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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-

HOWARD POWELL,  
  
Appellant.

NO. 22

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20 Eagle Street  
Albany, New York  
March 23, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 22, The  
2 People of the State of New York v. Howard Powell.

3 Counsel, give us one moment until counsel can - -  
4 -

5 MS. HUTCHINSON: Yes, thank you, Your Honor.

6 CHIEF JUDGE DIFIORE: Okay, good afternoon,  
7 Counsel.

8 MS. HUTCHINSON: Good afternoon, Your Honor. May  
9 it please the court, Kendra Hutchinson of Appellate  
10 Advocates, on behalf of Mr. Powell in this matter. I would  
11 ask the court for two minutes rebuttal, please?

12 CHIEF JUDGE DIFIORE: Of course.

13 MS. HUTCHINSON: Great, thank you.

14 CHIEF JUDGE DIFIORE: You're welcome.

15 MS. HUTCHINSON: Your Honors, in 2012, in  
16 Bedessie, this court held that in the proper case, expert  
17 testimony on false confessions should be admitted. Mr.  
18 Powell's case is the proper case here. Mr. - - -

19 JUDGE RIVERA: So counsel, do you read Bedessie  
20 to basically have decided that this kind of testimony  
21 should always be let in, assuming that the expert is  
22 qualified as an expert?

23 MS. HUTCHINSON: Your Honor, we are making the -  
24 - - the argument here that under Bedessie, certain  
25 testimony would be admissible on the papers alone,



1 particularly on fulsome papers like those presented here in  
2 this case.

3 Bedessie itself recognized that the research  
4 shows that "intellectually impaired or diagnosable  
5 psychiatric disorders or other psychological fragility  
6 would be admissible." So yes, Your Honor, I think as to a  
7 certain amount of testimony, we would hold - - - we would  
8 ask this court to hold that yes, it would be.

9 JUDGE STEIN: But wasn't - - - wasn't the - - -  
10 the issue in Bedessie whether there should be a Frye  
11 hearing?

12 MS. HUTCHINSON: In that case, actually, Your  
13 Honor, the court held that it was not error to - - - to  
14 refuse a Frye hearing or to refuse to permit the expert to  
15 testify. That's in the - - - the - - - as Your Honor knows  
16 - - -

17 JUDGE STEIN: In that - - - under the  
18 circumstances of that particular case?

19 MS. HUTCHINSON: Yes. Yes, Your Honor.

20 JUDGE STEIN: Because of what was being proffered  
21 as - - -

22 MS. HUTCHINSON: Um-hum.

23 JUDGE STEIN: - - - what the expert was going to  
24 say, right? So - - - so here there was a Frye hearing?

25 MS. HUTCHINSON: Right.



1 JUDGE STEIN: Okay. And - - - and so doesn't  
2 that place this in - - - in a little different position?

3 MS. HUTCHINSON: Certainly, Your Honor. I mean,  
4 we - - - you know, again, our point is that the - - - we  
5 can save the taxpayer expense, sometimes, for these Frye  
6 hearings if the court could firmly hold that some papers  
7 would entitle you to - - - entitle you to an expert. That  
8 said - - -

9 JUDGE STEIN: Well, I want to ask you also to - -  
10 - to - - -

11 MS. HUTCHINSON: Sure.

12 JUDGE STEIN: - - - compare with sort of the  
13 history of some of our other jurisprudence on - - - in  
14 various areas of expert testimony, for example, eyewitness  
15 testimony.

16 MS. HUTCHINSON: Um-hum.

17 JUDGE STEIN: And would - - - wouldn't - - -  
18 would you agree that even though that testimony has, in  
19 certain respects, been accepted for, you know, a pretty  
20 long time, that it - - - it has been a gradual process  
21 tested by Frye hearings and - - - and other things, to  
22 determine which aspects, which scientific principles are -  
23 - - are - - - are entitled to - - - to that recognition as  
24 being accepted as reliable in the scientific community.

25 So why - - - why should this be any different



1 from that?

2 MS. HUTCHINSON: Well, you know, it's because the  
3 court has, in other areas of the law, has admitted  
4 testimony without the need for a Frye hearing. For  
5 example, in the rape trauma syndrome, battered women  
6 syndrome, other prosecution-favorable evidence - - - you  
7 know, of social science areas, the court has allowed it  
8 there. And we think that there are some - - - this is a  
9 thirty-five-year-old discipline and there are certainly  
10 some factors which we can talk about, because Your Honor  
11 pointed to there being a Frye hearing. And I'm - - - I'm  
12 certainly happy to go to the factors here.

13 But there are some factors here that are - - -  
14 that are so firmly established by, you know, this thirty-  
15 five-year-old discipline with sixty scholars and white  
16 papers.

17 JUDGE STEIN: Yeah, but some of that, from the  
18 time that they were maybe first accepted, this witness  
19 herself testified that they were no longer accepted because  
20 of the testing methods involved, right?

21 MS. HUTCHINSON: Are you - - - is Your Honor  
22 talking about like the - - - the laboratory experiments of  
23 the ALT key paradigm and computer crash?

24 JUDGE STEIN: Yeah, yeah, sure.

25 MS. HUTCHINSON: Your Honor, the - - - the court



1 has recognized that there may - - - this court has  
2 recognized that there may be controversy or there may be -  
3 - - there may be - - - earlier studies may be disallowed,  
4 but that is the fact of scientific progress.

5 Again, People v. Taylor, which is the - - - the  
6 rape trauma syndrome case that - - - that we rely on  
7 heavily, I mean, in that case, this court acknowledged that  
8 earlier studies had been criticized and acknowledged that  
9 the - - - you know, and - - - and even cited the  
10 criticizing stuff, but yet - - - yet still held that it was  
11 admissible.

12 And - - - and you're right, Your Honor, the  
13 People do rely on this to - - - to undermine Dr. Redlich's  
14 testimony in this case. But in fact, it's our contention  
15 that really this goes to the weight of her testimony before  
16 the jury. It was not for the judge to be the gatekeeper  
17 and decide that he disbelieved in the science just because  
18 the - - - the DA was able to under - - -

19 JUDGE FAHEY: So - - -

20 JUDGE RIVERA: Counsel, do - - - do you think - -  
21 - because I think it's suggested in your briefing - - - is  
22 - - - is it your position that what the judge did was  
23 apply, perhaps, Daubert or a different standard that's not  
24 the State standard, and that's where the judge went awry?  
25 It's a misapplication of the law?



