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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 15

CADMAN WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York
February 12, 2020

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
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 15, the People of the
3 State of New York v. Cadman Williams.

4 Counsel?

5 MR. ZENO: Good afternoon, Your Honors. My name
6 is Mark Zeno, and I represent Cadman Williams. I'd like to
7 reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: Yes, of course.

9 MR. ZENO: Thank you.

10 May it please the court, the question on this
11 appeal is whether the trial court below, confronted with
12 conflicting hearing decisions on two new scientific DNA
13 techniques - - -

14 JUDGE FEINMAN: So - - - so I want to start with
15 what is the actual standard of review. And I don't mean,
16 you know, was it an abuse of discretion. But in terms of
17 the - - - there's this sort of tension between Lahey and
18 the mold case - - - Cornell - - - in terms of do we look at
19 it at the time that the judge is issuing the decision; do
20 you look at subsequent developments; do you - - - you know
21 - - -

22 MR. ZENO: Well, I think in - - -

23 JUDGE FEINMAN: - - - what - - - what is the rule
24 that - - -

25 MR. ZENO: I think in Wesley - - -



1 JUDGE FEINMAN: - - - in terms of that analysis?

2 MR. ZENO: - - - I think in Wesley, which was the
3 DNA case, that the majority opinion was very clear that you
4 look at it at the time the decision was made, and you don't
5 look to subsequent developments in the law.

6 And in fact, it would be really hard, in a case
7 like this, to look to subsequent developments in the law,
8 because the issue is whether there was the appropriate
9 factual record upon which to make a Frye determination, to
10 determine general acceptance.

11 JUDGE FEINMAN: Is the record different as
12 between the issue of low-copy DNA versus the use of S - - -
13 FST?

14 MR. ZENO: Well, they're two different
15 techniques, and they both had reasons in favor of - - - of
16 admitting them and reasons against admitting them. So in
17 that sense, the record is different. The defense made
18 different challenges to each of them, and there were two
19 different court decisions. Finding - - -

20 JUDGE FAHEY: There is a common theme, though,
21 isn't there? How much is enough before you decide to have
22 a Frye hearing? You see, while the - - - while the science
23 is very complicated, the legal issue seems to be relatively
24 straightforward.

25 And - - - so for - - - for us, we don't need to



1 be experts in DNA. What we need to be is experts in the
2 law and whether or not the standard was met here to - - -
3 to require another hearing. And so there are some
4 similarities, don't you think, between the two techniques
5 and the legal standards required?

6 MR. ZENO: I couldn't have said it better.
7 Absolutely, this - - - the court should not be trying to
8 decide whether the science was reliable. The court should
9 be deciding whether when this court made a determination
10 that no Frye hearing was necessary, that was - - - that
11 supported a general acceptance of reliability finding.

12 JUDGE FEINMAN: So - - - so what was the state of
13 the - - -

14 MR. ZENO: What was the - - -

15 JUDGE FEINMAN: - - - the law: Law Review
16 articles, scientific studies, what - - - what was the state
17 at the time in Williams - - - the decision was made as to
18 these two different issues?

19 JUDGE STEIN: And while you're addressing that,
20 if you - - - if you can also address what the - - - the
21 requirement of showing that it's novel and how that fits
22 into what there was.

23 MR. ZENO: Okay. I will try to get to both of
24 those questions.

25 So the st - - - to begin, these were novel tests.



1 I - - - there's no question that they were novel,
2 particularly with regard to FST. During the proceedings
3 below, while my client was waiting to come to trial, they -
4 - - the first report said only that he, you know, could not
5 be excluded as a contributor. A couple of months later
6 they ran new tests with - - - with new - - - a new version
7 of the FST or a new application of the FST, and they - - -
8 they made a much more conclusive finding, saying that it
9 was 4.3 million times more probable, and - - - and still
10 months later, they made an even more conclusive finding as
11 to probability.

12 So with - - - particularly with regard to FST,
13 this was developing as the case proceeded. Nothing can
14 show novelty more than - - -

15 JUDGE FAHEY: Well - - -

16 MR. ZENO: - - - than that.

17 JUDGE STEIN: - - - there were four tests;
18 weren't there?

19 MR. ZENO: There were four tests.

20 JUDGE FAHEY: Starting in 2011. And of the four
21 tests I believe the first test didn't show a match at all;
22 is that correct?

