APL-2013-00080

Court of Appeals

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

Against

ANTHONY ODDONE,

Defendant-Appellant.

BRIEF AMICUS CURIAE FOR DEFENDANT-APPELLANT ANTHONY ODDONE

On behalf of the New York City Bar Association

By: Sharon McCarthy, Chair of the
Criminal Law Committee
Dorothy Heyl
Attorneys for amicus curiae
New York City Bar Association
105 E. 22nd Street, Second Floor
New York, NY 10010
(212) 614-5339

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INTEREST OF AMICUS CURIAE

The New York City Bar Association (the "Association"), established in 1870, is a professional organization of more than 23,000 attorneys that seeks to promote integrity in, and public respect for, the justice system. The Association, by its Criminal Law Committee, submits this amicus brief to further the Association's advocacy toward reforming procedures in criminal trials with a view to reducing the number of wrongful convictions in this state.

PELIMINARY STATEMENT

The Association submits this *amicus curiae* brief in support of the appeal of Defendant-Appellant Anthony Oddone seeking reversal of his conviction. This brief addresses the second question presented in the brief submitted on his behalf: Whether the trial court applied the wrong standard in disallowing expert testimony on the reliability of eyewitnesses' estimations of the duration of a brief, stressful event and the impact on eyewitness testimony of post-event information. The Association frames the answer to this question in the context of prior decisions by this Court expanding the important role of expert witnesses in criminal trials well beyond the narrow one applied by the trial court. This Court has an opportunity in this case to supplement its guidance to trial courts on the bounds and proper exercise of discretion in determining whether to allow expert testimony that may be relevant to a crucial issue in the trial; based on principles that are well accepted

in the scientific community; proffered by a qualified expert; and on a topic beyond the ken of the average juror.

STATEMENT OF FACTS

A. The Duration of the Incident

The length of time that Mr. Oddone grappled with Mr. Reister is of critical importance to the theories of both the prosecution and the defense. A longer duration supports the prosecution's theory that excessive force was used. A shorter duration supports the self-defense theory that Mr. Reister died very quickly, after a brief compression of his neck triggered a fatal arrhythmia. In other words, the length of time is crucial.

Despite the central importance of the incident's duration, the eyewitness evidence at trial on this point was conflicting. The evidence on duration of the entire incident was:

- Shorter than five minutes (between a photograph at 1:07 a.m. and the call to 911 at 1:12 a.m.);[1]
- Shorter than two minutes and 45 seconds (between when the DJ passed Mr. Oddone on the table and when he came back inside and saw Mr. Oddone leaving);[2]
- Very brief (based on the failure of two bouncers standing 20 feet away to hear anything before the music stopped and the lights came on);[3]

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1 A2605:20-22 (Fitzpatrick) and A1052:3-15 (Everhart).

2 A2965:4-A2966:8, A2907:3-21; A2908:11-16 (Fallo).

- No longer than 30 seconds (estimate of eyewitness as to how long the two were struggling on the floor);[4] and
- Less than one minute (estimate of eyewitness as to time between when Mr. Reister approached the table and Mr. Oddone left the room).[5]

One eyewitness, Megan Flynn, gave two different estimates. Originally she told an investigator working for the Publick House's insurer that she saw Mr. Oddone hold Mr. Reister for only 6 to 10 seconds.[6] At trial, however, she testified, "I didn't have a watch. I wasn't keeping track of time. But it could have been a minute or so. I don't know."[7] The trial court did not permit the defense to use her original estimate in the insurance statement to refresh Ms. Flynn's recollection.

B. Exclusion of Expert Testimony

At trial, defense counsel sought to introduce an expert witness on circumstances that can render eyewitness testimony unreliable, Steven Penrod. A recognized authority on the fallibility of eyewitness testimony, Dr. Penrod was prepared to testify that eyewitnesses routinely overestimate the duration of short, stressful events, and the malleability of memory.

