Strategies for Cross-Examination in Eyewitness Identification Cases

SATURDAY, March 8, 2014

9:00 A.M. – 12:00 P.M.

Mohawk Valley Community College
1101 Sherman Drive
Utica, NY 13501

IT Room 225

Speaker:

Ray Kelly, Esq.

Law Offices of Ray Kelly, Esq.
Albany, NY

Chair: Frank J. Nebush, Jr., ***Oneida County Public Defender, Criminal Division***

Sponsored by:
Oneida County Bar Association
Oneida County Supplemental Assigned Counsel Program
Oneida County Public Defender, Criminal Division
New York State Defenders Association, Inc.

2 Skills, 1 Professional Practice

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association, the Criminal Division of the Oneida County Public Defender's office, the Oneida County Supplemental Assigned Counsel Program and the New York State Defenders Association, Inc. as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel . A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full day course provides continuing legal education credits in skills, professional practice and ethics.

This year, the Oneida County Supplemental Assigned Counsel Program is sponsoring a Basic Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There will be three, full day sessions this spring – two offering sessions on criminal law and one on family law. All programs will be held on Fridays at Mohawk Valley Community College, IT Building, Room 225 from 9 a.m. – 4 p.m. The fee for ***each session*** for attorneys residing in Oneida County is $25. For all others the fee is $85 ***per session***. To register, contact Jan Curley at the Oneida County Public Defender's office – 798-5870. Make all checks payable to the "Oneida County Supplemental Assigned Counsel Program" and send them to "Oneida County Public Defender, Criminal Division, 250 Boehlert Center, 321 Main Street, Utica, New York."

Friday, June 6th: "Fundamentals of Criminal Law"
Friday, June 13th: "Family Court 101"
Friday, June 20th: "Trial Practice"

The Oneida County Bar Association also offers a number of Saturday morning 3-hour Criminal Track programs focusing on various aspects of criminal defense. Past seminars included computer forensics, trial practice, appeals from local criminal court, immigration consequences of criminal convictions, alternative sentencing, motion practice, competency and the affirmative defense of not responsible by reason of mental disease or defect. These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A $25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. All programs are posted on the Oneida County Public Defender, Criminal Division's website at *http://www.ocgov.net/oneida/pdcriminal/training* and the Oneida County Bar Association's website at *www.oneidacountybar.org*. Also, the Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

The Oneida County Bar Association offers a wide range of CLE programs throughout the year. A full calendar of programs is available at their website.

The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year.

Our special thanks to Mohawk Valley Community College who continue to offer their first class facilities for our use.

The members of the Criminal Track Series Program Development Committee welcome you to today's program and hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

SPEAKER

Ray Kelly, Esq., Law Offices of Ray Kelly, Esq., Albany, New York. Mr. Kelly's primary areas of practice are criminal trials and appeals and civil trial practice. He served as a trial consultant for jury selection, cross-examination and substantive legal argument for the *Diallo* trial; was lead capital counsel in death penalty cases under Judiciary Law §35-b; served as Major Crimes Trial Counsel for the Albany County Public Defender's office; was an adjunct faculty member lecturing on Trial Tactics and Advocacy at Albany Law and has been lead counsel in over 280 trials in various civil and criminal cases including eight death penalty cases. Ray has been a guest lecturer and instructor at numerous CLE programs for the New York State Bar Association, the New York State Defenders Association and the New York State Association of Criminal Defense Lawyers. He has written about prosecutorial and defender liability, police and prosecutorial misconduct and authored "*Preparation, Persuasion and Self: Defending Fellow Human-Beings – A Criminal Trial Notebook"* published by the New York State Bar Association. Mr. Kelly received the *Denison Ray Indigent Defender of the Year Award* in 1998 from the New York State Bar Association, the *Charles F. Crimi Memorial Outstanding Practitioner Award* in 2000 from the Criminal Justice Section of the New York State Bar Association, the *Honorable Thurgood Marshall Distinguished Practitioner Award* in 2002 from the New York State Association of Criminal Defense Lawyers, the *Distinguished Service Award in Law-Related Education* in 2005 from the Law, Youth and Citizenship Committee of the New York State Bar Association, the *Wilfred R. O'Connor Lifetime Client-Centered Representation Award* in 2007 from the New York State Defenders Association and the *Clarence Darrow Award* in 2010 from the New York State Association of Criminal Defense Lawyers.

2014 Criminal Track Program
Schedule

Saturday, March 8, 2014

Strategies for Cross-Examination in Eyewitness Identification Cases

8:30 AM - 9:00 AM REGISTRATION

9:00 AM - 10:30 AM	**Ray Kelly, Esq., *Strategies***
10:30 AM - 10:45 AM	**BREAK**
10:45 AM - 12:00 PM	**Ray Kelly, Esq., *Strategies***

Materials

"Strategies for Cross-Examination in Eyewitness Identification Cases"
"Persuasion, Theory and Self as the Ultimate Tools of Effective Summation"
"Lessons from a Lifetime Defending Fellow Human Beings"

STRATEGIES FOR CROSS-EXAMINATION IN EYEWITNESS IDENTIFICATION CASES

"THE VAGARIES OF EYEWITNESS IDENTIFICATION ARE WELL-KNOWN, THE ANNALS OF CRIMINAL LAW ARE RIFE WITH INSTANCES OF MISTAKEN IDENTIFICATION."

U.S. v. Wade, 388 U.S. 218 at 228 (1967).

By

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Presented for:

2014 Criminal Law Academy
Mohawk Valley Community College
Utica, New York 13501
March 8, 2014

STRATEGIES FOR CROSS-EXAMINATION IN EYEWITNESS IDENTIFICATION CASES

I. Theory of Defense: **"Wrong Person is in the Courtroom".**

II. Mindset for Defending **"Wrong Person is in the Courtroom"**:

A. The prosecution eyewitness ties your client to the crime. Usually, the eyewitness is a sympathetic appearing citizen who points the finger of accusation at your client with a great deal of certainty. Despite the well-known fact that erroneous eyewitness identification is, and has been for centuries, the leading cause of erroneous convictions, judges, prosecutors and cops refuse to regard eyewitness identification testimony with skepticism. Our job with jurors is to ensure that, **in this case,** systemic lack of skepticism does not prevail. How do we in the criminal defense bar fulfill our obligation of **"constant vigilance"** to protect against the conviction of an innocent person?

B. The challenge for the defense attorney is to break through the tendency of jurors to believe that eyewitness memory and in-court identification are accurate. Jurors must have an open mind to the fallibility of eyewitness testimony. Two wrong assumptions are often at the root of jurors' misconception about the accuracy and reliability of eyewitness testimony:

1. The human mind is a precise recorder/storer of facts;
2. Memories remain undisturbed by startling/on-going events.

The objectives of cross-examination should include showing the jurors that the human mind is quite fallible in times of stress/fear and that memories can often be manipulated by the **power of suggestion** and the **process of reassurance** often utilized by the police/prosecution during the investigative and pre-trial stages.

C. **Level of certainty is no guarantee of accuracy.** If your pre-trial investigation (discussed below) reveals that you have an eyewitness who is absolutely positive that s/he has the right guy, you may consider filing a motion **in limine** "To Limit Expressions of Eyewitness Confidence" (Appendix "B"). As an alternative, do you strategically want to handle the "I'm absolutely positive" testimony on cross-examination?

D. Level of bias - some eyewitnesses do have a bias. An eyewitness who is a victim quite often has a desire for revenge and/or needs to feel secure that some person (sometimes **any** person) is locked safely

away. A bystander eyewitness may have different motivations including a need to avoid embarrassment while testifying, meeting the expectations of the prosecutor and/or public, or emerging a hero.

III. CRITICAL PRETRIAL DECISION:

A. Is it your theory that the eyewitness is mistaken?

or

B. Is it your theory that the eyewitness is a liar?

C. Decision must be made **before** the trial starts so that your trial-long campaign to explain why the **"Wrong Person is in the Courtroom"** is consistent both logically and emotionally . Your decision dictates the matter and manner of your cross of this critical witness.

D. Pretrial investigation dictates this decision.

IV. PRE-TRIAL SCENE INVESTIGATION

A. Malpractice not to visit the scene that will be the focus of trial.

B. Where was eyewitness? What could/could not be seen?

C. Where was ear witness? What could/could not be heard?

D. What does common sense dictate could/could not be seen or heard?

E. What potential testimony does not pass the smell test?

V. PRE-TRIAL INTERVIEW OF THE EYEWITNESS:

A. No witnesses belong exclusively to the prosecution/police. If the eyewitness refuses to be interviewed, find out what the police/prosecution have done to discourage the witness from being interviewed. The police/prosecution cannot obstruct justice by intimidating witnesses or interfering with your lawful investigation of the case. If informal agreement cannot be made for a pre-trial interview, make a motion to compel access to the eyewitness premised upon basic due process and right to present a defense grounds.

B. Never assume that a witness identified with the prosecution will refuse to talk to the defense. Even a rebuke by the witness gives you certain indications as to the witness' personality and demeanor which assists in planning the tone and emotion of cross-examination.

C. Characteristics of the Eyewitness Pre-Trial Interview:
   1. Fair.
   2. Honest.
   3. Professional.

D. Forge a connection with the witness.

E. Always have an investigator accompany you.

VI. SUBSTANCE OF PRE-TRIAL INTERVIEW OF THE EYEWITNESS:

A. Factors Affecting Initial Ability/Opportunity to Observe:
   1. Stress/fear.
   2. Lack of duration of the event.
   3. Conditions surrounding the perception (distance, light, obstructions, etc.)
   4. Cross-racial phenomenon.
   5. Percipient witness distraction(s).
   6. Eyewitness' physical/medical/mental limitations.

B. Factors Affecting Accuracy of Memory of Event:
   1. Time from event until initial identification.
   2. Decaying effect of time on memory.
   3. Intervening events.
   4. The power of suggestion.
   5. Descriptions given by others.
   6. Suggestibility of police-arranged identification procedures.
   7. Stress.
   8. Expectation that person shown is perpetrator.

C. Factors Affecting Accurate Recall of the Eyewitness' Memory:
   1. Eyewitness' personal motivation.
   2. Repeated showings of suspect during pre-trial period.
   3. Increased media exposure of client's face as trial approaches.
   4. The process of suggestion by authority.
   5. The process of reassurance by authority.
   6. Inherently suggestive pre-trial courtroom show-ups.
   7. Increased level of eyewitness' certainty as trial approaches.

VII. QUESTIONS TO BE ANSWERED BY PRE-TRIAL PREPARATION:

A. ***Caveat***: Open-ended not closed-ended questioning and definitely not "did the actual perpetrator have a gold tooth?" when your client has a gold tooth.

B. Some Fertile Areas:

- What were you doing just prior to the event?
- What caused you to first notice something was happening?
- What exactly happened?
- Describe everything you saw.
- How short a period of time did the event take?
- When did you first notice the perpetrator(s)?
- Describe your fright/fear. Why?
- Perpetrator(s) armed?
- Who else was in the vicinity?
- What else was in the vicinity?
- What else was going on in the vicinity?
- What was said during the incident?
- How minimal the time to actually see real perpetrator's face?
- Witness alone or with someone?
- Was a child accompanying the witness? Fear for the child?
- What was the witness carrying?
- Witness' eyesight - wearing glasses?
- Last eye exam?
- Was the witness struck or lose consciousness?
- Any medical treatment?
- Did the witness look around for help?
- Was the witness blind or drunk or stoned?
- Does the witness know the real perpetrator from prior occasions?
- How soon after the event does the witness give the initial description?
- To whom was the initial description given?
- Precise detail of every description?
- Experience of witness in describing people by height, weight and features?
- Any vendetta against your client?
- Witness commitment to accuracy and detail of each prior description.
- Any distinctive features of the real perpetrator?
- Any distinctive features of your client not included in initial description?
- Number of times client seen (media exposure) since the event?
- Was there anything the eyewitness recalled after the initial description about what the real perpetrator looked like?
- Did the eyewitness tell the police (or anyone else) that he/she **might** be able to make an identification?
- Where the witness has seen the real perpetrator (your client?) before or after the incident, what were the circumstances?

- Can the eyewitness visualize the event and describe the real perpetrator from that image?
- What were the perpetrator(s) wearing?
- What were independent witness(es) wearing?
- What is it about the real perpetrator that the witness most recalls?
- If more than one perpetrator, what are the descriptions of each, including clothing, and what did each do during the incident?

C. Contacts with Cops:

- Who called the cops?
- Who was first cop on scene?
- Can witness identify first cop on scene?
- Where was call to cops made from?
- When did the police first meet with the eyewitness(es)?
- Eyewitness(es) segregated or all speaking in the presence of other identifying witness(es)?
- What description of perpetrator did eyewitness hear broadcast by cops?
- What did cops tell the eyewitness about who they thought the perpetrator(s) might be?
- What did the eyewitness hear broadcast regarding the description during the police search for the perpetrator?
- What was eyewitness' level of anticipation regarding any potential suspects?

D. The Identification Itself:

- What were the actual circumstances?
  a. Show-up?
  b. Street ID after canvas?
  c. Line-up?
  d. Single photo show-up?
  e. Photo array?
- Have the eyewitness describe in detail the circumstances in which the actual identification went down.
- What was said by the cops before, during and after the identification procedure?
- How long did it take for the identification to be made?
- Did the eyewitness express any reservations?
- ***The process of suggestion*** - did the cops say "what do you mean he **might** be the perp, you have to be positive"?
- ***The process of reassurance*** - did the cops say "congratulations, you got the right guy"?
- Is the eyewitness willing to give a percentage (%) of their level of certainty/uncertainty?
- After the identification, was the eyewitness told that the person they picked out was arrested and/or charged?
- How did the eyewitness feel upon hearing that someone had been charged?

- How many statements in writing were given to the police?
- How many times has the eyewitness given testimony regarding the event prior to in-trial testimony?
- What is the level of the psychological need for closure?

E. **THE ACTUAL PERPETRATOR**:

- Had the witness ever seen the perpetrator before?
- "I know him", is not specific enough, that means different things to different people.
- Since the incident?
- If the witness has seen the perpetrator before or after the incident, what were the circumstances?
- Have the witness describe who did it. Ask the witness to visualize the incident and describe the person from that image.
- Ask the witness to describe the perp's face or any facial features that he recalls.
- What was the perpetrator wearing?
- What is it about the perpetrator that the witness most recalls?
- If there was more than one person involved, get descriptions of each, including clothing, and what each person did in the incident.

VIII. BRAINSTORMING YOUR TRIAL STRATEGY:

A. Emotional Theme - Two Victims:
   1. Your wrongfully accused client.
   2. The victim/eyewitness.

B. The premise of your defense is that the eyewitness is misguided and mistaken. The incident happened too quickly, the eyewitness was too frightened, too focused on survival to accurately identify and later recall the real perpetrator. The witness is neither lying nor hallucinating. Your client probably looks like the actual perpetrator in a general way which explains the in-court identification.

C. To Explain **Why the Witness is Mistaken** Consider:
   1. ***The Event Itself*** - the way in which the incident happened was not conducive to credible identification. The witness did not have the opportunity or the presence of mind to memorize the face of the perpetrator. It was fast, fraught with fear and the witness was focused on the weapon or on handing over the money and getting rid of the real perpetrator as quickly as possible.
   2. ***Mistakes*** - people make mistakes. By attending to detail along the path of how a very vague initial "I

may or may not be able to identify the person" becomes an in-court "that's the person, I'm absolutely positive" will show the fallibility of the eyewitness. Search for error in observation and recall. Minor aspects (but not to the jury) in the actual location of the event itself or the number of people in the line-up and whether sitting or standing score points. Inability to recall the first cop to whom the "I may or may not be able to identify the person" statement is given can be a fruitful area of cross.

3. ***The Initial Description*** - the more vague or general the initial description, the more questionable becomes the initial opportunity to observe. Was the eyewitness knocked down or were the witness' eyes focused on a gun or another part of the real perpetrator's body rather than the face? Does the eyewitness describe a feature that your client does not have? Does your client have a feature that the eyewitness should have immediately seen and remembered?
4. ***Time*** - too much time passed between the incident and the identification for the witness to continue to accurately recall the real perpetrator. Too little time passed between the incident and the identification and the witness was still shaken up. The witness pointed to the first person that he/she saw that fit the general description.
5. ***The Identification Procedure*** - The witness looked at the line-up too long, so he wasn't sure of his identification. The witness didn't look at the line-up long enough before picking your client. The witness did not look at each of the other people in the line-up. The witness went to the line-up hoping that the perpetrator would be there, knowing that a suspect had been arrested and he/she was looking for someone who fit the general description. For example, the perpetrator was light skinned and he/she picked the person in the line-up with the lightest skin (color photographs must be preserved).

IX. *STRATEGY CONSIDERATIONS FOR CROSS-EXAMINING THE EYEWITNESS:*

A. Why should the jury believe that, in this case, the eyewitness' mind did not precisely record and store the image of the real perpetrator?

B. Why should the jury believe that, in this case, the eyewitness' ability to perceive the face of the real perpetrator is truly questionable given the startling and frightful nature of the event?

C. Ask yourself, "what is the concrete and believable reason why the jury should not rely on the in-court identification and memory of the eyewitness?"

D. Choose carefully your attack on the witness' memory and identification. You may preferably choose to give a sympathetic witness an excuse for being wrong. Your approach shows the jury that you respect the witness but s/he is mistaken when pointing the finger of accusation. Your effort is a continuing campaign to persuade the jury of the reasonableness of the eyewitness' mistake. This strategy avoids jury sympathy.

E. Plan your cross on the witness' description of the event and be especially watchful for any event, person or weapon which would distract or divide the eyewitness' attention from the real perpetrator's facial features.

F. Where the facts dictate, does the witness' initial physical description (including clothes) differ in significant respects from your client's appearance at or near the time of the event? Does the witness say that the real perpetrator had a distinctive feature that your client does not have? Does your client have a distinctive feature that the witness failed to initially/subsequently describe?

G. **The Language of Cross**:

1. Refer to the real perpetrator as the "stranger".
2. Do not use the words "client" or "defendant" when crossing the eyewitness on the fallibility of the in-court assertion "that's the guy". For example, "Was my client wearing long hair when he robbed you?" may require a notification to your malpractice carrier.
3. Preferred:

Q: You didn't know the man who grabbed your purse?
A: No.

Q: You had never seen him before?
A: No.
Q: Had no idea who he was?
A: No.
Q: This man was a total **stranger** to you?
A: Yes.
Q: This **stranger** grabbed your purse?
A: Yes.
Q: You only saw the back of the **stranger's** head?
A: Yes.

H. Lack of Detail in Eyewitness' Original Description:
1. Review all police documents/business records for initial descriptions of the perpetrator(s).
2. Interview civilian witnesses regarding initial description.
3. Review/subpoena all 911 tapes/blotters containing original descriptions received and broadcast.
4. Review police officer memo books.
5. What does the hospital/ER records show regarding description of the perpetrator?

I. Exposing the "Newly Improved Description":
1. Isolate those portions of the witness' description of the perpetrator included in the direct examination which have never before been stated by the eyewitness.
2. Query: what level of coaching improved the description?
3. Query: what cop transported the eyewitness to the trial?
4. Caveat: make sure that before you attack the "newly improved description" as a recent fabrication that you have ***all*** of the prior descriptions given by the eyewitness and that all doors are closed so that the prosecutor is not permitted on redirect to introduce a prior consistent description including the identifying characteristic that you are claiming is a recent fabrication.

J. **"Things Not Done"** by Cops Which Would Have Insured Fairness of the Id:
1. The rear of photo spread display folders often contain a series of admonitions to be given to the eyewitness before conducting the ID procedure which are almost universally ignored by the cops:

a. "The real perpetrator may not be in this photo array".
b. "You are under no obligation to identify anyone".
c. "Please advise whether this person "looks like" the perpetrator or "actually is" the perpetrator".
d. "What is it about the person picked that made the witness select him/her?"

2. Was the eyewitness ever shown a "blank" array?
3. Were the photographs shown sequentially, not all at once (to promote absolute rather than relative or comparative judgment)? Note that there is a vast difference between an eyewitness picking someone who "most resembles" the real perpetrator and the witness who states "that's the guy".
4. Was the eyewitness shown photographs selected to "match" rather than "resemble" their description of the "stranger"?
5. Was the eyewitness shown photographs by "blind" investigators who do not know who the investigating officers actually suspect?
6. Was the eyewitness shielded from the statements and reactions of investigators and other witnesses to their identification.

K. Impeachment by Prior Inconsistent Description:

Q: You claimed today that the stranger who robbed you was shorter than you?
A: Yes.
Q: You told the jury the stranger was about 5'6" to 5'8"?
A: Yes.
Q: Without heels, you are 5'10" tall?
A: Correct.
Q: You gave an initial description to the police of the stranger?
A: Yes.
Q: Your initial description was given within 15 minutes of the robbery?
A: Yes.
Q: You told the first police officer on the scene that the stranger was taller than you were?
A: Yes.

