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Expert Testimony on Eyewitness Identification: Admissibility and Alternatives

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I. INTRODUCTION

On a dreary Thursday night in a suburban area, a young African-American male walks into a convenience store. He is wearing a black t-shirt and baggy blue jeans. He appears to be of average height and weight. A ski mask obscuring his face shows only his mouth, nose, and eyes. Behind the counter is a middle-aged white woman. The young man walks directly to the counter, brandishes a gun and yells, "Hand over the money, or I'll kill you!" The terrified clerk hands over the contents of the register in an exchange lasting less than a minute. The young man runs out the front door, pulling off his mask. A white customer about to enter the store bumps into him in the dimly-lit entry way. The customer glances at the young man for a second or two, says, "Excuse me," and enters the store. The young man heads to his car and starts to pull out of the lot, passing under a street light as he waits to enter traffic. At that point, a police cruiser enters the lot. Before pulling in the vigilant African-American policeman stares at the young man for a second or two. All three witnesses to the robbery provide descriptions to the investigating policeman who arrives in response to the robbery. A week later, all three are shown a photo lineup containing the suspect's photo. The policeman identifies him immediately. The customer says he is pretty sure of his identity. The clerk fails to identify him. The suspect is arrested and a live lineup is shown two days later. The policeman reiterates his identification and the customer now is sure of his identification. The clerk is not available to be interviewed until one month later, and, after having been told that a suspect is in custody, now identifies the suspect.

All three witnesses identify the suspect at trial. In response, the defense offers an alibi defense and asserts misidentification. The defense attorney, a public defender, is an extremely effective advocate, and cross-examines the witnesses regarding their identifications and credibility. She then attempts to introduce a preeminent expert on the psychological factors affecting eyewitness identifications. This expert is a staff psychologist at the Public Defender's office who will testify that stress can have a significant affect on memory; that cross-racial identifications can be less reliable; that short term encounters can result in misidentification; that a delay of more than a week or so between an encounter and identification lessens its accuracy; and that confidence in

identification has little correlation to its accuracy. The prosecution will attempt to exclude this expert's testimony. Considering that the state has no other evidence linking the suspect to the crime, how will the trial judge rule on this matter?

This issue has received a great amount of attention. In most states, as well as in the vast majority of federal circuits, this testimony will probably not be admitted into evidence. Although it is not generally excluded, per se expert testimony on eyewitness identifications does not enjoy a favored status in the state or federal courts. The Florida Supreme Court has identified three basic approaches used by courts when ruling on this matter.[1]

First, the court identified a discretionary view allowing the trial judge to exercise great discretion in admitting expert testimony regarding eyewitness identification.[2] This view is ostensibly taken by the overwhelming majority of the states as well as by various federal circuits.[3] The second view is prohibitory, providing a per se rule of exclusion of the use of expert testimony regarding "the credibility of eyewitness identification testimony under any circumstances."[4] Only a few states (Oregon, Nebraska, Kansas, Louisiana and Tennessee) and a federal circuit (Eleventh Circuit) have adopted this prohibitory view.[5] Finally, a very few jurisdictions (Third Federal Circuit, Massachusetts and California) have adopted a "limited admissibility" rule finding it an abuse of the trial judge's discretion to exclude this expert testimony where there is no substantial corroborating evidence tying the defendant to the crime.[6]

This Comment will argue that, while ostensibly following the "majority" rule, actual policy of courts so disfavors this type of evidence that many courts are actually operating in a nearly per se exclusionary manner. The courts in many jurisdictions have never overruled the trial judge's discretionary exclusion of misidentification testimony, thereby sending a message that almost inherently disqualifies this testimony. Following an overview of the theory and methodology followed by the courts, this Comment will turn to a discussion of the three groups, attempting to show a pattern of disqualification in many states regardless of the factual underpinnings of the particular cases. Of course, this approach inherently fails because there is little documentation of such testimony when admitted by the trial courts. These cases would have no

1. McMullen v. State, 714 So. 2d 368 (Fla. 1998).
2. *Id.* at 370.
3. *Id.*
4. *Id.* at 371.
5. *Id.*
6. *Id.*

occasion to ever reach review by the appellate courts. Nonetheless, the number of exclusions of testimony in what would arguably be proper cases for this testimony are legion. This Comment will attempt to show the narrow set of circumstances where courts will allow this testimony and find the common thread of reason that justifies this seemingly harsh treatment.

In addition, this Comment will attempt to analyze the solutions offered by courts to ameliorate the inherent problems in eyewitness identifications without resorting to the use of expert testimony. Foremost among these alternatives is the use of cautionary jury instructions as a substitute for the expert testimony. Other courts have developed specific tests to be applied, generally under the rubric of discretion to identify those circumstances sufficiently serious to invoke the admission of expert testimony. Judge Easterbrook of the Seventh Circuit has even suggested that judges sua sponte inform the jury of the various factors that could affect the reliability of identifications.[7] Apparently, this would be a combination of judicial notice and jury instruction placing the judge in the role of quasi-expert. Most courts still rely on the traditional solution, that effective cross-examination and argument by the attorneys, along with the generalized knowledge possessed by a jury, are sufficient to alleviate any misidentification that may occur.[8]

This Comment will attempt to make sense of these various solutions and determine which, if any, sufficiently safeguard the rights of the accused against erroneous eyewitness identification, while not creating an impenetrable shield against eyewitness testimony. With the prosecutorial burden to prove guilt beyond a reasonable doubt, the aura of infallibility surrounding expert testimony makes it difficult for the prosecution to overcome that burden. This may well be an implicit piece of the puzzle in determining why the courts are generally so loathe to allow this testimony.

However, the alternatives offered by the courts indicate that they are not willing to merely throw defendants to the wolves without at least some alternatives to expert testimony. Courts will usually offer a jury instruction, or at least allow broad latitude in cross-examination and argument regarding this testimony. The rationale seems to be that allowing expert testimony on eyewitness identification swings the pendulum too far towards the defendant unless the court makes an implicit decision that there is at least a strong possibility that the defendant may be innocent. In the majority of cases, the admission of this testimony

7. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

8. *See generally* BRIAN CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOL. & THE LAW (1995).

could make the burden on the prosecution untenable and lead to a rash of unjust acquittals. This would be a singularly unfortunate result in light of the plethora of reasonable alternatives available.

II. SUBJECT MATTER OF EXPERT TESTIMONY

A. *Basis of Testimony*

It is undeniable that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[9] In *Jackson v. Fogg*, the Second Circuit Court of Appeals stated that "[c]enturies of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously *unknown* to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable . . . ."[10] In order to combat this acknowledged unreliability, defendants often seek to offer expert testimony concerning the credibility of eyewitnesses. Proponents of this testimony argue that "the average juror actually knows little about factors affecting the accuracy of eyewitness identifications."[11] There is an empirical basis for this statement.[12] For example, two scholars conducted a survey of lay knowledge in Seattle and Omaha, two quintessentially typical American cities. The study asked a sampling of laypeople to respond to hypothetical situations that implicated the following factors: cross-racial recognition; prior photoarray; retention interval; training; and age. For instance, the respondent might be given a hypothetical involving a two month interval between a criminal incident and the identification of a suspect. In a correct answer to this hypothetical, the respondent would recognize the negative correlation in reliability of the identification, in accord with scientific studies. Therefore, a low percentage of correct answers would indicate, that the general public would have little knowledge regarding the particular scientific principle at hand. The survey results indicated that the public had little knowledge of the variables cited.[13]

Therefore, given the low level of knowledge the general public has regarding the reliability of eyewitness identification proponents would argue that under Federal Rule of Evidence 702,[14] expert testimony would help the trier of fact to understand an area outside the scope of his

9. United States v. Wade, 388 U.S. 218, 228 (1967).

10. 589 F.2d 108, 112 (2d Cir. 1978) (emphasis added).

11. Cindy J. O'Hagan, *When Seeing Is Not Believing: The Case for Eyewitness Identification Testimony*, 81 GEO. L.J. 741, 760-61 (1993).

12. *See* ELIZABETH LOFTUS, EYEWITNESS IDENTIFICATION 8-19 (1979).

13. CUTLER & PENROD, *supra* note 8, at 175.

14. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by

or her general knowledge.[15]

Rule 702 requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[16] Ironically, courts frequently utilized the Rule 702 standard to exclude expert testimony, on the theory that this is an area within the common knowledge of the jurors and therefore the testimony is useless. In *United States v. Christophe*, the court held that such testimony "addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding of the particular dispute."[17] However, the threshold question is whether this assertion is valid in light of the latest research done in this field. A number of common juror misperceptions have been identified undermining the assertion that this expert testimony is of little value. Surely, the pertinent inquiry is not whether factors leading to misidentifications exist. The pertinent inquiry is whether expert testimony regarding these factors is of any use to jurors. If jurors already have a generalized sense of these factors, then "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[18] Yet, if Dr. Elizabeth Loftus, a leading expert on misperceptions regarding eyewitness testimony, and her supporters are correct, then this information is far enough outside the common knowledge of the layperson to meet any rules "helpfulness" requirements.

B. *Juror Misperceptions*

Dr. Loftus has identified a number of these misapprehensions. First, many jurors believe that "witnesses remember the details of violent crimes better than those of nonviolent ones."[19] Research tends to show, however, that added stress caused by violence clouds memory.[20] The presence of a weapon can exacerbate this. A weapon diverts a witness's attention away from the assailant's face; a phenomena known as weapon focus.[21] The effects of stressful environmental factors during

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knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ." FED. R. EVID. 702.

15. For the most part, state rules of evidence are analogous to the Federal Rules of Evidence. Any significant deviations will be noted in the text.

16. FED. R. EVID. 702.

17. *See* United States v. Christophe, 833 F.2d 1296 (9th Cir. 1987); United States v. Hudson, 884 F.2d 1016, 1024 (7th Cir. 1989).

18. Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 596 (1983).

19. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 1-6, at 6 (3d ed. 1997) (emphasis omitted).

20. *Id.* § 2.9.

21. *See* Douglas J. Narby, Brian L. Cutler & Steven D. Penrod, *The Effects of Witness,*

the viewing period are illustrated by the Yerkes-Dodson law.[22] This law states that, while moderate stress might have a positive effect on the accuracy of an identification, a greater amount of stress would likely have an inverse relationship to accuracy, by greatly increasing the possibility of misidentification.[23] Due to misconceptions regarding the effects of stress, this is one of the most common areas of proposed testimony for eyewitness identification experts.

