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“She Said I Did What!”: An Argument Against the Admissibility of Eyewitness Expert Testimony

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* J.D. Loyola University New Orleans, 2009.
I. Introduction

Every false conviction yields a false acquittal.1 When a convicted rapist or murderer is exonerated by post-conviction DNA evidence, a tragedy of years lost is revealed in the newspapers and on television.2 But there are two more tragedies that also emerge from this situation; the mistaken eyewitness must face the fact that their testimony helped put an innocent

1 Richard A. Rosen, Reflections on Innocence, 2006 Wis. L. Rev. 237, 270 (2006) (“An open acknowledgment that our system of prosecuting and convicting those charged with crimes is imperfect, that it falsely convicts as well as falsely acquits, is a necessary first step for thinking about the implications of wrongful convictions for the future of the criminal justice system.”).

person in prison, and the true offender remains a threat to the community. Recent DNA exonerations highlight the growing understanding that eyewitness misidentification is the leading cause of wrongful convictions. In 1998, the National Institute of Justice published a study of the first twenty-eight cases of DNA exoneration, twenty-three of which involved eyewitness misidentification.

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3 Timothy P. O’Toole and Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges To Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 110 (March 2004) (“Mistaken eyewitness identification was a leading cause of these wrongful convictions, by one estimate accounting for eighty-eight percent of the erroneous rape convictions and fifty percent of the false murder convictions.”).

Our initial instinct is to immediately do something because our society holds such a deep preference to acquit when there is a reasonable doubt of guilt. While defending the British soldiers accused of the Boston Massacre, John Adams stated to the court that “[w]e find, in the rules laid down by the greatest English judges, who have been the brightest of mankind, that we are to look upon it as more beneficial, that many guilty persons should escape unpunished, than that one innocent person should suffer.” The solution, however, is more complex.

In response to the emerging DNA science, several states have recently enacted, with many others considering, eyewitness identification reform measures. One area of reform occurs

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5 Peleg W. Chandler, American Criminal Trials, 377, Boston: Charles C. Little and James Brown (1841) [hereinafter cited as American Criminal Trials].

in the courtroom where qualified psychological experts called “eyewitness experts” are freely

allowed to testify on the factors affecting memory and the inaccuracy of eyewitness testimony.

A second area of reform deals with changes in the procedures police use when performing
eyewitness identifications. Prior to this legislation, both reforms have been proposed, argued,

available at


(between 2005-2006 seventeen states have introduced legislation regarding eyewitness


R.I., Wash., Wis., W.Va.). Several cities and police agencies have independently adopted

reforms to improve eyewitness reliability such as Boston and Minneapolis. Richard S.

Schmechel, Timothy P. O’Toole, Catherine Easterly, and Elizabeth F. Loftus, *Beyond the Ken?*

*Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 184, notes

and generally dismissed by courts, prosecutors, and police for many years. The courts historically opposed eyewitness expert testimony because witness credibility is a function reserved for the jury, but recently, they have begun to allow the expert testimony in varying factual circumstances. The police generally oppose changes to identification procedures because of concerns over increased costs, time constraints and increased suspect rights, but likewise, are slowly considering and accepting new procedures.

This article proposes that modernized police training and identification procedures will improve witness identification reliability and accuracy prior to trial, rendering eyewitness expert testimony in the courtroom necessary only in the most unusual cases. This article will first explain the effects of the eyewitness expert on the jury and the discrete factors the experts

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7 As early as the early 1900’s, Professor Hugo Munsterberg, the chair of Harvard’s psychology laboratory “argued that a witness’ honesty is no guarantee of reliability, and that a witnesses’ certainty is no proof of accuracy.” TRUE WITNESS at 9.

8 See infra section III. B. Current Circuit Holdings.

9 See infra section IV. C. Overcoming Resistance.
believe affect witness reliability. This article will then describe the problems in allowing the eyewitness expert to testify on witness reliability. Next, this article will summarize the legal background of eyewitness expert testimony. Finally, this article will propose that simple changes in identification procedures at the beginning of an investigation will improve the reliability and accuracy of eyewitness identifications, thus rendering the use of eyewitness experts in court unnecessary in most circumstances.

II. Eyewitness Expert Value versus Prejudice

The Supreme Court in United States v. Wade expressed its frustration with witness misidentifications when it quoted Justice Frankfurter from 1927 who said “[t]he identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.”\(^{10}\) As a cure, defense attorneys advocate the use of expert testimony to educate the jury about the unreliability of eyewitness testimony.

\(^{10}\) United States v. Wade, 388 U.S. 218, 228 (1967) (quoting Justice Frankfurter, The Case of Sacco and Vanzetti 30 (1927)).
of eyewitness identifications. Eyewitness experts support this position by claiming this testimony is useful to a jury in determining witness credibility.\textsuperscript{11} They attempt to testify on general factors that affect witness reliability while avoiding influencing the specific witness’ credibility.\textsuperscript{12} The eyewitness experts admit that unopposed expert testimony carries a great deal of weight,\textsuperscript{13} so they even suggest the problem of witness reliability can be significantly cured by appointing an independent expert by the court, rather than one of the parties.\textsuperscript{14}

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\textsuperscript{12} Washington v. Schriver, 240 F.3d 101 (N.Y. 2001) (distinguished credibility as the jury’s role to determine the truth of the witness from reliability as the accuracy of the witness’ memory).
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\textsuperscript{13} CUTLER AND PENROD at 251. “[b]ased on the available data, adversarial, unopposed expert testimony produces the greatest degree of sensitivity and the least amount of skepticism.” \textit{Id.}
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\textsuperscript{14} \textit{Id} at 243.
\end{flushright}
A. Benefits of Eyewitness Experts

Live, victim testimony is very powerful and can influence a jury to disregard physical evidence in favor of the victim’s confident identification of the assailant. The Court in *Manson v. Brathwaite* agreed, and stressed that the jury may use a witness’ confidence as a factor that increases credibility.

The exoneration of Ronald Cotton in 1995 is one of the most frequently cited cases of mistaken identity by advocates of eyewitness reform. Jennifer Thompson was raped in her

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15 In *State v. Cotton*, the jury ignored blood serology tests, previous inconsistent victim statements, and the admission of the victim that she was not wearing her glasses in favor of the victim’s courtroom identification. *TRUE WITNESS* AT 39-40.


17 *O’Toole*, 41 Val. U. L. Rev. at 111-12. While these kinds of cases are frequently cited for their emotional impact, there are no satisfying stories that show a person was later found guilty of a brutal crime after an eyewitness expert convinced a jury to disregard the testimony of a reliable witness to the crime since most defendants have the sense to remain silent after acquittal.
North Carolina apartment in 1984.\textsuperscript{18} During the course of the crime, she made a special effort to remember specific things about the assailant such as his clothing, scars, and other identifying items.\textsuperscript{19} During trial, she confidently identified Ronald Cotton as the rapist and he was convicted primarily on both this testimony and some other very general corroborating physical evidence.

Cotton’s request for an eyewitness expert was not allowed, so the defense relied on cross-examination who pointed to the victim’s inconsistent statements, her admitted poor vision without her glasses, and physical evidence that excluded Cotton.\textsuperscript{20} The defense even managed to find and bring the real rapist, Bobby Poole, into the courtroom gallery where Thompson, under oath, failed to recognize him.\textsuperscript{21} Fourteen years later, DNA evidence exonerated Cotton and implicated Poole in the rape. This case shows that even compelling testimonial and physical evidence brought on cross-examination could not effectively rebut the witness’ confident identification in the jury’s mind. Thompson was not lying. She was convinced of the accuracy


\textsuperscript{19} \textit{True Witness} at 3-45.

\textsuperscript{20} \textit{See supra} note 15.

of her own memory and every attempt by the defense to discredit her only made her more
confident and more credible to the jury.

The advocates of eyewitness expert testimony present this case as the ideal candidate for
educating the jury on eyewitness reliability. The eyewitness expert would have told the jury that
confidence is not a reliable measure of reliability, that the cross-racial effect and the violent
nature of the crime degrades identification reliability, and the photo lineup procedures used by
the police encouraged a suggestive relative judgment. But in this case, the jury was so
compelled by the confidence of the victim that it overlooked the inconsistencies in the victim’s
statements and the physical evidence rebutting her testimony.

The proponents of eyewitness expert testimony criticize the court’s belief that the
workings of the human memory are not ‘beyond the ken’ of the ordinary juror. They believe
that educating the jury on factors that negatively affect memory will provide a basis for the juror

\[22 \text{ See infra section II. A. Benefits of Eyewitness Experts.} \]

\[23 \text{ True Witness at 40.} \]

\[24 \text{ Loftus, 46 Jurimetrics J. at 191.} \]
to evaluate a witness, and the juror will then adequately discredit an appropriate amount of the witness’ testimony. After testifying and obtaining an acquittal of a murder suspect, one eyewitness expert claimed that his “testimony had given the jurors permission to question the conclusions of honest eyewitnesses.” For the juror who felt pressured to accept the witness’ testimony, the expert was able to “put their discomfort into words.”

