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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 105

JAMELL R. MCCULLOUGH,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
May 31, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar  
2 is number 105, People v. Jamell McCullough.

3 MR. MILES: Good afternoon, Your Honors.  
4 Scott Miles on behalf of the People.

5 If I could - - -

6 CHIEF JUDGE DIFIORE: Would you like  
7 rebuttal time?

8 MR. MILES: Yes, Your Honor. Two minutes,  
9 please.

10 CHIEF JUDGE DIFIORE: Yes.

11 MR. MILES: Whether or not to admit expert  
12 testimony, is a decision which is best left to the  
13 sound discretion of the trial court. The trial court  
14 in this case did not abuse its discretion by  
15 precluding the introduction of expert testimony as to  
16 reliability by witness identification, because this  
17 was not a case where there was little or no  
18 corroborating evidence.

19 There was a single eyewitness in this case,  
20 however, his testimony was corroborated by the testimony  
21 of a cooperating codefendant.

22 JUDGE GARCIA: Counsel, let's say we get  
23 rid of that test, just hypothetically, if LeGrand is  
24 not going to go after Holmes, and you're looking at a  
25 pure abuse of discretion standard here, what would

1 the test be then?

2 How would this factor in to whether the  
3 judge abused his discretion or not?

4 MR. MILES: I believe if we would get rid  
5 of the LeGrand test, the only question - - - are you  
6 saying if we simply use simple rules of evidence as  
7 to whether or not - - -

8 JUDGE GARCIA: Or any other expert  
9 testimony you would admit.

10 MR. MILES: At that point, the only  
11 question would be whether the expert had information  
12 which would be relevant to the question at bar. And  
13 in that case, I can't imagine any trial that would  
14 not simply devolve into a battle of experts.

15 JUDGE GARCIA: But wouldn't the trial judge  
16 then still have discretion to say, even if this  
17 expert testimony is in some way relevant, I can  
18 preclude it because its relevance is outweighed by  
19 undue prejudice or it's being, you know, it's  
20 extraneous, or whatever. Wouldn't that balancing  
21 test still take place? And isn't that the point  
22 where you can consider the LeGrand factors?

23 MR. MILES: I'm sorry. The points - - - if  
24 the trial judge is making the determination that  
25 other factors outweigh the relevance - - -

1 JUDGE GARCIA: Right.

2 MR. MILES: - - - of the expert testimony?  
3 Well, Your Honor, I believe a LeGrand test is still  
4 the better method, because it has the two-part  
5 balancing test where - - -

6 JUDGE GARCIA: But my concern with LeGrand  
7 is Holmes, right, and if you're looking at really the  
8 strength of the People's case in considering whether  
9 or not testimony comes in. Right. So it's not a  
10 third-party accusation, but it's the defendant's  
11 evidence. Right. What the defendant wants to put  
12 on.

13 And we are saying, before you get to a  
14 regular balancing test, you have to jump through  
15 these hoops, and one of them is the corroboration  
16 requirement that you are - - - or the corroboration  
17 analysis that you just described. So if we're going  
18 to say that isn't any good under Holmes, let's just  
19 say we do that, or we consider doing that, then what  
20 would the standard be?

21 MR. MILES: The standard would be simple  
22 relevance, and whether or not the relevance of the  
23 testimony is outweighed by undue prejudice to either  
24 side. And the outcome would be similar to the  
25 LeGrand test.

1                   However, I believe, again, LeGrand is still  
2                   the better option. Because when you're dealing with  
3                   specifically eyewitn - - - or excuse me, expert  
4                   testimony on reliability of eyewitness  
5                   identification, you have - - - you run the risk of  
6                   confusing the issue - - - confusing the jury with  
7                   issues that are extraneous to the central  
8                   determination. It's taking the determination out of  
9                   the hands of the jury. The determination of whether  
10                  or not the eyewitness's testimony is - - - is  
11                  reliable.

12                  JUDGE GARCIA: But isn't that a - - - can't  
13                  you get that same - - - to that same place using the  
14                  standard admissibility criteria for expert testimony  
15                  and the balancing test without having the LeGrand  
16                  preliminary hurdle?