Second, a majority of jurors believe that "[t]he more confident a witness seems, the more accurate the testimony is likely to be."[24] According to Dr. Loftus, research shows little correlation between confidence and reliability.[25] It should be noted, however, that studies indicate some correlation between the two variables, albeit not very strong.[26] Moreover, other researchers have identified flaws in Loftus's methodology that artificially attenuates the link.[27] Thus, it is speculative whether the scientific evidence is strong enough on this issue to render it a fit subject for expert testimony.

Perhaps the most significant misconception is that jurors tend to underestimate the difficulties of cross-racial identifications. In one study, jurors were given the following question: "Some people say that it is more difficult for people of one race to identify people of a different race. Do you think this is: (a) true; (b) false; or (c) more true for whites viewing nonwhites than for nonwhites viewing whites?"[28]

Thirty-three percent chose (a), forty-five percent chose (b), twenty percent chose (c), and the remainder responded "[I] don't know."[29] According to Loftus, (a) is the correct answer.[30] While many studies have recognized this phenomena, the "theoretical underpinnings are elusive."[31] Nonetheless, there is little doubt that "own-race bias in recognition is reliable and appreciable in magnitude . . . ."[32]

These are just a few of the factors frequently misapprehended by jurors. There is also a body of additional information regarded by many experts to fall outside the common knowledge of jurors, hence bringing

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Target, and Situational Factors on Eyewitness Identifications, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 37 (Siegfried L. Sporer et al. eds., 1996).

22. LOFTUS, *supra* note 12.

23. *Id.*

24. *See* LOFTUS & DOYLE, *supra* note 19, at §§ 1-6.

25. *Id.*

26. *See* Narby, Cutler & Penrod, *supra* note 21, at 33.

27. *Id.* at 34.

28. LOFTUS & DOYLE, *supra* note 19, at 7.

29. *Id.* at 7.

30. *Id.*

31. Narby, Cutler & Penrod, *supra* note 21, at 42.

32. *Id.* at 30.

testimony regarding this information under the domain of Rule 702.[33] Dr. Loftus noted that at the acquisition stage the following factors are not within the common knowledge of the lay person: (1) event factors including lighting conditions, duration, and violence; and (2) witness factors including stress, fear, age, sex, and expectations. At the retention stage Dr. Loftus suggests people may overlook the time elasped or post event information. Furthermore, Dr. Loftus notes that at the retrieval stage a lay person may overlook the method of questioning or the confidence level.[34]

While this is far from an all-inclusive list, these are among the most commonly proffered subjects of testimony by Dr. Loftus and her colleagues.

III. METHODOLOGY

A. *Scientific Inquiry under Daubert/Kumho and the Federal Rules*

One question bound to be asked by all courts, particularly in light of *Daubert v. Merrell Dow Pharmaceuticals*[35] and its progeny, is whether eyewitness research qualifies to be considered based on the scientific method. *Daubert* proposed an inquiry based on scientific knowledge. This inquiry focused on: 1) whether the technique can and has been tested; 2) peer review and publication; 3) the known and potential rate of error; and 4) general acceptance by the scientific community.[36] While the voluminous publications on the subject of misidentification by witnesses satisfy the second criterion, the remaining three are frequently considered as satisfied by the amount of research conducted in this field.

Moreover, in light of *Kumho Tire Co. v. Carmichael*,[37] the *Daubert* inquiry is not considered a strict and exclusive list of factors. *Kumho* attempts to clarify the *Daubert* test of reliability by deeming it "flexible."[38] Moreover, *Kumho* stated that the *Daubert* factors "neither necessarily nor exclusively apply to all experts or in every case."[39] The *Kumho* opinion suggests that a search for assurances of correctness is inherent in the discretionary process. In many cases, this threshold

33. *See generally* LOFTUS & DOYLE, *supra* note 19; MELVIN B. LEWIS ET AL., EYEWITNESS TESTIMONY, STRATEGY AND TACTICS (1984); Gary L. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?, in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 277 (Gary L. Wells & Elizabeth Loftus eds., 1984).

34. LOFTUS & DOYLE, *supra* note 19, at § 202.

35. 509 U.S. 579 (1993).

36. *Id.* at 593-94.

37. 526 U.S. 137 (1999).

38. *Id.* at 140.

39. As will be demonstrated later, this flexibility is at the heart of the discretion exercised by trial judges in the eyewitness expert context. *Id.* at 141.

determination can provide a sufficient rationale for the trial judge to exclude expert testimony, notwithstanding other considerations. Of course, *Daubert* and *Kumho* are not limited to scientific approval because the "helpfulness" or "fit" requirement of Rule 702 must still be met.

In response to *Kumho*, Rule 702 was modified. The new rule reads:

> 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 on 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.[40]

This amendment codifies the *Kumho* flexibility test. The Advisory Committee notes state that the trial judge "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[41] It is also critical to a complete understanding of the amended rule to recognize that the amended rule has not vitiated the fit or helpfulness inquiry of the old rule. The Advisory Committee's notes state that:

> "[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved . . . ."[42]

While its framers possibly intended the rule to reflect the liberal bent towards admissibility of expert testimony, the flexible framework of the inquiry suggested it will allow judges to exclude expert eyewitness testimony with impunity, providing a rules-oriented basis for the exclusion. In light of the problems with this testimony discussed *infra*, this is not necessarily a bad thing.

B. *Methodologies Utilized*

Researchers have utilized a wide variety of methodologies in reaching generally accepted scientific conclusions. Many researchers have utilized questionnaires[43] to study groups to determine whether certain factors are indeed within the common knowledge of jurors, as seen in

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40. FED. R. EVID. 702.

41. FED. R. EVID. 702 advisory committee's note (citing *Kumho*, 526 U.S. at 152).

42. *Id.* (citing Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

43. *See* O'Hagan, *supra* note 11. A sample question: "Suppose that a man and a woman both witness two crimes. One crime involves violence while the other is non-violent. Which statement

the cross-racial identification question posed *supra*.[44] The best-known study performed in this manner was conducted in the early 1980's. The Knowledge of Eyewitness Behavior Questionnaire was designed to assess whether people, more specifically jurors, were cognizant of the factors that influence eyewitness identification.[45] The results showed that people were generally misinformed as to the factors that influenced eyewitness identifications.[46] Similar results were seen in other countries, and a follow-up test given in the District of Columbia to actual empaneled jurors also revealed similar results.[47] Critics have argued that these questionnaires may not be accurate in determining how actual testimony is viewed.[48] Nevertheless, this type of testing has generally proven sufficient to qualify as "science."

A second methodology utilizes prediction studies. In these tests, subjects are presented with a fictional line-up along with the instructions given to the fictional identifier by the administrators. The subjects are then asked to "predict" the outcome.[49] The results should theoretically reflect the knowledge of the subjects *vis-à-vis* the scientific principles regarding eyewitness identifications. Even proponents of this research method are cognizant of its inherent deficiencies. Leading researchers acknowledge that this is a very difficult type of test to compose and could almost always be improved.[50] This method could be criticized as being overly dependent on the actual given test, since responses might reflect the biases of the tester rather than the desired correlations. Moreover, these tests are not reflective of the actual outcomes of non-imaginary identifications. Thus, predictive studies may well be inherently suspect and of little probative value.

Third, and even more intriguingly, researchers utilize mock jury studies designed to test juror knowledge of factors believed to affect the accuracy of eyewitness identifications.[51] For example, in one study, real lawyers cross-examined "witnesses" in a reenactment of an actual trial. A number of factors were tested, and interestingly, most of the mock

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do you believe is true?" The responses asked for the students to determine which crime would be remembered better by which sex. *Id.* at 60-61.

44. Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Human Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982).

45. LOFTUS & DOYLE *supra* note 19, § 1-6.

46. *Id.*

47. *Id.*

48. *See generally* Wells, *supra* note 33.

49. *See generally* John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 319 (1983).

50. CUTLER & PENROD, *supra* note 8, at 64. The section of this book from pp. 55-71 provides an excellent, if highly technical, discussion of research methodology.

51. *See generally* Brad E. Bell & Elizabeth F. Loftus, *Trivial Persuasion in the Courtroom: The Power of (a few) Minor Details*, 56 J. PERSON. & SOC. PSYCHOL. 669 (1989).

jurors erroneously relied on the confidence of the witnesses to reach credibility decisions.[52] Other tests have shown the significance of a single eyewitness, even one partially blind, to a mock jury in reaching a guilty verdict.[53] These studies appear to achieve interesting results that can be presented to a jury in the form of expert testimony regarding scientific findings regarding common lay misconceptions.

Finally, a new and intriguing methodology is the "retrospective-DNA method" being utilized by Dr. Gary Wells.[54] In thirty-six out of forty cases studies by Wells in which the use of DNA cleared convicted felon a misidentification was involved in the original conviction.[55] In light of the growing acceptance of DNA evidence as outcome-determinative, findings based on this methodology will probably be considered inherently credible. While this does not appear to be a methodology discussed by the courts, DNA testing seems to possess sufficient indicia of reliability to withstand any *Daubert* inquiry.

Therefore, it is undeniable that a body of valid research exists. This research is sufficiently credible and enjoys sufficient scientific respectability so as to pass the first part of the *Daubert* inquiry. Thus, the question for the courts under Rule 702 is whether allowing this information to be presented to jurors is helpful, necessary or even deleterious to the search for justice.

IV. DECISIONS IN THE STATE COURTS

As stated above, courts have adhered to three basic rules. The following sections will set out in some detail both the factual scenarios and the rationales that courts have employed in adhering to these approaches. This Comment will discuss these in turn, from outright "NO" (per se inadmissibility) to "MAYBE" (the discretionary rule) to "YES (under certain circumstances)" (the limited admissibility rule).

A. *NO!—The Per Se Exclusionary Rule*

Only an extremely limited number of federal or state courts have explicitly prohibited expert testimony regarding the credibility of eyewitness testimony.[56] Oregon has been a strong critic of this testimony. In *State v. Calia*, the court considered a case where the main evidence

52. LOFTUS & DOYLE, *supra* note 19, § 1-3.

53. *Id.*

54. *See* Gary L. Wells et al., *Eyewitness Identification Procedures*, 56 LAW & HUM. BEHAV. 603 (1998).

55. *Id.* at 612-14.

