Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ANTHONY ODDONE,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* INNOCENCE PROJECT, INC. IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, 22 N.Y.C.R.R. § 500.1(f), *amicus curiae* Innocence Project, Inc., makes the following disclosure: The Innocence Project is a not-for-profit organization with no parents, subsidiaries, or affiliates.

TABLE OF AUTHORITIES

CASES

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INTEREST OF THE AMICUS

The Innocence Project, Inc. provides *pro bono* legal services and other resources to indigent prisoners whose innocence may be established through post-conviction DNA testing. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 311 people who were wrongfully convicted of crimes they did not commit. In 48% of those cases, the work of the Innocence Project also helped to identify the real perpetrators of the crimes.

In addition to post-conviction litigation, the Innocence Project works to prevent *future* miscarriages of justice by identifying the causes of wrongful convictions, participating as *amicus curiae* in cases of broader significance to the criminal justice system, and pursuing legislative and administrative reforms – all with the aim to enhance the truth-seeking function of the criminal justice system. The Innocence Project's work helps to ensure a more just society – and a safer one – by preventing wrongful convictions that not only destroy lives, but often allow the actual perpetrators of serious crimes to remain at large.

As a leading national advocate for the wrongly convicted, dedicated to improving the criminal justice system, the Innocence Project has a compelling interest in ensuring that, in cases where the outcome may depend on expert testimony, courts perform their proper "gatekeeping" role by: (1) precluding

expert testimony based upon scientific principles that are unsupported, untested, or invalid; and (2) admitting expert testimony when it is based upon established principles and will assist fact finders to reach more accurate determinations of guilt or innocence.

INTRODUCTION

Expert scientific testimony plays a critical role in many criminal cases, and, in some cases, may determine the outcome of a trial. Where a qualified expert provides an opinion, based upon sound scientific principles, about a matter that is beyond the common knowledge of a layperson, this evidence improves the accuracy of a jury's conclusions. The expert's "'specialized knowledge'… can give jurors more perspective than they get from their 'day-to-day experience, their common observation and their knowledge.'" *People v. Young*, 7 N.Y.3d 40, 45 (2006) (quoting *People v. Lee*, 96 N.Y.2d 157, 162 (2001)). That specialized knowledge is especially important where an expert's conclusions may be "counterintuitive." *People v. Abney*, 13 N.Y.3d 251, 268 (2009).

Conversely, this Court, like courts around the country, "recognize[s] the danger in allowing unreliable or speculative information (or 'junk science') to go before the jury with the weight of an impressively credentialed expert behind it." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." *Barefoot v. Estelle*, 463 U.S. 880, 926 (1983) (quoting Paul C.

Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1237 (1980)).

The dual potential of expert scientific evidence to enlighten and to mislead heightens the need for trial courts to act as "gatekeepers" – to admit expert evidence that can assist juries to reach accurate results and to exclude expert evidence that is unreliable. New York follows the rule of *Frye v. United States*, 293 F. 1013 (D.C. 1923), which focuses on whether a "scientific principle or discovery … [is] sufficiently established to have gained general acceptance in the particular field in which it belongs." *People v. Wesley*, 83 N.Y.2d 417, 422-23 (1994) (quoting *Frye*) (emphasis omitted). Even where testimony satisfies the *Frye* test, moreover, New York courts still must assess "the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial." *Parker*, 7 N.Y.3d at 447 (quoting *Wesley*, 83 N.Y.2d at 429 (Kaye, C.J., concurring)).

In this case, Supreme Court abdicated its responsibility to act as a gatekeeper. First, the court allowed the prosecution to present the testimony of Deputy Medical Examiner James Wilson concerning a complex issue of medical causation based solely on his "personal experience" without any showing that it was supported by generally accepted principles in the field of forensic medicine.

Second, the court excluded the testimony of Dr. Steven Penrod, a nationally-recognized expert psychologist, without considering whether his testimony regarding the tendency of eyewitnesses to overestimate the duration of short, stressful events and the effect of post-event information on eyewitness memory would assist the jury in its evaluation of the eyewitnesses' accounts.

