BY ALEX YUFIK

The Science of Eyewitness Testimony

ON NOVEMBER 10, 2000, POLICE ARRESTED Rachel Jernigan for allegedly robbing three banks in Arizona. Jernigan became a suspect in the case after an FBI agent investigating the robberies had a chance conversation with a postal inspector who had been investigating unrelated shoplifting incidents at a local post office. The postal agent noted that Jernigan fit the description of the previously unidentified bank robber. After the conversation, the FBI agent created a photographic lineup that included Jernigan and showed the pictures to one of the victim bank tellers. The teller identified Jernigan as the woman who robbed her. Five or six months later, the pictures were shown to other eyewitnesses who also identified Jernigan as the robber. At trial, the government relied entirely on the accounts of five eyewitnesses and an unclear bank surveillance video.

No physical evidence tied Jernigan to the robbery, and throughout her trial Jernigan asserted her innocence. Unbeknown to the jury, the government knew that other nearby banks were being robbed by another woman—fitting the same description as Jernigan—while Jernigan was in custody but failed to provide this information to her counsel. The jury convicted Jernigan, and the court sentenced her to 168 months in jail. While in jail, Jernigan learned from her fellow inmates of the other woman with similar features who was arrested for robbing the same bank on a different day. She then petitioned the court for a new trial. On July 9, 2007, the Ninth Circuit overturned her conviction in *United States* v. *Rachel Jernigan*.[1]

Psychologists have long questioned the seemingly blind faith courts place in eyewitness testimony. Over the last 30 years researchers have documented extensively the many factors that affect the accuracy of eyewitness identification. The research information has been used to make recommendations to change the manner in which eyewitness evidence is used in court as well as to make practical recommendations for law enforcement officials to change the manner in which they conduct eyewitness lineups.

Forensic psychologists have also made significant contributions in clearly and dispassionately educating fact finders about eyewitness memory, recall, and other factors that are relevant in properly evaluating eyewitness testimony. For example, one such recommended change is the use of experts in preventing false convictions based on unreliable eyewitness testimony. Many studies have shown that using expert testimony is the only legal safeguard that is effective in alerting jurors to the perils of eyewitness identification, and that neither jury instructions nor cross-examination is sufficient.

Despite the available studies, courts continue to preclude expert testimony, and the police refuse to change their procedures. As the Jernigan case illustrates, and as other cases continue to surface in the press, the need to change the system is strong. Despite the available data there is still a great deal of resistance to implementing changes. Why?

One possible explanation is the firm belief held by many judges that because the information about eyewitness fallibility is so ubiquitous, nothing an expert can say can benefit the jurors in deciding a case. On the contrary, recent studies have documented that lawyers and judges continue to remain ignorant about the empirical psychological findings that explain human memory and behavior as they relate to legal proceedings. As the Jernigan case shows, jurors often underestimate the frequency of errors present in testimony based on memory, and they remain unaware of the degree to which recall of past events is often subject to distortion.

As the Jernigan case shows, jurors underestimate the frequency of errors present in testimony based on memory.

The result has been that judges may feel that the scientific evidence is unnecessary because the information is within common knowledge of the jurors. In addition, attorneys may not know how or when to employ experts in these situations. Science has clearly and definitively identified that the intuitive notions about memory, cognition, and eyewitness identification that are often held by judges and juries are wrong. For example, a study published in the *Journal of Applied Cognitive Psychology*[2] found that judges have very limited understanding of eyewitness factors. In the study, more than half the judges surveyed mistakenly believed that an eyewitness's ability to recall peripheral details about a crime indicates that the witness has a better memory than a witness who cannot recall peripheral details.

As a result of these discoveries, California has made a landmark effort to institute change in our legal system. In 2004, the legislature created the California Commission on the Fair Administration of Justice with the task of reviewing the state's criminal justice system and to make recommendations to ensure the fair and accurate administration of justice. As part of its work, the commission has suggested a number of empirically supported changes to the rules guiding eyewitness identification. As members of the legal system we can ensure the fair administration of justice by supporting and encouraging such change, especially when it is based on sound, scientific, psychological principles. Only by continuing to question and examine our system of justice and its methods can we prevent a case like Jernigan's from occurring in California. ■

[1] United States v. Jernigan, No. 05-10086 (9th Cir. July 9, 2007).
[2] 18 J. APPLIED COGNITIVE PSYCHOL. 427-43 (2004).

Alex Yufik is a licensed forensics psychologist and an attorney in private practice in West Hollywood.

