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Narrowing the LeGrand Test in New York State: A Necessary Limit on Judicial Discretion

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Narrowing the *LeGrand* Test in New York State

A NECESSARY LIMIT ON JUDICIAL DISCRETION

INTRODUCTION

The unreliability of eyewitnesses, specifically with regard to identification of suspects, is an increasingly well-researched and documented phenomenon in criminal law.[1] According to the Innocence Project, eyewitness misidentifications contributed to over 70% of 318 convictions that were later overturned as a result of DNA evidence.[2] New York has acknowledged this troubling controversy by being one of the states that favors the admission of expert testimony when eyewitness identifications are the primary evidence offered against a criminal defendant.[3] Because both judges and juries may harbor misconceptions about the appropriate weight to give eyewitness identification, expert testimony can be an effective way to mitigate the harm caused by jurors' misperceptions of the reliability of eyewitness identification.[4]

New York's current standard for determining whether to admit expert testimony on eyewitness identifications originated in the *People v. LeGrand* decision.[5] In that case, the Court of Appeals of New York held that, when a case outcome is dependent

[1] George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 98 (2011).

[2] *National Academy of Sciences Releases Landmark Report on Memory and Witness Identification, Urges Reform of Police Identification Procedures*, INNOCENCE PROJECT (Oct. 2, 2014), http://www.innocenceproject.org/national-academy-of-sciences-releases-landmark-report-on-memory-and-eyewitness-identification-urges-reform-of-police-identification-procedures/ [https://perma.cc/DF3J-38UF] [hereinafter INNOCENCE PROJECT].

[3] Vallas, *supra* note 1, at 123.

[4] NAT'L RES. COUNCIL OF THE NAT'L ACAD., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 42 (2014), http://www.innocenceproject.org/wp-content/uploads/2016/02/NAS-Report-ID.pdf [https://perma.cc/MR6K-FL8M] [hereinafter NAS REPORT].

[5] People v. LeGrand, 867 N.E.2d 374, 375–76 (N.Y. 2007).

upon eyewitness identification evidence and insufficient corroborating evidence is available, a trial court abuses its discretion when it refuses to admit expert testimony by a qualified expert and the testimony is relevant, based on scientific principles, and on a topic unfamiliar to the average juror.[6]

Although the *LeGrand* test has been in use for nearly a decade, a June 28, 2016, decision by the Court of Appeals of New York, *People v. McCullough*,[7] represented an interpretation of *LeGrand* inconsistent with New York State case law, and highlighted a weakness in the *LeGrand* test that allows for excessive judicial discretion. The test as articulated in *LeGrand* requires that the trial court engage in a two-step analysis when a case turns on eyewitness identifications: first, the court must evaluate whether there is sufficient evidence to corroborate the eyewitness identification, and second, the court must assess the relevance and qualifications of expert testimony, then admit any expert testimony that passes the second stage of the inquiry.[8]

In *McCullough*, the only evidence tying the defendant to the crime was identification by an eyewitness and an accomplice, both of whom were strangers to the defendant.[9] Defying the original conception of the *LeGrand* test,[10] the Court of Appeals of New York declined to consider the nature of the evidence corroborating the eyewitness identification to be a threshold matter, stating that, "[t]o the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification" would assist a jury.[11] Although the only corroborating evidence available—accomplice testimony—alone could not have resulted in a conviction as a matter of law in New York,[12] the Court of Appeals of New York deferred to the trial court by stating that the trial court did not abuse its discretion by refusing to allow expert testimony regarding the fallibility of eyewitness identification evidence.[13]

Because the high rate of wrongful convictions based on eyewitness misidentification is attributable to both judges' and

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[6] The standard set forth in this case is commonly referred to as the *LeGrand* test. *Id.*
[7] People v. McCullough, 58 N.E.3d 386 (N.Y. 2016).
[8] *LeGrand*, 867 N.E.2d at 379.
[9] *McCullough*, 58 N.E.3d at 387–88.
[10] *LeGrand*, 867 N.E.2d at 375–76.
[11] *McCullough*, 58 N.E.3d at 388.
[12] N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1970).
[13] *McCullough*, 58 N.E.3d at 388.

juries' general misunderstanding of the factors that affect the reliability of eyewitness identification evidence, the *McCullough* court's deferential interpretation of the *LeGrand* test is problematic.[14] Even when properly applied as a two-part test in which the weight of corroborating evidence is considered as a threshold matter, the initial part of a *LeGrand* analysis that requires that judges move on to the second stage only if there is "little or no" corroboration for eyewitness testimony calls for excessive judicial discretion in cases like *McCullough* that rely solely on eyewitness identifications and accomplice testimony.[15] With that case as a backdrop, this note proposes a return to the original *LeGrand* test as a two-part analysis, and an addition to the first stage of the *LeGrand* test that places an additional limit on judicial discretion when a case turns on unreliable eyewitness identifications corroborated only by accomplice testimony.

Part I of this note discusses the origin and usage of the *LeGrand* test in New York State as a response to the understanding that eyewitness identification evidence is uniquely appealing to juries and counterintuitively fallible. Part I additionally demonstrates that *McCullough* was an abrupt departure from previous applications of the *LeGrand* test in which the test was considered to be a two-part test, and which should have mandated admission of expert testimony under the circumstances in *People v. McCullough*. Part II argues that the additional discretion afforded to trial judges by the Court of Appeals of New York in *McCullough* is inappropriate because neither juries nor judges fully appreciate the factors that affect the accuracy of eyewitness identification evidence. Part III proposes a revival and modification of the *LeGrand* test, based on the fact that both eyewitness identification evidence and testimony of accomplices have been categorically acknowledged to be unreliable by New York State. *People v. McCullough* exemplifies the need to further limit judicial discretion by requiring judges to admit relevant and qualified expert testimony when the only available corroboration for an eyewitness identification by a stranger is the testimony of an accomplice or similarly unreliable eyewitness identifications.

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[14] *See infra* Part II.

[15] *LeGrand*, 867 N.E.2d at 375.

I. THE HISTORY OF THE *LEGRAND* TEST IN THE COURT OF APPEALS OF NEW YORK

The *LeGrand* test is an acknowledgment by New York State courts of the unique fallibility of eyewitness identifications as evidence against criminal defendants.[16] Prior to *McCullough*, the court of appeals had considered *LeGrand* to require trial courts to use a two-stage test in cases in which the outcome relied on eyewitness identifications.[17] Despite reliable research demonstrating that a myriad of factors render eyewitness identifications questionable, and the fact that wrongful convictions have consistently resulted from incorrect identification of criminal defendants,[18] the court in *McCullough* appears to have ignored both its own precedent and the uniquely problematic nature of eyewitness identifications. The future of the *LeGrand* test, or any special consideration of expert testimony regarding eyewitness identifications by trial and appellate courts in New York, is now uncertain. By disregarding the traditional application of the *LeGrand* test and treating eyewitness identifications like any other type of evidence,[19] the Court of Appeals of New York retreated from its previous attempts to mitigate the risk of wrongful convictions on the basis of eyewitness misidentifications. As demonstrated by the origin and history of the application of the *LeGrand* test in New York, *People v. McCullough* represents two steps back after one step forward.

A. The LeGrand *Test Before* People v. McCullough

In *People v. LeGrand*, the court responded to a growing body of research on the unreliability of eyewitness identifications and subsequent attempts to mitigate the effect of this type of evidence on juries by admitting expert testimony.[20] The trial court convicted the defendant of a homicide that had occurred seven years prior to his arrest based solely on a positive identification by one eyewitness, and equivocal identifications by two other eyewitnesses.[21] An additional two eyewitnesses failed to identify the defendant at all, and there was no physical

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[16] *See id.* at 377–80 (discussing "reliable" research that, over the course of the preceding decades, had demonstrated that eyewitnesses were often mistaken with respect to identification).

[17] People v. Santiago, 958 N.E.2d 874, 881 (N.Y. 2011).

[18] *See, e.g.*, INNOCENCE PROJECT, *supra* note 2.

[19] *See infra* Section I.B.

[20] *LeGrand*, 867 N.E.2d at 377–80.

