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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

HOWARD POWELL,

NO. 22
(Reargument)

Appellant.

20 Eagle Street
Albany, New York
October 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 22, The People of the
3 State of New York v. Howard Powell. This is on for
4 reargument.

5 Counsel, give us a moment for our colleagues to
6 settle in.

7 Counsel, good afternoon.

8 MS. HUTCHINSON: Good afternoon, Your Honor. May
9 it please the court, Kendra Hutchinson of Appellate
10 Advocates for appellant Howard Powell. May I have two
11 minutes for rebuttal, please, Your Honor?

12 CHIEF JUDGE DIFIORE: You may, Ms. Hutchinson.

13 MS. HUTCHINSON: Thank you very much.

14 Your Honors, you know, here we are again at
15 reargument. But I really want to start out with very
16 strongly making this point. False confessions are
17 troubling. They are very real. They are found in fifteen
18 to twenty percent of documented false - - - false
19 convictions, and yet they are counterintuitive to juries,
20 who view confessions as the gold standard of evidence.

21 And for this reason, ten years ago, this court,
22 in Bedessie, held that expert testimony on this phenomenon
23 should be admitted before a jury in order to educate it.
24 And it held that there is no doubt that experts may offer
25 such valuable testimony about these factors that the



1 relevant scientific community considers to be associated
2 with it.

3 JUDGE GARCIA: But Counsel, didn't we also say in
4 Bedessie - - - Bedessie, there was no Frye hearing, right?
5 Didn't we also say in Bedessie that the expert can testify
6 on whether this particular confession is, you know,
7 wrongful, but they - - - the "proffer must be relevant to
8 the defendant and interrogation before the court." So it
9 almost seems to me like what you had here was a Bedessie
10 hearing. And after this Bedessie hearing, the court said
11 you don't meet the Bedessie test.

12 So it's a very different case to me than
13 Bedessie, and in fact, the trial court cites Bedessie
14 through its opinion and concludes that, indeed, they didn't
15 meet this standard.

16 MS. HUTCHINSON: Judge, I agree with you that
17 this is a very different case than Bedessie. And I contend
18 that it is because, indeed, all of the - - - the evidence
19 that the expert was going to proffer was actually relevant
20 to the defendant and the interrogation. So Dr. Redlich was
21 going to testify that - - -

22 JUDGE GARCIA: But is that really what we should
23 be doing? You know, they had a hearing. They had a
24 Bedessie hearing, I think, here rather than a Frye hearing,
25 and the trial court concluded no. And our review isn't we



1 go back and we see is that right or is that wrong; it's was
2 it an abuse of discretion, that ruling, right?

3 MS. HUTCHINSON: Well, I - - -

4 JUDGE GARCIA: So why was it an abuse of
5 discretion?

6 MS. HUTCHINSON: Well, to the extent that we're
7 discussing the relevancy issue, Your Honor, I do think that
8 there has to be a record basis for the court to have made
9 this factual finding as an irrelevancy. Here, it was
10 undisputed that my client had thirty years' worth of
11 documented psych - - - psychiatric illness, an IQ of 78,
12 and substance abuse history. And so to the extent that the
13 auth - - - that Dr. Redlich was going to proffer testimony
14 about those factors, it seems that there's no record basis
15 for the court's finding that it was irrelevant.

16 As to the sort of the further part, I mean, there
17 really are multiple aspects of Bedessie at issue here, and
18 Your Honor's getting to the next part here, which is
19 whether or not the court applied the correct standard. And
20 we contend that it did not in determining whether or not
21 this met Frye, whether or not these - - - the proffered
22 testimony, whether or not the factors that the expert was
23 proposing to testify about, whether or not it met the Frye
24 standard. You know, we contend that the court below
25 applied a wrong - - - an incorrect legal standard.



1 Here, it cited Daubert, the federal case, which
2 is not concerned, as it is in New York, with just counting
3 votes, counting the - - - you know, the experts on one side
4 of the issue or the other, but rather with passing on the
5 reliability. In fact, it even ordered what Your Honor
6 denominated, you know, a Bedessie hearing for the purpose
7 of whether or not the jury could be assisted. This court
8 already decided this in Bedessie ten years ago, when it
9 held that Bedessie could be assisted by such - - -

10 JUDGE GARCIA: But not in all cases. Right? So
11 it seems to me, it's a two-part kind of test. Yes, there
12 are some fundamental issues we can agree on and are
13 accepted, but what if - - - you know, false confessions.
14 But what if this person then comes in and proffers, you
15 know, left-handed people are more likely to falsely
16 confess. Well, that may not be scientifically accepted,
17 and this person may not be left-handed. So you've got kind
18 of two things going on there.

19 And I think that's what this hearing was about,
20 and it seems like what you're arguing for is more of a
21 blanket rule on false confessions, but that's not Bedessie.