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3 A4309:3-A4310:14 (Reiner).

4 A5024:24-A5025:9, A5021:19-A5022:14 (Leader).

5 A5066:9-17 (Cohen).

6 A3794:22-A3796:22; A4029:18-A4032:4; A6729 (recorded interview).

7 A3817:3-9.

Counsel for Mr. Oddone made an offer of proof at a bench conference during the trial on November 23, 2009. She stated that she would call Dr. Penrod to testify on the numerous complex factors that affect memory and perception, including media accounts, and the conditions pertaining to an event, such as stress and intoxication.[8] Dr. Penrod would also testify on distortions in witnesses' memory and perception of the duration of an unusual, brief event.[9] The People sought to preclude Dr. Penrod's testimony on the ground that it was irrelevant.[10] The premise of this argument was that experts on eyewitness unreliability such as Dr. Penrod can testify only on a witness's identification of an assailant (or other wrongdoer) and there was no dispute as to the identification of the man who grappled with Mr. Reister.[11] The trial judge denied a request for a *Frye* hearing and asked both sides to present the applicable law on the admissibility of the testimony proffered by Dr. Penrod.[12]

Two days later, counsel for Mr. Oddone renewed her application to present Dr. Penrod as an expert. She supplemented the application with an affidavit of Dr. Penrod in which he explained that he would address the reliability of time

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8 A4842:6-16.

9 A4842:25-A4843-11.

10 A4557:12-18.

11 *See, e.g.*, A4846:14-25.

12 A4559:21-A4560:18.

estimates by witnesses, the impact of suggestive questioning and feedback on witnesses and the impact of stress on memory.[13] He explained that he would also address the impact on memory of media accounts of an event.[14] Attached to the affidavit was a summary of the relevant scientific research.[15]

The People opposed the application on several grounds. First, the People cited two Appellate Division cases from the prior century, *People v. Johnson*, 138 A.D.2d 952 (4th Dep't 1988) and *People v. Mixon*, 203 A.D. 2d 909 (4th Dep't 1994) (involving expert on lighting and angles of vision) for the proposition that the sort of expert testimony being proffered should be excluded "on the general principle that this is the assessment that should be left to the jury and fact finding process."[16] Second, the People suggested, without citation to any contrary authority, that the studies were not "generally accepted."[17] Finally, the People argued that Dr. Penrod would "apply his psychology to the facts," which would be prejudicial.[18] At the conclusion of the argument, the trial judge denied the application to present Dr. Penrod as an expert and again denied the request for a

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13 A7132-A7145.

14 A5093:8-22.

15 A7146-A7189.

16 A5094:2-12.

17 A5094:21.

18 A5094:22-25.

Frye hearing, promising a written decision that indicated his reasons for the decision.

In his written decision,[19] issued after the trial had concluded, on December 16, 2009, the trial judge provided two bases for excluding Dr. Penrod's testimony. First, he held that applying the holding in *People v. LeGrand*, 8 NY3d 449 (2007), "makes clear that this is not a case which calls for the testimony of an expert," since the expert testimony would not focus on the identity of the defendant. Second, the trial judge held that the proffered testimony was on a topic that was not "beyond the ken" of the average juror. Instead, he ruled, the effect of "lighting, alcohol ingestion, noise, stress and panic" on memory and perception "is an area well within the ordinary experience and knowledge of the average juror." Expert testimony on these points, the trial judge concluded, therefore was unnecessary. The trial judge did not address specifically the proffered expert testimony on the tendency of witnesses to over-estimate the duration of a short stressful event or the effect of post-event suggestion on witness memory. The Appellate Division affirmed the ruling without any analysis, or even specific mention.[20]

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19 A8-10.