This case highlights the need for this Court to make clear that trial courts have a duty to scrutinize expert scientific evidence carefully – to ensure both that invalid science is excluded and that reliable expert testimony is admitted where appropriate. The trial court's rulings (1) allowing Dr. Wilson's testimony based only on his "personal experience," and (2) excluding Dr. Penrod's testimony created an unacceptable danger that Oddone was convicted based upon invalid scientific evidence and unreliable eyewitness testimony.

Based upon the trial court's failure to perform its critical gatekeeping role, Oddone's conviction should be reversed.

STATEMENT OF PERTINENT FACTS

At Oddone's trial, the parties hotly disputed how long Oddone held the decedent Andrew Reister by the neck. The prosecution argued that Oddone maintained the hold on the larger Reister for upwards of three minutes or more, evidencing an intent to kill or to cause serious physical injury to Reister, that the force Oddone used to defend himself against Reister was excessive, and that the excessive force caused Reister's death. The defense contended that Oddone applied the hold only briefly, in lawful self-defense, and that Reister's death was the unintended result of pre-existing medical conditions. Accordingly, Oddone's innocence or guilt depended on how the jury resolved the critical question of how long Oddone maintained the hold.

Both the prosecution and the defense introduced expert medical testimony in support of their respective positions. Dr. Wilson, testifying for the prosecution, opined based on his "experience" that Reister's neck must have been compressed for at least 2 to 4 minutes to trigger a fatal cardiac arrhythmia. (A. 3689-3697, 3894.) For the defense, by contrast, Dr. Daniel Spitz and Dr. John Kassotis both testified that death can be induced in as little as 10-15 seconds. (A. 4635-4636 (Spitz); A. 4951 (Kassotis).)

The parties also elicited testimony about the duration of the incident from

eyewitnesses. For example, Merel Beelen estimated that Oddone "choked" Reister for "[a]bout two minutes" while the two men were on the floor. (A. 1028.) John Cato estimated that Oddone had Reister on the floor in a "choke hold" for "like a minute, minute and a half, two minutes," before Cato left to get help. (A. 1163-1164.) On the other hand, Kira Leader testified that Oddone and Reister were on the floor for "[n]o more than thirty seconds." (A. 5024.) And Shamir Cohen said that the entire incident from start to finish took "less than a minute." (A. 5066.)

Two key evidentiary rulings by the trial court concerning the admissibility of proffered expert testimony shaped the jury's assessment of this central issue. First, the defense moved to strike Dr. Wilson's testimony, pursuant to the *Frye* rule, arguing that his opinion, based solely on his "experience," but without any support in the scientific literature, was not based upon principles that were generally accepted in the relevant scientific field. *See* Mem. Mot. Strike (A. 616-629). The trial court denied the motion based upon the ostensible rule that "a medical expert may give an opinion as to the nature, cause, extent and duration of the person's injur[ies] or disease or as to the cause of death." (A. 4541.) In the trial court's view, the defense motion raised only a factual disagreement with Dr. Wilson's conclusions, not an objection to the validity of the basic medical principles on which he relied. (A. 4543-4544.)

Second, the trial court granted the prosecution's motion to preclude Oddone from calling Dr. Penrod, a preeminent expert in eyewitness perception and memory. Dr. Penrod's testimony would have been grounded in peer-reviewed, published studies establishing the tendency of eyewitnesses to overestimate the duration of short, stressful events and to incorporate post-event information into their memories. *See* Mem. Dec. Denying Def. Request to Call Dr. Steven Penrod, Dec. 16, 2009 (A. 8-10.) The court ruled that Dr. Penrod's testimony was not admissible because guilt or innocence did not turn on eyewitness identification. (A. 9.) Because Oddone's identity was not in dispute, the court reasoned, the jury had no need for Dr. Penrod's testimony. (A. 9-10.)

In affirming Oddone's conviction, the Appellate Division agreed with the trial court that Dr. Wilson's testimony was admissible because it was "based on his personal observations and experiences as a forensic pathologist for many years." *People v. Oddone*, 89 A.D.3d 868, 870 (2d Dep't 2011). The court did not specifically address the trial court's decision to exclude Dr. Penrod's testimony.

ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE STRICKEN DR. WILSON'S TESTIMONY IN THE ABSENCE OF A SHOWING THAT HIS OPINIONS WERE BASED UPON PRINCIPLES THAT ARE GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY

The erroneous admission of invalid scientific evidence at criminal trials dramatically increases the likelihood that an innocent person will be wrongfully convicted. Invalid scientific evidence also compromises the integrity of convictions of people who may not be innocent. To take a recent example, following the exoneration of three men who had been convicted based in part on scientifically invalid testimony given by three different FBI hair examiners, the Department of Justice agreed to an unprecedented review of over 2,000 criminal convictions and a waiver of procedural objections that might otherwise have barred judicial review.[1]

[1] *See* Press Release, "Innocence Project and NACDL Announce Historic Partnership with the FBI and Department of Justice on Microscopic Hair Analysis Cases: Government Agrees to Notify Defendants of Error, Waive Procedural Arguments and Offer Free DNA Testing," Jul. 18, 2013, *available at*, http://www.innocenceproject.org/Content/Innocence_Project_and_NACDL_Announce_Historic_Partnership_with_the_FBI_and_Department_of_Justice_on_Microscopic_Hair_Analysis_Cases.php (last visited Sept. 27, 2013).

A distinguished panel commissioned by the National Academy of Sciences has observed that, while courts scrutinize the validity of scientific evidence offered in civil cases, "trial judges rarely exclude or restrict expert testimony offered by prosecutors." Nat'l Acad. Sci., *Strengthening Forensic Science in the United States: A Path Forward* 11 (2009). A recent study of wrongful convictions found that in 60% (82 out of 156) of cases examined "forensic analysts called by the prosecution provided invalid testimony at trial – that is, testimony with conclusions misstating empirical data or wholly unsupported by empirical data." Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, 95 Va. L. Rev. 1, 1 (2009). Much of this testimony went unchallenged, but even where it was challenged, "judges seldom provided relief." *Id.*

In this case, Dr. Wilson opined that Reister's neck had to have been compressed for at least 2 to 4 minutes, buttressing the prosecution's theory that Oddone both had the requisite criminal intent to cause death or serious injury to Reister and that the cause of Reister's death was excessive force used by Oddone. Dr. Wilson conceded that his opinion – based upon his observation of petechiae on and above Reister's eyelids and purpling of Reister's face – was not founded on "any kind of medical or scientific literature, but my experience and knowledge of

biology and medicine." (A. 3894.) He identified no generally accepted principle of biology or medicine, or any clinical data, to support his personal opinion about the time for which Reister's neck must have been compressed.

The defense motion to strike Dr. Wilson's testimony pointed to the fact that Dr. Wilson's opinions were his alone and not supported by the medical literature, arguing that the prosecution had not carried its burden of establishing that Dr. Wilson's opinions were admissible under *Frye*. Indeed, the defense proffered expert evidence to show that Dr. Wilson's opinion was *not* based on principles that were generally accepted. Thus, the trial court had a fundamental duty to exclude Dr. Wilson's opinion unless the prosecution demonstrated that it was based upon principles that had "gained general acceptance" in the relevant scientific community. *Wesley*, 83 N.Y.2d at 422-23 (quoting *Frye*). Furthermore, even if it had been shown that Dr. Wilson's testimony was based upon principles that are generally accepted, the trial court would still have had to assess the specific application of those principles to determine "whether they establish a foundation for the reception of the evidence at trial." *Parker*, 7 N.Y.3d at 447 (quoting *Wesley*, 83 N.Y.2d at 429 (Kaye, C.J., concurring)).

The trial court, however, brushed these issues aside, concluding that the defense was only disagreeing with Dr. Wilson's ultimate conclusions. This was

serious error. A medical expert may be qualified to give an expert medical opinion, but that does not give him license to give an opinion, based solely upon an *ipse dixit* grounded in unverified – and unverifiable – "experience."

