

From a Federal Perspective:  
Eyewitness Memory Issues & Suppression of Pretrial Identifications  
(Part I)

This is the first of a two part article on memory issues and the ways that defects in eyewitness memory can be used to advance both cross-examination and the potential suppression of pretrial identifications. The first part of the article will focus on current psychological studies and recognized phenomena related to eyewitness memory of events and subsequent identifications of our clients as the culprits. The second part of the article will be centered on the law related to suppression of various pretrial identification techniques.

As a preliminary matter, we all recognize that jurors give great weight to the testimony of eyewitnesses. We know this from personal experience - i.e., that guttural anxiety we feel as we observe the jury being overborne by the highly confident eyewitness who is wagging his/her finger at our client while saying, "that's the guy." What you may not realize is that studies show that jurors are more impressed by eyewitness testimony than by forensic evidence, such as fingerprints, handwriting comparisons, or DNA.<sup>1</sup>

Psychological studies also reveal that jurors tend to believe that the eyewitness's confidence is the best indicia of his/her accuracy.<sup>2</sup> Furthermore, at least one study shows that jurors believe confident witnesses, even when the witness testifies inconsistently. Thus, your wonderful cross-examination which is rooted in impeachment by showing inconsistencies will have little effect on the jury's perception unless you can shake the witness' confidence about the identification itself.<sup>3</sup>

Undercutting the witness' confidence will be an arduous task. Witnesses gain confidence when their initial memory is confirmed, and one recent study shows that erroneous post-identification feedback, either confirming or disconfirming an earlier identification, affects both adult and child witnesses. Thus, both children and adults who receive confirming feedback are more willing to testify that the person they identified was in fact the person they saw commit a crime.<sup>4</sup> This confirmation can come from either tacit or blatant suggestions by other witnesses, law enforcement or the prosecutor, or it could come from influences outside the case, such as friends, family or the media. From whatever source, affirming feedback or repeated exposure to the identification will lead to increased witness confidence.

Despite what juries think and regardless of our predilection for logic, eyewitness confidence does not always correlate with eyewitness accuracy. In fact, despite that the U.S. Supreme Court has indicated witness confidence as one of five criteria for determining reliability of an otherwise suggestive pretrial identification, psychology literature suggests that the confidence of an eyewitness is *not* a good indicator of accuracy or reliability.<sup>5</sup>

There are psychological phenomena that frequently arise in the context of criminal cases and should be taken into account when measuring the potential accuracy of the witness' recollection. A *non-exhaustive* list of phenomena to keep in mind when fashioning your cross-examination or assessing the need for an identification expert are the following: (1) unconscious transference; (2) cross-racial considerations; (3) selective attention; (4) state-dependent memory; and, (5) weapon

focus.

There are many detailed studies in existence on each of these factors (as well as many others) affecting memory. For the sake of brevity, the following information is intended only as a cursory overview of the aforementioned phenomena.

“Unconscious transference” occurs when a witness confuses or recalls a person seen in one situation with a person seen in a second situation.<sup>6</sup> “Unconscious transference” often becomes a concern in criminal cases because of repeated exposure to photographs of the defendant, seeing the defendant at pretrial hearings or even seeing the defendant’s likeness in the media. When this occurs, the witness is more likely to identify the defendant as being at the crime scene when, in fact, the witness’ memory of the defendant comes from a totally different context. Similarly, this may also be a consideration when moving for a change of venue in a media intensive case since your jurors may have seen the defendant’s photo in the media, and therefore, the jurors themselves will be more likely to draw on personal knowledge to confirm an eyewitness’s identification of your client at trial.

Cross-racial identifications are not nearly as reliable as same-race identifications. Generally speaking, members of one race are better at recognizing individuals from their own race, as opposed to faces of individuals from a race different than their own.<sup>7</sup> There are exceptions to this generalization; however, we should be mindful of this area of cross-examination and potential expert testimony.

“Selective attention” to one aspect of an event may affect a witness’ observations of other aspects of the event. Although jurors tend to be impressed with the amount of detail in an eyewitness’s testimony, studies show that memory for details about some aspect of an incident is not necessarily related to the witness’ accuracy on other critical aspects of an incident.<sup>8</sup> In fact, often times, when a witness is able to provide accurate details about one aspect (such as the attributes of a bank teller), it follows that the witness was not paying close attention to other details (such as your client’s face).

“State-dependent memory” is the phenomena that occurs wherein people tend to remember events better if they are in the same emotional state as they were in when they first acquired the memory. Conversely, if emotional conditions are very different at the time of acquisition and at the time of memory retrieval, then people may have difficulty recalling the event. This phenomenon may be an explanation for “red-outs” in domestic assault cases - that is, when spouses experience amnesia after violently attacking their spouse.<sup>9</sup> Re-exposing an individual to an unusual odor present at an event helps the individuals recall the previous event, even when the event occurred several years ago.<sup>10</sup> Although it is highly unlikely that the Court will allow you to simulate certain states (like intoxication) during the witness’ actual testimony, an expert can certainly explain “state-dependent memory” to your jury.

“Weapon focus” can be a significant factor in the accuracy of the witness’ memory for other details - such as your client’s identity. Studies show that when a crime is committed with a weapon, the weapon attracts the eyewitness’s attention, which, in turn, means that less attention is paid to the

characteristics and appearance of the perpetrator.<sup>11</sup> This recognized memory impediment is contrary to the belief of many jurors that the image of your client is indelibly burned into the witness' memory because of heightened fear for his/her life.

To be effective advocates in identification cases given the significant impact that eyewitness testimony has on juries, we must find a way shake the eyewitness's confidence regarding the identification or otherwise diminish the witness' impact on the jury. These (and other) memory phenomena may help defense practitioners fashion effective cross-examinations to strike at the core of the witness' confidence. Alternatively, employing an expert witness who can testify about the specific issues in your case may negate some of the detrimental affect of the testimony.

Statistics show that the vast majority of wrongful convictions are attributable to erroneous, but highly confident, eyewitness identification testimony. Let's find a way to effectively challenge this testimony and curb the zeal of prosecutors who prefer that witnesses point fingers.

1. See, Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony Civil and Criminal* § 1-5 (3<sup>rd</sup> ed. 1997 and Cumulative Supp. 2004).
2. See, Loftus & Doyle, *supra*, §1-3.
3. Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 Law and Human Behavior 353-364 (June 2002).
4. Gertrud H. Hafstad, Amina Memon & Robert Logie, *Post-identification feedback, confidence and recollections of witnessing conditions in child witnesses*, Applied Cognitive Psychology (in press).
5. Compare, *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) with Loftus & Doyle, *supra*, § 3-12.
6. See Loftus & Doyle, *supra*, § 4-10.
7. See Loftus & Doyle, *supra*, § 4-9.
8. See Loftus & Doyle, *supra*, §1-4.
9. Bower, G.H., *Mood and Memory*, 36 American Psychologist 129-148 (1981); Gayla Swihart, John Yuille, & Stephen Porter, *The Role of State-Dependent Memory in "Red-Outs,"* 22 Int'l Journal of Law and Psychiatry, 199-212 (May 1999).
10. John P. Aggleton, & Louise Waskett, *The Ability of Odours To Serve as State-Dependent Cues for Real-World Memories: Can Viking Smells Aid the Recall of Viking Experiences?* 90 British J. of Psychology 1-7 (Feb. 1999).
11. Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992).