20 CA2-4.

ARGUMENT

POINT I

TESTIMONY ON THE EFFECT ON MEMORY OF POST-EVENT INFORMATION SATISFIES THE REQUIREMENTS OF *FRYE* AND TESTIMONY ON THE TENDENCY TO OVER-ESTIMATE DURATION SHOULD NOT HAVE BEEN EXCLUDED WITHOUT A *FRYE* HEARING

Expert testimony on scientific evidence is considered reliable under *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), when the scientific principles on which it is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." The *Frye* standard, as this Court indicated in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006), keeps "junk science" out of the court room, while not setting an "insurmountable standard." In the decades after *Frye*, courts in this state have found scientific evidence to be admissible when proffered by prosecutors and defendants alike. *See, e.g., People v. Magri*, 3 N.Y.2d 562, 565-566 (1958) (approving the use of radar in speed detection); *People v. Wesley*, 83 N.Y.2d 417, 439 (1994) (holding that DNA profiling evidence was generally accepted as reliable by the relevant scientific community).

Almost 25 years ago, when the science on eyewitnesses' fallible memory and perception was less well developed than now, this Court chose to defer to the trial judge's discretion on the admissibility of experts in the field. *People v.*

Mooney, 76 N.Y.2d 827 (1990). Even then, Judge Kaye pointed out to the majority in her dissent:

> [T]he emerging trend today is to find expert psychological testimony on eyewitness identification sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance (*see United States v Downing*, 753 F.2d 1224 [3d Cir]; *People v McDonald*, 37 Cal.3d 351, 690 P.2d 709; *State v Chapple*, 660 P.2d 1208 [Ariz]; *United States v Smith*, 736 F.2d 1103 [6th Cir]; Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan L Rev 969, 1021-1023 [1977]; Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 Cal L Rev 1402 [1985]; Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U Pa L Rev 1079 [1973]; McCormick, Evidence § 206 [Cleary 3d ed]).

Id. at 829-830.

After a number of lower courts found that the *Frye* test was satisfied for admissibility on expert testimony concerning factors that can affect the reliability of eyewitness testimony,[21] this Court came to view that some of the science in this

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[21] *See, e.g.*, *People v. Drake,* 188 Misc. 2d 210 (N.Y. Co. 2001), *aff'd*, 19 A.D.3d 209, *aff'd* (2005), 7 N.Y.3d 28 (2006) (allowing, *inter alia*, expert testimony on the assimilation of post-event information, in assault case with high media attention); *People v. Beckford,* 141 Misc. 2d 71, 77 (Kings Co. 1988) (allowing, *inter alia*, expert testimony on the assimilation of post-event information where "alleged robbery occurred in seconds"); *People v. Lewis,* 137 Misc. 2d 84, 86-87 (Monroe Co. 1987) (allowing, *inter alia*, expert testimony on the selectivity of perception and the introduction of suggestiveness through photo arrays where eyewitness saw robber for "a minute or less"); *People v. Brooks,* 128

area is generally accepted in the scientific community, including the effect of post-event information on accuracy. Thus, in *People v. LeGrand*, 8 N.Y.3d at 458, involving the stabbing death of a livery cab driver, this Court found three factors on which an expert would testify as "generally accepted by social scientists and psychologists working in the field": (a) the correlation between confidence and accuracy of information; (b) the effect of post-event information on accuracy of identification; and (c) confidence malleability.

Two years ago, in *People v. Santiago*, 17 N.Y.3d 661 (2011), in a case involving an assault on a subway platform, this Court reaffirmed the holding in *LeGrand* that is relevant here—that the research Steven Penrod was prepared to offer on the effect of post-event information on accuracy of identification is generally accepted in the relevant scientific community. The trial court was held to have abused its discretion when it excluded testimony proffered by Dr. Penrod on the effect of post-event information on the ground that it was not well accepted. *Id.* at 672.