The fallibility of human memory has been extensively researched in recent years and this research has been gaining reputability. We have learned through empirical testing that a


26 *True Witness* at 58.

27 *True Witness* at 57.

person’s memory is not as reliable as we like to think. It is easily affected by events, situations, and time.

The research psychologists’ also claim there is a general misunderstanding among the public on how memory works. The common belief is that a memory is recorded and retrieved in the brain like videotape. Rather, the research psychologists say, memory is selective when being stored, and the retrieval process resembles the brain trying to put together a jigsaw puzzle. In addition, “experiments showed that memory begins to decay rapidly and at an

29 Id at 101.

30 Id at 101-02.

31 Elizabeth F. Loftus, Timothy P. O’Toole, Catharine F. Easterly, Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia, [CITE], 6 (????).

32 Id.

33 Id at 5.
accelerating rate, and after a surprisingly brief period.” This, they refer to as the ‘forgetting curve’.

One of the preeminent testifying psychologists, Dr. Elizabeth Loftus, summed up the role of the eyewitness expert in court when she said that “[t]ypically, eyewitness experts are prepared to testify in court about the extent to which the research literature explains how a particular factor, considered alone or in combination with others, likely would affect the reliability of an identification.”

By the 1990’s there were several commonly tested factors regarding identification accuracy that were testified to, such as the effects of “weapon focus,” cross-racial identifications, the influence of post-event contamination, and relative judgment.

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34 True Witness at 104.

35 True Witness at 104.

36 Loftus, 46 Jurimetrics J. at 180, citing Cutler and Penrod at 19.

1. Weapon Focus

It is believed by many that the use of a weapon during the commission of a crime reduces the reliability of a witness’ identification because the witness is so focused on the weapon that his memory does not concentrate on the offender’s face.\textsuperscript{38} Empirical testing has shown that the presence of a weapon always decreased the witness’ reliability and never improved it.\textsuperscript{39} The effect is most profound in crimes of short duration when the weapon is visible to the witness.\textsuperscript{40} In a survey of potential jurors, 37\% believed the presence of a visible weapon would make the

\textsuperscript{38} Mehrkens, 16 Law and Human Behavior at 414. Although weapon focus is only an ‘estimator variable’ “[t]o not consider a weapon’s effect on eyewitness performance is to ignore relevant information.” \textit{Id} at 421. “Weapon focus refers to the visual attention that eyewitnesses give to a perpetrator’s weapon during the course of a crime. It is expected that the weapon will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details.” \textit{Id.} at 414.

\textsuperscript{39} Mehrkens, 16 Law and Human Behavior at 414.

\textsuperscript{40} Mehrkens, 16 Law and Human Behavior at 421.
witness more reliable, 33% thought that it would have no effect on memory, and about 30% believed it would reduce reliability.\textsuperscript{41} However, despite the lack of a consensus opinion, the eyewitness experts believe that their testimony on this factor to be a clear case of usefulness to a jury.

2. Cross-Racial Effect

There is empirical evidence that people are less reliable in their identifications of people outside of their own race.\textsuperscript{42} Even people who were in daily contact with other races, such as police officers, shared the same decrease in reliability as those who had infrequent contact with other races.\textsuperscript{43} “The experiments found … this ‘cross-racial’ effect in witnesses of all races.”\textsuperscript{44}

\textsuperscript{41} \textit{Loftus}, 46 Jurimetrics J. at 197.


\textsuperscript{43} \textit{Id}.
Though the effect is testable, the cause has not been determined from the experiments.\textsuperscript{45} A survey of 500 people found that only fifty percent were aware of this effect.\textsuperscript{46} In another study, forty-eight percent of the respondents thought cross-race and same-race identifications were of equal reliability, and eleven percent thought that cross-race identifications were more reliable.\textsuperscript{47}

The Third and Sixth Circuits in \textit{Downing} and \textit{Smith} recognized the “inherent unreliability of

\begin{itemize}
\item[	extsuperscript{44}] \textit{True Witness} at 103. In the lab, “[p]eople turned out to be significantly better at identifying members of their own race than members of other races.” \textit{Id.} at 103.
\item[	extsuperscript{47}] \textit{Loftus}, 46 Jurimetrics J. at 200.
\end{itemize}
cross-racial identifications” and stated that eyewitness experts should not be excluded from testifying to this effect.\textsuperscript{48}

3. Post-Event Contamination

The influences a witness is subjected to after an event have also been studied to determine their contaminating effects on identification reliability.\textsuperscript{49} The most suggestive

\textsuperscript{48} United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) citing United States v. Smith, 736 F.2d 1103, 1105-06 (6th Cir.1984).

\textsuperscript{49} The experts claim that “[o]ver 90 percent of the experts in [a 2001] survey agreed that during the storage phase the eyewitness’s memory was vulnerable to contamination by ‘post-event’ information…95 percent of the experts agreed that a witness who had seen a mug shot of a defendant in a photo-array was more likely to identify the same man in a subsequent ‘live’ lineup, whether the initial photographic identification was right or wrong.” TRUE WITNESS at 104-05. This effect is not new. In 1770, immediately after the Boston Massacre, Paul Revere created an inaccurate print depicting the events of that day portraying the British soldiers lined
procedure used for identification is the “field showup,” where the police bring a witness to the suspect who was just caught and ask the witness to identify him.\textsuperscript{50} While the courts do not prohibit the highly suggestive field showup identification, in 1967 the Supreme Court held in \textit{Stovall} that violation of the suspect’s due process “depends on the totality of the circumstances surrounding it.”\textsuperscript{51} The Court revisited the issue again in 1977 in \textit{Manson} where it refused to up in formation with their Captain giving the order to fire. \textit{AMERICAN CRIMINAL TRIALS} at 340 n.1. In an era without the abundance of mass media, this was a very popular illustration and no doubt influenced the opinions of the colonists and the memories of the witnesses. \textit{AMERICAN CRIMINAL TRIALS} at 310-11, 314. The court delayed the trial of the soldiers for the express purpose to allow emotions to settle, and while that probably did accomplish the immediate concerns of the court, it also had the effect of allowing sufficient time to contaminate the jury pool and the witnesses’ memories. \textit{AMERICAN CRIMINAL TRIALS} at 310-11, 314.

\textsuperscript{50} \textit{Loftus}, 46 Jurimetrics J. at 200-01.

\textsuperscript{51} \textit{Stovall} v. Denno, 388 U.S. 293, 302 (1967) (Police use of a showup for identification purposes was reasonable since the victim was in the hospital and was unable to go to the police station for
completely prohibit highly suggestive identifications, but stated that “reliability is the linchpin in
determining the admissibility of identification testimony for both pre- and post-*Stovall*
confrontations.”

The standard lineup is also vulnerable to both intentional and unintentional influence. *Wade* addressed the intentional influence by requiring a suspect to have representation present at
the live lineup, but *Wade* does not require representation at photo lineups. The flawed
procedures that cause unintentional influences in live and photo lineups have generally been left
to the discretion of the police to address, but renewed criticism calls for reform. Eyewitness

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52 *Brathwaite*, 432 U.S. at 114.

53 *Wade*, 388 U.S. at 241-42.

54 *Id.* at 241-42.
experts claim that simple changes to lineup procedures would have significant positive effects on eyewitness accuracy. This is evidenced by experiments that included a verbal instruction to the witness that the suspect may or may not be in the lineup, which did not increase the number of accurate identifications, but did reduce false identifications when a suspect was not in the lineup. 56

Another simple change suggested is adoption of the double-blind method. 57 If the police officer conducting the lineup does not know the identity of the real suspect, he cannot provide unintentional feedback to the witness. 58 To support this claim, the eyewitness experts point to survey results that show about twenty percent of potential jurors erroneously believe that


56 Loftus, 46 Jurimetrics J. at 201-02.

57 Loftus, 46 Jurimetrics J. at 203-04.

58 Loftus, 46 Jurimetrics J. at 203-04.
identification reliability is increased when the lineup administrator knows the identity of the real suspect.\textsuperscript{59}

4. Relative Judgment

The traditional photo or live lineup displays the photos or members simultaneously on a single photo board or standing side by side.\textsuperscript{60} The witness then observes all of the individuals at once, tempting the witness to compare each individual to the other and make a relative judgment to select the individual that looks most like the suspect.\textsuperscript{61} Eyewitness experts claim that a sequential lineup is better.\textsuperscript{62} Showing the witness one photo or individual at a time reduces the

\textsuperscript{59} Loftus, 46 Jurimetrics J. at 203-04.

\textsuperscript{60} Loftus, 46 Jurimetrics J. at 202.

\textsuperscript{61} Loftus, 46 Jurimetrics J. at 202.

