State of New York
Court of Appeals

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 2 People v Levan Easley

The primary issue here is whether Levan Easley was entitled to a Frye hearing to determine the admissibility of DNA evidence derived by the Office of the Chief Medical Examiner (OCME) by use of its proprietary forensic statistical tool (FST), which it developed to analyze trace samples of crime scene DNA that are too small for standard genetic testing. The FST is a computer program that was used in this case to assess the likelihood that Easley contributed to a mixed sample of DNA found on the trigger of a handgun. Frye hearings are held to determine whether novel scientific evidence is generally accepted as reliable by the relevant scientific community.

Easley was beaten and stabbed during a fight with several other men inside a Queens deli in November 2011. Police found a loaded handgun in the deli, on a shelf near where the fight occurred, and they said surveillance video showed Easley reaching in that area when he was being attacked. He was charged with criminal possession of the weapon. Before the prosecution presented expert testimony about the FST results linking Easley to the gun, he moved for a Frye hearing and sought disclosure of the source code, algorithm and validation studies of the FST.

Supreme Court concluded the FST is not a novel scientific technique and denied both requests. It relied on prior trial court decisions in People v Megnath (27 Misc 3d 405) and People v Garcia (39 Misc 3d 482), which it said "both agree" that the FST is "not even scientific. It's mathematics, and it's a statistical tool..., not some new and exciting DNA test." An OCME witness then testified that the FST analysis showed it was 4.57 million times more likely that Easley contributed to the DNA on the gun than that he did not. Easley was found guilty and sentenced to seven years in prison.

The Appellate Division, Second Department affirmed, saying a Frye hearing is not required when a court "can rely upon previous rulings in other court proceedings as an aid" in deciding admissibility. "At the time of the court's ruling, a court of coordinate jurisdiction had determined that the FST was not a new or novel scientific technique, but 'a computer software program that uses accepted mathematical equations based on Bayes' Theorem to calculate the likelihood ratio of obtaining a recovered mixture of DNA if the suspect is a contributor versus the probability of getting the same mixture if the suspect is not a contributor,'" it said, quoting Garcia. "The court of coordinate jurisdiction noted that the FST had been peer reviewed, accepted in professional journals, presented at numerous scientific conferences, and admitted in several criminal trials in this State." It also upheld the denial of Easley's request for the source code and other FST materials, saying they "were not required to be disclosed pursuant to Brady ... since they were not in the possession or control of the People, but of OCME...."

Easley argues, "The trial court's refusal to hold a Frye hearing before admitting FST-generated DNA evidence, over appellant's objection that FST's developer had never disclosed how the program worked and the People had never proved its general acceptance in the scientific community, was plainly incorrect under this Court's decisions in People v Williams [35 NY3d 24] and People v Foster-Bey [35 NY3d 959], and was not harmless where there was no other testimonial or physical proof of guilt. He also says the denial of his disclosure request for materials underlying FST "violated his constitutional rights to favorable evidence and confrontation, as well as CPL § 240.20's discovery requirements."

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 3 People v John Wakefield

John Wakefield was charged with murdering Brett Wentworth, who was strangled with a guitar amplifier cord in his Schenectady apartment in April 2010. As in Appeal No. 2, People v Levan Easley, DNA from the crime scene was subjected to analysis by a software program that uses statistical modeling to calculate the probability that a defendant contributed to a trace mixture of DNA from more than one person. The program used in this case was the TrueAllele Casework System, which was developed and owned by Cybergenetics, a private company. The TrueAllele analysis determined there was a high degree of probability that Wakefield's DNA was found on the amplifier cord and on the victim's forearm and T-shirt, with the likelihood of a match with Wakefield's DNA on different samples ranging from 56.1 million to 170 quintillion times more probable than a coincidental match to an unrelated person.

Before trial, Wakefield requested the source code for TrueAllele. Cybergenetics refused to disclose it, contending it was a trade secret, and prosecutors responded that the source code was neither discoverable nor within their possession or control. Wakefield then moved to preclude the DNA evidence or for a Frye hearing to determine whether the TrueAllele technology is generally accepted as reliable by the scientific community. He argued that access to the source code was necessary to assess the accuracy of TrueAllele. Supreme Court granted the Frye hearing, but not his demand for the source code, saying "scientists can, and have, validated the reliability of [TrueAllele] even though the source code underlying the process is not available to the public." After the hearing, the court ruled TrueAllele was generally accepted in the scientific community and admitted the DNA evidence at trial. Wakefield was convicted of first-degree murder and robbery and was sentenced to life without parole.

Wakefield argued on appeal that the trial court erred in its Frye ruling because prosecutors could not establish the reliability of TrueAllele when no one outside of Cybergenetics could review the source code; and that the source code, part of an artificial intelligence system that actually conducted the DNA analysis, was in effect an out-of-court declarant that he had the right to cross-examine.