These factors pertain to the reliability of eyewitness testimony generally, and are not specific to the identification of a suspect. That is, post-event information

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Misc. 2d 608, 619 (Westchester Co. 1985) (allowing in rape trial, *inter alia*, expert testimony "that recall is affected by the selectivity of the initial perception and a phenomenon which involves filling in the details through after-acquired experience").

generally affects the memory of an eyewitness, and not just in relation to the memory of a face. Indeed, the research on hindsight bias described in Dr. Penrod's affidavit is unrelated to identification. For example, the study referred to in paragraph 13 of the affidavit concerns the distortion in participants' memory of an argument when they were told that one of the two arguing was found dead afterward. (They were more likely to falsely remember that there was a physical altercation during the argument.) The study referred to in paragraph 15 involved one witness referring to a misleading feature and over a third of the study's participants adopting the wording. In fact, none of the studies referred to by Dr. Penrod in his affidavit specifically involved facial recognition.

As this Court noted in *LeGrand*, a court need not hold a *Frye* hearing when it can rely on previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. *Id.* at 458 ("'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' (*Wesley*, 83 NY2d at 436 [Kaye Ch. J., concurring]"). Thus, since this court has already found the science on the effect of post-event information to be well accepted (in both *LeGrand* and *Santiago*), the trial court should have found that the same testimony proffered by Dr. Penrod in this case satisfied *Frye* (without holding a hearing) and then moved on to considering

whether it was relevant.

While trial courts can decline to conduct a *Frye* inquiry based on judicial precedent recognizing that the science is well accepted, they cannot decline to conduct a *Frye* inquiry based on the court's own belief that the subject of the proffered expert's testimony is not generally accepted. So, with respect to the proffered testimony on eyewitnesses' tendency to overestimate the duration of brief, stressful events, the trial court erred as a matter of law in denying the application for *Frye* hearing. This error is made clear in *Santiago* at 672, which also involved areas of testimony that this Court has not yet ruled on with respect to *Frye*. ("Supreme Court should also have given more adequate consideration to whether the proposed testimony concerning exposure time, lineup fairness, the forgetting curve, and simultaneous versus sequential lineups was relevant to this case and beyond the ken of the average juror, and if necessary held a Frye hearing, to determine whether these factors are generally accepted as reliable within the relevant scientific community.")

At a *Frye* hearing, the trial court would have confirmed that, as Dr. Penrod stated in his affidavit proffer, one of the earliest reliable findings to be documented in the psychology of eyewitness testimony is that the temporal length of relatively brief, stressful events is generally overestimated by eyewitnesses. Yarmey, A. Daniel, *Retrospective Duration Estimates for Variant and Invariant Events in Field*

Situations, 14 Applied Cognitive Psychol. 45, 47 (2000) ("Theoretical and empirical investigation of duration estimates date back to the nineteenth century with Vierodt's (1868) discovery that short intervals tend to be overestimated and longer ones under-estimated").

POINT II

STUDIES ON THE TENDENCY TO OVER-ESTIMATE THE DURATION OF A SHORT, STRESSFUL EVENT AND THE MALLEABILITY OF MEMORY ARE "BEYOND THE KEN" OF THE AVERAGE JUROR

In addition to the requirement that it satisfy *Frye*, expert testimony must also be "beyond the ken of the typical juror" to be admissible. *People* v. *Diaz*, 20 N.Y.3d 569, 575 (2013); *De Long* v. *Erie County*, 60 N.Y.2d 296, 307 (1983) ("The guiding principle is that expert opinion is proper when 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"). In other words, expert testimony should aid the jury in examining an issue that requires professional or technical knowledge. *Diaz*, 20 N.Y.3d at 575 (testimony by prosecution expert on sexual abusers' practice of "grooming" of children held properly admitted). As this Court explained in *LeGrand*, the trial court should consider whether jurors' "'day-to-day experience, their common observation and their knowledge,' would benefit from the specialized knowledge of an expert witness." 8 N.Y.3d at 455 (internal citations omitted).