\textsuperscript{62} See e.g. Loftus, 46 Jurimetrics J. at 202-03; Amy Klobuchar, Nancy K. Mehrkens Steblay and Hilary Lindell Caligiri, \textit{Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project}, 4 Cardozo Pub. Law, Policy & Ethics J. 381, 405-06 (2006);
number of false identifications because the witness must make an absolute judgment on each
photo or individual displayed in front of him.\textsuperscript{63} A survey of potential jurors showed that less
than twenty-four percent believed that a sequential live lineup was more reliable than a
simultaneous live lineup, and less than thirty-nine percent believed that a sequential photo lineup
was more accurate than a simultaneous photo lineup.\textsuperscript{64}

\textbf{B. Weaknesses of Eyewitness Expert Testimony}

The claims of the eyewitness experts are persuasive on their face. Their assertions that
they possess information that can decrease the number of misidentifications with minimal
expense appear to be a silver bullet for the judicial system. Thus, most advocates on the subject
defend the aforementioned benefits as clear and convincing evidence for adopting eyewitness

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http://www.thejusticeproject.org/.
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\textsuperscript{63} \textit{Loftus}, 46 Jurimetrics J. at 202.

\textsuperscript{64} \textit{Loftus}, 46 Jurimetrics J. at 203.
experts, but they do not give fair analysis to the significant weaknesses and dangers that eyewitness expert testimony brings to a courtroom. Fundamentally, the usefulness of eyewitness expert testimony to the jury is still not generally accepted by the courts and the prejudice against the witness remains high.  

The courts have historically refused the admission of eyewitness experts for a number of reasons. Primarily, the courts hold that the duty of determining witness credibility is a function reserved solely for the jury. The courts have also stated that the expert testimony would be prejudicial and that eyewitness research has not reached a point where it is reliable enough to be

65 Hibiscus Assoc. Ltd. v. Board of Trustees of Policemen & Firemen Retirement Sys. of Detroit, 50 F.3d 908, 917 (11th Cir.1995) (citing Salem v. U.S. Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 1122 (1962) ) (“Expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves.”).

66 United States v. Purham, 725 F.2d 450, 454 (8th Cir.1984) (finding the question is within the expertise of jurors)
used in trial.67 These tried and true arguments curtailed the use of eyewitness experts for many years, but the courts have recently become more accepting of expert testimony. Despite the lack of aggressive published scrutiny on the negative effects of admissibility of experts, there are significant unexamined reasons to avoid the panicked, full-scale adoption of eyewitness expert testimony.

1. Reliability Factors

Surveys of potential jurors have shown that research on eyewitness reliability factors can potentially significant impact on a jury if the expert is permitted to testify to them.68 Where a minority of the potential jurors believe in the factors that reduce witness reliability, expert testimony will tend to increase those percentages. Yet the courts have not fully accepted all of

67 See e.g. United States v. Fosher, 590 F.2d 381, 383 (1st Cir.1979) (ruling that the expert testimony would be prejudicial); United States v. Langan, 263 F.3d 613, 622 (2001) (eyewitness expert research and testimony did not pass the Daubert reliability test).

68 See supra sections II. A. Benefits of Eyewitness Experts.
the expert conclusions on the reliability factors. Even the researchers disagree on the accuracy of their own conclusions. “It may be argued that real-life crime events include so many stimuli that the hypothesized weapon focus effect becomes irrelevant or insignificant in magnitude.”

And in a 1989 study, only 56.6% of experts felt that the weapon focus effect was reliable enough.

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69 See Downing, 753 F.2d at 1240 (“The trial court must then balance its assessment of the reliability of a novel scientific technique against the danger that the evidence, even though reliable, might nonetheless confuse or mislead the finder of fact, and decide whether the evidence should be admitted.”) See also Roger B. Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, n.93 (1995) (citing Fosher, 590 F.2d at 383; United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978) (holding that psychological studies on cross-racial identification were “inadequate”), cert. denied, 439 U.S. 1132 (1979). But see Downing, 609 F. Supp. at 792 (finding inconsistent results in studies regarding the deterioration of memory, the assimilation factor, and the confidence-accuracy relationship), aff’d mem., 780 F.2d 1017 (3d Cir. 1985)).

70 Mehrkens, 16 Law and Human Behavior at 422.
for courtroom testimony.  

Put simply, the eyewitness expert’s testimony is based on the controlled environment of a lab, not the complex and highly emotional circumstances of a crime scene in three dimensions. It is, therefore, subject to the same inaccuracy to which he is testifying. While their research results are gaining acceptance within the scientific community, their inability to apply the results to specific facts in a given case is a significant limitation.

2. Manipulating the Jury

Federal Rule of Evidence 702 regarding the admissibility of testimony by experts states that the expert must have “scientific, technical, or other specialized knowledge” and it must be helpful to the trier of fact. The eyewitness expert certainly falls within the category of having scientific or specialized knowledge, therefore, if the court determines he is qualified as an expert, he may offer an opinion to assist the jury to determine a fact in issue. In the case of the

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71 Mehrkens, 16 Law and Human Behavior at 414.

72 Federal Rules of Evidence Rule 702.

73 Federal Rules of Evidence Rule 702.
eyewitness expert, the fact at issue is the identification. It is the opinion of the courts that any juror can understand the process of recalling an identification from memory.\textsuperscript{74} The eyewitness expert is not assisting the jury in understanding the eyewitness testimony, rather he is making a value judgment on the testimony of a particular witness based on the general behavior of a population.\textsuperscript{75} This value judgment is precisely what the jury is charged to perform. “It would simply be too easy for a party who desired to suggest to the jury that a certain witness was reliable or unreliable, to ask an investigator to testify as to the witness’ veracity during the investigation.”\textsuperscript{76} Thus, educating the jury has the effect of affecting their bias.\textsuperscript{77} The eyewitness

\textsuperscript{74} See supra note 65.

\textsuperscript{75} Fosher, 590 F.2d at 383 (ruling that the expert testimony would be prejudicial).

\textsuperscript{76} State v. Thompson, 832 A.2d 626, 640 (Conn. 2003).

\textsuperscript{77} “The [Sixth] Amendment's requirement that the venire from which the jury is chosen represent a fair cross section of the community constitutes a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).” Holland v. Illinois, 493 U.S. 474, 474 (1990).
experts claim that “[e]xperts do not comment on the reliability of a particular witness’s memory,” but despite their intent, this is exactly the effect that their testimony will have on the jurors they are attempting to educate. “Even when a witness does not literally state an opinion concerning the credibility of another witness but his or her testimony would have the same ‘substantive import,’ such testimony is inadmissible.”

When the defense calls an eyewitness expert in response to the testimony of a witness, they are not merely offering background information to assist the jury, instead they are indirectly...

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78 Loftus, 46 Jurimetrics J. at 180.

79 “In general, expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not ‘assist the trier of fact’ as required by Rule 702.” State of Idaho v. Perry, 139 Idaho 520, 525 (2003) citing U.S. v. Charley, 189 F.3d 1251, 1267 (10th Cir.1999).

asserting conclusions on that particular witness thereby intruding on the fact-finding mission of
the jury.\footnote{\textit{Perry}, 139 Idaho at 520 (\textquoteright\textquoteright Perry will be able to present all of the relevant details of the charge
from his perspective and will not be precluded from introducing factual evidence; the exclusion
merely bars the introduction of expert opinion testimony that would bolster Perry's credibility\textquoteright\textquoteright).}

\textit{See also} New York Times, National Briefing | Washington: Eyewitness expert Pressed In C.I.A.
Leak Case, Oct 27, 2006, can be found at

http://query.nytimes.com/gst/fullpage.html?res=9502E0DE153FF934A15753C1A9609C8B63&
n=Top\%2FReference\%2FTimes\%2FTimes\%2FPeople\%2FFF%2FFFitzgerald%2F+Patrick+J. The
defense called a eyewitness expert to explain how stress could affect the memory of I. Lewis
Libby Jr., Vice President Cheney's former chief of staff at his obstruction of justice and perjury
trial.

\footnote{\textit{Perry}, 139 Idaho at 525 quoting State v. Allen, 123 Idaho 880, 885, 853 P.2d 625, 630
(Ct.App.1993); see also State v. Thompson, 832 A.2d 626, 638-39 (Conn. 2003) (held as error a}
opinions on credibility are too fine of a line for a jury being inundated with information. Two prominent Johns Hopkins University psychology professors, Michael McCloskey and Howard Egeth, have long held an opposing viewpoint on the usefulness of eyewitness experts to the jury. They claim “it is by no means clear that expert psychological testimony about eyewitnesses would improve jurors’ ability to evaluate eyewitness testimony.”

They suggest that such testimony could “[i]n fact have detrimental effects” on a jury. “McCloskey and Egeth conceded that, while these figures make it ‘[c]lear that jurors’ ability to discriminate accurate district court’s admission of police officer’s testimony that another witness as “as reliable and consistent” since it was).