[21] *Id.* at 376.

evidence linking the defendant to the homicide.[22] Despite this lack of reliable evidence, the trial court judge refused to admit expert testimony on eyewitness identifications.[23] The Court of Appeals of New York recognized that judicial discretion regarding this expert testimony on eyewitness identification required constraint, and held that it is an abuse of discretion for a court to exclude expert testimony on eyewitness identification evidence when a case "turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime" and the expert testimony is relevant, based on accepted scientific principles, outside the "ken of the average juror," and "proffered by a qualified expert."[24]

The next time that the court of appeals applied the *LeGrand* test was in *People v. Abney*.[25] In that case, a victim of an armed robbery identified the defendant as the perpetrator after viewing a photo array[26] on the date of the robbery, and then in a lineup[27] weeks later.[28] The defendant claimed to have an alibi, which was corroborated by the defendant's girlfriend, her relatives, and a daycare worker; he also submitted logbooks with entries to support the alibi that he was picking up his girlfriend's daughter around the time of the robbery.[29] The logbooks were deemed inconsistent, however, and with no additional evidence he was convicted on the basis of the victim's testimony.[30] The trial court judge opined that there was "nothing unique" about the case that was "beyond the ken of the ordinary juror," and that all of the issues could be adequately addressed through cross-examination and jury charges.[31]

On appeal, applying the first stage of the *LeGrand* test, the Court of Appeals of New York first noted that there was no corroborating evidence for the victim's identification and the description given by the victim had not indicated that the perpetrator had any particularly unique features.[32] Accordingly,

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[22] *Id.*

[23] *Id.* at 377.

[24] *Id.* at 375–76.

[25] People v. Abney, 918 N.E.2d 486, 495 (N.Y. 2009).

[26] A photo array contains a photo of a suspect among photos of other individuals who are not suspects. *Eyewitness Identification*, NAT'L INST. JUST. (last updated Mar. 16, 2018), https://www.nij.gov/topics/law-enforcement/investigations/eyewitness-identification/Pages/welcome.aspx [https://perma.cc/NPV7-QV58].

[27] *Id.*

[28] *Abney*, 918 N.E.2d at 488.

[29] *Id.* at 489.

[30] *Id.*

[31] People v. Abney, 867 N.Y.S.2d 1, 3–4 (N.Y. App. Div. 2008).

[32] *Abney*, 918 N.E.2d at 495. The court noted that, while the logbook evidence was not helpful in exonerating the defendant, it was not "overwhelmingly inculpatory either." *Id.* at 496.

expert testimony by a qualified expert on the effect of "witness confidence" was relevant, based on accepted scientific principles, and "counterintuitive, which places [those topics] beyond the ken of the average juror."[33] The court concluded that the trial court judge had, in fact, abused his discretion by refusing to allow expert testimony, on that subject, and failing to hold a *Frye*[34] hearing on whether "event stress, exposure time, event violence and weapon focus" were generally accepted within the scientific community.[35]

In *People v. Santiago*, although two other eyewitnesses corroborated the victim's identification of the defendant, the Court of Appeals of New York again applied the *LeGrand* test and determined that the trial court had abused its discretion when it did not allow expert testimony on eyewitness identifications.[36] After an assault, the victim identified the defendant in a photo array and lineup, though part of his face was obscured at the time of the attack.[37] A witness who had seen the attacker fleeing the scene with a knife also viewed a lineup with the defendant; although he initially told police that he did not recognize anyone, he later identified the defendant in a photo array and testified that he had lied to police when he told them that he did not recognize anyone.[38] Another witness also identified the defendant after police showed him a sketch of the perpetrator based on the victim's description.[39] As in *Abney* and *LeGrand*, there was no physical evidence linking the defendant to the crime.[40]

The trial court judge refused to allow expert testimony because, although there was no corroboration for the eyewitness identification evidence, "the topics 'post-event identification,' 'forgetting curve,' 'wording of questions,' 'confidence malleability,' ha[d] little meaning" because the victim worked with an artist to create a sketch of the perpetrator of the assault prior to viewing a photo array and lineup.[41] The judge opined that jurors could not be educated about the fallibility of lineup procedures because they were not "experts on constitutional law and procedure," and that

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[33] *Id.* at 495–96.

[34] The *Frye* test is the test used in New York to determine whether the procedure and results of proposed scientific expert testimony are generally accepted as reliable in the scientific community. David R. *ex rel* Debra R. v. BMW of North America, 48 N.E.3d 937, 941 (N.Y. 2016).

[35] *Abney*, 918 N.E.2d at 496.

[36] People v. Santiago, 958 N.E.2d 874, 883 (N.Y. 2011).

[37] *Id.* at 877–78.

[38] *Id.*

[39] *Id.* at 884.

[40] *Id.* at 878.

[41] Decision on Expert Identification Witness, People v. Santiago, 781 N.Y.S.2d 627 (N.Y. Sup. Ct. 2004) (No. 005512003), 2003 WL 26477111, at *4.

jurors should intuitively know that memories fade over time.[42] Finally, the judge thought that his own jury instructions regarding the fact "that 'certainty' and 'accuracy' [were] different concepts" would be sufficient to educate the jury on assessing witness confidence with regard to eyewitness identification evidence.[43]

The Court of Appeals of New York's interpretation of the *LeGrand* test in *Santiago* was that it required a "two-stage inquiry" in which the trial court "must proceed to the second stage" of the test when there is insufficient corroborating evidence and the case otherwise "turns on the accuracy of eyewitness identifications."[44] The court suggested that when a "corroborating identification possess[es] strong indicia of accuracy,"[45] the trial court "need not" move on to the second stage of the test.[46] In *Santiago*, however, the court concluded that because there was insufficient corroborating evidence for the eyewitness identifications, the trial court judge should have moved on to the second stage of the *LeGrand* test to consider the applicability of the proffered expert testimony, and that the failure to do so was an abuse of judicial discretion.[47]

The *LeGrand* test is not a permissive standard in which deference is given to the trial court. Rather, the standard requires that the trial court engage in a two-stage analysis by first considering the nature of the evidence connecting the defendant to the crime, then of the nature of the expert testimony that the defendant seeks to admit.[48] The restrictive nature of this test is necessitated, the court has explained, by a growing field of "psychological studies that have addressed the potential for misidentification when a person observes an

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[42] *Id.* at *5.

[43] *Id.*

[44] *Santiago*, 958 N.E.2d at 881 (quoting People v. LeGrand, 867 N.E.2d 374, 375 (N.Y. 2011).

[45] *Id.* at 882. The court in *Santiago* did not expand significantly on what kind of corroborating identifications might "possess a strong indicia of accuracy," but it seems that the court will place greater value on identification by a witness who recognizes the perpetrator of a crime, at the time of the crime, based on previous interactions. *See generally* People v. Muhammad, 959 N.E.2d 463 (N.Y. 2011); People v. Allen, 918 N.E.2d 486 (N.Y. 2009). In *Muhammad*, the victim of the crime knew the perpetrator for "over a decade," drastically decreasing the possibility of misidentification that results from seeing a stranger for the first time in a highly stressful and limited interaction. *Muhammad*, 959 N.E.2d at 473. Similarly, in *Allen*, a robbery victim recognized the perpetrator of the crime from interactions in the neighborhood, and identified him by name when the police arrived. *Allen*, 918 N.E.2d at 491–92. In both of these cases, the court held that the trial court did not abuse its discretion by refusing to admit expert testimony on eyewitness identifications. *Muhammad*, 959 N.E.2d at 473; *Allen*, 918 N.E.2d at 496.

[46] *Santiago*, 958 N.E.2d at 882.

[47] *Id.* at 882–83.

[48] *LeGrand*, 867 N.E.2d at 379–80.

assailant—usually a stranger—for the first time in a highly stressful environment."[49] Given the court's acknowledgement of this body of research and the dangers associated with eyewitness identifications during the last ten years, *People v. McCullough* represents a troubling retreat from New York's progressive view of eyewitness identifications and efforts to reduce the extent to which judges and juries give excessive weight to such evidence.

B. The Erosion of the LeGrand *Test in* People v. McCullough

By deferring to the trial court's discretion and denying that *LeGrand* is a two-stage test, the *McCullough* court departed from the previous usage of the *LeGrand* test.[50] Although the court did not overturn *LeGrand*, and indeed claimed that it was assessing the trial court's decision using a *LeGrand* analysis,[51] the court's analysis appears to sound the death knell for New York's high scrutiny of eyewitness identifications by individuals who had no previous relationship with the criminal defendant.