That jurors may have experiences or knowledge relevant to the subject of expert testimony does not mean that they have "professional or technical" knowledge of certain aspects of that experience. So, for example, in *DeLong v. Erie County*, involving an economist's testimony on the value of services provided by homemakers, this Court observed, "Undoubtedly most jurors have at least a general awareness of the various services performed by a housewife. It is doubtful, however, that they are equally knowledgeable with respect to the monetary equivalent of those services." *Id.* at 307. Similarly, in *Selkowitz v. County of Nassau*, 45 N.Y.2d 9, 102 (1978) , this Court sustained the admission of testimony of a police captain on emergency traffic procedures and proper police conduct in a high-speed chase, even though the average juror "is quite familiar with the everyday rules of the road."

Likewise, in *People v. Cronin*, 60 N.Y.2d 430, 433 (1983), involving whether an intoxicated person could form the requisite criminal intent, this Court held that jurors' personal experience of intoxication was beside the point; the forensic psychiatrist skilled in drug and alcohol abuse who was proffered as an expert in *Cronin* had knowledge beyond the ken of the average juror. *Cronin* discredited the claim that expert testimony would usurp the role of the jury, as Judge Kaye later pointed out in her *Mooney* dissent, explaining:

> The notion that jurors are generally aware from their everyday experience of the factors relevant to the reliability of eyewitness observation and

> identification has not only been properly condemned as "makeshift reasoning" (*see*, McCormick, Evidence § 206, at 624 [Cleary 3d ed]), but also has been refuted by research demonstrating a number of common and widely held misconceptions on the subject among laypersons (*see*, Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Human Behav 19 [1983]; Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 Law & Human Behav 15 [1982]).

76 N.Y.2d at 832. Judge Kaye explained that the testimony "was intended to provide the jury with a general analytical framework for evaluation of the eyewitness testimony, by presenting scientific data concerning certain factors involved in perception and memory." *Id.* at 831.

In *People v. Lee*, 96 N.Y. 2d 157 (2001), involving a carjacking, this Court applied *Cronin* and similar cases to the type of expert testimony relevant here: the reliability of eyewitness observation and identification. [22] In a well-reasoned opinion, this Court advised that "courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province," and acknowledged that such expert testimony is "a kind of authorized encroachment"

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[22] Social scientists have conducted studies on what potential jurors actually understand about the workings and limitations of memory. *See, e.g.*, Schmechel, Richard S. *et al., Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177 (2006) (an independent survey of potential jurors in the District of Columbia demonstrated that jurors misunderstand how memory generally works.)

on the "jury's otherwise exclusive province which is to draw 'conclusions from the facts.'" *Id.* at 162, citing *People v. Jones*, 73 N.Y.2d 427, 430-431 (1989) (expert in chemistry and controlled substance testified for the prosecution in drug case). Accordingly, *Lee* held:

> Despite the fact that 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 an identification are within the ken of the typical juror.

Id.

This holding on the "ken of the typical juror" is not limited to specific factors bearing solely on the *identification* of a perpetrator, such as weapon focus or cross-racial identification. To the contrary, the expert proffered by the defense in *Lee* would have testified on other relevant factors, including the duration of the encounter. (This is relevant to identification because of the correlation between the length of time an eyewitness views the perpetrator of a crime and the accuracy of the identification:[23] The longer the witness has an opportunity to view a stranger committing a crime, the more likely the identification is to be reliable.) The expert would also have testified on the assimilation of post-incident information as affecting the reliability of the identification.

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[23] This correlation is so well accepted that jury charges on identifications instruct jurors to scrutinize whether the eyewitness had an adequate opportunity to view the perpetrator. *See, e.g. Beckford* at 74-75.

Five years later, this Court followed *Lee* in *People v. Young*, 7 N.Y 3d 40 (2006), a home invasion case. While concluding that the trial court had not abused its discretion in excluding expert testimony on factors affecting the reliability of eyewitness identifications, this Court, in an opinion by Judge Smith, quoted *Lee* ("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 an identification are within the ken of the typical juror'") and found that the expert could tell the jury something that jurors would not ordinarily be expected to know. *Id.* at 44. Likewise, in *People v. Abney*, 13 N.Y.3d 251, 268 (2009), this Court found that the counterintuitive principles of witness confidence "places then beyond the ken of the average juror."