17                  MR. MILES: You can, but again, you run the  
18                  risk of tipping the balance too far to the other  
19                  side, essentially. Of admitting - - - requiring  
20                  trial courts to admit expert testimony, when that is  
21                  not really a question that is properly before, or  
22                  rather - - -

23                  JUDGE FAHEY: You know, to put it another  
24                  way, once you admit that expert testimony is  
25                  necessary, let's say that in any eyewitness case,

1           once that threshold is caused - - - crossed, then why  
2           should this expert testimony be treated any  
3           differently than any other testimony?

4                       Once we have expert testimony in all sorts  
5           of evidentiary issues that the courts ruled or let it  
6           in, so I guess the question that strikes me is,  
7           what's different about eyewitness testimony than  
8           would be different about another form of testimony  
9           where we do allow scientific evidence outside the can  
10          of the jury to supplement their analysis of it. Why  
11          should it be different here than anywhere else?

12                      MR. MILES: Because the determination of an  
13          eyewitness's credibility and reliability is - - - has  
14          always been a central determination to be made by the  
15          jury who are in the position of observing that  
16          witness, and determining for themselves, really in  
17          many cases, the very essential question that the  
18          trial is being held for.

19                      JUDGE FAHEY: So what you're saying is, is  
20          that the juror's evaluation of the corroborating  
21          witness then, is something that they have that person  
22          right in front of them, and that's a normal human  
23          thing to do.

24                      You think see whether they're telling the  
25          truth or not, whether or not what they're saying is

1 credible, given this guy's background and everything,  
2 that kind of evaluation is an evaluation should only  
3 be made by a jury of your peers and can't be  
4 supplemented by an expert.

5 But seems to be a number of cases out there  
6 where eyewitness testimony has been wrong, and it's been -  
7 - - even though it's been corroborated, and that's - - -  
8 that's the argument that's behind why we should be  
9 allowing an expert testimony, so - - - so that that's  
10 factored into the jury's analysis.

11 MR. MILES: That's true, Your Honor.  
12 However, the balancing test is, I believe,  
13 specifically implemented to avoid the situation which  
14 would arise if - - -

15 JUDGE FAHEY: Which is what Gar - - - Judge  
16 Garcia was saying. That's where you would end up  
17 with the balancing test, the prejudicial - - -  
18 probative value versus prejudicial effect, and then  
19 abuse of discretion. Those two.

20 MR. MILES: Correct. But I believe what  
21 would happen, were we to simply rely on the standard  
22 evidentiary rules, rather than the LeGrand test, is  
23 that every single case, instead of having a jury  
24 determine the reliability, the credibility of the  
25 witness who was testifying before them, they are

1           instead relying on simply which expert testifying for  
2           the defense or for the people, they find to be more  
3           credible, rather than the witness themselves.

4                    JUDGE RIVERA:  Is the validity of LeGrand  
5           before us in this case?  I know the amici has - - -  
6           have raised this.

7                    MR. MILES:  I know there are certainly  
8           parties who would like it to be before this court,  
9           however, it's the People's position - - - the People  
10          are not arguing the validity of LeGrand.

11                   Certainly, the People argue simply that  
12          under the facts and circumstances of this case - - -  
13          of this case relying on LeGrand, the Appellate  
14          Division came to the incorrect conclusion by deciding  
15          that there was insufficient corroborating evidence in  
16          this case to obviate the need or the requirement for  
17          the expert testimony.

18                   JUDGE RIVERA:  Are there circumstances  
19          under which a co-participant might not be able to  
20          corroborate, an eyewitness, a single eyewitness?

21                   MR. MILES:  I - - - I can certainly imagine  
22          there might be circumstances if the - - - if the  
23          accomplice never had the opportunity to view the  
24          other accomplice per - - - you know, for instance if  
25          they were all masked during the entire - - -



1                   JUDGE RIVERA: Well, what about in this  
2 case, as I understood defense counsel's argument in  
3 part, is that the co-participant may have very well  
4 observed the defendant at some point, but had no - -  
5 - did not observe anything that went on inside the  
6 barbershop. And that's where the expert might have  
7 provided some useful information to the jury, to  
8 appreciate the eyewitness's observations of the  
9 events inside the barbershop. Why - - - why doesn't  
10 that work?