Q: In fact, you said the stranger was over 6' tall?
A: Yes.
Q: Now, 10 months later, you claim the stranger was shorter than you?
A: Yes.
Q: You were **mistaken** when you described the stranger as over 6' tall?
A: Yes.

L. Exposing the **Power of Suggestion/Process of Reassurance** by the Police:

1. Unfortunately, police often have a tunnel-visioned view of who they think committed the crime and quite often suggest by in person show-up, single photo show-up, police arranged pre-trial one-on-one viewings between the eyewitness and your client which solidify and reassure the eyewitness that the police have caught the right perp and the eyewitness has identified "the right person".
2. Do not underestimate the power of suggestion and process of reassurance utilized by the police to firm up an otherwise shaky ID. In particular, eyewitness victims often have a need to protect both themselves and society from "this perp". Our obligation is to be constantly vigilant to the true danger that the power of authority has in creating wrongful identifications. The jury must be exposed to the subtleties of police/prosecution efforts to influence the strength of the eyewitness' identification and the effect that "you got the right guy" has in reassuring the witness.

M. Failure of the Police/Prosecution to Conduct any Pre-Trial ID Procedures:

1. Quite often, eyewitnesses view photographs and say "I think that's the man but I would like to see him in person". Invariably, no line-up or other type of police-arranged identification procedure is conducted.
2. Also, especially in identification cases, the eyewitness has never seen the suspect from the moment of the incident until asked at trial to look around the courtroom "and see if the person who did this to you is present in court"? When the eyewitness points to your client and says "that's him", how do you handle it?

N. Diminishing the In-Court Identification:

Q: You just claimed that the stranger who did this to you is sitting in the courtroom?

A: Yes.

Q: You rehearsed your testimony with the prosecutor before coming into court?

DA: Objection.

COURT: Sustained.

Q: You knew the prosecutor was going to ask you to point out my client?

A: Yes.

Q: That question did not come as a surprise to you?

A: No.

Q: Was that question included in your rehearsal session?

DA: Objection.

COURT: Sustained.

Q: You certainly knew that Mr. Client was not going to be sitting at the prosecutor's table?

A: That's true.

Q: And only I was sitting with Mr. Client at the defense table?

A: That's true.

Q: You certainly weren't going to point the finger of accusation at me?

A: No.

Q: You had no choice as to who you were going to point to in this courtroom, now did you?

A: No.

X. OTHER POTENTIAL CHAPTERS OF CROSS-EXAMINATION:

(Attached as Appendix "A" is an Eyewitness Acronym Checklist)

A. Probes on the Eye-Witness' Perception:

1. Insignificance of the event.
2. Short duration of the event.
3. Movement within the event.
   a. Witness moving.
   b. Accused moving.
4. Obstructions Concealing Perpetrator's True Identity:
   a. Clothing.
   b. Mask.
   c. Facial hair.
5. Poor Vision:
   a. Failure to wear needed glasses.

b. Contact lenses.

6. Witness in Poor Health at Time of Incident:
   a. Intoxication.
   b. Drug use.
   c. Fatigue.
7. Witness' Poor State of Mind:
   a. Fear.
   b. Failure to realize the perpetrator's significance at the time.
   c. Preoccupation with events other than the perpetrator.
   d. Inability to pay attention to the perpetrator.
   e. Focus on events other than the perpetrator.
   f. Unfamiliarity with the perpetrator.
   g. Unfamiliar with the overall environment surrounding the incident.
   h. Inability to perceive details.
   i. The surprise nature of the event.

XI. DISTRACTIONS DURING THE ACTUAL FACE-TO-FACE:

A. Existence of Obstructions Between Witness and Perpetrator:
   1. Existence of competing activity.
   2. Large distance between witness and perpetrator.
   3. Differing levels of height between witness and perpetrator.
   4. Profile rather than full face.
   5. Change in lighting conditions.
   6. Poor weather conditions.

B. Presence of others during the event.

C. Eyewitness' ability to describe other events and/or give descriptions of others present (including clothing) which diminishes the actual time of the face-to-face.

XII. PROBES AFFECTING CREDIBILITY AND RELIABILITY:

A. Probing the Eyewitness' Ability to Perceive:
   1. Advanced age.
   2. Long delay between event and initial identification.
   3. Long delay between identification and trial.
   4. Inability to recall details.
   5. Inconsistent description of perpetrator.
   6. Failure of police to conduct an identification procedure prior to trial.
   7. Improper suggestions by the police.
   8. Inherent suggestiveness of the police identification procedure.
   9. Inherent suggestiveness of courtroom identification procedure.

B. Probe the Witness' Ability to Recall/Testify:

1. Any illnesses resulting in hallucinations, delusions or paranoia?
2. Inability to give a current accurate description of the event and the circumstances immediately before and after the event.
3. Inability to give a complete description (height, weight, sex, color, age, build, facial characteristics, scars, hair color, etc.)
4. Inability to give a complete description of perpetrator's clothing.
5. Inability to describe unique characteristics of the perpetrator (tattoos, limp, cast, scar, etc.)
6. Inability to select the accused as the perpetrator on prior occasion(s).
7. Selection of anyone other than the accused as the perpetrator on any prior occasion.
8. Lack of certainty as expressed prior to trial or at trial.
9. Lack of evidence to corroborate identification.

C. The Eyewitness with a Checkered Past:

1. While unskeptical judges, cops and prosecutors opine that there is no reason to believe that an eyewitness with a criminal record will be more likely to be mistaken than someone with an unblemished background, juries believe otherwise.
2. Caveat: sheer likableness of the eyewitness affects the way the jury receives, accepts or rejects the testimony.

XIII. SOME THOUGHTS ABOUT EYEWITNESS CONFIDENCE:

A. The eyewitness may be absolutely wrong and you may do a wonderful job of impeaching the finger-of-accusation testimony, but jurors seem to believe **confident** incorrect identification testimony almost as frequently as confident correct testimony.

B. How do we preclude the eyewitness from saying "that's him, I'm absolutely positive"? How about a motion **in limine** "To Limit Expressions of Eyewitness Confidence" (Appendix "B")? In your motion, point out that the eyewitness cannot become more accurate as the trial approaches then s/he was at the time of the crime - the witness can only become more confident. Set forth in your motion the forces outside the witnessing situation which increased the eyewitness' level of confidence.

C. Recent research indicates that as eyewitnesses levels of confidence improve, their accounts of the details of the event also get better with age. In cases where the eyewitness initially tells the cop "I don't know if I can identify him" or "I'm 75% certain that's the guy", we must expose the process by which the eyewitness' confidence gradually increases. The real subject of an eyewitness investigation is the process itself.

D. Admission of expert testimony (Appendix "C") is definitely worth a try especially in a one witness ID case of short duration. Try to show the court two things: (1) that confidence does not predict accuracy and (2) that jurors wrongly believe that confidence relates to accuracy.

E. Cross-examination and confidence: your goal on cross is to separate the eyewitness from the identification by showing that the identification was the product of the power of suggestion and the process of reassurance. Because eyewitnesses quite often are sympathetic figures with whom the jurors relate, by conceptualizing the eyewitness (in the eyes of the jury) as the victim of the authorities' defective procedures, the police administering **the power of suggestion and the process of reassurance** are made available as targets who can be cross-examined with no holds barred. In essence, cross-examination about confidence is two cross-examinations, one gentle of the eyewitness and one aggressive regarding the cops. For example, an eyewitness should be instructed that there may not be a suspect in the photo array; should be shown a "blank array" (with no suspect) first; shown the photographs sequentially, not all at once (to promote absolute rather than relevant comparison); be shown photographs by "blind investigators" who do not know the details of the investigation or the results of prior attempts to identify a suspect. Gentle cross-examination of the eyewitness reveals that the cops did not follow any of the above suggested procedures which then leads to aggressive cross of the cops who didn't follow these procedures.

F. Caveat: Separate the eyewitness from the process which produced the eyewitness testimony and its corresponding confidence.

XIV. PREPARE, PREPARE, PREPARE

A. Look at all the records available: police reports, memobooks, hospital records, etc.

B. Look at the description, or lack of one. Often there will be a general description that fits the accused and hundreds of other people.

C. Look for inconsistencies in the description given. If you client is 5'11", 170 lbs, a description of 6', 180 lbs is not an important inconsistency!

D. Did the witness say there was a weapon?
   1. Did the witness describe the weapon?

E. Look at the accused, what features are noticeable? Are any of these features listed on the original description by the witness? Be sure to find out if any of these features existed at the time of the incident.
   1. Facial hair.
   2. Hair style.
   3. Gold tooth.
   4. Earrings.
   5. Missing teeth.
   6. Facial scars.
   7. Tattoos.

F. How much time passed between the incident and the identification?

G. Go to the scene, at the same time of day as the incident and bring an investigator with you.
   1. Sketch the scene
   2. Put in the distances from any light sources.

XV. VOIR DIRE

A. As open-ended questions. Frame your questions so that jurors can't really answer "yes" or "no."
   1. How do you feel about _____?
   2. What do you think of the idea that _____?
   3. What is your opinion of _____?
   4. What is your reaction if I say ____?
   5. Can you think of a reason that ___?

B. You have to get jurors to talk about:
   1. Their personal experiences with misidentification.
   2. Whether the right person is always arrested?
   3. Whether people make mistakes in identification?
   4. Whether the witness saying I'm sure, pointing at the accused, repeating that he's the one, saying "I'll never forget that face" must mean the accused is guilty?

5. An alibi or lack thereof.
6. The accused's failure to testify.
7. Any other problems in the case, i.e.:
   (a) The accused arrested soon after in the area near the incident.
   (b) The description generally fits the accused.
8. The passage of time.
9. Whether people perform better or less well when they are frightened.

XVI. OPENING

A. Always. Even if you want to give a non-opening, opening. The classic in an ID case:

> Try to keep an open mind. That seems like a simple request but it is not. I watched your faces during the Mr. ADA's opening statement and I saw a change come over them. You looked distressed and concerned. But remember that Mr. ADA was not there on the street on November 3rd. He did not see or hear any of what he just described to you. He is merely repeating what his witness, Mr./Ms. ___ told him. Mr. ADA has no better way of know than you or I, whether the witness is correct or mistaken, truthful of lying, reliable or inaccurate. That is for you to decide and that is why we are here.

B. A real opening is better, but have to decide on your ***facts beyond change***.

XVII. PROSECUTION'S DIRECT CASE

A. Watch for a variety of dirty tricks, some of which are prohibited by case law:
   1. **People v. Tufano**, 69 A.D.2d 1969) and its progeny.
      (A) Bolstering: Prosecution cannot introduce evidence that the complainant had a conversation with the cop and the cop then arrested the accused. The implication is that the complainant's information was so accurate and reliable that the cop acted upon it.

2. **People v. Trowbridge**, 305 N.Y.471 (1953).
   (a) No one other than the complainant can refer to the complaint's actual identification of the accused, in the line-up, on the street, etc.
   (b) Having the complainant tell the story three (3) times, first in a simple run through, then with a twist, how far was the accused from you when that happened? Then with the map. It's permissible but object. Try "asked and answered."
3. **People v. Huertas**, 75 N.Y.2d 487 (1990).
   (a) On direct exam, the prosecution can elicit the description that the complainant gave of the perp, soon after the incident. Although this is offered to show that the description is consistent with the accused's appearance and it seems like bolstering, the rationale is that it is offered to show the complainant's state of mind. Read this case and be prepared to distinguish it from yours. For example, the description in your case wasn't given soon enough after the incident. Not all prosecutors are aware of this case so don't make a motion ***in limine*** and alert them to what they can do.
   (b) Watch out for the prosecutor expanding the time of the opportunity to view. It's never all in the police reports or grand jury testimony. The witness will have noticed the perpetrator approaching, or there will have been a conversation during the incident, or a struggle or an extended departure. Or the witness will have seen the guy after the incident and before the ID.

XVIII. CROSS EXAM

A. Do not go over the entire incident.

B. Cross the witness on the areas that you know are of value.

C. Don't ask questions, make statements. Include only one fact per statement:
   1. The man approached.
   2. He was a stranger.
   3. You did not know him.
   4. He pulled a gun.
   5. You saw that the gun was black and silver.
   6. You were frightened.

D. Be careful to refer to the perp as "the stranger" or "the person who did this". Not the accused or even the "robber."

E. The incident:
   1. The witness was frightened.
   2. The time. The length of time that the witness testified to on direct was an estimate. It could have been less time, it seemed to take a long time.

F. The focus.
   1. The perp's hand taking the wallet or going in the witness' pocket.

G. The other perpetrators.
   1. Their appearance.
   2. Their participation.

H. Inconsistent descriptions: lay a foundation and get a "No" or "I don't recall."

I. The passage of time between the incident and the identification.

J. The identification: state of mind of the witness.

XIX. YOUR CASE

A. A cop or other witness on complainant's lack of or inconsistent description. Lay a foundation with the cop.

B. Expert on the unreliability of eyewitness identification testimony is within a trial court's discretion (motion and memo annexed as Appendix "C").

XX. SUMMATION

A. Be sure to tell the jury that you are not saying that the witness is lying. The witness is doing the best s/he can but s/he's mistaken. It is understandable that s/he has made a mistake. Anyone could under the circumstances.

B. Wrap up that which you developed on cross and in your case. Go through the factors enumerated in the outline to prepare your summation.

C. "Testify" for the accused. "We are here because Mr. Accused has said "I did not do this, I am the wrong person."

D. If the jurors follow the law they will always be "right." The law says that they must acquit if the prosecution has not proven beyond a reasonable doubt that the accused is the right man.

E. How can the jury be sure beyond a reasonable doubt that Mr Witness is not mistaken? The witness is human. The witness if fallible. The witness makes mistakes.

XXI. CHARGE

A. If identification is an issue in your case, you are entitled to a charge on the issues of identification (see annexed CJI charges - Appendix "D").

XIX. CONCLUSION - OUR DUTY OF CONSTANT VIGILANCE

Control of the police and control of the prosecution takes place in the courtrooms of America or it does not take place at all. Fundamental fairness is enforced, not by cops, prosecutors or judges, but by the vigorous advocacy of criminal defense lawyers. Protecting against the ultimate injustice of convicting an innocent person based upon unreliable eyewitness identification testimony is one of our primary obligations as this Nation's sentinels of liberty. Perhaps the best synopsis of who we are and what we do comes from the following paragraph in Justice White's concurring opinion in **Wade** (388 U.S. at 256) from which the quote on the cover page of this CLE monograph is borrowed:

"Law enforcement officers have the obligation to convict the guilty **and to make sure they do not convict the innocent.** They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. **But defense counsel has no comparable obligation to ascertain or present the truth.** Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, **we must also insist that he defend his client whether he is innocent or guilty.** The State has the obligation to present the evidence. **Defense counsel need present nothing, even if he knows what the truth is.** He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. **If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.** Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, **regardless of what he thinks or knows to be the truth.** Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, **we countenance or require conduct which in many instances has little, if any, relation to the search for truth.**"

No profession has done more to defend the sacred constitutional liberties of this Country than the criminal defense bar. Hopefully, this monograph will be of some assistance in protecting against the wrongful conviction of an innocent human being.

THANKS FOR INVITING ME TO UTICA TO SHARE SOME THOUGHTS!

Ray Kelly

APPENDIX "A"

PRELIMINARY IDENTIFICATION CROSS CHAPTERS

NO RAIN IN SPAIN

N	NOTES	
O	OTHER WITNESSES	
R	REHEARSAL	
A	ACQUAINTANCE	
I	INVESTIGATOR	
N	NONSENSE	
I	IMPRESS	
N	NARCOTICS	
S	SCOUNDRELOUS **SORGE** ACTIVITY	
P	PHOTOS, PRIOR CONVICTIONS AND PRIOR INCONSISTENT STATEMENTS	
A	ANIMOSITY	
I	INTEREST	
N	NEWLY IMPROVED STORY	

IDENTIFICATION CROSS CHAPTER

DOPES GO LATE

D	DESCRIPTION GIVEN	
O	OPPORTUNITY	
P	PRIOR KNOWLEDGE	
E	EMOTION	
S	SELF-DECEPTION	
G	GLASSES	
O	OTHERS TOLD ME	
L	LEVEL OF CERTAINTY	
A	ATTENTION	
T	TOP-TO-BOTTOM	
E	ENVIRONMENT	

APPENDIX "B"

STATE OF NEW YORK
COUNTY COURT COUNTY OF _____

PEOPLE OF THE STATE OF NEW YORK,	:	
	:	**TRIAL MOTION *IN LIMINE* #1**
Plaintiff,	:	
	:	
-against-	:	**Indictment No.:**
	:	**Index No.:**
JOHN DOE,	:	
	:	**Honorable**
Accused.	:	

MOTION TO PRECLUDE THE PROSECUTION FROM ELICITING STATEMENTS OF CONFIDENCE FROM EYEWITNESSES REGARDING THE ACCURACY OF THE EYEWITNESS IDENTIFICATIONS

The prosecution should be precluded from eliciting any statements from their witnesses, or presenting any other evidence, relating to the confidence or certainty of the accuracy of the identifications.

At Mr. Doe's upcoming trial, the prosecution will present the testimony of at least two witnesses – strangers to Mr. Doe -- who will identify Mr. Doe, in court, as the person who stole property from them. The prosecution will also introduce the witnesses' prior out-of-court identifications of Mr. Doe, made at a live lineup. Apart from these identifications, there is little to no additional credible evidence tending to connect Mr. Doe to the crimes with which he is charged. Accordingly, the jury's verdict will turn on whether it finds that the eyewitnesses' identifications are accurate. As in all such cases, the prosecution can be expected to elicit statements from these witnesses to the effect that they are confident in the accuracy of these identifications. This testimony will probably take the following form:

PROSECUTOR: (after eliciting witness's identification of Mr. Doe): How certain are you that the defendant was the person who stole your property on the early morning of ____?

WITNESS: I'm 100% certain it's him.

The prosecution should be precluded from eliciting any such statements from its witnesses relating to either in-court or prior out-of-court identifications. Evidence of a witness' self-assessment of his/her confidence, or "confidence evidence," is irrelevant, because there is no proven correlation between an eyewitness' assessment of confidence in an identification and the actual accuracy of the identification. Further, such evidence is improper because it constitutes a lay witness' opinion regarding an ultimate issue at trial, and impermissibly invades the province of the jury. Moreover, "confidence evidence" is highly prejudicial, and damaging to the truth-seeking function of trials, because juries tend to believe, fervently but mistakenly, that confidence and accuracy are closely related. Finally, because "confidence evidence" invites the jury to draw a conclusion that is not reasonably inferable from a witness's opinion – in other words, invites the jury to conclude, without basis, that a witness's confidence is indicative of accuracy – Mr. Doe's right to due process is violated.

"Confidence Evidence" Should be Precluded Because it Lacks Relevance and Invades the Fact-Finding Function of the Jury

In considering whether the prosecution should be permitted to introduce "confidence evidence," the Court is respectfully reminded that cases, like this one, that turn on stranger-eyewitness identifications present a heightened risk of mistaken identification and wrongful conviction. It is widely accepted by courts, psychologists and commentators that "the identification of strangers is proverbially untrustworthy." Felix Frankfurter, **The Case of Sacco and Vanzetti: A**

Critical Analysis for Lawyers and Laymen, 30 (Universal Library ed., Grosset & Dunlap 1962) (1927) ("What is the worth of identification testimony even when uncontradicted? . . . The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent - not due to the brutalities of ancient criminal procedure."); see also **United States v. Wade**, 388 U.S. 218, 228 (1967) (stating that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"); C. Ronald Huff et al., **Guilty Until Proven Innocent: Wrongful Conviction and Public Policy**, 32 Crime & Delinq. 518, 524 (1986) ("the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification"). The advent of forensic DNA testing, and the resultant DNA based exonerations of wrongfully convicted human beings, have demonstrated that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. In 209 out of 328 cases (64%) of wrongful convictions identified by a recent exoneration study, at least one eyewitness misidentified the accused. Samuel R. Gross et al., **Exonerations in the United States: 1989-2003**, 95 J. Crim. L. & Criminology 523, 542 (2004). It is beyond dispute that "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, **Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?**, 42 Canadian Psychology 92, 93 (May 2001). "Eyewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence." **Id.** (Emphasis added.)

The danger that sincere but mistaken eyewitness identifications will lead to a wrongful conviction is compounded by the fact that "jurors seldom enter a courtroom with the knowledge that

eyewitness identifications are unreliable." Rudolf Koch, Note, **Process v. Outcome: The Proper Role of Corroberative Evidence in Due Process Analysis of Eyewitness Identification Testimony**, 88 Cornell L. Rev. 1097, 1099 n.7 (2003). Thus, although science has resoundingly established the "inherent unreliability of human perception and memory," **Id.** at 1102 (internal quotations omitted), this reality is outside "the jury's common knowledge," and very frequently contradicts jurors' "commonsense" understandings, id. at 1105 n.48 (internal quotations omitted). To a jury, "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says[,] 'That's the one!'" **Watkins v. Sowders**, 449 U.S. 341, 352 , (1981) (Brennan, J., dissenting) (emphasis in original).