84 Egeth, 38 Am. Psychol. at 550 (1983).
from inaccurate witnesses is far from perfect,’ jurors do take relevant factors into account when
evaluating witness accuracy.”

The jury represents a cross section of society for a reason, to ensure that no single point
of view is overly represented and influential. They are presented with the testimony of an
individual witness and should apply their own collective discretion to determine the credibility of
that testimony. Their job is not easy and their duty is solemn. The jury deserves the most
accurate and useful evidence to find the truth without the addition of outside influences.

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85 Robert J. Hallisey, *Experts On Eyewitness Testimony In Court--A Short Historical
Perspective*, 39 How. L.J. 237, 253, citing Gordon Bermant, *Two Conjectures about the Issue of
Egeth, *Eyewitness Identification--What Can a Psychologist Tell a Jury?*, 38 Am. Psychol. 550,
555 (1983).
3. Honest Witnesses versus Deceitful Witnesses

The eyewitness expert assumes both the experimental test subject and the testifying witness are disinterested and testifying honestly.\textsuperscript{86} In the lab, this assumption can be made because the subject is encouraged or paid to be as accurate as possible. However, in reality, everyone lies.\textsuperscript{87} The courts believe that the jury is capable of providing sufficient skepticism on all lay witnesses, and this certainly extends to a police informant or suspect’s self-serving testimony,\textsuperscript{88} but the eyewitness expert does not claim to be able to identify a lie. A victim may lie about a rape for revenge or shame. And if they are honest about the crime, they may still lie about the full details such as their background, why they were at the crime scene, or other collateral issues to protect their reputation. A witness may lie to avoid implicating himself in another crime or protect his friends and family. The eyewitness experts cannot predict this.

\textsuperscript{86} In survey questions regarding witness reliability the subject is told to assume the witness has no motivation to lie. \textit{Loftus}, 46 Jurimetrics J. at 207.

\textsuperscript{87} \textit{True Witness} at 175-76.

\textsuperscript{88} \textit{See supra} note 65.
behavior on a case-by-case basis. And if the eyewitness expert cannot distinguish the honest
witness from the deceitful witness, their testimony actually subtracts from the body of evidence
in a case and does not help the jury determine a factual issue. McCloskey and Egeth “asserted
[their] study showed that expert testimony had ‘absolutely no effect on jurors’ ability to
discriminate accurate from inaccurate witnesses. The expert testimony only appeared to reduce
jurors’ overall willingness to believe eyewitnesses.”

4. Lab Results versus Field Results

On their own, each reliability factor seems intuitive. Unfortunately, the single controlled
variable of the lab does not translate to the field where there are many variables in play in

89 Robert J. Hallisey, Experts On Eyewitness Testimony In Court--A Short Historical
Perspective, 39 How. L.J. 237, 253, citing Gordon Bermant, Two Conjectures about the Issue of
Expert Testimony, 10 L. & Hum. Behav. 97 (1986) at 248 citing Michael McCloskey & Howard
Egeth, Eyewitness Identification--What Can a Psychologist Tell a Jury?, 38 Am. Psychol. 550,
556 (1983).
differing degrees. An expert cannot tell a jury that the ‘cross-racial’ effect predominantly applies in a particular case, when its effect may be overshadowed by other factors increasing reliability.

The eyewitness experts admit “crime scene complexity, could not be assessed with [their] data.”\(^{90}\) And sometimes “the experiments resulted only in more confusion. The laborious process frequently resulted in nothing at all.”\(^{91}\)

When the eyewitness expert does testify, they testify only to the factors that affect witness reliability,\(^{92}\) but they give no guidance on the relative weights to each factor.

Effectively, the expert wants the jury to keep mental notes on a witness’ reliability based on the factors the expert explains; give the witness a down check if the identification is cross-racial, an up check because he is familiar with the suspect, then give a down check if there was a weapon involved, and another up check because he had a clear view of the suspect. The sum of the up

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\(^{90}\) *Mehrkens*, 16 Law and Human Behavior at 422.

\(^{91}\) *True Witness* at 106.

\(^{92}\) See infra note 110.
and down checks still leaves the jury where it was in the beginning; they must apply their own judgment based on the totality of the testimony.  

5. Due Process to All Defendants

The Supreme Court held in *Ake v. Oklahoma* that where a defendant’s sole defense is an issue within the purview of an expert, that expert should be permitted to testify even at the state’s expense. But a qualified eyewitness expert is hard to find, and they cannot be compelled to testify. Psychologists and physicians are plentiful, and if the defendant’s first choice refuses to

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93 *See e.g.* Purham, 725 F.2d at 454; *Smith*, 122 F.3d at 1357.

94 *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (defendant’s sole defense was insanity and court held that he was entitled to expert testimony).

95 “As Professor Wells has pointed out, there are probably fewer than fifty well-qualified eyewitness identification experts and over 77,000 eyewitness identification cases per year in the U.S.” O’Toole, 41 Val. U. L. Rev. 23 citing American Bar Association, *Gideon’s Broken*
testify a substitute with equivalent qualifications is easy to find. However there are very few eyewitness experts and if the defendant or the state cannot convince one of the eyewitness experts to testify, the indigent defendant is at a disadvantage to the wealthy defendant who can pay a much higher fee to fly in an expert to testify on his behalf. The result is an unequal application of justice because the state cannot meet the requirements of *Ake*.96

In 2004, the United States Supreme Court in *Crawford v. Washington* effectively created a check on the court’s 702 discretion to deny admissibility of defense eyewitness experts when it stated that “dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”97 A trial court under this reasoning should not exclude expert testimony because it has determined the state’s evidence is strong and the defendant does not

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96 See *supra* note 93.

need to challenge it. However, the Court also emphasized the unique role of jurors, rather than judges, as the ultimate finders of fact. Therefore, the jury must be allowed to resolve contested factual matters with the aid of expert testimony in those cases where it is determined to be helpful in their evaluation of the evidence. To accomplish this, the trial court judge must carefully weigh the risks of admission with the requirements as gatekeeper under Daubert.

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98 Loftus, 46 Jurimetrics J. at 189. 10 states have no legislative provisions for eyewitness experts (Hi., Mich., Miss., N.H., N.M., N.C., Okla., Or., Va., Wis.) and 4 states exclude eyewitness expert testimony. Id.

99 Ake, 470 U.S. at 81.

100 Id at 82-83 (“…where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield”).
III. Legal Background

The United States Supreme Court famously acknowledged the inaccuracy of eyewitness identifications in 1967 in *United States v. Wade* when it stated that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” To counter the most egregious cases of injustice, the Court held that a suspect is entitled to representation when he is subjected to a live lineup. The reasoning was that a suspect’s attorney could prevent or object to an unfairly administered test. In 1972, the Court in *Neil v. Biggers* provided several factors to help the judge and jury determine the reliability of a witness’s reliability: 1) opportunity to view the criminal during the crime, 2) witness’ degree of attention, 3) the witness’ accuracy of the description, 4) the witness’ level of certainty, and 5) the length of time between the crime and the identification. Several years later in the face of

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101 *Wade*, 388 U.S. at 228.

102 *Wade*, 388 U.S. at 241-42.

103 *Wade*, 388 U.S. at 241-42.

104 *Biggers*, 409 U.S. at 199-200.
growing criticism regarding the reliability of eyewitness testimony, the Court in *Manson v.*

*Brathwaite* affirmed *Biggers* and added that countering these factors supporting an accurate
identification, the court must also consider the negative effect of a suggestive identification. 105

The Court also emphasized that the jury was permitted to use a witness’ confidence in
determining credibility because “[j]uries are not so susceptible that they cannot measure
intelligently the weight of identification testimony that has some questionable feature.” 106

By the 1980’s the courts were becoming more confident in the science of eyewitness accuracy, but not
fully accepting of the admissibility of eyewitness expert testimony. 107

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105 *Brathwaite*, 432 U.S. at 117.

106 *Brathwaite*, 432 U.S. at 116.

