

## 7.17. Expert Testimony on Reliability of Identifications

(1) Expert testimony regarding the reliability of identification evidence may be admitted, limited, or denied in the discretion of the trial court.

(2) In the exercise of its discretion, the trial court should consider the following factors: (a) whether the eyewitness identification is a central element of the proof; (b) whether there is little or no corroborating evidence connecting the defendant to the crime; (c) whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case; (d) whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community; and (e) whether the proffered testimony meets the general requirements for the admission of expert testimony (Guide to NY Evid rule 7.01 [1]), in particular, whether the witness is a qualified expert and the testimony is beyond the ken of the jury and would aid the jury in reaching a verdict.

(3) (a) The principles upon which expert identification testimony has been recognized by the Court of Appeals as generally accepted within the relevant scientific community include:

*confidence-accuracy correlation* (a lack of correlation between the confidence the eyewitness expresses in the identification and the accuracy of the eyewitness's identification);

*confidence malleability* (an eyewitness's confidence in an identification can be influenced by factors that are unrelated to identification accuracy); and

*postevent information* (eyewitness testimony about an event often reflects not only what the

eyewitness actually saw but information the witness obtained later on).

**(b) The principles upon which expert identification testimony has been recognized by other New York courts as generally accepted within the relevant scientific community include:**

*event stress* (a stressful event can impair the ability of a person to recognize an unfamiliar face accurately);

*exposure time or event duration* (the amount of time available for viewing a perpetrator affects the witness's ability to identify the perpetrator accurately); and

*unconscious transference* (a witness may identify an individual familiar to them from other situations or contexts);

*weapon focus* (a victim's focus on the weapon used in an assault can affect ability to observe and remember the attacker).

**(4) To the extent the proffered testimony involves novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community, the trial court should conduct a *Frye* hearing to determine the issue. (Guide to NY Evid rule 7.01 [2].)**

#### Note

This rule is derived from a series of Court of Appeals decisions. (*People v Berry*, 27 NY3d 10 [2016]; *People v McCullough*, 27 NY3d 1158 [2016]; *People v Muhammad*, 17 NY3d 532 [2011]; *People v Santiago*, 17 NY3d 661 [2011]; *People v Abney* [and *Allen*], 13 NY3d 251 [2009]; *People v LeGrand*, 8 NY3d 449 [2007]; *People v Young*, 7 NY3d 40 [2006]; *People v Lee*, 96 NY2d 157 [2001]; see also *People v Mooney*, 76 NY2d 827, 833 [1990] [dissenting opinion].) *LeGrand* is the leading case on the exposition of the standards to be

observed and *Abney* summarizes and contrasts the Court's previous decisions, as does *Santiago*.

A guiding theme of the Court of Appeals decisions is that “[b]ecause mistaken eyewitness identifications play a significant role in many wrongful convictions, and expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, ‘courts are encouraged . . . in appropriate cases’ to grant defendants’ motions to admit expert testimony on this subject.” (*Santiago*, 17 NY3d at 669.)

**Subdivision (1).** The Court of Appeals decisions are uniform in holding that the admissibility of expert identification testimony is in the discretion of the trial judge. (*E.g. Santiago*, 17 NY3d at 668 [a “trial court may, in its discretion, admit, limit, or deny the testimony of an expert on the reliability of eyewitness identification”]; *LeGrand*, 8 NY3d at 456 [“it is clear that expert testimony regarding the factors that affect the accuracy of eyewitness identifications, in the appropriate case, may be admissible in the exercise of a court’s discretion”]; *Lee*, 96 NY2d at 162 [“the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court”].)

A trial court’s exercise of discretion in denying or limiting an expert’s testimony on the reliability of an identification is subject to appellate review for an abuse of discretion. (*E.g. LeGrand*, 8 NY3d at 456 [“there are cases in which it would be an abuse of a court’s discretion to exclude expert testimony on the reliability of eyewitness identifications”]; *People v Young*, 7 NY3d at 44.)