11                   MR. MILES: Your Honor, actually, I believe  
12 the fact that the corroborating witness did not see  
13 the same events as the - - - the victim, the  
14 surviving victim who testified, actually makes an  
15 even stronger corroboration. Because the expert  
16 testimony would have been on weapon focus, event  
17 stress, those issues, which only apply to the  
18 surviving victim inside the barbershop.

19                   The corroborating witness, the accomplice  
20 saw the defendant before the crime, immediately as  
21 the other people were walking into the barbershop, he  
22 saw them after the crime, and he saw them again when  
23 they were dividing up the proceeds of the crime.

24                   So none of the expert testimony as to those  
25 factors would have applied to the corroborating

1 witness in any way.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. MILES: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MR. SHIFFRIN: May it please the court,  
6 Brian Shiffrin on behalf Jamell McCullough.

7 It's our contention that the Appellate Division  
8 Fourth Department was correct under the LeGrand test, and  
9 as I'll argue in a moment, if - - - if the court were in  
10 fact to hold it was correct to preclude Mr. McCullough  
11 from the opportunity to present an expert on the factors  
12 affecting the reliability of identification that pertained  
13 to his particular case, such a ruling would demonstrate  
14 that is urged by amicus that in fact the LeGrand rule  
15 actually implic - - -

16 JUDGE STEIN: I read the - - - I read the  
17 LeGrand rule a little differently. I thought - - - I  
18 didn't think LeGrand was saying that sufficient  
19 corroborating evidence was a threshold determination  
20 to be made by the trial court. I thought it was in  
21 looking back in re - - - on appellate review,  
22 whether, you know, whether preclusion of the expert  
23 testimony wouldn't require reversal as long as there  
24 was some corroborating evidence.

25 MR. SHIFFRIN: And - - -

1 JUDGE STEIN: To me, those are - - -

2 MR. SHIFFRIN: They are different - - -

3 JUDGE STEIN: - - - those are different  
4 things.

5 MR. SHIFFRIN: And what happened here is,  
6 by the Appellate - - - with respect to the Appellate  
7 Division is what this court did in Santiago and in  
8 Abney. This court in Santiago had a case where there  
9 was the identification and there were two  
10 corroborating eyewitnesses. Two other people.

11 And this court held that the court erred in  
12 not getting to the Frye hearing by it holding that  
13 because there were two - - - because there were two  
14 additional witnesses who presented corroboration,  
15 both eyewitnesses, both strangers, and this is  
16 important, people who did not know Mr. Santiago  
17 before, this court ruled there was error for the  
18 trial court not to reach the Frye issue.

19 Indeed in Santiago, the court pointed out that  
20 similarly in LeGrand, there had been a witness besides the  
21 eyewitness - - - the immediate eyewitness, there was a  
22 second - - - there was a secondary - - - there were  
23 actually two secondary witnesses, who again were  
24 strangers.

25 And finally in Abney, which was actually two

1 cases, Abney and Allen, the court distinguished Abney from  
2 Allen because in Allen, the court held to be critical was  
3 that the corroborating witness already knew the - - - the  
4 defendant, and therefore, identification wasn't a critical  
5 issue.

6 Similarly, in People v. Young, relied on by the  
7 appellant, this court held that the court - - - trial  
8 court did not err in precluding the eyewitness' expert  
9 because there were two accomplished witnesses who were - -  
10 - pardon me, there were two prosecution witnesses who were  
11 acquaintances of Mr. Young, both of them who testified  
12 that the stolen property in their possession came from Mr.  
13 Young. So therefore I - - -

14 JUDGE ABDUS-SALAAM: It sounds like - - -

15 JUDGE STEIN: But - - -

16 JUDGE ABDUS-SALAAM: - - - counsel, that  
17 you're saying that the determining factor here is  
18 that Mr. Harvey didn't know the defendant before the  
19 crime took place.

