



© McCarony | stock.adobe.com

## Three Faces of Eyewitness Psychology and Expert Testimony

While the idea of an expert witness on eyewitness memory may seem novel, it was first introduced by Hugo Münsterberg, a German-American psychologist, in 1908, with the publication of *On the Witness Stand*.<sup>1</sup> The issues that he wrote about, eyewitness memory and confession, are still, by and large, the ones that modern day researchers continue to investigate.<sup>2</sup> Not only is Münsterberg the undeniable founder of law-psychology, but he also served frequently as an expert witness in courts across the country.<sup>3</sup> After Münsterberg, there was a hiatus on psychological research on eyewitness memory (a subset of research on human memory) until the 1970s, and since that time more than a thousand books, book chapters, and peer-reviewed articles on a wide range of topics concerning eyewitness memory have been published. These topics include the accuracy of eyewitness memory, memory malleability, factors affecting eyewitness memory, methods of improving eyewitness memory, children's testimony, the accuracy of repressed memories, and lay peoples' knowledge and opinions about eyewitness memory.

With increasing frequency since the 1970s, psychologists have been admitted as expert witnesses to educate factfinders about the many facets of eyewitness memory. This article provides readers with an overview of three distinct topics about which eyewitness experts typically testify: eyewitness identification, repressed memory, and child-witnesses.

### Eyewitness Identification Experts

Drawing on the vast literature on human memory and eyewitness memory, the eyewitness expert educates the factfinder about four primary topics: (1) how memory works; (2) factors that affect an eyewitness's ability to encode a perpetrator's characteristics to a degree necessary for eyewitness identification; (3) the nature of identification tests and how they increase or decrease the risk of false identification; and (4) eyewitness confidence, its relation to identification accuracy, and the false confidence effect.

With regard to memory, the eyewitness identification expert should point out that memory does not work like a VCR or DVR. When an eyewitness experiences an event, she does not record a verbatim and complete copy. Instead, she stores the gist of the event, and when she wants to retrieve the experience, she fills in any gaps in accordance with what she knows about how the world works. Because the eyewitness did not store an identical copy of what actually occurred in her memory, these reconstructions can be accurate, but they also may be inaccurate. This explains how people can have confidently held detailed memories of events that never occurred.

---

BY BRIAN L. CUTLER, PH.D., JEFFREY S. NEUSCHATZ, PH.D.,  
AND CHARLES R. HONTS, PH.D.

Furthermore, previously formed memories can still change with any retrieval of that memory.<sup>4</sup>

The eyewitness identification expert should be able to explain how factors such as stress, weapon focus, short exposure time (the time the witness has to view the face), long retention intervals (the amount of time between the incident and the lineup), previous encounters with the suspect, and head coverings can increase the risk of mistaken identification. For example, the expert should be able to explain to the jury that eyewitnesses make more mistakes when identifying a perpetrator of a different race than of the same race. In addition, the expert should be able to explain that eyewitnesses are at greater risk for mistaken identification when under stress, when a weapon is visibly present, when exposure to the perpetrator's face was brief, when the suspect was wearing a hat covering his hair and hairline, and when there was a long duration between the crime and the identification.<sup>5</sup>

The eyewitness identification expert should be able to critically evaluate the identification procedure and explain the ways in which it increased or decreased the risk of false identification. To this end, the expert will review the quality of the fillers in the photo array or lineup, the instructions given to the eyewitness prior to the identification procedure, the manner in which the identification procedure was presented to the eyewitness, and whether the procedure was double-blind.<sup>6</sup> The expert should be positioned to evaluate the identification procedure in light of modern best practices adopted in the relevant police department, state, or federal law enforcement authority. Relatedly, the expert can educate the factfinder about the complex relationship between eyewitness confidence and accuracy and the factors that can lead the eyewitness to develop a sense of false confidence in the accuracy of her identification.<sup>7</sup>

### Repressed Memory Experts

In a repressed memory case, the alleged victim is an adult who claims that she was sexually assaulted<sup>8</sup> — sometimes repeatedly — by a family member or friend of the family when she was a child. It is called a “repressed” memory case because the alleged victim for some period of time (sometimes many years) had no memory of the abuse, but some process, such as psychotherapy, “uncovers” the memory and gives rise to the accusa-

tions. Typically, the alleged victim's repressed memory is the only evidence of the alleged crime. The complaints made by a victim arising from her repressed memory may be egregious and may be used in the course of interrogation to pressure a suspect into a false confession of child sexual abuse.

