
**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 17948

**STATE OF CONNECTICUT
v.
BRADY GUILBERT**

BRIEF OF AMICI CURIAE NEIL VIDMAR, KENNETH DEFFENBACHER,
SOLOMON FULERO, HARMON M. HOSCH, ROD LINDSAY,
ROY S. MALPASS, and J. DON READ
IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICI CURIAE

Amici Curiae, whose biographies are set out in Appendix A, are university professors who have conducted research on or have other relevant experience with the problems of eyewitness identification. Amici seek to provide the Court with an accurate summary of findings from eyewitness identification research and particularly to highlight research concerning the effect of an alleged eyewitness's familiarity with a suspect on the reliability of the witness' identification of the suspect.

ARGUMENT

Even When Eyewitnesses Are Familiar With A Suspect, Such As In *Guilbert*, Experts Should Be Allowed To Testify To Ensure That Jurors Can Adequately Assess The Reliability of The Eyewitness Evidence¹

Since its decision in *State v. Kemp*, 199 Conn. 473 (1986), this Court and lower courts in Connecticut have consistently barred experts from testifying about the factors that undermine the reliability of eyewitness identifications on the ground that such information falls within the common knowledge of the average juror. *State v. Outing*, 298 Conn. 34, 98-99 (2010) (Palmer, J., dissenting); see, e.g., *State v. McClendon*, 248 Conn. 572, 589-91 (1999). The trial court below followed this scientifically-unsupported practice when it relied on *Kemp*'s reasoning to exclude expert testimony on a myriad of relevant factors (Def.'s Br. 9, 15).

Contrary to the trial court's finding and the State's arguments on appeal, substantial empirical evidence shows that many factors affecting the reliability of eyewitness identifications are *not* common knowledge. Without expert evidence, jurors will likely be misled by their commonly held—but incorrect—beliefs and assumptions.

The court below erroneously concluded that concerns about the reliability of eyewitness identifications are eliminated when an eyewitness is “familiar” with the identified person. Scientifically-designed research studies show that far from unequivocally increasing identification accuracy, familiarity affects eyewitness identifications in nuanced, complex, and often counterintuitive ways. Consequently, familiarity is just one of the many factors that affect eyewitness identification accuracy and whose effects fall outside jurors' common knowledge.

¹ *Amici* and counsel are grateful to Juliana M. Soic, Duke University School of Law, Class of 2012, for her invaluable contributions to this brief.

The recognition and identification of familiar faces has been the focus of much scholarly attention in the fields of psychology and neuroscience. See, e.g., Nancy Kanwisher & Morris Moscovitch, *THE COGNITIVE NEUROPSYCHOLOGY OF FACE PROCESSING* 3-4 (2000); B. Rossion, et al., *Task Modulation of Brain Activity Related to Familiar and Unfamiliar Face Processing*, 110 *CLINICAL NEUROPHYSIOLOGY* 449, 449 (1999). As a general matter, the accuracy of facial recognition and identification increases as a function of familiarity: *ceteris paribus*, people can recognize their own faces better than those of celebrities, the faces of celebrities better than those of acquaintances, and those of acquaintances better than those of strangers. See, e.g., Stephan M. Collishaw & Graham J. Hole, *Featural and Configurational Processes in the Recognition of Faces of Different Familiarity*, 29 *PERCEPTION* 893, 900-01 (2000); P.N. Shapiro & S. Penrod, *Meta-analysis of Facial Identification Studies*, 100 *PSYCHOL. BULL.* 139, 139-56 (1986). Within this general framework, however, empirical findings have painted an unexpectedly intricate and less straightforward picture.

In individual cases, research shows that identifications of familiar faces—like identifications of unfamiliar faces—are counterintuitively influenced by a host of variables: interaction time, contextual information, expectation, post-event information, and own-race bias. By changing how the brain perceives and processes interactions, these variables simultaneously increase the probability that an individual will identify a given face as familiar and inflate the individual's confidence in the identification—regardless of whether the face is familiar or the identification accurate. Additionally, because multiple factors that hinder eyewitness identifications of strangers have similarly deleterious effects on non-stranger identifications, it is highly likely that the

underlying cognitive processes for identifying familiar and unfamiliar faces are sufficiently similar that other factors that affect the identification of strangers (e.g., weapons effect and stress) similarly affect the identification on non-strangers.