Invalid forensic science has often played a central role in the conviction of individuals who were later exonerated by DNA testing. By way of example, in 1992, Kennedy Brewer was arrested in Mississippi for the murder of his girlfriend's three-year-old daughter.[2] At trial, Dr. Michael West, a forensic odontologist, testified that marks found on the victim's body were left by Brewer's two front teeth. Yet Dr. West's testimony was not based upon any scientific principle that had been independently validated. Although a defense expert testified that the marks on the child's body were insect bites, Brewer was convicted of capital murder and sexual battery in 1995 and sentenced to death. In 2001, DNA testing excluded Brewer as the source of semen recovered from the victim's body, and another man, Justin Albert Johnson, later confessed to the crime.[3]

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[2] The facts of the Brewer case are described on the Innocence Project's website: http://www.innocenceproject.org/Content/Kennedy_Brewer.php (last visited Sept. 27, 2013).

[3] Johnson also confessed to a second rape and murder, leading to the exoneration of Levon Brooks, who, like Brewer, had also been convicted based on scientifically invalid bite mark evidence provided by Dr. West. *See* "Levon Brooks," *at* http://www.innocenceproject.org/Content/Levon_Brooks.php (last visited Sept. 27, 2013). Invalid scientific evidence provided by Dr. West thus led to the conviction and

Michael Morton spent almost 25 years in prison for the murder of his wife, who was found bludgeoned to death one morning in 1986, after Morton had left for work.[4] At Morton's trial, the county medical examiner testified that, based on his analysis of the contents of Mrs. Morton's stomach, she had been killed no later than 1:15 a.m., when Morton was still at home. Morton was convicted and sentenced to life in prison. He steadfastly maintained his innocence, but it was not until 2011 that DNA testing on a bloody bandana found near the Morton home revealed a match to another man, Mark Alan Norwood, and proved the invalidity of the medical examiner's testimony. Morton was released from prison and exonerated, and Norwood was ultimately convicted of Mrs. Morton's murder.

In the vast majority of cases, however, guilt or innocence cannot be determined by DNA. *See* Daniel S. Medwed, *Beyond Biology: Wrongful Convictions in the Post-DNA World*, 2008 Utah L. Rev. 1, 1 n.7 (2008) (citing estimates that 80-90% of cases do not involve biological evidence that can be subjected to DNA testing). It is therefore all the more critical that trial courts perform their gatekeeping role scrupulously. To reduce the potential for wrongful

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imprisonment of at least two innocent men, while the true perpetrators of two heinous crimes remained free.

[4] The facts of the Morton case are described on the Innocence Project's website: http://www.innocenceproject.org/Content/Michael_Morton.php (last visited Sept. 20, 2013).

convictions, expert testimony must be confined to opinions that are supported by principles that are proven and reliable.

The case of Tyler Edmonds illustrates how invalid expert testimony may make the difference between conviction and acquittal in a case that could not be solved by DNA. Edmonds was convicted of murdering his sister's husband, based largely on his own videotaped confession, in which Edmonds, who was 13 years old at the time, told police that he and his sister together shot the victim with a single shot from a .22 caliber rifle. At trial, the defense argued that Edmonds's confession was false. However, Dr. Stephen Hayne, who had conducted the autopsy of the victim's body, testified – consistent with the confession but in defiance of common sense – that the single gunshot wound at the back of the victim's head was more consistent with two shooters than with one. *Edmonds v. State*, 955 So. 2d 787, 791 (Miss. 2007). The trial court overruled a defense objection to Dr. Hayne's quixotic two-shooter opinion, and Edmonds was convicted and sentenced to life in prison.

The intermediate appellate court affirmed Edmonds's conviction, even while recognizing that the testimony as to the cause of death was "scientifically unfounded: 'You cannot look at a bullet wound and tell whether it was made by a bullet fired by one person or by two persons pulling the trigger simultaneously.'"