1 MS. HUTCHINSON: Yes, Your Honor, actually. I  
2 think it is our - - - our - - - that the judge didn't just  
3 abuse discretion in this Frye hearing here, they actually  
4 misapplied the law as to the Frye standard and possibly as  
5 amicus Center for Appellate Litigation points out, too, as  
6 to the relevancy standard in this case.

7 JUDGE RIVERA: Um-hum.

8 MS. HUTCHINSON: That the judge really treated  
9 this as if this were a trial question in which it were the  
10 fact finder as to whether or not it believed this science.

11 JUDGE RIVERA: Um-hum. Let me ask you another  
12 question.

13 MS. HUTCHINSON: Sure.

14 JUDGE RIVERA: With respect to this question  
15 about the People's position that the - - - the Frye hearing  
16 revealed that the proposed expert's methodology was not  
17 respected in the field, was rejected, and that is a basis  
18 to then deny the testimony, what - - - I know you responded  
19 a little bit to that. I'd like you to be a little bit more  
20 precise about why that's not enough for a judge. A judge  
21 hears someone and maybe says, well, some of those studies  
22 seem to support that, but this particular expert is talking  
23 about studies that they have done, research that they have  
24 done that is now rejected. No one - - - no one accepts  
25 this. It's been highly criticized.



1                   Why - - - why wouldn't a judge be properly acting  
2 within their discretion to say I - - - I'm troubled by this  
3 expert. Bring me another expert who - - - who doesn't have  
4 these kinds of flaws in their methodology?

5                   MS. HUTCHINSON: Sure. Well, I mean, I think  
6 there's - - - there's three - - - there's - - - well,  
7 there's two - - - two sort of parts to this. There's the -  
8 - - the two laboratory studies, like in-lab studies or - -  
9 - or you know, research paradigms that had been used in the  
10 field that not - - - that were not necessarily tied to just  
11 Dr. Redlich. These had been used in the field, you know,  
12 decades earlier: the ALT key and the computer crash - - -  
13 those two - - - or the cheating paradigm. And the science  
14 had moved on.

15                   So this was not particular to Dr. Redlich. And I  
16 think you'll - - - you'll see the testimony from her in the  
17 Frye hearing, it is that the - - - that the science may  
18 have moved on or may not have been able to be replicated as  
19 much in the - - - in the - - - in the field.

20                   On the other hand, the other critique that the  
21 People lobbed towards Dr. Redlich herself is that she had  
22 conducted a number of self-report studies. Self-reporting  
23 studies are when you - - - you know, when you interview  
24 participants and ask them to self-report their experiences.

25                   Self-report is a widely accepted, scientifically





1 sound method of gathering data. It is the - - - the method  
2 of gathering data in nearly every so - - - social science  
3 field, as pointed out in our briefs. And this court has -  
4 - - has certainly accepted it before. And in fact, in  
5 Taylor, the court noted that these were self-report - - -  
6 this was - - -

7 JUDGE FAHEY: Well, is this - - - are you  
8 referring now to the trial court's rejection of the  
9 validity of certain psychological principles as - - - as -  
10 - - by a comparison to hard scientific principles? In  
11 other words, social science methodology is not the same  
12 methodology that one would find in plotting a course from  
13 the earth to the moon. We can't do that kind of research  
14 with that degree of scientific certainty.

15 Is that - - - is that what you're referring to as  
16 - - - you're identifying that as an error of the court?

17 MS. HUTCHINSON: Yes, exactly, Your Honor, that  
18 the court relied so heavily on the known error rate, the  
19 fact that there was no known error rate in this particular  
20 instance.

21 JUDGE FAHEY: Right. You - - - you don't - - -  
22 the way I understand the science is you don't get it that  
23 way. And more than that, science changes. Science is a  
24 process, it's not a - - - a guaranteed result.

25 What I'm wondering here is, it seemed - - - and



1 I'd ask both counsel to respond to this. It seems that the  
2 court may have been using the Frye hearing testimony as a  
3 way to say that the expert didn't lay a sufficient  
4 foundation for his testimony rather than - - - or her  
5 testimony, I'm sorry - - - rather than seeking to answer  
6 the question if - - - is - - - are false confessions  
7 generally accepted as a valid phenomenon in the scien - - -  
8 relevant scientific community.

9 It seemed that that's the question that had to be  
10 answered to satisfy Frye. If that question is then  
11 answered, then that expert should not be asked whether or  
12 not he thinks that was done. That's the jury's job.  
13 That's - - - that's not the expert's job.

14 And I - - - I think that - - - so what I'm  
15 wondering is, is has this - - - has this point been  
16 emphasized that - - - the desire to lay a foundation for -  
17 - - foundation for admissibility isn't quite the same as  
18 the court's responsibilities when they've got to deal with  
19 a Frye hearing?

20 MS. HUTCHINSON: I - - - I think I understand  
21 what you're getting at here, Your Honor.

22 JUDGE FAHEY: Okay.

23 MS. HUTCHINSON: Is that the - - - is that the  
24 judge here really - - -

25 JUDGE FAHEY: By the way, that's good. I'm glad



1 that someone understands. I'm happy with that.

2 MS. HUTCHINSON: Well, I'm just rereading  
3 LeGrand, actually, in - - - in preparation, and I - - - and  
4 I noted the - - - the requirement there that a proper  
5 foundation needs to be laid for the reception of the  
6 testimony. And - - - and I - - - and so to the extent that  
7 Your Honor is getting at this, this really may be part of  
8 the court's problem here is that it was applying this odd  
9 relevancy standard, some sort of personal knowledge,  
10 personal - - -

11 JUDGE FAHEY: Right.

12 MS. HUTCHINSON: - - - you know, ultimate opinion  
13 on whether or not this happened.

14 JUDGE FAHEY: Right. The - - - the expert that  
15 would be encroaching on the province of the jury - - -

16 MS. HUTCHINSON: Yes.

17 JUDGE FAHEY: - - - if it did that. Those  
18 standards are not relevant to a Frye hearing standard. The  
19 - - - it's an entirely separate issue.