23 MR. ZENO: It could only say - - - it only showed
24 that our - - - my client could not be excluded.

25 JUDGE FAHEY: And then by the third test, it



1 showed a - - - a match, and set up a likelihood ratio. And
2 by the fourth test, that likelihood ratio had increased
3 enormously over the third test.

4 So the - - - there were - - - I don't know if
5 that's unusual, to be honest, but - - - but there certainly
6 was an unusual progression here in the analysis.

7 MR. ZENO: Yes, and I - - - I think it - - -
8 going to novelty, it shows a strong showing of novelty that
9 the tests were still being refined.

10 JUDGE FAHEY: But isn't - - - isn't really the
11 novelty the - - - see, Judge Stein's question goes to the
12 heart of part of it here, I think, because isn't the
13 novelty question, as far as FST, relatively
14 straightforward, because there was - - - it was developed
15 by OCME, and it was a proprietary - - - they had a
16 proprietary interest in it, they were the only ones using
17 it. So it's about as novel as you can get.

18 I think the - - - the more difficult - - - or I
19 should say the closer issue is LCN, and I think you should
20 address that.

21 MR. ZENO: I - - - I'd like to do that. LCN,
22 just as with FST, was only being used - - - this particular
23 method of LCN was only being used by OCME, nationally, in
24 prosecutions. I believe there were - - - there was one or
25 two other places that used it for investigative purposes,

1 but not as proof of guilt.

2 Also - - -

3 JUDGE STEIN: Isn't part of the question whether
4 it was - - - it was really the same as high - - -

5 MR. ZENO: High copy?

6 JUDGE STEIN: - - - high copy - - -

7 MR. ZENO: Um-hum.

8 JUDGE STEIN: - - - DNA and - - - and therefore
9 there's nothing new about it?

10 MR. ZENO: That - - - that's absolutely the
11 question. And it is not the - - - the same as high copy.

12 JUDGE FAHEY: Why is that - - -

13 MR. ZENO: And - - -

14 JUDGE FAHEY: - - - why isn't it the same?

15 MR. ZENO: In fact, the kit that's used for
16 running - - - that was used to run the low copy number DNA
17 testing here was designed for only twenty-eight
18 amplifications.

19 JUDGE FAHEY: And that - - - and the difference
20 being that with low copy DNA, it's thirty-one
21 amplifications?

22 MR. ZENO: It's thirty-one. As far as - - -

23 JUDGE FAHEY: And what does that - - - what does
24 that create in terms of differences between - - - twenty-
25 eight to thirty-one seems like a small difference.



1 MR. ZENO: Well, it - - -

2 JUDGE FAHEY: Why is that unique?

3 MR. ZENO: - - - according to the experts, it's
4 not a small difference, and - - -

5 JUDGE FAHEY: But why?

6 MR. ZENO: Why - - -

7 JUDGE FAHEY: Why?

8 MR. ZENO: - - - is it not? Because it creates
9 mult - - - it's a multiplier of error.

10 JUDGE FAHEY: Doesn't it create eight times more
11 material from twenty-eight to thirty-one; is that correct?

12 MR. ZENO: Eight times more - - -

13 JUDGE FAHEY: Is that your understanding?

14 MR. ZENO: - - - material? I'm not sure whether
15 it's an exponential - - -

16 JUDGE FAHEY: That's my understanding of it. And
17 so - - -

18 MR. ZENO: - - - or an arithmetical progression.

19 JUDGE FAHEY: - - - so - - - so the error
20 question then is whether or not it creates more errors in
21 its replication and therefore isn't as trustworthy, because
22 of the large increase in amplified material.

23 MR. ZENO: That's correct.

24 JUDGE FAHEY: So - - - yeah. Now, what - - -
25 what expert argued that in court?



1 MR. ZENO: What ex - - - we didn't have any
2 opportunity to - - -

3 JUDGE FAHEY: Right. You - - -

4 MR. ZENO: - - - to present that expert - - -

5 JUDGE FAHEY: - - - you brought - - - you brought
6 somebody - - -

7 MR. ZENO: - - - in open court.

8 JUDGE FAHEY: - - - you were going to bring in -
9 - - well, how do you say his name?

10 MR. ZENO: Budowle.

11 JUDGE FAHEY: Yeah. Budowle.

12 MR. ZENO: Right. Budowle. I mean, he's
13 considered the father of DNA examination. And he found
14 this test to be unreliable. And I believe he testified,
15 ultimately, at - - - in the Collins hearing, and said the
16 same thing. And - - -

17 CHIEF JUDGE DIFIORE: Did he find it unreliable?

18 MR. ZENO: He found that it was not - - - yes, he
19 found it to be unreliable, that it was not generally
20 accepted as reliable.