56. Among federal courts, the Eleventh Circuit has been a vehement proponent of the exclusionary rule. *See* United States v. Holloway, 971 F.2d 675 (11th Cir. 1992).

against the defendant charged with robbery was the victim's identification.[57] The only corroborative evidence was testimony that the defendant was in Portland, the scene of the crime, at the time in question. The victim did not view a photo lineup until nearly eight months after the robbery, where he picked out the defendant. Nearly two and a half years later, he identified the defendant once again. The defense sought to introduce what the court pejoratively termed a "post-Proustian theory of deja vu" wherein the victim might have been conditioned to identify the defendant by having viewed his photo, and not necessarily due to the defendant's being the perpetrator of the robbery.[58] The court stated that the witness would be unable to conclude whether the recognition was accurate, merely point out the built-in possibility of error.[59] The court explicitly stated that "[t]he law does not deal with that potential for error by allowing expert witnesses to debate the quality of the evidence for the jury."[60] Rather the court was content to rely on the rules of evidence, the arguments of the lawyers, jury instructions, and the jury system itself to find errors in identification.[61] The particular instruction given in this case provided:

In this case, there has been eyewitness identification of the defendant. When you consider the weight to be given . . . you should consider the [familiarity] of the witness with the defendant, the opportunity . . . to make an identification, taking into consideration such matters as time, height, movement, the number of persons present and the excitement attending the event or occasion, the susceptibility of the witness through suggestion of others or other groups, and the period of time that elapsed between the initial observation and the final identification.[62] These factors, according to the court, stated the law and provided all the assistance the jury would need. There is no need for expert testimony on identifications in Oregon.[63]

Other states have also followed Oregon's explicit lead. In *State v. Ammons*, the Supreme Court of Nebraska specifically held expert testimony on eyewitnesses inadmissible despite reviewing a case hinging upon a lone identification without corroborative evidence.[64] Citing the Nebraska Rules of Evidence, the court held that such testing assisted

57. 514 P.2d 1354 (Or. Ct. App. 1973).

58. *Id.* at 1356.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See also* State v. Goldsby, 650 P.2d 952 (Or. Ct. App. 1982).

64. 305 N.W.2d 812 (Neb. 1981).

neither jury nor judge in understanding the evidence or a fact in issue.[65] The accuracy or lack thereof of the identifications was within "the common experience of daily life."[66] Therefore, the court felt the testimony invaded the province of the jury.[67] *State v. Sardeson* reiterated the *Ammons* rule in the strongest possible terms.[68] Sardeson was charged with burglary. The main witness against him had been shown a photo of the defendant several times and identified him in court. The defense expert was prepared to testify regarding the results of experiments where a subject was shown the same photo twice. The court reaffirmed that an expert is not permitted to suggest to a jury how a witness's testimony should be evaluated. "[F]ar from being an abuse of discretion, [the ruling was] the only correct ruling possible . . . ."[69] The exclusionary rule could not be more clearly stated.

The Louisiana courts have recently reasserted their aversion to this testimony. In *State v. Laymon*, the court reviewed a case in which testimony of an expert psychologist was excluded from the trial of an accused murderer.[70] The eyewitness, a mentally challenged young man, was allegedly traumatized by the event, and the expert was to testify regarding the effect of the trauma on the reliability of the identification.[71] The court asserted that the test of admissibility holds that opinion evidence cannot usurp the function of the jury or touch the issue before the jury.[72] In *Laymon*, the court held that the testimony was rightly excluded because it had prejudicial effect beyond its probative value and would have usurped the function of the jury.[73] Although not explicitly stating an exclusionary rule, this case is analogous to the Massachusetts rule discussed *infra* that has implicitly embraced the *inclusionary* rule.[74] While there is ostensible discretion, there are virtually no circumstances where the testimony would be admissible in Louisiana.[75]

A similar state of affairs exists in Tennessee, where *State v. Wooden*[76] is still good law. In *Wooden*, the defendant, accused of burglary, rape and sundry other charges, attempted to admit the expert testi-

65. *Id.* at 814. (citing NEB. REV. STAT. § 27-702 (1979)).
66. *Id.*
67. *Id.*
68. 437 N.W.2d 473 (Neb. 1989).
69. *Id.* at 485.
70. 756 So. 2d 1160 (La. Ct. App. 2000).
71. *Id.* at 1175.
72. *Id.* at 1176 (citing United States v. Brown, 501 F.2d 1048 (10th Cir. 1976)).
73. *Id.* at 1177.
74. *See* Commonwealth v. Francis, 453 N.E.2d 1204 (Mass. 1983).
75. *See also* State v. Stucke, 419 So. 2d 939 (La. 1982) (holding expert testimony on eyewitnesses inadmissible).
76. 658 S.W.2d 553 (Tenn. Crim. App. 1983).

mony of Dr. Robert Buckhout.[77] Buckhout was to testify only generally regarding various factors affecting identification and memory.[78] The court stated simply, "[w]hether an eyewitness's testimony is reliable is a matter which the jury can determine from hearing the witness's testimony on direct and cross-examination and which does not require expert testimony."[79] Moreover, the court would not even issue the so-called *Telfaire* instruction requested by the defense.[80] The court was content with the standard Tennessee instruction, which did not address witness credibility at all.

In *State v. Ward*, the court went further by stating that expert testimony on eyewitnesses had "not attained that degree of exactitude which would qualify it as a specific science," and that any marginal helpfulness it might possess did not render it admissible.[81] The courts in Tennessee have denied a per se inadmissibility standard, but have nonetheless continued to support exclusion even in somewhat questionable circumstances.[82] Most recently, the court considered the issue in *Beamon v. State*.[83] In this burglary case, there was evidence connecting the defendant through his sister to the burglary in question, as well as an in-court identification by the victim, who could not identify the defendant prior to trial. While acknowledging the discretionary rule, the court was satisfied that the defense attorney had ample opportunity to "exploit what appeared to be problems in the State's eyewitness proof."[84] The testimony was before the jurors, and that was held sufficient. Again, without an overt statement, the court had reiterated a "virtual" per se rule against admission.

Finally, the Supreme Court of Kansas explicitly stated an adherence to the per se exclusionary standard in *State v. Gaines*.[85] In Kansas, not with standing the circumstances, expert testimony is *always* prohibited. As far back as 1981, the Kansas Supreme Court held in *State v. Warren* that the answer to misidentifications was not admitting expert testimony,

77. Along with Dr. Loftus, Dr. Buckhout is a recurring figure throughout these cases.

78. *Wooden*, 658 S.W.2d at 556.

79. *Id.* at 557.

80. This instruction, commonly requested in conjunction with, or in lieu of, expert testimony is derived from that in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), containing many of the same factors that have been highlighted by experts in the field.

81. 712 S.W.2d 485, 486-87 (Tenn. Crim. App. 1986).

82. *See* State v. Coley, C.C.A. No. 01C01-9707-CC-00270, 1998 Tenn. Crim. App. LEXIS 1082 (Tenn. Crim. App. Oct. 13, 1998) (excluding testimony despite presence of cross-racial identification, evidence pointing to another suspect, presence of an alibi defense and no physical evidence implicating the defendant).

83. No. E1999-0614-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 696 (Tenn. Crim. App. Sept. 8, 2000).

84. *Id.* at *12.

85. 926 P.2d 641 (Kan. 1996).

but a proper cautionary "instruction, coupled with vigorous cross-examination and persuasive argument by the defense counsel . . . ."[86] In *State v. Wheaton*, the court was asked to overrule *Warren* based on new research in the field, but the court declined and adhered to the same basic tenets as in its previous cases.[87] The *Gaines* court analyzed the cases arguing for limited admissibility and a discretionary rule, then promptly and summarily dismissed them. Holding that "expert testimony regarding eyewitness identification should not be admitted into trial."[88]

These are the courts that have most explicitly adopted an exclusionary rule. There are others, however, that maintain an allegiance to the majority rule while operating in effect as barriers to the admission of expert testimony on this subject. Arguably, Tennessee and Louisiana are in that class. However, they appear to be operating more openly, without the veneer of discretion that other courts foist to cover their true agendas.

B. *"MAYBE"—The Majority "Discretionary" Rule*

There is no clean definition of the majority rule. In fact, it is less a rule than a compendium of cases that run the gamut from bordering on per se exclusion to the fringes of limited admissibility. The simplest way to try to understand this rule is to examine representative cases in various jurisdictions and try to make sense out of the underlying policy for their decisions and any common factual situations that seem to arise. In this way, it is possible to find broad similarities between various jurisdictions and to establish some patterns therein.

Many of the "discretionary" cases revolve around rationales derived (at least implicitly) from Rule 702. Rule 702 states in pertinent part, "[I]f 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."[89] While testimony relating to an ultimate issue of fact may not be objectionable under Rule 704,[90] Rule 702 requires the proffered testimony to be helpful to the trier of fact. This has provided a fertile ground for the courts to exercise discretion in excluding expert

86. 635 P.2d 1236, 1243 (Kan. 1981).

87. 729 P.2d 1183, 1189-90 (Kan. 1986).

88. *Gaines*, 926 P.2d at 649.

89. FED. R. EVID. 702.

90. "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a).

testimony.[91]

Pennsylvania is a state straddling the fence between *per se* exclusion and discretion. In *Commonwealth v. Simmons*, the court encountered a situation involving inconsistent testimony from various eyewitnesses.[92] The defense sought to point out general patterns regarding identifications to educate the jury about possible influencing factors so that they might more effectively evaluate the testimony of the witnesses.[93] The court held that expert testimony could not intrude upon the province of the jury, reiterating earlier Pennsylvania law.[94] The court in *Simmons* relied on the old standby that the testimony could invade the province of the jury, and further, that the expert testimony could give an unwarranted appearance of authority on matters the jury could assess on its own anyway.[95] These rationales are undoubtedly consistent with Rule 702.

This decision was also consistent with an interesting appellate level case, *Commonwealth v. Gregory*.[96] In *Gregory*, the defendant was charged with attacks on several young women. Besides numerous eyewitnesses, there was physical evidence linking the defendant to the crimes and a very similar *modus operandi* for each of the attacks. The defense presented Dr. Robert Buckhout to testify regarding various factors affecting eyewitness identification including the effects of stress, cross-racial identification, the lack of correlation between confidence and accuracy, and weapons focus.[97] The Court excluded his testimony based on an impermissible infringement into the province of the jury in an area they could determine with common sense.[98] The court slyly noted that Buckhout's testimony was rejected in previous cases, including the remand of *United States v. Downing*.[99] Most significantly, the court stated that the defense received "the greatest boon of all," a cau-

91. The Third Circuit Court of Appeals provides an excellent discussion of the application of the rules in *United States v. Downing*, discussed in depth later. 753 F.2d 1224 (3d Cir. 1985).

