Crafting Model Jury Instructions for Evaluating Eyewitness Testimony

By Jeannine Turgeon, Elizabeth Francis and Elizabeth Loftus

In courtrooms all around the nation jurors face the extremely difficult task of evaluating the credibility of eyewitness testimony. Lawyers, judges, plaintiffs, defendants, victims and social scientists are confronted daily with concerns about how effectively jurors and other fact-finders perform their duty to evaluate eyewitness testimony properly and what changes in practice will improve the fact-finding process. Recently our Pennsylvania Supreme Court acknowledged jurors' and other laypersons' commonly held misconceptions regarding the fallibility of eyewitness testimony and held that admitting expert testimony may assist jurors and trial courts. (*Com. v. Walker*, 2014 WL 2208139, ___ A.3d ___ (2014).)

Create a Connection with Your Jury

For more than 40 years *Pennsylvania Suggested Standard Civil Jury Instruction*s has remained unmatched as the authoritative reference for judges and counsel in civil cases.

Here's what the drafters are saying:
- Assures that the law is correct, the language is clear and there is substantial uniformity whether the case is tried in Franklin, Tioga or Westmoreland County.
- Introduces updates to the instructions and notes reflecting changes or expansions of legal principles.
- Incorporates plain English to make the law more understandable to citizen jurors.

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This article addresses the additional importance of accurate, precise and understandable jury instructions for evaluating eyewitness testimony and their appropriate expression in plain language. The model jury instructions discussed in this article incorporate the results of current scientific research on juror behavior and crafting understandable jury instructions and current scientific research recognized by our Supreme Court concerning eyewitness memory, judgment and perception.

While eyewitness testimony is often persuasive evidence for a jury to consider, more than 30 years of extensive research has concluded that eyewitness identification is often unreliable. (*Walker*, Id. and articles cited therein; Innocence Project 2013a.) In the United States, mistaken or faulty eyewitness identifications have contributed to approximately 75 percent of the first 250 convictions overturned due to DNA evidence, making it the leading cause of wrongful convictions. (*Walker* at ___; Bornstein and Hamm 2012; Garrett 2011, 48; Innocence Project 2013b.) Therefore, wrongful convictions due to erroneous eyewitness identification are a pressing and manifest concern for the criminal legal system and society. (*Walker* at ___.) Eyewitness testimony also affects outcomes in civil trials.

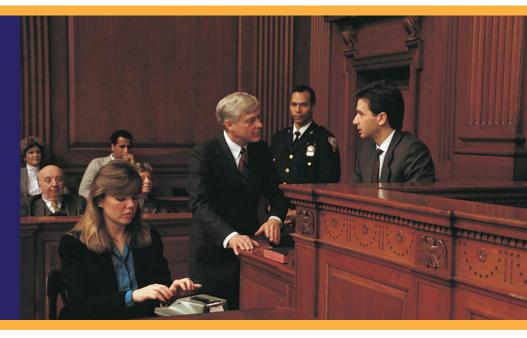Our Supreme Court in *Walker*, quoting U.S. Supreme Court Justice William J.

Brennan Jr. citing Dr. Elizabeth Loftus (one of the authors of this article), wrote: "As Justice William Brennan noted, 'There is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant and says, "That's the one!" ' … (quoting Elizabeth F. Loftus, Eyewitness Testimony (1979)) … Because eyewitnesses can offer inaccurate, but honestly held, recollections in their attempt to identify the perpetrator of a crime, eyewitness identifications are widely considered to be one of the least reliable forms of evidence." (*Walker*, Id. at ___.)

Psychological scientists' research has revealed that most jurors possess misconceptions regarding the factors used in evaluating eyewitness testimony and how these factors affect the accuracy of eyewitness testimony. (Bornstein and Hamm 2012; Schmechel et al. 2006.) In 2006, Schmechel, O'Toole, Easterly and Loftus showed that jurors' commonly held beliefs in evaluating these factors are unsupported by scientific literature and, in some cases, are even contradicted by it. For example, a significant number of survey respondents believed that a cross-racial identification (i.e., identifying a stranger of a different race) would be just as reliable or even more reliable than same-race identification. (Schmechel et al. 2006.) A more recent survey conducted by Simon and Chabris (2011) documented additional misconceptions jurors possess regarding memory.