21 And that's - - - and that is the hearing and that
22 is the testimony that my client was deprived of.

23 JUDGE FEINMAN: So let's say you're right that
24 you should have had a hearing, for the purpose of this
25 question, why isn't it harmless error?



1 MR. ZENO: Why isn't it harmless error? Because
2 the jury - - - my client was confronted with the fact that
3 a jury was going to hear that it was 125 times more
4 probable that he and an unknown person touched the - - -
5 held onto this gun than two unknown people. With that
6 evidence against him, he had no choice but to take the
7 stand and testify that he was justified in doing so.

8 Without that evidence - - -

9 JUDGE STEIN: But - - - but - - - but it's - - -
10 there - - - in this particular case, there was - - - there
11 was eyewitness testimony; there was his own admission; I
12 mean, there was the video surveillance. So how - - - how
13 does - - - how does he get around all that?

14 MR. ZENO: Okay. So let me take those one at a
15 time. There was video - - -

16 JUDGE STEIN: Well, you have take them together,
17 but can - - - you can - - -

18 MR. ZENO: Well, I want to - - -

19 JUDGE STEIN: - - - address them one - - - one at
20 a time; sure.

21 MR. ZENO: There was identification testimony. I
22 think in People v. Levan, under similar circumstances, they
23 found that an iden - - - identification testimony was not
24 sufficient. So - so let's start there.

25 There was surveillance testimony. I looked at



1 the video last night again, and it is essentially figures
2 moving in a way that the witnesses described, but there's
3 no basis for making an identification on the basis of that.

4 There were the Ri - - - there was a single Rikers
5 call where my client definitely did not confess to this - -
6 - to this incident, but said something - - - something
7 vague about not doing a shooting or not doing another
8 shooting or words to that effect.

9 JUDGE FAHEY: I thought, though, the Irizarry
10 testimony was - - - is that what how you say it - - -
11 Irizarry - - - I'm not sure about the - - -

12 MR. ZENO: Um-hum. Girlfriend.

13 JUDGE FAHEY: - - - name pronunciation. But I
14 thought that was pretty compelling.

15 MR. ZENO: It was - - - it was - - - you know, on
16 its face, it was - - - it was strong evidence of my
17 client's guilt. But had there not been - - - it wasn't 125
18 million times more probable from a forensic scientist.
19 That - - - that was the testimony he was confronting.

20 And he really had no choice but to take the stand
21 and present a justification defense, when confronted with
22 that - - - with that testimony.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 MR. ZENO: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. MCIVER: May it please the court, Robert
2 McIver on behalf of the Bronx County District Attorney's
3 Office.

4 JUDGE STEIN: Can I - - - can I start with a - -
5 - a slightly different question about nov - - - novelty?

6 MR. MCIVER: Sure.

7 JUDGE STEIN: Because I'm a little confused about
8 that. I - - - I think - - - to me, the novelty is the end
9 of the inquiry, which is: is - - - is it generally
10 accepted as reliable? And if it's - - - if it is, then
11 it's not novel, and if it isn't, then it is novel.

12 So I don't understand this putting the
13 requirement of having to show that it's novel before you
14 get to the question of whether you're entitled to a - - -
15 to a Frye hearing. Am - - - am I - - - am I missing
16 something here?

17 MR. MCIVER: So I think that the broader issue is
18 that Frye is only implicated when we have something as - -
19 - that is novel. And the issue, therefore, is that it
20 makes sense to address it as a threshold determination,
21 under those circumstances.

22 Now, I agree that general acceptance is
23 intertwined, in a lot of ways, with novelty. The longer
24 that something is around, the more likely that it's going
25 to be generally accepted and the scientific community will

1 have an opportunity to evaluate it.

