

EXPERTISE ON TRIAL

Testimony on Reliability of Eyewitness
Identification Stalls on General Acceptance

MARK HANSEN

EARLY ONE MORNING IN JUNE 1991, a taxicab crashed into a row of parked cars on a quiet street near Columbia University in Upper Manhattan. Several eyewitnesses saw two men fighting and watched in horror as the cabdriver was repeatedly stabbed by the second man, who took something from the cab and fled on foot, leaving his victim to die.

Four eyewitnesses helped police create a composite sketch of the suspect, which was included in a wanted poster. But no one was identified from police mug shots, and the poster did not generate a name.

Then, seven years later, Nico Legrand was arrested in connection with a burglary. One witness to the cabbie's murder picked Legrand out of a photo array as the killer. Another said Legrand and the killer were a "close match." A third said the two were similar.

That was enough to get Legrand indicted for second-degree murder. It also prompted his lawyers to ask permission to bring in expert testimony on the reliability of eyewitness identification. The trial judge denied that request. Legrand went to trial in April 2001, but the jury couldn't reach a verdict, and a mistrial was declared.

So far, a not-surprising series of judicial events. But a second attempt to bring in experts questioning the validity of eyewitness testimony has now set off a debate over such experts—and over what constitutes general acceptance within a scientific community.

Facing a late 2002 retrial, Legrand's attorney again asked to call in an expert on eyewitness reliability. Only this time, the trial court judge, acting New York Supreme Court Justice Bernard J. Fried, conducted a full-blown

hearing. And in a pretrial ruling Sept. 15, Fried held that what the expert had to say about the reliability of eyewitness identifications was inadmissible because the research has not achieved a level of general acceptance within the relevant psychological community.

"This is not a debate among experts about a generally accepted principle," Fried wrote in a 27-page opinion. "Rather, it is a real controversy among the relevant experts concerning whether these principles are generally accepted." *People v. Legrand*, 2002 N.Y. Slip Op. 22648.

UNUSUAL REASON

LEGAL EXPERTS SAY FRIED'S DECISION IS UNUSUAL IN ONE important aspect: While most courts have refused to admit expert testimony in this area, in most cases it was done on the grounds that it will not assist the trier of fact.

"The courts have been extremely skeptical of the value of this type of purported expertise," says David Faigman, a professor at the University of California, Hastings College of the Law in San Francisco who specializes in scientific evidence. "They think it's a big waste of time."

Eyewitness identification experts have found a significant correlation between the confidence witnesses have in their identifications and the accuracy of those identifications.

They have also found that witnesses tend to incorporate post-identification feedback into their recollections of events, and that witnesses to a crime in which the perpetrator displays a weapon tend to focus their attention on the weapon, not the perpetrator.

Only a few courts have excluded such testimony on the grounds of general acceptance, Faigman and other experts say. And in that respect, Fried may have gone further than anybody else. "Here," Faigman says, "the judge went out and made the case himself."

But other legal experts were less impressed. D. Michael Risinger, a law professor at Seton Hall University in Newark, N.J., says that under Fried's interpretation, virtually no expert testimony from any field of social science would ever be admissible. "You're never going to find the kind of universal agreement he is expecting, especially in

the social sciences," Risinger says.

Criminal defense lawyers and researchers in eyewitness identification say the ruling is contrary to what they see as a growing court trend to allow such evidence. Iowa State University psychology professor Gary L. Wells, a pioneer in the field of eyewitness identification, says he hasn't even bothered to read the opinion closely.

"I'm not going to waste a lot of time on that kind of wrongheaded thinking," he says. ■