20 MR. SHIFFRIN: There is one - - - one of  
21 the factors is - - - the factor is equitable to  
22 reliability of the testimony and to credibility.  
23 With respect to reliability, he was a stranger; he  
24 testified he never knew my client prior to that  
25 event. Number two, he failed to identify my client

1 in a photo array at a time that he picked out his own  
2 brother and his cousin. One would think, before you  
3 would pick - - - identify your brother as participant  
4 in a robbery murder, you would pick out - - - pick  
5 out someone else - - -

6 JUDGE PIGOTT: Isn't that - - - isn't that  
7 what you get down to in terms of what the judge - - -  
8 the trial judge is deciding? He's got Johnson who  
9 says that's the guy. He's got this other person who  
10 says that's the guy, but previously he said that's  
11 not the guy. And he is one that was involved in the  
12 robbery.

13 So a judge could, under those  
14 circumstances, say, this is not a LeGrand issue; this  
15 is a credibility issue with respect to Harvey. So  
16 that's for the jury to decide, not for me. If they  
17 want to believe Harvey, and say, you know, he  
18 corroborates Johnson, and they both put him at the  
19 scene, fine. If they don't, because of all the  
20 things that you brought out and are about to, that's  
21 fine too.

22 But there's no reason to say that Johnson  
23 didn't have an opportunity to see him properly, and  
24 Harvey didn't have an opportunity to see him  
25 properly, and the question of whether Harvey is

1           telling the truth or not is for the jury.

2                       MR. SHIFFRIN: A few things in response.  
3           First of all, I think there's a difference between  
4           reliability factors and credibility factors. This  
5           court, in a decision that you authored in Santiago,  
6           held that the trial judge was wrong in not getting  
7           past the corroboration issue and holding that because  
8           there were two corroborating witnesses, we're done,  
9           this court rejected the conclusion that a court can  
10          determine when it goes to reliability. The  
11          reliability factor, besides being a stranger, was the  
12          failure to identify - - -

13                      JUDGE PIGOTT: Aren't you - - - aren't you  
14          then saying there must always, always, always be a  
15          LeGrand expert in any eyewitness case?

16                      MR. SHIFFRIN: No. First of all, under  
17          LeGrand, this court's distinction has been two  
18          things, as pointed out by Judge Abdus-Salaam, whether  
19          it was a stranger or not, and also whether or not  
20          there was a possibility of prior transfer, prior  
21          observation, because Mr. Harvey had seen the  
22          photograph of my client previously, he was the only  
23          person in the initial photo array that was in the  
24          photo array fourteen months later.

25                      It's amazing, he had never seen my client

1           previously, but - - -

2                         JUDGE STEIN:   But he had a fair amount of  
3           opportunity to see him that night.

4                         MR. SHIFFRIN:   And yet - - -

5                         JUDGE STEIN:   - - - it wasn't a fleeting  
6           thing, and he wasn't under any stress or pressure of  
7           the situation at the time when he first saw him and  
8           met him, and - - -

9                         MR. SHIFFRIN:   And - - -

10                        JUDGE STEIN:   - - - there were no weapons  
11           involved, so, I mean, aren't those indicia of  
12           reliability?

13                        MR. SHIFFRIN:   Perhaps - - - perhaps they  
14           would have been if they - - - if he had had  
15           identified him, but actually, no, Your Honor;  
16           respectfully, what we know is stranger IDs fail.  And  
17           the amicus brief points out numerous cases with  
18           multiple stranger IDs are wrong.

19                        JUDGE STEIN:   Well, isn't the failure to  
20           identify him getting to your credibility question,  
21           because he gave an explanation of why he said he  
22           really did identify him; he just didn't want to say  
23           so at the time.

24                        MR. SHIFFRIN:   That could - - - in People  
25           v. Santiago, the corroborating witness also gave an

1 explanation, he was worried about his immigration  
2 consequences if he testified, because he was  
3 undocumented. And yet, again, this court held the  
4 fact that that witness had an explanation for his  
5 prior failure to identify was not a sufficient basis  
6 to say, well, there was corroboration.

