

2001 WL 36525264 (N.Y.Sup.) (Trial Motion, Memorandum and Affidavit)  
Supreme Court of New York.  
New York County

THE PEOPLE OF THE STATE OF NEW YORK,

v.

Nico LEGRAND, Defendant.

No. 26341999.  
April 9, 2001.

### **Memorandum of Law in Support of Motion to Admit Expert Testimony On Eyewitness Identification**

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#### **PRELIMINARY STATEMENT**

This memorandum of law is submitted in support of defendant's motion to permit an expert to testify on eyewitness identification. The expert will testify in regards to the following areas: (1) the effect of stress on identification; (2) the forgetting curve, i.e. the effect of time on memory as it relates to identification. the lack of correlation between witness confidence and accuracy in witness identification; (4) reconstructive memory i.e. the input from other sources, such as the police may substantially alter or fill in witness perceptions and recollections without any conscious awareness on the part of the witness; (5) the suggestiveness of the line up used in pretrial procedures; (6) exposure duration and how suggestive post identification feedback radically enhances the witnesses level of confidence in his identification; (7) problems with cross racial identification. The witness does not propose to give ultimate issue testimony on whether any specific eyewitness identification made in this case is accurate or not.

#### **STATEMENT OF FACTS**

On June 15, 1991, a stabbing occurred on Morning side Drive. There were a number of witnesses to the event. In 1998 there were three photo arrays conducted. In 1999, there was a line-up where one witness picked Mr. Legrand out of the line-up. On February 3, 1999, Mr. Legrand was arrested and charged with the murder of Joaquin Liriano. There is no physical evidence linking Mr. Legrand to the crime.

#### **ARGUMENT**

The vagaries of eyewitness identification are well-known the annals of criminal law are rife with instances of mistaken identification the identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the record of English and American trials  *United States V. Wade* 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967). In order to counter the considerable and very dangerous risk of a conviction based on misidentification especially in a ease such as this one where the prosecutors entire case rests on identification especially in a case such as this one where the prosecutors entire case rests on identifications that occurred between eight and ten years after the incident took place. The defense should be allowed to call a qualified expert witness in the field of human perception and memory. Such

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testimony would provide a scientific background information not otherwise available to the jurors to assist them in interpreting and evaluating the eyewitness testimony.

Research supports that jurors tend to trust such evidence. Extensive research done over the last twenty years has concluded that jurors have an inadequate understanding of the way in which memory and perception operate especially with respect to eyewitness testimony. One of the more significant problem in the context of a criminal trial is the fact that jurors tend to believe that a witness who says “I’ll never forget the face of the person who stabbed him” is necessarily accurate in his identification. The research demonstrates, however, not only that the inaccurate witnesses are commonly no less confident in their memory than are accurate ones, but also that, contrary to popular wisdom people who are the victims or witnesses of violent crimes are actually less likely to be accurate in their identifications.

In the present case the only option for defense counsel to counteract the eyewitness testimony is to present an expert in perception and memory. The general tools available to defense counsel, such as s cross examination, opening and closing arguments, and even the judges legal instructions, cannot adequately be relied upon to counter the danger of mistaken eyewitness identification. Studies demonstrate that none of these methods can overcome a jurors predisposition to believe an eyewitness.

## **I. THE COURT SHOULD ALLOW THE EXPERT TESTIMONY OF DOCTOR ANDERSON BECAUSE IT WILL HELP TO CLARIFY ISSUES FOR THE JURORS AND IS GENERALLY ACCEPTED BY THE SCIENTIFIC COMMUNITY.**

Expert eyewitness identification is admissible at the discretion of the trial court.  *People v. Cronin*, 60 NY.2d 430,433, 470 N.Y.S.2d 110 (1983). The testimony “is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.  *De Long v. County of Erie*, 60 N.Y.2d 296, 307, 469 N.Y.S.2d 611, 617 (1983).