92. 662 A.2d 621 (Pa. 1995).

93. *Id.* at 631.

94. *See, e.g.*, Commonwealth v. Spence, 627 A.2d 1176 (Pa. 1986) (holding that testimony regarding the effects of stress on identification were not admissible); Commonwealth v. Gallagher, 547 A. 2d 355 (Pa. 1988) (holding that testimony on timely identification and the correlation with misidentification could not be admitted).

95. *Simmons*, 662 A.2d at 631.

96. Nos. 2856-2862 1990 Phila. Cty. Rptr. LEXIS 15 (Comm Pleas Court of Philadelphia County Feb. 16, 1990).

97. *Id.* at *30-31.

98. *Id.* at *32-33.

99. 609 F. Supp. 784 (E.D. Penn. 1985), *aff'd*, 780 F. 2d 1017 (3d Cir. 1985). *Downing* is one of the leading cases in the limited admissibility variety, yet on remand, the lower court failed to heed the hints offered by the Third Circuit and rejected Buckhout's proffered testimony.

tionary instruction regarding the efficacy of eyewitness testimony.[100] While not stating that the rule is per se exclusion, Pennsylvania clearly masquerades as a discretionary state.

Conversely, Wisconsin seems to be one of the few states that truly follows an actual discretionary rule. While Wisconsin courts have admitted testimony, even in cases like *Small*, where there was adequate corroborative evidence, they have excluded it on occasion, and even limited it to specific topics. In *State v. Kutska*, the court provided an excellent example, utilizing discretion to limit expert testimony to relevant issues without resorting to any hard and fast rules that would bind future decisions.[101]

The defendant in *Kutska* was accused of murder. Witnesses saw the defendant with an accomplice walking away from the murder scene carrying a large object. Shortly thereafter, the defendant told one of the witnesses that the victim was "missing."[102] The defense offered an expert to testify to the standard difficulties in eyewitness identification (testimony sometimes admitted in Wisconsin) including the topic of "repressed-memory," owing to the fact that one of the witnesses had not remembered the events until six months later.[103] The court was concerned that the expert would be seen as a "super-juror" endowed with an aura of "mythic infallibility."[104] Second, it seemed that the testimony could overwhelm and confuse the jury in areas where jurors had some experience and common sense. The trial court invoked Wisconsin Rule of Evidence 907.02 allowing expert testimony in the form of an opinion or otherwise if it will "assist the trier of fact to understand the evidence or determine a fact in issue."[105] In limiting the expert's testimony, the court decided that this would impermissibly invade the province of the jury; a dubious utilization of the rule at best. A more coherent explanation was offered through the use of Wisconsin Rule of Evidence 904.03, the standard probative value versus prejudicial effect boilerplate.[106] In light of the concerns regarding undue influence by the expert, this seems a legitimate approach whereas the repressed memory testimony would seem to assist the trier of fact.

An example of outright reversal of an exclusion is *State v. Tucker*,

100. *Gregory*, 1990 Phila. Cty Rptr. LEXIS 15 at *34.
101. No. 97-2962-CR, 1998 Wisc. App. LEXIS 1089 (Wis. Ct. App. Sept. 28, 1998)
102. *Id.* at *6.
103. *Id.* at *65.
104. *Id.* at *69.
105. WIS. STAT. § 907.02 (2000).
106. *Kutska*, 1998 Wis. Ct. App. LEXIS 1089 at *71.

although the court deemed the error to be harmless.[107] The defendant, charged with armed assault and rape, was identified by three victims and a witness. There was also physical evidence in the nature of a DNA match. After declining to hear testimony from the expert, and despite expert affidavits tending to undermine the identifications of at least two of the witnesses, the trial court categorically barred the testimony. The appellate court held this to be abuse of discretion because the lower court provided no factual basis for its decision and declined to hear from the expert.[108] Again, discretion was the standard actually adhered to.

The Wisconsin courts have also placed great emphasis on modifying instructions to accomplish the ends of informing the jurors fully. In *State v. Murray*, the court excluded evidence from an expert psychologist even where questionable identifications were the main evidence against the defendant.[109] However, the court gave a specially modified jury instruction speaking not only to the vagaries of eyewitness identification but specifically to the difficulties in the particular case. This instruction emphasized the problems an eyewitness could have had in the case and listed various factors the jury should consider in determining the reliability of the eyewitness testimony.[110]

In *State v. Blair*, the Wisconsin Court of Appeals went so far as to tell the jury they might consider proximity, lighting, the physical ability of the witness, the length of observation, and other factors in deciding the credibility of an eyewitness.[111] The appellate court upheld the exclusion of expert testimony, despite the fact that "reasonable people might disagree," because it was not an abuse of discretion.[112] It speaks well of the remarkable history of integrity of the Wisconsin court that the author of the opinion favored a liberal *Downing* approach to the problem authoring a lengthy footnote in support of this proposition favoring a searching inquiry into the *Downing* factors, particularly the relevance of the testimony.[113] Wisconsin might well be the paradigm of a true discretionary state.

Thus far, we have considered a true discretionary state as well as one that hides a trend toward exclusion behind a so-called discretionary

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107. Nos. 94-1201-CR, 94-1202-CR, 94-1203-CR, 1995 Wisc. App. LEXIS 942 (Wis. Ct. App. Aug. 1, 1995).

108. *Id.* at *10-12. This abuse of discretion error was ultimately deemed harmless.

109. No. 92-0282-CR, 1992 Wis. App. LEXIS 948 (Wis. Ct. App. Dec. 8, 1992). The defendant's face was partially obscured, the event was traumatic, the suspect had a gun, and there may have been general recognition from multiple opportunities to view the defendant's photo as opposed to an actual identification as the suspect. *Id.* at *7-8.

110. *Id.* at *9 n.5.

111. 473 N.W. 2d 566, 572 n.8 (Wis. Ct. App. 1991).

112. *Id.* at 572.

113. *Id.* at 572 n.9.

rule. There are also states that favor limited admissibility despite a publicly stated adherence to the discretionary rule. Arizona is extremely close to outright adherence to limited admissibility. The case of *State v. Chapple*[114] has been one of the most influential rulings on the issue of admissibility and is cited in most jurisdictions (though not always favorably). *Chapple* certainly contains one of the most convoluted fact patterns in the recent memory.

In short, about one year after a drug-related murder, the defendant was picked out of a possibly suggestive photo lineup by two individuals who were at least marginally involved in the drug scheme. The defendant was convicted solely on the basis of their identifications (they also identified him at trial) as there was no other evidence against the defendant. His defense was that, even if the two were not lying, this was a case of mistaken identity. In light of the numerous attempts to procure an identification, the defense sought to introduce the testimony of Dr. Loftus who was prepared to testify regarding the feedback phenomena.[115] The court relied upon *United States v. Amaral*,[116] which sets out particularized criteria to evaluate admissibility. These criteria are: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted theory; and (4) probative value versus prejudicial effect.[117] In *Chapple*, the court held that the first and third categories were not in issue, and analyzed the case under the two remaining factors.[118]

The prejudicial effect is minimal, according to the court, in cases where the testimony is generalized in nature. Rule 702[119] recognizes that an expert may give a dissertation or other scientific explanation leaving the trier of fact to apply these principles to the facts.[120] The court was concerned that, without Dr. Loftus' testimony, the jurors might reach intuitive yet misguided conclusions.[121] Loftus would have informed the jury of specific variables, such as the forgetting curve, stress, unconscious transference, post-event information, and the lack of relation between confidence and accuracy.[122] In this case, using the "abuse of discretion" standard, the Arizona Supreme Court held that the trial court erred.[123] The court articulated several factors for this decision. First, the facts were close. Second, the testimony was *limited* to

114. 660 P.2d 1208 (Ariz. 1983).
115. *Id.* at 1218.
116. 488 F.2d 1148 (9th Cir. 1973).
117. *Id.* at 1153.
118. *Chapple*, 660 P.2d at 1219.
119. The Federal Rules of Evidence and Arizona Rules of Evidence rules are identical.
120. FED. R. EVID. 702 advisory committee's note.
121. *Chapple*, 660 P.2d at 1221.
122. *Id.*
123. *Id.* at 1224.

general testimony. Third, there was no significant prejudice to the state. Fourth, Loftus was a qualified expert testifying to a generally accepted theory. Moreover, the probative value outweighed any prejudice. Finally, the key issue pertained to whether Loftus' testimony was a proper subject for testimony. Even considering the misapprehensions that the jury could attach to the testimony, it was likely that her testimony would indeed be helpful.[124] Most significantly, the court explicitly declined to "open the gates to a flood of expert evidence on the subject."[125] The holding itself was limited to the facts specific to this case, and therefore not likely to recur with any particular frequency.[126] It would seem that given this specific set of facts and the lack of any corroborative evidence, expert testimony regarding the highly suspect nature of the identifications did not invade the province of the jury. *Chapple* seems a curious result, however, given the special circumstances of the case, not an unjust one.

State v. Via[127] provides an instructive example of the proper application of *Chapple*. In *Via*, the eyewitness failed to identify the defendant from a photo lineup. The defendant, however, was identified in a live lineup. While the live lineup contained overly suggestive procedures, there was little possibility of error since the witness viewed the defendant during the crime for thirty minutes from a distance of mere feet. Dr. Loftus was permitted to testify about variables and empirical studies concerning identification.[128] However, the court excluded her testimony regarding a dubious scientific experiment conducted on her way to the airport related to the particular facts of *Via*.[129] The court held that while *Chapple* suggested that general testimony was admissible under certain circumstances, it did not countenance specific commentary on particularized identifications.[130] Indeed, the court correctly pointed out that "witnesses are not permitted as experts on how jurors should decide cases."[131] *Chapple* provides precedent for the court to allow this testimony under particular circumstances; however, the courts in Arizona remain reticent to extend *Chapple* beyond a carefully circumscribed limit.

Yet, the Arizona court has declined to admit expert testimony in

124. *Id.* at 1222.

125. *Id.* at 1224.

126. *Id.*

127. 704 P.2d 238 (Ariz. 1985).

128. *Id.* at 253.

129. *Id.* In this experiment, fourteen out of fifteen random subjects shown a photo of the live lineup and given a description of the defendant identified him as the suspect.