The repressed memory expert should review the evidence concerning the victim's complaint and the context in which the complaint arose, such as investigative reports and interviews with the witness and anyone (e.g., a therapist) who assisted the witness with uncovering the alleged memory of the abuse. The repressed memory expert should educate the factfinder about how memory works. As explained above, a memory once formed is not etched in stone and can change substantially over time. These changes in memory typically occur unbeknownst to the person whose memory is at issue. The expert would explain that it is possible to have detailed memories of events that never occurred but are confidently believed, or what experts term “false memories.” In fact, the act of thinking about an event or even imagining an event occurring can create false memories.<sup>9</sup>

False memories are not confined to simple events; rather, they can be complex and compelling. In the seminal work on false memories, researchers gave 24 participants a booklet that contained brief narratives of three true events (as verified by the participants' relatives) and one false event (getting lost in a mall at a young age).<sup>10</sup> After reading the narratives and filling in any details that they could remember, the participants were interviewed twice about the events. They found that one-fourth of the participants remembered being lost as a young child and provided details about the event. Thus, it is possible to remember events that never occurred with great detail.

Since the influential “lost in a mall study,” psychologists have gotten people to remember being attacked by a dog, meeting Bugs Bunny at Disneyland, taking a ride on a hot air balloon, getting a finger caught in a mousetrap and going to the hospital, and committing a theft or assault as teenagers.<sup>11</sup> The repressed memory expert can explain that false memories feel as if they were actually experienced and that victims' emotional response to retelling these events is not indicative of the truth.<sup>12</sup>

Although an expert can educate the factfinder about how it is possible to create memories of traumatic events that never occurred, the expert should not give opinions regarding the truth of the memory. The expert simply cannot tell if a victim's memory is true or false and, if asked, the expert can say that no one can tell whether a memory is true without independent verification. Importantly, someone else's memory does not constitute independent verification because that person's memories work the same as the victim's and are susceptible to the same types of errors.

Finally, the repressed memory expert can evaluate the forensic interview of the client and identify suggestive influences that increased the risk of encoding a false memory. Previous research has pointed out that several therapeutic techniques such as hypnosis, repeated questioning, journaling, guided imagery, and other similar techniques are conducive to false memory creation.<sup>13</sup>

### Child-Witness Experts

When a child is involved as a prosecution witness, special concerns arise about the witness and the context. Even young children can provide accurate testimony, and they, like adults, can be subject to the negative effects of suggestive questioning and improper interview techniques. Some child-witness research findings are surprising and not well known in the general population. In addition, the normal courtroom tool of stringent cross-examination may be limited with an alleged victim/witness who is a child because the court may provide explicit protections for the child witness and the child witness is an inherently sympathetic witness. A child-victim/witness expert may be necessary to educate counsel and the triers of fact concerning the unique characteristics of children as witnesses.

Psychology has studied child witnesses for over 100 years.<sup>14</sup> That research has produced several well-established findings that have resulted in recommendations for evidence-based best practices when interviewing and assessing alleged victim/witness statements made by children. An interdisciplinary consensus statement was simultaneously published in six journals.<sup>15</sup> That consensus statement and subsequent research produced the following conclusions: No specific behavioral syndromes characterize victims of sexual abuse. Young victims/wit-

nesses are able to provide reliable and accurate accounts of events they witnessed or experienced when they are interviewed without manipulation. However, such interviewing is difficult and is best conducted by interviewers specifically trained to interview chil-

port-building, and then a substantive interview about the issues. After an exhaustive use of free-recall prompts, the interviewer is then allowed to use more directed questions, but always with the admonition to return to free narrative responses whenever possible. Research

sel about any particular risks observed with this witness and opine about the appropriateness of the interviews conducted and the content of the statements obtained.

In giving testimony, the expert should educate the trier of fact by commenting on the quality of the interview conducted and the expertise of the interviewer. The expert should also educate the trier of fact about the scientific research concerning the willingness and ability of children to tell convincing lies in forensic settings. Finally, the expert should educate the trier of fact about research indicating that lies told by even young children are as difficult to recognize as those told by adults. The expert would generally not opine directly about the credibility of the child witness's statement, but the expert should note weakness in the interview methods used and the dangers posed by those weaknesses.

### Conclusion

Psychologists, as eyewitness experts, can be helpful in several distinct types of cases, those involving eyewitness identification, repressed memories, and child witnesses. In some cases, the expert testimony on these topics may be novel and/or contested at the admissibility stage. The expert can be helpful in addressing typical challenges to admissibility. For example, challenges to eyewitness identification experts typically center on whether the testimony is helpful to the jury (Is it a matter of common sense?) and lack of expert consensus about the

**Memory does not work like a DVR. An eyewitness does not record a verbatim and complete copy of an event. Instead, she stores the gist of the event, and when she wants to retrieve the experience, she fills in any gaps in accordance with what she knows about how the world works. Because the eyewitness did not store an identical copy of what happened, reconstructions of the event can be accurate or inaccurate.**

dren. The most reliable statements from child witnesses (like adults) are obtained when children respond to open-ended questions and are allowed to give free narrative accounts of their experiences. All primary investigative interviews should be recorded. The number of interviews of an individual child witness should be minimized. Finally, preschool aged children pose additional problems as they are more susceptible to suggestion and source monitoring errors.

