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Eyewitness Identifications and Expert Testimony

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EYEWITNESS IDENTIFICATIONS AND EXPERT TESTIMONY

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Both courts and commentators have noted the problems of eyewitness identifications. In United States v. Wade, 388 U.S. 218, 228 (1967), the Supreme Court commented: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." LaFave and Israel provide the following account:

> A dramatic example of the dangers inherent in accepting the identification testimony even of several eyewitnesses in the absence of corroborative evidence is the case of Adolph Beck. Mistakenly identified by twenty-two witnesses, Beck served seven years in prison for crimes he did not commit. Subsequently, a committee formed to investigate the case concluded that "evidence as to identity based on personal impressions, however *bona fide,* is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury." More recently, seven eyewitnesses swore that Bernard T. Pagano was the man who politely pointed a small, chrome-plated pistol at them and demanded their money. Fortunately, midway through the trial of the Roman Catholic priest, Ronald Clouser admitted that he, not Father Pagano, had committed the six armed robberies. 1 W. LaFave & J. Israel, Criminal Procedure 549 (1984).

A substantial amount of psychological research also supports the proposition that eyewitness identifications are often problematic. *See* Evaluating Witness Evidence: Recent Psychological Research and New Perspectives (S. Lloyd-Bostock & B. Clifford eds. 1983); B. Clifford & R. Bull, Psychology of Person Identification (1978); E. Loftus, Eyewitness Testimony (1979); A. Yarmey, Psychology of Eyewitness Testimony (1979); Eyewitness Testimony: Psychological Perspectives (G. Wells & E. Loftus eds. 1984); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby,* 121 U. Pa. L. Rev. 1079 (1973).

Psychological research on eyewitness identification dates back to the turn of the century. *See* H. Munsterberg, On the Witness Stand: Essays on Psychology and Crime (1908). It is estimated, however, that "over 85% of the entire published literature has surfaced since 1978." Wells & Loftus, *Eyewitness Research: Then and Now,* in Eyewitness Testimony: Psychological Perspectives 1, 3 (G. Wells & E. Loftus eds. 1984). This research emphasizes the complex nature of human perception and memory. Human perception and memory do not function like a videotape recorder, accurately recording all images which can subsequently be retrieved fully. Rather, it is a constructive process, in which many factors play a part.

Perception

The perception and memory process can be divided into three stages. The first is the acquisition stage, during which the event is perceived and entered in the memory. The second is the retention stage — the time between the event and its recollection. The third stage is the retrieval stage during which the information relating to the event is recalled. E. Loftus, *supra*, at 21. Inaccuracies can be introduced at all three stages. A number of factors influence accuracy during the acquisition stage. The literature indicates that witnesses are more accurate when: (1) exposure time is longer rather than shorter, (2) events are less rather than more violent, (3) witnesses are not subject to extreme stress, (4) witnesses are free from biased expectations, (5) witnesses are young adults rather than children, and (6) witnesses are asked to report on salient aspects of an event rather than peripheral aspects. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought,* in 3 Crime and Justice: An Annual Review of Research 105, 115-16 (M. Tonry & N. Morris eds. 1981).

Memory

Studies of the retention of information indicate that two factors influence the accuracy of the memory during the retention stage. First, the longer the interval between the event and the recollection of the event, the greater the lapse in memory. However, the lapse in memory does not decrease at a uniform rate; it decreases sharply immediately after the event and then more slowly over a period of time. E. Loftus, *supra* at 53. Second, new information enters the memory between the event and its recollection: "External information provided from the outside can

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intrude into the witness's memory, as can his own thoughts, and both can cause dramatic changes in his recollection." *Id.* at 87. Finally, the way in which information is retrieved can influence memory. For example, the method of questioning, the type of identification procedure employed, the status of the questioner, and nonverbal communication clues all may distort memory. Loftus, *supra* at 110. Facial recognition presents special problems, especially cross-racial identifications. Johnson, *Cross-Racial Identification Errors in Criminal Cases,* 69 Cornell L. Rev. 934, 938 (1984)("The impairment in ability to recognize black faces is substantial."). Dr. Elizabeth Loftus, a prominent researcher in this field, notes that people "have greater difficulty in recognizing faces of another race than faces of their own race. This cross-racial identification problem is not due to the fact that people have greater prejudices or less experience with members of the other race." E. Loftus, *supra* at 139.

