GETTING AN EYEWITNESS EXPERT ADMITTED - A FANTASY IN ONE ACT.

By Lorca Morello, NY Legal Aid

Scene: The courtroom of Justice DeNyed. You’ve just moved for an i.d. expert.

Judge: Counselor, we’ve been doing identification cases for centuries without needing an expert.

What’s wrong with good, plain common sense?

You: Because we now know that “common sense” is a seriously misleading way to judge the accuracy of eyewitnesses. Jurors have all sorts of misconceptions about how memory works and what factors can lead to mistaken identifications. Yet, studies have shown that jurors are so strongly inclined to credit eyewitness testimony that they’ll even ignore contradictory objective evidence.

Judge: All of that can be covered by voir dire, cross-examination, summation, and of course, my excellent jury instructions, where I’ll tell the jury to consider the standard Neil v.

Biggers factors in evaluating the eyewitness testimony: opportunity to view, how much attention they were paying, how certain they are of their identification, the accuracy of their pre-lineup description and how much time elapsed between the crime and when they gave the description.[1](#_bookmark0) That should give you plenty of opportunity to educate the jurors.

You: Biggers was decided in 1972, and a lot of research has been done since then. As we know from the DNA exonerations eyewitnesses can be sincerely convinced of the correctness of their identification, but be completely wrong. Studies have shown that an eyewitness’s certainty is a poor predictor of the accuracy of the identification.

Another important research finding is that memory is easily tainted by post-event information and confirmatory feedback. For example, witnesses may hem and haw at the lineup, but after they’re told they’ve picked the right person, their recollection of the lineup is that the suspect’s face “just popped out.”

Experiments have also shown that a comparison between subjects who receive confirmatory feedback and those who did not show that the former report that they had a better and longer view of the perpetrator, that they have a clear memory of his face, and that they’re good at remembering faces.

Judge: But it would be unfairly prejudicial to the People to have some pointy-headed scientist come in and tell them how unreliable eyewitnesses are.

D.A.: As your Honor so brilliantly and perceptively points out, the People would be most unfairly denied our right to a conviction. The victim is a nun, she was looking at the

1 These are the factors set out in Neil v. Biggers, 409 U.S. 188 (1972) and incorporated into jury instructions.

robber’s face the whole time he was holding a gun to her head, and his face is indelibly imprinted on her memory for as long as she lives. It may have been ten years ago, but she’ll never forget that face! And why would she lie? The defendant matched the victim’s description as a black man between 20 and 50, and she picked him out of a photo lineup and a corporeal lineup which your honor so correctly found not to be suggestive.

You: That’s exactly why we need an expert, to combat all those misconceptions! Research has shown that, contrary to popular belief, high levels of stress reduce rather than improve accuracy. Memory isn’t like a videocamera that makes an indelible record. It’s a highly selective process of perception, encoding, storage and recall that can be tainted at any one of those stages. Memory retrieval isn’t like rolling a tape, but a reconstruction that can unwittingly incorporate information that was acquired later in the course of the interview process.

I recommend this book by Cutler and Penrod explaining the underlying science and showing how the procedures we now use aren’t effective safeguards against misidentification.[2](#_bookmark1)

Judge: I don’t need to read a book, the Court of Appeals says it’s entirely within my sound discretion whether to let you have an expert. I don’t have to allow irrelevant, time- consuming evidence.

You: This kind of evidence is always relevant whenever the defendant argues that he was mistakenly identified. A person’s identity as the perpetrator is always an element of the crime. So, evidence attacking his identity as the perpetrator can never be cumulative or a waste of time.[3](#_bookmark2)

Court: Everybody knows credibility is a jury question. The jurors should just look at the witness’s character and demeanor and use their life experiences.

You: Eyewitness i.d. experts don’t testify about the credibility of any witness, they talk about the psychological factors affecting identification. Even if jurors know in a general way that memory fades, or that good lighting is a better viewing condition than poor lighting, they’re not likely to know the research, for example, about how the forgetting curve

2Brian L. Cutler & Steven D. Penrod, Mistaken Identification (1995). Most of the information here about eyewitness identification research can be found there and in Elizabeth Loftus and James M. Doyle, Eyewitness Testimony (1997).

3 State v. Chapple, 660 P.2d 1208, 1222 (Ariz. 1983) (one of the first high state court decisions admitting eyewitness expert testimony); see also United States v. Mathis, 264 F.3d 321,339 (3d Cir. 2000) (admitting eyewitness experts, reasoning that experts who apply reliable scientific expertise to pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by courts, not turned away).

works, or that street lighting distorts colors.[4](#_bookmark3)

Judge: Well, I’m going to require an elaborate and detailed motion showing me exactly how the testimony will correlate to the facts of the case and an offer of proof showing what your defense will be and how this expert testimony is relevant.