22 MS. HUTCHINSON: You're absolutely right, Your
23 Honor. An expert could come in and testify, you know, that
24 left-handed people commit crimes, or you know, whatever it
25 is that they wanted to say. But the - - - the difference



1 here is that at this Frye hearing, there was - - - it was a
2 300-page Frye hearing, numerous scholarly articles of
3 thirty-five years' worth of research, sixty researchers in
4 the field. The preeminent scholar in this field, who later
5 on went to become the president of the American
6 Psychological Law Society, you know, a white paper, a
7 consensus paper, was admitted into evidence. All of that -
8 - -

9 JUDGE CANNATARO: But Counsel, let's talk about
10 the evidence that was put in front of the judge. And I - -
11 - I mean, in this context, I'm talking about traditional
12 Frye, general acceptance, and the relevant scientific
13 community. Your - - - Dr. Redlich testified during trial
14 and she - - - I think she was speaking specifically about
15 the white paper, that she contributed two pieces of
16 literature that formed the basis of the white paper.

17 One was the Alt-key Study, which she subsequently
18 stated had been found flawed by the relevant scientific
19 community and was no longer being used. And she also
20 contributed some literature on the cheating paradigm, which
21 she then subsequently said during the Frye hearing that it
22 was distinguishable from the interrogation that took place
23 in this case because in the cheating paradigm, the
24 participants were actually encouraged to lie.

25 And I'll even go one further. With respect to a



1 dispositional factor, like mental illness, she stated
2 during the Frye hearing that the scientific community was
3 still out on how much mental illness contributes to false
4 confessions.

5 And if there is still an element in this that is
6 a traditional Frye hearing, how can we say that - - - as a
7 matter of law, that the judge abused his discretion in
8 holding that this didn't look like it was yet generally
9 accepted in the scientific community?

10 MS. HUTCHINSON: Well, Your Honor, the white
11 paper cited, I think, like, 300 different articles because
12 it was a consensus paper along with five other authors.
13 And you know - - - and Your Honor's referring to the - - -
14 to the cross-examination of the district attorney during
15 Dr. Redlich's, you know, testimony because, of course, they
16 didn't put on an expert, and they didn't put on any
17 scholarly articles or any other evidence whatsoever.

18 Yes, Dr. Redlich candidly discussed the fact that
19 the Alt-key or the crash, you know, these other - - - these
20 tests that were early on in the science of - - - of false
21 confession research, that there - - - that certain aspects
22 of it had been revised. Science is progress, Your Honor.
23 And scientists constantly revise their hypotheses, and in
24 fact - - -

25 JUDGE FAHEY: Can I stop - - - can I stop you for



1 a second?

2 MS. HUTCHINSON: Sure.

3 JUDGE FAHEY: This is an important point that the
4 judge has raised because there's some confusion as to what
5 Supreme Court was doing. I don't know if Supreme Court
6 actually ever ruled that, number one, false confessions are
7 - - - as a reality are generally accepted in the relevant
8 scientific community. I don't think they ever made that
9 ruling. I don't think that ruling's ever been made in New
10 York, though. The jurisprudence is kind of sloppy and it's
11 all over the place, but I don't think we've ever really
12 ruled on that. And I don't think that this court has
13 definitively ruled that either.

14 Do you agree with that or disagree with me?

15 MS. HUTCHINSON: I think - - - given that we have
16 a lengthy Frye hearing before you, I think this court is
17 called upon to rule - - - to rule on it if it did not rule
18 on it in Bedessie.

19 JUDGE FAHEY: So my question to you, has anyone
20 ever done it? It's a yes-or-no question.

21 MS. HUTCHINSON: As Your Honor knows, we contend
22 that Bedessie holds that some such testimony should be - -
23 -

24 JUDGE FAHEY: Okay.

25 MS. HUTCHINSON: - - - admissible without a Frye



1 hearing. But you know, because Your Honor is a benefit - -
2 -

3 JUDGE FAHEY: Bottom line is - - - bottom line,
4 respectfully, is - - - is no. Nobody's actually ever
5 really done it.

6 MS. HUTCHINSON: Yes.

7 JUDGE FAHEY: So it's generally accepted in the
8 scientific community. That's what I think the judge needs
9 to do first.

10 And the second question: the judge says, after -
11 - - but the judge - - - in fairness to the judge, the judge
12 says, just like Judge Cannataro says, over the People's
13 objection, he says this - - - Dr. Redlich is an expert in
14 this area of false confessions and I'm going to allow this
15 testimony to go forward.

16 But then he makes a determination that - - - that
17 the testimony of the doctor was ultimately not reliable.
18 In other words, he - - - and I think the mistake there is,
19 is that - - - if there is a mistake, in fairness to him - -
20 - is that first you've got to decide whether it's generally
21 accepted in the scientific community. And secondly, then
22 the finder of fact, if it is, will make a determination as
23 its - - - to its reliability or believability.