The court must make a determination of “when jurors are able to draw conclusions from the evidence based on their day to day experience, their common observation, and their knowledge, and when they would be benefitted by the specialized knowledge of an expert witness.”  *People v. Cronin*, 60 N.Y.2d, 432, 470 N.Y.S.2d 110 (1983). Then, the Court must determine whether or not the scientific information that the expert will testify to is “generally accepted as reliable” by the scientific community. See  *Frye v. United states*, 293 F. 1013, 1014 (D.C.Cir 1923);  *People v. Wesley*, 83 N.Y.2d 417, 435,611 N.Y.S.2d 97, 100 (1994) (“The procedure need not be unanimously endorsed by the scientific community but only generally accepted as reliable.”);  *People v. Middletown*, 54 N.Y.2d 42, 49, 444 N.Y.S. 552, 584 (1952).



## **II. THE COURT SHOULD USE ITS DISCRETION TO ADMIT THE EXPERT TESTIMONY IN THIS CASE**

### **A. Many Courts Have Allowed Eyewitness Identification Experts To Testify**

Many courts have allowed identification experts to testify. By doing so, the courts have recognized that certain aspects of eyewitness identification experts are beyond the ken of typical juror. See e.g. *People v. Davis* 226 A, D.2d 125, 640 N.Y.S. 2d 53 (1st Dept 1996) [not reversible error for court to allow the prosecution to present expert testimony regarding eyewitness credibility]; *People v. Beckford*, 141 Misc.2d 71, 532 N.Y.S.2d 462 (Kings County 1988) [expert allowed to testify as to the effects of stress on identification, the role of delay on memory confidence of recollection, and accuracy and assimilation of post event information. *People v. Neal*, N.Y.L.J. 6/19/87 p.12 col.5 (Sup.Ct. Bronx County 1987) (eyewitness expert

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testimony similarly admissible);  *US v. Norwood*, 939 F. Supp. 1132 (D.N.J. 1996) [Federal District Court finds expert witness identification testimony admissible],  *U.S. v. Downing*, 753 F.2d 1224 (3rd Cir. 1985), conviction reversed because expert identification not admitted.

The defense acknowledged that not all courts have been amenable to this type of testimony. However no court has excluded an expert witness when faced with a single eyewitness as the only evidence against the defendant. See e.g., *People V. Mooney*, 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990) [four victims identified defendant]; *People v. Anderson*, 218 A.D.2d 533, 630 N.Y.S.2d 77 (1<sup>st</sup> Dept 1995) [defendant identified by three people who recognized his distinctive shirt and large wooden beads] *People v. Wright*, 161 A.D.2d 743, 558 N.Y.S.2d 842 (2d department 1990) [robbery defendant identified by more than one complainant]; *People v. Knighton*, 165 A.D.2d 904, 560 N.Y.S.2d 514 (3d Dept. 1990) [defendant identified by three witnesses].


#### **A. Dr. Anderson's testimony would help clarify an Area Which is “Beyond the Ken” of most jurors.**

Studies definitively demonstrate that while there is no doubt true that all jurors have some everyday experience which is relevant to determining the reliability of eyewitness identification testimony, the type of research, information, and factors about which Doctor Anderson would testify may be imperfectly understood by many jurors or may be counter to the intuitive beliefs of most. *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychology, Public Policy, and Law, 909 (1995); Brigham and Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law and Human Behavior 19 (1983); Deffenbacher and Loftus, *Do Jurors Share a Common Understanding Concernin Eyewitness Behavior?* 6 Law and Human Behavior, 15 (1982) as one study states:... the present experiment provided strong evidence that laypersons do not effectively integrate eyewitness evidence... the findings lead us to argue along with Loftus, (1986), and Wells, (1986) and Wells, (1984), that jurors do not possess the knowledge and skills necessary to adequately assess the reliability of eyewitness identifications. Cutler, Penrod and Stave, *Juror Decision Making in Eyewitness Identification Cases*, 12 Law and Human behavior 41, 42 (1988).

