

Monday, September 8, 2008

**I will never forget that face?**

Â Bill of RightsÂ (From public domain.)Â An armed robber bursts into the local bank with guns drawn. As a bank customer, do you stare at the robber's face to be able to describe the perpetrator to the police in the minutest detail, or do you try to protect yourself and those around you? Â Unfortunately, countless innocent people are wrongfully convicted on the testimony of an eyewitness saying "I will never forget that face" when the witness never had a chance to process the image of the suspect's face and other features in the first place, when the visual and sound observation totaled only seconds at best, and when the witness's first priority was to emerge safely, rather than to be a photographic-memory witness. We already know through DNA evidence how often people are wrongfully convicted. Defendants have a Due Process right to call expert witnesses in identification and memory related thereto. Â Particularly when discounting identification evidence will spell the difference between guilt and innocence, the defense must be permitted to present psychological experts in witness identification, because such cognition issues are uniquely within the ability of qualified experts to assist lay jurors in deciding a criminal defendants' liberty. However, on September 5, 2008, Maryland's intermediate appellate court gave trial judges wide leeway to slam the door on such expert testimony (leaving trial judges "sound discretion" to bar such witnesses), which is particularly ironic when considering such junk "expert" testimony allowed in evidence by the appellate courts in Maryland and elsewhere by so-called experts on whether a drug possessor intended to distribute the substance. *Bomas v. Maryland*, \_\_ Md. App. \_\_ (Sept. 5, 2008).Â Concerning the defendant's efforts to present expert testimony, *Bomas* says in pertinent part: Â "According to appellant, the court abused its discretion in assuming that potential deficiencies in the detective's recollective capacities could be exposed through cross-examination. There is, he claims, a 'recent national trend in the law' that recognizes that 'reliance on . . . jurors's common sense and understanding is an insufficient proxy for expert guidance as to the limits of eyewitnesses.'" Appellant's argument relies exclusively on decisions from other jurisdictions suggesting that studies have shown that juries give much weight to the memories of eyewitnesses, even when the memories have been shown to be unreliable. But the studies were not part of Dr. Schretlen's testimony. He neither relied upon them nor even referred to them in the course of testifying." *Bomas*.Â The above-reference studies not testified to by *Bomas*'s expert are referenced in footnote 5 to the *Bomas* opinion as follows: Â "Appellant relies on *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006), where the United States Court of Appeals for the Third Circuit reviewed a large amount of scholarly materials concerning the uncertainty of human memory and the reliability of eyewitness identifications. The *Brownlee* Court noted that 'while science has firmly established the "inherent unreliability of human perception and memory,"' id. at 142 (quoting Rudolf Koch, Note, Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony, 88 Cornell L.Rev. 1097, 1099 n. 7 (2003)), 'this reality is outside the jury's common knowledge,' and often contradicts jurors' commonsense understandings.' Id. (quoting Koch, 88 Cornell L. Rev. at 1105 n. 48). He also relies on *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000) ('Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive.')." *Bomas* at n.5.Â Hopefully cert. review to Maryland's highest court, the Court of Appeals, will be sought and obtained in *Bomas*.Â How do your jurisdictions deal with allowing criminal defendants to call experts in witness identification and failed witness memory? Jon KatzÂ

Posted by Jon Katz in Criminal Defense at 00:00