An evidence-based best practice model for interviewing child witnesses was developed at the National Institute of Child Health and Human Development ("NICHD").<sup>16</sup> The NICHD Protocol systematically moves through structured interview phases of introduction, rap-

indicates that children as young as four years of age can provide substantial amounts of accurate forensically relevant information when interviewed with these techniques. However, other research has shown that even in response to small amounts of suggestion and influence, children will tell lies in forensically relevant settings where they believe they are being interviewed by a police officer.<sup>17</sup> That same research found that adults were correct only 57 percent of the time when they attempted to detect those children's lies. The lies of children are thus no more detectable than the lies of adults.<sup>18</sup>

The role of a child-witness expert in support of the defense will be to review context and content of all forensic interviews of the child witness. The expert can then advise coun-

## About the Authors

Brian L. Cutler is Professor of Psychology



at Ontario Tech University and President of Coral Coast Group, Inc., which houses the Interrogation Evaluation Clinic and Eyewitness Evidence Evaluation Clinic. Dr. Cut-

ler regularly serves as a consultant and expert witness in false confession and eyewitness identification cases.

### Brian L. Cutler, Ph.D.

Ontario Tech University  
Oshawa, Ontario  
Canada

**EMAIL** [cutler@coralcoastgroup.com](mailto:cutler@coralcoastgroup.com)

**WEBSITE** [www.coralcoastgroup.com](http://www.coralcoastgroup.com)

Jeffrey S. Neuschatz, Ph.D., is a Distinguished Professor of Psychology at the



University of Alabama in Huntsville. Dr. Neuschatz has pioneered research on jailhouse informant testimony. He has testified as an eye-

witness memory expert witness or qualified as an expert in approximately 100 criminal cases in nine states, federal courts, and military courts.

### Jeffrey Neuschatz, Ph.D.

University of Alabama  
Huntsville, Alabama  
256-824-2321

**EMAIL** [neuschaj@uah.edu](mailto:neuschaj@uah.edu)

**WEBSITE** [www.uah.edu](http://www.uah.edu)

Charles R. Honts, Ph.D., is Professor of Psychological Science at Boise State University. He is one of the



world's top experts on polygraph testing. Professor Honts has appeared as an expert more than 130 times in courts in

the United States, Australia, and Canada.

### Charles R. Honts, Ph.D.

Boise State University  
Boise, Idaho  
208-867-2027

**EMAIL** [chonts@boisestate.edu](mailto:chonts@boisestate.edu)

**WEBSITE** <http://charleshontsphd.com>

expert opinions. Over the years, psychologists have addressed these issues empirically. Psychologists have convincingly demonstrated that eyewitness memory is not a matter of common sense and that there is a high degree of expert consensus on this matter.<sup>19</sup> Experts help the lawyer make the argument and provide the relevant peer-reviewed sources.

When feasible, expert psychologists should be retained early in the case for several reasons. The expert may be able to assist the lawyer with developing discovery relevant to the expert's opinion. For example, the expert can help develop questions for a preliminary hearing or a lineup suppression hearing. Through questioning of other witnesses and officers, the expert can help the lawyer to draw out the information that is missing from the discovery but is needed for the expert to analyze the case. When the defense lawyer retains the expert late in the game, there may be missed opportunities to gather opinion-relevant details about the crime or witnesses. Last, when expert testimony is not admitted or the lawyer chooses not to proffer the expert, the expert may nevertheless be helpful in educating the lawyer about the evidence and assisting with various aspects of trial strategy, such as developing questions for examination and cross-examination of other witnesses.

*The authors thank Baylee Jenkins and Alexis Le Grand for their research assistance in preparation with this article.*

© 2021, National Association of Criminal Defense Lawyers. All rights reserved.

