUGLER: And - - -

4 JUDGE RIVERA: Uh-huh.

5 MS. KUGLER: - - - without any case law,
6 what the record shows is the next day, the court and
7 the prosecutor - - -

8 JUDGE RIVERA: No, no - - - I'm asking
9 about - - - no, I'm asking about the representations
10 from the prosecution. What was your position? Did
11 you not object to some of the areas and say, we don't
12 want the expert to go into that area?

13 MS. KUGLER: The prosecutor did not
14 specifically say, I don't want that, on that day.
15 The prosecutor - - - the first day that they're
16 discussing it. But the prosecutor did discuss - - -
17 they were discussing certain areas. It doesn't look
18 like it was completely finalized at that point, so
19 for the defense to say they were blindsided the next
20 day, it doesn't seem genuine when it was - - - these
21 were subjects - - - areas they were discussing.

22 JUDGE PIGOTT: Maybe I misunderstood, I
23 thought defense was making the argument that at jury
24 selection and in - - - and in the earlier parts of
25 the trial, there was a big emphasis made on the fact

1 that stress did almost the opposite. That if you're
2 in - - - you know, if you're in one of these
3 situations, an ID becomes indelible, and you're more
4 likely to remember than not.

5 MS. KUGLER: The prosecutor, during the
6 voir dire, did mention several areas about how the
7 identification would be affected. I don't believe
8 that the prosecutor's voir dire emphasized stress as
9 being an area that affected this identification.

10 JUDGE PIGOTT: Okay.

11 JUDGE ABDUS-SALAAM: Yeah, as was said - -
12 - it wasn't - - - the term stress wasn't used;
13 memorable events were used.

14 MS. KUGLER: Being emblazoned upon
15 someone's memory.

16 JUDGE ABDUS-SALAAM: Yes, yes.

17 MS. KUGLER: You know, and there's a
18 distinction, especially when you're dealing with so
19 many different areas that are so closely surrounding
20 how an identification will be reliable, so that's
21 correct, Your Honor.

22 JUDGE RIVERA: But - - - but counsel may
23 have approached it that way, but I believe the
24 adversary - - - your adversary's argument is, no, no,
25 there's actually scientific data on this and we

1 wanted the opportunity for the expert to testify to
2 this, and we weren't given that opportunity.

3 MS. KUGLER: Well, they - - - they could
4 have been - - -

5 JUDGE RIVERA: You may have wanted to
6 describe it whatever way you want, but her point is,
7 but you're wrong, and I have an expert based on the
8 science who is going to testify to why that's wrong.
9 Why - - - why can't they do that?

10 MS. KUGLER: Well, because it wasn't
11 timely. They didn't make a motion in limine, they
12 didn't put this in front of the court; all they did,
13 like I said, was that in that application for fees,
14 in the middle of the trial, they then say - - - when
15 suddenly they think they're not going to be allowed
16 to go into this area - - - that they never made it an
17 accurate - - - an adequate offer of proof beforehand.
18 Now they want to throw things out to the court, but
19 they've never told the court at this point
20 specifically what it was - - - they don't give that
21 to the court and the court, at that point, is
22 entitled to rely upon what is, before it.

23 JUDGE RIVERA: LeGrand didn't already
24 suggest that this would have been an appropriate
25 area?

1 MS. KUGLER: I'm sorry.

2 JUDGE RIVERA: For expert testimony? There
3 weren't prior cases already that said that?

4 MS. KUGLER: There - - - there was nothing
5 - - -

6 JUDGE RIVERA: That this - - - this - - -

7 MS. KUGLER: - - - at New York, at that
8 time there was no case law that said this is
9 generally accepted, and the court was allowed to rely
10 upon that at that point and not have to hold a
11 hearing.

12 My time is up; thank you, Your Honor.

13 MS. HORWITZ: In fact, there were five
14 cases there in our - - - then, and they're cited in
15 our brief: Beck - - - Brooks, Beckworth (sic), I
16 think Douglas (ph.) is the name of one of them; they
17 date back to the - - -

18 JUDGE ABDUS-SALAAM: Smith and Drake.

19 MS. HORWITZ: Drake - - - there - - - there
20 were five cases that had been decided before then,
21 there were no cases that said that stress wasn't
22 accepted - - - in all of those cases it was accepted,
23 and the only case the court relied on, Banks, they
24 said it wasn't proven in that case because the study
25 on which the expert relied had not been introduced

1 into evidence, but it's never been cited for the
2 proposition that stress wasn't accepted. This
3 defense counsel was certainly sandbagged here, and
4 the People said on - - -

5 JUDGE PIGOTT: Well, I'm surprised it's an
6 issue. I mean, it just seems to me so often people
7 testify that, you know, when the accident happened, I
8 would - - - I got so excited I didn't even look to
9 see who was driving the other car.

10 But one of her points is that you delayed.
11 You didn't - - - you didn't make any application for
12 this type of testimony until the middle of the trial.

13 MS. HORWITZ: Well, they asked for
14 appointment of and - - - and the - - - the expert is
15 going to testify on these subjects, and the very
16 first one is stress, and the DA says on A594, I've
17 read the LeGrand decision and I object to that last
18 part which is about - - - is about people in lineups
19 and how they react; I object to that last part, I
20 don't believe that's something the courts have
21 allowed. But the other three things he mentioned,
22 one of which was stress, the Grand decision, I've
23 read, you know, the Grand decision - - - meaning
24 LeGrand - - - and those things were permitted.

25 And it's really only the next day, and - -

1 - and there's nothing untimely about this, and - - -
2 and the defense has their - - - their expert, and the
3 prosecution has their expert, and the defense counsel
4 says, we could have had a Frye hearing; he's not
5 given the opportunity. He says, Judge, I'd like to
6 show that. No, it's not accepted, we're going to
7 deal with the things that are - - - that are
8 relevant, and this was - - -

9 JUDGE ABDUS-SALAAM: Would there have been
10 any prejudice to the People in holding a Frye hearing
11 in the middle of trial? Has that never been done
12 before?

13 MS. HORWITZ: No, it has. I've cited the
14 cases which said it's been done, this court, it of -
15 - - of course has held that - - - that it's entirely
16 unnecessary, and you could just have the expert - - -
17 the testimony of the expert about what those studies
18 are, and that's what happened with the other areas
19 here, and they had another expert which was disputing
20 it and saying, I've got these studies, and she was
21 saying, I've got those studies about weapon focus and
22 other subjects.

23 But really - - - and given the facts of
24 this case, stress was the number one - - - number one
25 issue, and he was not given the opportunity - - - the

1 defense counsel - - - to have his expert establish
2 that it was accepted, it had been accepted in New
3 York; there was nothing late about this.

4 I would just say - - - I want to say one
5 thing about the first point. I want to remind the
6 court that, first of all - - - that this was - - -
7 the DA was absolutely intent on getting the prior
8 statement in whatever way she could before the jury,
9 and you get to summation, and not only is there
10 comment using it for its truth, but it is projected
11 up on a screen, it is read line by line, it is - - -
12 the emphasis that was given to it and the way in
13 which it was described and the seeing it during the
14 PowerPoint presentation unquestionably had the effect
15 which was intended, that it was evident in chief - -
16 - evidence-in-chief and this was a two-person ID
17 case.

18 CHIEF JUDGE DIFIORE: Thank you.

19 MS. HORWITZ: Thank you.

20 (Court is adjourned)

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, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Oliver Berry a/k/a Chris Tucker, No. 26 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 13, 2016