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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

LEVAN EASLEY,  
  
Appellant.

NO. 2

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20 Eagle Street  
Albany, New York  
March 15, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is The People of the State of New York  
3 v. Levan Easley.

4 Counsel?

5 MR. FITZMAURICE: Good afternoon, Your Honors.  
6 David Fitzmaurice on behalf of Mr. Easley, and I'd like to  
7 reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. FITZMAURICE: Your Honors, we're here again  
10 talking about FST, which is the black box technology that  
11 the OCME was using when faced with mixed DNA samples. As  
12 this court has held three times already, this technology  
13 cannot be admitted without a Frye hearing. This case is  
14 really a straightforward example of the most recent time  
15 this court considered the issue, which was Wortham.

16 Just like Wortham, a request for a Frye hearing  
17 was denied on the merits on the grounds that it was "not  
18 new" or exciting DNA, and it was just math, and as a  
19 result, FST's likelihood ratio, the 4.5 million likelihood  
20 ratio, was admitted into evidence and became the -- really  
21 the focal point of the People's case, because it was the  
22 only evidence connecting Mr. Easley to the gun.

23 So in virtually every respect, this case is - - -  
24 is like Wortham. The only real difference with Wortham is  
25 that we request the traditional remedy of a new trial, and



1 that is because of the second issue presented by this case,  
2 which is the disclosure failures.

3 So you know, the disclosure failures, I suppose,  
4 you know, the essence of the argument is - - - is really  
5 the - - - the price of using innovative software in a  
6 criminal case is disclosure to the defense. Disclosure,  
7 put simply, is the cost of use. And here, there was no  
8 disclosure to the defense, because an entire jury trial  
9 happened, without a single flaw of FST coming to their  
10 attention.

11 And again, this is FST; this is technology so  
12 flawed that the OCME abandoned using it several years ago.  
13 Defendant's request for - - - defense request for  
14 disclosure was denied, and instead, the trial consisted of  
15 the FST likelihood ratio itself coming into evidence, as  
16 well as an analyst from the OCME, who essentially parroted  
17 this black box figure of 4.5 million likelihood ratio.

18 JUDGE WILSON: So you didn't actually - - - over  
19 here, sorry. You - - - you didn't actually request  
20 specifically the source code until the trial was underway.  
21 If you'd - - - if the Court had granted your motion then,  
22 what could you have done with that?

23 MR. FITZMAURICE: So part of the re - - -

24 JUDGE WILSON: The source code is pretty  
25 difficult to - - - to deci - - - to - - - to work through,



1 no?

2 MR. FITZMAURICE: It - - - it absolutely is. I  
3 mean, you know, it - - - it - - - it could require - - - it  
4 would require an expert probably to read. Although it is  
5 written, lawyers probably can't read it on their own. But  
6 - - - but to go to Your Honor's point, the reason that this  
7 was requested midtrial was because that's when these issues  
8 came to a head. This was - - - this was black box  
9 software, that wasn't disclosed in the course of the  
10 regular discovery period. I mean, I - - - I think that and  
11 - - - and I appreciate - - -

12 JUDGE GARCIA: But Counsel, you did have the  
13 report in a regular discovery period, right?

14 MR. FITZMAURICE: We eventually got the FS - - -  
15 the FST likelihood ratio, but I think, you know - - -

16 JUDGE GARCIA: But that was before trial, or no?

17 MR. FITZMAURICE: It was before trial, but I  
18 think the - - - the - - - the kind of - - - the issues with  
19 that report really came to a head after you had started  
20 becoming aware that, you know, this wasn't like other DNA  
21 evidence. You know, it's - - -

22 JUDGE GARCIA: Was that as a result of the Daily  
23 News article?

24 MR. FITZMAURICE: You know, as a result of the  
25 Daily News article, maybe that's what alerted counsel to



1 it, but at the time, you know, this was - - - this was an  
2 ongoing issue across trial courts in the state. And I  
3 think the point is - - -

4 JUDGE TROUTMAN: So are you saying that counsel  
5 wasn't properly edit - - - educated with respect to the  
6 science?

7 MR. FITZMAURICE: I - - - I don't - - - I don't  
8 think counsel could have been properly educated, because  
9 there was not proper disclosure. I mean, remember when we  
10 think about DNA evidence, before FST - - - before FST came  
11 on the scene, all that the OCME would have been able to do  
12 was say that it's more likely than not that defend - - -  
13 you know, that defendant cannot be excluded as a possible  
14 contributor.