Jury Impact

The research reveals also that the impact of eyewitness identifications on juries is substantial. *See* Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications,* 7 Law & Hum. Behav. 19 (1983). In commenting on the research, Dr. Loftus has written that eyewitness testimony "is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all." E. Loftus, *supra* at 19. Indeed, two researchers have concluded that "the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings." Wells & Murray, *Eyewitness Confidence,* in Eyewitness Testimony: Psychological Perspectives 155, 165 (G. Wells & E. Loftus eds. 1984).

CONSTITUTIONAL ISSUES

The courts have taken several approaches to eyewitness identification testimony. One approach is based on a constitutional analysis — the right to counsel and due process.

Right to Counsel

Prior to 1967 the reliability of eyewitness identifications was primarily a jury issue. In that year, however, the Supreme Court decided three cases that "constitutionalized" this area of criminal law. Two of the cases — United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967) — involved the Sixth Amendment right to counsel. Because of the innumerable ways in which identification procedures can affect the accuracy of eyewitness identifications, the Court in *Wade* held that a lineup is a "critical stage" of the criminal process, thereby entitling the defendant to the assistance of counsel. The presence of counsel, according to the Court, would assure that a defendant could effectively challenge a subsequent in-court identification based upon a suggestive pretrial identification.

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . [a post-indictment lineup is] a critical stage of the prosecution . . . 388 U.S. at 236-37.

The right to counsel offered perhaps the greatest protection against erroneous eyewitness identifications because the presence of counsel would discourage the use of suggestive procedures by the police. In Kirby v. Illinois, 406 U.S. 682 (1972), however, the Court restricted the right to counsel. Under *Kirby*, the right to counsel attaches only *after* the "initiation of adversary judicial criminal proceedings . . ." *Id.* at 689. The "grave potential for prejudice" cited in *Wade* is not diminished simply because judicial criminal proceedings have yet to commence. Thus, *Kirby* ignored the underlying rationale of *Wade*, which is the need to protect the ability of the accused to confront effectively the eyewitnesses' identification at trial. Since most lineups are held before the commencement of judicial proceedings, the right to counsel is now applicable only in a small number of cases. *See generally* 1 W. LaFave & J. Israel, Criminal Procedure § 7.3 (1984); N. Sobel, Eye-Witness Identification: Legal and Practical Problems § 2 (2d ed. 1983).

Due Process

At the same time it decided *Wade* and *Gilbert*, the Court also held that identification procedures implicate the due process clause. Stovall v. Denno, 388 U.S. 293 (1967). This development is important because a criminal defendant's right to due process is more extensive than his right to counsel; all identifications are subject to scrutiny under a due process analysis. Thus, identifications made prior to the attachment of the right to counsel, Kirby v. Illinois, 406 U.S. 682, 691 (1972); identifications involving photographic displays, Simmons v. United States, 390 U.S. 377 (1968); and presumably, even identifications at which counsel is present, may be suppressed as violative of due process.