A. Many Unique Factors Can Interact With Familiarity To Produce Counterintuitive Results

The most obvious and relevant difference between stranger and non-stranger identifications is pre-event exposure time: previous interaction with a person is a prerequisite for familiarity, but a negating condition for unfamiliarity. As a matter of commonsense, the more time spent interacting with a person, the more thoroughly the unique physical characteristics of that person should be encoded, and thus the more accurate recognition and identification becomes. Indeed, increased interaction time does seem to produce marginally more accurate identifications. See J. Don Read, *The Availability Heuristic in Person Identification*, 9 APPLIED COGNITIVE PSYCHOL. 91, 97 (1995) (determining that test subjects' slight increase in correct identification due to increased familiarity was statistically insignificant).

However, a larger and more counterintuitive result that stems from increased interaction time with a familiar subject is the greater propensity to identify false positives (incorrect selections of strangers' photographs from lineups that contain and do not contain the familiar person's photograph). See *id.* at 98; see also José H. Kerstholt et al., *The Effect of Availability on the Identification of Known and Unknown Persons*, 6 APPLIED COGNITIVE PSYCHOL. 173, 179-80 (1992) ("For both known and unknown target persons the number of misidentifications increased with longer exposure times."); J. Don Read et al., *Changing Photos of Faces: Effects of Exposure Duration and Photo Similarity on Recognition and the Accuracy-Confidence Relationship*, 16 J.

EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 870, 875 (1990) (similar finding).

This counterintuitive relationship was most clearly demonstrated in a study that examined the effect of increased interaction time on store clerks' ability to accurately recognize and identify a female target. Read, *The Availability Heuristic*, *supra*, at 94-100. Half of the clerks ("short-interaction" clerks) spoke with the female target for 30-60 seconds; the other half ("long-interaction" clerks) were interviewed by the female target for between four and twelve minutes.² *Id.* at 95-96. Two days later, all clerks were asked to identify the target's picture in various photographic lineups; some lineups contained the target's photo, while others did not. *Id.*

On the whole, "[t]he largest and most reliable effects of increased duration [of interaction] were seen in the clerk's [sic] greater willingness to identify someone from the lineups" *Id.* at 97. But that greater willingness in no way correlated with an increased ability to choose the correct photograph. *Id.* at 97-99. For both target-present and target-absent lineups, the long-interaction clerks more often picked out a stranger and identified her as the interviewer. *Id.* at 98. The long-interaction clerks' performance

² A total of 112 store clerks participated in the study. In the 30- to 60-second scenario, the clerks were first approached by a research assistant (RA1) posing as a mother who was looking for her daughter, whom RA1 was supposed to meet at the store. RA1 provided an accurate description of the daughter and her clothes, and asked whether the daughter had been in the store. About 15 minutes later, a second research assistant (RA2), posing as the daughter, entered the store and asked the clerks if her mother had been in the store. All of the clerks told RA2 that her mother had stopped in the store. RA2 (the target) spent in total about 30-60 seconds in the store.

In the four- to twelve-minute scenario, the female target interviewed the clerks as part of a fake research project on eyewitness testimony and asked the clerks questions about the identity of a male customer (another researcher) who had come into the store two days earlier. The clerks were unaware that the actual experiment involved identifying the female researcher.

deteriorated most severely—and most disturbingly for eyewitness identification purposes—in target-absent lineups: with increased interaction time, the percentage of clerks who incorrectly said the target was present more than doubled.³ *Id.* at 97. This performance decline was “entirely attributable” to the clerks’ increased propensity to select a stranger’s photograph. *Id.* at 99.