1. The Facts of *People v. McCullough*

On December 27, 2008, James Johnson Jr.[52] observed a car pull up in front of a barbershop owned by Vincent Dotson.[53] Johnson entered the barbershop, followed by "[o]ne of the occupants of the vehicle."[54] After Johnson and the other man each sat in a chair, three additional men entered the barbershop and directed both Dotson and Johnson to lie face down on the floor.[55] One of the men pistol-whipped Dotson and Johnson after Dotson informed the perpetrators that the store did not have a safe.[56] The first man who had entered the barbershop took $200 from Dotson, then shot and killed him before all four men left the barbershop.[57] The shooter briefly came back into the shop,

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[49] *Muhammad*, 959 N.E.2d at 473. For a discussion of the factors that affect the accuracy of eyewitness identifications, including stress, see *infra* Section II.A.

[50] People v. McCullough, 58 N.E.3d 386, 388 (N.Y. 2016).

[51] *Id.*

[52] Although Johnson was identified only as J.J. in the relevant court opinion, his full name appears in a brief for the appellant. Brief for Respondent at 2, People v. McCullough, 58 N.E.3d 386 (N.Y. 2016) (No. APL-2015-00148), 2015 WL 11120467 at *2 [hereinafter Brief for Respondent].

[53] *McCullough*, 58 N.E.3d at 387.

[54] *Id.*

[55] Brief for Respondent, *supra* note 52, at 7.

[56] *Id.*

[57] People v. McCullough, 5 N.Y.S.3d 665, 667 (N.Y. App. Div. 2015), *rev'd* 58 N.E.3d 386 (N.Y. 2016).

and Johnson heard "a clicking sound over his head" before the shooter left the barbershop again and Johnson called 911.[58] Later that day, police apprehended Willie Harvey, who was identified as the driver of the vehicle from which several of the perpetrators had exited before committing the robbery and murder.[59] No other suspects were apprehended that day, and no physical evidence was gathered linking any particular individual to the crime.[60]

Upon the police presenting him with a photo array containing a picture of Jamell McCullough in the weeks following the crime, Johnson stated that McCullough resembled the first man who entered the barbershop during the crime, whom he had described as being of a darker complexion and wearing black.[61] In a subsequent lineup, and during McCullough's trial,[62] Johnson identified McCullough as the last man who entered the barbershop, whom he had previously described as being of a lighter complexion and wearing orange.[63] McCullough was the only person in the lineup who had also appeared in the photo array.[64]

Other than Johnson's identification, the only evidence linking McCullough to the crime was testimony from Willie Harvey.[65] After acknowledging he had a role in the crime, Harvey identified his brother and cousin as two of the other perpetrators.[66] When initially presented with a photo array containing McCullough's picture, however, Harvey "told [the] police that he did not recognize anyone."[67] Over one month later, having admittedly seen multiple newspaper and television stories regarding McCullough's arrest for the crime,[68] Harvey identified McCullough in another photo array.[69] Mere "minutes" after identifying McCullough, Harvey accepted a deal in which he pleaded guilty to robbery in exchange for the minimum sentence allowable for that crime.[70] During McCullough's trial, Harvey testified that he had initially lied when he told the police that he did not recognize McCullough, because he was uncertain

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[58] *Id.*

[59] *McCullough*, 58 N.E.3d at 387.

[60] Brief for Respondent, *supra* note 52, at 3.

[61] *McCullough*, 5 N.Y.S.3d at 667.

[62] *Id.*

[63] Brief for Respondent, *supra* note 52, at 3.

[64] *McCullough*, 5 N.Y.S.3d at 667.

[65] *Id.* at 667–68.

[66] Brief for Respondent, *supra* note 52, at 4.

[67] *McCullough*, 5 N.Y.S.3d at 668.

[68] People v. McCullough, 58 N.E.3d 386, 394 (N.Y. 2016) (Rivera, J., dissenting); Brief for Respondent, *supra* note 52, at 4.

[69] Brief for Respondent, *supra* note 52, at 3.

[70] *McCullough*, 5 N.Y.S.3d at 668.

of the nature of his brother's role in the crime.[71] He noted that he had never met the man who he identified as McCullough until the night of the robbery, and he did not know his name.[72]

Despite these inconsistencies, the trial court judge denied McCullough's motions to admit expert testimony on the effects of weapons, violence, and duration of an incident on the reliability of eyewitness testimony,[73] stating that because Harvey eventually corroborated Johnson's identification, expert testimony on eyewitness identifications was unnecessary.[74] McCullough was subsequently convicted of murder and robbery; he appealed his conviction, arguing that the trial court abused its discretion by precluding this expert testimony.[75] The Appellate Division of the Supreme Court of New York reversed the conviction and remanded the case for a new trial after applying the *LeGrand* test in accordance with the existing precedent.[76]

2. The Appellate Division's Application of the *LeGrand* Test

The Appellate Division of the Supreme Court of New York reversed the conviction.[77] Applying the *LeGrand* test, the court found that the case "hinge[d] upon the accuracy of the eyewitness's identification of [McCullough], and . . . that there was little or no corroborating evidence connecting him to the crime."[78] The appellate division noted that the proffered expert testimony on eyewitness identifications did meet all four of the qualifications enumerated in the second stage of the *LeGrand* test: the expert testimony was pertinent to the identification, based on accepted scientific principles, given by an expert who was qualified, and on a subject that was outside the expertise of "the average juror."[79]

The first part of the *LeGrand* test was satisfied by the facts before the court in *McCullough*. As the appellate division noted, the case against Jamell McCullough turned on the accuracy of Johnson's identification.[80] Because of Harvey's demonstrably poor credibility and inconsistent statements, there

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71 *McCullough*, 58 N.E.3d at 387–88.
72 Brief for Respondent, *supra* note 52, at 11.
73 Brief for Respondent, *supra* note 52, at 5.
74 *McCullough*, 58 N.E.3d at 388.
75 *McCullough*, 5 N.Y.S.3d at 668.
76 *Id.* at 671.
77 *Id.* at 666.
78 *Id.* at 666–67.
79 *Id.* at 667.
80 *Id.*

was "little . . . corroborating evidence" linking McCullough to the crime.[81] Harvey's credibility was, in fact, questionable on two fronts. Not only was he an accomplice with mixed motives, who initially said he did not recognize McCullough; he also saw the person he identified as McCullough only briefly, and in poor lighting.[82] As in *Santiago* and *LeGrand*,[83] a corroborating equivocal or inconsistent identification by additional eyewitnesses was "insufficient to relieve the court of its obligation to proceed to the second stage of the LeGrand analysis."[84]

Had the trial court proceeded to the second stage of the *LeGrand* analysis, the testimony proposed (on event violence, event duration, and weapon focus)[85] would have been admitted. The subject matter was clearly relevant to the facts of *McCullough*.[86] An expert witness, a psychologist, was qualified and prepared to testify on a presumptively scientifically accepted principle, as well as that the proposed subject matter was certainly outside of the knowledge of the average juror.[87] Having satisfied all requirements of the *LeGrand* test, then, the trial court did not have the discretion to refuse to admit the expert testimony.

Accordingly, the court held that, based on the *LeGrand* test, the trial court judge had abused his discretion by refusing to admit the expert testimony.[88] After the state appealed the appellate division's decision, however, the Court of Appeals of New York upheld McCullough's conviction with an unprecedented interpretation of the *LeGrand* test.

3. The New York Court of Appeal's Departure from the *LeGrand* Test

The Court of Appeals of New York declined to adopt the reasoning of the appellate division, despite the fact that it had been consistent with its own prior decisions regarding the application of the *LeGrand* test. The court decided that no two-stage test was required by *LeGrand*; instead, the court asserted that *LeGrand* "should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony

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[81] *Id.* at 668.

[82] *Id.* at 667–68.

[83] *See supra* Section I.A.

[84] *McCullough*, 5 N.Y.S.3d at 668; *see* People v. LeGrand, 867 N.E.2d 374, 375 (N.Y. 2007).

[85] *McCullough*, 5 N.Y.S.3d at 668.