The standard used by the Court in determining whether an identification comports with due process has undergone a substantial evolution since *Stovall* was decided. In *Stovall*, the due process test was whether the identification was "unnecessarily suggestive and conducive to irreparable mistaken identification." 388 U.S. at 302. The focus of this test is the reliability of the identification *procedure* used by the police; if the procedure is both suggestive and unnecessary, it offends due process. Although the Court considered the issue in a number of cases after *Stovall*, Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970), it was not until Neil v. Biggers, 409 U.S. 188 (1972), that it became apparent that the *Stovall* standard had been substantially diluted. The new standard — whether a substantial likelihood of misidentification has occurred — focuses on the reliability of the actual identification rather than on the reliability of the identification procedure. In determining whether there has been a substantial likelihood of misidentification the trial court must evaluate the "totality of the circumstances," including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior

description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

The Court's most recent treatment of the subject, Manson v. Brathwaite, 432 U.S. 98 (1977), may have altered again the due process test. After reaffirming *Biggers* and referring to the factors cited in *Biggers* as relevant to the totality of the circumstances test, the Court stated: "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114. Justice Marshall, in a dissenting opinion, read this statement as a recognition of the continued validity of *Stovall*:

> In assessing the reliability of the identification, the Court mandates weighing "the corrupting effect of the suggestive identification itself" against the indicators of [a witness'] ability to make an accurate identification. . . The Court holds, as Neil v. Biggers, failed to, that a due process identification inquiry must take account of the suggestiveness of a confrontation and the likelihood that it led to misidentification, as recognized in *Stovall* and *Wade*. Thus, even if a witness did have an otherwise adequate opportunity to view a criminal, the later use of a highly suggestive identification procedure can render this testimony inadmissible. *Id.* at 129.

See generally 1 W. LaFave & J. Israel, Criminal Procedure § 7.4 (1984); N. Sobel, Eye-Witness Identification: Legal and Practical Problems § 3 (2d ed. 1983).

JURY INSTRUCTIONS

The dilution of the due process test and the restriction of the right to counsel has undercut the constitutional approach to the eyewitness identification problem. Accordingly, several other approaches have been proposed. Some courts, in an attempt to minimize the dangers of eyewitness identifications, have required cautionary instructions. In United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the court proposed the following model instruction:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.
>
> Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.
>
> In appraising the identification testimony of a witness, you should consider the following:
>
> (1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?
>
> Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.
>
> [In general, a witness bases any identification he makes on his perception through the use of his senses.
>
> Usually the witness identifies an offender by the sense of sight — but this is not necessarily so, and he may use other senses.]
>
> (2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.
>
> If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.
>
> [You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]
>
> [(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]
>
> (4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.
>
> I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. (Paragraphs in brackets are to be used only if appropriate.) *Id.* at 558-59.

The *Telfaire* court emphasized that a failure to use the model instruction with appropriate adaptations "would constitute a risk [of reversal] in future cases." *Id.* at 557. Several federal courts have explicitly mandated the use of this instruction or a substantial equivalent. *See* United States v. Hodges, 515 F.2d 650, 653 (7th Cir. 1975); United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974). Other federal courts have expressed their approval of the instruction but leave the final decision on whether to give the instruction to the discretion of the trial court. *See* United States v. Scott, 578 F.2d 1186, 1191 (6th Cir.), *cert.*

denied, 439 U.S. 870 (1978); United States v. Kavanagh, 572 F.2d 9, 13 (1st Cir. 1978); United States v. Dodge, 538 F.2d 770, 784 (8th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1979); United States v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

Several state courts also favor jury instructions. *See* State v. Benjamin, 33 Conn. Supp. 586, 589, 363 A.2d 762, 764 (1976); State v. Warren, 230 Kan. 385, 397, 635 P.2d 1236, 1244 (1981); State v. Calia, 15 Or. App. 110, 114-15, 514 P.2d 1354, 1356 (1973), *cert. denied,* 417 U.S. 917 (1974); *but see* People v. Hefner, 70 Ill. App. 3d 693, 697, 388 N.E.2d 1059, 1062 (1979) (rejecting the use of jury instructions).

In Ohio the use of the instruction is left to the discretion of the trial judge. *See* State v. Guster, 66 Ohio St. 2d 266, 272, 421 N.E.2d 157, 161 (1981); State v. Caldwell, 19 Ohio App. 3d 104, 107, 483 N.E.2d 187, 191 (1984); State v. Dale, 3 Ohio App. 3d 431, 434-35, 445 N.E.2d 1137, 1140-41 (1982) (finding an abuse of discretion in the trial court's refusal to give an instruction). *See generally* Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases,* 60 Wash. U.L.Q. 1387 (1983); Annot., 23 A.L.R.4th 1089 (1983).