24 It's not a foundation question because the judge
25 already said this person was an expert and there's a

1 sufficient foundation for them to go forward. And he made
2 - - - he or she made a fair ruling, but it's the second
3 part of that question, I guess that I struggle - - -
4 struggle with. Does that reliability - - - does that go to
5 the court or the jury. And my experience is generally
6 that's a question of fact, and I thought that was the core
7 of your argument.

8 MS. HUTCHINSON: Yes, Your Honor. And it - - -
9 and to get to the next aspect of this, yes. Here, the
10 judge acted as if he were, indeed, the fact finder in this
11 case, passing upon the reliability as it - - - as it
12 applied to my client's confession, as - - - as to the
13 believability of the expert's testimony, as it applied to
14 this case as a whole. Indeed - - -

15 JUDGE SINGAS: But that's really accurate,
16 though, either, Counsel, right? Because the judge said, if
17 it was another expert, perhaps he would allow that
18 testimony. So he was leaving room for the - - - for his
19 conclusion that this expert didn't meet the requirements of
20 demonstrating that the science was generally accepted and
21 the second part of that, that it was relevant to this case.
22 So he didn't say outright, I don't believe this and I'm not
23 going to allow this testimony. He left the door open for
24 another expert to come in and talk about it. So perhaps it
25 was the wrong expert that testified.



1 MS. HUTCHINSON: Well, Your Honor, the judge's
2 vary - - - rationales were varying at times. He also
3 stated that he did not believe that the science is there.
4 I agree with Judge Fahey that this was not an ultimate
5 ruling in the - - - in the way that the judge should have
6 done so. But - - - but the judge did indeed err in passing
7 upon the reliability of this expert and the believability
8 of it as it applied to this case.

9 And indeed, this case, it was very crucial for
10 this testimony to come out, Your Honor, because while my
11 client proffered a voluntariness - - - voluntariness
12 defense, he was unable to properly educate the jury on
13 those aspects - - - those counterintuitive aspects of the
14 phenomenon of false confession. And - - -

15 JUDGE CANNATARO: But Counsel, I think Judge
16 Singas raises an important point, in that he put out there
17 that another expert could have persuaded him about the
18 reliability of the methodologies that were being talked
19 about to him. So I question - - - and I grant you, it's
20 very hard to understand what the words, even in context,
21 mean from that Frye hearing, but I posit to you that the
22 judge did not out of hand reject the science. He seems to
23 suggest that this could be demonstrated to him sufficiently
24 to pass the Frye test. It just didn't happen here.

25 MS. HUTCHINSON: Well, I think one of the



1 problems with the judge's decision is that, while it
2 suggested a different expert could - - - could testify at
3 trial, in this case, the only expert it would have allowed
4 was an expert who had personal knowledge as to my client
5 and personal knowledge as to the circumstances of his - - -
6 of the interrogation and confession.

7 And we - - - and that is completely contrary to
8 New York law, and is also contrary to - - - you know, an
9 expert is always permitted to base his or her opinion upon,
10 you know, other - - - other evidence. And it is also - - -
11 it is also contrary to Bedessie, in which, you know, in
12 doing so, the judge seemed to require that the expert
13 render an ultimate opinion. So to the extent that the - - -
14 - you know, an ultimate opinion on whether or not my client
15 falsely con - - - confessed, which, obviously, would very
16 much invade the province of the jury.

17 And so to the extent that the judge suggested
18 that that would be the proper expert, the judge was dead
19 wrong. And it suggests that the judge's sort of ability to
20 judge - - - to sort of evaluate the Frye hearing - - -

21 JUDGE CANNATARO: I agree with you, and I think
22 LeGrand speaks to that, as well. That is - - - you know,
23 that's not the standard; that's not the requirement. You
24 don't need a judge to come in with personal knowledge of
25 this defendant. Especially, in a case like this, where you



1 had another doctor who had direct, you know, diagnostic
2 knowledge of the situational fact - - - I'm sorry - - - the
3 dispositional factors that related to this defendant.

4 But I'm not so sure that that was the entirety of
5 this suppress - - - this Frye judge's holding.

6 MS. HUTCHINSON: I mean, when you look at the
7 basis for this Frye hearing and what the People did to
8 contest it, I - - - I can't stress enough. They didn't put
9 on an expert. They didn't put on any scholarly research or
10 articles themselves. They relied solely on cross-
11 examination.

12 In that regard, they managed to cross Dr. Redlich
13 on three things, three things that have continued to - - -
14 that we continue to discuss here. One, about whether or
15 not there is criticism of earlier studies, both that she
16 had done, but that others in her field had done. This
17 court has indeed accepted social science research, despite
18 there being criticism of early studies; that's People v.
19 Taylor in the rape trauma syndrome area.

