

**OPPOSITION BY THE DC US ATTORNEY'S OFFICE TO JURY INSTRUCTIONS  
ON EYEWITNESS IDENTIFICATION GENERALLY  
2016**

**The Benefits of Expert Testimony over a Jury Instruction**

Through a series of cases starting with *Benn v. United States*, 978 A.2d 1257 (D.C. 2009), the Court of Appeals has removed any barriers to the introduction of expert witnesses on eyewitness identification where the basic criteria of *Dyas* and *Frye* are met. See *Dyas v. United States*, 376 A.2d 827 (D.C. 1977); *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). The presentation of an expert witness by the defense affords both the defense and the prosecution the opportunity to explore the strengths and limitations of what is referred to as “eyewitness memory” research. Through direct and cross-examination, a jury is exposed to information that, alone or in combination with other evidence, can be used to assess whether the defendant is the person who committed crime(s) with which s/he is charged. Of course, the jury is free to disregard expert testimony in whole or part, if it so chooses. See D.C. Criminal Jury Instructions for the District of Columbia, No. 2.215 (11th ed. 2005).

**Flaws in the Proposed DC Jury Instruction on Eyewitness Testimony**

The defendant is not entitled to have a jury instruction that presents only the defense position on the accuracy of eyewitness identification. The proposed instruction is unbalanced, captures only a portion of the research (which, despite its volume in academia, is still very much evolving), does not accurately reflect the limitations and the external validity of the laboratory literature itself, and does not address contrary findings both within the academic literature and in real-world studies. The proposed instruction places the court in the position of being the expert witness without the opportunity to more fully explore and challenge the bases of its opinions.

Unlike expert testimony that the jury can accept or reject, see Jury Instruction 2.215 (“You are not bound by an expert’s opinion.”), the jury must follow the judge’s instructions, see Jury Instruction 2.101 (“It is your duty to accept the law as I instruct you. . . . You may not ignore or refuse to follow any of [the instructions]”). As the Court of Appeals has cautioned, “[t]he judge’s emphatic instruction . . . is likely to have been taken by the jury as a legal injunction (‘the law as I state it to you’), . . . an injunction that the jury had ‘a duty to accept’ without ‘question[ing its] wisdom,’ rather than as referring to the ‘facts’ as to which the jurors were the sole and exclusive judges.” *Wheeler v. United States*, 930 A.2d 232, 244-245 (D.C. 2007). It would be difficult for the jury to understand what the law is and what the facts are when they both come out of the court’s mouth. Moreover, “[i]t is primarily the task of counsel, not the court, to develop facts essential to jurors understanding of the case.” *Davis v. United States*, 567 A.2d 35 (D.C. 1989). For a judge to present facts, particularly contested facts, in the guise of “scientific research,” would constitute an impermissible comment on the evidence. See *Wheeler v. United States*, *supra*, 930 A.2d at 243–44 (explaining that the trial judge’s common-law privilege to comment on the evidence “has inherent limitations and must be exercised cautiously, for a judge’s influence on the jury is necessarily and properly of great weight and his or her lightest word or intimation is received with deference, and may prove to be controlling”) (internal quotation marks, brackets, and citations omitted), *cited in Blaine v. United States*, 18 A.3d 766, 785 (D.C. 2011). If the court is going to comment on the evidence (or lack of evidence), then clearly it

would have an obligation to do so fully and accurately, informing the jury of all of the countervailing considerations that might lead to different conclusions. These instructions fail on all counts. Ultimately these instructions are the equivalent of judicial notice, and “[t]he court may judicially notice [only] a fact that is not subject to reasonable dispute . . . .” Fed R. Evidence 201; *Gee v. United States*, 54 A.3d 1249, 1266 (D.C. 2012) (“A trial court errs if it takes judicial notice ‘without determining that ... the sources relied upon have an accuracy that cannot reasonably be questioned[.]’”) (internal citations omitted). Here the scientific research relied upon has an accuracy that can reasonably be questioned, and we do so.

The current instructions on identification and witness credibility tell the jury the kinds of information it may consider in assessing witness testimony and particularly eyewitness testimony. See Jury Instructions 9.210 and 2.200. The current instructions do not tell jurors how to consider this information. *Going beyond these instructions risks having the court weigh in on one side of a contested issue by providing incomplete and biased information that may or may not apply to the witnesses in the case.*

In general, jury instructions on disputed eyewitness research should not be given. In particular, the proposed instructions are seriously flawed.