130. *Id.*

131. *Id.* (citing ARIZ. R. EVID. 704 comment).

several cases. In *State v. McCutcheon*, a number of witnesses, both victims of robberies and disinterested observers, identified the defendant from photo lineups.[132] Physical evidence also linked the defendant to the robberies. The court distinguished *Chapple* as "an extremely complex factual scenario,"[133] substantively different than that in the instant case. Moreover, *Chapple* distinctly forbade the opening of floodgates to allow expert testimony on misidentifications. Unlike *Chapple*, this was "the usual case" where there was prompt, positive, unambiguous identification.[134] Therefore, the trial court did not abuse its discretion.

Nor did the court abuse its discretion by refusing to admit expert testimony in *State v. Roscoe*.[135] In *Roscoe*, despite only one eyewitness who could not positively identify the defendant or his vehicle, the court held that there was sufficient corroborative physical evidence to place the defendant at the scene of the crime. Moreover, there was sufficient cross-examination done to attack the witness's credibility.[136] Therefore, the trial court "properly concluded that the jurors could understand the eyewitness evidence based upon their own experience."[137] Arizona operates in a principled fashion regarding the discretionary rule, but there is an undeniable tilt towards limited admissibility.

A brief survey reveals other states with similar doctrines. Illinois has tended to follow the *Chapple* rule over time. This is unsurprising in view of *People v. Jordan*, which held that expert testimony is generally allowed by a qualified individual where his knowledge is not common to lay people and will aid the trier of fact in reaching a conclusion.[138] In *People v. Enis*, Dr. Solomon Fulero[139] was offered to provide expert testimony regarding generalized factors.[140] The trial court excluded his testimony. In affirming, the Supreme Court of Illinois stated that expert testimony should be admitted in specific circumstances without delineating what those circumstances should be. But, they did articulate a basic test that has been applied: (1) the testimony must be based on accepted scientific or technical principles; (2) the expert's qualifications must be beyond the knowledge of the lay person; and (3) the testimony should aid the trier of fact.[141] The standard of review was abuse of discretion,

132. 781 P.2d 31 (Ariz. 1989).
133. *Id.* at 34.
134. *Id.* at 35.
135. 910 P.2d 635 (Ariz. 1996).
136. *Id.* at 647.
137. *Id.*
138. 469 N.E.2d 569, 576 (Ill. 1984).
139. Another of the standard players in the expert field.
140. 564 N.E.2d 1155 (Ill. 1990).
141. *Id.* at 1179-80.

and a clear showing of abuse was required for reversal.[142]

Usually, the Illinois courts will uphold the trial court's determination on the use of expert testimony, but again the tilt towards limited admissibility can be gleaned. In *People v. Tisdel*, while the appellate court did not find that the trial court abused its discretion by excluding testimony by Dr. Loftus, it stated that there would have been no abuse of discretion had the testimony had been admitted.[143] In *Tisdel*, four witnesses identified the defendant as the shooter in a murder case nearly one year after the incident. The defense prepared Dr. Loftus to testify to the standard factors in a general sense. While acknowledging that the rule is discretionary, the Illinois Appellate Court went through a lengthy analysis to state that "[e]ven where cross-examination of an eyewitness and an instruction are sufficient, allowing expert testimony may still be helpful to the trier of fact."[144] In this case, where there was no evidence beyond the dubious identifications, Loftus's testimony would have been helpful because she could testify generally without directly assessing credibility.[145] Without opening the door to a battle of the experts, the court was able to protect against conviction based upon misidentification.[146] Illinois appears to have struck an acceptable balance in favor of the *Chapple* rule by limiting testimony to generalized scientific information.

The courts of Washington have also produced a strong and useful rule differing from *Chapple* but perhaps of greater utility. In *State v. Moon*, the defendant was accused of armed robbery.[147] The only evidence adduced at trial was from two victims, and their identifications were tainted by discrepancies between their original descriptions and the actual appearance of the suspect. The court acknowledged that abuse of discretion could exist in a narrow range of cases.[148] These cases may be discovered by a three-part test: (1) where the identity of the defendant is a principal issue; (2) where an alibi defense is presented; and (3) where there is little or no additional evidence.[149] In other words, the court made an ad hoc determination that the possibility of innocence was greater in a case passing this test than in the usual case. The court held that this would be one of those occasions, and that the testimony would

142. *Id.* at 1165.

143. 739 N.E.2d 31, 43 (Ill. App. Ct. 2000).

144. *Id.* at 42-43.

145. *Id.* at 36.

146. *Id.* at 37.

147. 726 P.2d 1263 (Wash. Ct. App. 1986).

148. *Id.* at 1266.

149. *Id.* This test is a compendium of the tests outlined in *Chapple, McDonald*, and *Downing*.

educate the jurors regarding their common assumptions.[150] The court went so far as to find a remand for consideration pointless, considering the appellate court's detailed inquiry.[151] Once again, as with *Chapple*, the court is performing an ad hoc balancing test. If the defendant is more than likely guilty, then the expert could provide reasonable doubt that may not be justified and therefore a guilty defendant may be found not guilty. However, if there is a better than even chance that the defendant is innocent, then the testimony should be admitted. The *Moon* test is an attempt by the court to provide some sort of standard for this balancing to ameliorate the possibility of widely disparate rulings on similar sets of facts. The court has effectively developed a test which provides a minimum standard for admissibility. No limitation forbids courts from admitting testimony not meeting this standard, but at least lower courts have a minimum baseline upon which to base their decisions.

As with *Chapple*, the *Moon* test has been applied to exclude, admit, and limit. In *State v. Johnson*, the court affirmed a trial court ruling to limit expert testimony in a case where four witnesses had identified the defendant.[152] Despite the lack of physical evidence, the court held that the facts were sufficiently distinguishable from *Moon* to justify the lower court's decision.[153] Conversely, in *State v. Taylor*, the court reversed the exclusion of the testimony of Dr. Geoffrey Loftus.[154] The *Moon* requirements were well met where the identification of the defendant was the principal issue, he had presented an alibi defense, and there was little additional evidence linking the defendant to the crime. The court held that the testimony regarding stress and weapons focus should be admitted.[155] It is important to note that if a case does not meet all of the *Moon* factors, the testimony is not per se inadmissible. The issue then becomes one for the trial court's discretion and is reviewed under that standard.[156]

The South Carolina court adopted a hybrid test in *State v. Whaley*.[157] In *Whaley*, the African-American defendant in an armed robbery case was identified by two white witnesses who had only seen an obscured portion of his face. The defense offered an expert witness to

150. *Id.* at 1267-68.

151. *Id.* at 1268.

152. 743 P.2d 290 (Wash. Ct. App. 1987).

153. *Id.* at 294.

154. 749 P.2d 181 (Wash. Ct. App. 1988).

155. *Id.* at 184-85.

156. *Id.; see also* State v. Di Bartolo, No. 17261-9-III, 2000 Wash. App. LEXIS 1195 (Wash. Ct. App. July 13, 2000) (holding no abuse of discretion in a case that did not meet the *Moon* threshold).

157. 406 S.E.2d 369 (S.C. 1991).

testify to various factors, including the heightened opportunity for error in cross-racial identifications.[158] The trial court excluded the evidence on the somewhat questionable basis that courts were just not ready for that type of evidence.[159] Interestingly, the Supreme Court of South Carolina carefully pulled this evidence out of the realm of scientific evidence and into the realm of expert opinion evidence, despite ruling that this type of evidence would meet the threshold requirements for admissible scientific evidence.[160] The court noted two instances where the evidence would be per se admissible: (1) where the witness has a mental or physical impairment; and (2) where the main issue of eyewitness identification is the sole evidence against the defendant and stands uncorroborated. The court, however, was careful to limit admissibility to general testimony not regarding a particular witness.[161] As with *Moon*, the courts have articulated a test wherein the guiltier the defendant appears, the less likely that the expert testimony will be admitted. Yet there is once again a minimum threshold for admissibility that may serve to prevent erroneous identifications in the close case.

South Carolina, as well as the vast majority of other jurisdictions, require that the testimony be extremely generalized in nature. Testimony relating to a particularized eyewitness identification would be subject to per se exclusion. Conversely, the courts of Texas have always insisted on some level of specificity, premised on a notion of "fit." A definite and firm correlation between the proffered testimony and the facts of the case at bar was required. This notion of "fit" was construed fairly strictly[162] until *Jordan v. State*.[163] In *Jordan*, there were a number of cross-racial, delayed, and/or ambiguous identifications of a suspect in a convenience store robbery. The defendant claimed alibi and mis-identification, and a co-defendant claimed that the defendant was not involved in the crime. The defense offered an expert to testify to a variety of factors casting doubt on the identifications. The trial court excluded his testimony as not beyond the common knowledge of the jury.[164] The appeals court affirmed, but based on lack of fit, the Texas standby.[165] The Texas Court of Criminal Appeals held this an error.

158. *Id.* at 371.

159. *Id.*

160. *Id.* at 371-72.

161. *Id.*

162. *See, e.g.*, Edwards v. State, No. 05-93-01878-CR, 1995 Tex. App. LEXIS 2630 (Tex. Ct. App. Oct. 25, 1995) (finding no abuse of discretion where the testimony did not precisely fit the facts); Merritt v. State, No. 01-93-01009-CR, 1995 Tex. App. LEXIS 2359 (Tex. Ct. App. Sept. 28, 1995) (same).

163. 928 S.W.2d 550 (Tex. Crim. App. 1996).

164. *Id.* at 553.

165. *Id.*

While fit was necessary, it was not necessary for the testimony to include every possible pertinent fact requiring such would go beyond Texas Rule of Evidence 702.[166] So long as the proffered testimony is sufficiently tailored to the facts, it should be admissible on that basis.[167]

Two other cases are informative in understanding the formalistic view that Texas applies to this area of the law. In *Weatherred v. State*, the Court of Criminal Appeals reversed a lower court ruling admitting expert testimony excluded by the trial court.[168] While the trial court gave no reason for its exclusion, the Court of Criminal Appeals upheld the exclusion simply because the trial court *could have* excluded on the basis of the witness's failure to name any studies, researchers, or writings that he relied on in his offer of proof.[169] The court claimed that the defendant bore the responsibility of convincing the court that it was not merely "junk science,"[170] a curious assertion in light of the numerous times that this very type of testimony had come before the court. *Wright-Thomas v. State* shows a return to the strict interpretation of fit.[171] The Court upheld the exclusion of expert testimony where the "proffered testimony did not tie the specific facts of [the] case to the scientific principles at issue and was not shown to be relevant to the issues in the case."[172] Little pattern can be seen in the Texas decisions beyond a somewhat perverse constructionist bent that has created a unique body of jurisprudence thankfully limited to Texas.

