PART II
Eyewitness News: How Science Can Help You Understand and Reduce Bias in Eyewitness Testimony

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INTRODUCTION

Eyewitness testimony can be a key piece of evidence presented to a jury. However, as discussed in Part I of this presentation, decades of scientific research demonstrate that it would be a mistake to assume categorically that recalling an event from memory is the equivalent of replaying a video of the event as it actually happened. The human brain is not equipped with such a videorecorder. In some situations, memories of events can be fallible and subject to bias. Environmental, contextual, and individual factors interact to influence whether and how we encode events into memory, what parts of a memory we retain in storage over time, and whether and how we later recall the event. Justice Sotomayor has succinctly recognized the risks inherent in eyewitness evidence in the context of eyewitness identifications: "eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial."[1]

In light of these recognized limitations of eyewitness evidence, a body of law has developed regarding the admissibility of expert testimony explaining to the jury the complexity of memory and recall and their inherent limitations. Part II of this presentation provides an overview of the legal landscape surrounding the admissibility of expert testimony on eyewitness accounts under *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993). Historically, courts have been reluctant to admit expert testimony on perception and the fallibility of memory and recall; however, a majority of courts have now adopted a discretionary approach to admitting expert testimony on eyewitness accounts that sometimes favors admission of such expert testimony. This trend is in line with the body of scientific research discussed in Part I of this presentation.

THE ADMISSIBILITY OF EXPERT TESTIMONY UNDER *DAUBERT*

Under the Federal Rules of Evidence, expert testimony must comply with Federal Rule of Evidence 702 to be admissible. Federal Rule of Evidence 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[2]

In *Daubert* the Supreme Court explained that courts must serve in a gatekeeping role to

[11] *See Perry v. New Hampshire*, 132 S. Ct. 716, 730-31, 739 (2012) (Sotomayor, J., dissenting) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues[.]").
[2] FRE 702.

screen expert testimony.[3] Under *Daubert*, the proponent of expert testimony must show that the expert's testimony both rests "on a reliable foundation and is relevant to the task at hand."[4]

EXPERT TESTIMONY AS A SAFEGUARD AGAINST THE SHORTCOMINGS OF EYEWITNESS EVIDENCE

Expert testimony pertaining to the science of memory and recall—and the shortcomings of both—can be crucial to placing eyewitness evidence into context and assisting the trier of fact in weighing such evidence. The following cases illustrate the importance of considering whether expert testimony on eyewitness accounts may be helpful to the trier of fact—and the dangers of excluding such expert testimony.

- In *Com v. Walker*, in which the Supreme Court of Pennsylvania struck down a blanket rule excluding expert testimony on eyewitness evidence, the American Psychological Association ("APA") submitted an *amicus* brief supporting "the admission of expert testimony regarding the factors that bear on eyewitness testimony."[5] Importantly, the APA explained that "extensive research has been conducted on human memory and its limits, as well as inaccurate eyewitness identification[.]"[6] An *amicus* brief submitted by the Innocence Network and the Pennsylvania Innocence Project highlighted the risk of *per se* barring such testimony by "emphasizing the high percentage of erroneous eyewitness identifications involved in [criminal] convictions later vacated[.]"[7]

- In *U.S. v. Smithers*, the Court of Appeals for the Sixth Circuit held that the trial court erred by failing to analyze under *Daubert* proffered testimony from an expert regarding eyewitness identifications where "eyewitness testimony was crucial, if not the sole basis for [the Defendant's] conviction."[8]

- Consider that eyewitness evidence can be crucial in the civil context as well. For instance, in *Arias v. DynCorp*, plaintiffs, approximately 2,000 Ecuadorian citizens brought tort claims related to defendants spraying herbicides over their land.[9] The plaintiffs defeated defendants' motion for summary judgment, which argued that plaintiffs failed to present expert testimony regarding causation of their injuries, based on their eyewitness accounts.[10] In denying summary judgment, the court stated that "plaintiffs' eyewitness testimony is sufficient to create a triable issue of material fact concerning what caused their alleged injuries."[11]

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[3] *Daubert*, 509 U.S. at 597.
[4] *Id.*
[5] *See* 625 Pa. 450, 465 (2014).
[6] *Id.*
[7] *Id.* at 466.
[8] *See* 212 F.3d 306, 317 (6th Cir. 2000).
[9] *See* 928 F.Supp.2d 1, 3 (D.D.C. 2013).
[10] *Id.* at 9.
[11] *Id.*

APPROACHES TO THE ADMISSION OF EXPERT TESTIMONY ON EYEWITNESS ACCOUNTS

The admission of expert testimony regarding eyewitness evidence under *Daubert* varies by jurisdiction—with a trend towards admitting such expert testimony. Historically, courts disfavored such testimony, but "[t]his trend shifted in the 1980's, with the emerging view that expert testimony may be offered, in certain circumstances, on the subject of the psychological factors which influence the memory process."[12] The three approaches are summarized below.