[86] *Id.*

[87] *Id.*

[88] *Id.*

on eyewitness identification" would assist the jury in making a decision.[89] The court's deference to the "sound discretion of the trial court"[90] diverged sharply from the previous decisions in which the court limited judicial discretion in cases that turned on the accuracy of eyewitness identification.[91] This permissive approach to the *LeGrand* standard is demonstrated in the court's conclusion that the trial court was "entitled" to balance the "probative value" of expert testimony against the "prejudicial or otherwise harmful effects" of the testimony using the factors enumerated in the *LeGrand* test.[92]

This balancing test is an iteration of the "general evidentiary balancing test" that is used in New York when there is no "heightened standard" for the admission of a particular kind of evidence.[93] In fact, the court cited this general balancing test using *People v. Powell*, a case that did not involve eyewitness identification evidence, in its reasoning.[94] Applying this relaxed analysis, which notably relied on cases that were decided before *LeGrand* or had nothing to do with eyewitness identifications, the court of appeals reversed the decision of the appellate division and held that the trial court in *People v. McCullough* did not abuse its discretion.[95]

The corroboration for Johnson's identification of McCullough was insufficient and required that the trial court admit relevant expert testimony under the original *LeGrand* approach. Even putting aside his demonstrably poor credibility, Harvey's identification of McCullough in a photo array contained no more "indicia of reliability" than Johnson's, or than the witnesses who identified the perpetrator of an assault in *Santiago*.[96] Because of his role as an accomplice, Harvey's inherent unreliability is acknowledged by New York's Criminal Procedure Law, which states that "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."[97] His identification of McCullough was particularly suspect given the fact that Harvey initially did not

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[89] People v. McCullough, 58 N.E.3d 386, 388 (N.Y. 2016).

[90] *Id.* (citing People v. Lee, 750 N.E.2d 63 (N.Y. 2001)).

[91] *See supra* Section I.A.

[92] *McCullough*, 58 N.E.3d at 388.

[93] People v. Powell, 55 N.E.3d 435, 439 (N.Y. 2016); *McCullough*, 58 N.E.3d at 388.

[94] *McCullough*, 58 N.E.3d at 388 (citing *Powell*, 55 N.E.3d at 439). *People v. Powell* examined the applicability of the balancing test when deciding the admissibility of evidence concerning third party culpability; it did not touch on the subject of expert testimony on eyewitness identifications. *See Powell*, 55 N.E.3d at 439.

[95] *McCullough*, 58 N.E.3d at 388.

[96] *See* People v. Santiago, 958 N.E.2d 874, 878 (N.Y. 2011); *supra* Section I.A.

[97] N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1970).

identify McCullough, then did so and testified that his inability to identify McCullough had been a lie (and that his subsequent identification of McCullough was not).[98]

Had the Court of Appeals of New York applied the two-part analysis required by its prior decisions using the *LeGrand* test, the results in *McCullough* would likely have been different. The court's refusal in *People v. McCullough* to apply the two aspects of the *LeGrand* analysis that deviate from a standard analysis of the admissibility of evidence—the mandatory nature of the test and the two-stage inquiry—are incongruous with the court's previous decisions regarding eyewitness identifications.[99] It is thematic in all of the previous applications of the *LeGrand* test that the purpose of the *LeGrand* test is to address eyewitness identifications as a uniquely perilous type of evidence upon which to base a conviction.[100] By holding that *LeGrand* is not a two-stage test in which the trial court is *required* to move on to the second stage of the test if a case turns on eyewitness identifications and there is "little or no" corroborating evidence linking the defendant to the crime,[101] the court ignored not only its own precedent, but the dangerous implications of holding eyewitness identifications to the same standard as other evidence. The gap between judges' and juries' perceptions and reality, and the pervasiveness of eyewitness identification evidence, are why the court's decision in *People v. McCullough* has such great implications for the future treatment of expert testimony on eyewitness identification, and potential resulting wrongful convictions in New York.

II. ASSUMPTIONS AND REALITY REGARDING THE RELIABILITY OF EYEWITNESS IDENTIFICATION

Eyewitness statements from victims and witnesses are powerfully compelling. As Justice William J. Brennan opined, "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!'"[102] The weight given to identification by such eyewitnesses is not surprising; in our daily lives, we are rarely subject to skepticism about the identity of the parties involved and the details recounted in our storytelling. Indeed, it

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[98] *McCullough*, 58 N.E.3d at 387–88.

[99] *See supra* Section I.A.

[100] *See supra* Section I.A.

[101] *McCullough*, 58 N.E.3d at 388.

[102] Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis omitted) (quoting E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

is conceptually counterintuitive to imagine that a witness—often with no external motivation to fabricate information about the identity of a perpetrator—could positively, and with certainty, identify the wrong individual. The fact that eyewitness identifications "played a role" in the gross majority of wrongful convictions overturned by DNA evidence, however, demonstrates that this intuitive trust in the ability of an individual to recognize a person that he or she encountered previously is misguided in many cases.[103] In the majority of all criminal cases, there is no biological evidence available,[104] so the danger of a false conviction based on eyewitness misidentification remains high despite technological advances that allow the analysis of more reliable evidence.

Eyewitness identifications made by witnesses who are strangers to the perpetrator, during stressful, violent, and brief interactions are not as reliable as they may seem to the average juror or judge.[105] This tension between perception and reality regarding the reliability of eyewitness testimony necessitates a more skeptical treatment of eyewitness identifications. Because both judges and juries may harbor misconceptions about the appropriate weight to give eyewitness identification, expert testimony can be an effective way to mitigate the harm caused by jurors' misperception of the reliability of eyewitness identification.[106] To that end, the *LeGrand* test in its traditional application—as a mandatory two-step procedure for determining whether a trial court must admit expert testimony—provides protection to criminal defendants against whom the primary evidence offered is identification by eyewitnesses. The additional judicial discretion allowed by *People v. McCullough* weakens this safeguard, making it more likely that judges and juries will assign significant weight to evidence that is, in fact, quite dubious.

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[103] *Eyewitness Misidentification*, INNOCENCE PROJECT (last visited Apr. 12, 2018), https://www.innocenceproject.org/causes/eyewitness-misidentification/ [https://perma.cc/B8RV-ADWV].

[104] *See generally* JOSEPH PETERSON ET AL., NAT'L INST. JUST., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 42–90 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf [https://perma.cc/2TVX-UUKB]. This is true for every individual category of crime except for sexual assaults, in which it is more likely than not that biological evidence will be collected. *See id.* at 90.

[105] *See* INNOCENCE PROJECT, *supra* note 2.

[106] NAS REPORT, *supra* note 4, at 42.

A. The Reality: The Fallibility of Eyewitness Identification Evidence

In 50% of the overturned convictions in which eyewitness identification was part of the evidence offered, eyewitness testimony was the primary reason for the conviction.[107] In addition, an examination of 175 exonerations of defendants—whose conviction was based on eyewitness identifications—indicated that, in 38% of those convictions, two or more eyewitnesses incorrectly identified the defendant.[108] This is not because so many eyewitnesses are lying. Rather, it is likely attributable to several common factors known to affect the reliability of eyewitness identifications; for example, the violence associated with and stress caused by an event or the presence of a weapon, the duration of an interaction, and post-event information all factor into an eyewitness's ability, or lack thereof, to reliably identify the perpetrator of a crime.[109] This means that a violent crime committed by a perpetrator who is a stranger to the victim or witness, such as the crime of which Jamell McCullough was accused, is rife with opportunities for misidentifications by eyewitnesses with even the best of intentions.

Consider, as one example, the story of Jennifer Thompson, who was a victim of a burglary and rape in 1984.[110] In a piece in the *New York Times*, Ms. Thompson told the unsettling story of how, during her attack, she carefully studied the face of her attacker because she knew that she would need to identify him later for the police.[111] She confidently described the perpetrator to police, and identified her attacker both in a photo array and a lineup.[112] Of the identification, she stated, "I was sure. I knew it. I had picked the right guy, and he was going to jail."[113] Based on Ms. Thompson's identification and testimony that she had "never seen [Mr. Poole] in [her] life" Ronald Cotton was convicted, even after a different man, Bobby Poole, bragged that he was the assailant.[114] Eleven years later, DNA evidence revealed that Bobby Poole had indeed been the perpetrator of the rape, and Ronald Cotton was innocent of the crime for which

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[107] Vallas, *supra* note 1, at 101.

[108] *Id.*

[109] *Id.* at 102.

[110] Jennifer Thompson, *I Was Certain, but I Was Wrong,* N.Y. TIMES (June 18, 2000), http://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html [https://perma.cc/W5DQ-LD7E].

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

he had been incarcerated for eleven years.[115] Of course, Ms. Thompson's incorrect identification was unintentional; she had no motivation to choose one stranger over another.[116] She was simply mistaken, but her mistake had severe consequences.