20 MS. HUTCHINSON: Exactly, Your Honor. And - - -  
21 and you know - - - and to the extent that Your Honor is  
22 asking about whether this foundational testimony was there,  
23 I mean, obviously you read the trial - - - well, you've  
24 read at least the brief recitation of the trial.

25 Yes, this evidence went in through my client.



1 But in - - - but in addition, you know, there was a report  
2 of a - - - of Dr. Drob, the psychological forensic expert  
3 who, you know, noted all of the factors that my client had  
4 - - - his IQ in the 70s - - -

5 JUDGE FAHEY: Um-hum.

6 MS. HUTCHINSON: - - - schizophrenia, substance  
7 abuse disorders, everything.

8 JUDGE FAHEY: No, I know the record. But here's  
9 the problem that I struggle with. Assuming that the court  
10 made an error in the way it handled the Frye hearing and it  
11 applied the wrong standard, why - - - why isn't this error  
12 harmless?

13 MS. HUTCHINSON: This error could not possibly be  
14 harmless in this case, Your Honor, because - - -

15 JUDGE FAHEY: Tell us why?

16 MS. HUTCHINSON: - - - yes.

17 JUDGE FAHEY: Yeah.

18 MS. HUTCHINSON: There are two - - - there were  
19 two pieces of evidence that connected my client to this - -  
20 - this was a confession - - - or the two confessions and  
21 the identification. The confession was hotly contested.  
22 It is very rare that a - - - that a defendant gets on the  
23 stand and testifies as to - - -

24 CHIEF JUDGE DIFIORE: But Counsel, let's talk  
25 about the defendant's trial testimony - - -



1 MS. HUTCHINSON: Sure.

2 CHIEF JUDGE DIFIORE: - - - for a moment, right?  
3 The defendant testified, to my reading of the record, to  
4 classic coercive police misconduct tactics: physical  
5 abuse, food deprivation. And in fact, he denied he even  
6 made the second statement, to my recollection.

7 Why would a jury, the average juror, need this  
8 kind of expert testimony to make a determination of  
9 voluntariness, under those circumstances?

10 MS. HUTCHINSON: Yeah, that's a - - - that's a  
11 great question, Your Honor. You're right. The jury was  
12 charged with voluntariness under the traditional sense, you  
13 know, the due process sense.

14 Because it is counterintuitive to jurors - - -  
15 well, let me - - - I - - - number one, I will say that my  
16 client did indeed state that he confessed for the first  
17 confession, the one in which he stated he was messed up on  
18 drugs. And so to that extent, he did do that.

19 But it is counterintuitive to juries that someone  
20 would make a statement like that and potentially still be  
21 considered an involuntary or - - - or a confession that  
22 should not be trusted or - - - or that should not - - -  
23 that does not have veracity.

24 So a jury may be properly instructed about  
25 voluntariness, but social science now shows us that - - -



1 that there is another precept as to which they should be  
2 able to evaluate this confession.

3 CHIEF JUDGE DIFIORE: But I guess my question is:  
4 didn't the defendant's testimony really undermine the  
5 expert's assumptions of the situational factors that were  
6 supposedly present?

7 MS. HUTCHINSON: Well, so - - - so you're saying  
8 that the - - - the client's testimony is a - - - is a  
9 misfit, basically; it does not fit with the situational  
10 factors?

11 I mean, I guess I would disagree, at least, as to  
12 the - - - the theme development, sort of, minimization  
13 factor that the - - - the - - - the - - - that the expert  
14 was going to testify about, because you know, our - - - my  
15 client literal - - - you know, said that Grinder (ph.) told  
16 him that he would not help him until he cooperated. He  
17 told me he wouldn't help me unless I helped him.

18 That's the type of - - - I mean, this is what my  
19 client testified at trial and at the suppression hearing.  
20 That's on page - - - or least at the suppression hearing,  
21 that's on page A-314.

22 And so that does not under - - -

23 JUDGE STEIN: Do you think that's beyond the ken  
24 of the typical juror?

25 MS. HUTCHINSON: Well, I think - - -



1 JUDGE STEIN: If the - - - you know, to - - - to  
2 put themselves in - - - in his shoes and say, well, gee,  
3 you know, if they're telling me you know, I'm - - - I'm not  
4 going to get food, I'm not going to get medication, I'm not  
5 going to be able to go home, unless I - - - unless I  
6 confess, what do you need the expert testimony for?

7 MS. HUTCHINSON: Well, I mean, I think this court  
8 has held that it is beyond the - - - that this is - - -  
9 some of this can be quite counterintuitive. In Bedessie,  
10 that - - - as to this implied - - - the implied leniency  
11 that - - -

12 JUDGE FAHEY: I - - - I thought your argument was  
13 that he was susceptible to false confession because of his  
14 limited intellectual capacity and head injury.

15 MS. HUTCHINSON: It certainly - - -

16 JUDGE FAHEY: And - - - okay. I want to get just  
17 back to - - - just one - - - I want to stay in this  
18 harmless error question, because it's something that I'm  
19 kind of struggling with here. I want to know, you know,  
20 why you say that this is not - - - there was a - - - there  
21 were two IDs here, and you got a confession. The - - - the  
22 DD5 form, I think it's called. That's what I understand  
23 the People to be relying on.

24 And in response to that, I - - - I think that the  
25 defendant says the identifications were wrong. His face



1 cannot be seen in the video, and that he had twelve missing  
2 teeth, and that the missing teeth in and of itself, were  
3 never pointed out by any of the witnesses at all; and it  
4 would be an impossible thing for them to miss.

5 MS. HUTCHINSON: Yes.

6 JUDGE FAHEY: So, that - - - that's the way I  
7 understand an argument being framed. What's your response?

8 MS. HUTCHINSON: My response - - -

9 JUDGE FAHEY: Do you - - - is the proof  
10 overwhelming? If it's not, why not?

11 MS. HUTCHINSON: No, Your Honor, the proof here  
12 was not overwhelming.

13 JUDGE FAHEY: Why not?

14 MS. HUTCHINSON: It was not because of precisely  
15 as Your Honor pointed out, that this was a - - - and just  
16 to - - - to correct, this was a trial with one complainant.  
17 The other one, the client pled to. So there was one  
18 identification in this case.

