

Perry vs. New Hampshire: Reflections on the Oral Arguments of Nov. 2, 2011

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“I have been too familiar with disappointments to be very much chagrined”

Abe Lincoln, *Address at New Salem, IL* (1832)

My expectations were low in the days and weeks leading up to the first case that the U.S. Supreme Court had heard on eyewitness identification evidence in 34 years. But, as I walked up the oval in front of the Supreme Court Building, observed the marble candelabra with carved panels flanking the steps, and proceeded through the Great Hall, with its double rows of monolithic marble columns rising to a coffered ceiling, my hopes rose a bit. In my rational mind, I knew that the Perry case was not likely to yield any substantial solutions to the serious eyewitness identification problem in the legal system, a problem that I have been working on for 35 years. But my emotional side, aroused by the splendor and mystique of the majestic Hall and Courtroom permitted me a temporary illusion of hope.

As I have written elsewhere, the Perry case might have been the wrong case and, in some ways, the wrong issue. The real issues concern the idea that mistaken eyewitness identification is much more common than people (including juries and judges) think and that standard safeguards (such as cross examination) are ineffective for sorting between mistaken identifications and accurate identifications. My own work has tried to address this problem by discovering better ways to collect eyewitness identification evidence and working with jurisdictions to reform how lineups are conducted. That has had some success. But, our most recent work that tested eyewitness identification evidence with actual eyewitnesses to serious crimes in San Diego, Tucson, Austin (TX), and Charlotte (NC) shows that between 30% and 40% of witnesses who make an identification mistakenly identify a lineup “filler” even when the best procedures are used. And, as shown by the Innocence Project, 190 of the first 250 DNA-based exonerations in the U.S. were cases involving mistaken eyewitness identification. Controlled laboratory studies of eyewitness identification, conducted by myself and scores of other social scientists, have long shown that mistaken identifications are quite common.

At one level, the Perry case was a simple one. Following a very questionable eyewitness identification that was fraught with suggestive circumstances, Perry’s defense wanted a pre-trial hearing on the issue of the reliability of the identification. The New Hampshire trial court denied the request, Perry was convicted, and the New Hampshire Supreme Court affirmed the lower court’s ruling. Case law is relatively settled on the question of whether there is a right to a pretrial hearing on reliability of eyewitness evidence if government actors (e.g., police) created suggestiveness in the identification procedure. But, there was no claim of suggestiveness by the police in this case. Instead, the issues concerned unfavorable distance, poor lighting, and the fact that Perry was the only Black person standing beside police officers when the witness looked out of her window from over 100 feet in near darkness and claimed that was the man she saw earlier breaking into a car.

Arguing before the court on behalf of Perry was Richard Guerriero, an experienced and competent defense attorney. But, Guerriero was only a minute or two

into his statement when he was interrupted with his first question from Justice Scalia. Scalia was concerned that virtually any kind of evidence could be challenged as unreliable. Guerriero kept arguing that he disagreed and that eyewitness evidence was “special.” But when challenged repeatedly by Scalia and others on the bench about why eyewitness evidence was special, Guerriero simply kept telling the Court that they themselves has said that it was special in their prior rulings dating back over 40 years. Indeed the Court had said so repeatedly. But, it was not *these* members of the Court who had said that eyewitness evidence was special and, in an attempt to deflect that line of argument, Scalia jettisoned that line of argument by saying “I’m saying we don’t mean it.”

So, the burden was on Guerriero to explain why eyewitness evidence was special. Allusions were made to the unreliability of eyewitness evidence as something that might make it special, but Guerriero never did make the case for why eyewitness evidence was special, at least not to the apparent satisfaction of the Justices. Justice Kagan introduced a hypothetical about jailhouse informants and suggested that if jailhouse informants were shown to be as or more unreliable than eyewitnesses, would the pre-trial hearing requirement apply to that evidence as well? Notice the fear here about a ruling favorable to Perry spreading to pre-trial hearings for other types of evidence. That would be a huge unintended consequence, so what makes eyewitness evidence special?