### **Flaws in the Instruction Proposed by the NJ Court in Henderson**

Defendant has proposed an instruction based on the Report of the Special Master in *State v. Henderson*, 27 A.3d 872, 877 (N.J. 2011). The New Jersey Supreme Court described the report this way: “The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies. He later issued an extensive and very fine report, much of which we adopt.” *Id.* at 877. As extensive as the hearing may have been, the Special Master was bound by the record before him. The United States, however, was not a party to this litigation and did not have the opportunity to challenge the assertions made by witnesses. We should not be bound by the decision and neither should the Court.

Despite the fact that *Henderson* has been touted as a well-reasoned and thorough analysis, it was decidedly one-sided.<sup>1</sup> Whether New Jersey simply chose the wrong expert or did not know where to find one that would challenge the defense experts, we cannot say. One cannot predict what the Special Master – or any other judge or magistrate – would have recommended had the government presented contrary evidence.<sup>2</sup>

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<sup>1</sup> There was one issue on which Professor Malpass differed from his friends: the sequential lineup “advantage.” On this issue, the Special Master did not make a recommendation and the New Jersey Court of Appeals did not either. *State v. Henderson*, 27 A.3d 872, 901 (NJ 2011) (“there is insufficient authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure [sequential or simultaneous presentation of photographs]”).

<sup>2</sup> The Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, The Report and Recommendations to the Justices (July 25, 2014), similarly based its recommendations in large part on the testimony of a single scientist, Professor Steven Penrod, one of the three researchers who testified in *Henderson*. The Study Group also looked to *Henderson* and *State v. Lawson*, 291 P.3d 673 (Or. 2012), for guidance. See *Commonwealth v. Gomes*, 22 N.E.3d 897 (Ma. 2015).

Here are some of our general objections to the instruction.<sup>3</sup>

(1) The evidence before the Special Master did not include any information about the limitations of academic studies or their generalizability to real eyewitnesses, nor did it include any information about laboratory, archival, and field research that has reached different conclusions.

(2) Eyewitness identification social science may have developed to the point that “the state of the pertinent art or scientific knowledge” would “permit a reasonable opinion to be asserted ... by an expert,” *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). Such a “state,” however, only supports the opinion’s admissibility; it does not establish its authoritative reliability. It is one thing to permit jurors to hear from an expert on the psychology of eyewitness identification subject to cross-examination and argument. It is quite another to have the Court, in effect, take judicial notice of a contested fact.

(3) “[R]esearch findings on the effectiveness of jury instructions on assessment of eyewitness identification evidence have been mixed. In general, such studies find that jury instructions cause jurors to become more suspicious of all eyewitness identification evidence. A recent study of the effect of the New Jersey jury instructions used in *Henderson* found that the instructions reduced reliance on *both* strong and weak eyewitness identification evidence.” National Academy of Sciences, Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION, 43 (2014) (NAS) (citations omitted). In other words, the *Henderson* instruction did not improve jurors’ ability to discern the quality of an identification; instead jurors “indiscriminately discounted ‘weak’” and ‘strong’ testimony in equal measure.”<sup>4</sup> Altering the results in such a fashion is not fair to the victims and witnesses, the government or justice.

(5) The proposed instructions generally provide blanket statements that capture neither the variability of the research nor its limitations. Instructing the jury properly about “research” is particularly fraught with peril when the effects found in the research are small and/or disappear with, for example, a longer exposure time; when researchers themselves say additional research is necessary; when some effects are trumped by others; when the effects move in opposite directions; when researchers did not follow the same protocols used by law enforcement; when research produces inconsistent results; when new research undermines existing research.<sup>5</sup> Differences between the conduct of laboratory research and reality of actual cases further complicate matters.

(6) Even if accurate, and they are not, the proposed instructions are excessively long and confusing. The sheer length of the proposed instructions likely would encourage the jury to give undue weight to them.

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<sup>3</sup> We are attaching objections to specific instructions on confidence and accuracy, cross-race, stress, and weapon focus. We are preparing similar objections to other specific instructions.

<sup>4</sup> Papailiou, Yokum, and Robertson, *The Novel New Jersey Eyewitness Instruction Induces Skepticism But Not Sensitivity*, Social Sciences Research Network (August 5, 2014).

<sup>5</sup> For example, the much ballyhooed claim of a “sequential advantage” in the display of photo arrays has been significantly undermined. See NAS at 104.

