

Testimony on Behalf of the National District Attorneys' Association

December 2, 2013

Presented by Kristine Hamann

Thank you for inviting the National District Attorneys Association to testify before this important committee. The NDAA is the oldest and largest organization representing over 39,000 district attorneys, State's attorneys, Commonwealth attorneys, and county and city prosecutors with the responsibility for prosecuting criminal violations in all 50 states in America.

I am a career prosecutor from the Manhattan District Attorney's office in New York City and for the past four years I have been the Chair of the Best Practices Committee for the New York State District Attorneys Association. Recognizing the importance of accurate eyewitness identification, New York prosecutors and police developed standardized identification procedures that have been implemented by police around New York State.

As prosecutors we have a dual obligation – both to protect public safety and to respect and uphold the rights of the accused. To meet this obligation, we need reliable evidence. Thus, we are hopeful that this committee will carefully scrutinize the research, fully listen to both sides of the debate, and recommend future studies that are relevant, rigorous and free of bias.

We all agree that human beings are capable of remembering and recognizing others. Eyewitness identification is powerful evidence. As prosecutors we meet real witnesses and victims every day; some have better memories than others; and all have variations in their ability to make an identification. The experiences we have of dealing with real data – the actual eyewitnesses who have experienced and observed a real crime – should be given strong consideration.

Although a valid conviction can be based on the testimony of a single eyewitness, provided the witness had a sufficient opportunity to observe the perpetrator, in most cases today, there is more. Technological advances, such as DNA, GPS, smart phones and surveillance cameras, give us reliable evidence that can corroborate, as well as refute, the identification made by a particular victim or witness.

Have a few eyewitnesses been wrong in the past? Yes. This is of grave concern to prosecutors. It is our obligation to make sure that we do not rest a case on

faulty eyewitness testimony. But the mistakes of the past should not drive us to make ill-conceived judgments about the accuracy and reliability of eyewitness identification evidence for the future.

For the safety of our communities, we must be vigilant about preserving accurate identifications that hold dangerous people accountable. The scale should not be tipped too far so that we end up overly suspicious of reliable and accurate witness identifications. If we discount a reliable identification or if we make the procedures so difficult that accurate identifications are suppressed, a guilty party will go free and innocent victims may be harmed. What do we say to the family of a homicide victim when the perpetrator was someone we could have stopped earlier? Preventing harm to an innocent victim is just as important as the desire to reduce wrongful convictions.

I am not a social scientist, but as a prosecutor I know that my job involves fact skepticism. We cannot take evidence or statements, including from social science, at face value – to do so would abrogate our responsibility to base our cases on valid and reliable evidence. We must probe and question to make sure that the social science research is empirically sound, relevant and unbiased.

We must become familiar with the studies and not just the alleged conclusions. We must ask the same questions of the social scientists as we do of all of our witnesses. We must hold the social sciences to the same high standards that are imposed on the “hard sciences” – as the National Academy of Sciences did in its earlier report on Forensic Science. Whether the prosecution or the defense is presenting the evidence, it must be examined with the same scrutiny and rigor.

Given the restrictions of time, I am going to provide a list of issues that I encourage you to consider as you are reviewing the social science of eyewitness identification:

- First, a very fundamental question:
 - Are all people the same? Does every witness remember in the same way? Does every witness recount that memory in the same way? We know the answer to this is “no.”
 - Given that there are differences between witnesses, does research which averages out the results of many people help us to evaluate an individual witness? What about a meta-analysis that averages the averages? Police and prosecutors must judge the credibility of a witness on a case-by-case basis. Just because some people have