As to scientific studies on the duration of an event, the typical juror is highly unlikely to be aware of scientific studies demonstrating that the temporal length of events is generally overestimated by witnesses when there is a lot occurring within the timeframe and when the witness is feeling stress or anxiety. For example, in a study by Elizabeth Loftus in which she conducted two experiments showing witnesses a simulated bank robbery that lasted 30 seconds, witnesses' average estimated duration of the event (across 66 witnesses) in the first experiment was 147.3 seconds (almost two and one-half minutes), with only two witnesses estimating a duration of 30 seconds or less, and 152 seconds in the second

experiment.[24] Previous opinions by this Court provide a basis for concluding that psychological studies on this phenomenon are not "within the ken" of the typical juror.

As to studies on the impact of post-event information, this Court has effectively decided that they are "beyond the ken" of the average juror. In *LeGrand*, this Court reviewed prior holdings in *Lee, Cronin* and *Young* and held that the jury would have benefitted from hearing from an expert on the effect of post-event information on the accuracy of eyewitness identifications. 8 N.Y.3d at 457. Certainly lower courts in this state have reached this conclusion. In *People v. Beckford*, 141 Misc. 2d 71, 75 (Kings Co. 1988), an early, scholarly opinion on the admissibility of expert testimony on the malleability of memory, the court explained:

> Empirical studies have demonstrated . . . that there are other psychological processes at work which can affect, impair and call into question the integrity of the initial viewing. As one commentator explains it, "As regards memory, there are other psychological processes at work. For instance, a witness can unconsciously incorporate post-event information which will alter the original memory, especially as to particular details. This memory reorganization occurs at a mental level uncontrolled by the subject, although the end result has the same appearance as intentional lying on the part of the witness. Memory is an active, continuing process in which new elements are continuously interwoven into the overall recollection until the subject

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[24] Loftus, Elizabeth F., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females*, 1 Applied Cognitive Psychol. 3, 7 (1987).

> cannot distinguish one from the other. In complex situations, memory can be adversely affected at its very inception." This court believes that these processes and factors are not necessarily within the knowledge of the typical juror nor are they a part of the court's typical charge. Nevertheless, it is essential information which is not in accord with common perceptions and admission of such testimony will result in a "better-informed decision" by the jury.

(Internal citations omitted.) In the intervening 25 years, research has significantly advanced social scientists' understanding of the malleability of memory, as reflected in Dr. Penrod's affidavit.

POINT III

THE EXERCISE OF SOUND DISCRETION IN DETERMINING WHETHER TO ALLOW EXPERT TESTIMONY REQUIRES A CAREFUL ANALYSIS OF THE RELEVANT FACTORS, RATHER THAN APPLICATION OF A *PER SE* STANDARD.

The role of the trial court is to conduct a careful analysis of whether expert testimony will aid the jury in its truth-finding mission. While the decision whether to admit expert testimony is committed primarily to the sound discretion of the trial court, the discretion must be based on a legally sufficient rationale. The *failure* to exercise discretion, based on an incorrect standard, constitutes reviewable legal error. So, for example, in deciding whether to admit evidence on the reliability of eyewitness identifications, a trial judge exercises discretion—either reasonably or not—when weighing factors such as "the centrality of the identification issue [to

the particular facts, and] the existence of corroborating evidence." *Lee* at 163.

Likewise, in the context of this case, if an expert proffered testimony on the reliability of witnesses' estimate duration of an incident, but the duration of the incident was not at issue, it would be a proper exercise of discretion to exclude the testimony. This would be the case even if the testimony met the *Frye* standard, and was "beyond the ken" of the average juror.