2 JUDGE STEIN: But I thought the question for Frye
3 was, is there general acceptance among the relevant
4 scientific community. And they talk about counting - - -
5 you know - - -

6 MR. MCIVER: Right.

7 JUDGE STEIN: - - - counting scientists.

8 MR. MCIVER: So in Chief Judge Kaye's
9 concurrence, she specifically says: "The court" - - -

10 JUDGE FAHEY: You're talking about Wesley?

11 MR. MCIVER: That's correct, I'm sorry.

12 JUDGE FAHEY: Yeah, that's all right.

13 MR. MCIVER: "The court agrees unanimously that
14 where the scientific evidence sought to be presented is
15 novel, the test is that articulated in Frye." That - - -
16 that implies that this would be a threshold determination.
17 And interpreting it that way will place this court in line
18 with California, Illinois, Pennsylvania, and Washington as
19 well.

20 It's not novel where it is a mere refining or
21 sensitizing of an existing technology. And that's the
22 issue. And I think that the touchstone of that inquiry is
23 ultimately whether there can be a meaningful battle of the
24 experts on - - - under those circumstances.

25 JUDGE FAHEY: Well, let's take an example,



1 because it's an interesting point, actually. Fingerprints.
2 Fingerprints were - - - were once viewed as the DNA of
3 evidence. They were the gold standard. That's not the
4 case anymore, though, is it?

5 MR. MCIVER: So I think there's a distinction to
6 be made there in terms - - -

7 JUDGE FAHEY: But just as to my point, it's
8 really not the case anymore. Fingerprints are not - - -
9 are not really viewed in the same way anymore. The
10 statistical probabilities have seem to have been reduced by
11 the FBI numbers I've seen, significantly, as far as the use
12 of fingerprints in identification.

13 MR. MCIVER: So I think that there's two points
14 here. The first is that it goes back to the original
15 determine - - - the original question today, is that it
16 should be viewed at the time of the decision, that all of
17 the Frye inquiries, whether we're addressing the no - - -
18 the threshold determination - - -

19 JUDGE FAHEY: Yeah, I - - - but that's not my
20 question for you.

21 MR. MCIVER: Sure.

22 JUDGE FAHEY: I understand that point. And
23 that's a valid point that you're making. But the point I'm
24 trying to make is that science changes and that analyses
25 (sic) must then change. And that in this particular area,

1 there seems to be a profound difference between the experts
2 that we've seen between HCN DNA analysis, which is, I think
3 as unquestioned as we're going to get, right now, and LCN -
4 - -

5 MR. MCIVER: Right.

6 JUDGE FAHEY: - - - DNA analysis. Fingerprints
7 do the same thing.

8 Now, this court has had a number of types of
9 forensic scientific methods that have been accepted and
10 approved - - - bite mark analysis - - - and then we've
11 given the stamp of approval to those techniques. And then
12 later on - - - it's pretty much a consensus now that that
13 was wrong. So they don't provide - - -

14 MR. MCIVER: I'm - - - I'm reminded - - - I think
15 that that dovetails with the concerns articulated in the
16 amicus brief from the Innocence Project. And our point is
17 that novelty doesn't end all of those inquiries - - -
18 whether it's novelty or general acceptance.

19 And that's not only our point, that's how it's
20 being practiced.

21 JUDGE FAHEY: Um-hum.

22 MR. MCIVER: Now, to - - - to take it a step
23 further, you've - - - you've identified fingerprints, and -
24 - - and we - - - I would add to that toolmark
25 identification. That's not novel - - -



1 JUDGE FAHEY: I'm sorry, what - - -

2 MR. MCIVER: Toolmark identification. This was
3 also - - - it was brought up in the PCAST report in a
4 number of ways.

5 JUDGE FAHEY: Okay.

6 MR. MCIVER: So with respect to that, those
7 aren't novel, necessarily. But that doesn't end the
8 inquiry where - - -

9 JUDGE STEIN: Well, then how can it be a
10 threshold question in - - -

11 MR. MCIVER: It's a threshold question in - - -
12 in the sense that it - - - it helps to avoid - - - I'm
13 sorry - - - it's a threshold determination as to whether it
14 is something that is simply sensitizing. So it's not a
15 threshold determination that I think ends the inquiry; and
16 it also doesn't create a situation in which we can - - -
17 that it leads to absurd results.

