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The Admissibility of Expert Testimony on Identification

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## THE HISTORIC TIMELINE FROM *MOONEY* TO *LeGRAND*:

### People v. Mooney, 76 N.Y.2d 827 (1990)

Majority avoids issue; Kaye's dissent says Court should follow other jurisdictions' trend toward allowing expert testimony

### People v. Lee, 96 N.Y.2d 157 (2001)

Recognizes that expert testimony on identification is not inadmissible, but finds no abuse of discretion in trial court's ruling excluding it, given strong evidence corroborating identification.

Lee is seen as changing the climate on expert testimony on identification, signaling a favorable attitude towards admissibility in an appropriate case

### People v. Young, 7 N.Y.3d 40 (2006)

Proposed expert testimony on, *inter alia*, cross-racial ID; weapon focus; effect of stress on memory and perception; confidence/accuracy relationship

Young upholds trial court's discretionary exclusion of expert testimony (a ruling made *prior to Lee*), but deems the issue "close," noting that "the testimony might well have been admitted."

Young recites two factors to consider:

- "extent to which the research findings ... were relevant" to the particular identification
- "extent to which that identification was corroborated by other evidence"

HELD: First factor favors admission "so much so that, if the identification were not strongly corroborated, the exclusion of [the expert's] testimony would be hard to

justify." Corroborative evidence: stolen property recovered from male defendant's female friends, who link him to the property.

People v. LeGrand, 8 N.Y.3d 449 (2007)

FACTS:

Defense offers expert testimony on: weapon focus; lack of correlation between confidence/accuracy; post-event assimilation of information; and confidence malleability.

After Frye hearing, trial court found the proposed witness to be a qualified expert and the proposed testimony to be relevant and beyond the ken of a typical juror. But, the court excluded the evidence as not generally accepted within the scientific community [for reasons including that the data was not based on real crime studies, but only simulated crimes and that there was controversy over some of the data.]

HELD:

"[W]here the case turns on the accuracy of eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identification."

As to the specific factors proposed, Court found that, with the exception of weapon focus, there was "sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field." Those factors are:

- o lack of correlation between confidence/accuracy
- o post-event assimilation of information
- o confidence malleability

## ANALYSIS OF LeGRAND

### I. **Recognition of the need to incorporate scientific research into criminal law**

- scientific research teaches us about memory and perception and has a place in how we construct identification procedures and evaluate identifications themselves

NB: This recognition can affect how identification procedures are conducted in the first place by law enforcement, how courts evaluate such procedures as to suggestiveness at the Wade hearing, and how jurors evaluate identification evidence itself

- scientific research on jurors and lay witnesses teaches us that lay perceptions do not always correspond to scientific findings and the latter are even occasionally counterintuitive

### II. **Puts to rest certain obstacles or rationales previously invoked to justify *per se* exclusions of expert testimony on identification**

- it will "invade the province of the jury"
- scientific findings are not beyond the ken of average jurors
- data is not valid because not based on real crime studies
- cross-examination, summation, and jury instructions are adequate substitutes for expert testimony

NB: Some of the above might be valid objections, depending on the particular subject matter:

E.g., People v. Fratello, 92 N.Y.2d 565, 572 (1998), cert. denied, 526 U.S. 1068 (1999): Upholding exclusion of expert testimony as to impaired "night vision," as this was matter within average juror's ken.

III. What must a court consider in deciding on the admissibility of expert testimony?

A. Two Young factors: nature of the identification case; relevance of the proposed testimony to the particular ID

1) Nature of the identification case

- Is identity a contested issue?
- Is the identification corroborated?
- What is the nature of the corroboration?
- Is the corroboration itself contested?

*NOTE: A few recent cases have begun to evaluate the circumstances and strength of the identification itself – even in a pure one-witness ID case – in assessing this factor:*

People v. Austin, 46 A.D.3d 195, 197-201 (1<sup>st</sup> Dep't 2007)(upholding exclusion of expert testimony in case involving prompt identification, distinguishing LeGrand as involving delayed identification; alternatively finding counsel's offer of proof inadequate)

People v. Abney, \_\_A.D.3d\_\_, 867 N.Y.S.2d 1 (1<sup>st</sup> Dep't 2008)(upholding exclusion of expert testimony on same basis as in Austin; also noting, alternatively, "significant corroboration")

People v. Nazario, 20 Misc.3d 1143A (Sup. Ct, Queens Co.)(noting prompt identification)

Q: Is this a legitimate basis to preclude expert testimony?

A: NO!