This increased propensity to choose a photograph erroneously is explained by the effect of increased exposure on self-perception. *Id.*; *cf.* Kerstholt et al., *supra*, at 180 (suggesting that reduced accuracy also may be due to a combination of increased exposure time and poor viewing conditions). The clerks who had interacted with the target for a longer period of time were more confident they were well-equipped to make identifications and thus more frequently chose a photograph from the lineup. *Id.* Unfortunately, they were mistaken. Although long-interaction clerks reported a greater aggregate quantity of information about the target, the absolute amount of *correct* information reported was the same for both long- and short-interaction clerks. *Id.* Simply put, increased interaction time causes people to *think* that they remember more about a familiar person’s physical appearance than they actually do; that more often leads them to erroneously conclude that strangers who look familiar are, in fact, the familiar person.

Whereas increased interaction time increases false-positive identifications by altering self-perception, context increases false positives through unconscious, associative distortions. In particular, subconscious expectations and the presentation of contextual information (such as information about the person’s background, personality,

³ Whereas only 27.8% incorrectly said the target was present after the short interaction, more than half (54.3%) answered incorrectly after the longer interaction. Read, *The Availability Heuristic*, *supra* at 97.

or the circumstances in which the person is typically encountered) serve as “priming” mechanisms that increase the probability of mistaken identifications. See Kerstholt et al., *supra*, at 173-78 (witnesses’ expectation of seeing a known person led to a 44% increase in false-positive identifications); Read, *The Availability Heuristic*, *supra*, at 115 (presenting subjects with additional contextual information about a familiar target made them twice as likely to choose false positives); accord Andrew W. Young et al., *The Faces That Launched a Thousand Slips: Everyday Difficulties and Errors in Recognizing People*, 76 BRIT. J. PSYCHOL. 495, 505 (1985) (witnesses in the experiment were more likely to identify strangers as familiar when they were expecting a familiar person).

This effect of context is due largely to the unique cognitive processes that underlie how one recognizes familiar faces. Significant neuroscientific data suggest that the successful recognition of familiar faces—unlike that of unfamiliar faces—involves not only visual familiarity, but also emotional responses and “person knowledge” stored in long-term memory (e.g., personal traits, biographic information, and episodic memories associated with the individual). See M. Ida Gobbini & James V. Haxby, *Neural Systems for Recognition of Familiar Faces*, 49 NEUROPSYCHOLOGIA 32, 32-33 (2007); see also Kerstholt et al., *supra* at 173 (“[F]or a successful identification [of a familiar face] to occur more specific information is needed such as where the person lives, his or her occupation and where he or she is usually encountered.”).

Consequently, problems with any one of these streams can negatively impact familiar face recognition. Moreover, the intermingling of processing streams sometimes allows

increased input from one stream hijacking the other streams to produce unexpected results.

Such hijacking is an example of the “availability heuristic,” which has been well-documented in other recall-based tasks. Read, *The Availability Heuristic, supra*, at 93; see C.M. Kelley & D.S. Lindsay, *Remembering Mistaken for Knowing: Ease of Retrieval As a Basis for Confidence in Answers to General Knowledge Questions*, 32 J. MEMORY & LANGUAGE 1, 1-24 (1993); A. Tversky & D. Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 207-32 (1973). As applied to facial recognition, the availability heuristic predicts that “enhanced contextual information increase[s] the ease of recall of information . . . and that that this familiarity [i]s misattributed to perceptual familiarity.” Read, *The Availability Heuristic, supra*, at 103. Expectation similarly “raises the basic activation level of the face recognition unit” to enhance the ease of recall and produce the same misattribution effect. Kerstholt et al., *supra*, at 170 (citing V. Bruce & A. Young, *Understanding Face Recognition*, 77 BRIT. J. PSYCHOL. 305 (1986)). Thus, because information about a familiar individual’s identity is already stored in an identifier’s brain, both contextual information and expectations, which are triggered by surroundings or circumstances associated with the familiar person, “prime” the identifier’s brain and thereby increase the likelihood that the identifier will misidentify a stranger as the familiar individual.

B. Irrespective of Familiarity, Other Factors Also Affect Eyewitness Identification

Although there are unique cognitive processes that affect familiar eyewitness identifications, there also are other cognitive processes implicated in all facial recognition, regardless of familiarity. See, e.g., J. Kirkland Reynolds & Kathy Pezdek,

Face Recognition Memory: The Effects of Duration and Encoding Instruction, 6 APPLIED COGNITIVE PSYCHOL. 279, 290 (1992). Consequently, it is almost certain that many of the factors known to make eyewitness identification of strangers unreliable will similarly affect non-stranger eyewitness identifications.

