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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-

NO. 16

ELIJAH FOSTER-BEY,

Appellant.

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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 next appeal on the  
2 calendar is appeal number 16, the People of the State of  
3 New York v. Elijah Foster-Bey.

4 Good afternoon, Counsel.

5 MS. ZLOCZOWER: Good afternoon. May it please  
6 the court, Dina Zloczower on behalf of appellant. I'd like  
7 to reserve two minutes of rebuttal time.

8 CHIEF JUDGE DIFIORE: Yes, of course.

9 MS. ZLOCZOWER: It was error for the court below  
10 to summarily deny appellant's motion to preclude the DNA  
11 evidence or for a Frye hearing when no court in any  
12 jurisdiction - - -

13 JUDGE GARCIA: Counsel, to go back to something I  
14 think Judge Stein was getting at earlier, which is I think  
15 where you're going now, which is how much is enough - - -  
16 right, how much is enough to - - - to trigger a Frye  
17 hearing. And it seems like it's very hard to disassociate  
18 the test - - - that test from the technology. And I think  
19 we've been talking about the timing of when this case was  
20 brought.

21 So what's the literature - - - what's the state  
22 of the literature, at that point? How many decisions have  
23 there been, particularly Appellate Division - - - as I  
24 think Judge Stein mentioned - - - the timing about that  
25 case - - - et cetera. And then you apply these factors



1 which the court has laid out. A lot of them seem fairly  
2 common-sensical.

3 You know, in the Wesley concurrence, Judge Kaye -  
4 - - and you arrive, I think, at a conclusion. So to me it  
5 seems that how much is enough is always going to be  
6 affected by those variables. Right?

7 So I - - - I don't think anyone here in these  
8 cases - - - I don't - - - you - - - are asking us for a  
9 rule that says one court case isn't enough, right? I mean,  
10 because you'd have to look at a lot of different variables  
11 and this technology, right? Is that - - - is that fair?

12 MS. ZLOCZOWER: I'm asking the court to - - - to  
13 hold what it has held in the past, which is at least one  
14 inquiry is - - -

15 JUDGE GARCIA: Okay, at least one.

16 MS. ZLOCZOWER: - - - absolutely necessary. And  
17 here there was none.

18 JUDGE GARCIA: Okay. So your rule would be an  
19 "at least one" rule?

20 MS. ZLOCZOWER: I'm - - - I'm - - - I'm - - - for  
21 purposes of this case - - -

22 JUDGE GARCIA: For purposes of this case.

23 MS. ZLOCZOWER: - - - at least one.

24 JUDGE GARCIA: And - - - and I think that's - - -

25 MS. ZLOCZOWER: I'm not saying that that's the



1 rule for - - - for every other case.

2 JUDGE GARCIA: And I think that's my - - - my  
3 point that I'm trying to get at is that would be the rule  
4 here, and given your arguments, which you've laid out very  
5 well in your brief, at the state of this technology at this  
6 time, and what the court decisions were.

7 And now we fast-forward however many years from  
8 now, they don't use this technology anymore, totally  
9 different issues would come up with the DNA or whatever  
10 they're doing right now. Right?

11 So this would be a test and an analysis based on  
12 - - - on your facts and circumstances and the technologies  
13 that existed at that time?

14 MS. ZLOCZOWER: Um-hum. And - - - and allow me  
15 to just contextualize this a little. FST was launched in  
16 July of 2011. Testing in this case was completed in  
17 September of 2011, three months in, early days. No  
18 scholarship yet. As Judge - - - then Chief Judge Kaye said  
19 in her concurrence in Wesley: it's too early. It's too  
20 early to establish an opposition to it. It's too early.

21 No Appellate court had rendered a decision, as  
22 Your Honor has just pointed out. And of course, this was  
23 novel. FST - - -

24 JUDGE FAHEY: Wasn't the core, though, of the F -  
25 - - FST criticism that I would draw from Judge Kaye, is



1 that she - - - she said that if you have a proprietary  
2 interest in the - - - in the method being examined, then -  
3 - - then your opinion can't be considered dispositive? So  
4 if OCME is the only one who's using it and it's what they  
5 developed, then they can't be considered the be-all and the  
6 end-all - - - they can't be the definitive opinion on it.  
7 And since those are the only ones who have ever seen it or  
8 used it, it's almost impossible to judge it.