18 And that's the - - -

19 JUDGE STEIN: So aren't we really looking at a
20 number of things? We're looking at literature. We're
21 looking at other court decisions. Significantly, I think,
22 maybe Appellate Court decisions. Right? We're looking at
23 what kind of - - - we're not just looking at any case
24 decisions - - -

25 MR. MCIVER: Um-hum.



1 JUDGE STEIN: - - - because a lot of times, I
2 think, one case just relies on another case, on another
3 case, on another case. And nobody's really done any real
4 inquiry.

5 So I think the question that really we're all
6 looking at here is how much is enough?

7 MR. MCIVER: In terms of the underlying - - -

8 JUDGE STEIN: To get you to the Frye hearing,
9 yes.

10 MR. MCIVER: To get to the Frye hearing. So my
11 broader issue, I - - - I would say, is that the Frye
12 hearings themselves don't offer all that much over the
13 underlying submissions. And in fact, in a lot of
14 situations, the Frye hearings create a misrepresentation of
15 the state of the evidence.

16 JUDGE FAHEY: But don't they create a record so
17 that for - - - for courts to rely on to review for
18 reliability. And - - - and that's what we're looking for
19 here.

20 MR. MCIVER: I don't know - - -

21 JUDGE FAHEY: And that - - - that's sort of the
22 basic scientific premise that this can be repeated
23 accurately and get the same results with the same
24 materials. Go ahead.

25 MR. MCIVER: And - - - and I - - - I think that



1 the combination of factors articulated in LeGrand, between
2 the peer review, the validation studies, the scientific
3 literature, I think, is the more important category.

4 If you have kind of - - - and I think that that
5 happened in - - - in Collins in a lot of ways.

6 JUDGE FAHEY: Um-hum.

7 MR. MCIVER: I think that rep - - - represents
8 the - - - the potential flaws in overemphasizing hearing
9 testimony. If you have the state - - - in our view, the
10 state of the literature as it related to the FST and - - -

11 JUDGE RIVERA: But that's not - - - that's not
12 the basis for the court's decision below, is it?

13 MR. MCIVER: I think - - - in this case?

14 JUDGE RIVERA: Yes.

15 MR. MCIVER: I - - - I think it was one of the
16 reasons that it didn't grant the hearing, is that there was
17 no - - - there was nothing more that was going to come out
18 of the hearing that wasn't going to be reflected already in
19 the peer review of literature.

20 JUDGE RIVERA: Well, let's say we disagree with
21 you. Let's get to the point of once you have conflicting
22 hearing outcomes from other courts, what is a court to do
23 with that? Once I - - - once a judge knows that - - -

24 MR. MCIVER: So - - -

25 JUDGE RIVERA: - - - why shouldn't the judge



1 grant a hearing, at that point?

2 MR. MCIVER: Because all LeGrand does is ask the
3 courts to take judicial notice. It could take judicial
4 notice whether something is a hearing or if it's simply a
5 filing in another court. So - - -

6 JUDGE FAHEY: You know, it's - - - one of the
7 things that strikes me is your theory places an enormous
8 emphasis on the one Frye hearing that's held initially and
9 everything else flows from that.

10 In this case, it seems we have two analyses that
11 everything flows from: the Megnath hearing, where a
12 hearing was held on the LCN, and then - - - DNA analysis;
13 and then the Garcia case, where FST was - - - was - - - was
14 not given a hearing.

15 MR. MCIVER: Correct. And then there was also
16 Rodriguez, out - - -

17 JUDGE FAHEY: Right.

18 MR. MCIVER: - - - out - - -

19 THE COURT: Okay. But let - - - let's just stay
20 with that. My point is since then there have been 140
21 cases that have cited and have said well, they held it
22 here, so that must be good enough. But the point was, is
23 that they relied on the same analysis.

24 So if you just keep a - - - it's like those DNA
25 errors that they say if you keep replicating them, that



1 doesn't make them true; it doesn't solve the underlying
2 problem.

3 It's - - - from a court point of view, I - - -
4 we're kind of confronted with his Copernican problem. The
5 Copernican problem is, what if the world isn't flat? What
6 if the facts are wrong? And how do we test that? And
7 since Copernicus, we have this method - - - the scientific
8 method where we decide how - - - what's right or wrong.
9 And - - - and at least - - - and what that - - - and what
10 we decide it based on is can it be repeated? Is it
11 verifiable? Is it reliable?

