

## **Lessons from DNA Evidence for Evaluating non-DNA Proof**

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(The following point I wrote for an amicus brief will cover the essence of the points I will be making in my presentation)

### **POINT I**

THE PROCEDURES BY WHICH MR. LEGRAND WAS IDENTIFIED, AND THE COMPLETE LACK OF ANY OTHER EVIDENCE AGAINST HIM, CREATED AN INTOLERABLY HIGH RISK OF CONVICTING A FACTUALLY INNOCENT MAN.

The exoneration by DNA analysis of a striking number of persons convicted of serious crimes, primarily rapes and murders, has brought the problem of factually wrongful convictions to the forefront of the American consciousness. In addition, the most recent data establish that these exonerations are not merely isolated instances. A recent analysis proves virtually beyond cavil that the factual wrongful conviction rate for capital rape/murders in the 1980's was *at least* 3.3%, and there is little reason to believe that this wrongful conviction rate does not hold for capital crimes in general, and for the related universe of brutal stranger murders and stranger rapes, capital or not. See D. Michael Risinger, *Innocents Convicted: An Empirically Justified*

*Wrongful Conviction Rate*, 97 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 761

(2007). This category, of course, would include Mr. LeGrand's case.

The Amicus is concerned both with freeing those who are factually innocent of the crimes for which they have been convicted, and with fostering legal doctrines that will reduce the likelihood of convicting the innocent without reducing the conviction of the guilty to an appreciable extent. After a conviction has been rendered, the factually innocent fall into two important categories: those for whom strong affirmative evidence of factual innocence, such as DNA exclusion in rape cases, is later discovered; and those for whom no new affirmative evidence of factual innocence is available, but who were convicted on such weak evidence that they are no more likely to be guilty of the crime for which they were convicted than are other persons who share the same characteristics that led to their conviction. We may call the first group instances of affirmatively proved factual innocence. We may call the second group instances of profoundly unsafe verdicts. Nico LeGrand falls into the latter category. While it is true that no one can affirmatively show that Nico LeGrand did not stab the victim, Joaquin Liriano, on Saturday morning, June 15, 1991, all that the evidence which was produced at Mr. LeGrand's trial proves is that Mr. LeGrand is a member of a group, of unknown but presumably numerous extent, of persons who share the same general appearance and resemblance to a composite sketch made near the time of the crime, nearly six years before any eyewitness identifications. By

excluding the expert testimony of Dr. Roy Malpass on various weaknesses of eyewitness identification, the trial court deprived Mr. LeGrand of reliable evidence tending to show this.

It has long been recognized that stranger-on-stranger eyewitness identifications are a problematical tool in the quest to convict the guilty, and a source of error of uncomfortably large dimensions in the wrongful conviction of the innocent. As Justice Brennan said in *United States v. Wade*, “The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: ‘What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.’” *Wade*, 388 U.S. 218, 228, 18 L. Ed. 2d 1149, 1154, 87 S. Ct. 1926, 1933 (1967) (footnotes omitted). As the Appellate Division in New York said recently in *In Re Duane F.*, 309 A.D.2d 265, 764 N.Y.S.2d 434, 439 (1st Dep’t 2003):

“Because of its persuasive power and inherent unreliability, eyewitness identification is always fraught with peril” [quoting *People v. Daniels*, 88 A.D.2d 392, 399, 453 N.Y.S.2d 699, 703 (1982)]; *People v. Cassidy*, 160 A.D. 651, 652, 146 N.Y.S. 15, 31 N.Y. Cr. 82 (1914), quoting 3 Rice, EVIDENCE §§ 300, 304 (“ ‘books are full of instances where inaccurate evidence as to identity has consigned unfortunate beings to the prison and the gibbet’ ”). Thus, “[e]fforts to control or, at least, to somehow reduce the built-in potential for error in eyewitness cases have long been the concern of the best minds of both Bench and Bar” (*People v Daniels*, 88 A.D.2d at 401, 453 N.Y.S.2d 699).