You: Judge, this is no different from the kinds of experts the People use to testify about rape trauma syndrome “to disabuse the jurors of commonly held misconceptions” and enable them to reach a more informed verdict.[5](#_bookmark4) Expert evidence on eyewitness i.d. can’t be treated as a “suspect class” of opinion evidence, particularly after Lee and LeGrand.[6](#_bookmark5) The Court of Appeals in LeGrand specifically held that expert testimony about the factors affecting the reliability of eyewitness identifications is based on sound scientific principles and can benefit the jury. LeGrand also says that this kind of expert testimony should be treated in the same way as any other kind of expert evidence. It would be unconstitutional to have stricter standards of admissibility for defense experts than for People’s experts.

Court: But LeGrand says I have to admit this expert only if there’s “little or no” corroborating evidence. There’s certainly corroboration in this case. The crime occurred in Brooklyn and the defendant lives in Brooklyn. Surely that’s no coincidence!

You: LeGrand didn’t consider - because it wasn’t raised - that a defendant has a due process and Sixth Amendment right to put on a defense and to compulsory process which includes the right to call experts to rebut an inference of guilt.[7](#_bookmark6) The existence of corroborating evidence goes to the weight, not the admissibility of the expert testimony. Just because the People’s evidence *if credited* corroborates the eyewitness i.d. doesn’t mean the i.d. isn’t central to the case.[8](#_bookmark7) Under Holmes, when a defendant proffers evidence going to the question of guilt, it’s unconstitutional to preclude it because of the perceived strength of the People’s case. Otherwise, only innocent defendants would be allowed to put on evidence.

4 See People v. Lee, 92 N.Y.2d 987 (1998) (subject of eyewitness expert testimony not necessarily within the ken of jury).

5 See People v. Taylor, 75 N.Y.2d 277 (1990) (rape trauma syndrome expert admissible to rebut arguments based on common-sense misconceptions about behavior of rape victims, notwithstanding disagreements about methodology).

6 See People v. Smith, 191 Misc.2d 765, 769 (Sup. Ct. N.Y. Co. 2002) (Yates, J.) (admitting eyewitness expert without a Frye hearing and rejecting arguments that admissibility be conditioned on detailed offers of proof).

7Holmes v. South Carolina, 126 S.Ct. 1727 (2006); Crane v. Kentucky, 476 U.S. 683, 689-690 (1986); see also Howard v. Walker, 406 F.3d 114, 132-133 (2d Cir. 2005) (prospective preclusion of defense witness implicates Sixth Amendment rights); People v. Carroll, 95 N.Y.2d 375, 385 (2000) (court=s discretion circumscribed by Sixth Amendment rights of defendant).

8 See Holmes v. South Carolina at 1734-1735.

D.A.: What’s wrong with that?

You: A study of 150 DNA exonerations of convictions based on misidentification showed that 145 of them contained purportedly corroborating evidence. An eyewitness identification creates a belief that the suspect is guilty and just about anything can become corroboration.[9](#_bookmark8)

Furthermore, due process requires the state to use reliable procedures. We have the right to show through expert testimony that the methods used in this case created a risk of misidentification.

Court: Never mind the Constitution, this is my courtroom. Are you seriously suggesting you’re entitled to this kind of expert whenever the defendant contests his identification? In every buy and bust case, no matter how much other evidence there is?

You: (taking a deep breath) Absolutely. The People can bring in fingerprint experts whenever they want, and they’re not limited to cases where fingerprints are the only evidence of guilt. Why should it be different for the defense? We need an expert to explain not only why the characteristics of the witness or of the crime might make the identification unreliable, but also how the state uses procedures that create an unacceptable risk of misidentification.

D.A.: Our procedures have been held to be constitutional. The court has no right to tell us or the police how to conduct our investigations or prepare our witnesses.

You: The criminal justice system relies on unscientific assumptions about how memory works, although that’s beginning to change in some jurisdictions. Memory is like a crime scene that’s easily contaminated by the kind of post-event information and confirmatory feedback that witnesses routinely get in the course of trial preparation.[10](#_bookmark9)

D.A.: That’s ridiculous. If the police wanted to frame the defendant, they would have done a better job.

You: It’s not a question of bad faith. It’s been known for decades that when an experimenter knows the expected or desired outcome, he or she will unconsciously bias the experiment. The “experimenter expectancy effect” is such an accepted phenomenon in

9 Gary Wells, Eyewitness Identification: Science and Reform, 29 Champion 12, 19 (2005).

10 Gary Wells and Amy Bradfield, AGood, You Identified the Suspect@: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience 83 J. of Applied Psychology 360 (1998) (demonstrating that confirmatory feedback not only inflates the confidence of witnesses in their identification, but also influences their memory of their opportunity to view, how much attention they were paying at the time).

the scientific community that experiments aren’t considered valid unless they’re performed by someone who doesn’t know what the result is supposed to be. In the same way, when lineups are conducted by police who know who the suspect is, they may unconsciously be giving non-verbal cues to the witness that affect the identification.