The violence of an event, stress level of the witness, and use of a weapon during a crime are interrelated event factors that can affect the accuracy of eyewitness identification.[117] Although the factors have been studied separately, they seem likely to overlap in many criminal cases: being a victim of or a witness to violence may induce stress, and the use or display of weapons is violent by nature. Even viewing violence on video has been demonstrated to impair the accuracy of eyewitness identification.[118] A number of other studies have also convincingly demonstrated that exposure to stress reduces accuracy of identification.[119] Research on "[w]eapon [f]ocus" indicates that when a weapon is present in "threatening scenarios," witnesses focus on the presence of the weapon rather than on the perpetrator, inhibiting facial recognition and overall accuracy of identification.[120] Both victims and witnesses of violent crime, therefore, are less likely to be able to accurately identify the perpetrator.

It is, perhaps, unsurprising that the longer one interacts with someone, the more likely he or she is to retain an accurate memory of the individual.[121] Research confirms that the duration of an event is positively correlated with a witness's ability to recall the incident and accurately identify the perpetrator.[122] This is particularly relevant when the crime in question is perpetrated by an individual who is a stranger to the victim or witnesses; a stress-inducing interaction with a short duration may be the extent of the time that is available to retain a memory of someone's face.[123] Equally intuitively, identification accuracy also decreases as the amount of time between the event and the point at which the victim or eyewitness is called upon to recall the event increases.[124] For example, in a study in which the subjects were asked to identify individuals from their photos,

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[115] *Id.*

[116] *Id.*

[117] Vallas, *supra* note 1, at 103.

[118] Gary L. Wells et al. *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INTEREST 45, 52 (2006).

[119] Wells et al., *supra* note 118, at 52.

[120] NAS REPORT, *supra* note 4, at 93.

[121] *See* Vallas, *supra* note 1, at 104–05; Wells et al., *supra* note 118, at 53-54.

[122] Vallas, *supra* note 1, at 104–05; Wells, *supra* note 118, at 54.

[123] NAS REPORT, *supra* note 4, at 68–69. The ability to recognize faces differs greatly depending on whether the faces are unfamiliar or familiar. Unsurprisingly, it is more difficult to recognize a face that one has not regularly seen. *Id.*

[124] *See* Vallas, *supra* note 1, at 105.

the subjects made far more false identifications after a mere twenty-four hours than they made a few hours after the incident.[125] It does not take long, then, for an eyewitness's memory to be compromised by the passage of time. This is consistent with years of research on what has been termed the "forgetting curve"; the rate of memory loss is highest immediately after an event, then slowly levels off over time.[126]

So, in a case like *People v. McCullough*, in which McCullough was not identified by Johnson until months after the incident,[127] Johnson's identification was less likely to be accurate than if he had seen the photo array and lineup immediately after the crime.[128] In cases in which the only available evidence is eyewitness identification by a stranger to the defendant, it seems particularly unlikely that law enforcement will identify the potential perpetrator for inclusion in a photo array or lineup within an hour or two after the crime. So those eyewitness identifications on which the case rests may be even more likely to be inaccurate because of the brevity of the encounter and the amount of time that has passed between the crime and the identification procedure.

As time passes between a crime and the administration of a photo array or lineup, eyewitnesses also unknowingly incorporate outside information into their "memory" of events.[129] In fact, memories of stressful events, such as those that occur as a result of being a victim of or witnessing a crime, are particularly susceptible to "modification by exposure to post-event misinformation."[130] Based on the information to which they are exposed after the event, a witness may unconsciously fill "gaps" in his or her memory with information that was actually acquired after the incident, and which may or may not be accurate.[131] As a memory fades, and there are more gaps to fill, witnesses may be particularly prone to incorporating misinformation into their recitation of the details of an

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[125] *Id.*

[126] *See generally* Jaap M.J. Murre & Joeri Dros, *Replication and Analysis of Ebbinghaus' Forgetting Curve*, 10 PLOS ONE 1, 10 (2015) (discussing the "forgetting curve"), http://journals.plos.org/plosone/article/asset?id=10.1371/journal.pone.0120644.PDF [https://perma.cc/M9HY-P6VM].

[127] People v. McCullough, 5 N.Y.S.3d 665, 667 (N.Y. App. Div. 2015), *rev'd* 58 N.E.3d 386 (N.Y. 2016).

[128] *See* Vallas, *supra* note 1, at 104–05; Wells et al., *supra* note 118, at 54.

[129] NAS REPORT, *supra* note 4, at 62.

[130] *Id.* at 95.

[131] Frederic D. Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969, 983 (1977).

incident.[132] This is likely why individuals who are *not* the target of a criminal investigation, and who first appear in a photo array and then in a lineup as fillers, are positively identified as perpetrators at almost the same rate as actual perpetrators of crimes are identified in lineups.[133] When a witness has seen a suspect more than once through previous identification attempts or through other means such as exposure to media reports, the witness recognizes the suspect without realizing that he or she may not have first encountered the individual during the commission of a crime. In a case like *People v. McCullough*, in which one of the eyewitnesses (McCullough's accomplice) picked him out from a photo array after being exposed to news stories depicting McCullough as the suspect,[134] there is a possibility that post-event information factored into Harvey's positive identification of McCullough.

Criminal cases involving violence and weapons that are perpetrated by strangers are subject to numerous factors that negatively influence the reliability of eyewitness identifications.[135] Although eyewitness testimony may seem persuasive, it is particularly fallible in cases that involve crimes like the one in *People v. McCullough*. Unfortunately, the average juror and judge may not be aware of all of the factors that could lead to misidentification, despite the fact that violence associated with, and stress caused by, an event, the presence of a weapon, the duration of the interaction, and post-event information are event factors that have been thoroughly researched and publicized in recent years.[136] To the contrary, it is counterintuitive that a sympathetic and seemingly honest victim or eyewitness could consistently identify the incorrect individual. If jurors assume that eyewitness identification is accurate, regardless of the circumstances of the crime itself, they will place greater weight on eyewitness identification evidence than is justified by an established body of research that demonstrates that eyewitnesses are frequently mistaken. This intuitively driven approach to the assessment of available evidence will necessarily lead to wrongful convictions on the basis of eyewitness identifications.

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[132] Pedro M. Paz-Alonso et al., *Adult Eyewitness Memory and Compliance: Effects of Post-Event Misinformation on Memory for a Negative Event*, 31 BEHAV. SCI. & L. 541, 554 (2013).

[133] *See* Vallas, *supra* note 1, at 105–06.

[134] People v. McCullough, 58 N.E.3d 386, 394 (N.Y. 2016) (Rivera, J., dissenting).

[135] NAS REPORT, *supra* note 4, at 54–55.

[136] *Supra* Section II.A.

B. Jury Perception of the Reliability of Eyewitness Identification

The high rate of convictions based on eyewitness identifications that have been overturned by DNA evidence[137] is demonstrative of the power of eyewitness identification evidence over a jury. This is hardly surprising, since such evidence is both emotionally compelling and appeals to common sense.[138] Although the unreliability of eyewitnesses and overturning of convictions based on DNA evidence are topics that have appeared regularly in the news for years,[139] this exposure is apparently insufficient to remind jurors of the counterintuitive fact that a sympathetic witness or victim can be certain of his or her observations, with no reason to fabricate information, and yet still be entirely mistaken. The fact that eyewitness identification evidence is simultaneously so convincing and so unreliable necessitates an approach that favors the use of expert testimony to educate juries in cases in which the primary evidence against a defendant is eyewitness identification.

The average juror is not familiar with the functions of human memory and other factors that can adversely influence eyewitness identification. In one study, not only did almost half of potential jurors believe that, when an eyewitness is reciting his or her memory of an incident, it is akin to the reliability of a video recording, and a large majority of jurors described their own memories as "above average."[140] It is likely, then, that those same juries would consider the memory of eyewitnesses to be as reliable as they consider their own memories.[141] Only 30% of these same potential jurors believed that the presence of a weapon, violence or stress during an incident would impair the accuracy of an eyewitness's memory.[142] A majority of the same group inaccurately believed that there was a correlation between a witness's purported confidence in the accuracy of an

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[137] INNOCENCE PROJECT, *supra* note 2.

[138] Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence,* 46 JURIMETRICS 177, 180 (2006).