107 *See e.g.* People v. McDonald, 690 P.2d 709 (Ca. 1984) (one of the first states to hold that
eyewitness expert testimony educating the jury of the reliability factors is useful information that
the jury may use to determine credibility, but most other states refused to accept); United States
v. Downing, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985) (accepted the *McDonald* analysis).
The admissibility of expert testimony is governed by Federal Rule of Evidence 702 which allows the court to admit expert testimony if the expert is qualified and the testimony is useful to the jury in making a determination of fact. The trial court will exclude expert testimony under Rule 702 if it determines the expert is not qualified under the Daubert test. Rule 702 is balanced by Rule 403, which allows the court to exclude the expert testimony if its value is outweighed by unfair prejudice, confusion, misleads the jury, wastes time or is

108 “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Federal Rules of Evidence Rule 702.

cumulative.\textsuperscript{110} Therefore, the trial court has significant discretion in allowing expert testimony if
the judge determines it to be contrary to the administration of justice.\textsuperscript{111}

\textsuperscript{110} “Although relevant, evidence may be excluded if its probative value is substantially
outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or
by considerations of undue delay, waste of time, or needless presentation of cumulative

\textsuperscript{111} In 1986, the defense in \textit{State v. Buell}, 489 N.E.2d 795 (Ohio 1986) attempted to admit the
testimony of an experimental psychologist to educate the jury on the factors affecting witness
reliability as well as offer an opinion on both the reliability and credibility of four witnesses. \textit{Id.}
at 800. The Ohio Supreme Court held that “the expert testimony of an experimental psychologist
concerning the variables or factors that may impair the accuracy of a typical eyewitness
identification is admissible under Rule 702,” but is subject to the court’s discretion. \textit{Id.} at 803-
04. At the same time the court also prohibited expert testimony “regarding the credibility of a
\textit{particular} witness' identification testimony.” \textit{Id.} at 803.
A. Eyewitness Experts Under Daubert

In 1993 the United States Supreme Court stated in Daubert v. Merrell Dow Pharmaceuticals, Inc. that to admit expert testimony requires the court to conduct “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”¹¹² Under this analysis, a medical doctor can take test results or examine a specific patient and draw medical conclusions based on the accepted results of that science. Additionally, a non-scientific witness such as a police officer, through experience and training can be qualified as an expert to testify to the specific facts of a case based on his own experiences.¹¹³ However, an eyewitness expert cannot speak directly to the facts of the individual witness’ memory or the facts of the case.¹¹⁴ Unlike a physician, the eyewitness expert cannot analyze the witness’ brain

¹¹² Daubert, 509 U.S. at 592-93.


¹¹⁴ Buell, 489 N.E.2d at 803 (the court prohibited eyewitness testimony regarding the credibility of a particular witness).
and determine what the witness thinks he saw and compare it to what actually happened. The eyewitness expert cannot testify that a particular witness is accurate in his description of the suspect or the events.\footnote{United States v. Poole, 794 F.2d 462 (9th Cir. 1986).} Rather, the eyewitness expert can only give a general opinion of broad statistical research and testify that every human being has imperfect memories and thus does not meet the ‘facts at issue’ standard of\textit{Daubert}.

\textit{Daubert} also requires trial judges determine if the proffered expert witness is both relevant and reliable.\footnote{\textit{Daubert}, 509 U.S. at 579-80.} To assist the judge, the Court suggests a number of factors to help determine if the expert’s methodology passes the reliability requirement: testability, peer review, rate of error, standards controlling the techniques, and general acceptance in the scientific community.\footnote{\textit{Daubert}, 509 U.S. at 593-94.} The eyewitness expert’s qualifications do not pass two elements of the\textit{Daubert} test when applied to a specific witness. His opinion is neither testable on the witness nor
repeatable to any reasonable degree of accuracy,\textsuperscript{118} and scientific community acceptance of the most common eyewitness reliability factors range from a low of 56\% to a high of 95\%.\textsuperscript{119} While the Court in \textit{Daubert} stated that Frey’s ‘general acceptance’ is no longer a necessary precondition for admissibility, the trial judge must still ensure the method rests on a reliable foundation.\textsuperscript{120}

\textsuperscript{118} See \textit{supra} note 110.

\textsuperscript{119} A survey of eyewitness experts found that only 56.6\% were comfortable supporting the ‘weapon-focus’ reliability factor in court. \textit{Mehrkens}, 16 Law and Human Behavior at 414.

\textsuperscript{120} \textit{Daubert}, 509 U.S. at 597 (1993). See also State of Idaho v. Perry, 139 Idaho 520 (2003) (demonstrate reliability rates ranging from 47 to 95 percent do not represent acceptance of polygraph testing).
B. Current Circuit Holdings

The traditional method of attacking witness credibility is through cross-examination.\textsuperscript{121} The attorney can directly attack the witness’s credibility by pointing out inconsistencies and limitations of the witness.\textsuperscript{122} Like the surgeon carefully using his instruments, the attorney must carefully handle the witness to identify issues of bias and lack of capacity.\textsuperscript{123} The attorney has a duty to accomplish a rigorous credibility-attack through cross-examination whereas the eyewitness expert has no duty beyond his oath to the court.\textsuperscript{124} The eyewitness experts claim cross-examination is historically insufficient for the task and ask that their testimony their

\textsuperscript{121} See e.g. Federal Rules of Evidence 405, 608, 705, 803.

\textsuperscript{122} See Federal Rules of Evidence Article VI.

\textsuperscript{123} See Federal Rules of Evidence 607.

\textsuperscript{124} MRPC 1.3 Diligence states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” Comment 1 of the rule also states that “[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”
testimony be allowed to make up for this deficiency.\textsuperscript{125} However, the courts are not yet fully convinced of the usefulness of their testimony and therefore most states and federal circuits have placed limits on the use of eyewitness expert testimony.\textsuperscript{126}

The United States Supreme Court has not ruled specifically on the admissibility of eyewitness expert testimony,\textsuperscript{127} leaving the lower courts to use \textit{Daubert’s} general two-prong test to determine if eyewitness expert testimony should be admitted; 1) is the eyewitness expert witness testimony relevant, and 2) is their methodology reliable.\textsuperscript{128} As a result, the Circuit Courts are slowly developing their own tests on the admissibility of eyewitness expert testimony

\textsuperscript{125} \textit{True Witness} at XXX.

\textsuperscript{126} \textit{See supra} section III. B. Current Circuit Holdings.

\textsuperscript{127} \textit{Loftus}, 46 Jurimetrics J. at 185 note 37.

\textsuperscript{128} \textit{Daubert}, 509 U.S. at 579-80.
and they fall into one of three areas: discretion to allow eyewitness experts, limited discretion to deny eyewitness experts, and denial of eyewitness experts.  

The D.C. Circuit granted discretion to the trial courts to allow eyewitness experts in the 1998 ruling of *Green v. United States* where the defendant was convicted of kidnapping, first degree murder of a drug dealer, and attempted murder of an associate. The witness, who was a reluctant driver of the getaway car, identified the suspect in a photo lineup but failed to identify the suspect in the courtroom during voir dire and admitted such on cross examination. The court stated that it was not advocating a *per se* exclusion rule on the admissibility of eyewitness expert testimony, but rather upholding the trial finding that the effects of stress on eyewitnesses are not ‘beyond the ken’ of jurors and therefore the trial court did not abuse its discretion.

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129 *Loftus*, 46 Jurimetrics J. at note 42, 45 (10 states have no legislative provisions for eyewitness experts; Hi., Mich., Miss., N.H., N.M., N.C., Okla., Or., Va., Wis.).


131 *Green*, 718 A.2d at 1049.

132 *Green*, 718 A.2d at 1051-53.
Likewise the Fifth Circuit supported the discretion of trial court in *United States v. Moore* to refuse the admissibility of eyewitness expert testimony.\(^{133}\) Based on the 1981 movie *Loophole*, Moore and two accomplices entered the home of a Dallas bank president.\(^{134}\) They placed fake bombs on the bank president and his family and ordered him to go to the bank alone and fill two satchels with money, otherwise the bombs would be detonated by remote control.\(^{135}\) After their arrest, one witness identified an accomplice as the person casing the bank president’s home several mornings earlier.\(^{136}\) Another witness identified Moore as the driver of the truck while leaving the house after the extortion.\(^{137}\) The Fifth Circuit held that the trial judge has discretion in admitting this evidence, however, admission should be encouraged when the sole

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\(^{133}\) *United States v. Moore*, 786 F.2d 1308 (1986).

\(^{134}\) *Moore*, 786 F.2d at 1310.

\(^{135}\) *Moore*, 786 F.2d at 1310.

\(^{136}\) *Moore*, 786 F.2d at 1311.

\(^{137}\) *Moore*, 786 F.2d at 1311.
evidence is based on casual identification. The First, Fifth, Seventh, Ninth, Tenth Circuits and twenty-three states also follow this analysis.

The Third Circuit has evolved from exclusion to limited discretion to deny admission of eyewitness experts. In 1985, the district court in *United States v. Downing* found the defendant guilty of mail fraud, wire fraud, and interstate transportation of stolen property based predominantly on eyewitness identification. The defendants had placed orders with various manufacturers by supplying fake credit references, addresses and foreign bank information. Twelve witnesses of varying degrees of confidence identified the defendant as the person who

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140 *Downing*, 753 F.2d at 1226-27.