Id. at 792. But the Mississippi Supreme Court reversed, based in part on the erroneous admission of Dr. Hayne's speculative expert testimony, explaining that the "two-shooter testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case." *Id.* In the words of the court, "[w]hile Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses." *Id.* At the retrial, Dr. Hayne was not permitted to opine that two hands were on the trigger, and Edmonds was acquitted.[5]

Like the testimony erroneously admitted in *Edmonds*, so here: Dr. Wilson's opinion that Reister's neck must have been compressed for 2 to 4 minutes improperly "bolstered" the prosecution's theory of the case. The trial court's conclusion that a medical expert may always give an opinion as to the cause of a person's death reflects a profound failure to perform its role as a gatekeeper. Put simply, a medical expert's opinion as to the cause of death must be based on principles that are generally accepted in the medical community.

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[5] The acquittal in Edmonds' retrial is noted on the website of the National Registry of Exonerations: http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3200 (last visited Sept. 30, 2013).

Contrary to the Appellate Division's decision, there is no exception and, in any event, should be no exception to the *Frye* rule for conclusions "based on … personal observations and experiences as a forensic pathologist for many years." *Oddone*, 89 A.D.3d at 870. Even if Dr. Wilson was qualified generally to give an opinion as to the cause of Reister's death, an expert must not be given "carte blanche to proffer any opinion he chooses." *Edmonds*, 955 So. 2d at 792.

The proponent of expert testimony bears the burden under *Frye*, and a court must perform its gatekeeping function, notwithstanding the availability of cross-examination and rebuttal experts. In this case, for example, the jury may have credited the opinion of the county medical examiner who conducted the autopsy of the decedent's body while viewing the defense experts skeptically. After all, unlike Dr. Wilson, the defense experts had no opportunity to examine Reister's remains. The defense experts, moreover, were being paid and may have been viewed as "hired guns." Indeed, the prosecution suggested just that in its cross-examination of Dr. Spitz. (A. 4665-68.) By contrast, Dr. Wilson was a salaried government employee with no apparent stake in the outcome of the trial. The jury, accordingly, may well have attached special credibility to Dr. Wilson's testimony.

Absent any showing that Dr. Wilson's opinion that Reister's neck was compressed for 2 to 4 minutes was based on principles that are generally accepted

in the relevant medical community, a grave risk exists that Oddone's conviction was based upon the very type of medical evidence that has contributed to numerous wrongful convictions.

POINT II

DR. PENROD'S PROPOSED TESTIMONY WAS BASED UPON GENERALLY ACCEPTED PRINCIPLES AND WOULD HAVE AIDED THE JURY IN ITS EVALUATION OF THE EYEWITNESS TESTIMONY

Errors by eyewitnesses are the single leading cause of wrongful convictions.[6] Over 30 years of robust social science research has demonstrated that eyewitnesses often make mistakes, that post-event information can influence memory, and that a witness's confidence in her testimony does not correlate with its accuracy. *See* Elizabeth F. Loftus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil & Criminal* § 1:3, at 3 (4th ed. 1997).

Experts in the field accept the validity of research findings regarding many of the factors affecting the accuracy of eyewitness memory. Courts nationwide have accordingly concluded that experts should be allowed to inform juries about this science in appropriate cases. *See, e.g.*, *State v. Guilbert*, 49 A.3d 705, 747 (Conn. 2012) (reversing for exclusion of expert testimony on identification and finding that scientific research on the reliability of eyewitness identifications

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[6] Innocence Project, *Eyewitness Misidentification*, *at* http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Sept. 23, 2013); *see also* Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011) (finding that 190 of the first 250 DNA-based exonerations in the United States involved eyewitness misidentification).

enjoys strong consensus in the scientific community, that many factors affecting eyewitness identifications are unknown to average jurors or are contrary to common assumptions, and that cross-examination, closing argument, and generalized jury instructions are inadequate substitutes for expert testimony).

This Court has been among the leaders in recognizing the value of expert psychological testimony on eyewitness identification. Over a decade ago, in *People v. Lee*, 96 N.Y.2d 157 (2001), the Court explained that judges "should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province":

> Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.