12 And that's - - - that's what sought to be tested
13 here, and that's why I'm challenging your approach.

14 MR. MCIVER: Sure. So I think that there's three
15 answers to that. The first is that it goes back to my
16 broader point with respect to the Frye hearings themselves.

17 If you have a mountain on one side of peer review
18 and validation studies and on the other side you have a few
19 scientific dissenters, that - - - that would alone, without
20 a hearing, reflect generalized acceptance. And Frye
21 contemplates a lack of unanimity on a lot of scientific
22 issues.

23 So you don't - - -

24 JUDGE STEIN: Well, does it matter where this - -
25 - you know, this review, this analysis comes from? For



1 example, if it comes from the very entity that's using it,
2 does that make a difference?

3 MR. MCIVER: So the issue - - - I assume that
4 this is in reference to OCME's internal validation?

5 JUDGE STEIN: Um-hum.

6 MR. MCIVER: I think that the broader - - -

7 CHIEF JUDGE DIFIORE: Also tack on to the answer
8 - - - excuse me for interrupting you - - - where - - -
9 where does the Commission on Forensic Science and the DNA
10 subcommittee, fit into this equation?

11 MR. MCIVER: So they're independent. They're
12 created by the - - - the legislature, in particular, to
13 make sure that the - - - that science in New York, in
14 particular DNA science in res - - - respect to the DNA
15 subcommittee, is done so in - - - in accordance with the
16 highest standards under - - - I'm sorry, the si - - - the
17 highest scientific standards practice - - - practicable.

18 JUDGE STEIN: But how do we know if they
19 represent a consensus in the relevant scientific community?
20 These are - - - these are certain people that are
21 handpicked, right, by government actors.

22 MR. MCIVER: They're - - - they're handpicked for
23 the purpose of representing the relevant scientific
24 communities. And I think that that's an incredibly
25 important distinction here, that it's not circular logic

1 that just - - -

2 JUDGE RIVERA: Don't you have now one member, at
3 least, who has taken a different position?

4 MR. MCIVER: And I think that that would be
5 something that should be within the discretion of the lower
6 court to look at that and say - - -

7 JUDGE RIVERA: But why - - -

8 MR. MCIVER: - - - maybe that - - -

9 JUDGE RIVERA: - - - but that's - - - but going
10 back to my question - - -

11 MR. MCIVER: But - - -

12 JUDGE RIVERA: - - - in light of - - - but this
13 is - - - I'd like to understand from you your rule as to
14 what is a judge to do when they have conflicting Frye
15 determinations and - - - it appears - - - there's one
16 member of at least one of those entities that you've
17 described, is now placing in question the use of the
18 particular methodology.

19 Why - - - why isn't that enough to trigger a Frye
20 hearing. We're not saying the outcome - - -

21 MR. MCIVER: Sure.

22 JUDGE RIVERA: - - - has to be one or the other,
23 just the Frye hearing.

24 MR. MCIVER: It's to recognize the fact that the
25 Frye hearings under that circumstance don't necessarily add



1 much to the overall peer review, that they're not going to
2 disturb validation studies, that they're not going to - - -

3 JUDGE RIVERA: But again, that - - - was that the
4 basis for the determination below?

5 MR. MCIVER: I think that the court declined to
6 follow Collins, in part, because Collins wasn't actually
7 applying Frye. It was a modified Daubert decision in which
8 it simply looked at the conclusions and said it was placing
9 emphasis on what it believed the correct state of the
10 science was. It wasn't counting the scientific votes.

11 And that goes back to my broader point - - -

12 JUDGE STEIN: Does it matter how long something's
13 been around? In other words, if something's been around a
14 really long time, then you would expect there would be more
15 studies that may or may not contradict the original
16 validation study - - -

17 MR. MCIVER: That - - -

18 JUDGE STEIN: - - - or studies. But if something
19 is - - - you know, hasn't been used for very long, there
20 really hasn't been time for all that to develop. Does that
21 make a difference?

22 MR. MCIVER: Not in - - - in the case of
23 sensitizing of an existing technology. When you're putting
24 forward LCN DNA, which is basically the exact same four
25 steps of PCR, you have the ability to make meaningful



1 estimations very quickly with respect to that.