141 *Downing*, 753 F.2d at 1227.
placed the orders.\textsuperscript{142} The district court denied a defense request for an eyewitness expert to help the jury determine credibility of any witness because determining witness credibility is the jury’s function.\textsuperscript{143} The Third Circuit reversed the trial court’s exclusion of eyewitness expert testimony as reversible error because “under certain circumstances expert testimony on the reliability of eyewitness identifications can assist the jury in reaching a correct decision and therefore may meet the helpfulness requirement of Rule 702.”\textsuperscript{144}

\textsuperscript{142} \textit{Downing}, 753 F.2d at 1227.

\textsuperscript{143} \textit{Downing}, 753 F.2d at 1228.

\textsuperscript{144} \textit{Downing}, 753 F.2d at 1230 n.6 (held that exclusion of eyewitness expert testimony because the trial court determined it could never be helpful to the jury was not harmless error). The court did not detail the circumstances when eyewitness testimony would be helpful, but the facts of this case included a short time to view the suspect, an innocuous meeting, and lapse of time between the event and the identification. \textit{Id.} at 1227-28. The court also did state as an example that when the sole evidence against a suspect was two eyewitnesses in a stressful situation, admission of eyewitness expert testimony would be appropriate. \textit{Id.} at 1232. The court also
Framing the opposing limit of admissibility, the Third Circuit in *United States v. Mathis* held that exclusion of eyewitness expert testimony was harmless error given the “interlocking correspondence of evidence throughout the record.” During the commission of a bank robbery in New Jersey, Mathis was chased and his unmasked face was observed by a police officer as he ran from the wrecked getaway car. The district court denied a defense proffer of an eyewitness expert to educate the jury on various memory reliability factors such as the short time of exposure, weapons focus, and post event influence. The Third Circuit found the exclusion to be error because the district court did not provide sufficient reason for exercising its discretion to deny the expert testimony, but still affirmed the conviction. Therefore, when the evidence is denied that cross examination was an “effective way to reveal the weaknesses in a witness' recollection of an event.” *Id* at 1231.


146 *Mathis*, 264 F.3d at 324-26.

147 *Mathis*, 264 F.3d at 333-34.

148 *Mathis*, 264 F.3d at 338-39.
limited to eyewitness identification, exclusion of eyewitness experts is reversible error, but when there is corroborating evidence, exclusion is harmless error.

The Sixth Circuit has likewise evolved from exclusion to limited discretion to deny. In 2000, the Sixth Circuit in *United States v. Smithers* reversed the bank robbery conviction of Smithers who was identified by the teller and two other witnesses. The defense moved *in limine* to admit eyewitness expert testimony to educate the jury on reliability factors, but this motion was denied because the expert opinion was not scientifically valid and the jury was capable of appropriate skepticism. The Sixth Circuit reversed, holding that admission of eyewitness expert testimony may be admissible, but is subject to the *Daubert* test.

The next year the Sixth Circuit in *United States v. Langan* affirmed the conviction of Langan, the leader of a white supremacist group, who robbed two banks in Ohio. A bank

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150 *Smithers*, 212 F.3d at 310.

151 *Smithers*, 212 F.3d at 313.

152 *Langan*, 263 F.3d at 616.
manager identified Langan from a photo lineup, but admitted in court “I hope I don't recognize this individual from T.V.”\textsuperscript{153} Despite this admission under cross examination, the defense proffered the testimony of an eyewitness expert to impeach the witness.\textsuperscript{154} The Sixth Circuit affirmed the limited discretionary rule by affirming the trial court’s exclusion of eyewitness expert testimony because the trial court nevertheless conducted a lengthy \textit{Daubert} analysis.\textsuperscript{155} The Second, Fourth, Eighth Circuits and thirteen states also follow this analysis.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{153} Langan, 263 F.3d at 618.
\item \textsuperscript{154} Langan, 263 F.3d at 623.
\item \textsuperscript{155} Langan, 263 F.3d at 622.
\item \textsuperscript{156} See Loftus, 46 Jurimetrics J. at note 42, 45 (2d., 3\textsuperscript{rd}, 4\textsuperscript{th}, 6\textsuperscript{th}, 8\textsuperscript{th}, Ala., Alaska., Ariz., Cal., Ind., Ky., La., Mo., Mont., Nev., Ohio, S.C., Utah). \textit{Id. See} notes 37, 47. See also Washington v. Schriver, 240 F.3d 101, 114 (N.Y. 2001) (held that corroborating evidence do not render in error the district court’s refusal to allow a eyewitness expert to testify); \textit{McDonald}, 690 P.2d at 709 (Ca. 1984) (use of a eyewitness expert is permissible as long at the testimony focuses on factors affecting reliability and not the credibility of a particular witness).
\end{itemize}
The Eleventh Circuit stands alone among the Circuits denying the admissibility of eyewitness experts *per se*. In *United States v. Smith*, Smith was convicted of robbing a bank in Atlanta based upon the identification of the teller and two other witnesses.157 The defense proffer of an eyewitness expert to explain reliability factors such as the cross-racial effect, weapon focus, and suggestive lineup procedures was denied by the district court because “it would not assist the trier of fact” and “the probative value of the testimony was outweighed by the possible danger of misleading or confusing the jury.”158 In 1997, the Eleventh Circuit held in *United States v. Smith* that “the proposed testimony [of an eyewitness expert] ... will not assist the trier of fact in this case to understand and determine a fact in issue”159 because “the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through common-sense evaluation.”160 Four states follow


158 Smith, 122 F.3d at 1357.

159 Smith, 122 F.3d at 1358.

160 Smith, 122 F.3d at 1357.
the denial rule. The remaining ten states have made no determination on the admissibility of eyewitness expert testimony.

**IV. The Way Forward**

The well publicized cases of DNA exonerations and mistaken identity dramatically illustrate the defendant’s side of the issue. These highly emotional stories tug at our conscience because it is a strongly held tenet of our judicial system that it is better for a guilty man to go free rather than convict an innocent man. However, mistakes are inevitable and the

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161 See *Loftus*, 46 Jurimetrics J. at note 47 (11th Cir., Kan., Neb., Pa., Tenn.).

162 See *Loftus*, 46 Jurimetrics J. at note 37 (Hi., Mich., Miss., N.H., N.M., N.C., Okla., Or., Va., Wis.).


164 See *supra* note 5.
only way to guarantee mistakes do not occur is to acquit all defendants.\textsuperscript{165} This is obviously not acceptable. The current system has a serious weakness, and a nation of justice must take action to reduce the chances of an erroneous conviction. Both the jury system and eyewitness testimony are here to stay, so changes must be made that allows these two pillars of criminal justice to work while still advancing the search for truth and justice.

I offer two solutions that address the four main factors to which the eyewitness experts generally testify. One solution is that simple changes in police witness handling procedures can be implemented at the beginning of an investigation to improve witness accuracy and reliability. These changes will address the factors of post-event contamination and relative judgment. A second solution consists of traditional witness cross-examination, encouraging the defense to point out inconsistencies in witness testimony or failures of police handling procedures on cross-examination as a way to attack witness credibility and capacity. This solution addresses the factors of cross-racial identification and weapon focus. Neither solution requires new legislation.

\textsuperscript{165} See supra note 1.
A. Treating Witness Testimony as Physical Evidence

Improvements to the system are available, and can be implemented at the beginning of the investigation where witness reliability and accuracy can be significantly improved. As knowledge and technology change, police procedures have adjusted to keep up. For example, recent technological advances in less-than-lethal weapons give the police options they did not have twenty years ago. A gun is the surest and final method to stop a violent offender, but is not always considered ideal. Adoption of ‘tazers’ and pepper spray require more overhead in terms of training and tactics, however the positive results outweighed the expenses. Likewise,

\[166\] Lois Pilant, *Less-Than-Lethal Weapons: New Solutions for Law Enforcement*, 1, (1993) (Research project paid for by the U.S. Department of Justice) available at http://www.ncjrs.gov/pdffiles1/nij/grants/181653.pdf. Other less than lethal options that were studied included airbags that restrain agitated suspects in the back of police cars, sticky foam that can be fired at a suspect like ‘silly string’ up to 35 feet away, and disorienting strobes and lasers.

*Id* at 3-4.

\[167\] *Id* at 2.
advances in the science of psychology give the police an opportunity to once again improve their 
training and procedures to increase the accuracy of suspect descriptions and obtain more reliable 
suspect identifications. Improvements in police training and procedures do not need to be 
revolutionary, but rather evolutionary.

The eyewitness experts present compelling evidence that a witness’s memory is 
vulnerable to post-event contamination.\textsuperscript{168} The issues that the eyewitness experts speak to are 
addressed by discrete factors that affect an honest witness’ reliability. However, the expert’s 
main usefulness lies in improving witness reliability before the damage is done and not during 
trial. The best opportunity to reduce the reliability problems in witness identification is for the 
police to protect the testimony just as they would protect physical evidence. When physical 
evidence is handled haphazardly, by unauthorized persons, with inconsistencies in the chain of 
custody, or lost along the way, it risks being declared inadmissible. The same damage can be 
done to a witness. Simple changes in police procedures can be implemented to address each of 
the reliability factors and reduce the chance of misidentifying innocent people.

