

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D13-1533

WALTER BAILEY,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY
(Case No. 88-748CF)

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Innocence Network (the “Network”) is an association of organizations that provides *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The Network is dedicated to improving the accuracy and reliability of the criminal justice system in order to reduce the incidence of wrongful convictions, advocating reforms that will enhance the truth-seeking functions of the criminal justice system. The work of the Network has led to the exoneration of 317 individuals whose post-conviction DNA testing has shown were convicted for crimes they did not commit. In addition to its work on behalf of the wrongly convicted, the Network seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Its work has revealed that nearly 75 percent of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Since eyewitness misidentifications are the leading cause of wrongful convictions, the Network endeavors to ensure that courts considering eyewitness identification evidence use all available tools to reduce the risk of a conviction based on misidentification. Among the most important of these tools is expert testimony to educate jurors about the factors that can affect the reliability of eyewitness identification

evidence, and robust, scientifically sound jury instructions. Expert testimony and enhanced jury instructions are most important in cases where the only evidence against the defendant is eyewitness identification evidence, as it is in those cases that the risk of wrongful conviction based on misidentification is greatest.

SUMMARY OF ARGUMENT

This case, with a traumatized crime victim who thought she had seen the assailant before, presents many of the circumstances that can lead to misidentifications. Mistaken identifications can occur, despite a victim's belief that she knows an assailant, due to complex psychological phenomena that have been widely studied by social scientists in peer-reviewed experiments accepted by courts in a number of states.

The results of these scientific studies are not common knowledge. An expert on this large body of scientific research can assist the jury in assessing the reliability of the EW identification. As recognized by courts in other states, such expert testimony does not usurp the role of the jury, since the expert only educates the jury on the context of an EW identification, and does not opine on the reliability of the identification at issue. For the reasons described herein, the court below made an error of law in excluding the proffered EW expert. Given the centrality of the EW identification evidence to the prosecution's case, this error cannot be deemed harmless and requires reversal.

ARGUMENT

I. EYEWITNESS MISIDENTIFICATION IS THE LEADING CONTRIBUTING CAUSE OF WRONGFUL CONVICTIONS

Misidentification is widely recognized as the single greatest contributing cause of wrongful convictions in this country.¹ *Peterson v. State*, __ So. 3d __ 2014 WL 2882801, *8 (Fla. June 26, 2014) (J. Pariente concurring). EW misidentification features so prominently in wrongful convictions for a number of reasons.² First, as the robust body of scientific research described *infra* has established, EW identifications are fallible. Studies have consistently shown error rates of approximately 20-25 percent.³ Second, fact-finders have difficulty assessing the reliability of EW identifications. Jurors tend to credit less relevant aspects of an EW's testimony, such as her certainty in the identification, attributing reliability to confidence where they are not correlated, while ignoring more probative circumstances, such as limitations on an EW's opportunity to observe the perpetrator. In addition, most EWs believe they are telling the truth; thus to the extent that jurors are assessing a witness's credibility, most EWs will appear credible. As a result, tradi-

¹ For that reason, the Innocence Commission appointed by the Florida Supreme Court to analyze the causes of wrongful convictions chose EW misidentification as its first area of study. Florida Innocence Commission, Final Report to the Supreme Court of Florida 18 (2012).

² Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011).

³ Wells, G. L., Memon, A., & Penrod, S. (2006). Eyewitness evidence: Improving its probative value. *Psychological Science in the Public Interest*, 7, 45-75;

tional trial tools, including cross-examination and argument to the jury, are ineffective at uncovering mistaken EW identifications because witnesses believe they are being honest and truly believe that their identifications are correct.⁴

As a result, EW misidentification is four times more likely than a false confession to contribute to a wrongful conviction.⁵ Moreover, there is a large group of erroneous convictions in robberies and other serious crimes of violence for which DNA testing is not available to definitively prove a defendant's guilt or innocence and where the defendant's conviction rests on EW identifications that appear to be mistaken.⁶

Wrongful convictions based on mistaken EW identifications have occurred in a wide range of circumstances. Most relevant here are cases in which a victim claimed to know, but demonstrably misidentified, the defendant. Among the DNA exonerations, there are at least 32 cases⁷ in which the victim of a crime erroneously identified a perpetrator whom he or she claimed to have seen previously. One trag-

⁴ Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 774 (2007).