Even if the proposed testimony was not beyond the jury's ken the Court of Appeals has repeatedly upheld the admission of expert testimony for the purpose clarifying an area of which jurors have a general awareness. *Mooney*, 76 N.Y.2d at 832, 560 N.Y.S. 2d at 118 (Kaye J. dissenting) (citing *Selkowitz v. County of Nassau*, 45 N.Y.2d 97,101-102, 408 N.Y.S.2d 10 (1978)



 *Delong v. County of Erie*, 60 N.Y. 2d 296, 307- 308, 469 N.Y.S. 2d 611 (1983). As the Second circuit has stated:

There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness, in the face of the need to recall often has on witnesses. Accordingly, doubts over the strengths of the evidence of a defendants guilt may be resolved on the basis of the eyewitness' seeming certainly when he points to the defendants and exclaims with conviction that veils all doubt, “That's the man!”

*Kampshoff v. Smith*, 698 F.2d 552, 585 (2d Cir. 1983) (citing  *United States v Wade*, 388 U.S. 218, 235-36(1967)).


### **B. The Accuracy and Reliability of Psychological Tests Regarding Perceptual Factors in Identification has been accepted by the Scientific Community.**

Chief Judge Kaye has stated “psychological research data is by now abundant, and the findings based upon it concerning cognitive factors are quite uniform and well documented.” *People v. Mooney*, 76 N.Y.2d 826, 830, 560 N.Y.S.2d 115, 117 (1990) (citing further case law and commentary).


As recently as September 1996, the District Court of New Jersey issued a well reasoned opinion admitting the testimony of an expert on eyewitness identification.  *United States v. Norwood*, 939 F. Supp. 1132 (D.N.J. 1996) Indeed, the court specifically analyzed each of the areas of testimony proposed in this case, found them to relate to areas of knowledge outside common understanding, and found them to be helpful to the jury. Psychological testimony regarding studies on eyewitness identification has been found sufficiently reliable by the overwhelming number of recent courts nationwide that have addressed the issue. See e.g. *People v. Lewis*, 137 Misc 2d 84, 86 520 N.Y.S.2d 125 (Monroe Co. Ct. 1987) citing case law from numerous other states *People v. Brooks*, 128 Misc 2d 608, 619, 490 N.Y.S.2d 692, 701 (Westchester Co. Ct. 1985) (holding that the consistency of the scientific results is well established and that there was sufficient showing of reliability). The Supreme Court of California, for example, concluded after an exhaustive review of the scientific literature that the consistency of the results of these studies on the reliability of eyewitness identification is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice.”  *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 718(1984).

## **II. TRADITIONAL METHODS TO COUNTER MISTAKEN IDENTIFICATION ARE NOT SUFFICIENT.**

### **A. Cross examination is not a substitute for expert opinion.**

Cross examination is not an equal substitute for expert testimony. Cross examination may raise issues that the jury should consider when evaluating witness accuracy, but it cannot impart knowledge to the jury necessary for them to understand the significance of these issues. For example, if a witness testifies that he has been carrying around the face of the man who stabbed the victim in his mind, no amount of questioning could demonstrate that he may have unconsciously blurred together the face of the man who stabbed the victim, with the face of the person he picked out of the photo array or line-up. Cross examination simply will not present the jury with the scientific information which they might need to properly evaluate his testimony. Chief Judge Kaye has pointed out that the type of information an expert would impart to a jury is “plainly not available through cross examination of the individual testifying witness...” *Mooney*, 76 N.Y.2d at 831, 560 N.Y.S.2d at 117. To the extent that a mistaken witness may retain great confidence in an “inaccurate” identification, cross examination can hardly be seen as an effective way to reveal the weakness in the witness recollection of the events.  *United States v. Downing*, 753 F.2d 1224, 1230-31 N.6(3d circuit 1985) (holding that because of false assumptions by jurors, cross-examination cannot substitute for an expert on witness identification).