The problem with traditional simultaneous lineups is that witnesses tend to make a relative choice, especially if they’re not told that the perpetrator might not be there. In other words, they’ll choose the suspect just because he’s the one in the lineup who most resembles the perpetrator.

Another problem is suggestive interviewing. Many studies have shown how it causes witnesses to incorporate information into their memories.

Judge: So you’re arguing that lineups should be conducted by a police officer who doesn’t know who the suspect is. This new-fangled “double blind” and “sequential lineup” nonsense.

You: It’s not nonsense, many police departments, such as Boston and New Jersey have changed their procedures. Not New York, of course.

Court: What does an eyewitness identification expert testify about?

You: I thought you’d never ask. Here are the most generally accepted results of the last 30 years of research:

* High levels of stress reduce rather than improve the accuracy of identification. Therefore, eyewitnesses may have more difficulty remembering the details of a violent event than of a non-violent event.
* A witness’s certainty is not a reliable predictor of accuracy.
* An eyewitness’s testimony about an event reflects not only what they actually saw, but information they obtained later.
* Eyewitnesses’ perceptions and memories of an event may be affected by their attitudes and expectations.
* The attention that a witness focuses on the perpetrator’s weapon during the crime reduces the ability to recognize the perpetrator afterwards (“weapon focus”).
* Hair and hairlines are significant factors in facial recognition. Therefore, even a cap can significantly reduce recognition.
* People are significantly better at recognizing persons of their own race than of other races without necessarily being bigots (“own-race bias” or “cross-race bias”).
* Witnesses such as police and bank tellers who claim to be “trained observers” have been show to be no more accurate at recognizing faces than anyone else.
* A fair lineup is one where all the targets resemble the witness’s description, not the suspect. An expert can measure the fairness of a lineup by conducting a mock-witness experiment. This consists of giving the experimental subjects the witness’s description or police sketch and asking the subjects to choose the perpetrator from the lineup photos. If the lineup is fair, the subjects’ choices will be more or less evenly distributed among the photos. To the extent that the defendant’s photo is chosen more than the others, the lineup is biased.
* Memory of a face can only deteriorate; it can never improve. If a witness didn’t recognize the defendant at an earlier lineup, but claims to recognize him in a later lineup, there is a real possibility that the witness’s memory has been tainted by the face in the earlier lineup (“mugshot-induced bias”).
* There is a well-documented phenomenon called “unconscious transference” whereby an eyewitness will sometimes identify as the perpetrator someone whom they have seen in another situation or context.
* The rate of memory loss for an event is greatest right after the event, and then levels off over time (“forgetting curve”).
* Judgments of color made under monochromatic light (e.g., an orange streetlight) are highly unreliable.

Judge: (sweetly) Doesn’t LeGrand say weapon focus doesn’t pass the Frye test?

You: Only because that particular expert apparently didn’t make a good case for it, but it’s certainly generally accepted in the community of eyewitness identification experts. Here’s the Kassin survey, showing that the vast majority of respondents consider the proposition reliable that the presence of a weapon impairs recognition of the perpetrator’s face. And there are numerous studies I can show you.[11](#_bookmark10)

D.A.: If they want to talk about weapon focus, I insist on a Frye hearing! Dr. Ebbe Ebbesen will testify that it’s junk science because you can’t say to a certainty what percentage of the witness’s attention is distracted by the weapon.[12](#_bookmark11)

11 Saul M. Kassin et al., AOn the General Acceptance of Eyewitness Testimony Research: A New Survey of the Experts,@ 56 American Psychologist 406 (2001); Nancy M. Steblay, AA Meta-Analytic Review of the Weapon Focus Effect,@ 16 Law and Human Behavior 421 (1992); Elizabeth Loftus et al., ASome Facts About Weapon Focus,@ 11 Law and Human Behavior (1987).

12 Ebbe Ebbesen is the prosecution=s anti-eyewitness expert. For a debunking of his testimony, see People

You: The purpose of the testimony is only to combat juror misconceptions, not come to an exact conclusion like a police chemist testifying about whether a substance is cocaine. Defendants’ experts should be freely admitted, and certainly not under more stringent conditions than the People’s experts.

Judge: I’ve just been handed a few cases from other jurisdictions finding this testimony admissible and helpful to the jury. Apparently this has been admissible for over 20 years in other states. Why is New York always the last to wake up?[13](#_bookmark12)

v. Williams, 2006 WL 3431886 (Sup.Ct. Kings Co. 2006) (McKay, J.).