Id. at 272–73, 764 N.Y.S.2d at 439. Unfortunately, it is clear that the best minds of the Bench and Bar have yet to arrive at a satisfactory solution.

What makes this clear is the stark view through the window opened on the world of wrongful conviction of the factually innocent by the DNA exonerations. Since 1989, 174 persons have been exonerated by DNA exclusion. Of that group, more than three quarters involved inaccurate eyewitness identifications. Even more importantly for the LeGrand case, in 38 of those cases there were multiple erroneous eyewitness identifications, and 36 of those multiple eyewitness cases were cases where eyewitness identification was virtually the sole evidence that the defendant was the perpetrator. In 18 cases, moreover, initial suspicion fell on the person later wrongfully convicted because of an asserted resemblance to a police sketch.

Clearly, multiple identifying witnesses are no good guarantee of accuracy, and to count multiple identifications as mutually corroborating in any strong sense derives from a tragically flawed perception. Yet that perception continues to drive certain proof doctrines in many jurisdictions. For instance, in New York there is a special jury instruction for single eyewitness identification cases to draw jurors' attention to the problems inherent in a single-eyewitness case. See CTJNY § 4:49 (2006). Yet it is certain identifiable types of multiple eyewitness cases where enhanced caution is most required.

Perhaps some examples would show how far the problem can extend:

The most famous miscarriage of justice of the modern era in England was the case of Adolph Beck, who spent many years in prison after having been misidentified in two separate trials (1895 and again in 1904) by sixteen separate witnesses as the man who had defrauded each one, using a particular distinctive story. Even though all of the witnesses had spent a significant amount of time with the culprit (from one to two hours or so), all were finally shown to have been mistaken after the apprehension of the actual perpetrator. This was one of the main cases that led to the creation of the British Court of Criminal Appeals and laid the foundation for the British “unsafe verdict” standard of review, to which we will return. See generally, E. R. Watson, *THE TRIAL OF ADOLPH BECK*, Notable British Trials Series (1924); Richard Nobles & David Schiff, *UNDERSTANDING MISCARRIAGES OF JUSTICE* 48-55 (2000).

Or consider the case of the Reverend Bernard Pagano, a priest identified by multiple witnesses in Delaware in 1979 as the perpetrator of a series of holdups dubbed the “Gentleman Bandit.” The actual perpetrator turned out to be a Pagano look-alike named Ronald W. Clouser. Pagano was originally made a suspect because the police were told that he resembled a composite sketch of the “Gentleman Bandit.” See Obituary, New York Times, Aug. 13, 2006, Sec. 1, p. 30, col. 1. We will examine this “investigative method” below also.

Finally, consider the case of Kirk Bloodsworth, who in 1984 became a suspect in the brutal rape-murder of nine-year-old Dawn Hamilton, solely on the basis of an anonymous phone call reporting his resemblance to a composite sketch done by various witnesses to the events leading up to the murder. He was then identified at lineups by five people, and spent years on death row. He was finally exonerated by DNA testing on semen recovered from the murder scene. The same DNA identified the real murderer, Kimberly Shay Ruffner, who pled guilty to the murder in 2004. See Tim Runkin, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 75–77, 98–101, 275–282 (2004). This is but one of the most chilling examples of a factually innocent person, completely unconnected to the crime (and in some cases any crime at all, for that matter), being convicted and sentenced on the basis of multiple eyewitness identifications.<sup>1</sup>

The law recognizes the weakness of multiple identification in some circumstances, but it does remarkably little about it in actual practice. For instance, witnesses to a crime are not supposed to confer over mug shots in deciding whether a particular mug shot looks like the perpetrator, and multiple identifications arrived at in this way are recognized as the potential products of mutual suggestion requiring an independent source determination. It has long been recognized in New York that when