### **B. JURY INSTRUCTIONS ARE INSUFFICIENT**

A jury instruction on the unreliability of witness identifications is not sufficient. The naive assumptions that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.  *Krelwitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson J. Concurring). Moreover, by the time of a jury instruction most jurors have made up their mind especially regarding eyewitness testimony. See Michael R. The Case for Expert Testimony About Eyewitness Memory, 1, *Psychology, Public Policy and Law* 909, 940-41(1995); Frederick D. Woodier, Note, *Did Your Eyes Deceive you? Expert psychology Testimony on the Unreliability of Eyewitness Identification*, 29 *Stan L. Rev.* 969, 1005 (1977). The pattern jury

instruction on identification simply lists without comment a number of factors for the consideration relating to the witness' opportunity to observe the perpetrator, such as the length of time elapsed during the witness' observation and the witness' mental state at the time. An identification expert would testify about human perception and memory in general and would explain what the research shows regarding such things as the fact that it is common for a witness under stress to overestimate considerably the length of an event, that memory, rather than decreasing at a steady rate, actually rapidly decreases the most in the few days after an incident, and that high stress may have an inverse relationship to accuracy of identification. A jury instruction simply does not, and could not cover this necessary information.

### **C. Voir Dire and Opening and Closing Arguments Are Insufficient.**

Doctor Anderson's testimony would cover information and studies which counsel may not simply address in opening and closing arguments and in voir dire. As discussed above, juror possess dearly held be about perception and memory which are often largely at odds with the scientific research. Without Doctor Anderson's testimony, counsel are put in the impossible position of telling jurors that some of their traditional beliefs regarding eyewitness identifications are simply wrong. Doctor Anderson testimony would thus clearly not be cumulative. mind especially regarding eyewitness testimony. See Michael R. Lieppe, *The Case for Expert Testimony About Eyewitness Memory*, 1 *Psychology. Public Policy and Law* 909, 940-41 (1995); Frederick D. Woocher, *Note, Did Your Eyes Deceive you? Expert psychology Testimony on the Unreliability of Eyewitness Identification*, 29 *Stan L. Rev.* 969, 1005 (1977). The pattern jury instruction on identification simply lists without comment a number of factors for the jury consideration relating to the witness' opportunity to observe the perpetrator, such as the length of time elapsed during the witness' observation and the witness' mental state at the time. An identification expert would testify about human perception and memory in general and would explain what the research shows regarding such things as the fact that it is common for a witness under stress to overestimate considerably the length of an event, that memory, rather than decreasing at a steady rate, actually rapidly decreases the most in the few days after an incident, and that high stress may have an inverse relationship to accuracy of identification. A jury instruction simply does not, and could not cover this necessary information.

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### **D. In Light of the Serious Questions as to this Defendant's Actual Guilt, the Trial Court Should Exercise its Discretion to Admit the Expert Testimony**

At least one witness wilt no doubt take the stand at trial and testify that Mr. Legrand is the man who stabbed Joaquin Liriano on June 15, 1991. Furthermore, he will most like ly testify that he is sure of his identification despite the eight-year time lapse in viewing a line-up. In light of that powerful testimony, and in light of the research indicating those common understandings regarding eyewitness identifications is actually contrary to scientific knowledge, Mr. Legrand deserves the opportunity to present expert testimony on his behalf to insure that the jurors have all the information to help them make an informed and reasoned decision in this case.

## **CONCLUSION**

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Doctor Anderson's testimony on eyewitness identifications meets the legal standards of admissibility and is critical to the defense. Doctor Anderson's testimony will illuminate many common misconceptions by jurors and will assist the jury in its credibility determination. Accordingly, we respectfully request that the Court permit the defense to introduce the testimony of Doctor Anderson as an expert witness on eyewitness identification

DATED: NEW YORK, NEW YORK April 9, 2001

YOURS, etc.,

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