Some of the most interesting discussion centered on the distinction between cases for which there is suggestion by police in the way they obtained the identification and case for which there is no claim of suggestion (such as the Perry case) but instead just a claim of unreliability. When there is suggestion, the due process clause is applicable and it becomes a constitutional issue deserving of a pre-trial hearing (as so-called Wade hearing). When there is not suggestion, however, the claim rests solely on unreliability for which the right to a pre-trial hearing is unclear.

Using Unreliable Evidence is Not Unconstitutional

The vocal members of the Court clearly articulated the view that *unreliable evidence is not unconstitutional*; you do not have the right to be tried using only reliable evidence. This might be big news to the general public, but constitutional scholars are not at all shocked because they are already very familiar with this view. The use of unreliable evidence per se does not violate due process according to this view because the jury can make, and is responsible for making, determinations of the reliability of evidence. In fact, this type of logic is a primary reason why trial judges almost never suppress eyewitness identification evidence and instead punt the ball to the jury.

It is not my intent to second guess Guerriero. I think he was very well prepared and, had he been allowed to deliver his entire statement instead of simply respond to somewhat antagonistic questions from the outset, he might have been quite effective. But, Guerriero needed to better answer the question of what is special about eyewitness evidence so as to not create the impression that pre-trial hearings on eyewitness evidence will open the floodgates for other types of evidence.

Is Eyewitness Evidence Special?

How might Guerriero have made the case that eyewitness evidence is special and thus the pre-trial hearing need not apply to other forms of evidence? The first thing to understand is that the usual safeguard of cross examination simply does not work with eyewitnesses. In Justice Kagan’s hypothetical about jailhouse informants, for instance, the

issue for the juror and the cross-examination is one of truthfulness. Cross examination is designed to distinguish between truth tellers and liars and it is a fairly effective tool for doing so. With jailhouse informants, juries can consider the motives of the informant (e.g., favorable treatment in the jail, deals cut on charges pending) and make a reasoned judgment about the likelihood that the informant is lying. In the case of an eyewitness, however, lying versus truth telling is not the issue and the usual mechanism of cross examination is fruitless. Mistaken eyewitnesses believe what they are saying; their errors are genuine and those errors of memory tend to be indistinguishable from accurate memories.

Second, unlike the eyewitness, there is no evidence that jailhouse informants are “over-believed.” But there is an extant social science literature showing that eyewitnesses are too readily believed, especially when they come across on the witness stand as highly confident. This was laid out clearly in briefs to the Court. I saw little evidence in their oral arguments that they read the scientific brief, but perhaps they did and rejected it somehow.

Related to this is the fact that, although jurors readily understand how people like jailhouse informants could come to lie in their own self-interest, they do not understand how perception and memory work. They do not understand how mistaken eyewitnesses can become so confident in their memories, they do not know the precise effects of distance or lighting on the ability of humans to make out details of a face, and so on. In fact, there are many ways in which eyewitness evidence is special. And, the fact that 75% of DNA-based exonerations are cases involving mistaken identification is only one of them

All in all, the questioning suggests that the Court will likely affirm New Hampshire’s opinion and not open up the right to a pre-trial hearing. On the positive side, all the justices who spoke (Justice Thomas never spoke) seemed to recognize that there is a reliability problem with eyewitness identification evidence. Maybe this just was not the right case.

As I exited the courtroom and walked back though the Great Hall, I wondered if the Court would wait another 34 years before they again took up the serious problem of eyewitness identification evidence. I hope not ... I don’t think I can climb these stairs at the age of 95.

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Recommended readings:

- http://www.psychology.iastate.edu/FACULTY/gwells/Wells_articles_pdf/Manson_article_in_LHB_Wells.pdf
- http://www.psychology.iastate.edu/FACULTY/gwells/Wells_articles_pdf/EWID_PrintFriendly.pdf