[139] *See, e.g.*, Kevin Johnson, Eyewitness Rules Ignored, Wrongful Convictions Result, USA TODAY (June 11, 2013), http://www.usatoday.com/story/news/nation/2013/06/11/eyewitness-wrongful-convictions-exonerate-dna/2411717/ [https://perma.cc/AG2Z-RJLL] (discussing exoneration after a wrongful conviction on the basis of eyewitness misidentification); Ruth Reiss, *Wrongfully Convicted by an Inaccurate Eyewitness,* ABC NEWS (Mar. 25, 2008), http://abcnews.go.com/Primetime/WhatWouldYouDo/story?id=4521253 [https://perma.cc/2ZTZ-F9RC] (same); Thompson, *supra* note 110 (same).

[140] Schmechel et al., *supra* note 138, at 196.

[141] *Id.*

[142] *Id.* at 197.

identification and the actual accuracy of the identification.[143] Even when jurors demonstrate comprehension of evidence, when prompted to consider factors that might affect accuracy such as weapon focus and violence, they may not integrate those factors into their consideration of eyewitness identifications.[144]

Given the fact that over 75,000 eyewitnesses identify criminal suspects per year,[145] jurors' tendency to overestimate the reliability of eyewitness testimony requires mitigation in order to protect criminal defendants against juror reliance on mistaken identification. Expert testimony like the kind offered and rejected in *People v. McCullough* would likely assist juries in making informed decisions, and perhaps reduce the rate of wrongful convictions based on eyewitness testimony. For example, Penrod and Cutler's study on expert testimony and eyewitness identification evidence found that "[e]xpert testimony clearly improved juror sensitivity to [witnessing and identification conditions]" that affect eyewitness identification accuracy.[146] Given the evidence that jurors do not have a good understanding of the fallibility of eyewitness identifications, the benefit of allowing expert testimony seems clear.[147] The *LeGrand* test's emphasis on expert testimony demonstrates an awareness of its importance. But judges ultimately make the decision regarding whether to admit expert testimony on any subject. Accordingly, the accuracy of judicial perception of eyewitness identification evidence, as well as judges' views on the effect of such evidence on jurors, must be considered in order to determine how and whether judicial discretion should be curtailed in cases where expert testimony is offered to explain eyewitness identifications to a jury.

C. Judicial Perception of the Reliability of Eyewitness Identification

In *People v. McCullough*, the Court of Appeals of New York showed deference to the trial court regarding whether to admit expert testimony regarding eyewitness identifications.[148] In addition

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[143] *Id.* at 199.

[144] *See* Brian L. Cutler et al., *Juror Decision Making in Eyewitness Identification Cases*, 12 L. & HUM. BEHAV. 41, 53–54 (1988).

[145] Adam Liptak, *34 Years Later, the Supreme Court Will Revisit Eyewitness IDs*, N.Y. TIMES (Aug. 22, 2011), http://www.nytimes.com/2011/08/23/us/23bar.html [https://perma.cc/9SWW-695P].

[146] Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking,* 52 LAW CONTEMP. PROBS. 43, 76 (1989).

[147] *See, e.g.*, Schmechel et al., *supra* note 138, at 196.

[148] *Supra* Section I.B.

to being aware of the factors that affect the reliability of eyewitness identifications, judges should know how juries misinterpret this kind of evidence in order to properly assess the importance of expert testimony. Since judges are susceptible to some of the same misperceptions as jurors are about eyewitness identification,[149] it is appropriate to severely limit judicial discretion regarding the admission of expert testimony on eyewitness identifications, as the *LeGrand* test did prior to *People v. McCullough*.[150]

Judges may, in many instances, be more aware than jurors of the controversy surrounding the reliability of eyewitness identifications, but their own expertise is not a substitute for an expert witness,[151] particularly because they may not be as knowledgeable as they believe themselves to be. Richard Wise and Martin Safer's study of judicial knowledge regarding factors affecting the reliability of eyewitness testimony[152] is instructive. Wise and Safer distributed and culled results from a survey completed by 160 judges who were members of the American Bar Association or the American Judges' Association.[153] The study addressed both what judges themselves believe about the accuracy of eyewitness testimony and what they think juries understand about the same subject.[154] For example, approximately 89% of the judges surveyed demonstrated an abstract awareness of how factors like the confidence malleability effect,[155] affect the accuracy of eyewitness testimony, yet only 32% of the same group of judges correctly disagreed with the assertion that the confidence with which an eyewitness testified about an identification was an

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[149] Richard A. Wise & Martin A. Safer, *What U.S. Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 431–35 (2004).

[150] *See supra* Section I.A.

[151] NAS REPORT, *supra* note 4, at 42. The report indicates that jury instructions may mitigate the effect of eyewitness identification evidence on a jury, "when expert testimony is not available." *Id.*

[152] Wise & Safer, *supra* note 149, at 429–31. Wise and Safer also participated in similar studies involving Norwegian and Chinese judges. Although Norwegian judges were slightly more familiar than U.S. judges with certain factors that affect eyewitness identification evidence, and Chinese judges were less familiar than both, the results were largely consistent with the results of the U.S. Wise and Safer study. *See generally* Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and U.S. Judges*, 14 PSYCHOL., CRIME & L. 177, 185 (2008); Richard A. Wise et al., *A Comparison of Chinese Judges' and U.S. Judges' Knowledge and Beliefs about Eyewitness Testimony*, 16 PSYCHOL., CRIME & L. 695, 708 (2010).

[153] Wise & Safer, *supra* note 149, at 429.

[154] *Id.*

[155] Confidence malleability refers to the fact that an eyewitness's confidence in the accuracy of his or her statement may be increased or decreased by a number of outside factors, regardless of the accuracy of his or her testimony. Essentially, a witness's confidence in the accuracy of his or her statement is not positively correlated with the actual accuracy of that statement. *See, e.g.*, C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. OF APPLIED PSYCHOL. 714, 718 (1994).

indication of the accuracy of that identification.[156] Similarly, less than 50% of judges were familiar with the "forgetting curve,"[157] and incorrectly believed that "[a] witness's ability to recall minor details about a crime is a good indicator of the accuracy of the witness's identification of the perpetrator of the crime."[158]

Although the respondent judges had practiced law for an average of approximately fourteen years, and 76% had been prosecutors or defense attorneys,[159] many of their perceptions about the effects of outside influences and psychological factors on the reliability of eyewitness identification evidence were woefully misguided. In fact, there was little correlation between either years on the bench or whether judges had been specifically educated about factors affecting accuracy of eyewitness testimony and the accuracy of their answers to the survey.[160] Nevertheless, the majority of judges surveyed for the Wise and Safer study believed "that judges and attorneys know more about eyewitness factors than the average juror."[161] It seems likely that if judges believe that they are already knowledgeable about eyewitness identification by virtue of their legal training, they will be less motivated to seek additional training, education, and clarification on the factors that affect the accuracy of eyewitness identification.

Moreover, if judges overestimate the extent to which they understand the factors that affect the reliability of eyewitness identifications, they may also believe that misperceptions by the jury can be corrected through commonly used judicial interventions like jury instructions, rather than through expert witness testimony. In the Wise and Safer study, the majority of judges acknowledged that jurors do not generally have knowledge of the factors that affect eyewitness testimony.[162] At the same time, only 39% of the same group of judges correctly disagreed with the statement that juries can tell the difference between "accurate and inaccurate eyewitnesses."[163] This indicates that judges put more faith in a jury's ability to assess eyewitness identification than is justified. Perhaps this is why 74% and 80% of judges, respectively, would permit cross-

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[156] Specifically, those judges accurately disagreed with the statement: "At trial, an eyewitness's confidence is a good indicator of identification accuracy." Wise & Safer, *supra* note 149, at 430–33.

[157] *See id.* at 430, 432.

[158] *Id.* at 430–32.

[159] *Id.* at 438.

[160] *Id.* at 437.

[161] *Id.* at 434.

[162] *Id.* at 430–33.