The risk of mistaken identification and a resulting wrongful conviction is enhanced by the introduction of "confidence evidence." "Confidence evidence" necessarily depends for its relevance on the proposition that confidence in an identification bears a predictive relationship to the accuracy of the identification. This assertion is simply incorrect. As the New York Court of Appeals has explicitly recognized: "[T]he professed confidence of [eyewitnesses] in their identifications bears no consistent relation to the accuracy of these recognitions." **People v. LeGrand**, 8 N.Y.3d 449, 454 (2007) (citing 1 McCormick, Evidence § 206, at 880 (6th ed 2006)); see also **People v. Mooney**, 76 N.Y.2d 827, 831-32 (1990)(Kaye, J., dissenting)(noting the absence of a positive correlation between confidence in and accuracy of identification). Quite simply, a wealth of recent social science research has established that there is little to no correlation between an eyewitness's confidence in his/her identification and the accuracy of the identification. See, e.g., Neil Brewer et al., **The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration**, 8 J. Experimental Psych. 44 (2002); Connie

Mayer, **Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays**, 13 Pace L. Rev. 815, 845 (1994); Steven Penrod & Brian Cutler, **Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation**, 1 Psych., Pub. Pol. & Law, 817, 825 (1995) (cited in **United States v. Rattler**, 475 F.3d 408, 413 (D.C. Cir. 2007)). Penrod & Cutler, supra, at 825, marshal the numerous studies and conclude that the most appropriate generalization is that "under the conditions that typically prevail in short criminal encounters . . . witness confidence is largely unrelated to accuracy, and confidence in having made a correct identification is, at best, only modestly associated with identification accuracy."

Lower New York courts are also increasingly aware of the lack of a correlation between confidence and accuracy. See e.g., **People v. Lee**, 96 N.Y.2d 157, 163 (2001). As the trial court explained in **People v. Lewis**:

> It is invariably very dramatic and often highly persuasive when a witness, with certainty and without equivocation, testifies that the defendant is the perpetrator and that the defendant's face was one the witness would never forget. **And yet, recent cases as well as social science make clear, certainty is no guarantor of, and appears to be uncorrelated to accuracy.**
> 20 Misc.3d 1136(A), at 2 (Sup. Ct. Kings Co. 2008) (emphasis added).

Courts outside of New York also have recognized the feeble relationship between a witness' self-assessed confidence and the ultimate accuracy of the eyewitness's identification. The Supreme Court of New Jersey, in a Special Master's Report, clearly acknowledged that **"a witness's self-report of confidence, whether given before or after the identification, is not a reliable indicator of accuracy."** Special Master's Report, Supreme Court of New Jersey, September Term 2008, at 35 **(attached) (emphasis added).** Similarly, the Connecticut Supreme Court, has stated that instructing the jury that confidence is a factor to consider in assessing the reliability of eyewitness

identification is "particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification." **State v. Ledbetter**, 275 Conn. 534, 566 (Conn. 2005). Evident from the findings of these high courts is that confidence does not predict, nor in any way bear any correlation to, accuracy. Therefore, "confidence evidence" operates only to support an invalid proposition that stands in bold opposition to the wealth of social science that has been acknowledged by a growing number of courts in New York and elsewhere across the county.

Further, "confidence evidence" improperly invades the province of the jury. A witness's identification of an accused as the perpetrator is an opinion offered by a lay witness, not a fact. It is up to the jury, not the witness him or herself, to evaluate the accuracy of the identification, in other words to decide whether the witness's identification reliably permits the inference that the accused is, in fact, the perpetrator. See, e.g., **Forrest v. Jewish Guild for the Blind**, 3 N.Y.3d 295, 315 (2004) (G.B. Smith. J, concurring)., ("credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions...")(quoting **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 255 [1986]). The general rule regarding the competency of a lay witness is that such a witnesses may testify only to facts, and not to their opinions or conclusions drawn from those facts. Instead, it is left to the jury to draw appropriate inferences arising from the facts (**Morehouse v. Mathews**, 2 N.Y. 514, 515-16 [1849]; **People v. Hackett**, 228 A.D.2d 377, 646 [1st Dept. 1996]; **People v. Russel**, 165 A.D.2d 327, 332 [2d Dep't. 1991]). The rule against lay opinion evidence operates to prevent witnesses from usurping the fact-finding role of the jury (see **People v. Sanchez**, 129 Misc.2d 91 [Bx. Co. Crim. Ct. 1985] [citing Richardson on Evidence, Chap. 20, § 361, p. 326 [10th Ed., 1973]; Fisch on New York Evidence, Chap. 13, § 361, p. 235 [2nd Ed.

1977]).

In this regard, a statement of opinion or belief as to the identity of an individual is distinct from a statement of opinion or belief regarding the accuracy of that identification. While the actual statement of identification is admissible evidence, further comment as to confidence is improper evidence to submit to a jury because it violates both the rules regarding lay testimony and the rule against any opinion testimony regarding the ultimate issue in the case.

Importantly, the preclusion of such "confidence evidence" does not prevent the prosecution from persuasively making its case. Testimony regarding lighting, the witness's opportunity to view the perpetrator, the duration of the incident, the witness's state of mind at the time of the events described, etc., are permissible and appropriate facts for the witness to testify to under the exception to the general rule against lay opinion testimony (**Hackett**, ***supra***, 228 A.D.2d at 378). Furthermore, a witness certainly may testify to his/her belief as to who the assailant is in a confident ***manner***, and as such, allow the jury to assess reliability by reference to the facts of the encounter as testified to by the eyewitness, in addition to verbal and non-verbal cues of confidence without having the witness bolster their own identification. By contrast, instead of providing the jury with reliable information that it may use to assess the veracity of an eyewitness identification, "confidence evidence" serves only to confuse and mislead jurors, creating the unnecessary and grave risk of wrongful conviction.

The fact-finding process requires a jury to consider the testimony of the witness regarding the atmospherics of the encounter, in conjunction with whatever verbal and non-verbal indications of accuracy that witness demonstrates while on the stand, in order to make reasonable conclusions as to the ultimate reliability of the identification. Because an eyewitness is in no better position than

is a juror to assess the accuracy of the witness's identification, a witness's testimony regarding his or her own sense of accuracy simply does not assist the trier of fact. Instead, such testimony invades the province of the jury by introducing evidence that is speculative on the part of the witness, and misleading to the average juror.

Permitting the prosecution to elicit a statement to the effect of "I am 100% certain that I have correctly identified the defendant as the perpetrator" would be no different from permitting, for example, a police officer in a DWI case to state that he is certain that he was correct in assessing the driver as intoxicated; or a testifying accused in an assault case to state that he is certain that he acted in self-defense. Such statements simply would not, and should not, be allowed in evidence.

"Confidence Evidence" Should be Precluded Because it is Extremely Prejudicial to John Doe

As noted above, courts have not only recognized the lack of correlation between eyewitness confidence and accuracy, but also the dangerous tendency of jurors to overvalue "confidence evidence." Thus, a great source of concern regarding eyewitness identification is the emphasis that jurors, and people generally, place on a witness' self-assessment of his or her confidence; jurors are inevitably inclined to equate confidence with accuracy – a misconception that has contributed to numerous wrongful convictions. See e.g., Lindsay, R.C.L., Wells, G.L., & Rumpel, C.M. **Can People Detect Eyewitness Identification Accuracy Within and Across Situations?** Journal of Applied Psychology, 66, 79-89 (1981); Wells, G., & Murray, D., **Eyewitness Confidence**, in G.L. Wells & Elizabeth Loftus, **Eyewitness Testimony: Psychological Perspectives** 155 (1984); Penrod & Cutler, **Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation**, 1 Psych.Pub.Pol. & Law 817 (1995); see also Kassin, S., Barndollar, K. (1992), **The Psychology of**

Eyewitness Testimony: A Comparison of Experts and Prospective Jurors, Journal of Applied Social Psychology, Vol. 22, no. 16, 1241-1249 (1992)

Thus, the overwhelming majority of social science research indicates that despite the lack of a predictive relationship between professed confidence and accuracy, jurors assume the opposite. See e.g., Kassin, S., Barndollar, K., **The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors**, J. of Applied Soc. Psych. Vol. 22, No. 16, at 1241-1249 (1992); Sporer, S.L., Penrod, S.M., Read, D., Cutler, B., **Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, Psych. Bulletin**, November 1995, Vol. 118, No. 3, 315-327. The average juror will be persuaded that the more confident a witness is in their identification, the more likely it is that they are correct. Penrod & Cutler, supra, at 820-822; see also Leippe, M.R.,; Eisenstaedt, D., **Eyewitness Confidence and the Confidence-Accuracy Relationship in Memory for People, The Handbook of Eyewitness Psychology**, Vol II: Memory for People, at 327-445 (2007). As the Supreme Court of Utah explained, "people simply do not accurately understand the deleterious effects that certain variables can have on the accuracy and memory processes of an honest eyewitness. Moreover, the common knowledge that people do possess often runs to the contrary" (**State v. Long**, 721 P.2d 483, 488 [Utah 1986]). The reality of the confidence-accuracy relationship is contrary to common sense and therefore jurors are more likely to convict a defendant based on misperceptions regarding the weight and accuracy of such testimony.

The absence of such a predictive relationship between confidence and accuracy, and the tendency of jurors to assume the opposite, has prompted efforts in the high courts of several other jurisdictions to reduce or eliminate consideration of a witness's confidence by a jury. In **State v.**

Romero, 922 A.D.2d 693, 701-03 (N.J. 2007), the New Jersey Supreme Court held that "in light of the social science research noting the fallibility of eyewitness identifications .... the charge should underscore, for jurors in all eyewitness identification cases, that eyewitness identification testimony requires close scrutiny and should not be accepted uncritically." The Massachusetts Supreme Judicial Court has disapproved of jury charges that instruct the jury to consider the confidence or "strength" of an identification because it places reliance on "certainty" (**Commonwealth v. Santoli**, 680 N.E.2d 1116, 1121 [Mass. 1997]). Similarly, in **Brodes v. State**, 279 Ga. 435 (Ga. 2005), the Supreme Court of Georgia also determined that it could no longer sanction the consideration of level of certainty evidence in assessing the reliability of an eyewitness identification.

Based on the wide consensus among courts and social scientists that jurors, and people generally, are inclined mistakenly to equate accuracy and confidence, a witness vouching for his or her own confidence is particularly prejudicial as it reinforces this all too commonly held misconception. Therefore, because "confidence evidence" is far more prejudicial than probative, the prosecution should be precluded from presenting any such evidence

The Admission of "Confidence Evidence" Violates John Doe's Right to Due Process of Law

The United States and New York state Constitutions guarantee Mr. Doe the right to a fair trial and due process of law. A central tenet of those core constitutional protections is the fundamental rule that prohibits the government from misleading the jury (see **Morrison v. United States**, 547 A.2d 996 [D.C. 1988] ["It is improper for an attorney to make an argument to the jury based on facts not in evidence or not reasonably inferable from the evidence"[see also, **Mooney v. Holohan**, 294 U.S. 103, 112 [1935] [holding that obtaining a conviction "through a deliberate deception of court

and jury" is "as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation"]). It is fundamental that "[i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw," and it is plain error for the prosecutor to do so (**United States v. Young**, 470 U.S. 1, 7 n.5 [1985] [citing ABA Standards for Criminal Justice, Standard 3-5.8]). Further, the prosecutor is not "an ordinary party to a controversy," but has an elevated duty "to refrain from improper methods calculated to produce a wrongful conviction" (**Berger v. United States**, 295 U.S. 78, 88 [1935]). When the government "prosecutor's [closing] argument constitute[s] a clear misstatement of the evidence," it is prosecutorial misconduct, and as such, reversible error (**Lewis v. United States**, 541 A.2d 145, 147 [D.C. 1988]). In short, the government is bound by a strict duty to refrain from misleading the jury with respect to the evidence presented at trial.

In addition to being misleading, evidence of eyewitness confidence, and any prosecutorial argument referencing statements of confidence, invite the jury to make an invalid inference of accuracy from the proven "fact" of confidence. Due Process requires that jurors not be invited to draw impermissible inferences. See **Leary v. United States**, 395 U.S. 6 (1969); For an inference to be constitutionally permissible, a reviewing court will consider the evidence supporting such an inference in detail and ask whether it can be said with substantial assurance that the inferred fact is more than likely to occur. **Id.** at 35.

With respect to confidence-accuracy correlation, in order to be constitutionally permissible, the prosecution would need to provide this court with substantial evidence that an individual's statement regarding his/her confidence is a valid indication of accuracy. As explained above, this conclusion in opposition to the vast majority of social science data and the conclusions arrived at in

recent years by numerous courts. Thus, such evidence, if offered to the jury, would deprive Mr. Doe of his right to due process of law under the state and federal constitutions. See **Leary v. United States**, 396 U.S. 6 (1969); U.S. Const. Amendments V, XIV; N.Y. Const. Art I § VI.

For all the reasons set forth above, Mr. Doe respectfully requests that the Court preclude the prosecution from eliciting any statements of confidence from their witnesses regarding the accuracy of any in-court, or prior out-of-court identifications of Mr. Doe.

MOTION TO PRECLUDE PEOPLE FROM ELICITING OPINIONS FROM CIVILIAN AND/OR POLICE WITNESSES AS TO WHETHER PERSON DEPICTED ON SURVEILLANCE VIDEO AND/OR PHOTOGRAPHS IS JOHN DOE

The prosecution will introduce evidence at Mr. Doe's upcoming trial that a male stole credit cards from Mr. complainant duringthe early morning of November 19, 2009. The prosecution will introduce additional evidence of surveillance video footage (and one or more photo stills derived from that footage) showing a male at two different Duane Reade stores in Manhattan in the hours after the theft. It will be the prosecution's position that the male depicted in the surveillance footage is in fact the perpetrator of the thefts from Complainant #1 and also the perpetrator of the theft from a second victim – Complainant #2 – during a second incident. Ultimately, the prosecution will assert that the male on the surveillance footage is none other than John Doe. It is of course ultimately the jury's decision to determine beyond reasonable doubt whether the male depicted in the surveillance footage – i.e., the perpetrator -- is John Doe. The prosecution should not be permitted to offer any testimony by any of its witnesses about whether those witnesses believe that the man in the surveillance footage is John Doe.

A lay witness may offer an opinion about the identity of a person captured in a photograph or videotape to aid the jury in cases where "the witness is more likely to correctly identify the

[person]. . . than is the jury" (**People v. Coleman**, 2010 N.Y. Slip. Op. 7999, at *2 [1st Dept. 2010] [quoting **People v Morgan**, 214 AD2d 809, 810 [3d Dept. 1995]). As the First Department recently explained in **Coleman**, "[s]uch testimony is most commonly allowed in cases where the accused has changed his or her appearance since being photographed or taped, and the witness knew the accused before that change of appearance." **Id.** (citations omitted).

In **Coleman**, the First Department held that it was error for the trial court to allow over defense objection two police officers and the accused's aunt to testify that, in their opinions, the person depicted on video surveillance footage was the accused. The First Department stated, "Here, the people never claimed that accused had altered his appearance, and no other circumstance suggested that the jury, which had ample opportunity to view the accused, would be any less able than the witnesses to determine whether he was seen in the videotape. The prosecution's contention that the police testimony was necessary because the accused has distinctive mannerisms was not borne out by the video." **Id.**

Here, as in **Coleman**, there is no suggestion that John Doe has altered his appearance since either November 19, 2009 or January 22, 2010 (the dates of the two thefts at issue in this case). Nor do any of the prosecution's witnesses have any special knowledge of John Doe that would allow them to be more likely than the jury to determine whether the person on the Duane Reade surveillance footage is in fact Mr. Doe. As both police witnesses conceded at the suppression hearing, the first time either detective saw or heard of John Doe was on February 4, 2010, the day of his arrest. Further, the prosecution's civilian witnesses have never seen John Doe before in their lives. Accordingly, none of the prosecution's prospective witnesses will be any better situated than the jury in evaluating whether the man in the surveillance footage is actually John Doe.

The facts of this case, and the facts at play in **Coleman**, ***supra***, are in marked contrast to the facts at issue in **People v. Russell**, 165 A.D.2d 327, 336 (2d Dept. 1991), where the Appellate Division held that the trial court properly exercised its discretion to allow certain witnesses to testify that the accused was in fact the person depicted in surveillance photos taken during a bank robbery. In **Russell**, the witnesses comprised the accused's roommate, the roommate's mother, the accused's landlord and the accused's friend. The prosecution had offered evidence to show that the accused had altered his appearance after the bank robbery . After an extensive analysis of out-of-state and federal court precedent, the **Russell** court concluded as follows:

> The admissibility of such testimony is a matter addressed to the sound discretion of the trial court which must determine whether the probative value of the testimony outweighs any prejudicial effect that it may have. In reaching its determination as to whether to admit such testimony, the court may consider a variety of factors, including whether the lay opinion testimony would be of assistance to the jury (e.g., as in cases where the defendant's appearance has changed in some fashion) and whether a sufficient foundation has been established to show that the opinion is rationally based upon the perception of the witness (e.g., the extent of the witness's familiarity with the defendant within a time frame reasonably connected with the date of the crime). . . .
> Applied to the case at bar, it is submitted that all the essential preconditions for the admission of the opinion evidence were satisfied. The People laid a careful foundation that the defendant had deliberately changed his appearance to thwart identification. All the witnesses who testified knew the defendant and saw him on or about the date of the commission of the offense. Thus, the evidence was properly admitted.
> **Id.** at 332.

Here, as noted above, there will be no evidence that John Doe altered his appearance between the dates of the crimes and the date of trial (cf. **Russell**, ***supra***, in which the person depicted in the bank photos had a beard, and the prosecution presented evidence to establish that the accused had

shaved his beard after the bank robberies). Nor will it be established that any of the prosecution's witnesses had any prior knowledge of Mr. Doe, so that they could be expected to know better than the jury whether the person depicted in the Duane Reade footage is actually John Doe. By contrast, in a case where the identity of the accused is essentially the sole issue to be decided at trial, and where the issue is hotly contested, it would be unduly prejudicial to allow multiple prosecution witnesses – especially law enforcement witnesses – to testify as to their opinions about whether Mr. Doe is the person in the footage depicting the use of the stolen credit card.

Accordingly, the defense respectfully requests that the prosecution not be permitted to elicit any opinion testimony from any of their witnesses as to whether Mr. Doe is the person in the Duane Reade surveillance footage and/or photo stills.

DATED: March 8, 2014
Albany, New York

Respectfully submitted,

RAY KELLY, ESQ.
Attorney for John Doe
112 State Street
Suite 1020
Albany, New York 12207
(518) 463-4569

APPENDIX "C"

STATE OF NEW YORK
COUNTY COURT COUNTY OF _____

PEOPLE OF THE STATE OF NEW YORK,	:	**NOTICE OF MOTION *IN LIMINE* TO ADMIT EXPERT TESTIMONY**
Plaintiff,	:	
	:	
-against-	:	**Indictment No.:**
	:	**Index No.:**
JOHN DOE,	:	
	:	**Honorable**
Accused.	:	

ACCUSED'S MOTION TO ADMIT EXPERT TESTIMONY ON FACTORS THAT AFFECT THE ACCURACY OF EYEWITNESS IDENTIFICATIONS

The accused, John Doe, through counsel, respectfully moves the Court to permit the defense to present expert testimony on the psychological factors of memory and perception that may affect the accuracy of eyewitness identifications. Counsel makes a detailed proffer of testimony in this motion, including citations to some of the leading studies in this field. Counsel believes that the proffer is sufficient to allow the Court to grant this motion on the papers, or at a minimum, order a **Frye** hearing.[1]

DATED: Month, Day, Year
Albany, New York

Yours, etc.

RAY KELLY, ESQ.
Attorney for Accused
112 State Street
Suite 1005
Albany, New York 12207
(518)463-4569

1 In People v. Smith, the court held that a Frye hearing was unnecessary and granted the defense motion to admit the defense expert on eyewitness identification at trial, holding where "it is clearly demonstrated that certain recurring phenomena and derivative patterns of human behavior have been observed, studied, recorded, analyzed and published in academic literature and pervasively subjected to peer review, the court will permit conclusions and opinions offered by a recognized expert in the field of study without the necessity of a pre-trial Frye hearing." 191 Misc.2d 765, 767 (Sup. Ct. N.Y. Co. 2002).

STATE OF NEW YORK
COUNTY COURT COUNTY OF _____

PEOPLE OF THE STATE OF NEW YORK,	:	**AFFIRMATION IN SUPPORT OF**
	:	**MOTION *IN LIMINE* TO ADMIT**
Plaintiff,	:	**EXPERT TESTIMONY**
	:	
-against-	:	**Indictment No.:**
	:	**Index No.:**
JOHN DOE,	:	
	:	**Honorable**
Accused.	:	

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

RAY KELLY, ESQ., a duly licensed and practicing attorney of the State of New York, affirms and respectfully submits the following to this Court:

1. I have represented John Doe since his arrest on 1/1/00. I am familiar with the facts of this case and make this affirmation in support of this motion and for such other relief as may be appropriate.