9 MS. ZLOCZOWER: Right. There's an implicit bias  
10 in - - - in - - - in your own self validation, and it goes  
11 contrary to the idea that it's the general scientific  
12 community that needs to have a consensus about it. It's  
13 not just your own - - -

14 CHIEF JUDGE DIFIORE: Did the Commission on  
15 Forensic Science approve those validation studies?

16 MS. ZLOCZOWER: So the - - - the commission - - -  
17 the DNA subcommittee, to be exact - - -

18 CHIEF JUDGE DIFIORE: Um-hum.

19 MS. ZLOCZOWER: - - - approved what was presented  
20 to them. And that wasn't a complete set of information, we  
21 learned later.

22 And also, in particular, for this particular  
23 case, the validation studies that were presented to the DNA  
24 subcommittee were limited to twenty-five picograms and up.  
25 The - - - the - - - the minute amount at issue here is



1 16.3. That was never validated by OCME, and it was never  
2 approved of by the DNA subcommittee.

3 And then what - - - the information that was  
4 given to the DNA subcommittee was apparently incomplete.  
5 There had been changes made to the source code, to the  
6 computer programming of the FST after its approval.  
7 Changes were made to the protocol. And at least one of the  
8 members of the committee said that there wasn't enough time  
9 to actually review all the information presented.

10 But again, it's - - - it's self-validation and a  
11 state agency that is really tasked at accreditation, is not  
12 - - - cannot be a substitute for a Frye inquiry.

13 CHIEF JUDGE DIFIORE: I wasn't suggesting a  
14 substitute.

15 MS. ZLOCZOWER: Well, here, that's the only thing  
16 that the People actually argued. I mean, and - - - and in  
17 fact, it's the only thing that was before the court was a  
18 decision in Garcia - - -

19 JUDGE FAHEY: But - - - but it's certainly  
20 something you'd consider, I think, that - - -

21 MS. ZLOCZOWER: It's - - - it's one of many  
22 factors.

23 JUDGE FAHEY: Okay.

24 MS. ZLOCZOWER: As is, you know, scholarship, as  
25 is appellate review, as is the opinions of other experts,



1 be that on the papers or at a hearing. You've - - - this  
2 court has said again and again, it has to be a combination  
3 of - - - of sources. And we've got to give this time to  
4 develop so that a record can be before a court to render a  
5 decision.

6 JUDGE FAHEY: The other - - - the way - - - the  
7 other argument I understand in favor of the FST is that it  
8 applied what's known as Bayesian analysis, based on Thomas  
9 Bayes and a statistical analysis or probability analysis,  
10 to develop a likelihood ratio, and that those formulas are  
11 standard mathematical formulas that are relied on in a  
12 broad range of fields, and there's nothing unusual about  
13 them.

14 MS. ZLOCZOWER: All - - - all of science involves  
15 theories and principles that have been established a long  
16 time ago.

17 JUDGE FAHEY: Um-hum.

18 MS. ZLOCZOWER: Let's just look at the Frye case.  
19 The Frye case involved blood pressure and whether you can  
20 measure someone's blood pressure and whether you can apply  
21 that to the truthfulness of their statements.

22 No one argued that the diagnostic ability of  
23 measuring blood pressure, that wasn't novel at the time.  
24 It's the application. Yes, likelihood ratio - - - ratios,  
25 Cardinal Bayes developed the idea of likelihood ratios a



1 long time ago. But it's their application to it here, in  
2 this context, that is novel. And what is particularly  
3 novel here is the way that the OCME programmed the  
4 Stochastic effect prob - - - rates and - - - and how they -  
5 - -

6 JUDGE FAHEY: Okay. Tell us what you mean by  
7 that?

8 MS. ZLOCZOWER: What I mean by that is, so this  
9 is a complicated mathematical - - - based on Bayes theorem  
10 - - - software program.