And *Berry* (27 NY3d at 19) noted that “ ‘where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for [the] 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 LeGrand*, 8 NY3d 449, 452 [2007]).” *McCullough* (27 NY3d at 1161) summed up the criterion for appellate review by stating: “Courts reviewing [the exercise of discretion] simply examine whether the trial court abused its discretion in applying the ‘standard balancing test of prejudice versus probative value’ (*People v Powell*, 27 NY3d 523, 531, [2016]).” (*See* Guide to NY Evid rule 4.07.)

In *People v Drake* (7 NY3d 28 [2006]), the trial court “ruled that the expert [on the reliability of eyewitness identifications] would be permitted to testify as to certain psychological factors that may influence the accuracy of an eyewitness identification, but held that ‘[t]o prevent any possibility that the expert testimony will infringe upon the jury’s fact-finding function, the witness will not

be permitted to give opinion testimony regarding the credibility or reliability of any witness. In addition, the expert may not opine as to whether any of the specific psychological factors outlined [in the trial court's opinion] actually influenced the identifications. In short, the testimony of the expert is limited to setting forth the relevant psychological factors and interpreting the research data that demonstrate an effect on memory and perception.' ” (*Id.* at 31-32.) The Court of Appeals, however, held: “Since defendant raised no objection to these limitations, the propriety of the [trial] court’s ruling in this regard is not before us.” (*Id.* at 32.) The Court has not since expressly resolved the questions presented by those limitations. (*Compare People v Bedessie*, 19 NY3d 147 [2012] [an expert who testifies to factors that may result in a false confession may not testify as to whether a particular defendant’s confession was or was not reliable]; *People v Carroll*, 95 NY2d 375, 387 [2000] [the expert’s testimony, explaining “child sexual abuse accommodation syndrome,” “did not attempt to impermissibly prove that the charged crimes occurred”]; *People v Banks*, 75 NY2d 277, 293 [1990] [“evidence of rape trauma syndrome is inadmissible when it inescapably bears solely on proving that a rape occurred”].)

**Subdivision (2).** The Court of Appeals decisions are uniform on the factors for a trial court to consider in determining the admissibility of expert identification testimony. There is, however, one caveat.

Until the decision in *McCullough* (27 NY3d 1158) the Court, beginning with *LeGrand*, had divided consideration of the factors into a “two-stage inquiry,” the first stage deciding whether the eyewitness identification is a central element of the proof and whether little or no corroborating evidence connects the defendant to the crime, and the second stage considering the remaining factors. In *McCullough* (27 NY3d at 1161), however, the Court held that “[t]o the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification would aid a lay jury in reaching a verdict” (quotation marks omitted).

Nonetheless, to date, key determining factors with respect to whether the testimony of an identification expert is warranted **have been as specified in subdivision (2): (a)** whether the eyewitness identification is a central element of the proof, and **(b)** whether little or no corroborating evidence connects the defendant to the crime.

In the words of the Court of Appeals: “In the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting defendant.” (*LeGrand*, 8 NY3d at 459.)

For example, in *Lee* (96 NY2d 157), the complainant's car was stolen at gunpoint; both the complainant and defendant were in close proximity to each other and exchanged words; and, two months after the theft, the defendant was arrested driving the stolen car. Given that corroborative evidence, the trial court did not abuse its discretion in denying expert identification testimony. In *Young* (7 NY3d at 45-46), in a robbery committed by a male, identified by a witness as the defendant, the stolen property was found in the possession of two of defendant's female acquaintances "and one of them pointed to defendant as the person from whom she got the property"; thus, "the corroboration was strong enough for the trial court reasonably to conclude that the expert's testimony would be of minor importance." In *Allen* (13 NY3d at 269), the corroborating evidence of the eyewitness was the identification of the defendant by an individual who knew the defendant and recognized him during the course of the robbery.

By contrast, where the key proof of guilt rests upon an identification (or identifications that are questionable) and there is "little or no corroborating evidence" (*People v LeGrand*, 8 NY3d at 452), upon a defendant's application, expert identification testimony about one or more of the scientific principles relevant to the case has been required.