Id. at 162 (citing *People v. Cronin*, 60 N.Y.2d 430, 433 (1983)). In *People v. LeGrand*, 8 N.Y.3d 449 (2007), this Court found that the trial court's decision to exclude expert testimony on three factors related to eyewitness identification – "correlation between confidence and accuracy of identification," "the effect of postevent information on accuracy of identification," and "confidence malleability," *id.* at 458 – was an abuse of discretion. The Court subsequently reversed convictions based upon the erroneous exclusion of an eyewitness expert

in *People v. Abney*, 13 N.Y.3d 251 (2009), and *People v. Santiago*, 17 N.Y.3d 661 (2011).

Under this Court's jurisprudence, the admissibility of expert psychological testimony is *not* limited to testimony regarding the reliability of identifications. In *People v. Bedessie*, 19 N.Y.3d 147 (2012), the Court explained that "[a]lthough *Lee* addressed expert evidence on the reliability of eyewitness identification, *we there laid out broad principles governing the admissibility of expert psychological testimony*." *Id.* at 156 (emphasis added). Indeed, this Court has approved the admission of expert psychological testimony totally unrelated to the subject of eyewitness identification because it was relevant to a disputed issue. *See, e.g.*, *People v. Williams*, 20 N.Y.3d 579, 584-85 (2013) (post-traumatic stress syndrome); *Bedessie*, 19 N.Y.3d at 149 (2012) (false confessions); *People v. Spicola*, 16 N.Y.3d 441, 465 (2011) (child sexual abuse accommodation); *see also Cronin*, 60 N.Y.2d at 433-34 (reversing conviction based on the erroneous exclusion of expert psychiatric testimony on the ability of an intoxicated defendant to form criminal intent). As these cases make clear, there is no reasoned basis for restricting expert psychological testimony to eyewitness identification cases.

The trial court failed to follow this Court's guidance when it concluded that expert evidence on the reliability of eyewitness perception and memory was

inapplicable to Oddone's case. The trial court reasoned that "this is not a case which calls for the testimony of an expert" because the "*identity* of the defendant as the perpetrator is not the central issue in the testimony of these eyewitnesses" and "there is significant corroborating evidence connecting the defendant to the crime, including, but not limited to, the statement of the defendant that 'it was self-defense,' descriptions of the defendant's torn clothing, and of the defendant fleeing the scene in a taxi cab." (A. 9 (emphasis in original).) This Court's precedents, however, make clear that the fact that Oddone's identity was not at issue did not *ipso facto* render Dr. Penrod's proposed expert testimony inadmissible or irrelevant.

Dr. Penrod, a recognized expert on eyewitness memory, would have testified about phenomena that related directly to the central disputed issue. He would have explained to the jury that "[i]t is generally accepted in the field of forensic psychology that eyewitnesses routinely overestimate the duration of relatively short events lasting a few minutes or less." Aff. Steven Penrod ¶ 4(a) (A. 7134). Studies have consistently confirmed this phenomenon, known as "Vierordt's Law," and have established that stress increases the tendency to overestimate time. *See, e.g.*, A. Daniel Yarmey, *Retrospective duration estimations for variant and invariant events in field situations*, 14 Applied Cognitive Psychol. 45-57 (2000).

Unquestionably, Dr. Penrod's testimony would have helped the jury evaluate the testimony of those eyewitnesses, who were subjected to highly stressful circumstances and estimated that Oddone had Reister in a headlock for several minutes.

Dr. Penrod also would have explained "hindsight bias – the fact that new information (including false information) can distort what one recalls about how one characterizes a previously witnessed event." Aff. Steven Penrod ¶ 13 (A. 7136-7137). The jury was confronted with testimony by witnesses who had once said that Oddone "embraced" Reister and that Oddone and Reister "grappled" with one another, but who later testified at trial that Oddone "choked" Reister – terminology that was consistent with the prosecution's theory of the case but not with the objective medical evidence that established that he was not "choked." In *LeGrand*, this Court recognized the general acceptance of the principle that "postevent information" can influence memory in the context of eyewitness identifications. 8 N.Y.3d at 458. Dr. Penrod's testimony would have helped the jury evaluate whether the trial testimony of these witnesses had been influenced by their interactions with detectives, prosecutors, and other witnesses. Aff. Steven Penrod ¶ 5 (A. 7134-7135).