Perhaps one of the finest expressions of the true discretionary rule may be seen in *Johnson v. State*, a Georgia Supreme Court case.[173] The old rule in Georgia had been that of *Norris v. State*, which had been interpreted as a per se exclusionary rule.[174] The court in *Johnson* clearly repudiated that doctrine, and further asserted that it would not join the limited admissibility jurisdictions either.[175] The rule articulated by the *Johnson* court should become the watchwords of the true discretionary state:

> Where eyewitness identification of the defendant is a key element of

166. Texas has the same rule as FED. R. EVID. 702.

167. *Jordan*, 928 S.W.2d at 556. The court also briefly considered the scientific reliability of the evidence, but this was not the main thrust of the case. On remand, the court of appeals held the evidence scientifically valid, or at lest not an abuse of discretion to be admitted. *See* State v. Jordan, 950 S.W.2d 210, 212 (1997).

168. 15 S.W.3d 540 (Tex. Crim. App. 2000).

169. *Id.* at 543.

170. *Id.* at 542.

171. No. S-98-01623-CR, S-98-01624-CR, S-98-01625-CR, S-98-01626-CR, 2000 Tex. App. LEXIS 5610 (Tex. Crim. App. Aug. 22, 2000).

172. *Id.* at 15-16.

173. 526 S.E.2d 549 (Ga. 2000).

174. *See* 376 S.E.2d 653 (Ga. 1989).

175. *Jordan*, 526 S.E.2d at 552-53.

> the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification. However, the admission or exclusion of this evidence "lies within the sound discretion of the trial court . . . ."[176]

Once again, the courts have bestowed discretion upon the trial judge while providing a minimal standard where the testimony should be more carefully scrutinized.

Florida has likewise made a strong commitment to the discretionary rule in its purest form. In the well-written *McMullen v. State*, the court discusses the three groups that we have delineated here, although perhaps naively characterizing far more jurisdictions as truly discretionary than have been placed in that category in this Comment.[177] Nonetheless, despite claiming to accept the discretionary rule, *McMullen* might have easily been reversed in many other jurisdictions. There were cross-racial identifications, inconsistent statements, little additional evidence, and the presence of a defense alibi. The facts here bear a resemblance to *McDonald* and it certainly would not have been an abuse of discretion to admit the testimony. Yet, the court simply sat back and allowed the trial judge to make the decision without any real review. While the standard was correctly delineated, it is questionable whether any exclusion would be overturned in Florida at the time of *McMullen*. Discretion in this case is merely code for no judicial review.

There are numerous examples of more probing uses of judicial review than seen in *McMullen*. In *State v. Miles*, the Minnesota court reviewed the exclusion of testimony in a murder trial where three witnesses identified the defendant.[178] While the identifications were cross-racial, a possible confession and physical evidence were also available. The defendant produced an alibi, that the prosecution effectively impeached. The court found that there was plenty of adequate evidence beyond the eyewitnesses. Moreover, cross-examination, argument and adequate closing instructions were all available at trial.[179] Therefore, the testimony of the expert was not admitted.[180] This result was consistent with a long-standing Minnesota policy of searching for the presence of

176. *Id.* at 552 (citations and footnotes omitted) (quoting O'Neal v State, 325 S.E.2d 759, 761 (Ga. 1985)).

177. 714 So. 2d 368 (Fla. 1998).

178. 585 N.W.2d 368 (Minn. 1998).

179. *Id.* at 372-73.

180. *Id.*

safeguards in order to evaluate the totality of the circumstances.[181] Again, a court balanced the probability of guilt versus innocence in determining whether necessity overcame the dangers of allowing the testimony. While this is not a *legal* test, it would appear to be both fair and effective.

Likewise, the Wyoming courts have tried to accommodate the liberal admissions policy of the Federal Rules of Evidence and follow the modern trend to allow, subject to discretion, expert testimony in this area.[182] The Ohio Court has also tried to provide guidance to the lower courts by holding that, while in the standard case expert testimony would not be admissible, there may be special circumstances where specific identifiable needs make the testimony helpful and therefore admissible.[183] Ohio has followed a strict abuse standard by excluding testimony where there was a daylight observation by disinterested observers,[184] while allowing testimony where the only evidence was a questionable eyewitness identification.[185] Finally, Connecticut provided a useful discretionary standard in *State v. Kemp*.[186] The *Kemp* standard provided the familiar federal rules based query for allowing expert testimony if one possessing particularized skill or knowledge not common to the average juror can offer helpful testimony.[187] But, this testimony is disfavored, as due process, cross-examination, jury instructions, and closing argument are adequate safeguards.[188] This general disfavoring has been reiterated recently by the Connecticut Supreme Court,[189] but at least the lower courts have received some guidance, and one can hope that Connecticut is not another "rubber-stamp" state.

C. *"YES! (Sometimes)"—The Limited Admissibility Rule*

This is perhaps the easiest of the rules to discuss since its proponents are so few. California and Massachusetts, alone among the states, have adopted a rule where the exclusion of expert eyewitness testimony

181. *See generally* State v. Helterbridle, 301 N.W.2d 545 (Minn. 1980).

182. *See, e.g.*, Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) (holding that the modern trend of favoring admissibility is to be incorporated into the traditional discretionary rule) (The Wyoming rules of evidence roughly parallel the Federal Rules of Evidence).

183. *See, e.g.*, State v. Buell, 489 N.E.2d 795 (Ohio 1986).

184. *See* State v. Martin, No. C-980444, 1999 Ohio App. LEXIS 4067 (Ohio Ct. App. Sept. 3, 1999).

185. *See* State v. Sinkfield, No. 17690, 2000 Ohio App. LEXIS 1913 (Ohio Ct. App. May 5, 2000).

186. 507 A.2d 1387 (Conn. 1986).

187. *Id.* at 1389.

188. *Id.* at 1390.

189. *See* State v. McClendon, 730 A.2d 1107 (Conn. 1999), which holds that no abuse of discretion exists where there is a questionable identification but other evidence is available and that expert eyewitness testimony is still disfavored.

is a per se abuse of discretion in certain limited circumstances. The seminal state case on this standard is the 1984 California case of *People v. McDonald*.[190]

In *McDonald*, a jury convicted an African-American defendant of first-degree murder with a special circumstance of robbery that resulted in the death penalty. The key issue in the case was the identity of the perpetrator. Seven eyewitnesses testified for the prosecution that the defendant was indeed the perpetrator, albeit with varying degrees of certainty. The defense countered with a large number of alibi witnesses. Four of the prosecution witnesses positively identified the defendant in court, but there were potential problems with the testimony of all four.[191]

Witness *A's* view was partially blocked, the murderer had his back to her, and she was terrified. Moreover, she could not positively identify the defendant during two photo lineups. Witness *B*, a passenger in Witness *A's* car, told a similar tale and admitted under cross-examination that he had been unable to positively identify the defendant in the photo lineups, in fact, selecting two photos. Witness *C* saw the crime from outside of his car and identified the defendant in court but, on cross by defense counsel, admitted that he had not identified him previously as well as other inconsistencies in his story. Witness *D* also had an obstructed view of the incident and was justifiably frightened. She did manage a quick sideways glance at the perpetrator as he walked by her but was unable to positively identify more than a similarity between the gunman and the defendant prior to trial.[192] None of the other witnesses were able to give a firm identification.[193]

The defense sought to introduce the expert testimony of Dr. Robert Shomer. At an evidentiary hearing, Shomer indicated he would testify regarding factors affecting reliability as well as to counter common misconceptions about identifications.[194] Shomer did not intend to testify about the particular reliability of any witness.[195] The trial court excluded his testimony, relying on the controlling California case at the time, *People v. Johnson*.[196] *Johnson* held that in the absence of any psychological or physical defects of a witness, expert testimony would

190. 690 P.2d 709 (Cal. 1984); *see also* United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (adopting this rule).

191. *Id.* at 711-16.

192. *Id.* at 712.

193. *Id.* at 711-14.

194. *Id.* at 715.

195. *Id.* at 716.

196. 112 Cal. Rptr. 834 (Cal. Ct. App. 1974).

be an invasion of the province of the jury.[197] The trial court in *McDonald* expanded on *Johnson* by commenting that introduction of the expert testimony would possibly cause juror confusion and was not scientific enough anyway.[198] This poor analytical reasoning led to a reversal at the appellate level.

The California Supreme Court overruled *Johnson*. The court stated that *Johnson* had applied the wrong sections of the evidence code, at least as applied to the case at bar.[199] The first section quoted in *Johnson*, section 801, *California Evidence Code*, applied to testimony in the form of an opinion.[200] The court reasoned that Dr. Shomer would be testifying to facts, "the contents of eyewitness identification studies reported in the professional literature."[201] His testimony would not bear on the reliability of any particular witness or identification. A qualified expert is clearly permitted to testify in this manner in light of section 351, *California Evidence Code*, (relevance) and section 720, *California Evidence Code*, (expert testimony by a qualified expert).[202] The other section quoted in *Johnson*,[203] section 780, *California Evidence Code* was interpreted by the *Johnson* court as not allowing a witness to testify as to the capacity to perceive, recollect, or communicate of another witness.[204] The *McDonald* court reasoned that Dr. Shomer would not have been testifying about the capacity of any particular witness, but merely providing general information.[205] Thus, the court held that expert testimony may be admitted when it would be of assistance to the jury, and should only be excluded "when it would add nothing at all to the jury's common fund of information . . . ."[206] The exclusion of this particular testimony undercut the defendant's main argument, and jurors were deprived "of information that could have assisted them in resolving that crucial issue."[207] The *Johnson* court effectively took the "fit" argument so frequently used in discretionary jurisdictions and came up with a test wherein "fit" would always be satisfied.

The court articulated the rule that is emblematic of the "limited admissibility" jurisdictions:

> When an eyewitness identification of the defendant is a key element

197. *Id.* at 837.
198. *McDonald*, 690 P.2d at 716-17.
199. *Id.* at 719.
200. CAL. EVID. CODE § 801 (West 1984).
201. *McDonald*, 690 P.2d at 719.
202. CAL. EVID. CODE § 351 and § 720 (West 1984).
203. CAL. EVID. CODE § 780 (West 1984).
204. 112 Cal. Rptr. at 837.
205. *McDonald*, 690 P.2d at 719.
206. *Id.* at 720.
207. *Id.* at 726.