EXPERT TESTIMONY

In addition to the constitutional and jury instructions issues, some commentators have advocated the use of expert testimony concerning the problems of eyewitness identifications. One of the first writers to propose this solution wrote:

> [The] presentation to the trier of fact of expert psychological testimony about the unreliability of eyewitness testimony provides the proper safeguard for the problems identification evidence poses.
>
> The expert witness can relate the findings of numerous studies and experiments that psychologists have conducted to test the general reliability of eyewitness identification and can analyze the various cognitive and social factors that may have affected the accuracy of the particular identification in the case at hand. . . [S]uch expert psychological testimony can respond to the particular facts of a case and, more importantly, can furnish the jurors with the scientific information needed for a full and proper evaluation of the identification evidence. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 Stan. L. Rev. 969, 1006-07 (1977).

Until recently, however, the overwhelming majority of courts were not receptive to expert testimony concerning the identification process. Most federal courts have upheld a trial court's decision to exclude such testimony. *See* United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984), *cert. denied,* 105 S. Ct. 2679 (1985); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied,* 459 U.S. 825 (1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied,* 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub. nom,* United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); United States v. Dodson, 16 M.J. 921, 930 (N.C.M.R. 1983), *modified,* 21 M.J. 237 (C.M.A. 1986); United States v. Hicks, 7 M.J. 561, 566 (A.C.M.R. 1979). *See also* Rodriguez v. Wainwright, 740 F.2d 884, 885 (11th Cir. 1984)(no constitutional violation in exclusion of expert testimony on eyewitness identification), *cert. denied,* 469 U.S. 1113 (1985).

Similarly, a substantial majority of state courts have upheld the exclusion of expert testimony on eyewitness identifications. *See* Perry v. State, 277 Ark. 357, 370-71, 642 S.W.2d 865, 872 (1982); Dyas v. United States, 376 A.2d 827, 831-32 (D.C.), *cert. denied,* 434 U.S. 973 (1977); Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983), *cert. denied,* 465 U.S. 1051(1984); State v. Hoisington, 104 Idaho 153, 165, 657 P.2d 17, 29 (1983); People v. Dixon, 87 Ill. App. 3d 814, 818, 410 N.E.2d 252, 256 (1980); State v. Galloway, 275 N.W.2d 736, 741-42 (Iowa 1979); State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981); State v. Stucke, 419 So. 2d 939, 944-45 (La. 1982); State v. Fernald, 397 A.2d 194, 197 (Me. 1979); Commonwealth v. Francis, 390 Mass. 89, 101, 453 N.E.2d 1204, 1210 (1983); State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980); Porter v. State, 94 Nev. 142, 147-48, 576 P.2d 275, 278-79 (1978); State v. Sims, 3 Ohio App. 3d 321, 324-26, 445 N.E.2d 235, 240-41 (1981); State v. Porraro, 121 R.I. 882, 892-93, 404 A.2d 465, 471 (1979); State v. Wooden, 658 S.W.2d 553, 556-57 (Tenn. Crim. App. 1983); State v. Onorato, 142 Vt. 99, 104-05, 453 A.2d 393, 395-96 (1982); State v. Barry, 25 Wash. App. 751, 760-61, 611 P.2d 1262, 1267 (1980); Hampton v. State, 92 Wis. 2d 450, 461, 285 N.W.2d 868, 873 (1979).