19 She described the robber as in his thirties, six  
20 foot tall. My client was in his fifties. He was six-foot-  
21 four. He had twelve missing teeth. You cannot see from  
22 the surveillance videos - - - particularly the one that is  
23 in the elevator, is completely - - - it's frightening and  
24 it's very impossible to see anything about who that robber  
25 is.





1           As for the deli one, although it is six minutes  
2 long, there are very, very, very set - - - brief seconds'  
3 long moments in which the robber is facing the camera, from  
4 a distance away, with his head facing down. It is not  
5 possible from that to make a definitive identification.

6           And for that reason - - -

7           JUDGE FAHEY: So - - - so what you're saying,  
8 there's proof, but it's not overwhelming?

9           MS. HUTCHINSON: Yes, absolutely, Your Honor.

10          JUDGE FAHEY: Okay. You know, I'm not clear on  
11 this. What teeth were missing?

12          MS. HUTCHINSON: I don't know off the top of my  
13 head, Your Honor.

14          JUDGE FAHEY: Okay, that's why - - -

15          JUDGE RIVERA: I thought it included some front  
16 teeth?

17          MS. HUTCHINSON: - - - teeth.

18          JUDGE RIVERA: Did it not include some front  
19 teeth?

20          MS. HUTCHINSON: I - - - I think it has to  
21 include some front teeth, but I can't tell you, Your Honor,  
22 off the top of my head.

23          JUDGE FAHEY: I see. Thank you.

24          MS. HUTCHINSON: Yes. And I mean, speaking of  
25 this, I do want to move very, very quickly and just remind



1 the Court that there is an identification expert point as  
2 well. I'm just going to bring this up because Judge Fahey  
3 brought up the identifications here.

4 And I - - - I would ask the court to look at that  
5 carefully, too, because my client here was really  
6 hamstrung. I mean, the manifest unfairness of the two  
7 pieces of evidence that come in before my - - - come in  
8 before the jury, and he wasn't able to contest either of  
9 them; and for that reason and for the reasons that we - - -  
10 we stated before as well, his right to present a defense  
11 was - - -

12 JUDGE RIVERA: But can I ask about the  
13 corroboration for one moment?

14 MS. HUTCHINSON: Sure, yep.

15 JUDGE RIVERA: This - - - I'm sorry, the - - -  
16 the expert on the witness - - - the accuracy of the witness  
17 ID.

18 So I just want to be clear. Your only argument  
19 on that is that it wasn't truly corroborative, or are you  
20 also taking the position that the judge should not have  
21 looked at corroboration, because it was a pre-trial motion  
22 as opposed to a motion at trial, once there's actual  
23 evidence?

24 MS. HUTCHINSON: Thanks very much for asking that  
25 question, Your Honor. I think that in our main briefing



1 the position that we're taking is - - - is the position  
2 that counsel took below, which was back in, you know, 2011.  
3 So we're - - - our preserved position is that there was  
4 insufficient corroboration here.

5 Amicus Innocence Project brings up an excellent  
6 point that I - - - that if Your Honor is asking about it,  
7 about the - - - about the - - - the problem of using  
8 corroboration in the pre-trial context because it is - - -  
9 it is not tested by the adversarial process. And in fact,  
10 I think this case is emblematic of it, because what you  
11 have after trial is a confession that corroborates the  
12 identification; yet the confession is hotly contested.

13 And we know that there are details about the  
14 confession that don't match up with the crime. Now - - -

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. HUTCHINSON: Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MS. O'BOYLE: May it please the court, Danielle  
19 O'Boyle, from the Office of Melinda Katz, the District  
20 Attorney of Queens County.

21 Turning first to this court's holding in  
22 Bedessie, that case does not and should not stand for the  
23 principle that a trial court would abuse its discretion any  
24 time it holds a Frye hearing with respect to false  
25 confessions.



1 JUDGE GARCIA: Counsel, the way I read Bedessie,  
2 very simplistic maybe, but there's two things going on in  
3 Bedessie. One is that whatever the proffered science is,  
4 it has to be related to the defendant and the  
5 interrogation, right?

6 MS. O'BOYLE: Yes.

7 JUDGE GARCIA: So if you come in and you say  
8 left-handed people are more likely to give false  
9 confessions, and the defendant is right-handed, you don't  
10 need a Frye hearing. And I think that's Bedessie part 1.

11 Then, let's say the defendant is left-handed.  
12 You need a Frye hearing to establish that scientific  
13 validity of your proposition that left-handed people are  
14 more likely to give you a false confession. Right?

15 To me, this case is the left-handed - - - the  
16 right-handed, you know, and the science is bad. There were  
17 two things that were wrong here, according to this hearing  
18 judge at the Frye hearing.

19 So one was factual fit with this defendant and  
20 this interrogation, and two was the science. Is that  
21 right? Is that the argument?

22 MS. O'BOYLE: Yes, Your Honor, there are issues  
23 here with respect to both general acceptance and relevancy.  
24 And looking at this court's decision in People v. Bedessie,  
25 it's important to look at how this case discussed People v.

1 Lee in terms of examining the broad principles of admitting  
2 expert testimony.

3 And the very first thing the court said is that  
4 the admissibility and the limits of expert testimony lie  
5 primarily in the sound discretion of the trial court. And  
6 the court goes on to talk about a trial court needing to  
7 determine whether the proffered expert testimony is  
8 generally accepted by the relevant scientific community.

9 So with the general acceptance point, I think  
10 it's important to look at this court's decision in *People*  
11 *v. LeGrand*, because this analogous field of eyewitness  
12 identification experts is the closest to the science of  
13 false confessions that we're discussing here.