The Appellate Division, Third Department affirmed the conviction, saying the trial court properly admitted the DNA evidence after the Frye hearing. It said "articles evaluating TrueAllele have been published in six separate forensics journals. In addition, at the time of the Frye hearing, TrueAllele had undergone approximately 25 validation studies, some of which appeared in peer-reviewed publications," and it had "been deemed admissible in Virginia, Pennsylvania and California." Rejecting Wakefield's argument that the Frye hearing was a "farce" because he was not allowed to review the source code, it said he waived the claim when "he proceeded with the Frye hearing in the absence of the source code and did not object in doing so." As for his claim that his right to confront witnesses was violated when he was denied access to the source code, it said, "This argument raises legitimate and substantial questions concerning due process as impacted by cutting-edge science. Given the exponential growth of technologies such as artificial intelligence, to embrace the future we must assess, and perhaps reassess, the constitutional requirements of due process that arise where law and modern science collide." However, while it found "the TrueAllele report is testimonial in nature," it said the source code is not a declarant due, in part, to the "human input" required in using the program. "Also key to our analysis is that [Cybergenetics CEO Mark] Perlin, the creator of TrueAllele and the individual who wrote the underlying source code, was present in court and testified.... Given the totality of the circumstances..., we find that Perlin was the declarant in the epistemological, existential and legal sense rather than the sophisticated and highly automated tool powered by electronics and source code that he created." Since Perlin testified, it said, "we find that there was no Confrontation Clause violation ... because [Wakefield] had the opportunity to confront his true accuser."

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For respondent: Schenectady County Assistant District Attorney Peter H. Willis (518) 388-4364

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 24 Nemeth v Brenntag North America

Florence Nemeth was diagnosed in 2012 with peritoneal mesothelioma, a cancer of the lining of the abdomen. Claiming that her illness was caused by her exposure to asbestos contamination in Desert Flower Talcum Powder, which she used to powder her entire body on a daily basis from 1960 to 1971, she sued Shulton, Inc., the manufacturer of Desert Flower, and Whittaker, Clark & Daniels, Inc. (WCD) a minerals distributor that supplied Shulton with raw talc for its powder. Nemeth died of the cancer in 2016, shortly before the trial began, but she left a videotaped deposition describing her use of Desert Flower. The plaintiff's experts at trial included Dr. Jacqueline Moline, a specialist in environmental medicine and the principal expert on specific causation, who concluded that Nemeth's mesothelioma was caused by her exposure to asbestos in Desert Flower; and geologist Sean Fitzgerald, who found that talc ore from WCD's mines was contaminated with asbestos and tested a vintage sample of Desert Flower in a sealed chamber to simulate Nemith's use of the powder and estimate her level of asbestos exposure.

Shulton settled before trial. The jury found WCD 50% liable for Nemeth's illness and Supreme Court entered judgment of $2.9 million against the company.

The Appellate Division, First Department increased the award to $3.3 million and otherwise affirmed in a 3-1 decision, focusing on the issue of specific causation. It said, "[T]he trial record contains sufficient evidence, consistent with the Court of Appeals' reasoning in Parker v Mobile Oil Corp. (7 NY3d 434 [2006]), to support the jury's verdict and conclusion that Nemeth was exposed to a sufficient quantity of asbestos to cause the disease.... Parker is significant because it recognizes that mathematically precise quantification of exposure to a toxic substance, years after a plaintiff's exposure..., may be impossible and ... alternative means of proof should be available for an injured plaintiff to pursue what may otherwise be a valid claim.... Although Dr. Moline did not precisely quantify the amount of asbestos contaminated talc Nemeth was exposed to when using [Desert Flower], Dr. Moline's conclusion was based upon Nemeth's estimated exposure to such toxin, as derived from Nemeth's own testimony about the timing, frequency and duration of her historical use of [Desert Flower]. Dr. Moline also took into consideration the results of Fitzgerald's testing of an historical sample of [Desert Flower] quantifying the number of asbestos fibers released from [it] in a simulated setting. Thus, the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker." It also rejected WCD's claim that remarks of plaintiff's counsel in summation that Nemeth could have been exposed to asbestos through vaginal excursion, as well as by breathing in airborne fibers, misled the jury and deprived it of a fair trial. It said the trial court's direction to plaintiff's counsel to clarify his remarks, "while perhaps not an ideal choice, was a sufficient cure...."

The dissenter said "plaintiff failed to present expert evidence specifying the level of exposure to respirable asbestos that would have been sufficient to cause peritoneal mesothelioma .... Indeed, plaintiff's medical expert on causation admitted that her report did not offer any numerical definition of a 'significant exposure' to asbestos. While this omission, by itself, renders plaintiff's evidence on causation legally insufficient, plaintiff's experts also failed to quantify the level of Mrs. Nemeth's actual exposure to asbestos – that is to say, they offered no estimate of the amount of asbestos she actually would have breathed in while using Desert Flower in a space with the dimensions and air conditions of her bathroom.... [U]nder the governing precedents of the Court of Appeals, plaintiff's evidence falls short of establishing that Mrs. Nemeth 'was exposed to sufficient levels of the toxin to cause the illness (specific causation)' (Parker, 7 NY3d at 448)." He also said WCD is entitled to a new trial due to the trial court's failure to issue a curative instruction correcting the "prejudicial" remarks of plaintiff's counsel in summation.

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