BY ALEX YUFIK

The Science of Eyewitness Testimony

ON NOVEMBER 10, 2000, POLICE ARRESTED Rachel Jernigan for allegedly robbing three banks in Arizona. Jernigan became a suspect in the case after an FBI agent investigating the robberies had a chance conversation with a postal inspector who had been investigating unrelated shoplifting incidents at a local post office. The postal agent noted that Jernigan fit the description of the previously unidentified bank robber. After the conversation, the FBI agent created a photographic lineup that included Jernigan and showed the pictures to one of the victim bank tellers. The teller identified Jernigan as the woman who robbed her. Five or six months later, the pictures were shown to other eyewitnesses who also identified Jernigan as the robber. At trial, the government relied entirely on the accounts of five eyewitnesses and an unclear bank surveillance video.

No physical evidence tied Jernigan to the robbery, and throughout her trial Jernigan asserted her innocence. Unbeknown to the jury, the government knew that other nearby banks were being robbed by another woman—fitting the same description as Jernigan—while Jernigan was in custody but failed to provide this information to her counsel. The jury convicted Jernigan, and the court sentenced her to 168 months in jail. While in jail, Jernigan learned from her fellow inmates of the other woman with similar features who was arrested for robbing the same bank on a different day. She then petitioned the court for a new trial. On July 9, 2007, the Ninth Circuit overturned her conviction in *United States* v. *Rachel Jernigan*.[1]

Psychologists have long questioned the seemingly blind faith courts place in eyewitness testimony. Over the last 30 years researchers have documented extensively the many factors that affect the accuracy of eyewitness identification. The research information has been used to make recommendations to change the manner in which eyewitness evidence is used in court as well as to make practical recommendations for law enforcement officials to change the manner in which they conduct eyewitness lineups.

Forensic psychologists have also made significant contributions in clearly and dispassionately educating fact finders about eyewitness memory, recall, and other factors that are relevant in properly evaluating eyewitness testimony. For example, one such recommended change is the use of experts in preventing false convictions based on unreliable eyewitness testimony. Many studies have shown that using expert testimony is the only legal safeguard that is effective in alerting jurors to the perils of eyewitness identification, and that neither jury instructions nor cross-examination is sufficient.

Despite the available studies, courts continue to preclude expert testimony, and the police refuse to change their procedures. As the Jernigan case illustrates, and as other cases continue to surface in the press, the need to change the system is strong. Despite the available data there is still a great deal of resistance to implementing changes. Why?

One possible explanation is the firm belief held by many judges that because the information about eyewitness fallibility is so ubiquitous, nothing an expert can say can benefit the jurors in deciding a case. On the contrary, recent studies have documented that lawyers and judges continue to remain ignorant about the empirical psychological findings that explain human memory and behavior as they relate to legal proceedings. As the Jernigan case shows, jurors often underestimate the frequency of errors present in testimony based on memory, and they remain unaware of the degree to which recall of past events is often subject to distortion.

As the Jernigan case shows, jurors underestimate the frequency of errors present in testimony based on memory.

The result has been that judges may feel that the scientific evidence is unnecessary because the information is within common knowledge of the jurors. In addition, attorneys may not know how or when to employ experts in these situations. Science has clearly and definitively identified that the intuitive notions about memory, cognition, and eyewitness identification that are often held by judges and juries are wrong. For example, a study published in the *Journal of Applied Cognitive Psychology*[2] found that judges have very limited understanding of eyewitness factors. In the study, more than half the judges surveyed mistakenly believed that an eyewitness's ability to recall peripheral details about a crime indicates that the witness has a better memory than a witness who cannot recall peripheral details.

As a result of these discoveries, California has made a landmark effort to institute change in our legal system. In 2004, the legislature created the California Commission on the Fair Administration of Justice with the task of reviewing the state's criminal justice system and to make recommendations to ensure the fair and accurate administration of justice. As part of its work, the commission has suggested a number of empirically supported changes to the rules guiding eyewitness identification. As members of the legal system we can ensure the fair administration of justice by supporting and encouraging such change, especially when it is based on sound, scientific, psychological principles. Only by continuing to question and examine our system of justice and its methods can we prevent a case like Jernigan's from occurring in California. ■

[1] United States v. Jernigan, No. 05-10086 (9th Cir. July 9, 2007).
[2] 18 J. APPLIED COGNITIVE PSYCHOL. 427-43 (2004).

Alex Yufik is a licensed forensics psychologist and an attorney in private practice in West Hollywood.