15 And now all of a sudden, we're faced with - - -  
16 with this value, this 4.5 million figure, so you - - - the  
17 - - - the disclosure that typically accompanies regular DNA  
18 cases, simply cannot be the disclosure that's sufficient  
19 here, because here, by - - - by - - - by the OCME's  
20 recognition, something happened that wasn't regular DNA.  
21 You know, a computer came on and did something that the  
22 humans have - - - have been unable to do prior to then, and  
23 it only became, you know, evident during the trial, because  
24 it - - -

25 JUDGE TROUTMAN: And the code that's created - -



1 -

2 MR. FITZMAURICE: - - - it was shielded.

3 JUDGE TROUTMAN: - - - it's created by humans,  
4 correct?

5 MR. FITZMAURICE: So the code is created by  
6 humans. It's - - - it's - - - you know, it - - - you know,  
7 we - - - what defense counsel eventually, you know, after a  
8 five - - - five-day - - - five days of discussing this  
9 issue, you know, once - - - once he alerted the court to  
10 what they - - - this five day period back and forth  
11 discussing what - - - what was - - - what - - - what - - -  
12 what they knew, what they didn't know, and he requested the  
13 code; he requested the underlying assumptions. He  
14 requested the validation studies.

15 So as part of the code, he had the code - - -

16 JUDGE TROUTMAN: Did he clearly request the  
17 validation studies?

18 MR. FITZMAURICE: I think - - - I think he did,  
19 and that he - - - he asked for all - - - all materials that  
20 went to the - - - to - - - to the, you know - - - all - - -  
21 all assumptions that were made, all written materials, and  
22 then - - - and then, he - - - he basically said he wanted  
23 to contest the computer. You know, he - - -

24 JUDGE TROUTMAN: And did the court rule as to  
25 those studies?



1 MR. FITZMAURICE: The court - - - the court did  
2 rule, actually. And I think this is a really important  
3 point. As this was emerging, you know, the court indulged  
4 defense counsel, had a five-day discussion - - - well,  
5 discussion spanning five days; there was a weekend in  
6 there, and initially the court said, yes, you - - - you do  
7 get all this discovery; you do get this disclosure. And it  
8 - - - it instructed the prosecutor to go back to the OCME  
9 and to provide this material to defense counsel. And then  
10 what happened is very interesting.

11 What happened after that was the court second-  
12 guessed itself, and it said, you know what? You don't get  
13 this discovery, because really, FST is no more than - - -  
14 FST is no more than getting discovery into the chemical  
15 compounds. So what the court essentially did was the court  
16 said, you know what? I think FST is reliable enough, as  
17 reliable as a chemical compound, to - - - to not require  
18 discovery. And that is exactly the problem here.

19 It is defense counsel's role to test reliability.  
20 It can only be tested by defense counsel. That is  
21 Hemphill; that is Crawford. You know, it is defense  
22 counsel's sole job to do this, through the crucible of  
23 cross-examination, and that didn't happen here because of a  
24 reliability determination that this was just regular  
25 science. We know this wasn't regular science. This was



1 not - - - was not an abacus. You know, they didn't  
2 generate this - - - this figure, you know - - - humans  
3 didn't generate this figure; a computer generated this  
4 figure, and they did it in a black box.

5 So what this all boils down to is a - - - is a  
6 conviction based on black box evidence that was never  
7 opened up.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 JUDGE WILSON: I - - - I just have one question,  
10 if I could?

11 CHIEF JUDGE DIFIORE: Oh, excuse me.

12 JUDGE WILSON: Sorry. If - - -

13 CHIEF JUDGE DIFIORE: Judge Wilson has one  
14 question.

15 JUDGE WILSON: If you could just isolate the Frye  
16 error for a moment, assuming that that's the only error. I  
17 know you've alleged other things, but just focus on that  
18 for a second. If - - - could you then address  
19 harmlessness?

20 MR. FITZMAURICE: Well, so with - - - with - - -  
21 with the Frye, yes. I think - - - again, like I've said,  
22 it - - - this is very like Wortham in - - - in virtually  
23 every respect, including the harmlessness. This was the  
24 only evidence of - - - of - - - of - - - of - - - that - -  
25 - that related specifically to possession. And this court





1 has described DNA evidence as having an aura of  
2 invincibility. And what FST did was, it took that aura,  
3 and it assigned it a 4.5 million figure.

4 So without the DNA, I've already said, that you  
5 couldn't make that calculation, and when you think of what  
6 evidence that wasn't DNA existed in this case, it basically  
7 consisted of a - - - of a - - - of a video where nobody,  
8 you know - - - a video in which appellant can be seen being  
9 brutally beaten. His hands are certainly not visible.  
10 There's no gun visible. All you see is appellant pinned up  
11 against a shelf being assaulted.