⁵ Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes And How To Reduce the Chance of a Misidentification* 3 (2009).

⁶ Samuel R. Gross *et al.*, *Exonerations in the United States 1989 through 2003*, 95 J. of Crim. L. & Criminology 523, 530-31 (2005).

⁷ Karen A. Newirth, Innocence Project, *Applying Scientific Research on Identification to Post-Conviction Innocence Claims* 39 (2014), http://www.innocencenetwork.org/conference/ApplyingScientificResearchonIdentifyingPostConvictionInnocenceClaims_KarenNewirth.pdf

ic example occurred in Texas, when a rape victim claimed that she had seen the man she identified as her attacker, Charles Chatman, in her neighborhood several times. He was exonerated by DNA evidence and released from prison after serving more than 26 years. In Ohio, the young son of a murder/rape victim identified Danny Brown, a man who had been dating his mother as the perpetrator. Mr. Brown was exonerated by DNA evidence and released after serving 18 years of his sentence. In Pennsylvania, a witness to a murder erroneously identified his neighbor as an assailant wearing a nylon mask and a hat, helping to secure a sentence of life in prison. He was subsequently exonerated by DNA testing. As these wrongful convictions cases suggest, despite the fact that EWs claiming to know the perpetrator can be wrong, their identifications are unusually persuasive evidence. *See, e.g., Ortiz v. State*, 884 So. 2d 70 (Fla. 2d DCA 2004) (holding that identity is still a disputed issue where the victim knew the individual identified as the suspect).

When the EW is herself a victim of the crime, numerous factors can contribute to a highly unreliable identification. The psychological trauma of the event can interfere with the victim's ability to form and to retrieve a strong memory. The victim may be trying to hide or shield her face and thereby impair her ability to observe. The victim might focus on a weapon, rather than the face of the assailant. And recovering from serious wounds, the victim may be medicated causing mental impairment, which makes her susceptible to suggestion in the identification proce-

dure. Eager to solve the crime, the victim may take cues from police officers.

The facts in a landmark case recently decided by the Oregon Supreme Court, *State v. Lawson*, 291 P.3d 673 (Ore. 2012), exemplify the circumstances that can impair the ability of a victim to identify an assailant. The victim in *Lawson* was shot in the chest and terrified that the man who had killed her husband would also end her life if she got a good look at him. Her face was covered with a cushion, and she told a 911 dispatcher that she did not know who had shot her and her husband. While in the hospital, heavily medicated and sedated, she was shown a photo lineup and asked suggestive questions. Over the next few weeks and months, the police officers continued to show her lineups with a photograph of a man she and her husband had interacted with on the day of the shooting. By the time of the trial she was absolutely certain that the man had shot her, testifying, “I’ll never forget his face as long as I live.” Reversing the conviction, the court found that there were serious concerns regarding the reliability of the identification evidence. The court came to this view after a thoughtful, thorough consideration of the scientific research on EW unreliability, brought to its attention by the Innocence Network and a large group of social scientists who have contributed to the research.

II. A ROBUST BODY OF SCIENTIFIC RESEARCH EXPLAINS THE PREVALENCE OF MISIDENTIFICATION

Social science research in the area of EW identification conducted over the past 30 years has produced over 2,000 published studies. Topics that were largely

guesswork in the past have been elucidated by rigorous, peer-reviewed research that is now widely accepted and has been hailed as the “gold standard” of scientific research. *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (“The peer review process is a method of quality control that ensures the validity and reliability of experimental research.”) This research has explored the mental processes of forming, storing and retrieving memories, as well as the extent to which memories can be distorted by time and external influences. The research is conducted in well-designed experiments from which scientists can draw relevant conclusions from different conditions. *Id.* at 892.