20 The other criticism that has been lod - - - you
21 know, that the - - - that has - - - that was picked up by
22 the judge below and has been brought up by the People on
23 appeal is that there's no known error rate as to certain
24 aspects of - - - of this. That pertains to self-reporting
25 studies only in - - - and in that regard, it is a red

1 herring, because self-reporting is an accepted laboratory
2 technique - - - or rather technique, scientific technique,
3 in multiple social sciences. And again, you know, this is
4 something that this court has endorsed in People v.
5 LeGrand, this idea - - - this - - - you know, of self-
6 reporting.

7 And then, I think all of this sort of reliability
8 aspect and these questionings about Dr. Redlich, really,
9 this is going to the weight. This is going to the weight
10 as it should go before the jury.

11 The fact remains is that this - - - that this
12 Frye hearing, this voluminous, lengthy, taxpayer-funded,
13 expensive, multiple-expert Frye hearing with numerous
14 articles, scholarly articles and a white paper entered into
15 evidence demonstrated that even if some of these were valid
16 critiques of early studies, the - - - this was known within
17 the relevant community. It was accepted within the
18 relevant community. It was subject to peer review and it
19 was subject to revision. Upon - - -

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MS. HUTCHINSON: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. BLIRA-KOESSLER: Good afternoon, Your Honors.
24 It's Chris Blira-Koessler for the Office of Melinda Katz,
25 the Queens County District Attorney.



1 I liked the way Judge Garcia put it. The court
2 here conducted a proper Bedessie hearing because the court
3 essentially did an analysis in line with Bedessie. Whether
4 the factors that this expert wished to testify to were
5 relevant to the - - -

6 JUDGE RIVERA: So Counsel, if I may - - -
7 Counsel, if I may interrupt you.

8 MR. BLIRA-KOESSLER: Yes.

9 JUDGE RIVERA: I'm on the screen. Can you be
10 explicit as to where the expert went wrong during, as
11 counsel has already argued, this cross-examination. What -
12 - - what is it that went wrong? What is it that she was
13 unable to say or do apropos of the questions that were
14 asked previously, regarding another expert might have - - -
15 might have satisfied the judge? What - - - what's wrong
16 with this expert? What is it that she said or failed to
17 say?

18 MR. BLIRA-KOESSLER: Well, just on the subject of
19 general acceptance - - -

20 JUDGE RIVERA: Um-hum.

21 MR. BLIRA-KOESSLER: - - - this expert, at one
22 point, stated with respect to depression and anxiety, that
23 although it was not entirely clear, there was "some
24 evidence" that people with these particular mental
25 illnesses could falsely confess. And she said there was -



1 - - I'm just looking for the exact language. Yeah, that's
2 - - - that's on page 43 of her testimony. Her testimony,
3 not - - - not the appendix.

4 Then on pages 45 to 46 of the record, she
5 testified there was some literature that substance abusers
6 were at risk for false confessions. Now, in People v.
7 William - - - now that language is significant, because in
8 People v. Williams, at 35 N.Y.3d, page 37, this court
9 ruled, "A showing that an expert's opinion has 'some
10 support' is not sufficient to establish a general
11 acceptance in the relevant scientific community." Now,
12 that's just one example.

13 You can look at the articles that she, herself,
14 authored. The - - - one was the Comparing True and False
15 Confessions Among Mentally Ill Offenders. The other was
16 the Self-Reported False Confessions and False Guilty Pleas
17 Among Offenders with Mental Illness. In that article on
18 page 14, she states, "Although mental illness is a commonly
19 cited risk factor for false confessions, without comparable
20 data from those without mental illness, the rates here must
21 stand alone and should not be used as evidence that mental
22 illness increases susceptibility to making false
23 confessions."

24 And she even admitted that that particular study
25 was - - - was a first in two important ways: the first



1 large-scale study of self-reported false confessions and
2 the first study of offenders with mental illness. So doing
3 a first study in an area really doesn't seem like it
4 establishes general acceptance.

5 JUDGE RIVERA: So if I'm understanding you, your
6 argument is that the particular types of conditions that
7 the defendant was going to rely on, she - - - you're saying
8 her testimony, the evidence - - - not just her testimony,
9 the evidence - - - at that Frye hearing about what she
10 would be testifying about would not show that the
11 scientific community had accepted those conditions as
12 indeed affecting the confession.

13 MR. BLIRA-KOESSLER: Right. It's limited to this
14 expert, her testimony. We're not contesting that - - -

15 JUDGE RIVERA: But so - - - but - - -

16 MR. BLIRA-KOESSLER: - - - false confessions
17 don't exist.

18 JUDGE RIVERA: Okay. So I'm a little confused
19 then. It - - - you're saying that if another expert got up
20 and said, I know that someone said it's only some of the
21 literature, but actually there's many, many, many studies
22 on this, and they all establish this - - - you're saying
23 that's where she went wrong?