12 You know, so when you compare this to the  
13 harmlessness that - - - that - - - that this court found in  
14 Williams, where there was eyewitness testimony and there  
15 was a confession to a girlfriend, and the - - - the gun was  
16 hidden in a wall cavity, I mean, it couldn't be further  
17 from that situation here.

18 Here, there was no witness. Not a single witness  
19 testified as to possession. The - - - the video absolutely  
20 did not show any gun, did not show Mr. Easley's hands at  
21 all. The only hands it showed were the hands of his  
22 assailants as they were brutally beating him.

23 Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 Counsel?



1 MR. BRANIGAN: William Branigan for the Office of  
2 District Attorney Katz. Good afternoon, Your Honors. May  
3 it please the court.

4 JUDGE GARCIA: Counsel, I'm sorry. Could you  
5 start with the last point on the harmless error analysis?

6 MR. BRANIGAN: Start - - - yes, Your Honor.  
7 Starting from the harmless error, Your Honor, the - - - the  
8 video in this case shows the defendant reach in between a  
9 series of - - - of boxes of baked goods in the deli.  
10 That's exactly where the officer then, a few minutes later,  
11 recovers the gun from. During the entire course of that  
12 videotape, you won't see anyone else - - -

13 JUDGE TROUTMAN: But in that videotape, there are  
14 other people in the store; there's chaos going on at times.  
15 No one sees a gun in his hand, correct?

16 MR. BRANIGAN: I cannot see a gun in his hand in  
17 the video, no, Your Honor.

18 JUDGE TROUTMAN: And does anyone testify that  
19 they saw a gun in his hand?

20 MR. BRANIGAN: No, Your Honor. But Your Honor,  
21 if you look at that group of people who come into the  
22 store, and it's at that point, you have a 911 tape where  
23 you can hear, give - - - give me the hammer, and certain  
24 other things on the tape. Nobody else goes into that point  
25 in - - - in the boxes. Nobody else could have put the gun



1 there, and that's why there is harmlessness in this case.

2 JUDGE GARCIA: And you do see the officer recover  
3 the gun on the video, don't you?

4 MR. BRANIGAN: Yes, Your Honor.

5 JUDGE SINGAS: And is the camera on that area for  
6 the entire two minutes before - - - from when you see some  
7 activity with his hand going into that area, to then when  
8 the police officer recovers the gun?

9 MR. BRANIGAN: Yes, Your Honor.

10 JUDGE SINGAS: Is the camera on?

11 MR. BRANIGAN: The camera's on the whole time.  
12 It also captures the people coming into the store, and  
13 everything that - - - that proceeds the - - - the recovery  
14 of the gun, Your Honor.

15 But Your Honors, the - - - the court - - - I  
16 mean, at least for harmless error, because the issue below  
17 was not preserved. The defendant made his Frye application  
18 in the middle of trial, well past the point when the court  
19 could have resolved the issue - - -

20 JUDGE TROUTMAN: Is there a requirement in the  
21 CPL with respect to when that motion had to have been made?

22 MR. BRANIGAN: No, Your Honor. Frye is not among  
23 the - - - the so-called pre-trial motions or - - - in - - -  
24 in - - - in the CPL. At the same time - - -

25 JUDGE GARCIA: And the - - - the judge ruled on



1 the substance of the motion. As I read that transcript,  
2 the judge didn't make a timeliness determination.

3 MR. BRANIGAN: Your Honor, the court did make a  
4 timeliness determination. When he first made his  
5 application, the court said, this is the - - - these  
6 applications are to be made pre-trial. She also said this  
7 is not the kind of application you make midtrial. And the  
8 defendant - - -

9 JUDGE GARCIA: But then she didn't rule. She  
10 waited, right? And then she ruled on the merits of the  
11 application.

12 MR. BRANIGAN: But Your Honor - - - but that - -  
13 - that is a holding, and she didn't - - - she didn't pull  
14 back from that. I'd also say, if the court wasn't looking  
15 at this in terms of preservation, the - - - the - - - the  
16 question here for this court is whether the trial court  
17 abused its discretion.

18 So first, the court said this is not - - - this  
19 application has to be made pre-trial. Second, the  
20 defendant then came back and said, well, I couldn't - - - I  
21 couldn't make it pre-trial, that the - - - the papers were  
22 given to me too late. The court then went through with the  
23 prosecutor and discussed when - - - when things had been  
24 given. The entire package was given April 1st. The trial  
25 began May 7th. The defense attorney then said, well, I



1 just got this newspaper article. And the court said, these  
2 types of applications are not to be made on - - - on  
3 newspaper articles.