- Young looks at strength of independent corroborative evidence, i.e., whether identification is "corroborated by other evidence" (emphasis added)

- When a court, as reason to preclude the expert testimony, makes a finding that the particular identification is a "strong" one, despite the absence of independent corroborative evidence, the court is engaging in *fact-findings* as to the reliability of the particular identification. But, expert testimony is offered precisely for the purpose of challenging that particular ID, so it is inappropriate for court to make its own determination as to whether ID is reliable based on ID itself. Requirement of independent corroborative evidence, though it may require some underlying fact-findings, at least justifies determination that case is not "pure one-witness ID case."
- Other cases do not make this distinction:

People v. Gonzalez, 47 A.D.3d 831, 833 (2d Dep't 2008)(error to preclude expert testimony without Frye hearing, even though case involved prompt photo ID and lineup next day)

2) Relevance of the proposed testimony to the particular ID

This involves comparing the list of factors on which the expert testimony is proposed to the facts in the case. EXAMPLE: Expert testimony discussing cross-racial ID and weapon focus, in a grand larceny case where the victim and perpetrator are of the same race, is not relevant.

B. Other factors pertinent to the admissibility of expert testimony

[Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)]

- 1) Is the proposed witness an expert?
- 2) Has the subject matter gained general acceptance in the scientific community?

IV. Procedural issues as to expert testimony

A. Offer of proof

Competing decisions on what defendant must show in his offer of proof:

Compare People v. Radcliffe, 191 Misc.2d 545, 548-549 (Sup. Ct, Bronx Co. 2002) with People v. Smith, 191 Misc.2d 765, 769-771 (Sup. Ct, NY Co. 2002)

Offer of proof to be made pre-trial, but subject to renewal based on how evidence develops

B. Frye hearing

LeGrand held that a court could, but need not, hold a Frye hearing on this issue. A court could rely on rulings of other courts or the published research.

CAVEAT: This is subject to defense right to litigate, based on new, different, or more fully developed offers of proof, issues which may have been decided adversely in another case.

EXAMPLE: LeGrand's finding of insufficient record evidence as to general acceptance of scientific principles relating to weapon focus, whereas subsequent Frye hearings have shown otherwise.

V. **What factors are potential subjects of expert testimony?**

The list is not exhaustive:

- Confidence/accuracy correlation
- Effect of stress and/or arousal on memory, perception and recall
- Post-event assimilation of information
- Confidence malleability
- Retention interval

- Cross-racial identification
- Experimenter expectancy effect
- Effect of cautionary instructions on initial ID
- Weapon focus

NOTE: LeGrand upheld trial court's ruling insofar as it found "insufficient evidence" adduced at the Frye hearing to establish general acceptance of principles relating to weapon focus. In two cases decided since lower court's decision in LeGrand, Frye hearings specifically addressed concerns voiced in that case and both courts approved expert testimony on weapon focus. People v. Banks, 16 Misc.3d 929, 943-944 (Westchester Co. Ct 2007); People v. Williams, 14 Misc. 3d 571, 578 (Sup. Ct, Kings Co. 2006).

## VI. What other issues lie ahead?

### A. Admissibility of expert testimony at the Wade hearing

#### 1) Analysis of factors relevant to suggestiveness:

- Role of cautionary instructions
- Sequential versus simultaneous procedures
- Experimenter expectancy effect

E.F.Lofus & J.M.Doyle, Eyewitness Testimony: Civil and Criminal § 4.06 (Michie Co. 1992): studies show more than twofold increase in misidentification, where witness was led to believe that suspect was in lineup

QUERY: Is the impact of a "suspect in custody" remark not sufficiently appreciated in light of this science?

- Suggestiveness vis-à-vis ID versus suggestiveness vis-à-vis ID of defendant

- Repeated viewings of defendant's image
- Assimilation of post-event information
- Confidence malleability

2) Analysis of factors relevant to independent source:

"[S]everal of the criteria listed by the [U.S. Supreme] Court [in Neil v. Biggers, 409 U.S. 188 (1972)] are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." State v. Long, 721 P.2d 483, 491 (Utah 1986).

- Relevance of certainty as factor
- Retention interval
- Factors relevant to opportunity to observe
  - Stress
  - Weapon focus

B. Role of jury instructions

1) What is adequate instruction on identification?

- Statement as to prosecution's burden of proof on ID is all that is required as a matter of law, though intermediate appellate courts might reverse for inadequate instructions in close cases
- Should more instruction be required as a matter of law?

EXAMPLES:

- Instruction that accuracy, not credibility, is the issue and that accuracy must be proven BRD

- instruction that identification should be scrutinized with care (cautionary instruction)
- instruction on identification factors

2) What is *permissible* in light of science?

- Can courts start incorporating scientific findings into their jury instructions?