2. Unless otherwise specified, all allegations of fact are based upon inspection of the record of this case or upon conversations with prosecutors, the accused, and counsel's own investigation.

3. John Doe is charged with two counts of Robbery in the Second Degree and one count of Assault in the Second Degree.

4. The prosecution's case relies exclusively on the identification testimony of a single eyewitness – the complainant. Apart from this eyewitness identification, there is no other evidence linking Mr. Doe to the crimes with which he is charged. Although Mr. Doe is alleged to have been the assailant who removed a cell phone and money from the complainant's pocket in the course of the robbery, no physical evidence was recovered from Mr. Doe or from any of his co-defendants.

Nor is there any other physical evidence, or evidence of any inculpatory noticed statements made by Mr. Doe or his co-defendants, connecting any of them to this criminal episode. In sum, this case centers on the eyewitness identification made by the complainant. The accuracy and reliability of that identification is the critical issue with which the jury will be confronted.

5. In order better to educate the jurors about the weakness and dangers in the eyewitness testimony in this case, the defense seeks to call at trial an expert in eyewitness identification.

6. Defense counsel has retained for trial the expert services of Professor Jennifer Dysart, a preeminent scholar and leading author and teacher in the field. As outlined below in greater detail, Professor Dysart will assist the jury in its truth-seeking mission by telling the jury about generally accepted psychological studies and principles which consistently have shown that several factors that are present in this case may affect the accuracy of a typical eyewitness identification. Further, because several of these factors have been conclusively demonstrated through numerous controlled studies to be either unknown or affirmatively misunderstood by lay persons, Professor Dysart's testimony will be well "beyond the ken" of the average juror and will aid the search for the truth far more effectively than will defense counsel's cross-examination of the identification witnesses alone.

7. As described in the attached Memorandum of Law, the defense expects that the identification testimony of the complainant will be suspect in ways not commonly known or accepted by lay persons. As stated above, the reliability of the identification made by the complainant is absolutely critical to the jury's fact-finding function. Where, as here, there is little to no evidence corroborating the identification made by an eyewitness, a trial court's refusal to allow the defense to present the testimony of a qualified expert on eyewitness identification, about factors that are relevant to the facts of the case, generally accepted within the relevant scientific community,

and beyond the ken of the jury, constitutes an abuse of discretion as a matter of law (see, **People v. Abney**, 13 NY3d 251 [2009]).

8. In addition, where, as here, the only evidence connecting the defendant to the crime is his identification by an eyewitness, preclusion of testimony by an expert on the factors that affect the accuracy and reliability of the eyewitness' identification would deny defendant's due process right to present a defense (see, U.S. Const. Amends. V, VI, XIV; **Chambers v. Mississippi**, 410 U.S. 284 [1973]).

9. Thus, Mr. Doe should be permitted to demonstrate to the jury, through the testimony of Professor Dysart, that several factors affecting memory and perception present in this case are known to make such identifications less reliable. Alternatively, the defense requests that the Court order a **Frye** hearing to determine whether relevant factors that are the subject of Dr. Dysart's proffered testimony are deemed to be accepted as generally reliable within the relevant scientific community.

WHEREFORE, it is respectfully requested that the motion herein be granted, and the Court grant any further relief it may deem just and proper.

DATED: March 8, 2014
Albany, New York

Respectfully submitted,

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STATE OF NEW YORK
COUNTY COURT COUNTY OF _____

PEOPLE OF THE STATE OF NEW YORK,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	**Indictment No.:**
	:	**Index No.:**
JOHN DOE,	:	
	:	**Honorable**
Accused.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ADMIT EXPERT IDENTIFICATION TESTIMONY

Statement of Facts

John Doe, is charged by indictment with two counts of Robbery in the First Degree, under Penal Law §§ 160.10(1) and 160.20(2)(a), and one count of Assault in the Second Degree, under Penal Law §120.05(2). According to the Voluntary Disclosure Form (the "VDF"), the indictment, and the felony complaint, the prosecution alleges that on December 19, 2009, at approximately 3:50 AM, in the vicinity of West 146th Street and Amsterdam Avenue, two males and two females approached the complainant, Sam Victim; that Mr. Doe took money and a cell phone from the complainant; and that the co-defendants then punched the complainant and stomped on him with their boots. According to the VDF, the complainant subsequently identified Mr. Doe and his co-defendants as the perpetrators of the assault and robbery in a non-police-arranged identification, at 4:09 AM, approximately 20 minutes after the assault and robbery.

Apart from the complainant's identification of Mr. Doe as one of the four people who robbed and assaulted him, there is no other evidence connecting John Doe with the commission of the crime. Mr. Doe was not apprehended in the course of committing the crime. Rather, based upon

the information in the VDF and counsel's own investigation, the complainant identified Mr. Doe and the co-defendants as his attackers approximately 20 minutes after the attack. On information and belief, at some point after he was robbed and assaulted, the complainant encountered Mr. Doe and the co-defendants at a restaurant on the corner of West 146th and Amsterdam Avenue and accused them of the crime, accusations which Mr. Doe and the co-defendants denied at the time and continue to deny to the present day. The complainant then chased Mr. Doe down the block. Mr. Doe and his co-defendants were subsequently arrested. No stolen property was recovered from Mr. Doe or from any of the other defendants. No admissions of guilt are attributed to Mr. Doe or the co-defendants. No other forensic or corroborating evidence exists to support the reliability of the eyewitness identification.

Argument

The Court of Appeals has held that:

> Where a 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 identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.
> **People v. Abney**, 13 N.Y.3d 251 (2009) (quoting **People v. LeGrand**, 8 NY3d 449, 452 [2007]).

Here, as stated above, the prosecution will present no evidence, apart from the identification made by the complainant, to connect Mr. Doe with the assault and robbery. In addition, the factors relating to eyewitness identification about which Dr. Dysart – a qualified expert – will testify are relevant to the facts of this case, based on principles that are generally accepted within the relevant scientific community, and involve topics that are beyond the ken of the average juror.

THE COMPLAINANT'S IDENTIFICATION IS THE ONLY EVIDENCE TYING MR. DOE TO THE CRIME

In this case, as noted above, there is no evidence – apart from the identification made by the complainant after the assault and robbery – to link Mr. Doe to the crime.

In **Abney**, supra, the Court of Appeals reversed the First Department and found that the trial court abused its discretion when it denied the motion to call an eyewitness expert. The First Department had affirmed the trial court's decision based on evidence in the case that the First Department considered "significant corroboration of [the] defendant's guilt" (**People v. Abney**, 57 A.D.3d 35, 43 [1st Dept. 2008]). Specifically, the First Department noted that the complainant had identified the accused in an identification procedure only one hour after she was robbed, and later in a lineup at which the accused's attorney was present (**Id.**). The First Department also found it significant that, despite the fact that the robbery in question had occurred very quickly, "the complainant had two opportunities to see the accused at close range, first when he asked her for change and second when he returned brandishing a knife" (**Id.**). Finally, the First Department pointed to the accused's extremely muddled alibi evidence as further corroboration of his guilt such that the trial court was not required to permit him to call an expert (**Id.** at 44).

The Court of Appeals reversed and, in a stark rejection of the First Department's conclusions about the significance of the corroborating evidence present in **Abney**, held that the trial court had abused its discretion when it denied the motion to call an eyewitness expert. The Court wrote that, at the close of the prosecution's case, "[I]t was clear that there was no evidence other than [the complainant]'s identification to connect the accused to the crime, and she did not describe him as possessing any unusual or distinctive features or physical characteristics" (**People v. Abney**, 13 N.Y.3d at 268). Thus, in the absence of corroboration apart from the identification, it is error as a

matter of law for a trial court not to permit the defense to present the testimony of an expert witness on identification.

In this case, no physical evidence was recovered from Mr. Doe or from any of the three co-defendants. No incriminating noticed statements were made by Mr. Doe or the co-defendants that corroborate the identification. On information and belief, the complainant did not describe Mr. Doe or his co-defendants as possessing any unusual physical characteristics, features, or articles of clothing, and neither Mr. Doe nor the co-defendants at the time the identification was made in fact possessed any unusual characteristics, features, or clothing, that would tend to corroborate the complainant's identification. Thus, in this case, as in **Abney**, there is no evidence apart from the complainant's identification to link the defendant to the crime.

To the extent that the prosecution argue that the complainant identified Mr. Doe as one of the perpetrators in close spatial and temporal proximity to the crime, or that the identification otherwise was made under circumstances likely to produce an accurate identification, this was precisely the reasoning that the Court of Appeals rejected in **Abney**. **Abney** teaches that the trial court, in determining whether to admit testimony of an expert in eyewitness identification, should not engage in an assessment of the strength of the eyewitness identification itself. The purported strength of the identification itself simply does not constitute "corroboration." Rather, the court must consider whether there is corroboration ***independent*** of the eyewitness identification. Absent such corroboration, consisting for example of physical evidence recovered from the accused, proof that the accused was previously known to the eyewitness, other forensic evidence, admissions by the accysed, or some other fact(s) apart from the eyewitness identification itself, it would be an abuse of discretion to refuse to allow Dr. Dysart to testify (see also **People v Cordes**, 2010 NY Slip Op 2168, at *2 [2nd Dept. 2010] [in absence of corroboration, court should permit identification to

testify subject to relevancy determination]; **People v. Gonzalez**, 2008 NY Slip Op 523, at *1 (2nd Dept. 2008] [post-**LeGrand**, trial court erred in refusing to permit defense to present testimony of identification expert; although complainant engaged in protracted struggle with defendant, who had distinctive goatee and tattoo, and complainant identified defendant from photo array conducted soon after incident, expert nevertheless should have been permitted to testify, in absence of any corroborating evidence]).

Accordingly, because the prosecution's case consists solely of identification evidence, without any corroboration, it would be an abuse of discretion as a matter of law for this Court to deny the defense the opportunity to present the testimony of a qualified expert on eyewitness identification, relating to relevant topics that are based on principles generally accepted as reliable within the relevant scientific community.

THE PROFFERED TESTIMONY IS RELEVANT

Based on the limited information available to the defense at this juncture[2], the defense intends to offer Dr. Dysart's testimony on a number of factors that relate to the reliability or accuracy of eyewitness identification and are likely to be present in this case, including but not limited to the following factors: 1) the stress and violence of the event; 2) exposure time of the event; 3) weapon or dangerous instrument focus; 4) the effect of multiple perpetrators on the accuracy of the identification; 5) the cross-racial aspect of the identification; 6) the effects of alcohol and/or drugs on the accuracy of the identification; 7) the effect of assimilating post-event information on the accuracy of the identification; 8) the effect of the eyewitness's attitudes and expectations on the accuracy of identification; 9) confidence malleability; and 10) the lack of correlation between a witness's confidence and his/her accuracy. All of the applicable findings

2 If additional information relevant to another factor is learned by the defense at the pre-trial hearing or in its review of the discovery and Rosario material, counsel will seek leave to supplement the instant motion.

about which Dr. Dysart will testify meet the general admissibility standard for scientific testimony[3] and are directly relevant to this case.

Professor Dysart will rely upon the results of numerous well-documented studies conducted by research psychologists to inform the jury of the effects that certain psychological factors which are present in this case have upon the ability of typical eyewitnesses to make accurate identifications. After summarizing her substantial academic and professional credentials (see **Exhibit A** - curriculum vitae of Dr. Jennifer Dysart, attached), and a description of the research studies and experiments upon which her conclusions are based, Professor Dysart will divide her testimony among three general subject areas: features of the original incident; the effect of post-incident events; and factors relating to the witness. Specifically, Professor Dysart will inform the jury that controlled experiments have led her and other leading experts in the field to draw the following general conclusions:

Features of the Original Incident:

Stress: Very high levels of stress impair identification accuracy.

Exposure time: The less time an eyewitness has to observe an event, the less well he or she will remember it.

Weapon focus: When a weapon or dangerous instrument is involved, witnesses have more trouble making accurate identifications because during the incident they focus on the weapon/dangerous instrument.

Event violence: Eyewitnesses have more trouble remembering violent than non-violent events.

Multiple Perpetrators: Research shows that where multiple perpetrators are involved in a violent event, eyewitnesses are less likely to make an accurate identification of each particular perpetrator.

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3 See **Frye v. United States**, 293 F. 1013, 1014 (D.C. Cir. 1923); **People v. Wesley**, 83 N.Y.2d 417, 435, 611 N.Y.S.2d 97, 100 (1994)(test of reliability is "not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally accepted as reliable."); **People v. Middleton**, 54 N.Y.2d 42, 49, 444 N.Y.S.2d 581, 584 (1981).

Cross-racial inaccuracy: Eyewitnesses are generally more accurate in identifying members of their own race than members of other races.

Effects of Intoxication: Eyewitnesses who are under the influence of drugs and/or alcohol at the time of the incident are more likely to make an inaccurate identification.

Effects of Post-Incident Events:

Post-event information: Eyewitness testimony about an event often reflects not only what the witnesses actually saw but information they obtained later.

Attitudes and expectations: An eyewitness's perception and memory for an event can be affected by pre-existing attitudes and expectations.

Factors Relating to the Witness:

Lack of Correlation between Witness Confidence and Accuracy: An eyewitness's confidence level is not a good predictor of identification accuracy.

Confidence malleability: Eyewitness confidence can be influenced by factors unrelated to identification accuracy.

The above-summarized testimony will be relevant to the facts of Mr. Doe's case. For example, in Mr. Doe's case, the incident was brief, violent and highly stressful. The perpetrators are charged with assault using dangerous instruments (namely, their boots). In addition, the incident was cross-racial: the complainant is Hispanic and Mr. Doe is African-American (as are his three co-defendants). Further, the defense expects that the evidence will show that the complainant discussed the assault and robbery with police officers, detectives, and prosecutors at various times during the months that have passed since the incident occurred. The complainant's memory of the event therefore may have been tainted by post-event information. Similarly, the receipt of post-event information was likely to heighten artificially the complainant's confidence in the accuracy of the

identification.[4] Finally, the defense expects that the prosecution will elicit from the complainant testimony relating to the certainty, or confidence, the witness has in the accuracy of his identification. It will therefore be crucial to educate the jurors about the counter-intuitive principle that an identification's accuracy has no correlation with the confidence or certainty with which the identification was made.

These facts, as well as other facts that may emerge in the course of this litigation, make Professor Dysart's testimony highly relevant to the topics set forth above. Professor Dysart will not state her opinion about the accuracy of the identification evidence in this case, either directly or in hypothetical form.

THE PROFFERED TESTIMONY RELATES TO PRINCIPLES THAT ARE GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY

The proposed expert testimony of Professor Dysart satisfies this state's standard for admissibility of scientific evidence. Eyewitness identification research findings are the result of regular controlled experiments -- the basic and accepted scientific method -- that can be compared with data provided by police, prosecutors and courts. These findings have been widely adopted by police departments, the United States Department of Justice, and recognized as scientifically sound by numerous courts.

(A) New York Courts Have Held That Factors About Which Dr. Dysart Will Testify Are Generally Accepted Within the Relevant Scientific Community

As the Court of Appeals stated approximately 20 years ago, "psychological research data is by now abundant, and the findings based upon it concerning cognitive factors that may affect

4 The danger of that the jury will fail to understand the potential artificiality of the complainant's confidence will be compounded, necessarily, by the nature of the in-court identification procedure itself. During the in-court identification procedure, the defendant, apart from his male co-defendant, will be the only young Black male sitting at the defense table. Prior to the complainant's attempt to make an in court identification, he will already have been told that Mr. Doe is one of the persons who has been charged with committing the assault and robbery against him. The complainant knows that he is being called as a witness by the prosecutor for the purpose of trying to identify the person sitting at the counsel table.

identification are quite uniform and well-documented" (**People v. Mooney**, 76 N.Y.2d 826, 830, [1990] [citing further case law and commentary]). New York courts have already deemed as generally accepted in the scientific community a number of the principles and/or topics about which Professor Dysart will testify. Specifically, the Court of Appeals, in **LeGrand** held that the **absence of correlation between eyewitness confidence and accuracy**; the phenomenon of **confidence malleability**; and the **effect upon accuracy of post-event information** all were generally accepted within the relevant scientific community. In **LeGrand**, the Court of Appeals also strongly encouraged courts to rely on the findings of admissibility made by other courts in the state, holding that a "court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" (**LeGrand**, 8 N.Y.3d at 458). Accordingly, this Court should rely on the fact that other courts have held that the following are proper subjects for expert testimony on eyewitness identification:

- **Stress:** **People v. Young**, 7 N.Y.2d at 40; **People v. Lee**, 96 N.Y.2d at 157; **People v. Drake**, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28; **People v. Smith**, 191 Misc.2d 765 (Sup. Ct. N.Y. Cty. 2002); **People v. Beckford**, 141 Misc.2d 71 (Sup. Ct. Kings. Cty. 1988); **People v. Lewis**, 137 Misc.2d 84 (County Ct. Monroe Cty. 1987); **People v. Brooks**, 128 Misc.2d (County Ct. Westchester Cty. 1985).
- **Violence of the Situation**: **People v. Smith**, 191 Misc.2d 765 (Sp. Ct. N.Y. Cty. 2002); **People v. Drake**, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28; **People v. Beckford**, 141 Misc.2d 71 (Sup. Ct. Kings. Cty. 1988); **People v. Brooks**, 128 Misc.2d (County Ct. Westchester Cty. 1985).

- **Weapon Focus:** People v. Young, 7 N.Y.2d at 40; People v. Banks, 2007 WL 1989843 (County Ct. Westchester Cty. July 6, 2007); People v. Drake, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28; ; People v. Beckford, 141 Misc.2d 71 (Sup. Ct. Kings. Cty. 1988).
- **Cross-Racial Aspect of the Identification:** People v. Young, 7 N.Y.2d at 40; People v. Drake, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28; People v. Radcliffe, 196 Misc.2d 381 (Sup. Ct. N.Y Cty. 2003); People v. Smith, 191 Misc.2d 765 (Sup. Ct. N.Y. Cty. 2002); People v. Lewis, 137 Misc.2d 84 (County Ct. Monroe Cty. 1987); People v. Brooks, 128 Misc.2d (County Ct. Westchester Cty. 1985).
- **Duration of the Encounter:** People v. Lee, 96 N.Y.2d at 157; People v. Banks, 2007 WL 1989843 (County Ct. Westchester Cty. July 6, 2007); People v. Drake, 188 Misc.2d 210 (Sup. Ct. N.Y. Cty. 2001) *aff'd* 7 N.Y.3d 28 (2006); People v. Smith, 191 Misc.2d 765 (Sup. Ct. N.Y. Cty. 2002).

6. **Selectivity of Perception:** People v. Lewis, 137 Misc.2d 84 (County Ct. Monroe Cty. 1987); People v. Brooks, 128 Misc.2d (County Ct. Westchester Cty. 1985).

7. **"Filling-In" Phenomenon:** People v. Drake, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28;); People v. Brooks, 128 Misc.2d (County Ct. Westchester Cty. 1985. (This phenomenon, upon information and belief, is included within the topic of post-event information and concerns the adaptation of post-event suggestion, either by the subject himself or herself, or by others.)

8. **Expectancy:** People v. Brooks, 128 Misc.2d (County Ct. Westchester Cty. 1985).

9. **Effect of Repeated Viewings**: **People v. Lewis**, 137 Misc.2d 84 (County Ct. Monroe Cty. 1987); **People v. Brooks**, 128 Misc.2d (County Ct. Westchester Cty. 1985).

10. **Motivation of the victim to make a correct identification: People v. Drake**, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28;); **People v. Brooks**, 128 Misc.2d (County Ct. Westchester Cty. 1985).

11. **Motivation of the police to make an arrest: People v. Drake**, 188 Misc.2d 210 (Sup. Ct. N.Y.Cty 2001) *aff'd* 7 N.Y.3d 28;); **People v. Brooks**, 128 Misc.2d (County Ct. Westchester Cty. 1985).

Accordingly, this Court should find that Dr. Dysart's proposed testimony regarding any of the topics enumerated above is generally accepted within the relevant scientific community and thus passes the **Frye** test. Alternatively, to the extent that Dr. Dysart seeks to testify on topics that have not been the subject of prior court decisions and the Court wishes to hear from Dr. Dysart on whether such topics and/or principles have been generally accepted within the relevant scientific community, the defense respectfully requests that the Court order a **Frye** hearing to be held.

(B) The Proposed Testimony is Based on Accepted Scientific Method

Eyewitness identification research is part of the larger fields of social and cognitive experimental psychology. Like the other members of the field, eyewitness identification researchers use controlled experiments, the prevailing norm of all forms of scientific inquiry. The experiments' design, assumptions and results are open and explicit; their results must be replicable by others; and the results must be generalizable. Its theories and predictions are subject to invalidation if they are not consistent with the large body of data generated by the criminal justice system.