14 So in that case - - -

15 JUDGE RIVERA: So what would not be relevant?  
16 What would not be relevant in her testimony?

17 MS. O'BOYLE: Several of the dispositional and  
18 situational factors that Dr. Redlich discussed - - -

19 JUDGE RIVERA: Doesn't that go to the scope of  
20 the testimony not the full-stop preclusion?

21 MS. O'BOYLE: It - - - it goes to both, Your  
22 Honor. And it's important that in *Bedessie* the court said  
23 that the proffered expert testimony on false confessions  
24 needs to be relevant to both the defendant and the  
25 interrogation. So it's not enough that this defendant had



1 a history of mental illness, substance abuse, and low  
2 cognitive abilities.

3 JUDGE RIVERA: Um-hum.

4 MS. O'BOYLE: It - - - the court also had to look  
5 at what were the circumstances under which this particular  
6 defendant confessed. And throughout his suppression  
7 hearing testimony and trial, the defendant maintained that  
8 he gave that written statement; he never admitted to giving  
9 the oral statements. He says he gave that written  
10 statement so that the detective would provide him with his  
11 medication, which he was withholding.

12 And to Judge Difiore's point, earlier, that  
13 really wasn't within the scope of what this proffered  
14 expert, Dr. Redlich, was proposing to testify to.

15 So that's why this case would be similar - - -

16 JUDGE RIVERA: I - - - I'm sorry. I don't  
17 understand that leap that you just went through. The - - -  
18 they put into evidence medical records, right?

19 MS. O'BOYLE: Yes, Your Honor.

20 JUDGE RIVERA: His medical records - - - he  
21 testifies to it too. And then you've got evidence of  
22 medications that he's on. He comes in. He - - - his  
23 statement is he's on drugs. It appears he's in possession  
24 of drugs. That's why he's arrested for it. He's got a  
25 long history of substance abuse. Long history of mental

1 illness.

2 I - - - I'm not really clear how an expert who's  
3 saying the - - - the consensus of the scientific community  
4 is that mental illness is a factor associated with false  
5 confessions and why if - - - if the People's position is,  
6 well, we don't know how that affected him specifically,  
7 that isn't something that gets resolved at trial, as  
8 opposed to that general science, when he has put forward  
9 medical records and his own testimony about his condition  
10 at the time.

11 And of course the detective, the first day, is  
12 talking about what appears to him to be somewhat erratic,  
13 perhaps, drug-induced behavior. Who knows?

14 MS. O'BOYLE: Your Honor, if I could answer that  
15 in two parts? First, related to the timing and the  
16 circumstances of the interrogation, it's important to note  
17 that this defendant was brought into the precinct - - --  
18 precinct first, on the night of March 1st. And at that  
19 point, even the detective admitted he was in a bit more of  
20 an agitated state.

21 JUDGE RIVERA: Um-hum.

22 MS. O'BOYLE: He was not willing to speak at that  
23 time. He did sign his - - - the Miranda sheet and agreed  
24 to speak with the detectives, but really didn't get into  
25 anything substantive, at that point. According to Det.



1 Grinder, that is the night when he was asking for his  
2 medication, which the detective did testify, he went and  
3 picked up from the defendant's friend.

4 At that point, at the end of the night, the  
5 defendant is sent back to Central Booking, where he stays  
6 for more than eight hours. And it's not until the next  
7 morning, March 2nd, when he's brought back to the precinct,  
8 somewhere around 9:30, that he gives that first written  
9 statement at 10 o'clock in the morning.

10 In the defendant's own testimony about the  
11 circumstances of that statement, he affirms on cross-  
12 examination that he was not feeling as he did the night  
13 before when he claimed he had a seizure - - -

14 JUDGE RIVERA: So if I - - - if I'm understanding  
15 your argument, your argument is there's nothing in the  
16 record, including from the defendant, to say that the mo -  
17 - - the second day, when - - - when you've got the typed-up  
18 forms and he makes what - - - what the detective says is an  
19 oral - - - a verbal account of having committed the - - -  
20 the crime, the one that's on - - - he's on trial for or was  
21 going to be on trial for - - - that that in no way suggests  
22 that he's under the influence of any - - - or is - - - is -  
23 - - I'm sorry, indicating any of the dispositional factors  
24 that the expert was testifying to, despite the long history  
25 of mental illness. Is that correct?





1 MS. O'BOYLE: Yes, Your Honor, that is correct.

2 JUDGE RIVERA: That's your position? Okay.

3 MS. O'BOYLE: And it's important to note that  
4 going - - - this relates both to the relevance and the  
5 general acceptance point - - - but for the primary focus of  
6 mental illness, which is what the defense has focused most  
7 heavily on - - -

8 JUDGE RIVERA: So let me ask you this. Does that  
9 devolve, then, to your rule being that under Bedessie, the  
10 only expert who could ever testify is the one who not only  
11 has the research background, like this particular expert,  
12 but also has the clinical experience and interviews and  
13 goes through a conversation with - - - with the actual  
14 defendant? Is that - - - is that the rule that the People  
15 are proposing?

16 MS. O'BOYLE: No, Your Honor, it is not.

17 JUDGE RIVERA: Okay.

18 MS. O'BOYLE: And I disagree with the defense's  
19 characterization that the judge was imputing some type of  
20 personal-knowledge requirement here.

21 Ultimately, the issue was that this expert could  
22 not establish that the particular principles about which  
23 she was going to testify were generally accepted in the  
24 scientific community. And it's important to make that  
25 distinction between the general science and the phenomenon



1 of false confessions as opposed to the specific situational  
2 and dispositional risk factors about which she was  
3 proposing to testify.

4 And that's why this is most analogous to the line  
5 of cases with identification expert testimony, because each  
6 of those factors, like weapon focus, has cross-racial  
7 identification; they've had to withstand numerous Frye  
8 hearings - - -

9 JUDGE RIVERA: Well, let me ask you this. If - -  
10 - if you're correct about the record and the way the court  
11 views the record, then why would the court say, as I  
12 understand it, twice, just get me an expert who is able to  
13 - - - for lack of a better way of saying it - - - connect  
14 the dots - - - but to - - - to establish that indeed their  
15 testimony will be relevant?

16 Because if you're right, no one could ever do  
17 that, right? If in the moment he - - - he is not in any  
18 way expressing any of these dispositional characteristics,  
19 no one - - - no expert could ever walk in the door and  
20 testify to that.