11 JUDGE FAHEY: We accept it's complicated but - -  
12 - trust me.

13 MS. ZLOCZOWER: All right, but used as - - -

14 JUDGE FAHEY: But tell us - - - tell us what you  
15 mean by stochastic effects and what you mean by what you're  
16 saying to us.

17 MS. ZLOCZOWER: Sure. So it takes what is - - -  
18 what was then already controversial, the results of LCN  
19 testing - - -

20 JUDGE FAHEY: Um-hum.

21 MS. ZLOCZOWER: - - - and takes those results - -  
22 - in this case it was tested on fifteen locations - - -

23 JUDGE FAHEY: Um-hum.

24 MS. ZLOCZOWER: - - - only - - - there was only  
25 information for seven of them. So a lot of it was missing.



1 And it takes that profile that's developed by LCN, and then  
2 tries to calculate the likelihood of the suspect being one  
3 of two or three contributors.

4 And that's what this software program was  
5 designed to do. And the reason it was designed to do that,  
6 and the reason it's novel, actually, is before that, the  
7 OCME, all it could say was the person cannot - - - is a - -  
8 - cannot be excluded as a contributor.

9 And to add mathematical meaning to that to assist  
10 the jury, they developed a brand new software program,  
11 another reason why it's novel. And then they copyrighted  
12 it. Another reason why we know it's novel. And then they  
13 sought to get approval for it, et cetera, et cetera.  
14 Clearly novel.

15 And so what it does it devel - - - it then comes  
16 up with a - - -

17 JUDGE FAHEY: Well, the - - - the novelty aspect  
18 of this seems to be self-evident to me, as to FST. But the  
19 reliability is a different question.

20 MS. ZLOCZOWER: Okay. So why is FST not  
21 reliable? Because it has been critic - - - criticized  
22 heavily for basing its estimates on the stochastic effects,  
23 on pristine lab-generated samples, not on real-world  
24 samples that actually involve the degradation that we see.

25 JUDGE FAHEY: And that was a criticism that was



1 made by Mr. Budowle?

2 MS. ZLOCZOWER: No.

3 JUDGE FAHEY: Dr. Budowle? No?

4 MS. ZLOCZOWER: That - - -

5 JUDGE FAHEY: Where did that - - - where did that  
6 criticism come from?

7 MS. ZLOCZOWER: That criticism comes from - - -  
8 at a later time than - - - than here - - -

9 JUDGE FAHEY: Um-hum.

10 MS. ZLOCZOWER: - - - because we didn't get a  
11 chance of a Frye hearing - - - it comes from - - - from - -  
12 - out of Collins.

13 JUDGE FAHEY: Oh, all right.

14 MS. ZLOCZOWER: And other - - -

15 JUDGE FAHEY: So - - - okay. So Co - - - this  
16 trial took place in in 2013; Collins was in 2015. But the  
17 Appellate Division had Collins in front of it in 2018, when  
18 it reviewed it.

19 MS. ZLOCZOWER: Correct.

20 JUDGE FAHEY: Yeah.

21 MS. ZLOCZOWER: And the old decision in Collins  
22 is actually earlier.

23 JUDGE FAHEY: I see.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 MR. LIEBERMAN: Good afternoon. My name is Seth



1 Lieberman.

2 There's something deeply wrong about reviewing  
3 the propriety of the trial court's dec - - - Frye decision  
4 based on information that wasn't presented to it. The - -  
5 -

6 JUDGE STEIN: Well, but isn't that the point, was  
7 that the defendants were seeking to present information to  
8 the court?

9 MR. LIEBERMAN: No, Your - - - Your Honor, the -  
10 - - the People had presented and the defense was aware at  
11 the time of decisions that had held that both LCN and FST  
12 were generally accepted.

13 JUDGE STEIN: Well, let's talk about F - - - FST.  
14 What were those decisions? What courts were they from and  
15 what did they rely on to make - - -

16 MR. LIEBERMAN: The - - -

17 JUDGE STEIN: - - - their determinations?

18 MR. LIEBERMAN: The - - - with respect to FST,  
19 there was the decision in Garcia, there was the decision in  
20 Percet.