The research findings are clear: memory does not function like a video recording, replayed upon command. Instead, as the research shows and courts have agreed, human memory is far more complex. Because memory is a constructive, dynamic and selective process, recollections are affected by both the circumstances at the time of the event and witnesses’ subsequent experiences. These two categories are referred to as “estimator variables,” and “system variables.”

“Estimator variables” are factors relevant to the characteristics of the witness, the alleged perpetrator, and the event. One significant, and often misunderstood, estimator variable is stress. High levels of stress have been found to negatively impact accurate recall and correct identification rates, even though

moderate levels of stress can improve cognitive processing.⁸ Another important estimator variable is referred to as “weapon focus effect.” This phenomenon occurs when the presence of a weapon interferes with an EW’s ability to encode a perpetrator’s face by interrupting the EW’s attention to the perpetrator.⁹ The weapon-focus effect may also affect long-term memory formation.¹⁰ Another estimator variable, “unconscious transference,” is discussed in Section IV, *infra*.

“System variables,” by comparison, are factors that are within the control of the criminal justice system, such as lineup procedures. Scientists have developed a large body of research on the extent to which system variables can affect witness’ storage and retrieval of memories, leading them to “misremember” faces and the circumstances in which they saw them. For example, an identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion (*i.e.* the administrator does not know who the actual suspect is). Even seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or

⁸ Kenneth A. Deffenbacher *et al.*, *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 *Law & Hum. Behav.* 687 (2004).

⁹ Elizabeth F. Loftus *et al.*, *Some Facts About “Weapon Focus”*, 11 *Law & Hum. Behav.* 55 (1987).

¹⁰ Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Hum. Behav.* 413 (1992).

smiles—can influence an EW's behavior.¹¹

Information received by witnesses before and after an identification, known as confirmatory feedback, can significantly affect their memory.¹² A police signal to an EW that she has correctly identified a suspect can reduce doubt, engendering a false sense of confidence. The effect of confirming feedback is consistent, reliable, and robust.¹³ Confirming feedback can come from various sources, including routine occurrences in the course of a criminal case, such as learning of the arrest and prosecution of the suspect, seeing the suspect sitting at defense counsel's table, and meeting with prosecutors in preparation for testimony.¹⁴

Jurors are generally not aware of this research, and tend to overestimate the reliability of EW identifications with remarkable consistency,¹⁵ and by significant

¹¹ Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1107 (2004).

¹² See Susan Dixon & Amina Memon, *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 Applied Cognitive Psychol. 935 (2005).

¹³ Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 Applied Cognitive Psychol. 859 (2006).

¹⁴ See John S. Shaw, III & Kimberley A. McClure, *Repeated Postevent Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 Law & Hum. Behav. 629 (1996).

¹⁵ See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 28 (1983).

margins.¹⁶ For example, jurors have been shown to misunderstand the effects of stress on EW accuracy,¹⁷ and to give undue weight to the factor of witness confidence.¹⁸

III. COURTS IN OTHER STATES ARE RESPONDING TO THIS RESEARCH

Courts across the nation are incorporating the science of EW identifications into courtroom procedures. One such reform pertains to the test for admissibility into evidence of EW identifications. Some courts have jettisoned the traditional two-step balancing test for admissibility that is no longer supported by scientific research. *Henderson* at 919. New Jersey, for example, created a framework that would “allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness.” *Id.* at 919. Similarly, Oregon has ceased using a two-step process that admitted any identification that was not rooted in suggestive police procedures, determining that “there is no reason to hinder the analysis of EW reliability with purposeless distinctions between suggestiveness and other sources of unreliability.” *Lawson* at 688-689. Most recently, Massachusetts has undertaken an inquiry into

¹⁶ See *id.* at 24.

¹⁷ See Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 *Applied Cognitive Psychol.* 427 (2004).

¹⁸ See, e.g., Michael R. Leippe *et al.*, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 *Law & Hum Behav* 194, 194 (2009).

the ongoing validity of the traditional admissibility rubric, which permitted unreliable identifications into evidence.¹⁹ The Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification, appointed by the state's high court, determined that "estimator variables as well as system variables should be subject to pretrial judicial scrutiny in certain limited circumstances." The Massachusetts Supreme Judicial Court is considering the Study Group's recommendation to overhaul the ways in which identification evidence is collected and used in criminal cases.