The reason that eyewitness identification researchers use the basic scientific method of controlled experiment is that it makes it possible to vary one factor while holding everything else

constant, thereby isolating the effect of the variation. One kind of experiment is the so-called "staged crime," in which the researcher tries to create a situation that approximates a real-world crime but which can be studied to observe how eyewitnesses behave. The earliest staged crime experiments tended to involve college students viewing a staged crime in a lecture hall. This generated criticism as being unrealistic. See, e.g., Yuille & Cutshall, ***A Case Study of Eyewitness Memory of a Crime***, 71 J. App. Psych. 291-301 (1986).

Responding to this criticism, researchers have done a number of studies that suggest that if there is a difference between real crime victims and witnesses in a simulation, it is that the stress of being a crime victim makes an accurate identification less likely and heightens susceptibility to suggestive circumstances. Researchers have staged crime studies in which the witnesses are victimized. Compared to other witnesses who were in the same situation and saw the same event, victim-witnesses make the same mistakes or do worse. For example, victim-witnesses are even more susceptible to suggestiveness when viewing lineups. A number of studies have also been done in which the ruse of a staged crime is carried on until after the eyewitness gives a description of the perpetrator and attempts to make an identification. The subjects of the tests speak to uniformed officers, view real-looking mug shots and photo spreads, and are advised that the consequences of misidentification are serious. The results of these more realistic studies are consistent with those of earlier, more academic-style studies. See Lieppe, ***The Case for Expert Testimony About Eyewitness Memory***, 1 Psych., Pub. Pol'y & Law 909, 919-920 (1995).

Expert eyewitness testimony compares favorably to other kinds of social science expertise that have been regularly accepted by the courts. In **People v. Taylor**, 75 N.Y.2d 277 (1990), the Court of Appeals accepted as scientifically reliable expert testimony on the subject of rape trauma syndrome ("RTS"). It is now routinely used in sex crime prosecutions (see, B. Anthony Morosco,

The Prosecution and Defense of Sex Crimes [Lexis Pub. 2000], §14.01). RTS is based on theories of human behavior formulated by clinical psychologists based on interviews with crime victims. "Syndrome opinion evidence often cannot be scientifically verified or duplicated and is almost exclusively based upon the expert witness's education, training and clinical experience" (**Id.**, §14.03[1]). It remains somewhat controversial in the sense that many researchers disagree with its methods, conclusions, and with its use in criminal trials (see, **Id.**; ["RTS is coming to be seen as a valuable and reliable tool in aiding a jury," but "much criticism has been leveled at the use of psychological testimony in sex crimes prosecutions"]; P. Der Ohannesian II, ***Sexual Assault Trials***, 2d Ed. [Lexis Law Pub. 1998], Vol. 1, p, 659 ["The main problem from a scientific reliability perspective is that the signs and symptoms of [post-traumatic stress disorder] have many potential causes other than abuse or assault"]). Similar syndrome expert testimony is also widely used when the victim is a child (see, **White v. Keane**, 51 F. Supp. 2d 495 [S.D.N.Y. 1999] [child sexual abuse syndrome widely accepted in New York]).

It also bears noting that prosecutors have relied on the same body of eyewitness identification research in cases where it was useful to do so. Although prosecutors generally oppose admission of expert testimony for the defense, in **People v. Alexander**, 94 N.Y.2d 382 (1999), the prosecution cited research on cross-racial identification to argue that it was not improper for the trial prosecutor to argue that the identification of Mr. Doe was more reliable because it came from a member of the same ethnic group.

(C) The Validity Of Empirical Research In Factors Affecting Eyewitness Identification Has Been Recognized By The Nation's Chief Law Enforcement Authorities

The United States Department of Justice issued a document titled **Eyewitness Evidence: A**

Guide for Law Enforcement ("Guide").[5] The Guide represents the first set of national guidelines in the United States for the collection and preservation of eyewitness evidence for criminal cases. Psychological research played a strong role in making the case that such guidelines were needed, and it provided the scientific foundations for the content of the guidelines. The Guide was the product of a unique collaboration between law enforcement, defense attorneys and research scientists that began when the United States Attorney General received the 1996 National Institute of Justice Report on DNA exonerations and learned that 80% of the cases had been the product of mistaken identification. The Attorney General also reviewed some of the eyewitness identification research and concluded that its findings could help reduce the chances of mistaken identification. She convened a working group that included leading researchers, state and federal prosecutors, and state and federal police investigators, as well as defense attorneys. This was not the first time prosecutors had turned to scientists in this field (a few State and local police departments had asked for training, and national prosecution standards in England, Canada and Israel had issued mandatory standards for eyewitness investigations that were based on the same research[6]) but the Attorney General's was the first large-scale initiative in the United States.

The group focused on ways in which the scientific research could improve police practices in investigating eyewitness identification cases. Law enforcement personnel, all highly experienced detectives, sergeants and captains with first-hand knowledge of crime investigation, reviewed the scientific evidence and generally expressed support for the concept of improving lineup, showup

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5United States Department of Justice Office of Research Programs, *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999) (downloadable at <www.ojp.usdoj.gov/nij/pubs-sum/178240.htm>).

6See Wells, et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, American Psychologist, June 2000, 590 (describing *Memorandum of Good Practices on Video-Recorded Interviews with Child Witnesses for Criminal Proceedings* (England, 1992); Law Reform Commission of Canada (1983); and work in Israel of researcher Avaraham Levi).

and interviewing practices based on its conclusions. (The process is described in Wells, ***From the Lab to the Police Station***, American Psychologist, June 2000, at 590-92.) The police members of the group had all frequently seen eyewitnesses confidently identify fillers in lineups. Thus, research findings suggesting a mistaken filler identification rate of 20% (Wright and McDaid, ***Comparing System and Estimator Variables Using Data from Real Lineups***, Ap. Cog. Psych. 10, 75-84 [1996]) did not seem implausible to them.

In contrast, prosecutors within the working group were more resistant to the premise that eyewitness identifications were a significant source of error, and more resistant to any changes in investigation procedures. The prosecutors in the group did not have as much first-hand experience with eyewitness mistakes as the police members, since the great majority of identifications involve only the police and the eyewitness, and if the eyewitness identifies a known-innocent the case is not likely to proceed to a prosecutor for further investigation. Prosecutors' cases are based on "hits," instances where the eyewitness has identified the suspect in the case. In addition, prosecutors' trial training inclined them against the research. Eyewitness research is more commonly offered by the defense than by the prosecution in cases that proceed to trial, and prosecutors generally oppose admission of the testimony, and actively seek to discredit it if it is allowed.

In the end, however, the working group was able to reach consensus on many important recommendations. In the introduction to the Guide, the Attorney General acknowledged "the growing body of research in the field of eyewitness identification," and the Introduction to the Guide states:

> During the past twenty years research psychologists have produced a substantial body of findings regarding eyewitness evidence. These findings now offer the legal system a valuable body of empirical knowledge in the area of eyewitness evidence.

Eyewitness Evidence: A Guide for Law Enforcement, supra, Message from Attorney General Janet Reno, p. iii, and Introduction, p. 1.

Specific practices recommended by the Guide based on the scientific research include:

- warning the eyewitness before viewing a lineup that the perpetrator may not be in the lineup (studies have shown that this will reduce the number of false identifications without reducing the number of correct identifications) (Guide, p. 32).
- avoiding post-lineup statements to the eyewitness that congratulate him for selecting the "correct" suspect (studies have shown that this "feedback effect" inflates the confidence level of the witness and has no positive benefits of its own) (Guide, pp. 31, 35).

In addition, the Guide noted the strong scientific support for changing lineup procedures to show suspects and fillers to the eyewitness one at a time ("sequential lineups") rather than in a group ("simultaneous lineups") (studies show that this produces more accurate identifications and fewer false identifications) (Guide, p. 36); and for "double-blind" lineups, in which the detective running the lineup does not know who the suspect is.

Following the publication of the Guide, the Department of Justice is currently preparing nation-wide training programs for police and prosecutors to facilitate implementation of the Guide's recommendations. The psychological researchers who participated in the working group will play a key role in this training as well. See Wells, ***From the Lab to the Police Station***, supra, p. 590, n. 5.

In the Guide, then, the validity and importance of the new generation of psychological researchers has been recognized by the Nation's chief law enforcement authorities, and will serve as the basis for changes in investigation techniques that have the potential to dramatically improve

the accuracy of eyewitness identification. Although the Guide was focused on investigation methods rather than the question of the admissibility of expert eyewitness testimony at trial, its conclusions confirm that the scientific basis of research and theory is sufficient to warrant its admission at trial.

In sum, the scientific basis of research and theory for eyewitness identification is sufficient to qualify it as a subject for expert testimony. It is a large and well-established specialty within its field, with an ever-growing number of peer-reviewed publications. It uses the basic scientific method of controlled experiment, and its conclusions and predictions can be compared to the large body of data generated by the criminal justice system. Many of the findings in the field command broad consensus. The high quality of the research has influenced the United States Department of Justice, as well as foreign prosecutors in England and Canada, in revising procedures for investigating and prosecuting identification cases. The findings have even been adopted by New York State prosecutors where it has been to their advantage. Considered as a field of scientific endeavor, it unquestionably satisfies state and federal standards for admissibility, and is superior to some fields that have already been accepted in this State. This Court should find that Professor Dysart's proffered testimony in the field of eyewitness identification is scientifically sound.

THE EXPERT TESTIMONY IS PROFERRED BY A QUALIFIED EXPERT

Dr. Jennifer Dysart has devoted her professional life to the investigation and interpretation of factors that influence the accuracy of eyewitness investigation. Her credentials speak for themselves (see **Exhibit** A, CV of Dr. Jennifer Dysart, attached hereto). In brief, Dr. Dysart is an Associate Professor at John Jay College of Criminal Justice and has extensive research and practical experience in this field. Notably, she is the co-author, along with Dr. Elizabeth Loftus and Mr. James Doyle, of the most recent edition of ***Eyewitness Identification: Civil and Criminal*** (4th Ed. 2007), one of the leading treatises in the field .

THE EXPERT TESTIMONY WILL ASSIST THE JURY IN JUDGING THE ACCURACY OF THE IDENTIFICATION TESTIMONY

In the wake of **LeGrand**, it can no longer be credibly argued that traditional trial "safeguards" against mistaken identification, including cross-examination (information an expert would impart to a jury is "plainly not available through cross-examination of the individual identifying witnesses ..." **Mooney**, 76 N.Y.2d at 831, 560 N.Y.S.2d at 117); jury instructions, which simply list - without comment - a number of factors for the jury's consideration relating to the witness's opportunity to observe the perpetrator, including at least one - witness confidence - that has been expressly discredited by subsequent research; and voir dire and opening and closing arguments (**People v. Alexander**, ***supra***), are adequate substitutes for expert testimony.

In determining whether the proffered expert testimony is beyond the ken of the average juror, courts need to look at "whether the 'specialized knowledge' of the expert c[ould] give jurors more perspective than they get from 'their day-to-day experience, their common observation and their knowledge'" (**People v. Young**, 7 N.Y.3d 40, 45 [2006] [quoting **People v. Cronin**, 60 N.Y.2d 430, 433 [1983]). That is, "could the expert tell the jury something significant the jurors would not ordinarily be expected to know already?" **Id.** Although "jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, ***it cannot be said that psychological studies regarding the accuracy of identification are within the ken of the average juror***" (**People v. Abney**, 13 NY3d 251, 267 [2009] [quoting **People v. Lee**, 96 NY2d 157 [2001] [emphasis added]).

Thus, numerous trial courts have exercised their discretion to permit expert testimony on eyewitness identification (see, e.g. **People v. Banks**, 2007 NY Slip Op 27281, at *6 [Westchester Co. County Ct. 2007] [finding that proposed testimony of identification expert, on eight separate

topics relevant to eyewitness identification, could assist triers of fact]; **People v. Williams**, 2006 NY Slip Op 26469, 14]Kings Co. Sup. Ct. 2006] [finding proposed expert testimony on eyewitness identification to be beyond ken of average juror, even on topics – such as cross-racial identification and effect of reduced exposure time – where "although the average juror may have some awareness of these effects, there is sufficient underlying scientific research involved to permit [the expert] to tell the jurors something significant they may not already know about these factors"]; **People v. Drake**, April 18, 2001 [Sup. Ct., NY Co.]; **People v. Beckford**, 141 Misc.2d 71, 532 N.Y.S.2d [Sup. Ct. Kings Co. 1988] [may be an abuse of discretion not to admit expert testimony on eyewitness identification since processes and factors about which expert would testify are not necessarily within the knowledge of the typical juror, since the information would lead to a better-informed jury, and since the jury is free to accept or reject the testimony]; **People v. Lewis**, 137 Misc.2d 84, 520 N.Y.S.2d 125 [Monroe Co. Ct. 1987] [eyewitness expert testimony admissible since expert would "assist" jury]; **People v. Neal**, N.Y.L.J. 6/19/87, p.12, col.5 [Sup. Ct. Bronx Co. 1987] [eyewitness expert testimony similarly admissible]; **People v. Brooks**, 128 Misc.2d 608, 490 N.Y.S.2d 692 [Westchester Co. Ct. 1985] [a well-reasoned and expansively analyzed decision admitting eyewitness expert testimony on the grounds that it would bring to the attention of the jury relevant matters of which they were not previously aware]).

In the instant matter, the identifying witness was assaulted and robbed by multiple perpetrators who used their fists to strike him and boots to stomp on his face and neck. These perpetrators were unknown to the complainant. The entire episode was very brief in duration and occurred at night and in the dark. The enormous stress and anxiety that anyone would feel under such circumstances, along with many other factors, have tremendous impact on the reliability of the subsequent identifications in ways that the relevant research has shown to be counter-intuitive to the

average juror. Furthermore, on information and belief, the complainant has been exposed to post-event information and post-event expectations which certainly will effect the accuracy of his attempted in court identification.

As Dr. Dysart will testify, many of the psychological factors that affect the accuracy and reliability of eyewitness identifications are either unknown to jurors or affirmatively misunderstood by them. That these factors are counterintuitive to, and thus "beyond the ken of" the average juror, is borne out by a recent survey of more than 1000 potential jurors in the District of Columbia. The results of the survey demonstrate that many jurors simply do not understand the factors that can undermine the reliability of an eyewitness identification or the effects that procedures used to elicit eyewitness identification evidence can have on the reliability of that evidence. See **Exhibit B** -- Results of Survey conducted by Peter D. Hart Research Associates, Inc., February 2004, attached. The questions in the survey were written with the assistance of Dr. Elizabeth Loftus, a Distinguished Professor of Psychology at the University of California, Irvine, another leading expert in this area of psychological research, and conducted by professional pollsters using standard methodologies.

For example, according to the survey

- 54% of potential jurors polled do not understand that memory is a reconstructive event and that the act of remembering is not like replaying a video recording. See question 11.
- 62% of potential jurors polled do not understand the effect the presence of a weapon will likely have on an eyewitness' ability to make a reliable identification. See question 7.
- 57% of potential jurors polled do not understand the weak correlation between eyewitness confidence and accuracy. See question 5.

In light of the powerful testimony expected to be given by the complainant-witness, and in light of the research indicating that common understanding regarding eyewitness identifications is actually contrary to scientific knowledge, Mr. Doe deserves the opportunity to present expert testimony on his behalf. Mr. Doe faces a minimum of 15 years in prison if convicted. The risk that an actually innocent man might be wrongly imprisoned because jurors might not have all the information that might help them make an informed and reasoned decision should certainly weigh in favor of admitting the testimony in this case.

PRECLUSION OF EXPERT TESTIMONY ON THE FACTORS THAT AFFECT THE ACCURACY AND RELIABILITY OF THE EYEWITNESS' IDENTIFICATION WOULD DENY JOHN DOE'S DUE PROCESS RIGHT TO PRESENT A DEFENSE

The prosecution has charged Mr. Doe with robbery and felony assault, staking its case against Mr. Doe on the testimony of a complainant eyewitness. As discussed at length above, there is no other evidence connecting Mr. Doe to the crimes – no recovered stolen property, no forensic evidence, no inculpatory statements. Mr. Doe has a right to defend himself against the serious charges made against him by the prosecution. He has the right to subject the prosecution's proof to the crucible of adversarial testing, and "the right to present the [his] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" (**Washington v. Texas**, 388 U.S. 14,19 [1967]; see also **Crane v. Kentucky**, 476 U.S. 683, 690 [1986] [the Constitution guarantees . . . 'a meaningful opportunity' to present a complete defense"]). A central component of every accused's right to present a defense is the right to offer the testimony of witnesses (**Taylor v. Illinois**, 484 U.S. 400, 409 [1998]). Because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," due process guarantees are implicated whenever the exclusion of evidence acts to obstruct this right. Id. at 408. Thus, "a court's discretion in ruling on the admissibility of evidence "is circumscribed by . . .the defendant's constitutional right to

present a defense" (**People v. Carroll**, 95 N.Y.2d 375, 385 [2000]; see also **Holmes v. South Carolina**, 126 S.Ct. 1727 [2006]; **Chambers v Mississippi**, 410 US 284, 294 [1973] ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]). Thus, as the Court of Appeals recognized in **Carroll**, "[j]ust as the People are allowed to rebut key assertions of the defense, the defendant also is allowed to attempt to disprove the People's theory and rebut their key assertions" (**Carroll**, 95 NY2d at 386. See also **Howard v. Walker**, 406 F.3d 114, 132-33 [2d Cir. 2005] [prospective preclusion of defense witness may implicate defendant's Sixth Amendment rights]).

The rights implicated by the instant application are founded in the Sixth and Fourteenth Amendments to the United States Constitution, which in turn guarantee Mr. Doe the rights to due process, to compulsory process, to present a defense, and to have the prosecution's proof meaningfully evaluated by a jury. See U.S. Const. amends. VI and XIV. In this case, where the state seeks to convict Mr. Doe based solely on eyewitnesses testimony, these constitutional guarantees ensure Mr. Doe's ability to probe the reliability of the observations of the prosecution's eyewitnesses and the reliability of the procedures used by the state in the months that passed from the initial identification to the moment when the eyewitness identifies Mr. Doe at trial.

Certainly, Mr. Doe's right to defend himself is not wholly unfettered. The Court may enforce evidentiary rules that regulate the admission of evidence and ensure that the evidence the jury hears is both relevant and reliable. But these rules, on their face or as applied, may not be arbitrary or disproportionate to the interests at stake (see **Rock v. Arkansas**, 483 U.S. 44, 55 [1987]). Here, the evidence that Mr. Doe seeks to present to the jury at his trial – the testimony of Dr. Dysart about factors, present in this case, that can impact eyewitness reliability – is relevant. Just as evidence of an external impediment or distortion of eyewitness perception or memory – for

example, evidence that the eyewitness was not wearing his or her glasses – would be relevant, so too is the evidence of the internal or psychological impediments and distortions. Nor does it matter that the identification evidence that Mr. Doe seeks to challenge comes from an eyewitness. Indeed, it is beyond question that if the evidence in question were fingerprint evidence, or DNA evidence, or gun-powder residue evidence, or a host of other types of testimony dealing with the proper collection of prosecution evidence by the police, the defense would have a right to present testimony – including expert testimony – to challenge the reliability of that evidence and the method of its collection. "The teaching of [**People v. Lee**, 96 N.Y.2d 157 (2001)] is that the testimony of experts concerning the reliability of eyewitness identification testimony is not to be treated as a suspect class of opinion evidence" (**People v. Smith**, 191 Misc. 2d 765, 770 [Sup. Ct. NY Co. 2002] [Yates, J.]). Thus, just as this Court would permit the prosecution and defense to present the testimony of experts on such issues as DNA and fingerprint analysis, so too should the defense be permitted to present its expert witness on eyewitness identification.

Accordingly, because the proffered expert testimony is integral to the defendant's constitutional right to due process and to present a defense, the Court should not preclude Dr. Dysart from testifying.

CONCLUSION

Professor Dysart's testimony on eyewitness identification meets the legal standards of admissibility and is critical to the defense. Her testimony will educate the jurors on many counter-intuitive findings that bear directly on the reliability of the identification evidence in this case. Accordingly, we respectfully request that the Court permit the defense to introduce the testimony of Professor Dysart as an expert witness on eyewitness identification.

For these reasons and for any other that may appear to the Court, Mr. Doe respectfully

submits that this motion should be GRANTED and the Court should allow Professor Dysart to testify regarding the psychological factors that effect eyewitness testimony.

DATED: March 8, 2014
Albany, New York

Respectfully submitted,

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APPENDIX "D"

Defendant's Request to Charge — Identification —

(Where sole evidence connecting the defendant with commission of offense is eyewitness identification)

"In this case, as you are now aware, the only evidence which in any way establishes or tends to establish that the defendant, (*name*), is the actual perpetrator, i.e., the 'right man,' is testimony of the eyewitness (*name of witness*).