21 JUDGE STEIN: Yes, but what were those decisions  
22 based upon? Were they - - -

23 MR. LIEBERMAN: Yes, they re - - -

24 JUDGE STEIN: - - - based upon - - -

25 MR. LIEBERMAN: - - - they reviewed - - - they



1 reviewed a decision by the New York State Commission on  
2 Forensic Science, the National Forensic Science Technology  
3 Center, which also looked at these technologies. According  
4 to the decision on Garcia, numerous scientific groups had  
5 peer-reviewed and accepted the validity of FST.

6 That's what the court said. If this defendant  
7 wanted to show otherwise in order to get a hearing, in  
8 order to put into play the notion that it wasn't generally  
9 accepted, because you already had courts that had held they  
10 were generally accepted, then the defense should have said  
11 something to indicate that there was a problem with those  
12 previous decisions.

13 And what the defense said in his papers was  
14 totally inadequate. All he said was well, there - - -  
15 there wasn't any Appellate decision cited. That's not a  
16 legal requirement.

17 He said they didn't cite to the - - - the opinion  
18 of the national scientific community. That's not the legal  
19 standard. It's not the entire scientific - - - national  
20 scientific community that's supposed to be looking at this;  
21 it's the relevant scientific community.

22 With respect to FST, he - - - he didn't provide  
23 any documentation challenging it. And with respect to the  
24 LCN, all he presented was this one article which the main  
25 author had testified at the Frye hearing in Megnath and the



1 Megnath court had implicitly rejected that expert's  
2 testimony.

3 And also, that decision - - - that article  
4 referred to a United Kingdom Commission study of LCN, which  
5 had concluded that that could be relied upon, that it was  
6 robust and therefore could be used in criminal cases.

7 So now the defense, for the first time, is  
8 bringing all this new information and saying, oh, see,  
9 that's why this Frye court made the wrong decision. But  
10 that can't be the basis for determining whether the Frye  
11 court properly exercised its discretion. It has to be  
12 based on what information was presented it.

13 Not only that, the defendant is relying on  
14 information that wasn't even in existence at the time of  
15 the - - - of the Frye decision.

16 JUDGE FAHEY: So could - - - so could the  
17 Appellate Division consider the Collins co - - - Collins  
18 decision?

19 MR. LIEBERMAN: Absolutely not.

20 JUDGE FAHEY: I see.

21 MR. LIEBERMAN: Because - - -

22 JUDGE FAHEY: That's your position?

23 MR. LIEBERMAN: Yes, because this is - - - this  
24 is shifting. It's a shifting - - -

25 JUDGE STEIN: But doesn't the Collins decision at



1 least suggest that maybe the - - - the conversation hadn't  
2 played out yet?

3 MR. LIEBERMAN: No, no, bec - - - because you  
4 have one - - - you already - - - first of all, you - - -  
5 you have an initial decision in - - - in Garcia, which had  
6 reviewed some of the literature. Then you have Rodriguez,  
7 which held that it was generally accepted. So now you have  
8 another court. And - - -

9 JUDGE FAHEY: But those are - - -

10 MR. LIEBERMAN: - - - certainly - - - cert - - -

11 JUDGE FAHEY: - - - those are all - - - excuse me  
12 - - - those are all trial-level courts. So now the  
13 Appellate Division reviews the case law that's out there at  
14 the time the case comes to it. And the way I understand  
15 what you're saying is they can't look at that case law?

16 MR. LIEBERMAN: Your Honor, no, because - - - and  
17 I'll tell you - - -

18 JUDGE FAHEY: I'm not saying that they have to  
19 look at it in terms of saying, okay, for its factual  
20 determinations. That's a little bit different.

21 But they - - - they can look at it and say, well,  
22 the standard's been applied differently here in this  
23 instance than it was in this other case. Otherwise, under  
24 your theory, the only thing that they could look at would  
25 be everything that happened in 2013, and that would be it.

1 MR. LIEBERMAN: No, the only thing they could  
2 look at - - - because this is a - - - these - - - these are  
3 appellate courts, they're not - - - it's not de novo  
4 review. What they can look at were the facts that were  
5 before the court when it made its decision. That is how  
6 you determine whether a court properly exercised its  
7 discretion, just as in a Wade hearing or a Huntley hearing,  
8 you can - - -

9 JUDGE FAHEY: No, I do - - -

10 MR. LIEBERMAN: - - - rely on the evidence - - -

11 JUDGE FAHEY: - - - I do understand your  
12 argument. I - - - I understand what you're saying. I  
13 don't know if I entirely agree with it. There's a  
14 difference in different cases. But I understand your  
15 argument.