Various rationales have been offered to support this result. First, some courts have held that expert testimony on this subject is unnecessary, or at least not helpful, because the jury is capable of evaluating deficiencies in eyewitness testimony. According to these courts, "effective cross-examination is adequate to reveal any inconsistencies or deficiencies in the eye-witness testimony." United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973). Second, there has been some concern about the scientific basis for such testimony. One court found that the work in the field "still remains inadequate to justify its admission into evidence." United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979). Third, there is a concern that expert testimony on this issue will "invade the province of the jury." United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub. nom,* United States v. Nobles, 422 U.S. 225 (1975). Fourth, some courts have excluded expert testimony because it would entail a time-consuming "battle of experts" that may confuse the jury. United States v. Fosher, 590 F.2d 381, 383-84 (1st Cir. 1979).

Several recent cases, however, have adopted a more receptive attitude to expert testimony concerning the problems of eyewitness identifications. In particular, these courts have questioned the principal obstacle to admissibility — the view that eyewitness identification problems are readily understood by juries and therefore expert testimony is neither necessary nor helpful.

State v. Chapple

In State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), the Arizona Supreme Court held that the exclu-

sion of expert testimony under the facts of that case was an abuse of discretion:

> Even assuming that jurors of ordinary education need no expert testimony to enlighten them to the danger of eyewitness identification, the offer of proof indicated that Dr. Loftus' testimony would have informed the jury that there are many specific variables which affect the accuracy of identification and which apply to the facts of this case. *Id.* at 293, 660 P.2d at 1220.

First, the expert would have testified that the "curve of forgetting" is not uniform; forgetting occurs very quickly and then tends to level off. Thus, an immediate identification is far more reliable than a long-delayed identification. Second, whereas most laymen believe that stress causes people to remember better, the experimental research indicates that stress causes the opposite effect. Third, there is the problem of "unconscious transfer." This involves a situation where the witness fails to make a photographic identification and then later sees the same face in a subsequent photo display. The eyewitness may associate the face with the crime instead of the prior photo display. Fourth, the assimilation of post-event information, such as the feedback of another eyewitness, may taint the identification. Finally, the research data indicates that there is no relationship between the confidence of a witness in making an identification and the accuracy of that identification. *Id.* at 292-94, 660 P.2d 1220-21.

People v. McDonald

The California Supreme Court also has held that expert testimony may be proper: "We conclude that although jurors may not be totally unaware of the . . . psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'" People v. McDonald, 37 Cal. 3d 351, 369, 690 P.2d 709, 721, 208 Cal. Rptr. 236, 248 (1984). In particular, the dangers of cross-racial identifications played an important role in the court's analysis. The expert could have testified that laboratory experiments indicated that own-race/other-race recognition rates differed by as much as 30 percent.

> The studies also reveal two aspects of the matter that will probably be contrary to most jurors' intuitions: first, that white witnesses who are not racially prejudiced are just as likely to be mistaken in making a cross-racial identification as those who are prejudiced; and second, that white witnesses who have had considerable social contact with blacks may be no better at identifying them than those who have not . . . Finally, some jurors may deny the existence of the own-race effect in the misguided belief that it is merely a racist myth exemplified by the derogatory remark, "they all look alike to me," while others may believe in the reality of this effect but be reluctant to discuss it in deliberations for fear of being seen as bigots. *Id.* at 368, 690 P.2d at 721, 208 Cal. Rptr. at 248.

United States v. Downing

The leading federal case recognizing the usefulness of expert testimony is United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). Agreeing with the state courts in *Chapple* and *McDonald*, the Third Circuit held that "under certain circumstances expert testimony on the reliability of eyewitness identifications can assist the jury in reaching a correct decision and therefore may meet the helpfulness requirement of Rule 702." *Id.* at 1231. *See also* United States v. Smith, 736 F.2d 1103 (6th Cir.), *cert. denied,* 469 U.S. 868 (1984).

The court, however, remanded the case to the district court to determine the issue. On remand, the trial court excluded the evidence. United States v. Downing, 609 F. Supp. 784 (E.D. Pa. 1985).