Courts are also incorporating science in procedures relating to contested EW identifications that are admitted into evidence. First, there is a clear trend in states to permit the use of experts on the science of EW unreliability, at the discretion of the trial court, to assist the trier of fact in understanding the characteristics of EW identifications. Indeed, only two states, Kansas and Louisiana, now prohibit the admission of expert testimony in EW identification cases. Pennsylvania was the most recent state to turn away from the obsolete reasoning that barred such expert testimony (*e.g.*, that it spoke to the credibility of a witness, thus invading the province of the jury). *Commonwealth v. Walker*, __ A.2d __, 2014 Pa. LEXIS 1348 (Pa. May 28, 2014). Citing decisions in 44 states, including Florida (*McMullen v.*

¹⁹ Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendation to the Justices at 39-40 (2013), <http://www.mass.gov/courts/docs/sjcdocs/eyewitness-evidence-report-2013.pdf> (last visited July 18, 2014).

State, 714 So. 2d 368 (Fla. 1998)), the Pennsylvania Supreme Court embraced the “extensive research and studies” on factors that lead to the unreliability of EW identifications. Connecticut recently came to the same conclusion for the same reasons:

We now conclude that [the Connecticut precedents] are out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror.

State v. Guilbert, 49 A.3d 705 (Conn. 2012) (citing numerous examples of decisions throughout the nation where courts permitted the admission of expert testimony).

Second, the science on EW unreliability is reforming practices with respect to jury instructions, which have in the past consisted of a partial, often irrelevant list of the factors, premised on the erroneous assumption that evaluating such testimony is intuitive. Scientific data is making jury instructions into far more focused, precise tools for juries. In *Henderson*, the New Jersey Supreme Court pointed out that standard jury instructions, listing a number of potential factors, did not enable jurors to determine how to apply them in the case at hand. The court pointed to the urgent need to incorporate all generally accepted identification science in the drafting process for jury instructions. The Massachusetts Study Group followed New Jersey’s lead, while cautioning that even improved jury instructions “are not a substitute for expert testimony on eyewitness identification,” but provid-

ed guidance helpful to jurisdictions seeking to make their instructions helpful and accurate tools for jurors. The instructions proposed by the Massachusetts Study Group must be grounded in an explanation of “the central precepts of memory function,” including an explanation of “the system and estimator variables by their impact on the three stages of memory.” *Study Group* at 55. Jury instructions are to “accurately convey the science in language that jurors will understand and that will be fair to both parties,” *Id.* at 56.

Finally, the consensus of the scientific community on aspects of EW unreliability has led some courts to take “judicial notice” of the research findings. In *Lawson*, the Oregon Supreme Court held:

Based on our extensive review of the current scientific research and literature, we conclude that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence.

See also Study Group (recommending that courts take “judicial notice” of the modern psychological principles regarding EW memory set out in *Lawson*).

Florida has not kept pace with this research or its judicial application. Trial courts in Florida have interpreted two precedents from the last century, *Johnson* and *McMullen*, to exclude EW experts on grounds disproven by science. The “sound discretion” afforded trial courts by these precedents has permitted judges to

substitute their own views, whether accurate or not, for those of the scientific community. In 2006, the Florida Supreme Court had the opportunity in *Simmons v. State*, to revisit those precedents, and the majority at the time declined to do so. In a thoughtful concurrence, Justice Pariente, joined by two other justices, explained that the persistent use of these precedents is not supported by the developing science:

In the years that have passed since we stated our belief in 1983 that jurors can accurately assess eyewitness identifications without the aid of expert testimony as they do most other evidence, we have learned that quite the opposite is often true. For example, common sense would lead us to believe that greater certainty by an eyewitness in making an identification corresponds to greater accuracy. Yet research shows that a witness's degree of certainty correlates weakly, at best, with the accuracy of the identification.