24 MR. BLIRA-KOESSLER: Well, you know, it's
25 interesting you mention that, Judge, because they cite - -



1 - I believe it's in one of the amicus briefs - - - they
2 cite a 2018 study, which obviously wasn't before the court
3 during the 2014 hearing, where they interview a lot of
4 experts on the subject of what is generally accepted. And
5 a lot of experts stated, you know, in the eighty, ninety
6 percent range, this is generally accepted; that's a general
7 accepted factor, things like that.

8 But what's ironic about that - - - what's ironic
9 is that then they got to the next category, which was - - -
10 I'm just looking for the exact language here.

11 JUDGE CANNATARO: Counsel, while you're looking,
12 where are we on false confession science? If - - - if
13 we're not at eighty, ninety percent acceptance rate in the
14 relevant scientific community, are we at fifty-one, are - -
15 - are we at thirty-two or - - - how - - - it seems as if at
16 some point this science will develop to the point where you
17 won't even need a Frye hearing anymore, it'll be so
18 generally accepted.

19 MR. BLIRA-KOESSLER: Right.

20 JUDGE CANNATARO: So how close are we to that?

21 MR. BLIRA-KOESSLER: I mean, so like, we haven't
22 we've reached that point. Yeah, and again, our position is
23 not that there aren't false confessions out there. We all
24 know that there are. It's reached, you know, popular media
25 to the extent that, I think, a lot of jurors know this, but



1 we're talking about the specific dispositional and
2 situational factors and how they apply to individual cases.
3 That's what Bedessie is about, because it's two part. It's
4 not just whether the defendant has a mental illness; it's
5 also the interrogation, and how did that mental illness
6 take that, then, as a - - -

7 JUDGE FAHEY: Let me - - - let me ask you this.
8 Has there ever been a court in New York, which has said the
9 science that verifies the existence of false confessions is
10 generally accepted in the scientific community? Is there a
11 case that you can point to that says that?

12 MR. BLIRA-KOESSLER: I mean, I know in this court
13 - - - in Bedessie, this court did mention that the
14 defendant in that case - - -

15 JUDGE FAHEY: We mentioned it, but we didn't make
16 that ruling.

17 MR. BLIRA-KOESSLER: Off - - - no, oh, no, no,
18 no, that's the case that comes to mind. I don't know of
19 any court that has said - - -

20 JUDGE FAHEY: I researched it and - - -

21 MR. BLIRA-KOESSLER: - - - one hundred percent -
22 - -

23 JUDGE FAHEY: Let me stop you a second. I
24 researched it; I could find none.

25 MR. BLIRA-KOESSLER: I'll trust your research,



1 Judge.

2 JUDGE FAHEY: Well, you know.

3 MR. BLIRA-KOESSLER: I trust you're accurate on
4 that point.

5 JUDGE GARCIA: Counsel, wasn't the point really
6 in Bedessie that false confessions are such common
7 knowledge now that you're almost swinging the other way
8 towards, do you really need an expert to come in and tell a
9 jury that people falsely confess? And the way I read
10 Bedessie is, no, you don't need that anymore. It's - - -
11 in fact, it's beyond scientific; it's now accepted by
12 pretty much everyone.

13 What you could have is expert testimony on
14 certain factors accepted by the scientific community that
15 lead people to falsely confess, so I think the idea of
16 expert testimony on false confessions, to me, seems to
17 misrepresent what's really going on in a Frye context,
18 which isn't, do people falsely confess? Is that
19 scientifically proven? I mean, that's so proven that you
20 may not even be able to use scientific evidence for that.
21 It's have you established that left-handed people falsely
22 confess more than righthanded people? And that's what
23 we're going to have a Frye hearing about. So - - -

24 MR. BLIRA-KOESSLER: Right, I mean, you know, but
25 it's interesting you bring up that language in Bedessie,



1 where this court did realize that it's become so common.
2 That's the 2018 article that I was referring to. So while
3 they did a survey and you know, certain experts agreed that
4 this proposition is generally accepted, that proposition is
5 generally accepted, I'll - - - I'll just read a little bit
6 of it here.

7 "They were also asked their opinion of whether
8 most jurors believed a proposition to be true as a matter
9 of common sense", and they have a table that shows this.
10 "And on one hand, a majority of respondents believe that
11 jurors, like experts, are aware" - - - and then it goes
12 through various factors - - - "are aware that people with
13 intellectual abilities (sic) are vulnerable to social
14 influence" - - - that was sixty-six percent - - - "and that
15 the risk of false confessions are increased by
16 psychological" ord - - - "disorders". Again, sixty-six
17 percent.