United States v. Moore

Following the trend of the recent cases, the Fifth Circuit also has altered its position on the admissibility of expert testimony concerning eyewitness identifications. In United States v. Moore, 786 F.2d 1308 (5th Cir. 1986), the court commented:

> Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely *counter-intuitive* . . . For example, it is commonly believed that the accuracy of a witness' recollection increases with the certainty of the witness. In fact, the data reveal no correlation between witness certainty and accuracy.
>
> Similarly, it is commonly believed that witnesses remember better when they are under stress. The data indicate that the opposite is true. The studies also show that a group consensus among witnesses as to an alleged criminal's identity is far more likely to be inaccurate than is an individual identification. This is because of the effect of the "feedback factor," which serves to reinforce mistaken identifications. We therefore recognize that the admission of this type of testimony is proper, at least in some cases. *Id.* at 1312.

Although the court went on to uphold the exclusion of expert testimony in the case under review, it again highlighted its change in attitude: "We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged." *Id.* at 1313.

State v. Buell

In State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1986), the Ohio Supreme Court also recognized the admissibility of expert testimony. Relying on *Downing, Chapple,* and *McDonald*, the court ruled that expert testimony concerning the factors that may impair the accuracy of a typical eyewitness identification is admissible under Ohio Evidence Rule 702. The court, nevertheless, limited its decision in one important respect. According to the court, expert testimony concerning the credibility of the identification testimony of a particular witness is inadmissible "absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events." *Id.* at 133, 489 N.E.2d at 804.

For other state cases accepting such testimony, see People v. Brooks, 128 Misc. 2d 608, 490 N.Y.S.2d 692 (Westchester Cty. Ct. 1985); State v. Moon, 40 Crim. L.

Rptr. (BNA) 2122 (Wash. Ct. App. Oct. 20, 1986); Annot., 46 A.L.R.4th 1047 (1986).

Research

Most of the researchers who have studied this issue believe that expert testimony would assist jurors in evaluating eyewitness testimony. For example, one recent study concluded that "the present data refute the claim that expert psychological testimony on eyewitness identifications would not tell the jury members anything they do not already know. Not only do jury members overestimate the accuracy of eyewitness identifications in target-present lineups, they also appear unaware, to some extent, of the sources of error associated with this type of evidence." Brigham & Bothwell, *supra* at 29. This view, however, is not universally accepted. Two psychologists have written that "the available evidence fails to demonstrate that expert psychological testimony will routinely improve juror's ability to evaluate eyewitness testimony." McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?,* 38 Am. Psychologist 550, 558 (1983). *See also* McCloskey & Egeth, *A Time to Speak, or a Time to Keep Silence?,* 38 Am. Psychologists 573 (1983); Egeth & McCloskey, *Expert Testimony About Eyewitness Behavior: Is It Safe and Effective?,* in Eyewitness Testimony: Psychological Perspectives 283 (G. Wells & E. Loftus eds. 1984).

REFERENCES

A number of recent articles discuss the use of expert testimony regarding eyewitness identifications. *See* Arnolds, Carroll & Seng, *The Admissibility of Expert Testimony on the Issue of Eyewitness Identification in Criminal Trials,* 2 North. Ill. U. L. Rev. 59 (1981); Holt, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?,* 26 Ariz. L. Rev. 399 (1984); Kerans, *Recent Developments in the Law Concerning Alibi and Identification Evidence,* 25 Crim. L.Q.47 (1982); Sanders, *Expert Witnesses in Eyewitness Facial Identifications Cases,* 17 Tex. Tech. L. Rev. 1409 (1986); Wade, *Do the Eyes Have it? Psychological Testimony Regarding Eyewitness Accuracy,* 38 Baylor L. Rev. 169 (1986); Comment, *Admission of Expert Testimony on Eyewitness Identification,* 73 Calif. L. Rev. 1402 (1985); Comment, *Expert Testimony on Eyewitness Perception,* 82 Dick. L. Rev. 465 (1978); Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases,* 45 La. L. Rev. 721 (1985).