2 And it wasn't - - - this was not something that
3 developed - - -

4 JUDGE STEIN: But there was some testimony that
5 that - - - that was not true. So that's - - - that's my
6 point is, okay, so you have the HCN, right - - -

7 MR. MCIVER: Um-hum.

8 JUDGE STEIN: - - - and then along comes the LCN.
9 And you say one thing, but you know, there's somebody over
10 here that's saying, oh, not so fast. But the studies
11 haven't been done yet. That - - - that's my question.

12 MR. MCIVER: The biggest distinction between LCN
13 and HCN related to allelic dropout. And I think the
14 Washington courts in Bander and Russell handled this well
15 by saying allelic dropout is something that necessarily
16 goes to the weight of the evidence, not admissibility under
17 Frye.

18 And I'd also note that in all forms of
19 probabilistic genotyping and in all forms of DNA, there's
20 going to be some uncertainty present in the estimation of
21 various parameters, not just drop-in and drop-out.

22 JUDGE WILSON: So in - - - in your view, what
23 would be the circumstances in which it would be an abuse of
24 discretion for a court to deny a Frye hearing?

25 MR. MCIVER: If there's a substantial showing



1 controverting the underlying science in a way that goes to
2 the general acceptance that cannot be resolved by a battle
3 of the experts. And that's not present here, because we
4 can look at the underlying submissions here and recognize
5 that this is perfect for a battle of the experts, a battle
6 of likelihood ratios, a battle of assumptions, as to
7 allelic dropout rates.

8 That's the kind of thing that goes before the
9 jury. That wasn't present here. And more importantly, the
10 scientific dissent, which is contemplated under Frye, did
11 not rise to the level of granting a hearing.

12 JUDGE FAHEY: Can I - - - Judge, sorry?

13 CHIEF JUDGE DIFIORE: Please.

14 JUDGE FAHEY: Yeah. If 0 - - - if this case came
15 to OCME today - - - today, right now in 20 - - - in 2020,
16 would these same techniques be used to analyze this DNA?

17 MR. MCIVER: With - - - this is with reference -
18 - - I'm sorry - - -

19 JUDGE FAHEY: Both - - - to both LCN and FST. Is
20 it correct to say that neither of these techniques would be
21 used by OCME now?

22 MR. MCIVER: OCME upgraded its technology to - -
23 - not because there was a problem - - -

24 JUDGE FAHEY: No, no, no, I understand there's -
25 - - I understand there's a rationalization. But my point



1 is, they would not use either one of these techniques
2 today, would they?

3 MR. MCIVER: Only to ensure compliance with
4 CODIS, not because they were worried about - - -

5 JUDGE FAHEY: Well, there was - - - there was a
6 lot of controversy about FST, in fairness to - - - it's
7 sort of outside the record and really isn't directly
8 relevant to your case, in fairness to you. That
9 necessarily wasn't exactly the same with LCN, though to a
10 lesser degree it was.

11 But it is fair to say that OCME wouldn't use
12 these techniques today?

13 MR. MCIVER: They would use the new techniques
14 that they have in order to - - -

15 JUDGE FAHEY: Yeah, but that wasn't my question.

16 MR. MCIVER: It was a cost - - - no, they - - -

17 CHIEF JUDGE DIFIORE: That's my question. Why
18 did they - - - why did they change it?

19 JUDGE FAHEY: Can I just get him to answer mine
20 first - - - before?

21 MR. MCIVER: No, they wouldn't. They have a new
22 - - -

23 JUDGE FAHEY: All right.

24 MR. MCIVER: - - - today.

25 JUDGE FAHEY: That's all I wanted to know. Thank



1 you.

2 MR. MCIVER: To answer the question, what
3 happened was the FBI and international protocols, in order
4 to comp - - - they decided they were not longer going to
5 test at thirteen loci, and they broadened that to twenty.

6 We were using a test that identified sixteen. So
7 in order to - - - to be compatible with these national and
8 international databases, we had to change the underlying
9 software. Now - - -

10 JUDGE STEIN: But isn't that - - - doesn't - - -
11 isn't that some indication that maybe those national and
12 international organizations thought that what was being
13 done was not adequate?