But trial courts err when they fail to exercise discretion, under an erroneous belief that their discretion is limited by law. Thus, in *Cronin*, the trial court was found to have failed to exercise its discretion by excluding testimony by a forensic psychiatrist on the ability of an intoxicated person to form intent. The testimony was excluded on the ground that it was an ultimate question, usurping the jury's function. This Court held, "The court failed to exercise its discretion because it erroneously perceived that it had no discretion to exercise. This was not a proper application of the test for expert testimony, and presents a legal issue for review by us." *Cronin* at 433. (For support, the decision relies on *People v. Williams,* 56 N.Y.2d 236 (1982), in which the trial court did not exercise its discretionary power to weigh various factors in its Sandoval ruling, giving rise to a legal issue for review.)

Likewise, in *People v. Lee*, this Court faulted the trial court for failing to exercise its discretion. The original hearing court had "summarily" rejected a

defense motion for expert testimony on the factors that may influence the perception and memory of a witness and affect the reliability of identification testimony. The summary rejection (later corrected by a different trial court) was a failure to exercise discretion. *See also People v. Aphaylath*, 68 N.Y.2d 945 (1986) (in homicide trial, reversible error to exclude experts concerning the stress and disorientation encountered by Laotian refugees in attempting to assimilate into American culture).

Here, the trial court misread *LeGrand* as establishing a *per se* rule that divides psychological testimony on eyewitnesses' observations and memory into two categories: when it applies to the identification of a perpetrator and when it does not.[25] According to this dichotomy, the first category of expert testimony is admissible and the other category is not. *LeGrand*, however, does not establish a *per se* rule as to the type of expert testimony that is admissible. Rather, the only issue in *LeGrand* was whether the trial court had erred in excluding relevant testimony that was proffered by a qualified expert on a topic "beyond the ken" of the average juror on the ground that the expert's conclusions were not generally accepted within the relevant scientific community. 8 N.Y.3d at 454. In other

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[25] The trial court stated: "application of the holding in *LeGrand* makes clear that this is not a case which calls for the testimony of an expert. . . . . [I]dentity of the defendant as the perpetrator is not the central issue in the testimony of these eyewitnesses . . . [and] there is significant corroborating evidence connecting the defendant to the crime. . . ."

words, *LeGrand* is concerned mainly with *Frye* admissibility (as well as whether the expert testimony is beyond the ken of the typical juror). It simply holds that expert testimony, so long as it satisfies *Frye*, is admissible. The trial judge committed a legal error by precluding Dr. Penrod's testimony on the ground that it did not fit within the exact contours of the testimony deemed admissible in *LeGrand*. The trial court's failing, therefore, was its failure to recognize that *LeGrand* affirms the obligation of the trial judge to exercise discretion and admit such expert testimony "in the appropriate case." *Id.* at 456.

CONCLUSION

As gatekeepers of evidence heard by juries, trial courts must exercise their power of discretion meaningfully and in accord with the prior rulings of this Court. The exercise of discretion is not unfettered. Since this Court has ruled that scientific evidence on the impact on memory of post-event information is generally accepted within the relevant scientific community, trial courts do not have the discretion to ignore that ruling, and come to their own view. And on an area of scientific evidence on which this Court has not yet ruled—scientific evidence on the over-estimation of brief, stressful events—trial courts must analyze the evidence and, in light of the one-sided evidence here, recognize that Vierodt's law has been generally accepted in the scientific community for well over one hundred

years. Discretion, in other words, is not only a right, but a responsibility, and the failure to exercise discretion is therefore reversible error.

Dated: New York, New York
October 10, 2013

Respectfully submitted,

NEW YORK CITY BAR
ASSOCIATION

By: Sharon McCarthy by Dorothy Heyl

Sharon McCarthy, Chair of the
Criminal Law Committee
Dorothy Heyl
Attorneys for *amicus curiae*
New York City Bar Association
105 E. 22nd Street, Second Floor
New York, NY 10010
(212) 614-5339