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<sup>1</sup> **The conviction of innocents by multiple eyewitness identifications has also been known to happen in New York. See, e.g., Rojas v. Iannatto, 2003 U.S. Dist. LEXIS 938 (S.D.N.Y. 2003).**

groups of witnesses view photographs together, “there is a substantial risk that one of the viewers could influence the identification made by the others,” rendering the in-court identifications the result of impermissible suggestion. People v. Jones, 108 A.D.2d 824, 485 N.Y.S.2d 561 (2d Dep't 1985); see also People v. Gaddy, 98 A.D.2d 729, 730, 469 N.Y.S.2d 143, 144 (2d Dep't 1983); People v. Fernandez, 82 A.D.2d 922, 923, 440 N.Y.S.2d 677, 679 (2d Dep't 1981). However, it is not at all clear that independent source hearings manage to correct the problems of multiple intersuggestive identifications except in the most extreme cases. See generally Stephan A. Saltzburg & Daniel J. Capra, AMERICAN CRIMINAL PROCEDURE, CASES AND COMMENTARY 769-771 (6th ed. 2000). This should be kept in mind when evaluating the effects of creating a jointly derived and agreed-upon sketch of the perpetrator on later identifications.

The law of New York also already recognizes two important domains of eyewitness identifications: asserted identifications of people by acquaintances, and asserted identifications of people by strangers. For instance, acquaintance identifications can be handled through confirmatory showups, but stranger identifications generally require lineups, at least outside the immediate post-crime investigatory setting. See People v. Rodriguez, 79 N.Y.2d 445, 593 N.E.2d 268, 583 N.Y.S.2d 814(1992).

Each domain presents its own set of problems, and there are of course borderline situations. It is indisputable that in the LeGrand case we are dealing with the problems of stranger-on-stranger identification.

Even though under some circumstances you might mistake a person seen fleetingly for your sister, there seems to be little doubt that, in most circumstances, stranger identifications carry with them a greater risk of inaccuracy than do acquaintance identifications. People are usually pretty good (though not necessarily perfect) at internalizing the particularizing aspects of appearance for their acquaintances, especially their intimate acquaintances. They seem less good at doing so for persons seen in short encounters. Another way of saying this is that when we deal with our friends and relations, few people will be confusably similar; when we deal with casual acquaintances, somewhat more people will be confusably similar, and when we deal with strangers encountered once or twice for short periods, still more people will be confusably similar. In addition, the reliable diagnosticity of our memories of friends and relations' faces is likely to be more stable over time than will be the case with strangers encountered once.

None of this is particularly counterintuitive or controversial. It has, however, significant implications for how the law should treat claimed exercises in eyewitness identification, implications which have up to now been generally overlooked.

Interestingly, and perhaps ironically, one of the few who have not overlooked those implications is the State's expert witness at trial, Dr. Ebbesen.

In November of 2000 Dr. Ebbesen wrote as follows:

*Lineup diagnosticity* is one measure that some (e.g. Wells & Lindsay, 1980) have suggested should be used to assess the ability of witnesses to indicate accurately who the culprit is when shown a lineup. This measure compares the rate at which subjects falsely identify "innocent" suspects in target absent lineups to the rate of correct choices of the "guilty" target in target present lineups (citations omitted). The higher this ratio, the more diagnostic the lineup is thought to be. Of course, this measure can only be computed in experimental studies (with a known culprit) that use single event/culprit, multiple witness paradigms in which different subjects are shown the same target present or target absent lineup. This is because lineup diagnosticity would be expected to be different for different culprits, foils and suspects.

As Navon (1990) correctly noted, given the decision problem facing police, prosecutors and jurors, lineup diagnosticity is not the measure of diagnosticity on which the real world should focus its attention. This is because lineup diagnosticity depends so much on how the experimenter selects the innocent suspect for the target absent lineup as well as the match between what the target looked like during the event and what he or she looked like in the lineup (photo). It seems obvious that the more the innocent suspect looks like the culprit, the higher the false alarm rate will be (assuming that the witnesses remember something about the culprit's looks).