21 MS. O'BOYLE: Well, Your Honor, I - - - I  
22 disagree with that, and that there would be circumstances  
23 when those factors would be specifically relevant to a  
24 particular defendant and interrogation. And I think that  
25 what the trial court was getting at is that the defendant



1           could have called Dr. Drob, who was the clinical  
2           psychologist in this case. And it would not have been to  
3           testify about false confessions generally, but to testify  
4           about this particular defendant and his history of mental  
5           illness, his history of medication. And - - -

6                         JUDGE RIVERA: But if he did - - - and if he did  
7           that, why, then, couldn't the defense counsel then call Dr.  
8           Redlich, to then have that further information specific - -  
9           - as you say, specific about false confessions, that would  
10          allow the jury to then make the determination, solely  
11          within the province of the jury, whether or not they  
12          believed that in this case, based on the evidence  
13          presented, hearing the experts, that they've decided no,  
14          that - - - there's no false confession here, or yes, there  
15          was a false confession here.

16                        MS. O'BOYLE: It would still not have been  
17          appropriate to allow Dr. Redlich to testify, even if Dr.  
18          Drob had testified, because Dr. Drob was in the unique  
19          position of being able to testify that this defendant with  
20          this history would have been experiencing certain symptoms  
21          or side effects as a result of not having taken his  
22          medication for X number of hours.

23                        That doesn't cure the problems with Dr. Redlich's  
24          testimony. And that comes back to general acceptance. So  
25          to have Dr. - - -

1 JUDGE STEIN: Can you - - - can you - - -

2 MS. O'BOYLE: - - - Redlich - - -

3 JUDGE STEIN: - - - can you specify what the - -  
4 - then what were the problems with her testimony? Was it  
5 that she didn't testify that the specific kinds of mental  
6 illness that he had were - - - would have made him more  
7 suggestible to or amenable to false confession? Or what -  
8 - - what exactly is it that you're saying is missing?

9 Let's assume that Dr. Drob had testified to what  
10 his - - - his - - - his - - - you know, his particular  
11 circumstances were, the kinds of mental illnesses he had,  
12 what kinds of medications he was on, whatever. What was  
13 then missing from - - - from Dr. Redlich's testimony that  
14 would have put the two together?

15 MS. O'BOYLE: What was missing, Your Honor, is  
16 that the specific dispositional factors and situational  
17 factors that she proposed to testify about, showing that  
18 those were generally accepted within the scientific  
19 community.

20 JUDGE STEIN: Give me - - -

21 MS. O'BOYLE: So - - -

22 JUDGE STEIN: - - - an example.

23 MS. O'BOYLE: When we look at her discussion of  
24 mental illness, which is primarily what she focused on,  
25 she's really impeached by her own testimony and her own



1 words in the studies proffered as part of the defense  
2 papers at the Frye hearing.

3 In the 2010 study that she did about self-  
4 reported false confessions among people with mental  
5 illness, she actually says - - - this is Dr. Redlich's  
6 study - - - that those findings should not be used as  
7 evidence that mental illness increases susceptibility to  
8 making false statements against oneself. And that's only a  
9 few years before she gets up at the Frye hearing and  
10 proposes to testify to that very principle before a jury.

11 So to have Dr. Redlich testify to a principle  
12 like that at trial and show as if it had been well-studied  
13 or well-established, that improperly invades the province  
14 of the jury.

15 JUDGE RIVERA: What - - - what about all the  
16 scientific studies that were also entered at the Frye  
17 hearing? Are you saying those don't establish that mental  
18 illness is generally considered by the relevant scientific  
19 community as a factor associated with false confessions?

20 And - - - and I don't read the record the way you  
21 do about her testimony. But let's just stay with - - -  
22 with the other scientific - - - there was a lot of  
23 scientific information and literature that was submitted,  
24 right?

25 MS. O'BOYLE: There were several pieces of



1 literature introduced at the hearing - - -

2 JUDGE RIVERA: Um-hum. Including the white  
3 paper, correct?

4 MS. O'BOYLE: Yes, there was a white paper, Your  
5 Honor.

6 JUDGE RIVERA: Um-hum.

7 MS. O'BOYLE: But that was not sufficient to  
8 show, at that time, that the particular principles were  
9 established as generally accepted. And a white paper alone  
10 - - - some of that, in terms of who sponsored it and what  
11 the white paper discussed, is actually just letting the  
12 community know what are these topics that are being  
13 researched by the relevant - - -

14 JUDGE RIVERA: So clarify for me, is it your  
15 position, then, that an expert - - - given what the court  
16 had said - - - given what the court had said - - - that if  
17 defense counsel brought in another expert that had used  
18 different studies that - - - that the expert didn't say  
19 those were old kind of studies, they've been critiqued and  
20 not really used so much now, but said these are the studies  
21 we're using now and had said - - - the same documents are  
22 submitted on the scientific literature and had said there's  
23 a general consensus, that that would have been acceptable?

24 MS. O'BOYLE: No, Your Honor. I don't believe  
25 so.



1                   And at the time that this is - - -

2                   JUDGE RIVERA: So then, full stop, the People's  
3 position is that when this hearing was held, I think it's  
4 2014, two years, more or less, after Bedessie, the science  
5 was not there?

6                   MS. O'BOYLE: Yes, Your Honor, that the - - -

7                   JUDGE RIVERA: Okay.

8                   MS. O'BOYLE: - - - science regarding the  
9 specific principles - - - not the phenomenon of false  
10 confessions generally. The People are not contesting that.  
11 But that the science regarding these specific principles  
12 was not there.

13                   Dr. Redlich was a qualified expert in her field.  
14 She was clearly one of the leading researchers looking at  
15 these specific factors. But in her own words, she says  
16 that the studies aren't there yet. She says there needs to  
17 be comparable data from those without mental illnesses. We  
18 need to look more into - - -

19                   JUDGE RIVERA: So is the People's position the  
20 science is not there now?

21                   MS. O'BOYLE: Your Honor, that would have to be a  
22 decision for another court to make - - -

23                   JUDGE RIVERA: Um-hum.

24                   MS. O'BOYLE: - - - at another Frye hearing. And  
25 again, it would have to look at the specific principles.