4 JUDGE WILSON: What is the problem - - - sorry -  
5 - - what is - - - what is the - - - is there a policy  
6 reason why you can't have a Frye hearing after the trial is  
7 concluded?

8 MR. BRANIGAN: Yes - - - sorry, Your Honor. The  
9 - - - the - - - the - - - a Frye hearing, basically, takes  
10 months at a minimum. It requires expert testimony from  
11 both sides. So as far as having a jury around while this -  
12 - - this type of hearing's going on in the criminal court,  
13 it's just impossible.

14 JUDGE WILSON: But what if - - - I have a diff -  
15 - - it's a different question, though. I mean, what we've  
16 done in Wortham is effectively that, right? We've got - -  
17 - taken the jury verdict, conditional upon a Frye hearing  
18 to occur, in that case, probably several years later.  
19 It'll take however long it takes.

20 MR. BRANIGAN: Your Honor, I - - - I - - - I  
21 would say it's the same thing for, let's say, a suppression  
22 hearing. This type of - - - of pre-trial hearing - - -

23 JUDGE WILSON: But those are specifically limited  
24 in the CPL.

25 MR. BRANIGAN: That's correct. There isn't a - -



1 - there is not that specific limitation, Your Honor. But  
 2 we do have practice. We do have custom. And the - - - the  
 3 fact is, that the - - - in order to - - - to have - - - to  
 4 decide whether this - - - this evidence is going to go  
 5 before this - - - this particular jury, this issue had to  
 6 be decided beforehand.

7 Your Honor, as - - - as far as the - - - the  
 8 second issue, the - - - the second issue is - - - is - - -  
 9 is also unpreserved. The defendant had his discovery  
 10 package beforehand. The - - - no request was made for the  
 11 - - - the materials until the - - - the middle of trial.  
 12 And again, if we look at the old statute, the old statute  
 13 240.21(c), this was not a test made for this particular  
 14 trial. The test in question here are tests that underlie  
 15 the - - - the computations used to produce this, but it  
 16 wasn't made for trial. It was not done at behest of law  
 17 enforcement. OCME is not a law enforcement organization,  
 18 so it did not fall under - - - under the prior discovery  
 19 statute, Your Honors.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. BRANIGAN: Thank you, Your Honors.

22 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

23 MR. FITZMAURICE: Very briefly, Your Honors.

24 Counsel mentioned that the video shows Mr. Easley  
 25 reaching in. The video shows Mr. Easley being - - - Mr.



1 Easley being brutally assaulted by six people and stumbling  
2 afterwards. Nobody else touched that area. The video  
3 shows nobody touching that area, and yet, Mr. Easley was  
4 not the main contributor of the DNA on the gun. We know  
5 that. That's why they had to do FST. He wasn't the main  
6 contributor. So in terms of what the gun had, it didn't  
7 have his fingerprints. It didn't have his blood, despite  
8 the fact that he's been stabbed multiple times. It - - -  
9 it just didn't have enough. It didn't have any connection  
10 except FST.

11 Regarding timeless - - - timeliness, the judge  
12 certainly, you know, huffed and puffed about the timeliness  
13 at the beginning. That's not a holding. You know, if  
14 that's a holding, are the next five days just dictum? You  
15 know, it's not a holding under any stretch. What happened  
16 afterwards was an exchange of cases, an exchange of  
17 arguments, and actually, the only holding that happened  
18 here was that, on the merits, it's been denied, citing  
19 Garcia, because it is not a new and exciting DNA test.

20 Garcia - - - the reliance on Garcia is what this  
21 court said in Williams to be an abuse of discretion. I'll  
22 also just note that in Williams, that was a midtrial  
23 application. So the whole problem here is, we're in the  
24 situation because we're dealing with a black box that was  
25 kept from the world. You know, convictions were based on



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black - - - back - - - black box technology.

And I think it's - - - it's also telling, in terms of there not being, you know - - - counsel cites to a custom that - - - that - - - that these are - - - are written, that they're - - - that they're written, you know. A custom is not law, you know. That's what Justice Kagan would call a law-free zone. There is no requirement in the CPL that they be written. There's no requirement stopping it from being midtrial, and for that reason the preservation arguments, which were just raised for the first time before this court, are completely meritless.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

(Court is adjourned)

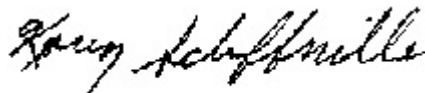




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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Levan Easley, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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