Both mundane and less obvious factors have been shown unexpectedly to affect the accuracy of eyewitness identification, irrespective of familiarity. For commonplace factors like poor viewing conditions and facial typicality, what is surprising is the size of the deleterious effects. In one study, bad lighting and a hooded sweatshirt on the subject reduced correct identifications of known subjects by 28.6%. Kerstholt et al., *supra*, at 179.

Because of the “typicality effect,” individuals are more likely to recognize a typical but unfamiliar face as familiar than they are to misidentify an atypical familiar face. See, e.g., John R. Vokey & J. Don Read, *Typicality, Familiarity, and the Recognition of Male and Female Faces*, 42 CAN. J. PSYCHOL. 489, 493 (1988); James C. Bartlett et al., *Typicality and Familiarity of Faces*, 12 MEMORY & COGNITION 219, 219 (1984). This is because “increased typicality is associated with increased general familiarity and decreased memorability.” Vokey & Read, *supra*, at 294. Moreover, “familiarity arising from some specific prior exposure is *not* intrinsically separable from the structurally induced familiarity that arises from a lifetime of experience with similar exemplars.” *Id.* at 300.

Less obvious phenomena—namely, the own-race bias (ORB) effect and post-event information-- may also affect both familiar and unfamiliar face recognition. The effect of post-event contextual information discussed above applies to the identification

of strangers and non-strangers alike. See, e.g., *People v. Legrand*, 867 N.E.2d 374, 379 (N.Y. 2007).

The Own Race Bias effect is resilient and pronounced. This effect occurs across memory tasks (e.g., face recognition, face matching, and lineup identifications), and is resistant to time and familiarity manipulations, and replicable in a wide variety of experimental settings. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 PSYCHOL., PUB. POL'Y & L. 3, 5 (2001); Kathy Pezdek & Stacia Stolzenberg, *How Accurately Do Eyewitnesses Determine if a Person is Familiar?* 10-13 (Sept. 29, 2010) (unpublished manuscript, on file with the authors of this brief). In a meta-analysis of 91 studies and 39 research articles, Own Race Bias was found consistently to decrease correct identifications and increase false-positive identifications. Meissner & Brigham, *supra*, at 15; see also, Pezdek & Stolzenberg, *supra*, at 13 (a study of the ORB effect found “recognition accuracy for casually familiar non-strangers is not reliably higher than that for strangers.”)

Finally, it is now well-established that eyewitness' confidence is also an unreliable predictor of accuracy across the board. E.g., Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 BRIT. J. PSYCHOL. 339, 349 (2003); Pezdek & Stolzenberg, *supra*, at 13; Read, *The Availability Heuristic*, *supra*, at 115.

CONCLUSION

Empirical evidence and an array of DNA exonerations have confirmed that familiarity does not eliminate misidentification problems. Even with familiar faces, people are significantly worse at recognizing faces than they expect. Judges and juries,

however, do not take this into consideration and instead think that eyewitness testimony “is particularly valuable where . . . lay [eye]witnesses are able to make the challenged identifications based on their familiarity with characteristics of the defendant” *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986) (emphasis added); accord *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005); *United States v. Jackman*, 48 F.3d 1, 4-5 (1st Cir. 1991); *United States v. Jackson*, 688 F.2d 1121, 1125 (7th Cir. 1982). Such increased willingness to rely on eyewitness testimony of non-strangers has significantly contributed to many wrongful convictions.⁴ For that reason, this Court should overturn *Kemp*’s scientifically-unsound presumption that factors affecting the accuracy of eyewitness identifications are within the common knowledge of the average juror and, in circumstances like those in *Guilbert*, permit expert testimony to assist the jury in properly assessing the reliability of eyewitness evidence.