"Apart from his testimony that the defendant is the 'right man,' there is no other evidence whatsoever which identifies the defendant as the perpetrator. In such case, the law requires that the jury be satisfied that identification testimony by (*name of witness*) is as certain as human recollection permits under the most favorable circumstances.

"It becomes your duty to examine with great care all the circumstances surrounding the crime. For example, what were the lighting conditions at the scene of the crime? What was the distance between (*name of witness*) and the perpetrator? Did (*name of witness*) have an unobstructed view of the perpetrator? Did (*name of witness*) have an opportunity, during the commission of the crime, to observe and remember the facial features, the body size, skin color and the clothing of the perpetrator? How much time elapsed during the commission of the crime? During that period of time how long did the witness actually observe the perpetrator and what direction were the witness and the perpetrator facing? Did the perpetrator have distinctive features which an eyewitness would be likely to remember and recall? What was the physical, mental and emotional state of the witness before, during and after the observation. To what extent, if any, did that condition affect the witness' ability to observe and accurately remember the perpetrator? Was the identification of the defendant, as the person in question, suggested in some way to the witness before the witness identified the defendant, or was the identification brief and suggestive? These are some of the factors you must weigh in deciding whether the witness in fact had an opportunity to observe and, therefore, to remember, the perpetrator.

Further, scientific research has demonstrated that the confidence expressed by a witness does not necessarily bear any relation to the accuracy of the recollection. Therefore, increased confidence is not necessarily a reliable indicator of accuracy of what a witness recalls.

[Add, if applicable]

[You should also consider the fact that the eyewitness misidentified defendant's accomplice in this case as bearing on the witness' general reliability.][1]

[Add, if applicable]

[Our courts have recognized that cross-racial identifications are often much less likely to be accurate than same race identifications.][2]

[Add, if applicable]

[Studies have shown that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults.][3]

[Add, if applicable]

[You are also free to consider and weigh the effect of the witness' failure to identify the defendant in open court.][4]

"You must also evaluate the credibility of (*name of witness*) as you observed him while he testified in court. You must evaluate his general intelligence, his capacity for observation, reasoning and memory, and determine whether you are satisfied that he is a reliable eyewitness who had the ability to observe and the capacity to remember the facial features, body, clothing and other characteristics of the perpetrator.

"From your evaluation of the witness' opportunity during the commission of the crime to observe and remember the perpetrator's facial features, body features and clothing, and upon your assessment of his ability to observe, to reason and to remember, you will determine whether you are satisfied beyond a reasonable doubt that the defendant is the 'right man,' i.e., the man who in fact committed the crime. If you have a reasonable doubt whether the defendant is the one who committed the crime, you must find him not guilty.[5]

"You will understand that all of us, judge, prosecutor, defendant, and you the jury, must be deeply concerned that no mistake in identification should result in the conviction and punishment of the 'wrong man,' of a defendant innocent of the crime. In order to avoid that, the jury must consider identification testimony with great care, especially when the only evidence identifying the defendant as the perpetrator comes from one witness.

"The potential for inaccuracy in visual identification is well-known to the legal community and has been recognized by the Supreme Court of the United States.[6]

"In evaluating the witness' capacity to observe and remember, you may consider the 'description' of the perpetrator which he gave to the police soon after the commission of the crime. If the 'description' does not match the physical characteristics of the defendant, that factor must be considered by you in making your determination of the witness' capacity and ability to observe and remember the physical features of the perpetrator. On the other hand, an accurate matching 'description' may be considered by you in assessing the witness' capacity to observe and remember."

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1. *People v. Jenkins*, 68 NY2d 896.
2. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 345, n. 8; *State v. Cromedy*, 158 N.J. 112, 727 A2d 457 (1999)
3. *Washington v. Schriver*, 255 F3d 45 (2d Cir. 2000).
4. *U.S. v. Dove*, 916 F2d 41 (2d Cir).
5. *People v. Love*, 244 AD2d 431, 664 NYS2d 91.
6. Adapted from *People v. Whelan*, 59 NY2d 273.
See also, *People v. LeGrand*, 8 NY3d 449, *People v. Luis Gonzalez*, 47 AD3d 831 (2008) (authority to present eyewitness expert).

Supplied courtesy of

NEW YORK DEFENDER DIGEST

101 N. State Road No. 7, Margate, FL 33063 (954) 972-0300

Identification

(*The charge assumes that a charge on credibility has already been given to the jury.*)

As you know, an issue in the case is whether the defendant has been correctly identified as the person who committed the charged crime(s).[1]

The People have the burden of proving beyond a reasonable doubt, not only that a charged crime was committed, but that the defendant is the person who committed that crime.

Thus, even if you are convinced beyond a reasonable doubt that a charged crime was committed by someone, you cannot convict the defendant of that crime unless you are also convinced beyond a reasonable doubt that he/she is the person who committed that crime.[2]

[For identification evidence by only one witness:

Our system of justice is deeply concerned that no person who is innocent of a crime be convicted of it. In order to avoid that, a jury must consider identification testimony with great care, especially when the only evidence identifying the defendant as the perpetrator comes from one witness.

Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince you beyond a reasonable doubt that all the elements of the charged crime have been proven and that the identification of the defendant is both truthful and accurate.[3]]

[*For identification evidence from more than one eyewitness:*

In examining the testimony of any witness who identified the defendant as that person, you should determine whether that testimony is both truthful

and accurate.]

With respect to whether the identification is truthful, that is, not deliberately false, you must evaluate the believability of the witness who made an identification. In doing so, you may consider the various factors for evaluating the believability of a witness's testimony that I listed for you a few moments ago.

With respect to whether the identification is accurate, that is, not an honest mistake, you must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and determine whether you are satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question.

Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification testimony, you should also consider such factors as[4]:

What were the lighting conditions under which the witness made his/her observation?

What was the distance between the witness and the perpetrator?

Did the witness have an unobstructed view of the perpetrator?

Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?

For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

Did the witness have a particular reason to look at and remember the perpetrator?

Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question? [5]

What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

[NOTE: Add if applicable:

Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see that person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?]

When and under what circumstances did the witness identify the defendant? Was the identification of the defendant as the person in question suggested in some way to the witness before the witness identified the defendant, or was the identification free of any suggestion?

[*Note: Add if placed in issue by the evidence*:

You may consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, whether that difference affected the accuracy of the witness's identification. Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. With respect to this issue, you may consider the nature and extent of the witness's contacts with members of the defendant's race and whether such contacts, or lack thereof, affected the accuracy of the witness's identification. You may also consider the various factors I have detailed which relate to the circumstances surrounding the identification (and you may consider whether there is other evidence which supports the accuracy of the identification). [6]]

[*NOTE: Add if applicable:*

You may also consider the testimony of *(specify)*, who gave an opinion about the factors bearing on the accuracy and reliability of an identification. You will consider that testimony in accordance with the [following] instruction [I have already given you as to such testimony].[7] [*NOTE: If the CJI2d charge on expert witness testimony has not already been given, read it here.*[8]]

[For identification evidence by only one witness:

If, after careful consideration of the evidence, you are not satisfied that the identity of the defendant as the person who committed a charged crime has been proven beyond a reasonable doubt, then you must find the defendant not guilty of that charged crime.]

1. *See People v. Whalen*, 59 N.Y.2d 273, 279 (1983) ("New York's trial courts are encouraged to exercise their discretion by giving a more detailed identification charge when appropriate.")

2. *See People v. Knight*, 87 N.Y.2d 873, 874 (1995) ("The court's charge...sufficiently apprised the jury that the reasonable doubt standard applied to identification.")

3. *See People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985) ("In order to reduce the risk of convicting a defendant as a result of an erroneous identification, trial courts are encouraged, in appropriate cases, to provide juries with expanded identification charges that direct the jurors to consider both the truthfulness and the accuracy of the eyewitness' testimony."); *People v. Daniels*, 88 A.D.2d 392, 400 (2d Dept. 1982)(the Court stated that this case illustrated "...the situation found in many, if not most, pure identification cases. The eyewitnesses are usually firmly convinced that they *are* telling the truth and neither cross-examination nor endless polygraph tests will ever shake that belief. Bitter experience tells us, however, that the real issue is whether or not the witness is mistaken -- however honest or truthful that mistake might be....[The trial court] should have charged that in weighing the evidence on the issue of identification, the jury should focus on accuracy as well as veracity...")

4. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)("As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include 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."); *People v. Brown*, 203 A.D.2d 474 (2d Dept. 1994)(The court properly "elaborated on the People's burden to prove identification beyond a reasonable doubt, and urged the jury to consider the victim's credibility and her opportunity to observe the defendant during the commission of the robbery. The court also instructed the jury to consider the surrounding circumstances, e.g., the lighting conditions at the crime scene, the distance between the victim and the defendant, and how long the robbery lasted."); *People v. Ruffino*, 110 A.D.2d 198, 202 (2d Dept. 1985) ("Thus, where, as in this case, there exists an issue of identification, the jury should be instructed to examine and evaluate the many factors upon which the accuracy of such testimony turns including, among others, the witness' opportunity and capacity to observe and remember the physical characteristics of the perpetrator at the time of the crime (citations omitted). It follows logically that where there has been a lineup or other pretrial identification procedure, the trier of facts should also be permitted to consider the suggestiveness of that procedure, and the extent to which it may have influenced the witness' present identification...."); *People v. Gardner*, 59 A.D.2d 913 (2d Dept 1997)("The trial court should have instructed the jury to consider and balance, *inter alia*, such factors as the complaining witness' opportunity for observation, the duration and distance of the viewing, the lighting and weather conditions, the witness' ability to describe the assailant's physical features and apparel, and any other relevant factors.").

5. *People v. Huertas*, 75 N.Y.2d 487 (1990) ("As charged to the jury, the relevance of the complainant's description testimony was also based on the fact that the jurors could compare it to the physical

characteristics of the defendant. This was a factor to be considered by the jury in assessing the witness's ability to observe and remember the features of the perpetrator. Thus, defendant misconstrues the purpose of the description testimony here. It is not the accuracy or truth of the description that establishes its relevance. It is, rather, the comparison of the prior description and the features of the person later identified by the witness as the perpetrator that is the ground of relevance.")

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8. *See, People v LeGrand*, 8 N.Y.3d 449, 458 (2007).

IDENTIFICATION – ONE WITNESS [1]

(This charge is be used when identification is in issue and is premised solely on the testimony of one witness identifying the defendant as the person who committed the crime.

The charge assumes that a charge on credibility has already been given to the jury.)

As you know, an issue in the case is whether the defendant has been correctly identified as the person who committed the charged crime(s).[2]

The People have the burden of proving beyond a reasonable doubt, not only that a charged crime was committed, but that the defendant is the person who committed that crime.

Thus, even if you are convinced beyond a reasonable doubt that a charged crime was committed by someone, you cannot convict the defendant of that crime unless you are also convinced beyond a reasonable doubt that he/she is the person who committed that crime.[3]

Our system of justice is deeply concerned that no person who is innocent of a crime be convicted of it. In order to avoid that, a jury must consider identification testimony with great care, especially when the only evidence identifying the defendant as the perpetrator comes from one witness.

Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince you beyond a reasonable doubt that all the elements of the charged crime have been proven and that the identification of the defendant is both

truthful and accurate.[4]

With respect to whether the identification is truthful, that is, not deliberately false, you must evaluate the believability of the witness who made an identification. In doing so, you may consider the various factors for evaluating the believability of a witness's testimony that I listed for you a few moments ago.

With respect to whether the identification is accurate, that is, not an honest mistake, you must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and determine whether you are satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question.

Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. Thus, in evaluating the accuracy of identification testimony, you should also consider such factors as[5]:

What were the lighting conditions under which the witness made his/her observation?

What was the distance between the witness and the perpetrator?

Did the witness have an unobstructed view of the perpetrator?

Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?

For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

Did the witness have a particular reason to look at and

remember the perpetrator?

Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question? [6]

What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

[NOTE: Add if applicable:

Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see that person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?]

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PERSUASION, THEORY AND SELF AS THE ULTIMATE TOOLS OF EFFECTIVE SUMMATION

As an estimable trial lawyer once stated,
"I am never at ease when handling a case until
I have bounded it north, bounded it south,
bounded it east and bounded it west."

Abraham Lincoln, 1858

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1. PRELIMINARY THOUGHTS REGARDING PERSUASION AND SUMMATION:

A. Persuasion during summation is the final element in the trial long endeavor of educating the jury to think along your lines (i.e., your theory of the case and its accompanying logical and emotional themes).

B. A persuasive summation grounded in passion and common sense logic gives the jury the reasons to acquit, makes the jury comfortable in acquitting and explains how, in fulfillment of your opening statement, the case has already been won.

C. No better place to begin your summation then where you want the jury to end.

D. Summation complements prior efforts during voir dire, opening statement, cross-examination and the defense case-in-chief in tying together the ultimate purpose of trial, i.e., the continual struggle to expose and corroborate at every opportunity your theory of defense and its accompanying logical and emotional themes.

II. PERSUASIVE SUMMATION AND THE ART OF STORYTELLING:

A. WHAT IS A STORY?

1. Simply, a story is a rendition of a sequence of events.
2. A good story evokes feeling, emotion and empathetic reaction in the listener-juror.
3. A persuasive story has impact with its audience because of the feelings it evokes rather than because of the cold reasoning or logic it demonstrates.
4. The persuasive story creates a memory in vivid and permanent images through the use of language which paints word pictures.

B. THE IMPENETRABLE BOND:

1. Emotion - as king.
2. Passion - as queen.
3. Identification in the listener-juror established through emotion and passion.
4. Emotion/Passion as superior to reason/logic.

C. FEAR:

1. A most powerful emotion.
2. Jurors' universal fear - conviction of an innocent person.

D. GREAT STORYTELLERS ...

1. Know their audience.
2. State their messages clearly.
3. Touch their audience's emotion and passion.
4. Show their audience the appropriate course of action.
5. Recognize conflict and crisis.
6. Recognize preconceived notions/scripts in their audience.
7. Overcome/neutralize the preconceptions of the audience.

III. CONTINUAL PREPARATION AS THE ULTIMATE PREREQUISITE:

A. Test of a vocation is the love of the drudgery involved (Dostoevski's "Before I was a Genius, I was a Drudge").

B. Fear as the ultimate ally - preparation tames the demon (i.e., tension) and is the key to getting the butterflies to fly in formation.

C. Shun idleness - it's a rust that attaches to the most brilliant of metals.

D. We live in deeds, not years. Every summation is a unique deed carefully crafted by the persuasive advocate as the culmination of the trial's campaign of communication.

IV. PREPARATION - THE VIRTUE IS IN THE STRUGGLE:

A. Brainstorming.

B. Thought Book.

C. Trial Notebook.

D. Pretrial development of a summation story-line (theory) which guides voir dire, opening statement, direct-examination, cross-examination and summation.

1. Knowledge of your case includes:
   a. Time line.
   b. Witnesses.
   c. Facts.
   d. Emotions/Passion.
   e. Elements of each crime charged.

f. Applicable law.
g. Evidentiary issues.

2. The human factor element involving every participant in the trial including:
   a. Fact witnesses.
   b. Cops.
   c. Prosecutor.
   d. Judge.
   e. Jurors - have the analogies you use in summation match the character/ background of your jurors especially your target jurors.

V. PREPARATION - REVISITING BRAINSTORMING AND THE NECESSITY FOR PINPOINTING THE DEFENSE THEORY AND ITS RELATED LOGICAL AND EMOTIONAL THEMES.

A. IDENTIFY PROBABLE PROSECUTION AND POTENTIAL DEFENSE THEORIES:

1. The theory of the case is the underlying theme to be presented to the jury reduced to a single word or extremely short sentence.
   a. Sample prosecution theories:
      i. Accused murdered victim to protect drug empire.
      ii. Accused assaulted victim due to jealousy.
      iii. Accused stole to support drug habit.

2. Defense theory: Query: Why should jury acquit?

   Caveat: Ascertain whether your goal is total acquittal vis-a-vis lesser includeds.

B. TRIAL = A STRUGGLE TO EXPOSE AND CORROBORATE AT EVERY OPPORTUNITY THE "THEORY OF DEFENSE". THE THEORY IS:

1. **COHESIVE** - no shotgun approach (i.e., my client wasn't there but if he/she was there he/she was merely present but if he/she wasn't merely present he/she didn't do it and if he/she did do it he/she wasn't in his/her right mind and if he/she was in his/her right mind then he/she was acting under duress)

2. **CONCISE - KISS** principle

3. **CONGRUENT** - factually and emotionally - you must be able to deliver to the jurors, a mirror or fellow defense lawyers without laughing. If you can't, the trial will be an agonizingly extended guilty plea.

C. DEFENSE THEORIES BREAK DOWN GENERALLY INTO TWO (2) GENERAL HEADINGS, I.E., "CLIENT DID NOT DO IT" OR CLIENT DID IT BECAUSE..."

1. Client did not do it:
   a. Mistaken I.D.
   b. My twin brother/sister did it
   c. Mere presence doctrine
   d. Alibi - a.k.a., the "Timber Defense"
   e. SODDI - Some other defendant done it
2. Client did it because:
   a. Insanity
   b. Duress
   c. Entrapment
   d. Self-defense
   e. Post-Traumatic Stress Disorder
   f. Battered woman/child
   g. Child's no sense of death
   h. Jury nullification

D. CEREBRATION REGARDING POTENTIAL THEORIES IN THE CASE:

1. Honest assessment regarding theories:
   a. Identify the terrible fact(s) which won't go away. You can't run from it. You must explain or minimize it or you will lose.
   b. Identify the terrible fact(s) which won't go away for your adversary. S/he can't run from it and must explain, neutralize or minimize otherwise your theory wins.
   c. Identify the most damaging witness who will point the finger of accusation in court.

d. Query: What does the jury have to believe in order to convict?
e. Query: What does the jury have to believe in order to acquit?

2. Why such cerebration?
a. Your theory must be feasible and neither offend common sense nor controvert facts beyond change.
b. Streamlines your investigation especially if limited resources, i.e., time and money.
c. Helps butterflies fly in formation as you prepare for trial.

3. Why early development of the theory is the blue-print for success?
a. Maximizes you strengths and minimizes weaknesses.
b. Maximizes your adversary's weaknesses and minimizes your adversary's strengths.
c. Forces recognition and adaption in the most favorable light of facts beyond change.
d. Forces development of your legal theory (i.e., accident) supported by an emotional theory (i.e., "a tragedy" or "two victims").
e. Transforms neutrals into rose-tinted positives.
f. Gives direction to your continuing campaign of communication and persuasion.

V. SUMMATION AND SELF:

1. **Dare to be great** - unlock the internal prisoner preventing you from persuasive advocacy.
a. Go out on a limb.
b. You are on your own.
c. I can't be you and you can't be me.
d. Trust yourself and your abilities - you are extremely capable.

2. **The persuasive mindset** - give yourself permission to argue freely and passionately even though argument has been the forbidden fruit of your childhood. We must argue to live.

3. As is our confidence, so is our capacity.

CAVEAT: If you think you can't, you never will. Give yourself the chance to discover the Clarence Darrow within you. Dare to be great.

4. Overcoming the perfection trap:

a. Only the mediocre are always at their best.
b. It's okay to make mistakes.
c. The enemy to conquer is not our adversary's argument - it's the mythical, unattainable vision of perfection within ourselves.
d. Vast distinction between **LOOKING GOOD** vis-a-vis **BEING GOOD** - must overcome our society which rewards not who we **<u>are</u>** but how we **<u>appear</u>**. Is it really more important to look good than to be good? Does the truly effective advocate give a damn what anyone else thinks?

5. When some "bad" verdicts are returned remember:

a. Defeat has a richness all its own.
b. Out of every crisis comes the opportunity to be reborn.
c. Failure isn't falling down - it's remaining there once you have fallen.
d. There can be no real freedom without the freedom to fail.

VI. FEELING/PASSION:

1. To feel we must take risks of pain - our pain.

a. The risk of criticism.
b. The risk of rejection.

2. Why? The reward is to be alive, vibrant, communicative and persuasive.

3. Embrace the soul - argue from the heart.

4. No persuasive summation has ever been delivered by the dead or those who imitate the dead.

VII. NO MIMICKING MEDIOCRITY:

1. Break free from the cocoons of convention (i.e., law school and those of similar ilk).

2. Arguments which appeal to judges and lawyers never appeal to jurors. Present your arguments in a bar to normal, non-legal potential jurors and get their reactions.

3. No extemporaneous summations - recall the words of Sir Winston Churchill when asked by a young cub reporter named Edward R. Morrow, "What is this room in the House of Commons to which only you have the key?" to which Sir Winston replied, "That is the place where I rehearse all of my extemporaneous remarks".

4. Don't be blinded by your own brilliance! Your perception of you may very well contradict the jurors perception of you. Be a juror, not a lawyer.