(7) It is currently rare for the government in this jurisdiction to prosecute a felony based on a single eyewitness identification of a stranger with no corroboration.<sup>6</sup> While we recognize that the defense has the right and the duty to challenge each piece of evidence used to establish identity, it would be inappropriate for the Court to suggest that the jury should treat eyewitnesses skeptically, or that identification evidence should be scrutinized more carefully than other evidence. Expert witnesses, cross-examination, and argument are the domains in which to explore the strengths and weaknesses of a given witness's ability to identify the perpetrator.

(8) Observations from reading scores of laboratory studies:

- Laboratory research has not necessarily used identification procedures that are “best practices” recommended for the police (such as, the target “may or may not” be in the array).
- Laboratory research often offers the witness only a yes/no option when viewing the photos; not “don’t know” or “not sure.”
- Laboratory research does not weed out subjects who (if asked) might say, “I didn’t get a good enough look at him,” or “I was looking at the gun the whole time,” or “I wasn’t paying attention to his face,” responses that would lead the police away from conducting an identification procedure and, therefore, would not result in their use as identification witnesses at trial.
- Laboratory research uses video tapes or mock events (often not mock crimes) where the perpetrator is visible for only a few seconds. In facial recognition studies, subjects view multiple photographs for milliseconds to 3 seconds or so each.
- Laboratory research scenarios do not necessarily draw attention to the face of the target to be identified later.
- In some studies, a photograph that closely resembles the mock perpetrator in “target absent” arrays is deliberately used, something the police cannot do deliberately because they do not know what the perpetrator looks like. It is only by chance that an innocent suspect would closely resemble, but not be, the perpetrator.
- Laboratory research does not (because it cannot) create the same emotional response as real crimes.
- Laboratory research subjects are aware that no consequences are attached to their choice or failure to choose.
- Early laboratory research subjects were rarely asked at the time of the identification about their level of confidence.
- When confidence has been solicited, researchers have not analyzed it properly, lumping all levels of confidence together to assess accuracy rather than looking at each level of confidence (100%, 90%; definitely, probably, etc.) separately. A single overall accuracy rate says little, if

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<sup>6</sup>There are two exonerations in the District where the convictions rested on eyewitness identification evidence (and, in one of them, now-discredited hair evidence): a 1989 rape case where the court vacated the verdict in 1990 before sentencing (Edward Green); and a 1981 rape conviction where the defendant was found to be actually innocent last year (Kirk Odom). Both cases involved a victim who had a brief glimpse of a stranger before being blindfolded and, in both, the witnesses were not initially confident of their identifications.

anything, about the accuracy of highly confident witnesses who, research now shows, are highly reliable.

- Laboratory researchers do not necessarily reveal all of the data underlying their conclusions.
- Laboratory researchers often do not publish results that are inconsistent with other findings or that find no effect.

(8) Assuming the conclusions of the researchers are accurate, a point we do not concede, it is difficult to imagine that the Court would instruct witnesses in the reverse because it would interfere with the jury's right to consider the evidence without the heavy weight of the judge's thumb on the scale. For example, we imagine that the defense would object to instructions such as "witnesses are more reliable identifying a perpetrator of the same race," "witnesses are more reliable when a weapon is not present;" or "highly confident witnesses are highly accurate."

(9) The *Manson v. Brathwaite* factors – especially statements of confidence – have been characterized as not being "diagnostic of reliability." But the *Manson* factors turn out to be right: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, *the level of certainty demonstrated at the confrontation*, and the time between the crime and the confrontation," are the most dispositive indicators of accuracy. 432 U.S. 98, 114 (1977) (emphasis added). In context, the word "confrontation" means the initial identification, not an in-court identification. See *id.* at 106 (using the word "confrontation" to mean the identification procedure); *id.* at 108, 110 (discussing "identifications resulting from 'unnecessarily suggestive confrontation'"); *id.* at 115 (only two days elapsed between the crime and the "confrontation"). The facts of *Manson* may have confused the issue because the first time the witness expressed his level of confidence was at the time of trial. *Id.* at 115. But the phrase "the level of certainty demonstrated at the confrontation" seems to brook only one interpretation, that is, the level of certainty demonstrated or expressed at the initial identification. Whether or not this is a correct interpretation of *Manson*, we agree that the level of certainty demonstrated at the time of the initial identification is likely to be more informative. Although a statement of certainty may not be solicited at trial, there is no reason not to do so as long as all of the information pertaining to an identification is presented to the jury. See NAS at 111.