16 MR. LIEBERMAN: And - - - and Your Honor, this  
17 court has indicated and other courts have - - - have stated  
18 - - - and maybe this court has stated it as well - - - that  
19 the issue is what is the state of knowledge at the time  
20 that the Frye court is making its decision.

21 You can't look at developments past that. And  
22 it's not as if the defendant is without any source of  
23 review. He can always raise a claim in a 440 of newly  
24 discovered evidence, or if the defense attorney didn't  
25 prevent sufficient information to the Frye court, a claim



1 of ineffective assistance of counsel.

2 But in this particular case, where you had two  
3 decisions stating that - - - well, one stating that after a  
4 Frye test, that L - - - a Frye hearing, that LCN was  
5 generally accepted; another several courts reviewing the  
6 literature based on that review, stating that - - -

7 JUDGE STEIN: What was there on FST, at the time?

8 MR. LIEBERMAN: There was the New York State  
9 Commission on Forensic Science. There was the National  
10 Science - - - National Forensic Science Technology Center.

11 JUDGE STEIN: Didn't - - - but didn't - - -  
12 wasn't there some indication that that was - - - that that  
13 was like a black box, how - - - the internal software?

14 MR. LIEBERMAN: Well, first of all, that is also  
15 not information that was presented to this Frye court, and  
16 - - - and - - -

17 JUDGE STEIN: So that's getting back to my point,  
18 and my point is your - - - your adversary talked about that  
19 there were three months between the time that FST started  
20 being used until it was used in this case.

21 MR. LIEBERMAN: Your - - -

22 JUDGE STEIN: How is that enough time to know  
23 what the general - - -

24 MR. LIEBERMAN: Your Honor - - -

25 JUDGE STEIN: - - - acceptance is in the - - - in



1 the scientific community?

2 MR. LIEBERMAN: The Frye decision - - - the Frye  
3 decision came out well over a year afterwards. How could  
4 it be relevant that it was two months later? The - - - the  
5 court was reviewing the - - - the issue months after it  
6 happened, and so that - - - it can't be that just because  
7 two months had passed, that's - - - that's the way to  
8 review it.

9 You have all this more knowledge that came forth  
10 after those two months. So I'm not really understanding  
11 the defense point.

12 JUDGE RIVERA: So Counsel, to understand - - - we  
13 can all take a breath here - - - to understand your rule,  
14 what - - - what are you saying a defendant could put  
15 forward that would satisfy their burden to get a Frye  
16 hearing - - -

17 MR. LIEBERMAN: Point - - -

18 JUDGE RIVERA: - - - ordered by the court.

19 MR. LIEBERMAN: Well, if insofar as - - -

20 JUDGE RIVERA: In these particular - - -

21 MR. LIEBERMAN: Yes.

22 JUDGE RIVERA: - - - circumstances.

23 MR. LIEBERMAN: In these - - - in these - - -

24 JUDGE RIVERA: Given the time frame - - -

25 MR. LIEBERMAN: - - - circumstances.



1 JUDGE RIVERA: - - - and what was available?

2 MR. LIEBERMAN: He - - - if the defense had  
3 pointed out as he tried to do in his appellate brief - - -

4 JUDGE RIVERA: Um-hum.

5 MR. LIEBERMAN: - - - flaws in the reasoning of  
6 the courts that had concluded that these technologies - - -  
7 technologies were generally accepted, or had presented  
8 facts to the court that had not been considered by those  
9 other courts that suggested that the - - - these initial  
10 courts, both Garcia and Megnath, had gotten it wrong, then  
11 that would have gave - - - given the Frye court in this  
12 case a reason to conclude that perhaps a Frye hearing was  
13 needed in this case.