7 If in fact, even though we know, which from DNA  
8 exonerations and misidentification is the leading cause of  
9 wrongful convictions because a witness saying, that's the  
10 one, is understandably powerful evidence, even if sincere  
11 but wrong - - -

12 JUDGE PIGOTT: I think everyone knows that.  
13 I think we're on to the second part.

14 MR. SHIFFRIN: Well - - -

15 JUDGE PIGOTT: In other words, Johnson is  
16 Johnson. Johnson says that's the guy - - -

17 MR. SHIFFRIN: Well - - -

18 JUDGE PIGOTT: - - - whether you believe  
19 him or not, maybe you've got a point with respect to,  
20 you know, we need LeGrand. But when you got somebody  
21 else who, as Judge Stein is pointing out, is a  
22 participant at least to some extent in this thing or  
23 not, and who makes an identification or not, aren't  
24 you down to credibility? In other words, he - - -  
25 there is nothing reliable about him. I mean - - - I



1 mean, he was there. So he either saw him or didn't,  
2 and you got to believe him or not.

3 MR. SHIFFRIN: The - - - a few things,  
4 again. First of all, with respect to Johnson, he  
5 first identified the person as the shorter, darker  
6 person wearing dark clothing.

7 JUDGE PIGOTT: What you're doing - - - but  
8 what you're doing is you're replacing yourself with  
9 Judge Valentino. You're - - - you're saying Judge  
10 Valentino was flat out wrong because the guy was  
11 shorter, was this, was that.

12 Looking at it broadly, as a - - - as a  
13 matter of law, you have a judge that says, here is  
14 somebody that identified the defendant. Here's  
15 another person who identified the defendant. Both of  
16 them have scars. This guy has got a major  
17 credibility problem, but I've looked at it all. And  
18 I know how this thing unfolded. I know the det - - -  
19 I know the timing, I know how everything occurred,  
20 and I don't think LeGrand is going to help us.

21 MR. SHIFFRIN: A holding that a judge can  
22 make his or her own determination that I think that a  
23 stranger ID by someone who previously failed to  
24 identify the person, is sufficiently credible to  
25 preclude a defendant's right to present evidence,

1 would be an abuse of discretion as a matter of law.

2 Because this court held in People v. Hudy,  
3 the limits of discretion are, the defendant has the  
4 show right to present a defense. If in fact under  
5 LeGrand, a court can say, well, in my opinion, that's  
6 reliable ID, talk about not having a jury decide,  
7 having a judge decide that, we in fact limit a  
8 defendant's right at the most critical evidence in ID  
9 case - - -

10 JUDGE RIVERA: And is that in part - - - if  
11 I'm understanding part of your argument here, and is  
12 that in part because if the jury were to discount  
13 Harvey's testimony, they are then left with Johnson,  
14 and they now have - - - are left without this expert  
15 testimony that might assist the jury in determining  
16 whether or not - - -

17 MR. SHIFFRIN: Absolutely.

18 JUDGE RIVERA: - - - Johnson could identify  
19 the defendant.

20 MR. SHIFFRIN: In this case - - -

21 JUDGE RIVERA: Is this your point?

22 MR. SHIFFRIN: In this case, there is good  
23 reason to believe the jury did not consider - - - did  
24 not credit Mr. Harvey. They didn't ask for his  
25 testimony to be reread; they asked for Mr. Johnson's

1 testimony to be reread.

2 Mr. Johnson - - - pardon me, Mr. Harvey - - -

3 JUDGE RIVERA: I get that. But - - - so  
4 let me ask you a different question. So you say yes  
5 to that. So then did defense counsel make this  
6 argument below?