Ebbe B. Ebbesen, *Some Thoughts About Generalizing the Role that Confidence Plays in the Accuracy of Eyewitness Memory* 11, Nov. 3, 2000 (App. 1) (emphasis added).

Dr. Ebbesen made these observations as part of his evaluation of the weaknesses of some current views concerning the low diagnosticity of a witness's confidence in an identification. A little later he summarizes his position thus: "The problem for the real world decision-maker is estimating the number of people who match the evidence (e.g. suspect seen driving a similar car, gun found in suspect's home, etc) and who

look enough like the culprit that a witness would be willing to say “that’s him.” *Id.* at 18-19. (emphasis added)... *Id.* at 13-14.

Dr. Ebbesen has here assumed that the suspect who will be put in a lineup or photo spread will have been selected on independent evidence tending to show a likelihood of guilt. That is a main factor that constrains the universe of confusable faces which might be presented for identification. But what if we simply trawl through hundreds or thousands of faces looking for a face that meets the witness’s resemblance criteria? As Dr. Ebbesen appears to suggest, at least by implication, our confidence in any resulting selection of that person as being the culprit should plummet. *And that is exactly what happened in the case of Nico LeGrand.*

It appears to be the inevitable fate of every generation to follow various investigatory procedures that later generations will condemn. Our failure to recognize the trawl search problem in its various manifestations in the criminal investigation setting is likely to be one of those errors.

The problem of the trawl search has been understood to a degree in the sciences and in general statistical theory for a while, where it has been called variously “data dredging,” or “data trawling.” It was first noticed when large public data bases became generally available to researchers. At that point, anyone with a computer could “trawl through” the data base, looking for correlations between data points. If the data base contained enough data items, it was easy to predict that a certain number

of them would correlate very highly, simply at random. If one usually thinks that a correlation between variables in an ordinary research setting that would be accounted for by random variation only one time in twenty is a meaningful correlation (this is the most common criterion for a “significant” correlation), it is easy to see that such an approach cannot be applied to a data trawl, because if you examine twenty correlations in a large data base at random, you are likely to find one that correlates so highly that you would only expect it at random, well, only one time in twenty. The appearance of significance is spurious, and a conclusion of significance would be unwarranted. See generally, Mark Klock, Finding Random Coincidences While Searching for the Holy Writ of Truth: Specification Searches in Law and Public Policy or Cum Hoc Ergo Propter Hoc? 2001 WISC. L. REV. 1007.

Various responses to the data trawling problem in the research context have been suggested (none entirely satisfactory), which need not concern us further here. The important thing to note is that much of what is done in criminal investigation presents problems analogous to the data trawling problem.

The attention of lawyers, judges and legal academics was first called to this kind of problem in regard to so called “cold hits” in searches of DNA data bases. See generally, Peter Donnelly & Richard D. Friedman, DNA Database Searches and the Legal Consumption of Scientific Evidence, 97 MICH. L. REV. 931 (1999). In the case of DNA markers, good data from population studies enables us to determine

defensible random match probabilities for a particular profile derived from a particular test. Let us assume that DNA circumstantially linked strongly to the perpetrator of a crime is recovered from a crime scene. Let us further assume that for various reasons, that DNA testing results in a random match probability that is high for a DNA test: One person in every 100,000 would be expected to have the same profile. Now assume that the state has assembled a DNA data base of 100,000 persons. We search the data base looking at each member and comparing each profile to the one from the crime scene (a “trawl search”). We discover one person with a match (a so-called “cold hit,” meaning that there was no other evidence of their involvement in the crime prior to the data base match). What does that tell us?