[163] *Id.* at 430–32.

examination and closing statements to address a variety of factors—confidence malleability, mug-shot-induced bias, weapon focus, forgetting curve, and lineup presentation format—that affect the accuracy of eyewitness identification, but were far more reluctant to admit expert testimony in order to address the same.[164]

It appears, then, that in addition to their own misconceptions regarding the reliability of eyewitness identification testimony, judges may incorrectly believe that jurors have an ability to appropriately judge the accuracy of such witnesses at trial. Judges appear to erroneously place great weight on a skilled attorney's ability to address eyewitness credibility without the help of an expert.[165] While cross-examination is a common method of attacking a witness's credibility, even the most skilled attorney would likely find herself unable to effectively cross-examine a witness about the accuracy of her identification because inaccuracy is often based on factors "not known to the witness herself."[166]

In addition to overestimating the reliability of eyewitness identification, both jurors and judges tend to underestimate the effect of well-documented psychological factors that can damage an eyewitness's ability to accurately identify the perpetrator of a crime. Generally, assessing and addressing the potential unfair prejudice presented by various types of evidence is within the realm of a judge's expertise.[167] It seems clear, however, that the proper evaluation of eyewitness identifications is challenging, not just for juries, but also for experienced judges.[168] Criminal defendants against whom little more than eyewitness identification evidence is offered, then, face two hurdles: the judge's misconception about eyewitness identifications and the judge's misconception about the jury's ability to appropriately consider the weight of eyewitness identification.[169]

This is not an area, then, in which it is appropriate to defer to judicial discretion; indeed, it seems likely that this judicial ignorance would naturally lead to judges refusing to admit expert testimony on the subject, and also failing to give appropriate instructions to the jury. Even if judges do give such

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[164] Specifically, 44% of judges said that they would permit expert testimony as a "legal safeguard" to protect against the potentially prejudicial effects of these five factors on a jury's assessment of eyewitness testimony. *Id.* at 434.

[165] Anna Lvovsky, *The Province of the Jurist: Judicial Resistance to Expert Testimony on Eyewitnesses as Institutional Rivalry*, 126 HARV. L. REV. 2381, 2388–91 (2013).

[166] Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross Examination,* 36 STETSON L. REV. 727, 778–81 (2007).

[167] Lvovsky, *supra* note 165, at 2397.

[168] Wise & Safer, *supra* note 149, at 431–35.

[169] *Id.* at 430–32.

instructions, it is unlikely to be as effective as admitting expert testimony on the same subject.[170] Expert testimony on eyewitness identification evidence leads jurors to question such evidence and consider it more carefully during deliberations.[171] A limit on judicial discretion regarding the admission of expert testimony on eyewitness identifications, consistent with the original application of the *LeGrand* test, is a fitting remedy to correct for this issue.

III. THE SOLUTION: RESTORE THE *LEGRAND* TEST AND PLACE AN ADDITIONAL LIMIT ON JUDICIAL DISCRETION

Eyewitness identification evidence is unique in that it seems intuitively reliable to both judges and juries, but can be highly unreliable in the context of violent crimes committed by strangers.[172]

It is too soon to tell if the departure from *LeGrand* is a trend or a one-time detour,[173] but the retreat from the use of this test in *People v. McCullough* was an error by the Court of Appeals of New York that may have had serious consequences for Jamell McCullough and other criminal defendants in New York. Regardless of whether the decision was an anomaly, the trial court judge's decision to credit the questionable testimony of an accomplice as corroborating evidence for eyewitness identification highlights a weakness in the existing *LeGrand* test that the court of appeals should remedy.[174]

Even as originally conceived, the *LeGrand* test still calls for judges to exercise some discretion when determining how much evidence is needed to corroborate eyewitness identification.[175] If judges overestimate the reliability of identifications by eyewitnesses and assign greater weight to that type of evidence, however, they are necessarily unable to appropriately assess how much corroboration for the identification is sufficient to justify a refusal to admit expert testimony under *LeGrand*. Judges should be unable to refuse to admit relevant expert testimony regarding

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[170] Vallas, *supra* note 1, at 129–30.

[171] Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK L. REV. 1121, 1162 (2001).

[172] *See supra* Part II.

[173] The composition of the Court of Appeals of New York has changed significantly since the cases discussed in Section I.A of this note were decided. All but one of the judges who were appointed as of the court's decision in *People v. McCullough* were appointed in 2013 or later. *See Judges of the Court*, CT. OF APPEALS, ST. OF N.Y., http://www.nycourts.gov/ctapps/index.htm [https://perma.cc/GA3Y-CY8L]. A search of recent New York decisions reveals no cases applying the *LeGrand* test approach since *McCullough*.

[174] It is likely that, were the *LeGrand* test to be modified, it would be modified by the courts, as *LeGrand* was. *See generally* People v. McCullough, 58 N.E.3d 386, 388 (N.Y. 2016); *Legrand*, 867 N.E.2d at 379.

[175] *See LeGrand*, 867 N.E.2d at 375–76.

eyewitness identifications when the only available corroborating evidence is a type of evidence that also requires corroboration to result in a conviction.[176] As demonstrated by the result of *People v. McCullough*, judicial discretion should be further limited by requiring that judges move on to the second prong of the *LeGrand* test by considering the relevance of expert testimony when (1) the case turns on eyewitness identifications, and (2) there is little or no corroborating evidence for the eyewitness identification(s); or, as this note proposes, (3) the only corroborating evidence linking a defendant to a crime is corroborating identification by other eyewitness who are strangers to the defendant, or accomplice testimony. Support for treating these two categories of evidence differently already exists in New York State law[177] and in the Court of Appeals of New York's previous treatment of the *LeGrand* test.[178] Explicitly requiring that New York judges treat eyewitness identification and accomplice testimony as uniquely inadequate is an appropriate additional limit on judicial discretion in cases where there is no additional reliable evidence available to corroborate eyewitness identifications.

A. Corroboration Is Required for Both Eyewitness Identification Evidence and Accomplice Testimony in New York

Even applied as originally intended, the first prong of the *LeGrand* test leaves too much room for the judicial interpretation of evidence that judges may not be able to accurately assess.[179] The requirement that judges evaluate the admissibility of relevant expert testimony by first assessing whether there is "little or no corroborating evidence" for the eyewitness's identification of the defendant[180] does not assist judges in determining just how much corroborating evidence is sufficient to justify the exclusion of expert testimony. Although the meaning of "no corroborating evidence" is plain, "little . . . corroborating evidence" leaves room for both trial and appellate judges to incorrectly evaluate multiple pieces of unreliable evidence. *People v. McCullough* provides an excellent illustrative example of eyewitness identification corroborated only by evidence that could either be viewed as accomplice testimony or an identification by an eyewitness who was a

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176 *See* N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1970).
177 *Id.*
178 *Supra* Section I.A.
179 *Supra* Section II.C.
180 *LeGrand*, 867 N.E.2d at 375.

stranger to the defendant.[181] But the unreliability of accomplice testimony and multiple eyewitness identification evidence has already been consistently acknowledged by New York courts and state law.[182]

In *People v. McCullough*, there were just two pieces of evidence linking McCullough to the murder and robbery: Johnson's testimony and Harvey's testimony.[183] Harvey's testimony could be evaluated either as accomplice testimony or as eyewitness identification evidence. The trial court considered Harvey to be a cooperating accomplice, but his testimony had much in common with Johnson's: McCullough was a stranger to Harvey, with whom he only interacted briefly, and who he identified for the first time after a number of months after the crime.[184] Viewed as an eyewitness, Harvey was unreliable because he did not initially identify McCullough in a photo array and only identified him after being exposed to media coverage regarding McCullough's alleged role in the robbery and homicide.[185] Viewed as an accomplice, Harvey may have had an interest in minimizing his role, and maximizing or fabricating McCullough's role in the crime for which he and his family members had also been charged. Through either lens, Harvey's identification of McCullough carried very little indicia of reliability without adequate support. In fact, his testimony exemplifies the reasons for the concerns that exist regarding both eyewitness identifications and accomplice testimony.

Both eyewitness identification evidence and testimony from a cooperating accomplice are considered to be uniquely unreliable evidence in New York. According to New York Criminal Procedure Law § 60.22, "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."[186] Accomplice testimony is, in fact, the only kind of evidence upon which New York's Criminal Procedure Law specifically prohibits conviction in the absence of corroborative evidence.[187] As is the case for eyewitness identifications, sufficient corroborating evidence for accomplice testimony "tends to connect the defendant with the

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[181] *See* People v. McCullough, 58 N.E.3d 386, 387 (N.Y. 2016).

[182] *See* N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1970) (regarding accomplice testimony); *supra* Section I.A (regarding eyewitness identification).

[183] Brief for Respondent, *supra* note 52, at 3.