For example, in *LeGrand* (8 NY3d at 457), the case turned solely on the accuracy of the "eyewitness identifications" and, "unlike *Lee* and *Young*, there was no corroborating evidence connecting defendant to the commission of the crime charged"; thus, the defendant's application for expert identification testimony should have been granted. In *Abney* (13 NY3d at 268), there was no corroborating evidence of the identification, and the trial judge therefore "abused his discretion when he did not allow [the expert] to testify on the subject of witness confidence. As for the remaining relevant proposed areas of expert testimony—the effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification—the trial judge should have conducted a *Frye* hearing before making a decision on admissibility."

Uniquely, eyewitness identification with little or no corroboration may not warrant expert identification testimony where the complainant and the defendant are known to each other. (*People v Muhammad*, 17 NY3d at 546 [the victim knew the defendant for over a decade; so that "prior relationship took any issue regarding human memory formation and recollection out of the case, rendering the victim's ability to perceive his attacker as the only aspect on which expert testimony was even potentially relevant. . . . (A)n average juror would have been capable of assessing whether a person in the victim's situation had an adequate opportunity to observe someone he had known for so long. Moreover, the defense never directly challenged the victim's ability to observe or recall who shot him, but instead sought to characterize his testimony implicating defendant as a lie, thereby further removing the scope of the proposed expert testimony from the issues presented to the jury"]; cf. *People v Zohri*, 82 AD3d 493, 494 [1st Dept 2011] [the trial court did not abuse its discretion in excluding expert testimony on

eyewitness identification where, in addition to some corroboration, “(b)etween the crime and defendant’s apprehension, the victim continuously kept defendant in sight, except for very brief periods under circumstances that would render mistaken identity highly unlikely”].)

A trial court that denies pretrial an application for an expert identification witness may need to reconsider, upon a defense request, once the trial has produced evidence that may not have been known or appreciated before trial. (*Santiago*, 17 NY3d at 673 [the trial court “abused its discretion when, after the defense had rested, the court denied defendant’s renewed request to call an expert witness on eyewitness identification”]; *People v Austin*, 46 AD3d 195, 198-199 [1st Dept 2007] [based on the pretrial proffer for an expert, the trial court did not abuse its discretion in denying the application, and, while the expert may have been warranted after evidence had been received, the defense did not renew its motion].) *Austin* noted that “[p]erhaps the better practice would [be] to reserve decision or deny the motion with leave to renew during presentation of the People’s case, at which time both the defense and the court would have been in a better position to consider the relevance of any expert testimony proffered on the effect of various factors on the reliability of eyewitness identification.”

With respect to factor (c) (i.e., “whether the proffered expert testimony is relevant to the eyewitness identification of the defendant on the facts of the case”). *Santiago* (17 NY3d at 672-673) provides an example of testimony on identification factors found irrelevant upon the pretrial defense application and then relevant in part after the defense rested and renewed its application. Thus, on the pretrial application, the Court noted that: “weapon focus, the effects of lineup instructions, wording of questions, and unconscious transference” were irrelevant, given that the “victim was not aware that her assailant had a weapon, and the record contains no evidence of improper lineup instructions, suggestive wording, or the presence of defendant’s image in photographs the victim saw prior to identifying him in the photographic array she viewed.” In the ruling on the defense’s second application, the trial court “should have given specific consideration to the proposed testimony concerning unconscious transference. That testimony would have been relevant, given that [at the trial, an eyewitness (not the victim)] saw a photograph of [the defendant], and [another eyewitness (not the victim)] saw a sketch of the perpetrator based on the victim’s description, and familiarity with these images may have influenced these eyewitnesses’ identifications.” (*Id.* at 673.)

With respect to factor (d) (“whether the eyewitness testimony is based on principles that are generally accepted within the relevant scientific community”), see subdivision (3) of this rule and the Note thereto.

With respect to factor (e) (“whether the proffered testimony meets the general requirements for the admission of expert testimony [Guide to NY Evid rule 7.01 (1)]), in particular, whether the witness is a qualified expert and the

testimony is beyond the ken of the jury and would aid the jury in reaching a verdict”), the Court of Appeals has noted that “it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.” (*Lee*, 96 NY2d at 162; *but see People v Fratello*, 92 NY2d 565, 572 [1998] [“It was well within the trial court’s sound discretion to reject expert testimony on a matter (night visibility) that is a subject of common experience of lay triers of fact”].)