7 MR. SHIFFRIN: The defense argument - - -

8 JUDGE RIVERA: Can I find this in the  
9 transcript, this particular argument?

10 MR. SHIFFRIN: The argument was that - - -  
11 that - - - the argument that Mr. Harvey was not so -  
12 - - was not so credible and reliable - - -

13 JUDGE RIVERA: Yes.

14 MR. SHIFFRIN: - - - yes. At the - - -  
15 when the motion was renewed - - -

16 JUDGE RIVERA: Yes.

17 MR. SHIFFRIN: - - - at the end of the  
18 case. Yes, Your Honor. The - - - again, the fact  
19 that the - - -

20 JUDGE RIVERA: Well, I looked at that  
21 transcript, and I looked at that argument, and I saw  
22 maybe one sentence - - -

23 MR. SHIFFRIN: She - - -

24 JUDGE RIVERA: - - - for you to stand  
25 behind, and it's a pretty weak one, out of pages of

1 argumentation where he's focusing on Harvey did not  
2 observe what went on in the barbershop. And that  
3 what I understood counsel to be arguing. So  
4 therefore, he cannot corroborate what went on in the  
5 barbershop.

6 MR. SHIFFRIN: Respectfully, I believe she  
7 - - - I believe counsel also argued that Harvey was  
8 simply not credible, as the DA described him as a  
9 liar, he - - - a self-admitted liar. What he's  
10 testified to is different than we said during the  
11 plea. The basis to say, well, because this admitted  
12 liar came in, we can - - - we can therefore ignore  
13 the issues of reliability of identification events is  
14 dangerous.

15 JUDGE RIVERA: Well, I agree with you,  
16 defense counsel may have attempted to discredit, if  
17 you will, this particular witness, Harvey. But to  
18 actually have based his motion on Harvey's  
19 credibility, is - - -

20 MR. SHIFFRIN: Not the initial - - -

21 JUDGE RIVERA: - - - very weak, and  
22 therefore I should still have the expert, because  
23 Harvey cannot be believed for purposes of the  
24 identification in the barbershop?

25 MR. SHIFFRIN: Again, I believe when the

1 motion was renewed, the answer is yes. And in any  
2 event, any ruling that would preclude this - - - this  
3 - - - on the most critical evidential ID, we believe  
4 would be an abuse of discretion, because it would  
5 violate a defendant's critical constitutional rights.

6 CHIEF JUDGE DIFIORE: Counsel, did - - -  
7 did - - - was there any argument below by defendant  
8 that the expert's testimony would be relevant as to  
9 Mr. Harvey's identification?

10 MR. SHIFFRIN: The - - - there was - - - I  
11 have to be careful. The pretrial motion specified  
12 three separate grounds. Weapons focus, the stressful  
13 nature of the event, and the duration. The - - - I  
14 don't recall if that issue was ended up being  
15 addressed, because the focus - - - the initial  
16 pretrial ruling was - - -

17 CHIEF JUDGE DIFIORE: As to Mr. Harvey, I'm  
18 talking about.

19 MR. SHIFFRIN: Oh, no. That was with  
20 respect to Mr. Harvey.

21 CHIEF JUDGE DIFIORE: His - - - his  
22 eyewitness - - -

23 MR. SHIFFRIN: I don't - - - I do not  
24 believe so. I believe the focus was on - - - was on  
25 Mr. Johnson, because again, the contention was Mr.

1 Harvey was neither reliable nor credible.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. SHIFFRIN: Thank you.

4 CHIEF JUDGE DIFIORE: Mr. Miles.

5 MR. MILES: Your Honors, again, the  
6 question of credibility. The credibility of the  
7 corroborating evidence in the eyewitness case is a  
8 question that is best left to the discretion of the  
9 trial court because it's difficult to imagine any  
10 type of corroborating evidence whose credibility  
11 could not be attacked.

12 JUDGE PIGOTT: But what's the downside? If  
13 - - - if the LeGrand's expert came in and said what  
14 she was going to say, which, you know, weapons,  
15 focus, stress, et cetera, you'd still be arguing; it  
16 makes absolutely no difference, she's - - - that's a  
17 fog, you know, the fact of the matter is that Johnson  
18 identified the defendant. Mr. Harvey identified. He  
19 has his flaws and scars, but he's still there. So it  
20 doesn't make any difference what she's saying,  
21 because you got two people who say he did it.