1 And it's important not to just group this as what is the  
2 testimony about false confessions generally, but to go  
3 through each and every factor just like - - -

4 JUDGE FAHEY: I'm struggling, though. It sounds  
5 to me like you're saying that the phenomenon of false  
6 confession is - - - is not scientifically valid.

7 MS. O'BOYLE: I would disagree with that, Your  
8 Honor, in that - - -

9 JUDGE FAHEY: Tell me - - - tell me, what are you  
10 saying? What is your position on false confessions?

11 MS. O'BOYLE: Our position would be that false  
12 confessions do and can occur. And in terms of the specific  
13 factors that might lead to that, there needs to be further  
14 research done on that. The ALT key study and the cheating  
15 paradigm that are brought up by Dr. Redlich, those were the  
16 initial laboratory-type methods used and those have been  
17 found to be unreliable or inapplicable.

18 So it seems that the research has moved more into  
19 these self-reporting studies. And I'm not contesting that  
20 self reporting can be a legitimate means of testing the  
21 reliability and assessing general acceptance, but it is one  
22 factor to consider, given the very limited body of research  
23 that is available and that was available - - -

24 JUDGE FAHEY: Well, that, of course, would be  
25 something that a trier of fact would weigh. But that - -





1 - but - - - but you're not saying before us that you don't  
2 believe false confessions take place?

3 MS. O'BOYLE: I am not saying that, Your Honor.

4 JUDGE FAHEY: All right.

5 JUDGE RIVERA: So - - -

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 JUDGE RIVERA: I'm sorry, may I just have one - -  
8 - I know you can't come back.

9 So let me just ask, given what you've just said,  
10 what - - - what are we to understand of the language in  
11 Bedessie - - - and it's in two different paragraphs. I'm  
12 going to quote it: "Research in the area of false  
13 confessions purports to show that certain types of  
14 defendants are more likely to be coerced into giving a  
15 false confession - - - e.g., individuals who are highly  
16 compliant or intellectually impaired or suffer from a  
17 diagnosis - - - diagnosable" - - - excuse me - - -  
18 "psychiatric disorder, or who are for some other reason  
19 psychologically or mentally fragile," and then quotes some  
20 - - - some research on that.

21 And then the next paragraph: "Research also  
22 purports to identify certain conditions or characteristics  
23 of an interrogation which might induce someone to confess  
24 falsely to a crime." And that's discussing situational  
25 factors.

1           What - - - what are we to make of that language,  
2           if - - - if the science isn't there in 2014, so it's not  
3           going to be there in 2012, what - - - what are we to make  
4           of this kind of language?

5           MS. O'BOYLE: Your Honor, I think what's key in  
6           that language is Bedessie's discussion of what the research  
7           purports to show.

8           JUDGE RIVERA: Um-hum.

9           MS. O'BOYLE: The research is getting there. And  
10          that's why LeGrand is a helpful case to use and analogous  
11          to this circumstance, because in that case the court found  
12          that three out of the four factors proposed by the defense  
13          regarding expert identification - - -

14          JUDGE RIVERA: But - - - but then why - - - why  
15          does - - - I believe it's Judge Read - - - close - - -  
16          close the discussion with "and there is no doubt that  
17          experts in such disciplines as psychiatry and psychology or  
18          the social sciences may offer valuable testimony to educate  
19          a jury about those factors of personality and situation  
20          that the relevant scientific community considers to be  
21          associated with false confessions"?

22          She must be referring to the factors she's  
23          already listed, otherwise it - - - it makes no sense in  
24          context.

25          MS. O'BOYLE: Your Honor, I think that should be



1 read as that those are the factors being researched in the  
2 scientific community. And saying that the testimony could  
3 be valuable does not mean that the testimony about each and  
4 every one of those factors has been deemed to be generally  
5 accepted.

6 And when you take that and the general acceptance  
7 idea together with the relevance issue in this case, where  
8 the Reid method was such a significant part of what this  
9 expert proposed to testify about, she had no indication of  
10 whether or not those specific methods were used in this  
11 case; she talks almost exclusively about this idea of  
12 minimization and how that's consistent.

13 But there's two issues with that, because in her  
14 own study, the 2011 study where she compares true and false  
15 confessions, which she says was only the second study done  
16 at the time comparing those two, she says because  
17 minimization is so common, its utility to distinguish  
18 between true and false confessions may be of limited value.

19 So here, when we look closely at the  
20 interrogation and the defendant that were before this trial  
21 court, he was absolutely within his discretion to preclude  
22 this expert's testimony.

23 If I could just briefly, Your Honor, address the  
24 harmless error issue that several of Your Honors brought up  
25 before? Here it's - - - the video surveillance is one



1 aspect of what corroborates the eyewitness' testimony as  
2 well as the confession.

3 But it's important to look at what that video  
4 surveillance actually showed. The victim testified that  
5 she initially encountered the defendant outside a grocery  
6 store, just down the block from her apartment building.  
7 She sees him briefly there and is within two feet of him,  
8 she testifies.

9 Ultimately, she then goes back to her apartment  
10 where the robbery occurs in the elevator, which is almost  
11 three full minutes long. And although that video does not  
12 clearly depict the - - - the defendant's face at any point,  
13 it shows that Ms. Yan (ph.), the victim in that case, had a  
14 significant opportunity to view the defendant, so that when  
15 she ultimately makes an identification - - -

16 JUDGE RIVERA: Yeah, but that - - - isn't that -  
17 - -

18 MS. O'BOYLE: - - - of him - - -

19 JUDGE RIVERA: - - - the whole point that that's  
20 what the expert might have helped the jury understand that  
21 really having that kind of vantage point, under all the  
22 other circumstances, might not make it so obvious that it's  
23 an accurate identification? Is - - - isn't that the point?

24 MS. O'BOYLE: No, Your Honor. And the trial  
25 court was absolutely within his discretion to preclude both



1 the identification expert and the false confession expert.

2 And I would just conclude by saying that this  
3 court has repeatedly gone against bright-line rules. And  
4 with this court's decision in People v. McCullough, it  
5 specifically rejected that bright-line rule with respect to  
6 identification experts.