18 So you know, it's a funny sit - - - you know, if
19 - - - if that's the current state of the science, you know,
20 yes, false con - - - false confessions exist, but it's sort
21 of ironic then. What do we need an expert to testify to if
22 the experts themselves are saying people are generally
23 aware of this, as a majority of these experts are saying
24 that people are aware of this?

25 JUDGE CANNATARO: Well, Counsel, I'll posit to



1 you, I think I read in the defendant's papers that a lot of
2 these factors, especially the situational factors, are
3 sometimes counterintuitive. The things that you think
4 might give rise to a false confession aren't really the
5 ones that's inspire it.

6 So let's assume for just a moment that the - - -
7 the science - - - that there's still science to be done,
8 that we haven't gone beyond Frye or beyond Bedessie, and
9 everyone in the community knows exactly how and when a
10 false confession happens. Isn't that the - - - isn't that
11 the essence of the evidence that was being put to the trial
12 judge - - -

13 MR. BLIRA-KOESSLER: I mean, I think that's - - -

14 JUDGE CANNATARO: - - - in this case?

15 MR. BLIRA-KOESSLER: Yeah, and I think to address
16 some of the things Judge Fahey brought up, too, you know,
17 this goes to the opinion and what the judge said about
18 personal knowledge. You know, the judge may have pointed
19 out that, well, nobody interviewed this defendant, but he
20 wasn't imposing a rule that you have to interview a
21 defendant. The judge even clarified that in his later oral
22 explanation of his ruling.

23 All the judge wanted was what Bedessie requires,
24 which is, again, it has to be relevant to the defendant and
25 the interrogation. So if the defendant is undergoing a



1 mental health episode or some type of break with reality or
2 something that's connected to his or her depression and
3 that it influences the interrogation to some extent, that's
4 one thing. But if - - -

5 JUDGE WILSON: Can we - - -

6 MR. BLIRA-KOESSLER: - - - we just have it - - -
7 sorry, Judge?

8 JUDGE WILSON: Can we put the relevance to the
9 side just a second and focus just on the Frye issue. Is it
10 your position that the record on the Frye hearing as to no
11 dispositional or situational issue demonstrated general
12 scientific acceptance?

13 MR. BLIRA-KOESSLER: I mean, I think there was
14 enough in the record for the court to take pause, and say,
15 this is not the right expert. So - - -

16 JUDGE WILSON: No, I'm asking a different
17 question, right. There's - - - it's not just Dr. Redlich's
18 testimony. There's a huge volume of studies submitted. Is
19 it your position that there isn't a single - - - whether
20 it's left-handedness or it's mental illness or it's
21 depression or you know, however you want to count - - -
22 separate them up, that there's no dispositional or
23 situational factor that there was sufficient scientific
24 acceptance of that that would pass Frye. Forget about
25 relevance for a second because I take your point; it might

1 not be relevant. It might be left-handedness.

2 MR. BLIRA-KOESSLER: I mean, I think what the
3 court was saying, though, as to the specific factors
4 relevant to this case, there was - - - general acceptance
5 had not been established. I think that's the core of its
6 ruling, you know. And whether it's based on the literature
7 or the expert's testimony, even in the literature, you had
8 - - -

9 JUDGE WILSON: But that kind of mashes together
10 the relevance and the Frye hearing, right? I mean, at the
11 Frye hearing, you should not really be asking - - - at
12 least, I wouldn't think you should be asking things like,
13 is this really relevant? That's the - - - the expert can
14 testify hypothetically, and that can be linked up or not
15 linked up. That's the way it used to be done.

16 MR. BLIRA-KOESSLER: Well, I mean, the court
17 still has to consider that in light of Bedessie. I mean, a
18 court can't ignore Bedessie and say, all right, just do
19 this Frye analysis. I mean, a court has to ask, is what
20 this expert is telling us - - - is this relevant to this
21 case. The expert testified about the Reid technique, about
22 psychological techniques and deception. That didn't happen
23 here. Even from the defendant's mouth, we know that didn't
24 happen here.

25 The detectives were straightforward with him.



1 They said we have this evidence, these are going to be the
2 charges, you'll be put in a lineup - - - they never lied to
3 him at any point.

4 JUDGE CANNATARO: But couldn't that just be a
5 reason to preclude certain evidence from the testimony by -
6 - - while still allowing the expert to testify? If there's
7 no suggestion in the record that the Reid method was used,
8 and she wants to testify that the Reid method is a
9 situational factor that could give rise to false
10 confessions, just tell her she can't testify about that
11 because there's no basis to believe that that actually
12 happened. But that doesn't go to this larger issue of the
13 science, does it?