13 State v. Whaley, 406 S.E. 369 (S.C. 1991); State v. Skamarocius, 731 P.2d 63 (Alaska Ct. App. 1987);

People v. McDonald, 690 P.2d 709 (Ca. 1984); State v. Chapple, 669 P.2d 1208 (Ariz. 1983);

SUMMARY

Under LeGrand (2007), the court *must* admit an eyewitness expert when:

1. the case turns solely on the accuracy of eyewitness identifications and “there is little or no corroborating evidence connecting the defendant to the crime;”
2. the testimony is relevant to the identification;
3. the testimony is based on principles that are generally accepted within the relevant scientific community;
4. the expert is qualified; and
5. the topic is “beyond the ken of the average juror.”
6. Corroboration

Having more than one eyewitness is not considered “corroboration,” since there were four of them in LeGrand. However, in Young (2006) and (Lee) (2001), the Court found no abuse of discretion because there was purportedly corroborating evidence. There is, however, a strong argument that corroborating evidence goes to weight, not admissibility, and that it is a violation of the defendant’s due process and Sixth Amendment right to present a defense and to compulsory process to preclude expert testimony going to the crucial element of his identity as the perpetrator. As the Supreme Court reasoned in Holmes v. South Carolina, 126 S.Ct. 1727 (2006), it is illogical and arbitrary to preclude relevant evidence proffered by the defendant based on the court’s assessment of the strength of the People’s case.

It can also be argued that “corroborating” evidence is seldom independent of the eyewitness identification. Either the evidence is a product of the identification or vice versa.

1. Relevance

Presumably this means the expert can’t talk about weapon focus if no weapon was involved, or own-race bias if the complainant and defendant were the same race. Beyond that, expert testimony about the factors influencing identification are always relevant whenever the defense argues mistaken identification.

1. Based on generally accepted principles in the relevant scientific community.

This is the Frye standard, which the Court of Appeals construes broadly. See Legrand (2007) and the cases it cites. “General acceptance” does not require unanimity: “widespread acceptance by professionals of good reputation is enough.” People v. Goldstein, 6 N.Y.3d 119 (2005). Even when there’s disagreement in the field, this isn’t enough to make the expert

testimony inadmissible. People v. Taylor, 75 N.Y.2d 277, 286-287 (1990) (rape trauma syndrome expert admissible despite controversy in the field over methodology).

“Relevant scientific community” does not, as the People have argued, have to include everybody who studies memory. It means “scientists who would be expected to be familiar with the particular *use* of the evidence at issue,” People v. Wesley, 83 N.Y.2d 417, 436 (1994) (Kaye, C.J., concurring). In other words, that community of scientists who study eyewitness memory as used to determine the reliability of trial witnesses.

1. the expert is qualified.

This is easy if it’s someone who publishes peer-reviewed research in the field. At the very least, they have to be demonstrably familiar with the research and literature.

1. the topic is “beyond the ken” of the jury.

This has to be read together with Lee which specifically held that even though jurors may know from their own experience some of the factors “relevant to the reliability of eyewitness observation and identification, *it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror*.” Lee at162 ; see also People v. McDonald, 690 P.2d 709, 720 n.13 (Ca. 1984) (explaining that even if jurors know about the “obvious” factors affecting accuracy, they still don’t know how these factors operate).

Courts and the People are inclined to try to erode this principle by arguing that some parts of the testimony can be precluded if the propositions are just common sense. See, People v.

Young, 7 N.Y.3d 40, 45 (2006). One answer is that even if the conclusions *accord* with common sense, the jurors to know the theory to be able to properly apply them to the case. Another answer is that the standard of admissibility is whether expert testimony is *helpful* to the jury “to rebut widely held misconceptions” on which the opposing party relies. Taylor at 292-293.

RESOURCES

Gary Wells’s homepage (has good, up-to-date articles) [www.psychology.iastate.edu/faculty/gwells/homepage](http://www.psychology.iastate.edu/faculty/gwells/homepage)

other experts with websites containing good articles: Saul M. Kassin

Steven Penrod

Eyewitness id blog

lawyers with eyewitness id cases or interested in law reform Ben Hilzheimer at Public Defender Services of Wash D.C. To join, e-ma[il BHilzheimer@PDSDC.org](mailto:BHilzheimer@PDSDC.org)

Local eyewitness id law reform resource lawyer Robert Garcia at Neighborhood Defender Service [rgarcia@ndsny.org](mailto:rgarcia@ndsny.org)

Innocenceproject.org (for news and anecdotes) search: eyewitness identification

BOOKS

Brian L. Cutler & Steven D. Penrod, Mistaken Identification (1995)

Elizabeth Loftus & James M. Doyle, Eyewitness Testimony (1997) 3d ed.

James M. Doyle, True Witness (2005)