14 But in this particular case - - - you know, it -  
15 - - the defendant sets all - - - out all these facts and  
16 his brief. Some of those facts actually were available at  
17 the time of the Frye decision in this case. He could have  
18 presented those facts in his materials, but he didn't. And  
19 so what is the - - - what is the trial court supposed to  
20 do?

21 It's not re - - - there's not - - - it's not the  
22 trial court's responsibility to go out and do - - -

23 JUDGE WILSON: Well, what - - -

24 MR. LIEBERMAN: - - - the research.

25 JUDGE WILSON: - - - are the - - - what are the -



1 - - excuse me. What are the facts that were available at  
2 the time that the defendant could have presented that would  
3 have entitled him to a Frye hearing?

4 MR. LIEBERMAN: I'm not saying that there were  
5 any such facts.

6 JUDGE WILSON: I thought you did.

7 MR. LIEBERMAN: But the defendant - - - it's the  
8 defense - - - the defense is making those arguments.

9 JUDGE WILSON: Well, I thought you just said - -  
10 - maybe I misunderstood you - - - that there were some of  
11 the facts that the defendant is pointing to now that were  
12 available to the defendant at the time, that would have  
13 entitled the defendant to a Frye hearing.

14 MR. LIEBERMAN: No. No, no, that - - - you mis -  
15 - - you misunderstood. I wasn't saying that it would have  
16 entitled him to a Frye hearing. I'm saying - - -

17 JUDGE WILSON: So there were no - - - so there  
18 were no facts available to the defendant at the time that  
19 would have entitled him to a fact hearing. It has to be  
20 one or the other?

21 MR. LIEBERMAN: No, actually, I don't - - - the  
22 thing is, I'm - - - I'm not arguing - - -

23 JUDGE FEINMAN: Is what you're saying is that  
24 there were facts that were available that he could have put  
25 forth - - -



1 MR. LIEBERMAN: Exactly.

2 JUDGE FEINMAN: - - - that he didn't put forth  
3 that would have at least raised the issue.

4 MR. LIEBERMAN: Exactly. At least - - -

5 JUDGE RIVERA: Okay, but what were those facts?  
6 I think that's the question. What were - - - given the  
7 rule that I think you're trying to propose here, what is it  
8 that defendant, at that time frame, could have put forward?

9 MR. LIEBERMAN: I am - - - I am not saying that  
10 there were any such facts, but there are facts in the  
11 defendant's brief, at this point, that were available at  
12 the time of the Frye decision - - -

13 JUDGE STEIN: What are those facts? I think  
14 that's the question - - -

15 MR. LIEBERMAN: Okay, I - - -

16 JUDGE STEIN: - - - we're trying to - - -

17 MR. LIEBERMAN: - - - I understand.

18 JUDGE STEIN: - - - trying to get answered.

19 MR. LIEBERMAN: I understand. So I mean, you've  
20 - - - you've - - - I can't really recall offhand, but there  
21 are - - -

22 JUDGE FEINMAN: For example, that it was only  
23 three months old, this technology.

24 MR. LIEBERMAN: Or the - - - or the articles that  
25 are cited in - - - in her brief that were published before



1 the date in this case, for example.

2 JUDGE FEINMAN: So I see your red light's on and  
3 I just didn't know if you wanted to comment on - - - at all  
4 on harmlessness - - -

5 MR. LIEBERMAN: Yeah. Yes, I do.

6 JUDGE FEINMAN: - - - before you finish?

7 MR. LIEBERMAN: And this was a case of absolutely  
8 overwhelming evidence of the defendant's guilt. The - - -  
9 the main thing being that a bullet recovered from the  
10 officer's calf was matched to this seven-shot revolver that  
11 was found at the scene, which was not a police-issued gun.

12 The defendant himself made a statement that he  
13 had possessed the gun, take - - - taken it out as he was  
14 running up the steps. The officers had seen the defendant  
15 firing at the officers. And the - - - in contrast, the - -  
16 - the DNA evidence was really relatively weak, given that  
17 the expert couldn't even say that the defendant was, in  
18 fact, a contributor to the DNA material, for a variety of  
19 reasons.