Today in Pennsylvania courts, as in most state courts across the country, a trial judge may permit testimony by a nationally recognized expert to explain to a jury how the human mind works and explain "scientifically proven" findings that have received general acceptance in the scientific and judicial communities relating to eyewitness identification, such as:

1. the phenomenon of "weapons focus";

2. the reduced reliability of identification in cross-racial identification cases;

3. the significantly decreased accuracy in high stress/traumatic events;

4. increased risk of mistaken identification when police investigators do not warn a witness prior to viewing a photo array or line-up that the perpetrator may or may not be in the display; and

5. the lack of a strong correlation between witness statements of confidence and witness accuracy. (*Walker* at _____.)

The Pennsylvania Supreme Court Suggested Standard Jury Instructions, however, list none of these factors.

Both our civil and criminal suggested jury instructions on "credibility" instruct jurors that one of the factors to consider in evaluating witness credibility is how certain the witnesses are about their testimony. However, various studies establish that any correlation between witness confidence in identification and witness accuracy is minimal. (*Walker*, supra at ___. See cases and studies cited therein.) Accordingly, expert testimony on the absence of confidence-accuracy correlation has been accepted in numerous jurisdictions. In Pennsylvania we therefore had not only not permitted expert testimony on how to evaluate eyewitness testimony, we have been instructing and perhaps continue to instruct jurors improperly on this difficult task in both criminal and civil cases.

In 2011, the New Jersey Supreme Court, demonstrating a sophisticated appreciation of the problems posed by eyewitness identification and jury instructions and following their reversal of a verdict in a case involving eyewitness identification, directed its Committee on Model Criminal Jury Charges to draft revised jury instructions based upon generally accepted current scientific research and specifying factors that affect the reliability of eyewitness identification. (*New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011).) It is generally well accepted that carefully crafted jury instructions dealing specifically with witness-identification testimony also have the potential to help improve juror decision-making. (Bornstein and Hamm 2012; Severance and Loftus 1982.) In 2012, the New Jersey court adopted these enhanced jury instructions. The completed report and recommended jury instructions can be found at www.judiciary.state.nj.us/criminal/ModelCrim JuryChargeCommHENDERSON REPORT.pdf. These New Jersey jury

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instructions, scientifically based and far more detailed than anything that exists elsewhere in the United States, are expected to be influential as other courts revise their eyewitness-identification instructions.

These instructions challenged Dauphin County Judge Jeannine Turgeon, Dr. Elizabeth Francis, an expert in "plain English," and Dr. Elizabeth Loftus, an internationally recognized expert on eyewitness memory, to devise a practical set of model eyewitness-identification instructions that are scientifically accurate, concise and linguistically accessible to lay jurors. The challenge was in applying scientifically proven methods of improving juror comprehension — "The Plain English Solution" — to the 26-page, 8,000-word New Jersey jury instructions.

It is axiomatic that a judge's jury instructions should be accurate, impartial and understandable. (Turgeon and Francis 2009.) Difficult or incomprehensible instructions obviously interfere with a jury's ability to render a just verdict. (Turgeon and Francis 2009.) "Plain English seeks to make legal terms understandable to the layperson by removing legalese, which is characterized by technical vocabulary; archaic, formal and unusual words; impersonal constructions; overuse of nominalizations and passives; overuse of modal verbs; multiple negations; long and complex sentences; and poor organization." (Tiersma 1999,

203-210; Tiersma 2005-2006.) Every study done on instructions rewritten in plain English has found a positive effect on jury comprehension. (Cronan 2002, 1237.) It is an effort supported by the American Bar Association and the National Center for State Courts in promoting jury-trial innovations and evidence-based practices. The effort to write plain English instructions is a challenging task. All who have attempted this difficult task soon realize that retaining legal accuracy and sufficiency, yet achieving clarity and understandability, is more difficult than one would think. (Turgeon and Francis 2009.) Entire law review articles have been devoted to the "simple" task of writing a jury instruction on a single issue.

Utilizing the latest scientific research on eyewitness identification, memory and psycholinguistic approaches to comprehensible and scientifically proven methods for crafting understandable jury instructions, we crafted our eight-page Model Criminal Jury Instructions for Eyewitness Testimony.

Conclusion
At this stage we can be reasonably certain that failing to set forth the scientifically accepted factors for evaluating eyewitness testimony, compounded by providing jurors perhaps incorrect, unclear instructions, cannot and do not advance accurate fact-finding by lay jurors. At the very least, the effort to draft correct instructions in plain language narrows the field of discourse and

allows the possibility that jurors will be able to apply the scientifically accurate and understandable instructions we propose to their difficult fact-finding responsibilities in both criminal and civil jury trials. We humbly suggest that these concise, plain-language, scientifically based eyewitness-identification instructions have the capacity to reduce the number of wrongful convictions and enhance the decision-making process. ⚖

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