- difficulty with cross-racial identifications, does not mean that a witness in a particular cross-racial case is inaccurate.
- Whether by expert testimony or by jury instructions, how is a jury to apply the generalized conclusions from the studies to a witness in a real case? Generalized claims about human memory at a trial may make jurors overly suspicious of the testifying eyewitness, without any way to determine if that claim applies to the witness before them.
 - Secondly, what is the methodology of the study?
 - Does it replicate the circumstances in the field? Does it test volunteers watching a video or actual witnesses who have experienced and observed a crime? Do the researchers ask the same questions in the lab as police and prosecutors ask in the field? We know that there are significant differences between an artificial scenario and a real crime.
 - What statistical model is used? You heard from Dr. Wixted regarding the ROC analysis – should that statistical model be used in eyewitness memory research? It certainly should be considered.
 - Has the study undergone a robust peer review? If so, are the peers old friends and colleagues, or are they genuinely independent peer reviewers? We must strive for a review that is demanding and in-depth.
 - Have independent researchers replicated the studies? It has been demonstrated, even in the hard sciences, that a noteworthy published finding sometimes cannot be replicated at a later date.
 - Do the experiments examine factors that are affected by too many variables that can interfere with a clear result? Crimes are highly complex events that throw together a myriad of factors in a kaleidoscope of permutations. How do we determine how they all interact? Assessing how these factors apply to a specific case or an individual witness is extremely challenging.
 - Is the research transparent so all can see the data – whether the research is published or not? Transparency is critical for science. If only the researcher and his friends can see the data, then an objective assessment is unlikely to be achieved.
 - Thirdly, is there a bias?
 - Cognitive bias affects all people.
 - Is the researcher's livelihood or reputation dependent on certain research findings? Losing income or professional standing are

- powerful motivators for the researcher to intentionally or unintentionally reach a pre-determined result.
- Do some studies get preference for publication because of their point of view, and are other studies rejected because they challenge that point of view? This is one explanation of why there are more studies on one side than the other.
 - Does the researcher have tunnel vision - so that the outcome is what the researcher is hoping for? Is the testing within an experiment truly double blind not only to a suspect's identity but also to the researcher's hypothesis? We are aware of meta-analyses where studies inconsistent with the researcher's point of view have been excluded. This certainly will skew the results.
 - Fourth, do we have the answers to how human memory works because memory studies have been on going for decades?
 - The answer to that is "no." Our understanding of human memory and human thought processes is still in its infancy.
 - Can we simply count the number of studies that have one point of view and say that provides an answer? No, because this is not a question of quantity, but of relevance and quality.
 - Should we rely on what the studies have reported to date because it is the best we have for now? We think not. If studies routinely come to different conclusions, or are biased, or cannot be replicated, or do not apply to real witnesses, then that would be an unwise choice.

I encourage you to ask all of these questions and to strive for answers before you reach your conclusions. We have submitted some articles in support of our testimony and we would like to recommend additional speakers for your consideration.

In New York, prosecutors and police developed standardized identification procedures based on an analysis of the research, consultation with social scientists and our experience with witnesses. The thrust of the procedures is to enhance law enforcement's ability to create a fair and neutral environment in which a witness can make an accurate identification of a perpetrator. This is done in three phases: first, preparing for the identification procedure, second, conducting the procedure itself, and lastly, dealing with next steps after the identification has been made.

Briefly, the New York State Identification Procedures include these components:

- The composition of the array must be fair so that the suspect does not stand out from the fillers.
- Witnesses must be given instructions including: “The perpetrator may or may not be in the array,” and “Do not look to me for guidance.”
- When speaking with the witness, the officers must remain neutral and cannot comment on the identification before, during and after the identification procedure.
- Identification procedures are conducted simultaneously rather than sequentially – for the reasons outlined by some of the presenters here.
- Blinded procedures are required in all instances, whether the administrator is double blind or not. We know that even with the best of intentions it can be difficult to conduct a double blind procedure, either because of manpower issues, or because there are a myriad of ways that the administrator can inadvertently discover the identify of the suspect.
- If the witness’ identification is vague, the officer must ask: “What do you mean by that?” There is no research on which confidence statements are best to use. We opted for this open-ended question and specifically chose not to use the question “How sure are you?” Our concern was that depending on how the question is asked, it could suggest an answer.
- Finally, a witness cannot be told of the results of the identification until it after is recorded.

The benefit of our voluntary procedures in New York is that they can and have changed and improved as we learn more.

In sum, I ask that you keep in mind that the scales of justice must be balanced, so the concern for preventing wrongful convictions does not blind us to the need to promote justice for the victims of today’s crimes and to prevent future crimes by persons who may be set free because juries were misinformed about the accuracy and reliability of eyewitness identifications.

Thank you for the opportunity to speak.