> of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury, it will ordinarily be error to exclude that testimony.[208]

While creating a per se rule of admissibility (at least in the specified circumstances), the court somewhat disingenuously stated that it did not intend to displace the discretion that should be accorded to the trial judge.[209] Yet, it did not intend to abdicate what it perceived as a duty to apply a non-discretionary standard.[210] This curious half-measure decision has not been extensively followed, at least in an explicit sense, however, it has had some implications.[211]

Several states, while ostensibly following the "majority" rule, have in fact migrated to a *McDonald*-like posture. Massachusetts had long held that, although expert testimony on the capacity of eyewitness testimony is not *per se* admissible of right, it is admissible as a matter of discretion.[212] The court held in *Commonwealth v. Francis* that expert testimony was not a good safeguard of misidentification, particularly considering its tendency to *cause* misidentification.[213] Since the testimony that was offered in this case[214] was not beyond the ordinary experience of jurors, the court should instead have offered an instruction as a safeguard.[215] Yet, in *Commonwealth v. Santoli*, the court acknowledged that the discretionary rule might result in disparate treatment of similarly situated cases.[216] While declining to formally adopt a limited admissibility rule, the Massachusetts Supreme Judicial Court offered "guidance" to assist judges in their exercise of discretion.[217] The court treated *McDonald* and its progeny with favor and remarked on the fact specific circumstances that might conceivably call abuse of discretion

208. *Id.* at 727.

209. *Id.*

210. *Id.*

211. *See, e.g.*, People v. Fudge, 875 P.2d 36 (Cal. 1994) (allowing expert eyewitness identification, but not incorporating a detailed instruction regarding the vagaries of eyewitness identification). *But see* People v. Sanders, 905 P.2d 420 (Cal. 1995) (excluding expert testimony where identification was a key point of the case, where both the witnesses and the identification were strong and unequivocal).

212. *See* Commonwealth v. Francis, 453 N.E.2d 1204 (Mass. 1983).

213. *Id.* at 1210.

214. Testimony was offered by Dr. Elizabeth Loftus, the leading expert in the field, acknowledged by the court as a qualified expert. *Id.* at 1206.

215. *Id.* at 1210; *see also* Commonwealth v. Hyatt, 647 N.E.2d 1168 (Mass. 1995) (reaffirming *Francis*).

216. 680 N.E.2d 1116, 1120 (Mass. 1997).

217. *Id.* at 1116-17.

into play.[218] Generally, the court acknowledged that these cases involved circumstances where there was little or no corroborating evidence.[219] The court declined to admit the testimony offered in the case because there was corroborative physical evidence present.[220] Yet, the implication of the case was clear. Lower courts would be well served to follow the limited inclusionary rule or risk being reversed. The court also hinted that the use of instructions might be a substitute for expert testimony, particularly as the scientific principles involved became more grounded.[221]

Further confirmation of the Massachusetts position came in *Commonwealth v. Ashley*.[222] In *Ashley*, the defendant was charged with a shooting. Three witnesses, two of whom were policemen, identified the defendant in a lineup. Two of the witnesses identified the defendant to a 100% certainty. Other evidence included an identification of the defendant's car at the scene of the crime and testimony as to motive. Therefore, this fell outside the limited admissibility rule. The Massachusetts Supreme Judicial Court court was careful to mention the *Santoli* ruling and affirm that even though the trial judge did not have the benefit of the guidance of the court, he had come to the correct decision anyway.[223] The trial judge had held that this was a "simple garden variety identification-type case and it [did] not require any expertise relative to the capacity of a witness to make an identification."[224]

The Supreme Judicial Court had implicitly reiterated its inclusionary rule under the right circumstances. In fact, the amount of discretion actually left to the lower courts was intact unless the particular circumstances came up, but, as in *McDonald*, the spectrum of cases that would fit within the exception could conceivably swallow the rule.[225] While other courts have adopted a "liberal" discretionary view, weighted toward admissibility, some even hinting at moving toward the limited admissibility rule,[226] no other state yet has explicitly moved in this direction.

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218. *Id.* at 1115.
219. *Id.* at 1119-20.
220. *Id.* at 1121.
221. *Id.*
222. 694 N.E.2d 862 (Mass. 1998).
223. *Id.* at 866.
224. *Id.*
225. Many commentators would speculate that *State v. Chapple*, 660 P. 2d 1208 (Ariz. 1983), would fall into this category. A close reading, however, reveals that *Chapple* is limited to a far narrower set of circumstances than are present in the limited admissibility cases.
226. Colorado has moved solidly towards this result, but stopped short of joining this camp. *See, e.g.*, Campbell v. People, 814 P.2d 1 (Colo. 1991) (stating that *Downing* provides room for admissibility, but the court explicitly declined to adopt a per se rule in favor of allowing this testimony).

V. FEDERAL DECISIONS

A. *NEVER (Well Hardly Ever)—Per Se Exclusion and Discretion*

Federal courts have frequently been called upon to determine admissibility in this area. Generally the federal judiciary has not favored admissibility. Most jurisdictions adhere to at least a facial allegiance to the discretionary rule. However, the federal courts have virtually uniformly rejected expert testimony on eyewitnesses misidentification. This may well be due in large part to the nature of the cases arising in the federal courts. Rarely do these cases involve a single eyewitness without any further corroboration. Conversely, the state courts are riddled with highly suspect cases often involving single eyewitnesses. Therefore, even a federal court operating under the *Moon* test would be ill-disposed toward admissibility, simply because few factual situations in federal court would reach the minimum threshold. The high rate of convictions in the federal courts, as compared to the significantly lower conviction rates in the state courts, speaks to the difference in the type of non-eyewitness evidence generally present in a federal case. These cases are not purse-snatchings or low-level drug deals, but large quantity drug transactions, kidnappings, or bank robberies where the federal authorities often have significant corroborative evidence. The eyewitness identification is often icing on the cake. Therefore, a likelihood of guilt analysis seen in some states will seldom benefit the defendant.

Alone among federal jurisdictions, the Eleventh Circuit has explicitly rejected the admission of expert testimony. The court has taken to doing this without comment. In *United States v. Benitez*, the court affirmed the conviction of a drug dealer and the district court's exclusion of expert testimony on the basis that such testimony was inadmissible in the circuit, scarcely a helpful rationale.[227] *United States v. Holloway*[228] is similarly instructive. The court simply stated that the argument was without merit, and there was no reason to reconsider the precedent of the circuit that such testimony was inadmissible.[229] Both cases cited to *United States v. Thevis*,[230] a pre-Daubert case. In *Thevis*, the court held that the trial court did not abuse its discretion in excluding the testimony of an expert citing the availability of cross-examination to counter any problems with the identification.[231] *Thevis* however, does not necessarily indicate that the Eleventh Circuit had adopted a *per se* exclusionary rule. Yet, in *United States v. Smith*, the court held that

227. *Id.*
228. 971 F.2d 675 (11th Cir. 1992).
229. *Id.* at 679.
230. 665 F.2d 616 (5th Cir. 1982).
231. *Id.* at 641.

Thevis did indeed establish an exclusionary rule.[232] The court claimed that there was no need to vitiate the *Thevis* ruling, or indeed even to re-examine it, in light of *Daubert*.[233] The court found cross-examination and jury instructions sufficient to serve the purposes of expert testimony.[234]

Perhaps the single most important case on this issue was decided in the Third Circuit. In *United States v. Downing*, the court fashioned a balancing test that essentially became the heart and soul of the *Daubert* test.[235] After conducting a balancing test regarding the admissibility of the evidence on a scientific basis,[236] the court devised a test of fit to determine whether there was a specific connection between the proffered testimony and the particular features of the eyewitness identifications involved.[237] In remanding the case for reconsideration the appellate court envisioned a liberal tilt towards admissibility, but still left the trial judge discretion to exclude expert testimony based on the lack of fit or even under Rule 403.[238] On remand, the district court declined to admit the testimony, citing a lack of fit.[239]

The Third Circuit has consistently applied this flexible standard. In *United States v. Dowling*, the court affirmed convictions for bank robbery, holding that there was no abuse of discretion where the testimony of the expert lacked a proper fit to the specific facts of the case.[240] Conversely, in *United States v. Stevens*, the trial judge had permitted testimony on cross-racial identification, weapons focus, and stress but disallowed other testimony regarding the correlation between confidence and accuracy, as well as the use of a "wanted board."[241] The appellate court affirmed the exclusion of the board but reversed on the accuracy correlation, holding that there was fit as the correlation was counterintuitive.[242]

While the Third Circuit is a paradigm of a true discretionary jurisdiction, other federal jurisdictions have merely paid lip service to a discretionary standard. The overwhelming majority merely iterates a discretionary standard while affirming a lower court decision to exclude testimony. For example, in *United States v. Brien*, the court held that

232. 122 F.3d 1355, 1359 (11th Cir. 1997).
233. *Id.*
234. *Id.*
235. 753 F.2d 1224 (3d Cir. 1985).
236. *See Daubert* discussion, *infra* Part III.A.
237. *Downing*, 753 F.2d at 1239-41.
238. *Id.* at 1242-43.
239. 609 F. Supp. 784, 792 (E.D. Pa. 1985), *aff'd*, 780 F.2d 1017 (3d Cir. 1985).
240. 855 F.2d 114 (3d Cir. 1988), *aff'd*, 493 U.S. 342 (1990).
241. 935 F.2d 1380 (3d Cir. 1991).
242. *Id.* at 1400-01.

trial courts should take proffers individually and weigh them in light of reliability and helpfulness, the importance of the testimony, and any considerations of jury confusion or delay.[243] The First Circuit declined to adopt a per se rule in either direction, explicitly adopting the discretionary rule.[244] The court did so, however, while affirming the trial judge's exclusion based on a lack of a sufficient proffer by the defense.[245] It should be noted that, at least at the district court level, there are examples where expert identification testimony has been permitted in this circuit.[246]

Most other circuits join in this trend towards allowing the trial judge wide discretion while generally disfavoring this type of testimony. For example, in *United States v. Harris*, the Fourth Circuit noted a trend to allow such testimony "under circumstances described as 'narrow.'"[247] However, the court declined to find that the case of multiple eyewitness identifications of an armed bank robber fell within this narrow exception owing to the "eyewitness cornucopia" that was present and the lack of fit between the facts and the proffered testimony.[248]

The Seventh Circuit has likewise adopted an ostensible discretionary rule while finding that expert testimony is generally within the ken of the jurors.[249] In *Gregory-Bey v. Hanks*, the District Court for the Southern District of Indiana went so far as to suggest that where there is corroborative evidence, a defendant must affirmatively show that the jury is not alerted in some way to the potential problems associated with eyewitness identification.[250] The *Gregory-Bey* court goes on to use particularly strong language to state that admission of eyewitness expert testimony is never constitutionally mandated.[251] This case also suggests that even the failure to give an instruction concerning the vagaries of eyewitness identification does not constitute a due process violation.[252] This case is representative of the extreme disfavor with which many federal courts, particularly those of the Seventh and Eleventh Circuits, hold expert eyewitness testimony. Yet, true to its reputation as one of the "maverick" circuits of the United States judiciary, the Seventh Cir-

243. 59 F.3d 274, 277 (1st Cir. 1995).