Simmons v. State, 934 So. 2d 1100, 1124 (Fla. 2006). [citations omitted]. The concurring opinion points out the strong trend in federal courts to read broadly the standard that the expert testimony must be helpful to the jury. *Id.* at 1125-1126. Urging a narrow reading of the precedent, Justice Pariente stated, “It is now clear that such testimony can assist the jury in assessing guilt in certain cases, especially where, as some courts have recognized, the only inculpatory evidence is eyewitness testimony.” And last month, in her concurrence in *Peterson*, Justice Pariente pointed out that the science continued to develop after *Simmons* (“courts throughout the country have continued to take notice of the growing body of scientific research on EW identifications and have repeatedly recognized that expert testimony

on EW identification provides jurors with information that is beyond an average juror's general knowledge.")

IV. THE COURT ERRED AS A MATTER OF LAW IN EXCLUDING THE PROPOSED DEFENSE EXPERT

Florida statute Section 90.702, as in effect at the time of the decision below, set forth this "helpfulness" standard for deciding the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion. However, the opinion is admissible only if it can be applied to evidence at trial.

The statute requires the judge to decide two issues: whether the subject matter is appropriate for expert testimony and whether the proffered expert is qualified to render an opinion. These are two separate inquiries.

The hearing judge misapplied this standard, in a ruling that demonstrates a thorough misunderstanding of the expert's role generally, and the now-standard use of EW experts in most states and federal courts. In the Order Granting State's Motion to Exclude Eyewitness Expert Testimony (R 127-32), the hearing judge twisted the statutory standard to require that an expert opine on whether the factors affecting EW reliability "affected the identification made in this case, or did not affect the identification made in this case." (R 129). That is precisely what an expert is not supposed to do: substitute her assessment of the evidence for that of the

jury, and definitively opine whether a specific identification is, or is not, reliable. Instead, the “helpfulness” standard inquires whether an expert can aid the jury “in understanding the evidence or in determining a fact in issue.”

The inappropriate evidentiary hurdle set by the hearing judge would bar expert testimony on all EW topics, except perhaps the most technical (*e.g.*, whether an identification could be made from a given distance). Eyewitness research is probabilistic, shedding light on tendencies and human limitations. While the research is scientifically rigorous, it does not provide bright lines, or precisely forecast reliability in particular circumstances. No reputable EW expert would testify, as the hearing judge apparently expected, that the victim in this case misidentified the defendant, or even that “she believed witness unconscious transference was likely or unlikely to have played a role in the eyewitness’ identification made in this case.” (R 129-130). Deciding whether Geneva Nottage confused Walter Bailey with the shooter was the role of the jury, not the expert. This factual determination, while informed by the scientific research on unconscious transference, weapon focus, the impact of stress, and other relevant factors, depends ultimately on the jury’s assessment of Ms. Nottage’s credibility, in light of all the evidence. The jury, not the expert, needed to assess the credibility of her identification in light of the restrictions on her ability to observe and store an accurate image of the shooter’s face, as well as her failure to mention to police Walter Bailey’s gnarled

hand (T 2853-55), and initial statement to hospital personnel that she did not know the shooter (R 307).

Qualified experts are equipped, by their training and knowledge, to educate juries on their areas of expertise. This training and knowledge does not provide a scientific basis for applying these precepts to the facts in a specific case. Given that an expert has no special skills for applying research findings to specific facts, allowing the expert to proffer a case-specific opinion would create a danger of unfair prejudice to the party against whom the opinion was being introduced since the opinion comes cloaked in the mantle of scientific authority. Under the Florida statute, there is no expectation that an expert usurp the role of the jury, or cast a scientific mantle over the application of scientific precepts to specific facts.

The hearing judge made a second, equally important, error of law in excluding the EW expert's testimony. She ruled that the proposed expert's testimony was "barely relevant as applied to this case and will only serve to confuse the jury," for the reason analyzed above, and also that "her research and discussions are all related to cases where the perpetrator is unknown to the victim." (R 130). Specifically, the hearing judge noted that the proposed expert's studies involved laboratory experiments in which subjects were asked to identify "an unknown suspect," and that she had never worked with "real life misidentifications" (R 129). This analysis misapplies the standard.