7 So I would ask that this court find that the  
8 trial court was within his discretion to preclude both the  
9 false confession expert testimony and the identification  
10 expert testimony. Thank you.

11 CHIEF JUDGE DIFIORE: Thank you. Thank you.

12 Counsel, you have your two minutes' rebuttal  
13 time.

14 MS. HUTCHINSON: Thank you, Your Honor.

15 CHIEF JUDGE DIFIORE: You're welcome.

16 MS. HUTCHINSON: I'm going to focus really - - -

17 JUDGE RIVERA: So counsel, why isn't she correct  
18 that the real problem is that the - - - the expert is  
19 testifying to situational dispositional factors, talking  
20 about the literature, et cetera, et cetera, but herself  
21 says that there's a real problem in the methodology that  
22 she herself has used? Why - - - why isn't - - - why aren't  
23 the People correct about that? That's what really makes  
24 her the wrong expert for this kind of testimony.

25 MS. HUTCHINSON: Your Honor, I think candid



1 discussion of scientific progress and about revising  
2 hypotheses and about the evolving nature of science  
3 actually makes her a more credible expert.

4 And I think the People really are glossing over  
5 the fact that there's - - - there were numerous articles  
6 entered into evidence that even if they quibble with Dr.  
7 Redlich, they are certainly free to do that before a jury,  
8 but here the jury didn't get it, because the judge believed  
9 this cross-examination that was given of Dr. Redlich,  
10 decided the science wasn't there, and did not allow the  
11 jury to have it.

12 In fact, these - - - these quibbles with her  
13 previous - - - her previous research or you know, maybe you  
14 backtracked on this hypothesis, Doctor, that would have  
15 been great before a jury. And so the - - - the People's  
16 argument really is suited for that, for trial, not for a  
17 Frye - - - Frye hearing.

18 I also would note, the People did not present an  
19 expert. There was no expert here. This was - - -

20 JUDGE RIVERA: Did any - - - did any of the  
21 scientific literature that was admitted in - - - at the  
22 Frye hearing did any of it suggest uncertainty within the  
23 scientific community about situational dispositional  
24 factors that would put any of them in - - -

25 MS. HUTCHINSON: Yes.



1 JUDGE RIVERA: - - - some - - - you know, a box,  
2 we're not sure, we think, but we're still doing research on  
3 this?

4 MS. HUTCHINSON: Yes. I mean, having perused all  
5 of the literature that was entered, much of it was quite  
6 candid about what was not - - - for example, as to the  
7 mental illness issue, the question was which particular  
8 diagnosis might predispose someone.

9 So I would refer the - - - Your Honors in the  
10 white papers to 584 to 85 of the appendix. There, the  
11 question was the diagnosis, but recent research had shown  
12 that depression, of which my client suffered, had a  
13 correlation to it.

14 If - - - if the court is inclined to throw out  
15 some of these factors, if - - - if the court actually is  
16 inclined to, I just would point to the fact that the  
17 cognitive impairment is widely established, has been  
18 established by the Supreme Court, you know, by this court,  
19 by - - - it is widely acknowledged as a - - - as a - - -  
20 mental retardation, in older parlance, is widely  
21 established as linked to false confession.

22 And in addition, on lengthy interrogations - - -  
23 and if the Court would like references to the articles, I  
24 would - - - I would - - -

25 JUDGE STEIN: Why - - - why didn't defendant



1 offer any evidence about the - - - the particular  
2 interrogation techniques used by the NYPD and the training  
3 that they have, and so forth and so on? Wouldn't - - -  
4 wouldn't that have possibly helped?

5 MS. HUTCHINSON: Well, Your Honor, I mean, he  
6 tried to during the suppression hearing, and the detective  
7 clammed up and said I was - - - I've never been trained in  
8 interrogation; I don't remember what I asked. So I mean,  
9 that was the only basis that he had of finding out - - -

10 JUDGE STEIN: Well, but couldn't they have  
11 brought in other witnesses to testify, you know, superiors  
12 in the department? Here's the - - - here's the training  
13 that we give our - - - our police officers, and so on and  
14 so forth?

15 MS. HUTCHINSON: Certainly he could have. I  
16 don't think it was necessary here, Your Honor, given that  
17 there was evidence in my client's statement itself as to  
18 the - - - the possibility of minimization.

19 That said, if the court doesn't find that  
20 situational factors are present here, aside from the  
21 lengthy interrogation, which is an acknowledged situational  
22 - - -

23 JUDGE STEIN: Well, and what - - - what - - -  
24 yeah, you refer to lengthy interrogation. But what - - -  
25 how long was the interrogation? We're talking about from





1 the time he was arrested to the time he made his statement,  
2 even though he was only in the interrogation or the  
3 interview room and discussing this for what sounds like  
4 about maybe an hour, if that?

5 MS. HUTCHINSON: He was interrogated three times  
6 over the course of about twenty-four hours. He was  
7 arrested at 2 o'clock. He was Mirandized, according to the  
8 detective at the suppression hearing, at 6:30, although  
9 this was impeached at trial, that the Miranda happened at  
10 that time, at all.

11 JUDGE STEIN: So when we look at the duration of  
12 the interrogation, we look from the time they brought him  
13 till the time he went home, regardless of whether he slept,  
14 regardless of whether he was in the same room, regardless  
15 of whether he ate, is that - - - is that - - -

16 MS. HUTCHINSON: Well, I would - - -

17 JUDGE STEIN: - - - your position?

18 MS. HUTCHINSON: - - - I would point Your Honor  
19 to the - - - to the white paper, page - - - appendix page  
20 579. Part of this is the custody and the isolation, the  
21 twenty - - - the actual removal of somebody. So yes, he  
22 was interrogated intermittently. He certainly wasn't  
23 interrogated for twenty-four hours. That would be  
24 outrageous of me to say that.

25 But he - - - but I would point the court to page



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579 which discusses this technique of isolating someone for a lengthy period of time.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MS. HUTCHINSON: If the court has any further questions.

CHIEF JUDGE DIFIORE: No.

MS. HUTCHINSON: We've taken a lot of your time. Thank you.

CHIEF JUDGE DIFIORE: Court will stand in a ten-minute recess.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Howard Powell, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

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Date: March 31, 2021