Well, it tells us something, but a lot less than many people would initially be tempted to think. It tells us that the one person we found is a candidate to be the perpetrator, one that falls into a set significantly smaller than the whole world. Yet there are still many other people out in the world (one per 100,000) with the same characteristics. *Just because our data base was too small to capture them doesn't mean they aren't there.* So while it would not be irrational to investigate the one we have found, it would be irrational to allow tunnel vision to allow us to get too invested in his guilt. It would clearly be irrational to convict him solely on this information. This is easily illustrated if we expand our data base to 200,000, which then yields the expected two indistinguishable candidates. Investigate further, yes. But picking one

and convicting on no more information would be obviously ludicrous, **since each candidate now shares an equal (though unknown) probability of guilt.**

It is easy to see the problems of the use and misuse of trawl search hits in the illustrative context of a DNA data base search. What is harder to see is that many currently common investigative techniques for obtaining eyewitness identifications are nothing more than trawl searches, which are then treated, inappropriately, as if they were something more.

Initially, this is probably easiest illustrated with an example from a very common practice involving mug shots. Assume a single witness to a crime, say a street shooting resulting in death. The witness is set to work by the police examining mug shots of persons fitting the general description given by the witness (e.g., male, Hispanic or light skinned black, age 25-35, 5'10" to 6'2", lean but muscular). The witness sees a picture which, she asserts, either “looks like” or “is” the perpetrator. The witness is then allowed to discontinue the search through the “data base” (which has, incidentally, already been selected to be rich in candidates that might be right, but also which might be confusingly wrong). On the basis of this pick, the candidate selected, if he is not incarcerated, is located and arrested, and the witness may be asked to view a corporeal lineup containing the person she already selected out of the mug shot “data base.” Selection at the corporeal lineup adds little new information to the original selection. But note that we have no way of knowing how many *other*

photos in the photo “data base” would also have been selected by the witness if she had been requested to go through the entire available universe of generally conforming photographs, and if that had been the search protocol from the beginning. This is exactly like stopping a DNA data base search on the cold hit of the first matching person in the data base.

The problem is compounded when there is more than one witness. The witnesses are all put to work looking at the mug shots (**it is to be hoped**) independently. However, when one witness makes a selection, the rest are often told to stop, and the selection of the first witness is put in a photo spread, which is then administered to the other witnesses. Since the first witness selected the first-encountered similar photograph based on resemblance to the perpetrator, it is hardly surprising when some or all of the other witnesses pick the candidate out on that basis. Now the initial trawl search has become the hidden springboard to multiple identifications, which superficially appear independent, but which no one can be confident are not merely unrecognized echoes of the original, improperly terminated, trawl search.

In the LeGrand case itself, the witnesses (four of them) looked at mug shot files, (which, incidentally, seem almost certainly to have contained mug shots of Nico LeGrand, since he had a criminal record.) None of the witnesses made any selections. They were then sent to participate in the creation of a composite sketch of the perpetrator. The process by which that sketch was generated was the subject of some

disagreement. Some of the witnesses indicated more interactive collaboration than was remembered by the artist. Nevertheless, what is clear is that the resulting sketch, the product of contributions by all four witnesses, was shown to all four at the conclusion of the process, and the process took a considerable amount of time. The sketch was supposed to generally capture the appearance of the perpetrator. But, like virtually all such sketches, while it might exclude a lot of people as candidates, it looked like nobody in particular, and thus it would be expected that many Hispanic or light-skinned black males would “look like” the picture (see sketch attached as App. 2). In addition, it is hard for anyone to know, after the passage of a long time, the degree to which the witnesses would remember the perpetrator independently of remembering the general appearance of the sketch. So if a person is selected for inclusion in a photo spread to be shown to the witnesses merely on the basis of looking like the sketch, that by itself is a kind of trawl search through the population at large, constrained by only the very general search criteria of the sketch. And since any such candidate has been selected because he “looks like” the sketch, it is not surprising that such a candidate would thereafter be identified from a photo array by some or all of the witnesses. And this is in fact what happened in Nico LeGrand’s case. He was identified from such a photo spread by three of the four original witnesses (the other made neither a selection nor an affirmative exclusion). And his

picture, not surprisingly, was the only one that looked like the sketch (see photo spread, App. 3)