[184] People v. McCullough, 5 N.Y.S.3d 665, 667 (N.Y. App. Div. 2015), *rev'd* 58 N.E.3d 386 (N.Y. 2016); Brief for Respondent, *supra* note 52, at 11.

[185] *McCullough*, 5 N.Y.S.3d at 668; Brief for Respondent, *supra* note 52, at *11.

[186] N.Y. CRIM. PROC. LAW § 60.22.

[187] *See* N.Y. CRIM. PROC. LAW § 60.

commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth."[188] Courts are prohibited from relying entirely upon accomplice testimony because of the likelihood that an accomplice will misrepresent facts in order to minimize his or her own involvement in the crime.[189] For example, in *People v. McCullough*, Harvey's testimony identifying McCullough could be regarded as questionable, not only because of his own plea deal, but because other than McCullough, the identified defendants were all related to him.[190] The New York Criminal Procedure Law pragmatically recognizes that a witness's credibility is suspect when that witness has a personal motivation for identifying someone else as the doer, and therefore requires corroboration to support a conviction.[191]

The Court of Appeals of New York has consistently found that having multiple pieces of evidence that have a tendency to be unreliable is not sufficient corroboration under *LeGrand*.[192] The troubling result of *People v. McCullough* demonstrates the logic of this position: if there are only two pieces of evidence available, and both of those pieces of evidence cannot result in a conviction without sufficient corroboration, how can each provide corroboration for the other? The trial court's failure to appropriately assess the available evidence in *People v. McCullough*, however, indicates that limiting judicial discretion when evaluating eyewitness identification that is corroborated by other eyewitness identification or accomplice testimony is necessary and appropriate.

B. The Addition of Categorical Limits to Judicial Discretion Regarding the Admission of Expert Testimony

Although there is an acknowledgment by judges that juries may benefit from a more sophisticated explanation of the pitfalls of eyewitness identification, their confidence in the efficacy of cross-examination and their own judicial expertise regarding evidence may lead to an avoidance of experts when dealing with evidence that is commonly utilized and generally

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[188] People v. Reome, 933 N.E.2d 186, 188 (N.Y. 2010) (quoting People v. Dixon, 131 N.E. 752, 754 (N.Y. 1921)).

[189] William Donnino, McKinney Practice Commentary, N.Y. CRIM. PROC. § 60.22.

[190] Brief for Respondent, *supra* note 52, at 4.

[191] For additional discussion of accomplice testimony and wrongful convictions statistics, see Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE UNIV. L. REV. 107, 110–14 (2006).

[192] *See supra* Section I.A.

unenhanced by modern technology.[193] This is particularly true of eyewitness identification evidence, since judges are more likely to overestimate their own understanding of eyewitness identification evidence.[194] There is, therefore, a greater likelihood that these same judges will overestimate how much corroboration is necessary before they are required to move on to the second stage of the *LeGrand* test. In *McCullough*, for example, although Harvey's poor credibility was undisputed, the trial court believed that the addition of Harvey's testimony identifying McCullough constituted sufficient corroboration because the judge considered Johnson to be credible.[195] This demonstrates a lack of understanding of the factors that may adversely influence this unique type of evidence, as credibility is not necessarily the predominant concern for eyewitness identification by an individual with no previous knowledge of the defendant.[196] Certainly, there is no indication that Johnson had an external motivation to identify McCullough. He may well have been certain of his identification, but nonetheless have been mistaken due to unknown influences and stressors.[197]

Because both accomplice testimony and eyewitness identification evidence from strangers to the defendant are acknowledged to be categorically unreliable in New York,[198] the ultimate result in *People v. McCullough* is inherently problematic. The trial court judge moving to the second stage of the *LeGrand* test could very well have meant the difference between conviction and exoneration in this case, as there is no real dispute that the expert testimony offered was relevant and offered by a qualified expert.[199] There is no dispute that the case turned on the accuracy of Johnson's and Harvey's identification.[200] The original *LeGrand* test, however, allowed the judge the discretion to decide whether Harvey's testimony qualified as sufficient evidence to corroborate Johnson's identification before moving on to the second part of the test that requires admission of relevant expert testimony.

The modification proposed in this note would allow no such discretion in cases like *McCullough* in which the only available evidence is eyewitness identification and accomplice

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193 *See* Lvovsky, *supra* note 165, at 2387–95.

194 *Supra* Section II.C.

195 People v. McCullough, 58 N.E.3d 386, 390, 395 (N.Y. 2016) (Rivera, J., dissenting).

196 *See supra* Section II.A.

197 *Supra* Section II.A.

198 *Supra* Section III.A.

199 *See McCullough*, 58 N.E.3d at 388.

200 *See supra* Section II.A.

testimony. Rather, upon finding that a case turns on eyewitness identifications, and that the only available corroborating evidence is other identification by strangers, or accomplice testimony, or both, the trial judge will be forced to admit the relevant expert testimony. Accordingly, the jury will have received effective education regarding some of the factors that may have unfairly influenced Johnson's identification of McCullough. While the disposition of the case may not have changed, the result in *McCullough* might have appeared far more equitable had expert testimony been admitted.

Despite the historically skeptical treatment of both eyewitness identifications and accomplice testimony in New York, judicial misunderstanding of eyewitness identification and the likelihood of eyewitness identification evidence leading to a wrongful conviction necessitates a greater restraint on judicial discretion than is present in the original formation of the *LeGrand* test. Judges should remain free to exercise discretion when determining whether physical evidence, a confession, or other types of evidence constitute "little or no corroborating evidence connecting the defendant to the crime other than eyewitness identification."[201] It should always be an abuse of discretion, however, to refuse to admit relevant and qualified expert testimony when the only corroboration for eyewitness identification is other eyewitnesses who are strangers to the defendant or accomplice testimony or both.

CONCLUSION

Cases with fact patterns like that of *People v. McCullough*—in which the perpetrator commits a violent crime against a stranger[202]—are hardly uncommon.[203] Although DNA evidence proves immensely helpful in exonerating those who have been wrongfully convicted of crimes on the basis of unreliable evidence, DNA evidence is only available in 5% to 10% of criminal cases.[204] While best practices may improve the reliability and reduce the suggestibility inherent in law enforcement procedures used to identify perpetrators of crimes,[205] even the best identification techniques cannot account

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[201] People v. LeGrand, 867 N.E.2d 374, 375 (N.Y. 2007).

[202] *See generally McCullough*, 58 N.E.3d 386.

[203] JENNIFER L. TRUMAN & LYNN LANGTON, CRIMINAL VICTIMIZATION, 2014 2 (2014), http://www.bjs.gov/content/pub/pdf/cv14.pdf [https://perma.cc/N55G-25TT]. For example, in 2014, there were over 930,000 combined sexual assaults, aggravated assault, and robberies committed by strangers recorded in the United States. *Id.*

[204] Vallas, *supra* note 1, at 101.

[205] *See* Wells et al., *supra* note 118, at 59–60.

for the effects of stress, violence, and the presence of weapons on eyewitness memory. These factors are functions of what occurs during the crime itself. No identification procedure can effectively prevent the incorporation of post-event information from media sources or other outside influences; law enforcement officers can hardly isolate witnesses until they have a suspect for a photo array or lineup. Nor is it reasonable to suggest that eyewitness identification evidence should be eliminated as admissible evidence. It is therefore the courts' responsibility to mitigate the unfair prejudicial effect of false eyewitness identifications through the use of legal safeguards like the *LeGrand* test.

Although identifications by eyewitnesses who are strangers to the perpetrators of crimes—particularly violent crimes—are unreliable, both judges and juries continue to harbor misperceptions about the reliability of eyewitness testimony that may lead them to assign unjustified weight to this kind of evidence. It is therefore appropriate to favor an approach that limits judicial discretion and tends to require the admission of expert testimony regarding eyewitness identifications.

While the expert testimony favored by the existing *LeGrand* test forces juries to consider complex issues, and takes some extra time, it is an effective means of educating jurors and judges about the fallibility of eyewitness identifications.[206] *People v. McCullough* shows that, in addition to the limits on judicial discretion in the *LeGrand* test as originally conceived, it is appropriate to require that trial court judges admit relevant expert testimony when the only evidence tying a defendant to a crime is identification by other eyewitness who are strangers to the defendant, or accomplice testimony. This solution is not only consistent with existing New York law, but also a step toward further reducing wrongful convictions.

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[206] Vallas, *supra* note 1, at 98.

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