## Notes

1. H. MÜNSTERBERG, ON THE WITNESS STAND (1908).
2. B.H. Bornstein & C.A. Meissner, *Basic and Applied Issues in Eyewitness Research: A Münsterberg Centennial Retrospective*, 22 APPLIED COGNITIVE PSYCHOL. 733-736 (2008).
3. B.H. BORNSTEIN & J.S. NEUSCHATZ, HUGO MÜNSTERBERG'S PSYCHOLOGY AND LAW: A HISTORICAL AND CONTEMPORARY ASSESSMENT (2020).
4. E.F. Loftus, *The Malleability of Human Memory: Information Introduced After We View an Incident Can Transform Memory*, 67 AM. SCIENTIST 312-320 (1979); E.F. Loftus & G.R. Loftus, *On the Permanence of Stored Information in the Human Brain*, 35 AM. PSYCHOL. 409-420 (1980); D.L. SCHACTER, MEMORY DISTORTIONS: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST (1995).
5. J.M. LAMPINEN, J.S. NEUSCHATZ & A.D. CLING, ESSAYS IN COGNITIVE PSYCHOLOGY: THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION (2012).
6. A double-blind identification procedure is one in which the investigator

administering the identification test is "blind too," meaning the investigator does not know which photo or lineup member is the suspect and therefore cannot inadvertently communicate that information to the eyewitness.

7. N.K. Steblay, G.L. Wells & A.B. Douglass, *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 PSYCHOL. PUB. POL'Y & LAW 1-18 (2014); J.T. Wixted & G.L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCHOL. SCI. IN THE PUB. INTEREST 10-65 (2017).

8. We have couched this section in terms of repressed memory occurring as the result of sexual abuse, but we realize that repressed memory can occur from a variety of very traumatic experiences (i.e., physical abuse, emotional abuse, injury, and so forth). Thus, a memory expert should be able to address the memory issues associated with memory from all traumatic events.

9. G. Mazzoni & A. Memon, *Imagination Can Create False Autobiographical Memories*, 14 PSYCHOL. SCI. 186-188 (2003).

10. E.F. Loftus, J.A. Coan & J.E. Pickrell, *Manufacturing False Memories Using Bits of Reality*, in IMPLICIT MEMORY AND METACOGNITION 195-220 (L. Reder ed. 1996).

11. J. Shaw & S. Porter, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOL. SCI. 291-301 (2015).

12. C. Laney & E.F. Loftus, *Emotional Content of True and False Memories*, 16 MEMORY 500-516 (2008).

13. E.F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOL. 518-537 (1993).

14. S.J. Ceci & M. Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403-439 (1993).

15. M.E. Lamb, *The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus*, 18 CHILD ABUSE & NEGLECT 1021-1028 (1994).

16. M.E. Lamb, Y. Orbach, I. Hershkowitz, P.W. Esplin & D. Horowitz, *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201-1231 (2007).

17. M.C. Tye, S.L. Amato, C.R. Honts, M.K. Devitt & D.P. Peters, *The Willingness of Children to Lie and the Assessment of Credibility in an Ecologically Relevant Laboratory Setting*, 3 APPLIED DEVELOPMENTAL SCI. 92-109 (1999).

18. C.F. Bond & B. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY AND SOC. PSYCHOL. REV. 214-234 (2006).

19. S. M. Kassin, V.A. Tubbs, H.M. Hosch & A. Memon, *On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOL. 405-416 (2001). ■

## CREATIVE VOIR DIRE IN DUI TRIALS

(Continued from page 44)

they are in the minority or because they are under pressure from other jurors.

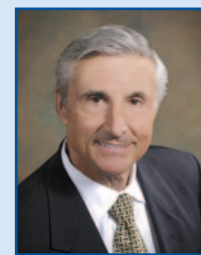
In their own way, get jurors to say, "I am my own person. No one will pressure me to change my vote when it is not what I believe." Perhaps this can be achieved through a scaled question: "On a scale of 1 to 10, with 1 being less likely and 10 more likely, how likely would you be to change your vote due to pressure from fellow jurors?" In all fairness, almost every juror will give a low number. But the benefit is in deliberations. This question may be used by jurors who believe they are being bullied, and they can remind other jurors of their own responses.

Voir dire is a difficult art in any trial because the lawyer is not in control of the responses by prospective jurors. The same is not true for opening statements, direct examination, closing statements and, to a large extent, cross-examination. All of those aspects of a trial can be rehearsed and practiced. But when a question is asked during voir dire of a stranger, the trial lawyer has to be ready for the response. Next, the lawyer must have a follow-up question and then a decision. And if the response is negative, defense counsel should create a cause challenge. This takes practice, experience, and intuitiveness. When those all come together, the best jury that can be chosen will be sworn in to increase the chances of an acquittal.

© 2021, National Association of Criminal Defense Lawyers. All rights reserved. ■

## About the Author

Denis deVlaming has lectured throughout the United States on matters pertaining to DUI. He is board certified in criminal trial law and teaches Advanced Criminal Trial Advocacy as an adjunct professor at Stetson College of Law in St. Petersburg, Florida.



NACDL MEMBER

### Denis deVlaming

deVlaming & Rivellini, P.A.  
Clearwater, Florida  
727-461-0525

EMAIL [denis@devlaming.com](mailto:denis@devlaming.com)

WEBSITE [devlaming.com](http://devlaming.com)