20 And also, the - - - the issue - - - there's no -  
21 - - there was no issue with respect to really whether this  
22 defendant had possessed the gun. If - - - if the issue was  
23 whether the defendant had - - - defendant had intentionally  
24 pulled the trigger, that DNA evidence didn't prove that.  
25 It was because you merely have a presence of DNA on the - -



1 - on the trigger, which could have certainly happened  
2 months before this incident ever happened.

3 So I - - - in this particular case, their DNA  
4 evidence was really of very little weight. Thank you.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
6 Counsel?

7 MS. ZLOCZOWER: I think we think to need first  
8 point out that defense counsel didn't have the burden to  
9 show a non-general acceptance of this. The burden is  
10 squarely on the proponent; and the proponent of this  
11 technique must establish that there's general acceptance.

12 You can't shift the burden now and make circular  
13 arguments that - - -

14 JUDGE STEIN: But is that - - - is that the same  
15 burden as the burden - - - as a showing necessary to - - -  
16 to have it be an abuse of discretion not to grant the  
17 hearing?

18 MS. ZLOCZOWER: What happened here - - - yes,  
19 because counsel not only filed a lengthy motion with a  
20 memorandum of law, he pointed out that there had - - - that  
21 OCME was the only entity using both of these technologies;  
22 he pointed out that there had been no external review; he  
23 included an article from the leading - - - from the  
24 architect of the FBI CODIS system, Professor Budowle; and  
25 he also referenced an - - - an affidavit he would be

1 seeking from an expert, if he was given the opportunity for  
2 it.

3 And what did the People do in opposition? Did  
4 the People submit any articles from any leading scholars  
5 and scientists to say that yes, this is generally accepted,  
6 you don't need to have a Frye inquiry here? No. What did  
7 they do? They included four trial court decisions, none of  
8 which had held a Frye inquiry, and said that's it. Just by  
9 judicial fiat, just let this in.

10 JUDGE GARCIA: Counsel, do you want to comment on  
11 your adversary's characterization of the evidence in this  
12 case?

13 MS. ZLOCZOWER: Absolutely. This was not  
14 harmless error. In the oral swab motion, the prosecution  
15 stated, and I quote, "that the DNA on the revolver was  
16 crucial - - - a crucial part of the prosecution." It went  
17 to whether, I quote - - - "the defendant possessed the  
18 gun," and here it's very important, "pulled the trigger  
19 undermining his claim of an accidental shooting."

20 The DNA evidence here was minute and it came from  
21 the trigger ridges. That's why they wanted it in.

22 And then the OCME assistant director, no less,  
23 testified repeatedly that the 1,100 times more likely - - -  
24 likelihood ratio was very strong support - - - I quote.

25 The prosecutor, in his opening and in summation



1 repeatedly referenced that number, 1,100 times more likely.

2 JUDGE RIVERA: Can you go back - - - how - - -  
3 how the DNA established the - - - the pressure on the  
4 trigger?

5 MS. ZLOCZOWER: Pardon?

6 JUDGE RIVERA: How the DNA established or  
7 suggested to the jury that indeed he had pulled the trigger  
8 as opposed to dropped the gun and it goes off accidentally?

9 MS. ZLOCZOWER: Precisely. Yes. That was the -  
10 - - that was the whole purpose of - - - of the DNA evidence  
11 here.

12 JUDGE RIVERA: But I'm saying, how did it do  
13 that?

14 MS. ZLOCZOWER: Oh, how did it do that? By the  
15 OCME assistant director testifying and then the prosecutor  
16 repeating it in opening and summation that the likelihood  
17 that the appellant, the defendant, and one unknown  
18 contributor - - - it was more - - - it was 1,100 times more  
19 likely that the defendant and one unknown contributor  
20 contributed to the DNA on the trigger ridges than two  
21 unknown contributors.

22 And it was that likelihood ratio, by the way, and  
23 this probability evidence, that the - - - that the jury  
24 requested twice, in two separate notes, to see - - - to  
25 hear again.



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This is the second trial in this case. The first one was deadlocked. This - - - this jury in the second trial was deadlocked as well. They sent in fourteen notes, two notes about probability. This was critical evidence in this case and led to my client's conviction.

CHIEF JUDGE DIFIIORE: Thank you, Counsel.

(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. Elijah Foster-Bey, No. 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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