In the end, the trial court’s exercise of discretion may depend on “whether the ‘specialized knowledge’ of the expert can give jurors more perspective than they get from ‘their day-to-day experience, their common observation and their knowledge’ . . . . In other words, could the expert tell the jury something significant that jurors would not ordinarily be expected to know already?” (*Young*, 7 NY3d at 45.)

**Subdivision (3)** lists the scientific principles related to an expert identification witness that the Court of Appeals and other courts have found generally accepted by the relevant scientific community.

Thus, in *LeGrand* (8 NY3d at 458), the Court of Appeals held that as to the first three factors listed in subdivision (3)—“correlation between confidence and accuracy of identification, the effect of postevent information on accuracy of identification and confidence malleability—the defense expert’s testimony contained sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field. Accordingly, defendant met his burden under *Frye*.” (*See Abney*, 13 NY3d at 268 [followed *LeGrand* with respect to “witness confidence”]; *Santiago*, 17 NY3d at 672 [held it was error to exclude expert testimony “showing that eyewitness confidence is a poor predictor of identification accuracy and on studies regarding confidence malleability” and the effects of “postevent information on eyewitness memory”].)

With respect to cross-racial identification, in *People v Boone* (30 NY3d 521, 535-536 [2017]) the Court of Appeals held that “a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness’s identification.” (*See* CJI2d[NY] Identification.)

In coming to that conclusion, the *Boone* Court explained that “[t]he cross-race effect is ‘generally accepted’ by experts in the fields of cognitive and social psychology, a point that the People do not dispute. Indeed, in a survey of psychologists with expertise in eyewitness identification, 90% of the experts

believed that empirical evidence of the cross-race effect was sufficiently reliable to be presented in court. The phenomenon has been described as ‘[o]ne of the best documented examples of face recognition errors’ ” (30 NY3d at 528-529 [citations to supporting studies omitted]).

With respect to expert testimony on cross-racial identification, the *Boone* Court made the point that the required jury instruction does not preclude expert testimony “explaining the studies to the jury . . . , because ‘it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror,’ with the decision to admit subject to the trial court’s discretion.” (*Id.* at 531 [citation omitted].) While, therefore, mandating the instruction, the Court left to the discretion of the trial court whether the criteria for expert testimony had been satisfied. In *People v Santiago* (17 NY3d at 672), the Court held: “Given that the People did not dispute that the victim is a non-Hispanic Caucasian, the proposed testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant, and is beyond the ken of the average juror.” In *Abney* (13 NY3d at 268), the Court held that the trial court should have held a *Frye* hearing, inter alia, on the effect of cross-racial identification. On remand, the trial court conducted the *Frye* hearing and held the expert testimony inadmissible because “[w]hile [the expert] opined that the own-race bias phenomenon extended to persons of Asian/Indian descent, she acknowledged that she was unable to point to any specific scientific studies to support such a conclusion.” (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U], \*50 [Sup Ct, NY County 2011]; see also *People v Banks*, 16 Misc 3d 929, 942 [Westchester County Ct 2007] [because the expert at a pretrial hearing “did not mention any studies demonstrating . . . a bias between Hispanics (the identification witness) and African Americans” (the defendant), the court excluded the testimony].)

With respect to other courts:

On remand from *Santiago* (17 NY3d 661), the prosecutor conceded that the proffered testimony related to identification factors was generally accepted by the relevant scientific community and the trial court accepted that concession and considered which identification factors were relevant to the case. (*People v Santiago*, 35 Misc 3d 1239[A], 2012 NY Slip Op 51043[U] [Sup Ct, NY County 2012].) The factors held relevant (in addition to those accepted by the Court of Appeals) included: “*unconscious transference*” (a witness may identify an individual familiar to them from other situations or contexts); “*high event stress*” (introduction of evidence that high stress negatively impacts the accuracy of eyewitness identification and recall of crime details); “*exposure time*” (because “the victim viewed her attacker’s partially obscured face for no more than 25 seconds, the subject of exposure time is certainly relevant” [2012 NY Slip Op 51043[U], \*8]); and “*weapon focus*” (but only if the complainant testified to having seen the “boxcutter while viewing the perpetrator’s face” [*Id.* at \*9]). With respect to “exposure time,” see CJI2d(NY), Identification (“the accuracy of a



witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person" followed by a listing of related factors). Testimony related to the conduct of a lineup was also found relevant; however, in 2017, New York amended its identification laws to account for some of the issues related to fairness in lineup procedure. (*See* Executive Law § 837 [21]; Identification Procedures: Photo Arrays and Line-ups Municipal Police Training Council Model Policy and Identification Procedures Protocol and Forms Promulgated by the Division of Criminal Justice Services Pursuant to Executive Law 837 [21] [June 2017].)

On remand from *Abney* (13 NY3d 251), the trial court held, after conducting a *Frye* hearing, that (in addition to the identification factors accepted by the Court of Appeals) expert identification testimony would be admissible with respect to the following factors: “*event stress*” (i.e., “a stressful event impairs the ability of a person to recognize an unfamiliar face accurately” and “the complainant was placed in a highly stressful situation as she was allegedly robbed in the subway at knife point by a complete stranger”); “*weapon focus*” (given the use of a knife during the robbery); and “*event duration*,” also known as “exposure duration” (refers to “the phenomenon that [the] longer a person is exposed to a face the more likely that person will make a correct identification at a later time’ [and conversely] an identification is likely to be less accurate if the perpetrator is viewed only for a brief period of time. In this case, as the charged crime took only seconds to complete this Court finds that the phenomenon of event duration is relevant to the identification of the defendant.”) (*People v Abney*, 31 Misc 3d 1231[A], 2011 NY Slip Op 50919[U] [Sup Ct, NY County 2011] [citations omitted]; *see also e.g. People v Norstrand*, 35 Misc 3d 367, 372-373 [Sup Ct, Monroe County 2011] [allowing expert testimony on a number of factors including: “identification of a stranger”; “exposure duration”; “event stress”; “recovered memories ([eyewitness] recalled more details regarding the event two days later following a dream)”]; *People v Banks*, 16 Misc 3d 929, 930 [Westchester County Ct 2007] [exposure time; weapons focus]; *People v Drake*, 188 Misc 2d 210, 213 [Sup Ct, NY County 2001] [admitting expert identification testimony on the “stress of the event” (emphasis omitted)]; *but see People v Banks*, 74 AD3d 1214, 1215 [2d Dept 2010] [the trial court “providently exercised its discretion in precluding, after a *Frye* hearing . . . , expert testimony on the effects of stress”]; *compare People v Berry*, 27 NY3d at 20-21 [there was no abuse of discretion in precluding expert testimony on “event stress” on the ground that it was “not relevant”].)

Ultimately, in the words of the Court of Appeals: “We have acknowledged that even when expert testimony is required, the trial court is ‘obliged to exercise its discretion with regard to the relevance and scope of such expert testimony’ and that ‘not all categories of such testimony are applicable or relevant in every case’ (*LeGrand*, 8 NY3d at 459).” (*Berry*, 27 NY3d at 20.)

**Subdivision (4)** recognizes the standard procedure for determining the admissibility of novel scientific theories and techniques not yet found by courts to be generally accepted by the relevant scientific community. (*Lee*, 96 NY2d at 162 [where expert testimony may “involve novel scientific theories and techniques, a trial court may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community”].)

The caveat here is that although the Court of Appeals has recognized the rule set forth in subdivision (4), the Court has also noted that a trial 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. ‘Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure.’ ” (*LeGrand*, 8 NY3d at 458; *but see People v Williams*, 35 NY3d 24, 43 [2020] [“our *Frye* jurisprudence accounts for the fact that evolving views and opinions in a scientific community may occasionally require the scrutiny of a *Frye* hearing with respect to a familiar technique. There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations”].)