14 MR. BLIRA-KOESSLER: Well, I mean, the court even
15 said at one point - - - in explaining its ruling, the court
16 said orally, it's on page 1130 of the appendix, so I'm not
17 saying that the science doesn't exist. The court was not
18 saying that false confessions don't exist or that various
19 factors can't lead to false confessions, just that this
20 expert did not establish that.

21 JUDGE CANNATARO: This expert couldn't connect
22 it. But we've discussed and we were talking with
23 defendant's counsel for a moment that it's not necessarily
24 proper for the trial judge to insist that every expert have
25 direct personal knowledge of what happened in the specific



1 case, or even the specific diagnoses of the defendant.

2 MR. BLIRA-KOESSLER: Right, but I think under
3 Bedessie - - - I mean, first of all, by personal knowledge,
4 you know, I can't read the court's mind and know what the
5 court was thinking, but to me, when I hear personal
6 knowledge, I mean, you know something about the defendant,
7 not just through an interview, but through anything, paper
8 - - - police paperwork, a videotaped interview, and you can
9 say, you know, this defendant had a break with reality, and
10 that may have influenced him to make - - - him or her to
11 make a false confession. That it's - - -

12 JUDGE WILSON: You know, another problem - - -

13 MR. BLIRA-KOESSLER: - - - that it's - - -

14 JUDGE WILSON: - - - I have, is that in looking
15 at the transcript, there were many times when there was a
16 question asked that called for Dr. Redlich to say something
17 about the facts of the case, and there was an objection,
18 and it was sustained. So it's a little hard to view this
19 as a combined Frye-Bedessie hearing when the expert isn't
20 allowed to testify about facts having to do with this case.

21 And again, you know, my understanding that a
22 hundred years ago, you couldn't ask a question of an expert
23 in court about the facts of the case. You had to ask
24 everything purely hypothetically and then use a fact
25 witness to establish the facts that made the hypothetical



1 relevant. That practice has changed, but it just strikes
2 me as - - - the problem that I have is that these two
3 different things, relevance and Frye, got mushed together
4 in a way that's very difficult to disentangle.

5 MR. BLIRA-KOESSLER: I mean, even if the court
6 got the Frye aspect of it wrong, its overall decision was
7 correct under Bedessie and therefore should be affirmed.

8 You know, defendants that suffer mental - - -
9 anyone that suffers mental illness, and this is made clear
10 from the record, they are not always in a state when they
11 are suffering from an episode related to their mental
12 illness. We even know that from the testimony the
13 defendant gave at the pre-trial hearing. He said, I wasn't
14 going through anything - - -

15 JUDGE WILSON: That sounds like - - -

16 MR. BLIRA-KOESSLER: - - - during that second day
17 when I gave my statements.

18 JUDGE WILSON: That sounds like great cross-
19 examination.

20 MR. BLIRA-KOESSLER: Excuse me, Judge?

21 JUDGE WILSON: That sounds like great cross-
22 examination.

23 MR. BLIRA-KOESSLER: Oh, I'm sorry. I didn't
24 mean to cross - - -

25 JUDGE WILSON: No, no, no, I mean, if the expert



1 is testifying - - -

2 MR. BLIRA-KOESSLER: No, yeah.

3 JUDGE WILSON: - - - that's exactly what - - -
4 what you do, right?

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 MR. BLIRA-KOESSLER: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

8 MS. HUTCHINSON: Thank you, Your Honor.

9 I would just point the court to appendix page
10 585; that's of the white paper. And that unequivocally
11 sets out that at least depression is one of the mental
12 illness diagnoses that is - - - that is linked to false
13 confession, notwithstanding what happened during cross that
14 - - - with Dr. Redlich, and that was entered into evidence.

15 I think what's interesting about the - - - my
16 adversary's arguments and some questions from the court,
17 they - - - it seems like it really is time for this court
18 to issue a ruling one way or another - - -

19 JUDGE CANNATARO: Counsel, I'm sorry, before you
20 get to that point - - -

21 MS. HUTCHINSON: Sure.

22 JUDGE CANNATARO: Going back to 585 - - -

23 MS. HUTCHINSON: Yes.

24 JUDGE CANNATARO: - - - because I - - - I
25 actually happen to have it in front of me. It also says



1 that "there is currently little research available to show
2 how different" disord - - - "disorders, for example,
3 anxiety, depression, and schizophrenia, potentially impair
4 the suspect's capacity to waive legal rights and navigate
5 through a police interview", thereby suggesting that we
6 just don't know what role those maladies play in false
7 confessions.

8 MS. HUTCHINSON: Well, I mean, you know, if I - -
9 - that portion also, Your Honor, states that there is
10 recent research providing the correlation between the two,
11 and you know - - - and we know in that the - - - in the
12 mis-ID context, we do allow experts to testify about how
13 there's a higher likelihood of mis-IDs in certain
14 instances.