\textsuperscript{168} See supra section II. A. Benefits of Eyewitness Experts.
In 1999, the Department of Justice published “Eyewitness Evidence: A Guide for Eyewitness Identification.”\textsuperscript{169} It was developed through the combined efforts of prosecutors, police officers and defense attorneys.\textsuperscript{170} It is not just a compromise, but rather a workable change in procedures to reduce the effects of each reliability factor described by the testifying eyewitness experts. The Guide is not aimed at creating additional legal protections to a suspect, but rather reducing errors in the identification process from the beginning of an investigation.\textsuperscript{171} The reforms suggested are generally simple changes to the existing procedures. They do not directly apply to situations where speedy questioning in the field is required to apprehend an armed suspect in a neighborhood for example. Rather, they are techniques that can be used when


\textsuperscript{170} \textit{Guide for Law Enforcement} at v-vi.

\textsuperscript{171} \textit{Guide for Law Enforcement} at 2.
time is available and the situation is under control. The Guide “describes practices and procedures that, if consistently applied, will tend to increase the accuracy and reliability of eyewitness evidence, even though they cannot guarantee the accuracy (or inaccuracy) of a particular witness’ testimony in a particular case.”

1. Interviewing Witnesses

Leading questions at any stage of an investigation can cause a cooperative witness to remember things they may not have really seen. From the initial 911 call through all follow-up interviews, the interviewer should strive to ask open ended questions in a non-suggestive manner.

172 Guide for Law Enforcement at iii-iv (Attorney General Janet Reno acknowledged that the specific circumstances of a crime such as local conditions, the quality of other evidence, and whether the victim is also a witness may preclude adherence of the recommended procedures).


175 True Witness at 153.
manner, follow up with closed-ended questions, and avoid leading questions.\textsuperscript{176} In a survey of potential jurors, this was a factor that jurors understood broadly.\textsuperscript{177} This change eliminates much of the post-event contamination.\textsuperscript{178}

2. Field Show Ups\textsuperscript{179}

Although the field show up identification is not a prohibited method of identification, it should be limited to situations where an immediate identification is necessary and its

\textsuperscript{176} An open ended question would be ‘Tell me about the car?’ A closed-ended question would be ‘What color was the car?’ A leading question would be ‘Was the car red?’ \textit{Guide for Law Enforcement} at 13.


\textsuperscript{178} \textit{See supra} section II. A. 3. Post-Event Contamination.

\textsuperscript{179} \textit{Guide for Law Enforcement} at 26-28.
suggestiveness is minimized as much as possible. The witness should be instructed that the suspect may or may not be the perpetrator. The proceeding should be documented in detail for later use in court to strengthen credibility. If there is more than one witness, use one witness for the show up and reserve the other witnesses for a traditional live or photo lineup.

3. Live and Photo Lineups

Wade eliminated some of the problems of suggestion by requiring a suspect be represented by an attorney at a live lineup. The recommendations from the Guide seek to improve witness accuracy further. Many witnesses at a lineup may come prepared to make an

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180 See supra note 50.


182 See supra note 10.
identification, therefore a simple verbal instruction telling the witness prior to making an identification that the suspect ‘may or may not’ be in the lineup gives the witness an opportunity to admit they do not recognize the suspect and freely say that the suspect is not in the lineup. In empirical studies, this simple instruction had the effect of reducing misidentifications when the real suspect was not present in the lineup.  

Secondly, use of fillers who match the description given to police rather than fillers who are similar to the suspect also helped lower misidentifications. Studies show that when fillers


184 Loftus, 46 Jurimetrics J. at 201-02.

do not resemble the real suspect, witnesses are twice as likely to identify an innocent member when the real offender was not present.186

Finally, presenting the suspects sequentially, one at a time, rather than all at once requires the witness to decide on the spot if the suspect is the guy or not.187 This eliminates the problem of ‘relative judgment’ and requires the witness to make an ‘absolute judgment’.188 When presented sequentially, the witness must make an identification based on the person in front of them and their own memory. “[I]t virtually denies the eyewitness the opportunity to rely on relative judgments.”189

186 True Witness at 156.

187 Loftus, 46 Jurimetrics J. at 202-03.


189 True Witness at 160. See also Mehrkens, 4 Cardozo Pub. Law, Policy & Ethics J. at 406 (During a field trial of a sequential photo lineup, “[e]ven after being instructed about the new lineup procedure, witnesses still would ask to see two photographs simultaneously. Now
4. Double Blind Administration\textsuperscript{190}

When practical, police should conduct a double-blind administration of the lineup with an officer who does not know the identity of the real suspect. This eliminates unintentional feedback by the police on the witness, which can influence the witness’ identification and affect his confidence.\textsuperscript{191} The Court in \textit{Brathwaite} stated that confidence is an important factor for the jury to consider, but when it is artificially improved by a police officer’s gesture or telling the witness “he’s the guy,” the testimony is corrupted.\textsuperscript{192} This is a difficult thing for an officer to restrain from doing when emotions are involved, but if the officer conducting the lineup doesn’t realizing the increased potential for misidentifications when eyewitnesses engage in relativism, investigators say they better understand and appreciate the new protocol.”).\textsuperscript{190} This was not among the final recommendations in the Guide, but was a note for further consideration and study. \textit{Guide for Law Enforcement} at 9.\textsuperscript{191} \textit{Loftus}, 46 Jurimetrics J. at 203-04.\textsuperscript{192} \textit{TRUE WITNESS} at 161-62.
know the identity of the suspect himself, the identification remains more credible by the time it reaches trial.

**B. Aggressive Cross Examination**

To address the factors of cross-racial identification and weapon focus, the solution is to record all police identification procedures and allow the defense to attack inconsistencies and failures on cross examination. To accomplish this, the recommended changes in police procedures do not need to be legislated. The sanction for not following the procedures is exposure on a vigorous cross examination. This eliminates the need for dueling experts identifying the strengths and weaknesses in the witness’ testimony.

The California Supreme Court in 1984 was one of the first courts to definitively hold that eyewitness experts may be helpful to the jury. In *People v. McDonald* the defendant was convicted and sentenced to death for the murder of a man on a street corner during the commission of a robbery. Six witnesses identified McDonald as the murderer, which helped secure the conviction. The court’s reasoning focused on the testimony of four witnesses which stated, “there were factors that could have raised reasonable doubts in the minds of jurors as to
the accuracy of the identification.”\textsuperscript{193} These witnesses freely testified on direct and cross examination making statements such as “I’m not sure,” “pretty sure,” and “not positive…because they kind of looked alike.”\textsuperscript{194} Another witness admitted her view of the defendant had been partially blocked by cars and she “wasn’t totally positive” of her identification.\textsuperscript{195} The court then went on to note the widespread acknowledgement of the fallibility of human memory and the growth in the empirical science that identifies the factors that decrease witness reliability and stated that “[t]he consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice.”\textsuperscript{196} Yet, while the court repeated that in each witness’ testimony “there were elements that could have raised reasonable doubts as to the accuracy of the identification,”\textsuperscript{197} the court failed to acknowledge

\begin{itemize}
\item[193] \textit{McDonald}, 690 P.2d at 711.
\item[194] \textit{McDonald}, 690 P.2d at 712.
\item[195] \textit{McDonald}, 690 P.2d at 712.
\item[196] \textit{McDonald}, 690 P.2d at 718.
\item[197] \textit{McDonald}, 690 P.2d at 726.
\end{itemize}
that it was the witnesses themselves who admitted doubt over their own identification. Had the eyewitness expert testified, he would have nothing new to say because jury education on witness reliability was fully accomplished on direct and cross examination.

The error in *McDonald*, assuming the jury convicted the defendant based predominantly on eyewitness testimony, is not that eyewitness expert testimony was improperly excluded, but rather that the jury ignored the admitted lack of accuracy of the witnesses on cross examination. The court’s final order to admit eyewitness expert testimony served only to present an “aura of reliability” of the defense’s position.\(^{198}\)

*McDonald* demonstrates that vigorous cross examination does bring out material facts that are useful to a jury. The D.C., Third, and Sixth Circuit cases of *Green, Downing* and *Langan* share similar facts with *McDonald* where the witness’ admitted doubt about their own testimony on cross examination, yet these cases represent the analysis for these Circuits limited

\(^{198}\) *Mathis*, 264 F.3d at 335. The district court was clearly concerned with the effect of the expert’s ‘aura of reliability’ on the jury, and while the Third Circuit shared the district court’s concern, it did not find the ‘aura of reliability’ to be unfairly prejudicial in this case. *Id.*
discretion to deny holdings.¹⁹⁹ These cases actually show that if the opposing attorney, on cross
examination, is able to sufficiently identify a witness’ lack of capacity, inconsistencies in
testimony, or inconsistencies in police identification procedures then there is no need for the
cumulative testimony of a witness expert. The weight the jury places on the witness’ admissions
are not a matter for the court to decide by allowing an expert to further discredit a witness.