The exclusion of Dr. Penrod's testimony deprived the jury of specialized knowledge that would have aided them in resolving key factual disputes relating to the nature and duration of the incident that resulted in Reister's death. The trial court's observation that "[t]he jury does not need an expert witness, in a case where identification is not an issue, to explain that memory and perception are affected by lighting, alcohol ingestion, noise, stress and panic" (A. 9), misses the critical point: the specific research findings about eyewitness memory are often counterintuitive. *See, e.g.*, Sarah L. Desmarais & J. Don Read, *After 30 Years, What Do We Know About What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 L. Hum. Behav. 200, 207 (2011) (noting that "estimator variables" – factors not under the control of the criminal justice system – most frequently appear to be "beyond the ken" of a jury); Tanja Rapus Benton, et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 119 (2006) (finding that jurors disagreed with experts on 87% of issues surveyed).

In particular, studies show that potential jurors do not understand that eyewitnesses tend to overestimate the duration of short, stressful events. *See, e.g.*, Richard S. Schmechel, et al., *Beyond the Ken? Testing Jurors' Understanding of*

Eyewitness Reliability Evidence, 46 Jurimetrics J. 177, 198 (2006) (63% of survey respondents either believed witnesses' subjective time estimates or thought that the witnesses tended to underestimate the actual time); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & Hum. Behav. 19, 21 (1983) ("Approximately two-thirds of the citizen jurors were unaware that eyewitnesses tend to overestimate the time involved in a witnessed crime.").

Numerous courts have concluded that expert testimony on this very subject is beyond the ken of ordinary jurors. *See, e.g.*, *State v. Lawson*, 291 P.3d 673, 702 (Or. 2012); *State v. Henderson*, 27 A.3d 872, 905 (N.J. 2011); *Benn v. United States*, 978 A.2d 1257, 1268 (D.C. 2009); *United States v. Graves*, 465 F. Supp. 2d 450, 457 (E.D. Pa. 2006). Had the jury heard Dr. Penrod's testimony, it would have had a well-founded reason for discounting the testimony of the eyewitnesses who said that Oddone "choked" Reister for a period of several minutes. That is to say, the jury may have had a reasonable doubt.

In short, the trial court's ruling excluding Dr. Penrod's testimony deprived the jury of important information with which to evaluate both the prosecution's theory that Oddone "choked" Reister for three minutes or more with the intent to kill or seriously injure, as well as the defense's theory that the incident was

fleeting, that Oddone acted in self-defense, and that he did not use excessive force during a struggle with a larger man. *See United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) ("The function of the expert here is not to say to the jury – 'you should believe or not believe the eyewitness.' … All that the expert does is provide the jury with more information with which the jury can then make a more informed decision."). Given the tendency of jurors to credit eyewitness testimony, notwithstanding its proven infirmities, the exclusion of expert testimony relating to the pitfalls of eyewitness memory denied Oddone evidence that was critical to his defense.[7]

[7] *See* Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in *Expert Testimony on the Psychology of Eyewitness Identification*, 169, 171 (Brian L. Cutler, ed., 2009).

CONCLUSION

The trial court's admission of Dr. Wilson's opinion that Reister's neck had to have been compressed for a period of at least 2 to 4 minutes, without any showing by the prosecution that his opinion was based on generally accepted scientific principles, was clear error. Likewise, its exclusion of Dr. Penrod's testimony also reflected a failure to perform the court's proper gatekeeping role.

The sum of these two errors was greater than the individual parts. The jury heard eyewitnesses testify that Oddone maintained the hold on Reister's neck for several minutes, without hearing from Dr. Penrod that witnesses routinely overestimate the duration of short, stressful events. The jury also heard Dr. Wilson's unsupported expert opinion that seemed to corroborate the eyewitnesses. Because the duration of the hold was a critical issue, these evidentiary rulings created an unacceptable risk of wrongful conviction.

For the foregoing reasons, this Court should reverse the Appellate Division's order affirming Oddone's conviction.

Dated: New York, New York
October 3, 2013

Respectfully submitted,

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