22 MR. MILES: Well, it - - - that is  
23 precisely why the rule exists, to not distract a jury  
24 with evidence which has no real bearing on their  
25 determination. The determination that they are there

1 to make, whether or not the witnesses saw what they  
2 claim to have seen, and whether or not they're  
3 credible and reliable.

4 JUDGE ABDUS-SALAAM: But counsel, I - - - I  
5 read this case slightly differently. I thought the  
6 judge was initially willing to allow the testimony of  
7 the expert, but because of scheduling, there might  
8 have been a problem.

9 MR. MILES: The scheduling question  
10 essentially was never really reached because the  
11 judge decided it on the first part of the LeGrand  
12 test. The judge did consider the motion for the  
13 expert testimony, however, he took the papers back,  
14 and there was a recess, he looked at everything, and  
15 then he came back and said that - - - he was making  
16 the determination that based on what he knew or  
17 suspected was going to be the People's proof, that's  
18 her - - - the defense's motion would fail under the  
19 first part of the LeGrand test.

20 JUDGE PIGOTT: Did he say that in the  
21 context of a Frye hearing, or am I confusing - - -

22 MR. MILES: There was - - - the People did  
23 argue in the alternative. They argued that there was  
24 sufficient corroboration to obviate the need for the  
25 expert testimony, and they argued - - - also argued

1 in the alternative that if the judge determined that  
2 there was not sufficient corroboration, that a Frye  
3 hearing would be necessary.

4 And the judge did determine that - - - he  
5 did deny a Frye hearing, but he did so under the fact  
6 that the proposed testimony would fail under the  
7 first part of the LeGrand test.

8 So essentially, he never really reached  
9 whether or not a Frye hearing was going to be  
10 necessary because of the nature of the evidence; he  
11 simply denied it because the testimony itself was not  
12 going to be coming in.

13 JUDGE RIVERA: Counsel, does it matter that  
14 the - - - Harvey is - - - does not observe anything  
15 in the barbershop, that can't corroborate what was  
16 done in the barbershop, does it matter? I know it's  
17 a felony murder case, I know it's accomplice theory,  
18 does that matter that all he's corroborating at best  
19 is that the defendant was in the car, went into the  
20 barbershop, and came out of the barbershop?

21 MR. MILES: Well, the corroboration we're  
22 looking for is as to the identity of the defendant,  
23 whether or not he was the person who was actually  
24 inside the barbershop.

25 JUDGE RIVERA: Right.



1                   MR. MILES: Johnson's testimony about what  
2 the defendant did while he was in the barbershop, and  
3 what everybody - - - all of the robbers did, is very  
4 credible and reliable in itself.

5                   JUDGE RIVERA: I understand. But it's  
6 uncorroborated; is it not?

7                   MR. MILES: That's true.

8                   JUDGE RIVERA: He is the only person who  
9 can testify as to what went in, because he is the - -  
10 - he is the surviving victim.

11                  MR. MILES: The only survivor, that's  
12 correct. But again, when we're dealing solely - - -

13                  JUDGE RIVERA: No, what I'm asking is does  
14 it matter in this case.

15                  MR. MILES: It does not matter, no.  
16 Because we're dealing solely with whether or not the  
17 defendant was one of the person - - - one of the  
18 people who went into the barbershop and participated  
19 in the robbery, not what he did when he was in the  
20 barbershop, not whether he was one of - - - he was  
21 the shooter or one of the people with - - - with a  
22 weapon. The question is - - -

23                  JUDGE RIVERA: What's the evidence to  
24 finding him guilty of the felony murder then?

25                  MR. MILES: That he was participating in a

1 robbery and that - - -

2 JUDGE RIVERA: But doesn't that only come  
3 from Johnson?

4 MR. MILES: No, it does not. Because the -  
5 - - after the robbery occurred - - -

6 JUDGE RIVERA: Um-hum.

7 MR. MILES: - - - Mr. Harvey also  
8 witnessed the individuals who went into the  
9 barbershop dividing up to the proceeds of the  
10 robbery.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. MILES: Thank you.

13 (Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jamell R. McCullough, No. 105 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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