15 So you know, obviously, you know, if the court
16 does not want to, you know, consider this particular
17 factor, I want to go to another question that the - - -
18 that Your Honors have, which is - - -

19 JUDGE SINGAS: But Counsel, can I interrupt you
20 for a second?

21 JUDGE WILSON: I'm sorry, Your Honor.

22 JUDGE SINGAS: Sorry, Judge.

23 Which situational factors did the expert - - -
24 was she prepared to testify on in this case?

25 MS. HUTCHINSON: Yes.



1 JUDGE SINGAS: Situational. Other than the Reid
2 method, which counselor brought up.

3 MS. HUTCHINSON: Yes, she was prepared to testify
4 about the following three situational factors that were
5 relevant. One, the lengthy custody isolation and
6 interrogation cycle. Two, the minimization and theme
7 development that occurred here. And three, withholding of
8 medication as a specific, you know, situational factor
9 here. And all of those - - -

10 JUDGE SINGAS: All those facts were disputed
11 during the hearing.

12 MS. HUTCHINSON: I'm sorry, Your Honor?

13 JUDGE SINGAS: All those facts were disputed
14 during the hearing. For example, the long custody; it
15 wasn't a continuous custody, correct? It was just an hour
16 here, let him sleep for how many hours, half an hour here.
17 We can't really say that it was an interrogation of twenty-
18 four-plus hours.

19 MS. HUTCHINSON: Right. And the whole point is
20 that she should have been able to test - - - to give this
21 opinion before the jury, Your Honor. She should have been
22 able to say that research says that twenty-four hours held
23 without - - - you know, being away from your family - - -

24 JUDGE SINGAS: If the evidence demonstrated that
25 he was away from his family and being interrogated for



1 twenty-four hours. I guess my point is, if the evidence
2 isn't that, then why should she be allowed to testify to
3 that situational factor if it's not present in the case
4 before the court?

5 MS. HUTCHINSON: I think I haven't made myself
6 clear, Your Honor. He was in custody for twenty-four
7 hours; he was interrogated intermittently. So he should -
8 - - she should have been able to test - - - to give this
9 testimony to the jury, and the jury could assess whether or
10 not they thought themselves that this affected the veracity
11 of his confession because remember, that's what about fall
12 - - - false confession is about. It's about whether this
13 confession is reliable and, like, serves the truth-seeking
14 function of trial.

15 And so the fact that she wasn't even able to get
16 up before a jury and explain that - - - and same as to the
17 minimization and theme development, I mean, my client
18 testified at the suppression hearing and at trial, that the
19 officers said to him, I will give you your medication if
20 you help me; I will let you go home if you help me - - - if
21 you help me out. And so again - - - and then - - - then we
22 have a confession from him that says, I was doing drugs; I
23 was messed up; I did some robberies; I want to help the
24 NYPD; will you help me.

25 And so again, Your Honor, you're absolutely right



1 that we could be skeptical of whether or not this is or not
2 a false confession, but the point is, is that the jury
3 should have been able to assess that with her - - - with
4 her, you know, expertise before it.

5 And as for factors that were established, Judge
6 Wilson, you asked if there was anything, you know,
7 established at this hearing, and I think as to the
8 dispositional factors, whether we argue or not about, you
9 know, mental illness, I think cognitive impairment has not
10 even been disputed by the People. They haven't written a
11 single thing about cognitive impairment not being, you
12 know, a type of factor that could influence someone. And
13 that was undisputed. It's unanimous. I mean, it's been
14 extent in the case law forever.

15 JUDGE GARCIA: So Counsel - - - Counsel, when you
16 ask us for a definitive ruling one way or another, on what?

17 MS. HUTCHINSON: That - - - that these - - - that
18 this Frye hearing establish that these factors should be
19 able to be testified about before a jury, Your Honor.

20 JUDGE GARCIA: But these spec - - - you want us
21 to rule that these specific factors are scientifically
22 acceptable and should be allowed before the jury in every
23 case?

24 MS. HUTCHINSON: And that's why I'm discussing
25 the factors that I think were established here, Your Honor.



1 And I think that the cognitive impairment, at a bare
2 minimum, which the People again, have not disputed on
3 appeal. They've written not a single word about it, and my
4 client had an IQ of 78. There was nothing - - - there was
5 nothing in dispute about this. And I think this court has
6 a record at which it can at least rule on that.

7 But you know, obviously, we think that the court
8 could also rule on psychiatric illness, despite any sort of
9 flux in this that could go before a jury later. And - - -
10 and indeed, my - - - you know, my adversary is pointing to
11 surveys from 2018. You're right; I couldn't cite them
12 because they're not a part of my record.

13 CHIEF JUDGE DIFIORE: Okay. Thank you, Counsel.

14 MS. HUTCHINSON: Thank you, Your Honor.

15 (Court is adjourned)

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

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



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