Respectfully submitted,

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⁴ DNA exonerations have occurred in numerous cases in which the defendant was erroneously identified by an eyewitness who had prior experience with him. (Mark Bravo; Danny Brown; Charles Dobbs; Gerald Davis; Dewey Davis; Charles Elkins; and Robert McClendon) See *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Nov. 21, 2010).

CERTIFICATE OF SERVICE

This is to certify that on this the 4th day of January, 2011, a copy of the foregoing Brief of *Amici Curiae* Neil Vidmar et al. in Support of Defendant-Appellant, was served, via U.S. Mail, postage prepaid, to Lisa J. Steele, Esq., Special Public Defender, Steele & Associates, P.O. Box 794, Bolton, MA 01740, (978) 368-1238 (Telephone and Facsimile), counsel for Defendant-Appellant, and Paul J. Narducci, Esq., Senior Assistant State's Attorney, State's Attorney's Office, 70 Huntington Street, New London, CT 06320, (860) 443-2835 (Telephone), (860) 442-3018 (Facsimile).

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CERTIFICATE OF COMPLIANCE

The foregoing Brief of *Amici Curiae* Neil Vidmar et al. in Support of Defendant-Appellant complies with P.B. § 67-2.

JEREMIAH DONOVAN

APPENDIX A

Neil Vidmar is Russell M. Robinson II Professor of Law at Duke Law School and Professor of Psychology at Duke University. He holds a Ph.D. in social psychology from the University of Illinois (1967) and conducts empirical studies on issues in the legal system. He has published research on eye witness reliability and the effects of eyewitness evidence on jurors in peer review journals. He is co-author of *Judging the Jury* (1986) and editor/author of *World Jury Systems* (2000). Vidmar has published more than 100 articles in law reviews and social science journals (e.g., *Stanford Law Review*, *Law & Human Behavior*, *Law & Society Review*, and *Duke Law Journal*). He reviews research proposals for the National Science Foundation and is a current or past member of the following editorial boards: *Law & Human Behavior*, *Law & Society Review*, *Law & Social Inquiry*, *Journal of Applied Social Psychology*, *Psychology Crime and Law*, *Legal and Criminological Psychology*, *Psychology, Public Policy and Law*, and the *Journal of Empirical Legal Studies*.

Kenneth Deffenbacher is Emeritus Professor of Psychology at the University of Nebraska at Omaha and holds a Ph.D. in experimental psychology from the University of Washington (1968). For more than 30 years, he has researched the variables affecting the fidelity of eyewitness report. Among his many published studies, which have appeared in various peer-reviewed journals, was the first published report noting the weak correlation between eyewitness confidence and accuracy, as well as various articles explaining the effects of heightened stress and forgetting on eyewitness identification. Dr. Deffenbacher co-authored *Perception and the Senses* (1979) and more than 60 journal articles and chapters in edited volumes of scientific papers. He also regularly reviews grant proposals for the National Science Foundation, has been a member of the editorial board of the *Journal of Applied Psychology*, and regularly reviews for the *Law and Human Behavior* and *Memory & Cognition* periodicals. Dr. Deffenbacher has been called to testify as an expert witness on eyewitness identification issues in both state and federal criminal trials.

Solomon Fulero is both a practicing attorney and a psychologist. Dr. Fulero received his Ph.D. in social psychology and his law degree from the University of Oregon in August 1979 and December 1979 respectively, and a respecialization certificate in clinical psychology from Wright State University in June 1988. He is Professor and former Chair of Psychology at Sinclair College in Dayton, Ohio, Clinical Professor of Psychology and Psychiatry at Wright State University in Dayton, and Adjunct Professor of Law at the University of Cincinnati School of Law. Dr. Fulero maintains private practices in both psychology and law, and is a frequent expert witness on matters pertaining to legal psychology, in both social/experimental (eyewitness testimony, interrogations and confessions, pretrial publicity, etc.) and clinical (competency, sanity, sexual predator status, competency to waive Miranda rights, etc.) areas. His work on mental retardation, suggestibility, and confessions was cited by the U.S. Supreme Court in *Atkins v. Virginia*. He is the author or co-author of numerous scholarly articles in both psychology journals and law reviews, as well as the textbook "Forensic Psychology, 3rd Edition," published by Cengage. He appeared on the CBS 48 Hours

episode “Eyewitness,” and was a member of the National Institute of Justice Technical Working Group on Eyewitness Evidence. Dr. Fulero is a Fellow of the American Psychological Association. He has served on the Executive Committee of the American Psychology-Law Society (APLS), and was President of APLS in 2003-2004.