But in LeGrand's case it was actually worse than that—or at least (as in the case of the 200,000-member DNA data base which yielded two actual candidates, as discussed above), it is easier to demonstrate the problem concretely in his case. It is important to remember that the problem of the trawl search is present and rationally the same even if there were not a specific second candidate identified, but it is easier to see when there is a concrete known second candidate. And that did happen in Nico LeGrand's case. It is uncontested that the only reason that Nico LeGrand was put into a photo spread at all was that a retired police detective asserted that he thought Nico LeGrand looked like the police sketch. But there was a second suspect in exactly the same position, a person with a similar extensive record of crimes (i.e., crimes not at all like the murder at issue), a man named Winner Lane. Winner Lane had also been identified as “looking like” the sketch by another officer. More importantly, information about the putative resemblance of both Mr. LeGrand and Mr. Lane was in the police file within two years of the incident, when both suspects were interviewed. It is less than clear why more was not done then,<sup>2</sup> but that is not the main point here.

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<sup>2</sup> There is some reason to be a bit suspicious of the story that was told by Detective Roe to justify (to the extent possible, which isn't much) the **additional five- or six-year delay before anything more was done. According to Detective Roe, he was told by Detective Castellano (who did not testify at the LeGrand Wade hearing or trial) that a retired NYPD detective, Dennis O'Sullivan head of Columbia University security (who also did not testify), supposedly happened to notice the resemblance of Nico LeGrand to the six-year-old sketch when he saw LeGrand on the**

The main point here is that if the Detective who had inherited the file and was motivated to try and clear a cold case, Detective Roe, had chosen to start the identification procedure with a photo spread containing Winner Lane instead of a photo spread containing Nico LeGrand, the caption of this appeal would almost certainly be *People v. Lane* instead of *People v. LeGrand*.

It is important to note that we are not here asserting that Winner Lane was the real perpetrator, but merely that he was as likely to be the real perpetrator as Nico LeGrand, and also as likely to have been identified as the perpetrator by the witnesses if he had been the one Roe chose to start with in the photo spread.

The Amicus would prefer to present this analysis of the fundamental weakness of the identification evidence incriminating Nico LeGrand as part of an appeal to this court calling upon it to adopt some version of the “unsafe verdict” standard of review, as practiced by the English Courts. See D. Michael Risinger, Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims, 41 HOUSTON L. REV. 1281, 1311-1321 (2004). In the English Court of Criminal

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**videotape of a 1998 burglary at a Columbia property. There is a striking coincidence between this story and the testimony of Detective Castellano and Mr. O’Sullivan in *Jones v. Conway*, 442 F. Supp. 2d 113 (S.D.N.Y. 2006), regarding an identification that Mr. O’Sullivan made from a videotape in an unrelated burglary that occurred in 1998, a year before Mr. LeGrand was indicted for the murder in this case. The issues raised by this odd coincidence (and the failure to make more use of the Winner Lane information ) are of course not before this court at the present time, and will have to await a proper CPL § 440.10 motion, should that become necessary, which hopefully it won’t.**

Appeal this case would likely be reversed on that ground. Such a standard would do away with the artificial and uncalled-for rule in the majority of American jurisdictions that disqualifies an appellate court from judging the sufficiency of evidence rationally when live eyewitness testimony is involved, even in regard to whether a new trial is called for. It is difficult for an organization devoted to the proper protection of the wrongfully convicted to understand why in civil cases a new trial can be had, giving consideration to every aspect of the case, including the weakness of eyewitness testimony, but in criminal cases such a ground is unavailable to an appealing defendant. However, we are well aware that the posture of this case as it has been brought before the court by the parties does not present this issue. So we have presented our analysis as context to inform the decision on the propriety of rejecting the expert testimony proffered by Mr. LeGrand on the weaknesses of the identifications given by the witnesses in his case.