14 MR. MCIVER: No, because it was simply - - -

15 JUDGE STEIN: Not reliable?

16 MR. MCIVER: - - - testing at more loci in order
17 to make sure that they - - - it was - - - it was a cost-
18 benefit analysis, at the end of the day, with respect to
19 OCME, that they believed that they could have reimplemented
20 the FST, but ultimately looked at this and said we have a
21 determination here that we have to upgrade the software.
22 And the software would require, then, revalidation, as to
23 both LCN and the FST, or they could use commercially
24 available practices that weren't going to result in
25 additional litigation.



1 So it was not OCME looking at this and saying the
2 cat's out of the bag, we've been wrong this whole time. It
3 was a cost-benefit analysis.

4 JUDGE STEIN: I'm not suggesting that. What I'm
5 suggesting is that those other organizations made a
6 determination that they were not satisfied with the
7 reliability of what was being used by OCME?

8 MR. MCIVER: I - - - I cannot improve upon the
9 OCME's handling of this. I would direct the court's
10 attention to the respondent's supplemental compendium of
11 materials with respect to OCME's letter, and then the DNA
12 subcommittee's analysis, which ultimately determined that
13 these were still valid under the circumstances,
14 notwithstanding the - - -

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 JUDGE FEINMAN: Chief, I just - - -

17 CHIEF JUDGE DIFIORE: Yes.

18 JUDGE FEINMAN: I know you didn't get the chance
19 to address this and I didn't know if there was anything
20 besides what you've said in your brief that you want to
21 address our attention to on the issue of harmless error.

22 MR. MCIVER: The defendant - - - the People's own
23 case indicated that the victim in this crime threw a
24 baseball bat at the defendant. Ultimately, it was
25 uncontested as to the issue of identity. And the Appellate



1 Division down below recognized that DNA added nothing to
2 the People's case, in part, because of the testimony of the
3 girlfriend, in part because the defendant took the stand
4 and admitted shooting this individual.

5 He said it was in self-defense. The People's own
6 case created a colorable justification defense. The idea
7 that he was going to change radically because we couldn't
8 put in something like the FST and that we couldn't put in
9 any sort of DNA evidence, I think is speculative and beyond
10 the point.

11 Ultimately, the defendant in this case did not
12 contest identity. DNA did not offer anything that we
13 couldn't have achieved through alternative means.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. MCIVER: Thank you, Your Honor.

16 CHIEF JUDGE DIFIORE: Counsel?

17 MR. ZENO: To begin with, the point that opposing
18 counsel made about this is an appropriate weight-of-the-
19 evidence review for a jury; Frye makes clear that there is
20 a threshold beyond which scientific tests must pass before
21 they are appropriately reviewed by a jury.

22 I've spent the last two years studying FST and
23 LCN, and if an expert was cross-examined in front of me, I
24 would understand the concepts they were talking about, but
25 I would be unable to opine about the reliability or how



1 much weight should be given to that testimony or to that
2 evidence. Only an expert can say whether it's reliable,
3 and that's the genius of Frye, is to defer to the experts.

4 And here there was no agreement, no general
5 acceptance by the experts. So I think that the idea that
6 lay jurors can assess whether a test was reliable, whether
7 it was multiplied - - - whether DNA was amplified twenty-
8 eight times or thirty-one times, and what the effects are,
9 and what the meaning of drop-in and drop-out and stutter,
10 that's - - - that's a nonissue. No - - - no lay juror
11 could ever understand that.

12 JUDGE RIVERA: Do you want to quickly address the
13 Del-Debbio and justification issue?

14 MR. ZENO: Sure, on the - - - on the Del-Debbio
15 point, counsel was ineffective, because this was a - - -
16 there were two shots fired, and he allowed, without
17 objection, an instruction to go to the jury that - - - that
18 if either of the two shots caused the victim's death, Mr.
19 Sackey's death, and either of them was not justified, then
20 he was - - - my client was guilty and there was no
21 justification.

22 What was required under the circumstances was an
23 instruction that it was the excessive portion of the force
24 that caused death; and that wasn't given here.

25 And that's a dispositive issue in the case.



1 There was strong evidence that while the first shot might
2 have been justified, the second shot wasn't justified. And
3 - - - and an issue - - - an instruction on which the entire
4 case can turn, if counsel doesn't insist on something
5 that's authorized by the law, that's ineffective assistance
6 of counsel.

7 CHIEF JUDGE DIFIORE: Thank you, Mr. Zeno.

8 MR. ZENO: Thank you.

9 (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. Cadman Williams, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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