5. Examples of mediocrity:

a. "What I say is not evidence" vis-a-vis you are speaking ex cathedra.
b. Rehashing witness by witness.
c. Thinking assault is persuasion.
d. Shouting.
e. Non-purposeful motion.
f. Reading from a yellow pad.
g. Smashing the podium.
h. Incessant jingling of change in your pocket.
i. Pointing your finger or pen at the jury.
j. Incessant pacing.
k. Non-purposeful lounging on the podium.
l. Shuffling papers.
m. Monotone language.
n. Beating the same point to death in the same language.
o. Filler language, e.g., "and so forth", "etc.", "in this case".
p. Wandering aimlessly at the end.

6. Other language pitfalls:
   a. Qualifiers such as "I will attempt to show", "I think", "Perhaps", "I believe" or the worst "hopefully".
   b. Pronouns are not communication.
   c. Pronouns are not persuasion.
   d. Pronouns should be removed from your trial vocabulary.

VIII. NON-VERBAL COMMUNICATION:

1. Congruence of self with message:
   a. Awareness of jurors and their reaction to your theory.
   b. Awareness of one's own body language and what it says to the jurors.

2. Trustworthiness of message and messenger.

3. Dynamics of message and messenger.

4. Blending of competence, art, science, persuasion and communication.

5. The need to believe yourself and your message.

6. Feeling the cause.

7. Passion for the cause.

8. Communicating this feeling and passion for the cause.

9. Intensity/Energy/Dynamism

10. The dynamic self as the true believer of innocence.

IX. DELIVERY:

1. Paint vivid word pictures.

2. Use persuasive speech techniques.

3. Have intensity.

4. Silence can be deafening.

5. Voice inflection.

6. Purposeful motion.

X. A CHECKLIST WHICH SERVES THE PURPOSE:

1. Notes on yellow legal pads break lines of communication with the jurors.

2. We need notes - but what type of checklist will aid our campaign of communication and not impede lines of communication?

3. Block summation technique - separate page for each block of summation.

4. Transfer of each block to one page which assists in the smooth transition from one block of summation to the next.

5. The need to appear "to be in the moment".

6. An effective one page summation checklist provides a non-intrusive means of beginning your summation, ease of facilitation from one block of summation to the next and provides a basis for ending your summation. Accordingly, the following summation checklist is suggested as one method of delivering a comprehensive and uninterrupted persuasive summation keyed to your theory of defense and its related emotional and logical themes.

7. The symbols and their meanings:

↑ = 1. What's the first thing I want to say about our theory of the case?
2. How am I going to get on my feet?
3. How am I going to get on stage?

~ = Rhetorical theme question related to your theory providing smooth transition from opening gambit to first block of summation.

_____ = First block of summation and each succeeding block of summation.

= Repeated rhetorical theme question providing transition from first block of summation to next block of summation.

=

1. Challenge to the prosecution to answer your theory as argued in summation.
2. Basic jury fear - the thought of convicting an innocent person.
3. What's the last thing I want to say regarding our theory?
4. How am I going to get off my feet?
5. How am I going to get off stage?

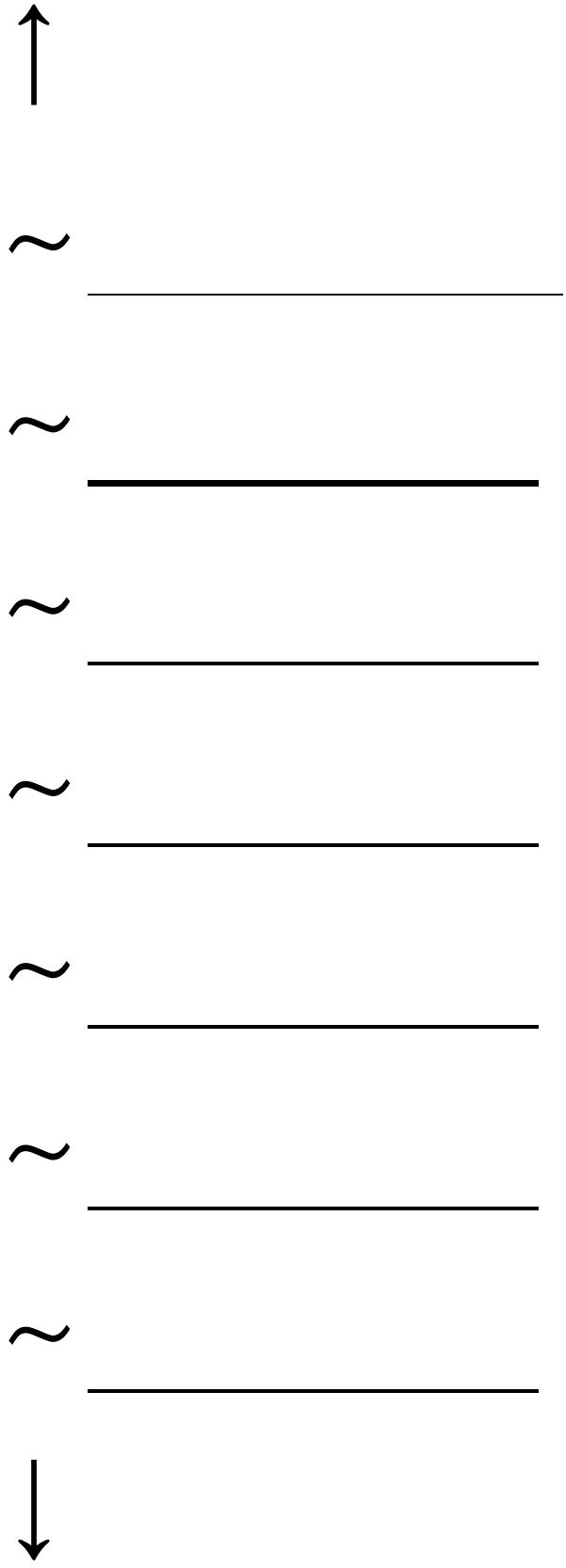
XI. A FINAL THOUGHT ON SUMMATION AND SELF

A. As criminal defense lawyers, we recognize more than most that injustice anywhere is a threat to justice everywhere. We have come to realize that where all think alike, no one thinks - the ultimate danger to democracy. Few of us will have the greatness (and the luck) to bend history itself in the likes of Clarence Darrow but each of us, with each summation, can work to change a small portion of events and, in the total of all these summations, will be written the history of the trial lawyers of this generation. Each of us must endeavor to continue our sworn constitutional duty to police the police, audit the prosecution and government and ensure that no citizen accused ever stands alone. Each of us is singularly unique. It is the duty of each of us to discover our uniqueness and share it uncompromisingly with every jury in summation.

THANKS FOR INVITING ME TO SHARE SOME THOUGHTS!

Ray Kelly

ONE PAGE SUMMATION CHECKLIST



LESSONS FROM A LIFETIME DEFENDING FELLOW HUMAN BEINGS

"I have lived my life, and I have fought my battles, not against the weak and the poor - anybody can do that - but against power, against injustice, against oppression, and I have asked no odds from them, and I never shall." **Clarence Darrow**

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NEVER LOSE SIGHT OF OUR THRESHOLD QUESTIONS:

**Where do I need to go? Will this witness,
this question or this objection help us get there?**

I. NO SUBSTITUTE FOR KNOWLEDGE OF THE CASE

A. Go where the action is. Knowledge **will** come to you.
   1. Visit the scene (importance cannot be overstated)
      a. Get a mental picture and flavor.
      b. You always find a witness who can't wait to tell you a story.
   2. Go to the prosecutor's office or the cops.
      a. Something will occur - a conversation, a chart on the wall, an investigator you know - you always learn something.

B. Live and breathe the file - - do more than just read the discovery file.
   1. Sit in a quiet place and meditate over - - inhale - - each police report, medical record, etc. Even in a simple case, spend hours making the file create word pictures in your mind's eye.
   2. Repeat the process as the trial progresses. You will be amazed what jewels **will** be found - - **each time** you vignette each piece of evidence.

II. CONCERNING DEMEANOR

A. The Lawyer
   1. Keep yourself elevated to the level of the judge. That is, the jury should see you have the Court's respect (there are very few exceptions).
   2. Be professional - the jury respects the teacher (same re: the teacher-witness).
   3. The jury should see the judge rely on your judgment and wisdom.
   4. The jury should see you command the respect of the court personnel (the same people, by the way, who may deal with the jury).
   5. The jury should see that in every situation you are honest and straightforward. Let them once believe you to be simply a talented trickster - or worse - and you are finished.

B. The Human Being You Are Representing
   1. Having the client OUT ON BAIL is advantageous beyond measure.
   2. Forget the theory, in practice the jury always knows when the client is in jail.
   3. It is highly prejudicial for a juror to be reminded that your client "needs" to be kept in jail during the trial.
   4. As a general proposition, your client must dress and carry him/herself consistent with those conventions that your jury will associate with honesty, peacefulness, and the mainstream. Put simply, this means conservatively. The average juror would have a totally different reaction toward a banker wearing a sweat shirt and jeans instead of a conservative blue suit. We're concerned with salesmanship, not whether it ought to matter.

III. BECOME THE JURY'S TEACHER

A. The psychological dynamics of the teacher-student relationship, involving trust and admiration, gives you a great advantage over the lesser relationship of lawyer-juror.
   1. Applies to the witness who becomes teacher - - e.g., use of pointer and easel.
   2. Somewhere - opening, voir dire, summation - "explain" the adversary system (to your advantage, of course!).
      a. Small touches, like candidly admitting you are no less biased than your biased adversary, show you to be honest, self-effacing and reliable - a breath of fresh air in most courtrooms. At the same time, you will not hear the prosecutor object as you appear to be touting the jury off placing any reliance in the opinion of your, non-objective advocate.
      b. E.g., "In his opening statement, the prosecutor told you he will ask for a verdict of guilty, even before hearing any cross-examination or any defense witnesses. That's not wrong; it's part of what we call the adversary system. Just as I work for the accused, he works for the prosecution - and hopes to win."
      c. Notice that which might have drawn an objection is said last, following an apparently harmless introduction. The above example might not succeed if your point (the ADA wants to win) came first.
         (1) "Speaking backwards" is the phrase I have coined for this concept which, though doubtless used unconsciously by many, I have not seen named or recognized.
         (2) "Speaking backwards" may be effectively employed in many areas, including comments ("instruction"?) on the law.

B. There ain't nothin' simple. Examples:
   1. In post verdict statements, jurors said they were offended by the judge and defense attorney because the defense attorney was permitted to ask leading questions of prosecution witnesses while the prosecutor was not. The jurors, unaware as to who had the right to cross-examine and when, perceived unfairness.
   2. A jury, acquitted because they believed the knife in evidence must have belonged to the arresting officer because they found his initials scratched into it. They did not understand that the cop scratched his initials on the knife for chain-of-custody and identification reasons.
   3. REMEMBER: Everything has to be explained. Take nothing for granted.

IV. DIRECT EXAMINATION OF ACCUSED

A. Traditional method
   1. Take plenty of time.
   2. Make your client human.

B. A path less traveled: "Hit and Run" presentation of accused.
   1. A direct calculated to thwart effective cross in some special situations.
      a. You heard the witness testify that you shot and killed John Smith?
      b. Did you in fact shoot or otherwise cause any harm to John Smith?
      c. Did you even have gun with you that night?
      d. Have you ever killed anyone in your life?
      e. Your witness.
   2. When to use.
      a. Want to get accused off stand same day - be sure to start early.
      b. When you calculate that the prosecutor lacks cross-examination skill and expertise.
         (1) Many prosecutors do not have the opportunity to often cross-examine our clients.
         (2) Many prosecutors sit and write, using questions on direct to formulate cross - each of your questions is one more item the prosecutor not only welcomes, but needs.
      c. To prevent a "he opened the door" claim justifying admission of some cannon ball previously ruled inadmissible "unless or until the defenses opens the door" - particularly with a hostile judge lying in wait for anything beyond a virtual waiver of examination.
      d. Some witnesses do better - respond more credibly, forcefully, spontaneously - under the pressure of cross-examination than direct.

V. CROSS-EXAMINATION OF PROSECUTION WITNESSES

A. Practical considerations
   1. Start early in the day.
      a. Jurors, witnesses and you are fresh.
      b. Best calculated to avoid giving prosecutor overnight for redirect.
      c. Even if you have to cut short the prior afternoon.
         (1) "Judge, if I can have the time, I'll be able to organize and thereby greatly shorten my cross from 5 hours to 1 hour".
         (2) In any event, ask the one nasty question or series before the overnight - or better, weekend - or even better, the long holiday weekend - recess and save rest for when everybody is fresh in the morning.

(3) BEST OF BOTH WORLDS - The jury has a lengthy period for this unfavorable impression to settle in. How? Try this:

Judge: Well we have just concluded the direct and I see it is 4:45. Mr. Kelly does this seem like a good time for a break and we'll start cross right after the July 4th weekend?

Mr. Kelly: That's fine Judge, we'll all be fresh then. But would you mind if I just ask one or two questions now, before we break?

NOW, CRISPLY - a brief taste of brutal murder, extortion, child porn, perjury, etc. - Of course, there can be no redirect until you're through - no sooner than sometime next Tuesday.

2. NOTE: When your adversary's direct examination ends at the end of the morning or the day, before adjourning to the next session for your cross, always ask at least one question - any question - before concluding for the session. This formally closes the direct and commences the cross. Otherwise, the prosecutor, having reflected, e.g., over lunch, evening or the weekend, may request continuation of his/her direct, "since the cross hasn't actually begun yet." Such a request is routinely granted.

B. Control the Adverse Witness

1. The first question is the question to yourself: Is this witness in fact lying or telling the truth?
   a. Truth often has its own special ring. You may not want to hear such music.
   b. This may well determine whether you deal with the merits or more collateral matters, like prior record, deal, preparation, etc. In the case of an expert, perhaps his/her fees and nature of his/her practice, rather than expertise in issue.
2. Remember, this is not a grand jury investigation! Remain focused: Where do we need to go? How will this witness get us there?

3. As Al Krieger says: There are no questions on cross-examination.
   a. Put the information you want the witness to concede in your "question". Your "question" is a **declaratory** statement in disguise. It only takes the appearance of an **interrogatory** by using the simple device of adding, e.g., ".., correct?" or "...., isn't that right?"
      (1) Wrong: "How did you feel?"
      (2) Right: "You were nervous, right?"
   b. Sometimes, even better:
      (1) "...am I right"
      (2) "... I've stated the fact correctly, right?"

(3) Better because in addition to the information you have provided, **your** wisdom, knowledge, credibility, position, what-have-you is being ratified or conceded.

4. But methodology should differ for pretrial hearing (when used as discovery vehicle), because goal is different. Comparison - hearing versus trial - of cross-examination of the same witness on same subject.
   a. Difference in purpose dictated by difference in method.
      (1) Hearing:
         (a) Purpose: discovery, learning.
         (b) Method: short questions and long answers (avoid knee-jerk objections, get it all in).
      (2) Trial:
         (a) Purpose: establish **your** points; get specific concessions.
         (b) Method: Long questions and short answers.
5. There are of course, exceptions to the general rule that the questions are long and the answers are short, i.e., "yes", "no".
   a. Example: "The cop testifies about a purported statement of your client - or of anyone else important - but in his/her report it is perhaps:
      (1) paraphrased, and/or
      (2) written sometime after the event or
      (3) nonexistent.
   b. After some foundation questions - some may concern the hundreds of complainants, witnesses and others this police officer speaks to and gets information from, over the period of time which has elapsed until this trial; others may concern the requirement or practice of keeping certain kinds of notebooks and the rules concerning the creation and maintaining of official reports;
      (1) Det. Smith, would you tell the ladies and gentlemen of the jury why it is you have been taught and today teach other officers that, whenever possible, the exact words of a witness should be taken down?
      (2) ...why it is desirable to make notes as contemporaneously as possible?
      (3) For fun, or to lay a foundation for introducing an autopsy report, ask a medical examiner how many autopsies he/she has performed or otherwise participated in the 2 year period from the homicide to he date of his/her testimony. The answer may well be in the thousands (in New York State, one to two thousand would be no surprise). After this, getting testimony about the absolute necessity for and reliability of notes and reports and the shortcomings of naked memory

easily falls into place. BE CAREFUL: Do not rely on this in, e.g., a notorious brutal murder of an infant.

C. Establish the witness is not NEUTRAL and is in bed with the prosecution - another biased member of the team. This is another opportunity to underscore the adversarial nature of a system which deprives the defense of a level playing field.

1. Before trial, write a letter to the witness.
   a. Tell him/her you have the responsibility of preparing the defense.
   b. Acknowledge he/she will be agreeing to interviews with the prosecutor to enable your adversary to prepare for presentation of the prosecution's case.
   c. Ask the witness to consent to be interviewed by you, at his convenience, so you will be able to carry out **your** responsibility to likewise prepare your client's defense.
   d. Do this with all kinds of witnesses - cops, informers, anyone. To those beyond your contact, send the letter together with a cover letter to the prosecutor, asking him to forward your letter(s) to the witness(es).
2. This is a no-lose gambit. Consider the possible outcomes:
   a. The witness gives you an interview, or
   b. The witness does not give you an interview, and on cross-examination must say:
      (1) The prosecutor never told him about your request, or
      (2) The prosecutor told him either
         (a) The witness does not have to talk to you or
         (b) The witness ought not talk to you, and
      (3) The witness chose to help the prosecutor prepare for his responsibility, but denied you an **equal opportunity**.

D. **CROSS-EXAMINATION OF EXPERT WITNESS**: Discussed in Section XII.

E. **SOMETIMES IT'S BEST NOT TO SHOW HOW SMART OR HOW GOOD A CROSS-EXAMINER YOU ARE**

1. Use a sniper's rifle, not a shotgun!
   a. Demonstrating that you can effectively discredit **any** witness (even an unessential one) depreciates and may well completely undermine your excellent cross of the particular witness and testimony you need to place in doubt.
   b. Don't necessarily be more expert than the expert. Better to appear a slightly bright, slightly lucky "victim" of the expert's specialized knowledge. In other words, just like the jury. Now you, on behalf of everyone, capitalize on your "discoveries" as you cross-examine this expert who begins to expose himself. But the jury should discover this just a bit before you do.
   c. Don't beat up on the helpless - jurors don't like this.

d. Use the expert, or any other witness, as your supporter. Using, but not necessarily demonstrating, your expertise, get the expert to **"explain"** all that good stuff you have been struggling to get the jury to understand and believe.

e. **EXCEPTION:** Sometimes you need to show the jury you are knowledgeable and credible in certain specialized claims you have made. Just as you sometimes put yourself and the jury together, here put yourself and the expert together - part of the same fraternity or community. THUS:

(1) Q: Now, is that what **we** in the business call "rifling", Dr. X.

(2) Q: And while that might not mean anything special to the jurors, those of **us** in the business would easily recognize that not just as a shell, but specifically a shell which was ejected upon the firing of a cartridge from a 9-mm semi-automatic, isn't that so?

(3) Q: Would you please explain to these folks why **we** say that?

F. DON'T FEEL YOU HAVE TO ASK QUESTIONS

1. Resist the "Don't just sit there, do something" compulsion.
2. Sometimes better judgment requires "Don't just do something, sit there".
3. Just another application of "If it ain't broke, don't fix it."
4. General MacArthur was said to have avoided great damage to his troops by bypassing many small islands containing enemy soldiers. The decision not to engage them effectively kept them isolated and inconsequential.
5. Don't shoot yourself in the foot; stay off thin ice.
   a. It is often instructive, when the record is later read back, to see how much damaging testimony was brought out, not on direct, but on cross-examination.
   b. If direct is weak - bypass it and **don't**, by dealing with the subject in your cross, provide the opportunity for the prosecutor to strengthen it in redirect. Set the stage to object to "improper redirect" as to the subject you carefully avoided on cross.
      (1) It is "The Art of Cross-Examination"
      (2) Not "The Art of Clarification"

G. TOO MANY COOKS

1. A special pitfall of multi-defendant trials
   a. Co-counsel often undermine the carefully planned and artfully executed cross-examination you designed to push precisely just up to but not beyond a particularly limit.
   b. This is the "That looked easy, let me do some too" syndrome.
   c. Again - - this is **not** the art of clarification. More is not necessarily better.

H. **AVOID THE BREAK-EVEN QUESTION**

1. Basic principle: Where do we want to go and how do we get there?
2. How will this help me get there?
3. Think: What is the best case scenario? If I have the best day of my life:
   a. what is the best possible answer?
   b. the worst?
   c. probable?

I. **ONE QUESTION TOO MANY** - Often asked for emphasis, I suppose. Some lawyers must think, if it sounded good on direct, it is more than safe and will get even better with repetition. One of the attractions of this approach is that it requires no effort, talent or thought.

1. The time-honored classic example:
   a. Q: So you testified that you didn't actually see my client bite the complainant's ear off, right? (Nothing seems safer and easier to this school of cross-examiners than the plainly useless exercise of asking for the repetition of what is already in the record.)
   b. A: Yes, you're right, I only saw him spit it out. (That is a break-even question - the best you could have done was end up where you started. Note that destroying your client did not require the classic, "Then what did you see?" It's usually sufficient simply to tread near the thin ice.)