First, there is no requirement under Section 90.702—or the *Daubert* standard generally—that an expert witness herself have performed the research about which she testifies. That would unduly restrict experts to narrow areas of testimony. Instead, the statute provides a broad basis for the expertise of an expert: “knowledge, skill, experience, training, or education.” None of these criteria contemplate that an expert can be qualified only if she has done original research in a relevant area. If this were true, no forensic expert, including, for example, latent fingerprint examiners, would be permitted to testify unless they themselves had conducted research on the scientific underpinnings of the field. The proffered expert testified at the evidentiary hearing that she has performed relevant research, and is familiar with others’ research. Under Section 90.702, which incorporates *Daubert*, judges must consider: (1) whether the theory or technique can, or has been, tested; (2) “whether the theory or technique has been subjected to peer review and publication”; (3) “the known or potential rate of error” for a “particular scientific technique”; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

The hearing judge should have ruled initially on whether the science passed muster. A separate, subsidiary question, to be evaluated independently, was whether the expert was sufficiently qualified. The statute is clear that any of these means of qualification are sufficient: knowledge, skill, experience, training, or ed-

ucation. Separately, the hearing judge improperly used a single assertion by Ms. Nottage to rule out a broad swathe of expert testimony on EW factors generally. The statement in question (which contradicted the victim's earliest statement to hospital staff that she did not recognize the person who shot her) was that "[t]he first one, I kind of recognized as somebody who usually comes around to buy drugs." (T 3182). In other words, when Ms. Nottage was watching TV and two men entered the apartment, she "kind of recognized" the first one as someone who had been to the apartment before. Her testimony was not that she definitely recognized him, or that she and this person had a degree of prior familiarity that would preclude the possibility of a mistaken identification. At trial she testified that she had seen Walter Bailey "a couple of times" at her boyfriend's apartment (T 3090), and had never spoken to him. (T 3190). She admitted that she did not get a good look at "the first man." (T 3191). With this record, the hearing judge had no factual basis for finding that the perpetrator was "known to the victim," (R130) and that EW evidence on the misidentification of strangers was irrelevant.

Putting aside the lack of a factual basis, the hearing judge's exclusive focus on Ms. Nottage's fuzzy recollection of the "first man" served to exclude expert testimony on subject matters that pertain equally to cases involving either a possibly familiar assailant and an unfamiliar one. Witnesses can be just plain wrong about whether they recognize the perpetrator, for a wide variety of reasons. Testimony

on the possible effect of Ms. Nottage’s limited visibility, severe emotional stress, and injury during a brief, violent encounter factors would have aided the jury.

Indeed, one area of proffered testimony, “unconscious transference,” is uniquely relevant in the case of a confusing, traumatic encounter with a participant who is “kind of” familiar. Between the time when a memory of a face is encoded and retrieved, an EW may experience unconscious transference, substituting a familiar face with that of the perpetrator. Courts have accepted this phenomenon as based in science. For example, the Oregon Supreme Court, in *Lawson*, stated:

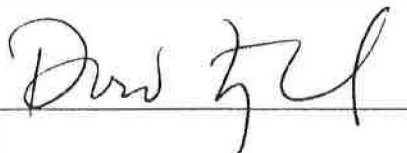
Studies have found that witnesses who, prior to an identification procedure, have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory. . . . The phenomenon is most problematic when a witness is vaguely familiar with a suspect but unconscious of why that is so. The result, often, is that the witness mistakenly attributes that familiarity to having previously observed the suspect at the crime scene.

Lawson at 704. Excluding such testimony on the ground that the “first man” was “known” to Ms. Nottage was an abuse of discretion.

CONCLUSION

For the reasons set forth above, Amicus urges this court to reverse the decision below excluding the expert.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point, and otherwise meets the requirements of the rule.

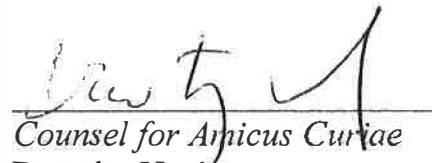

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief was served electronically on this 21st day of July 2014, to the following persons:

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