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Supreme Court lets light shine on flaws with eyewitness testimony

A decade ago in his perceptive book "Courtroom 302," Steve Bogira noted that most of the judges at 26th and California took a "dim view of eyewitness experts."

Bogira quotes one judge's reaction to the work of Elizabeth Loftus, a psychologist generally considered the nation's most prominent expert on the problems in evaluating eyewitness testimony: "She can write all the books she wants. I don't have much faith in these self-styled experts."

I thought of this while reading Richard A. Posner's critique of judges in his new book "Divergent Paths: The Academy and the Judiciary." In faulting judges for an overall lack of curiosity, he asserts that the judge's most important role is a creative one, that is, "fitting the law to novel activities, transactions, technologies and institutions."

A judge who lacks curiosity about the world in general "will not do a good job of keeping law up to date and in tune with a society undergoing dizzying change."

Does he have an example? Absolutely. Posner bemoans the general ignorance of judges concerning "phenomena such as the reliability of eyewitness testimony, the subject of a vast and persuasive debunking literature unknown to many judges."

That there is a problem with eyewitness identifications is beyond dispute. Of the first 325 exonerations caused by post-conviction DNA evidence, 70 percent of the cases included mistaken eyewitness identifications. Equally troubling, in half of those cases the eyewitness testimony was not corroborated by confessions, forensic evidence or informants.

In fact, it has been estimated that about 7,500 of every 1.5 million annual convictions in the United States may be based on misidentifications by eyewitnesses.

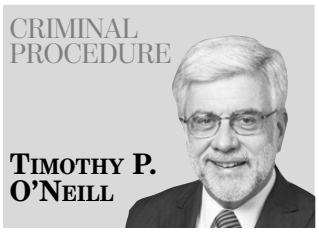
This is why the Illinois Supreme Court's recent decision in *People v. Lerma* is so welcome.

The trial judge in the case had denied a defense request to call a psychologist as an expert witness on the subject of the fallibility of eyewitness identifications. In a unanimous decision, the court not only held that the judge's ruling was wrong and merited a new trial, but it went on to hold more generally that the research concerning the reliability of eyewitness testimony is now "well settled, well supported and in appropriate cases a perfectly proper subject for expert testimony." *People v. Lerma*, 2016 IL 118496 (Jan. 22, 2016).

Eduardo Lerma was tried for first-degree murder. Jason Gill and Lydia Clark were sitting on the front steps of Gill's house late at night. A gunman approached and opened fire. Gill was shot several times. After Clark pulled him into the house, Gill identified the shooter before he died.

The state's case against Lerma relied on identifications made by the two eyewitnesses. This evidence consisted of an excited utterance from the deceased victim as well as an in-court identification from Clark. The defense asked to call Dr. Geoffrey Loftus as an expert on problems of eyewitness identifications in general. (Interestingly, Loftus is the ex-husband of Elizabeth Loftus, mentioned above.) The trial judge refused to allow it.

The Supreme Court began by noting that it had not considered this issue of eyewitness experts since 1990. At that time, the court had expressed some skepticism about the value of such testimony. But *Lerma* notes a "dramatic shift in the legal landscape" during the last few decades. The use of such testimony is now "widely accepted" by both state and federal courts.



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In light of this clear legal trend, the court held that Loftus' testimony was "both relevant and appropriate." It first noted that the two identifications were the only evidence of defendant's guilt. There was no confession and no physical evidence. The state's case was based "100 percent on the reliability of its eyewitness identifications."

Second, a number of factors that Loftus said could potentially contribute to the unreliability of the identifications were present in this case: the stress of the event itself; the use and presence of a weapon; the wearing by the gunman of a partial disguise; exposure to post-event information; nighttime viewing; and cross-racial identification.

Third, Loftus made it clear that his testimony would not include any judgments about whether a particular witness was or was not mistaken. Rather, the purpose of his testimony would be to tell the jury why they needed to evaluate eyewitness testimony with appropriate caution.

Fourth, Loftus said that his testimony would confront the fact that both witnesses may have been previously acquainted with Lerma. Loftus was prepared to show research indicating how, under certain circumstances, a prior acquaintance could actually work against an accurate identification.

One reason would be that in trying to reconstruct a stressful situation that occurs in the dark, the memory of the actual assailant could be replaced with a stronger memory of a person with whom you are acquainted.

On that last point, the court conceded that such an idea may be unfamiliar to the average person and even counterintuitive. And this is precisely the reason it is so important to allow the jury to hear expert testimony on this issue.

The Illinois Supreme Court deserves credit for unanimously holding that advances in research in a nonlegal area such as psychology can have an effect on how trials are conducted. *Lerma* perceptively notes that "eyewitness misidentification is now the single greatest source of wrongful convictions in the Unites States and responsible for more wrongful convictions than all other causes combined" (citing *State v. Dubose*, 699 N.W.2d 582, 591-92 (Wis. 2005) (collecting relevant studies)).

Lerma is a much-needed step forward toward the goal of fairer criminal trials in Illinois.

One final point deserves mention. In the course of denying defendant's motion to call the eyewitness expert, the trial judge derisively described it as the current "motion du jour." I was glad to see the Supreme Court take the judge to task for not recognizing that at the time he ruled there was more than a quarter-century of case law and psychological research behind the defense motion.

Posner's new book would describe the trial judge as exhibiting what he calls "rearview mirror syndrome" the knee-jerk reaction of some judges to mindlessly reject any idea that has not been around for a century. *Lerma* reminds us that law must be a living organism, not a fossilized museum relic.

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