J. **AVOID THE KNEE-JERK QUESTION** (like the knee-jerk objection)

1. Q: Now, you said in your direct that my client "scuffled" with the complainant. Now, isn't it a fact that only minutes after the event you told Officer Jones that my client repeatedly and viciously punched the complainant and then kicked him in the face after he fell from the blows?
   a. No sense letting the witness get away with an inconsistency that the rules say we can confront him with, right? Wrong - consider the cost of such a "benefit".
2. Again: Where do we need to go, and will this question help us get there?

K. **LISTEN TO THE ANSWERS TO YOUR QUESTIONS**

1. Would seem unnecessary to say - but quite the contrary is true.
2. Countless examples of attorneys, fixated on their own questioning agenda, who let priceless opportunities pass unnoticed because they do not really listen to the answers to this own questions.
3. As Darrow said, "great lawyers have three (3) ears and no mouth."

L. **REFRESHING RECOLLECTION AND CONFRONTATION WITH PRIOR INCONSISTENT STATEMENTS AND TESTIMONY** - a hybrid method.

1. Normal: Show prior statement and ask classic recollection questions.

2. Normal: Read verbatim witness' prior questions and answers from transcript, following with the required formula, i.e., Q: Were you asked this question and did you give this answer?
3. An interesting but delicate hybrid - Refresh recollection with prior testimony and ask the witness:
    a. "Please tell these folks what you said when you were asked that question - perhaps this document will help you recall."
    b. This is very powerful
        (1) The jurors now not merely hear the prior inconsistent statement, but actually experience the witness saying it.
        (2) With this method you need not worry about whether the jury will recall what was read to them; they heard the witness himself say it.
    c. Sometimes more easily done when you first place the prior statement into evidence. Now the witness is simply reading what is already admitted into evidence.
    d. Your ability to use this method may be affected by the judges "strike zone" - his/her flexibility in applying rules of evidence.

M. **TOPIC OF "REHEARSAL"** - shedding light on the sausage-making nature of the witness preparation game.
1. Really a particular application of the jury education process.
2. We will expose as clever legerdemain what is being passed off as legitimate preparaton.
3. Later in summation you will explain to the jury that, but for your efforts, they would have been "fooled" into thinking they are observing a process that in fact existed in appearance only.
4. The prosecutor wants the jurors to believe they have observed the following:
    a. A prosecutor presents a question to the witness.
    b. The witness listens to the question and takes it in.
    c. The witness reacts to the question.
    d. The witness applies his/her mind to the question and deals with it.
    e. The witness calculates his/her response.
    f. The witness puts his/her response in his/her own words.
    g. The answer given resulted from the dynamics of the above"process" which took place in the jury's presence during the relatively short period of time the jury "observed" to be available.
5. In order to do their job, the jurors must, by observing the witness' demeanor, determine: does the witness seem uncertain or evasive, is the witness hostile to the accused's position, does the witness easily recall clearly what s/he is asked about, does the witness look you in the eye, etc.?
    a. The judge is going to instruct them as to exactly this, reminding them to "use your everyday experience".

b. Expect your adversary, in summation, to point out how well the witness fared against your great skills and experience in cross-examination as "the engine of truth".

6. Undermining this false appearance.
   a. Establish how many times the witness spoke with members of the "prosecution team".
   b. This often includes weekends, nights and holidays.
   c. Perhaps an unused courtroom was even used in "dress rehearsal".
   d. Establish that each report, grand jury transcript, was used or at least present. (The grand jury presentation itself necessarily involved a similar, albeit, abbreviated process. Bring this out too.
   e. Do the arithmetic - e.g., Twice each week for the last 2 months = 16 days X average of 4 hours/day = 64 hours – and it could have been more, right?
   f. During these 64 hours of preparation - call it "rehearsal" if the court will allow it (watch the "strike zone") - what took place was essentially questions and answers, right?
   g. By the way, would it be fair to say that you were already familiar with the questions the ADA asked you today?
      (1) In fact, you didn't hear any questions today you didn't hear before, correct?
      (2) And you had given answers to those questions before, right?
      (3) Were any of your answers to those questions today different in any way from the answers you gave during your preparation/rehearsal sessions?
      (4) Q: An in the 64 hours that you were asked questions, during the days, nights, and weekends you told us about, would it be fair to say that you heard at least some of the questions more than once? Even 5 or 10 or in some cases perhaps 20 times or more?
      (5) Q: Were your answers always the same or did some of your answers change as the process went on?
         (a) Note: There is no good answer here. Either the witness
            i) repeated and re-repeated the same responses or
            ii) the process was designed to change answers to key questions from the original (unknown to us) to the final product.
         (b) Thus, the evaluation of this witness' testimony under the standards to be given by the judge has been made impossible by your adversary, who - the jury may recall - wants to win.

h. The variations on this theme are many. Your object is educate the jury that:
   (1) The **truth finding** process the jurors thought they were in a position to observe in order to carry out their duties DID NOT take place here in the courtroom - if at all.
   (2) What they saw was a polished final product designed by an expert to appear to inexperienced laymen to be the process they took an oath to evaluate.

N. **PHYSICAL APPEARANCE AND PRESENTATION OF THE WITNESS** - Exposing the Charade
1. An example: Miguel Jose (fictitious)
   a. In real life
      (1) Tough looking rogue
      (2) Speaks a very vulgar Spanish
      (3) Dresses like those we are conditioned to fear.
   b. In court
      (1) Dressed up and groomed like a sailor on leave to his sister's wedding.
      (2) The jury hears his testimony through the mouth of a very pleasant and likeable interpreter who speaks extremely genteel English, and even adds affable body language.
   c. Your job: Show the jurors
      (1) They never saw or heard the real Miguel Jose.
      (2) To carry out their duty, observing and knowing the real Miguel Jose is essential.
      (3) The prosecutor, an experienced professional, has used his/her skills, experience, training and resources to disguise the truth and present a cleverly fabricated product.
      (4) The real Miguel Jose - perhaps use an enlarged old mug-shot (be imaginative).
      (5) Of course, proper foundation must first be laid for the introduction of such a photo.
         (a) Q: At the time of the events you've testified about, you did not wear a suit and tie as you do today? Hair? Jewelry?
         (b) Q: You appeared as you do in Def. Exhibit "A", right? Def. Exhibit "A" is in fact a photo of you taken during that time and is a fair and accurate representation of how you typically dressed and looked, correct?

O. **TOPIC OF "THE DEAL"** - another fraud which must be exposed.

1. Show the jury that "the deal" is **not** the same as the deal letter (cooperation agreement); the gov't will claim it is.
    a. Remember: It's what the witness **believes** or **hopes** may happen that counts - his state of mind - Don't "correct" him with the letter.
    b. The prosecutor will object, of course, arguing the witness is in error - the letter correctly states the deal. But the correct ruling is in your favor; the witness is **motivated** by what he/she **believes** the deal to be, not what it may in fact be.
2. Show the witness and his testimony are bought and paid for the prosecution.
    a. Reasons for testimony
        (1) less or no jail time.
        (2) keep money, especially ill-gotten gains.
        (3) make money - bounty.
        (4) protect friends and/or relatives.
        (5) other motivations, e.g., enmity.
    b. Be careful: Better know **all** the reasons. Don't get yourself into:
        (1) I saw the light, reborn.
        (2) Your client was going to kill me and my family.
3. **ANALYZE THE DEAL LETTER**
    a. Show that it is a self-serving fraud - What we call "jury food".
    b. Show the witness doesn't know what's in it or doesn't understand it.
    c. It's a lawyer's document.
        (1) Made by the prosecution.
        (2) Negotiated by the witness' lawyer, like any other "deal"
    d. Contains language making the prosecution the final arbiter of the witness' value.
    e. Show violations of the terms have not resulted in sanctions - i.e., other crimes, withholding information, perjury.
    f. Show several deal letters in the case to be virtually the same.

P. Getting the Witness' Criminal History Before the Jury - Some Ingenuity May be Required

1. Credibility
    a. The familiar impeachment rules.
    b. Use of some or much of a witness' prior criminal conduct may not be permitted extrinsically or even on cross-examination.
2. "Bias" and "benefits" - more imaginative.
    a. By its terms, a witness' deal is voidable at the prosecutor's discretion absent full and complete disclosure to the prosecutor (and/or probation department) of all prior criminal conduct. Likewise, by express terms, subsequent criminal activity is a deal breaker.
    b. Thus, all criminal conduct may be exploitable as "bias."

(1) Disclosed:
   (a) value of "benefits" showered upon the witness.
   (b) price prosecutor is paying for witness' testimony in form of money and freedom.
(2) Undisclosed:
   (a) what the witness is hiding from his/her benefactors contrary to deal.
   (b) what the prosecutor may have intentionally left out of the deal letter.
(3) Subsequent:
   (a) what the prosecutor has allowed the witness to get away with.
   (b) what the prosecutor holds over the witness' head.

VI. BATTLE OF VOCABULARY

A. The choice of particular words and phrases often influence the listener's perception. Sometimes this is intentional and conscious, sometimes not. Democrats refer to the "Democratic" party; Republicans say "Democrat" party. For whatever reason, "Democrat", used as an adjective, sounds less appealing than "Democratic".

B. Let us look at some of the choices in our business, and consider their positive and negative impressions.

Prosecution	**Us Folks**
Preparation	Rehearsal
Alibi	Explanation: elsewhere
Interview	Interrogation
Debriefing	Preparation, interrogation, rehearsal
Plea agreement	Deal letter
Emolument, moiety	Payment, cash
Cooperate with gov't.	Make a deal
Come to an understanding	Negotiate, haggle re: jail time
Cooperating witness	Informer, Snitch
Informant	Informer, Snitch
Testimony, narrative	Story
New York State/U.S.	Cops, prosecution; government
The People/Government	Prosecution Team, prosecutor
The Defendant	Accused, my client, Mr. Client
Victim	Complainant, Complaining witness

C. NOTE: Names certainly count. Look at "RICO". The acronym corresponds to a statutory scheme, which was given a name containing words designed by the author to have prejudicial impact: Racketeer Influenced and Corrupt Organizations.

VII. **MORE ON THE BATTLE OF VOCABULARY** - watch your verbs.

A. In cross-examination.
   1. COMPARE:
      a. And at that moment what did you hear my client say? **with**
      b. What is it you claim you heard my client say?
   2. COMPARE:
      a. What did you do then? **with**
      b. What is you say you did then?

B. In objecting before the jury
   1. COMPARE:
      a. "Objection, leading" or "Objection, form" **with**
      b. "Objection, your Honor, the questions suggests the answer."
   2. This is not a "speaking objection".

VIII. **THINKING ON YOUR FEET**

A. PROBLEM: the witness becomes obviously evasive, continually asks for you to repeat your question, repeatedly claims not to understand.

B. SOLUTIONS:
   1. Q: Officer, you are a college graduate, right? You told us you have 20 years experience as a detective and have taught classes at John Jay for the last 8 years, correct? Now is it your testimony that you don't understand what I mean when I ask whether you made your notes "contemporaneously?"
   2. Q: Officer, are you able to hear me all right from where you're sitting? Have you found it easier to hear and understand my adversary, Mr./Mrs. Prosecutor, than to hear and understand me?

IX. **HANDLING THE COURT**

A. Be Respectful. Even an extremely prejudiced and evil judge often will have the jury eating out of his/her hand.
   1. People have strong favorable presumptions about e.g., clergy, judges, etc. - Err on the side of being too kind. Better to be criticized for being too much the victim rather than too much the heavy.

B. But there are exceptions...
   1. Current events in every locale include some high-profile acquittals which many believe would have rightly been convictions but for the behavior of the trial judge.

X. WHEN THE JUDGE AND PROSECUTOR TEAM UP AGAINST YOU

A. This may be the best thing - perhaps the only thing - going for you.

B. Sometimes you just get killed.

C. But the jury may empathize with the human being you represent as the underdog/victim. Often juries have strong resentment of foul play - from any quarter.

XI. ATTACKING THE HEARSAY STATEMENT

A. Fed. R. Evid. 806:

1. What a hearsay statement, or ...[an admission by either one authorized by a party-opponent, or an agent or servant of a party-opponent, or a statement by a co-conspirator] has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

B. Methods:

1. Prior convictions.
2. Prior inconsistent statements
3. Perception and memory. Includes declarant's ability to perceive.
4. Communication. Includes declarant's ability or perhaps even likelihood to have used such language.
5. Predisposition (bias, prejudice, motive, interest, corruption).
6. Reputation for truthfulness - a very interesting device.

C. Other Applications:

1. Against information relied on by an expert witness (even when not in evidence).
2. Impeachment of children (as absent witnesses).
3. Rehabilitation - reputation of declarant.
4. Rule 806 allows you to call the declarant as a witness and use cross rather than direct-examination.

XII. CROSS-EXAMINING THE EXPERT

A. How to approach/handle the witness.
   1. Appraising - "sizing up" - the witness. Decide appropriate general approach using guidelines applicable to any witness;
      a. Is witness telling truth or lying?
      b. Where are witness' or case's weaknesses? Where am I going and how can this witness help me get there?
      c. Would I be better off without the personal appearance of this witness altogether, i.e., stipulate to witness' testimony? Pass on cross?

B. Obtain (well in advance if possible) expert's resume' and writings. Of course, carefully examine and investigate same.
   1. Perhaps use subpoena or have a colleague ask for this information under guise of potentially hiring witness. Get transcript of a prior proceeding.
   2. Fed. R. Crim. P. 16(a)(1)(e) Expert Witness:
      a. "At the defendant's request, the government shall disclose to the defendant a written summary of the testimony the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case-in-chief at trial. This summary must describe the witness' opinions, the bases and the reasons therefore, and the witness' qualifications.
      b. Remember to include this in your motions.

C. Choices of Cross-examination methods:
   1. Destructive cross:
      a. Subject matter of witness' expertise - examiner must have sufficient expertise.
      b. Conditions under which "scientific" process was employed fall short of scientifically acceptable standards. E.G., handling and maintaining of alleged drug money to which a trained dog reacted. Ask for preliminary hearing.
      c. General or incidental; allows cross-examiner to avoid area of expertise. The lesson given standing on one foot: Don't ask the psychiatrist nuttin' about psychiatry, Buddy."
      d. Qualifications.
         (1) Subject not recognized, regulated or licensed by the state or government; contrast, e.g., massage parlor, accountant, private investigator.
         (2) Often nature, quality and intensity of course training is exaggerated.
         (3) Recency, currency.

(4) Occasionally credentials are exaggerated or not as relevant as may first blush appear: chemist doctorate may be in education, not chemistry; handwriting expert's bachelor of science degree, rattled off in direct testimony in a list of credentials, may be in accounting.

e. When applicable - Your field is not recognized as an exact science; in the end it's only an **opinion**, after all.

f. Fees. Often involves obvious evasive and dissembling.

g. Nature of witness' practice. E.g., psychiatrist who makes a living as a witness, and not as a practicing physician - a hired gun who must produce a particular product in order to survive.

h. Bias: e.g., member of police department, or history of depending for his/her livelihood exclusively upon law enforcement work in general, perhaps this prosecutor in particular.

i. Preparation: too little or too much.

j. Knowledge of nature and details of case on trial: too little or too much.

k. Came into case after ultimate decision sought from the witness was a foregone conclusion; testimony therefore predictable and obligatory.

l. Absence of written report or notes. Often purposeful on part of prosecutor to avoid turning over such prior statements and reports pursuant to CPL §§240.30, 240.45 or federal rules: Fed. Rule Crim. Proc. 16 and 18 U.S.C. §3500. In such circumstances, when asked on cross-examination, the witness cannot truthfully explain the absence of such report or notes; thus, his/her answer may well seem dishonest.

2. Constructive cross. Even if he is a member of law enforcement, witness may provide helpful truthful information; for among other reasons:

a. Witness may be sufficiently distanced from case (out of loop).

b. Witness may be more loyal to his/her scientific craft than to the organization. Often such a witness is more scientist than cop.

3. Combination - part destructive, part constructive.

4. Various techniques possible in the cross:

a. Straight-forward cross on the merits in the witness' field of expertise.

(1) Examiner must be sufficiently competent in the field to go head-to-head with the expert.

(2) Do your homework; hit the books.

(3) Hire your own expert to tutor you (even if you do not use him/her for testimony).

(a) In court: with you when prosecution expert witness testifies and perhaps other parts of the proceeding. "Pulls your coat".

(b) Out of court: teach you; point you to appropriate authoritative writings; analyze and interpret prosecution witness' writings.

b. Don't necessarily be more expert than the expert. Better to appear a slightly bright, slightly lucky "victim" of the expert's specialized knowledge. In other words, just like the jury. Now you, in behalf of everyone, capitalize on your "discoveries" as you cross-examine this expert who begins to expose himself. But the jury should discover this just a bit before you do.

c. Use the expert, or any other witness, as your supporter. Using, but not necessarily demonstrating, your expertise, get the expert to **"explain"** all that good stuff you have been struggling to get the jury to understand and believe.

d. EXCEPTION: Sometimes you need to show the jury you are knowledgeable and credible concerning specialized claims you have made. Just as you sometimes put yourself and the jury together, here put yourself and the expert together - part of the same fraternity or community. Thus:

(1) Q: Now, is that what **we** in the business call "rifling", Dr. X.

(2) Q: And while that might not mean anything special to the jurors, those of **us** in the business would easily recognize that not just as a shell, but specifically a shell which was ejected upon the firing of a cartridge from a 9-mm semi-automatic, isn't that so?

(3) Q: Would you please explain to these folks why **we** say that?

e. General techniques for cross of non-expert still apply.

(1) Control of the expert can be extremely difficult but especially necessary. Experts are extremely dangerous; improper handling may result in a cross which is more suicidal than homicidal.

(2) As with all witnesses, don't just ask questions - listen to the answers; you may learn something and find an unexpected fruitful avenue of inquiry.

(3) Keep witness "on the ropes" with whatever turns out to be effective. This may be a totally unanticipated area, e.g., unexplainable absence of notes or report; evasiveness about fees, billable hours, records of same; failure to examine relevant material; - whatever). Don't rush on: You can get back to your prepared battle plan after the judge says you've over-used whatever this effective punch is, or you sense the jury has tired of it.

D. Some special rules of evidence of evidence applicable to expert witnesses.
   1. Contrary to normal witness, expert, of course, may be asked for opinions.
   2. May rely on and be cross-examined on items not admitted and, indeed, not admissible in evidence. Fed. R. Evid. 703.
   3. "...opinion...is not objectionable because it embraces an ultimate issue..." Fed. R. Evid. 704(a)
   4. Experts not subject to exclusion-of-witnesses ruling. Your expert is allowed to listen to prosecution expert witness' testimony (and that of other witnesses?). He/she may be permitted to sit at counsel table (but whether to take this opportunity may be a tactical decision).
   5. Because of nature of the expert witness and the special treatment he/she is accorded under the rules of evidence, the cross-examiner's control - while more necessary than ever - may become extremely difficult. Contributing factors:
      a. Witness may be highly educated or trained.
      b. Witness is likely to be (literally) a professional witness fluent in the favorable rules and agile in getting before the jury wheat he/she wishes.
      c. Dealing with underlying facts which may not be in evidence.
      d. Testifying about conclusions and opinions, etc.
      e. For reasons including the above, expect Court to allow the expert witness great leeway in responses. Experts are somewhat exempt from "yes" and "no" limitations; permission to "explain" may be expected.
      f. Experts not subject to exclusion-of-witness ruling.

E. Learned treatises
   1. Federal Rule of Evidence 803 (18) [hearsay exception] - permits admission into evidence, not merely for impeachment. Prerequisites:
      a. Called to the attention of witness upon cross-examination, or
      b. relied upon by witness in direct; and
      c. established as reliable authority by
         (1) the witness, or
         (2) other expert testimony, or
         (3) judicial notice.
      d. NOTE: "...the statements may be read into evidence but may not be received as exhibits."
      e. Consider use of Rule 806 (impeachment of absent declarant).
   2. New York Rule. Common Law. Not entirely clear? If acknowledged as authoritative by the witness, may be used to impeach, but not as evidence?
   3. Chess move: witness who - to prevent a reading before the jury - claims not knowledge of authoritative text, is portrayed as lacking basic knowledge in his/her field of expertise.

F. Query: After defense attorney's vigorous cross-examination attacking the prosecution chemist's methodology, may the prosecutor on re-direct:
   1. elicit the fact that the item was always available (and remains so even now) for testing by the defense? and/or
   2. Invite the defense expert to test the item now?
   3. Is this a shift in the burden of proof?

XIII. CONCLUSION

A. Remember how we began.

B. **NEVER LOSE SIGHT OF OUR THRESHOLD QUESTION**:
   1. Where do we need to go? and
   2. Will this witness, or this question, or this objection (or whatever) get us there?

THANKS FOR INVITING ME TO SHARE SOME THOUGHTS!

Ray Kelly