C. Overcoming Resistance

The benefits of protecting witness accuracy and reliability are undeniable; fewer
innocents are suspected and actual offenders are sought. The benefits are felt by the judge, jury
and lawyers,²⁰⁰ but the pace of change is slow. “[P]retrial identification procedures are being
conducted the same way they have been for the last forty years in the overwhelming majority of

¹⁹⁹ See supra notes 130, 135, 147.

American jurisdictions. They are shaped to avoid findings of unconstitutionality, but are doing little to minimize the misidentifications that lead to convicting the innocent.\textsuperscript{201}

One of the most significant points of resistance with these reforms is that it gives the impression of establishing a minimum legal standard that must be met similar to \textit{Miranda} warnings.\textsuperscript{202} Unlike \textit{Miranda}, there are situations where the circumstances require procedural flexibility without impacting the admissibility of the evidence. In a situation where an identification is immediately needed on the street to apprehend a suspect, the police may need to use leading questions or a highly suggestive field show up.\textsuperscript{203} Another situation occurs when a

\begin{footnotesize}
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\item[\textsuperscript{201}] Reflections on Innocence, 2006 Wis. L. Rev. 237, 268 (2006).
\item[\textsuperscript{202}] Miranda v. Arizona, 384 U.S. 436 (1966)
\item[\textsuperscript{203}] A show-up is the situation when the police have captured a suspect in the field and bring the witness and lone suspect together for an identification. It is more suggestive than a photographic or live lineup, but it is allowed. In Wisconsin, “according to State v. Dubose, show-up identification evidence will be inadmissible unless, based on the
\end{enumerate}
\end{footnotesize}
suspect is well known in a small town or is a repeat offender. In these cases, the use of a sequential lineup and double blind administration will not prevent bias. If there is no flexibility, then the opposing attorney may attack the admissibility of the urgently made show-up identification because the procedure used deviated from the approved procedures, and therefore did not meet fairness standards or protect the suspect’s due process rights. It must be

totality of the circumstances, the show-up was necessary. A show-up will not be deemed necessary unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array. Furthermore, the admissibility of show-up identification evidence will turn on whether police conducting a showup utilized appropriate safeguards to minimize the suggestiveness of the procedure.”


204 Mehrkens, 4 Cardozo Pub. Law, Policy & Ethics J. at 408.


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remembered that the Guide’s suggestions are not police department declarations of minimum
standards or requirements, but rather guidelines or best practices to be trained and strived for.\textsuperscript{206}

Also, the Supreme Court has held that guidelines such as these do not impose new rights or

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Identification, 1, September 12, 2005. “This model and guidelines are not intended to be a

comprehensive treatment of all of the factors involved in criminal investigation. Rather, it is a
general policy and procedural guide outlining methods for collecting and preserving evidence.

Readers should keep in mind that the information and procedures presented here are intended to

be used as guidelines when encountering circumstances and factors not specifically covered.

These recommendations are not intended to create, do not create, and may not be relied on to

create, any rights, substantive or procedural, enforceable at law by any party in any matter civil

or criminal.” \textit{Id}.

\textsuperscript{206} “The Guide is not intended to state legal criteria for the admissibility of evidence. Rather, it

sets out rigorous criteria for handling eyewitness evidence that are as demanding as those
governing the handling of physical trace evidence.” \textit{Guide for Law Enforcement} at 2.
There are too many variables in the field to hamstring the police in every case. Public safety requires that the Guide represents best practices to be used as the situation dictates.

It is also argued there are environmental and cultural reasons for police resistance that include issues of communications, tradition, lack of judicial direction, and local control.”

207 United States v. Craveiro, 907 F.2d 260, 264 (“...the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party”).

208 Gary L. Wells, Eyewitness Identification: Systemic Reforms, 632, 2006 Wis. L. Rev. 615 (2006). See also Daniel L. Schacter, Robyn Dawes, Larry L. Jacoby, Daniel Kahneman, Richard Lempert, Henry L. Roediger, Robert Rosenthal, Policy Forum: Studying Eyewitness Investigations in the Field, ??? Law Hum. Behav. ??? (2007). Not all studies have been able to duplicate lab experiments in the field. “It is easy to understand the sentiment expressed by Mecklenburg in her Addendum that not all variables can be controlled in a field study such as the one she designed and describes in the Report.” Id at 2.
Fortunately these elements can be overcome. Tradition is certainly a cause of slow change, but police tactics and procedures have always changed with the times.\textsuperscript{209} And the numerous law enforcement agencies are becoming increasingly better at exchanging information with advances in communications technology.\textsuperscript{210} The cooperation of diverse law enforcement agencies, prosecutors and defense attorneys demonstrated in the creation of the Guide evidences a mutual desire of all parties to improve the system.\textsuperscript{211} Some may argue that general acceptance of these techniques is coming too slowly,\textsuperscript{212} but the low number of states taking legislative action shows that progress is being made carefully yet consistently.\textsuperscript{213}

\textsuperscript{209} See supra note 138.

\textsuperscript{210} United Guide for Law Enforcement at 9.

\textsuperscript{211} See supra note 143.

\textsuperscript{212} See e.g. Westling, 71 Or. L. Rev. 93; O’Toole, XX Valparaiso L. Rev. XX; Handberg, 32 Am. Crim. L. Rev. 1013.

\textsuperscript{213} See supra note 6.
V. Conclusion

The easy, one-sided cases generally do not go to a jury. They are settled, dismissed, or pled out. It is the case with genuine issues of disputed fact that is sent to the jury. To assist the parties there are procedural and evidentiary rules in place that give the competent attorneys adequate opportunity to support and attack the credibility of a witness’ testimony.\footnote{See Federal Rules of Civil Procedure; Federal Rules of Evidence.} The rules are designed to consider and balance the accuracy of scientific evidence with the benefit of usefulness going to the jury.\footnote{See e.g. Federal Rules of Evidence 403, 702.} Ultimately, the jury has the sole discretion and duty to determine credibility of all evidence presented.\footnote{Purham, 725 F.2d at 454 (finding the question is within the expertise of jurors).} The case of Ronald Cotton, although tragic, was not an appropriate case for eyewitness expert testimony. Cross examination of the victim yielded admissions of inconsistent statements, poor vision without her glasses, and exculpatory physical evidence.\footnote{See supra note 15.} Although the jury ultimately decided the case incorrectly, the addition of an

\footnote{See Federal Rules of Civil Procedure; Federal Rules of Evidence.}

\footnote{See e.g. Federal Rules of Evidence 403, 702.}

\footnote{Purham, 725 F.2d at 454 (finding the question is within the expertise of jurors).}

\footnote{See supra note 15.}
eyewitness expert’s testimony would still create no more doubt in the victim’s testimony than what the cross examination produced.

Jury duty is a serious civic obligation and should not necessarily be pleasant or easy. It is a duty that should be taken with the same solemn approach we expect all court officers to take. There are many rules of evidence for the judge to consider, ensuring that only proper evidence is admitted to the jury. Admitting eyewitness expert evidence with minimal usefulness, in many circumstances, may unnecessarily confuse or delay the jury. In the end, the individual jurors unique experiences and natural skepticism should influence their evaluation and application on the totality of the evidence.

The science of understanding the workings of human memory has come a long way in the last one hundred years to the point that the vast majority of jurisdictions allow trial court discretion in allowing expert testimony in varying degrees. The usefulness of expert testimony regarding the validity of coerced confessions was examined by the Supreme Court when it said that when an inculpatory confession was nearly the only evidence against the defendant,

218 Federal Rules of Evidence 403.
testimony must be allowed regarding details of the physical and psychological environment present during a confession because these go to the reliability and credibility of the evidence.²¹⁹

Likewise, the use of eyewitness experts should be reserved for those circumstances when the witness identification is the single most prominent piece of evidence against a suspect²²⁰ and the witness is uncharacteristically over confident such as expressing no doubt whatsoever, no lack of capacity and no bias.

It is certainly true that eyewitness misidentification is a problem in the criminal justice system and it must be addressed. To not do so would render the United States justice system no better than the tyrannical courts of the world whose dubious and arbitrary decisions are not based upon the law.
on law and secure no justice. Improvements are necessary as our knowledge of science and human nature advances. Expert scientific opinion has its place in the courtroom, but there is no consistent way to accurately identify the infallibilities of human behavior or deceptiveness in a specific case. The most appropriate place for improvement is in the initial evidence-gathering phase of the investigation. This has the most desirable effect of reducing errors and doubt in the beginning of an investigation, rather than at the end during a trial. If this approach is taken, the defense lawyer has adequate tools in the Code of Evidence and the body of jurisprudence to challenge a witness and place adequate skepticism in the jury’s mind when it is truly warranted.