1. Blanket Exclusion.

Despite the body of scientific evidence establishing the limitations of eyewitness testimony, some courts have maintained their blanket exclusion of expert testimony on this topic. Only three state courts (Louisiana, Nebraska, and Oregon, all applying the *Daubert* standard), maintain complete exclusion.[13] The Court of Appeals for the Eleventh Circuit also appears to maintain a bar on this expert testimony.[14]

2. Discretionary Approach.

A majority of courts have adopted a discretionary approach to admission of expert testimony under an abuse of discretion standard.[15] Under the discretionary approach, when considering whether to admit expert testimony regarding eyewitness accounts, courts that have excluded such testimony have often done so on the following grounds: (1) the expert testimony regarding is unreliable;[16] (2) the expert testimony will not assist the jury because it is within their lay knowledge;[17] (3) the expert testimony is likely to confuse the jury;[18] and (4) a jury instruction may sufficiently inform the jury of the limitations of eyewitness testimony. Practitioners seeking to introduce expert testimony regarding memory and recall to rebut eyewitness testimony should be prepared to address these arguments by arguing that: (1) (as addressed in Part I) the body of scientific literature on the limitations of memory and recall is reliable and extensive; (2) the complexity of memory and recall is beyond the lay understanding of jurors; (3) the likelihood of confusion is outweighed by the probative value of such testimony; and (4) a jury instruction will be insufficient to adequately educate the jury of this complex scientific topic.

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[12] *Smithers*, 212 F.3d at 311.
[13] *See State v. Young*, 35 So.3d 1042, 1046-50 (La. 2010); *State v. George*, 645 N.W.2d 777, 790 (Neb. 2002); *State v. Goldsby*, 650 P.2d 952, 954 (Or. Ct. App. 1982).
[14] *United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997).
[15] *See, e.g.*, *United States v. Rodriguez-Berrios*, 573 F.3d 55, 71-72 (1st Cir. 2006); *United States v. Lumpkin*, 192 F.3d 280, 288-89 (2d Cir. 1999); *United States v. Alexander*, 816 F.2d 164, 167 (5th Cir. 1987); *United States v. McGinnis*, 201 F. App'x 246 (5th Cir. 2006); *United States v. Hall*, 165 F.3d 1095, 1104-1106 (7th Cir. 1999); *United States v. Martin*, 391 F.3d 949, 954 (8th Cir. 2004); *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994); *United States v. Smith*, 156 F.3d 1046, 1052-54 (10th Cir. 1998).
[16] *See United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996).
[17] *See United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1991); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995).
[18] *See United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 2000).

3. Modern Trend: Favors Admission.

The third approach, which has been described as the "modern trend,"[19] favors admission of expert testimony regarding eyewitness evidence if the eyewitness evidence is uncorroborated and central to the case.[20] When those two "make or break the case" elements apply to eyewitness testimony, practitioners may argue that courts have been particularly likely to admit expert testimony to inform the jury of the limitations of eyewitness evidence.

CONCLUSION

As discussed in Part I of this presentation, studies from a wide body of scientific literature demonstrate the counter-intuitive proposition that, although our memory generally serves us well, one cannot assume that memories are infallible. This research allows one to apply the scientific method by testing predictions regarding the likelihood of error given such factual evidence as: the mental state of a particular witness; the conditions under which the witness observed the event; intervening events that occurred; and the circumstances in which the witness has recounted the event. Expert testimony providing such an evaluation, when conducted in accordance with both the science and the facts of an incident, can provide valuable insight to the jury as to the general scientific reliability of eyewitness testimony. It can further identify empirically-established reasons why a witness's account may not correspond with other witness accounts, physical evidence, or scientific findings. The trend favoring admission of expert testimony on these topics acknowledges the state of science regarding memory and recall errors. Indeed, expert testimony regarding perception and the fallibility of memory can help the jury put eyewitness evidence into context and weigh such eyewitness evidence in light of the science.

[19] *See* George Vallas, A Survey of Federal and State Standards For the Admission of Expert Testimony on the Reliability of Eyewitnesses, 39 AM. J. CRIM. I. 97, (Fall 2011).

[20] *See United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Brownlee*, 454 F.3d 131, 141-42 (3d Cir. 2006); *United States v. Harris*, 995 F.2d 532, 534-35 (4th Cir. 1993); *United States v. Bellamy*, 26 F. App'x 250, 257-58 (4th Cir. 2002); *Smithers*, 212 F.3d at 317.