Harmon M. Hosch earned his Ph.D. in Personality and Social Psychology from the New School for Social Research in 1976 and is the Helen M.C. and J. Edward Stern Professor of Psychology at the University of Texas at El Paso. He previously served as Chairman of the Department of Psychology and now is Associate Dean of Liberal Arts. Dr. Hosch conducts empirical studies on the social psychological processes underlying jurors’ and juries’ decisions in legal cases. He has focused his work on the impact of expert testimony on jury decisions and the factors that influence eyewitness accuracy. From 1996 to 1998, he served as a visiting scientist at the National Science Foundation, where he directed the Law and Social Science Program. Dr. Hosch became a Fellow of the American Psychology-Law Society in 2000, of the American Psychological Association in 2001, and of the Association for Psychological Science in 2006. He currently serves as the North American Vice President of the Interamerican Society of Psychology and is an *ad hoc* reviewer for several granting agencies and numerous professional journals.

Rod Lindsay has been Professor of Psychology at Queen’s University since receiving his Ph.D. from the University of Alberta in 1982. Dr. Lindsay has testified as an expert on eyewitness issues in criminal and civil cases in domestic and international courts. In 1998, he consulted on was called to testify in one of the United Nations war crimes (genocide) trials for Rwanda. As a member of the National Institute of Justice’s Technical Working Group for Eyewitness Evidence, Dr. Lindsay co-authored the American national guidelines for obtaining and preserving eyewitness evidence (published in 1999 as *Eyewitness Evidence: A Guide for Law Enforcement*). Dr. Lindsay also co-edited and co-authored several chapters of the *Handbook of Eyewitness Psychology* (2007), the most comprehensive collection of scientific views on eyewitness issues to date. In 2002 the Canadian Psychological Association bestowed upon Dr. Lindsay a career award for Distinguished Contributions to the Application of Psychology.

Roy S. Malpass received his Ph.D. at Syracuse University (1968) and is Professor of Psychology and Criminal Justice at the University of Texas at El Paso. His contributions to the field of eyewitness identification studies have been significant: Dr. Malpass published the first scientific studies on the cross-race recognition effect (or own-race bias (ORB)) and the first study on the use of context reinstatement to enhance eyewitness identification accuracy. In 1999, Dr. Malpass was one of six scientists selected to participate in the National Institute of Justice’s Technical Working Group on Eyewitness Evidence. He has repeatedly testified as an expert in state, federal and military courts and has twice appeared as an expert on NBC Dateline programs on eyewitness identification. He is currently on the editorial board of *Law and Human Behavior*.

J. Don Read is Professor of Psychology, Chair of the Department of Psychology, and former Director of the *Law and Forensic Psychology Program* at Simon Fraser University. As well, Dr. Read is member of the Graduate Faculty at the University of Victoria and Emeritus Professor at the University of Lethbridge. Dr. Read received a B.A. degree from the University of British Columbia followed by M.Sc. and Ph.D. degrees from Kansas State University. His research investigates eyewitness memory, detection of deception and credibility, face recognition, reconstructive memory, recollections of childhood sexual abuse, and long-term autobiographical memory. The research has been funded for over 30 years by the National Sciences and Engineering Research Council of Canada, as well as NATO and the Alberta Law Foundation. Recently, he co-edited the 2-volume *Handbook of Eyewitness Psychology*. Dr. Read has published some 80 peer-reviewed papers and chapters and co-edited four other books including *Recollections of Trauma* (1997), *Eyewitness Memory* (1997), and *Adult Eyewitness Memory* (1994). Dr. Read has given over 160 conference presentations and has provided expert testimony on issues related to memory, childhood abuse, and person identification to 17 courts in Alberta, BC, Newfoundland, Nova Scotia, NorthWest Territories, Manitoba, Washington, Oregon, and Nevada.