244. *Id.*

245. *Id.*

246. *See, e.g.*, United States v. Hines, 55 F. Supp. 2d 62 (D. Mass. 1999).

247. 995 F.2d 532, 534 (4th Cir. 1993).

248. *Id.* at 535-36.

249. *See, e.g.*, United States v. Larkin, 978 F.2d 964 (7th Cir. 1992) (holding that the unreliability of identifications made under stress was within the common knowledge of lay jurors).

250. No. IP 94-903-C H/G, 2000 US Dist. LEXIS 18932, at *65-66 (S.D. Ind. Nov. 29, 2000).

251. *Id.* at *66.

252. *Id.* at *66 n.18.

cuit has come up with some interesting solutions outside of the mainstream that will be discussed *infra*.[253]

In sum, it seems safe to say that the majority rule is akin to the "catch-all" hearsay exception. Many of the discretionary jurisdictions are merely exclusionary or limited admissibility states hiding behind a veneer of judicial conservatism. Others seem to have either no standards or unusual ones rendering them outside of the mainstream. Only a small minority appears to have developed coherent rules, and these vary so greatly in both their composition and execution from jurisdiction to jurisdiction that the majority rule could be sub-divided into many minority rules subsumed within a rhetorical umbrella.[254]

VI. ALTERNATIVES TO ADMISSIBILITY

As can be seen from the analysis *supra*, courts have developed a number of alternatives to ameliorate the potential problems of erroneous identifications. These range from a reliance on existing procedures to specialized jury instructions to other more imaginative solutions. A brief discussion of some of these solutions follows. A potential application of these solutions to the hypothetical presented at the opening of the paper is also included.

A. *Jury Instructions*

Many of the jurisdictions discussed *supra* have required jury instructions to further guard against any jury misconceptions. In *United States v. Rincon*, the Ninth Circuit provides an excellent example of a model instruction that could apply to the hypothetical.[255] Holding that the use of jury instructions was adequate to exclude the testimony of an expert witness, the court cited with approval the instructions given by the district judge. The judge instructed the jury to consider:

> 1) the capacity and adequate opportunity of the witness to observe the offender based upon the duration and conditions of the observation;
> 2) whether the identification was the product of the eyewitnesses' own memory or prompted by subsequent suggestiveness;
> 3) whether the eyewitness has made inconsistent identifications;
> 4) whether the testimony was credible;

253. *See* United States v. Hall, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring).

254. Of course there are numerous jurisdictions that were not mentioned in the course of this survey. Some have little or no case law. Others fell into one of the groups already described under the majority rule. Still others, had such nebulous standards that they were incapable of classification.

255. 28 F.3d 921 (9th Cir. 1994).

5) the nature of the lineup; and
6) the length of time between the occurrence of the crime and the eyewitness identification.[256]

While this instruction did not include a reference to cross-racial identification, courts have held that the judge has discretion to give such an instruction. The Supreme Judicial Court of Massachusetts stated that "[a jury] may consider the fact of any such cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identifications by a person of the same race."[257]

Most states have a standard identification instruction. For example, in Wisconsin, the standard instruction reads in pertinent part:

> [T]he identification of the defendant is an issue in this case. If you find that the crime alleged, that is, in each particular instance, was committed, before you may find the defendant guilty you must be satisfied beyond a reasonable doubt that the defendant is the person who committed the crime, and, of course, you've got to make a finding independently in [each] charge.[258]

The *Telfaire* instruction, derived from *United States v. Telfaire*,[259] speaks specifically to questionable eyewitness identifications. The instruction begins as follows:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing [sic] identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him . . . . Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reasonable identification later.[260]

The instruction goes on to state several factors for consideration such as: (1) whether the witness had both the capacity and an adequate opportunity for observation; (2) the strength and circumstances of the recollection, specifically including the length of time between incident and identification; (3) occasions where the witness failed to identify or

256. *Id.* at 925-26.
257. Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995).
258. State v. Small, No. 83-2439-CR, 1984 Wis. App. LEXIS 3971 (Wisc. Ct. App. Jul. 24, 1984).
259. 469 F.2d 552 (D.C. Cir. 1972).
260. *Id.* at 558.

misidentified the defendant; and (4) the credibility of the witness in general.[261] In effect, the court is able to provide much of the information available via expert testimony in an instructional manner without giving it the cachet of authority that expert testimony may impose even upon the most carefully phrased generalities.

In *State v. Small*, the Wisconsin court chose to give a special instruction in light of the admitted testimony of Dr. Stephen Penrod.[262] The jury was instructed that:

> A witness may inform the jury of psychological principles underlying human observation and perception, but the jury must retain the task of and the responsibility for applying these principles to the specific facts in the cases under consideration. The jury must not abdicate or surrender its duty which is to determine the credibility of various witnesses and the weight to be given to the testimony of each, nor must a jury surrender their own common sense in weighing testimony.[263]

This instruction seems tailored to ameliorate the possible prejudicial effects of the expert testimony and moderates the "expert as God" effect that seems to scare so many courts and observers.

If the hypothetical is in a jurisdiction that encourages the utilization of cautionary jury instructions, then these would seem to cover the facts of the case. Taken as a whole, along with the cross-examination and the closing argument, this seems to even further safeguard both the integrity of the judicial process and the rights of the defendant.

B. *Cross-Examination*

As seen *supra*, numerous courts have held that the appropriate forum to challenge an eyewitness identification is in cross-examination, generally in conjunction with closing argument and often along with jury instructions discussed *infra*. Cross-examination itself has long been regarded, and rightly so, as "the greatest legal engine ever invented for the discovery of truth."[264] There are identifiable weaknesses in this approach. First, the typical eyewitness is sincerely convinced of her own sincerity.[265] This is one reason why expert testimony is frequently proffered: to ameliorate the impossibility of shaking the unassailable confidence of a witness who believes in herself. In fact, Dr. Loftus posits that traditional cross-examination may reinforce the jury's faith in

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261. *Id.* at 558-59.

262. *Small*, 1984 Wisc. App. LEXIS 3971 at *14.

263. *Id.* at *6 n.11.

264. California v. Green, 399 U.S. 149, 157 (1970) (quoting 5 WIGMORE, EVIDENCE §1367, at 29 (3d ed. 1940)).

265. LOFTUS, *supra* note 12, § 10-1.

the eyewitness.[266]

Moreover, eyewitnesses are frequently the victims of crime and therefore subject to the sympathies of the jury. Even where the witness is a bystander, the jury is generally more likely to sympathize with her than with a hard-pressing lawyer using all the tricks in his repertoire to damage the eyewitness's credibility.[267] Particular types of identification problems, such as the potential for error in cross-racial identifications, are a veritable minefield for the cross-examiner. Here, he runs the risk of converting even a bystander eyewitness into a victim.

How would a cross-examiner respond to these difficulties under the facts of the hypothetical? In examining the clerk, there would be several ways of handling the stress and weapons focus issues. The attorney could simply ask her if she was under stress at the time of the incident, if the assailant was carrying a weapon, and if she got a good look at him. While this would satisfy the basic needs of the examination, the following might be more effective:

Q: You were alone in the store. Right?
A: Yes.
Q: And this young man terrified you, right?
A: Yes.
Q: He was shouting?
A: Yes.
Q: And threatening you, correct?
A: Yes, he threatened to kill me!
Q: You believed him, didn't you?
A: Absolutely.
Q: There was no one there to help you?
A: No, I was alone and terrified.
Q: And he was pointing a gun at you, right?
A: Yes.
Q: You saw the gun, right?
A: Yes, I couldn't take my eyes off it.[268]

While perhaps the last comment is a defense lawyer's dream, the remainder of the questioning is extremely plausible and brings out the stress and terror that the victim was under without attacking her. Combined with a closing argument, which will be discussed *infra*, this may be effective.

The uncertainty of the initial identification can likewise be brought out on cross without bullying or sarcasm. Simply elucidating testimony in a sympathetic manner that the witness was unable to initially identify

266. *Id.* § 10-1(a).
267. *Id.* § 10-1(b).
268. The examination is modeled after that presented by Dr. Loftus. *Id.* § 10-6.

the suspect lays the foundation. Moreover, the fact that a month transpired can be gently probed as well. The cross-racial element, however, simply cannot avoid an inquiry to the effect to, "they all look alike, right?" without some sort of outside information. In certain circumstances, it may be possible to establish that a witness cannot distinguish between a Malaysian and a Korean, however the risk to the attorney is that of appearing a bully.

The other witnesses in the hypothetical are easier to effectively cross-examine. Both the policeman and the customer only had a brief encounter with the suspect, and this can easily be brought out on cross. Likewise, the lighting conditions can be explored as well. Unfortunately for the defense attorney, if the jury is unaware of the forgetting curve, the effects of stress, and the weapons-focus problem, then all this work may be for naught, notwithstanding the total inability to get at the problems of cross-racial identification. For even the most skilled lawyer, cross-examination by itself is probably insufficient to attack the problems of eyewitness identification.

C. *Closing Argument*

The link between cross-examination and closing argument cannot be overstated. Dr. Loftus has stated that "the cardinal flaw of inexperienced cross-examiners is their failure to recognize that because closing argument *is* argument, and because it is possible to ask jurors to draw inferences during it, many dangerous patches of cross-examination can be avoided."[269] In the model cross-examination *supra*, the examiner avoided asking the victim the overly conclusive follow-up: "So you were so stressed out, and so busy looking at the gun, you couldn't really identify the suspect, could you?" The response could likely be something totally devastating, such as, "Sure I could! I was staring at him the whole time, and it was your client beyond a doubt!"[270]

The time to attempt to help the jury draw such inferences is closing argument. For example, the defense attorney could tie up the cross of the victim by saying:

> "You heard the victim testify to how terrified she was. She was in fear of her life. She was staring down the barrel of a gun, and she was scared out of her mind, and who wouldn't be?! The last thing she was thinking about was getting a good look at the suspect. There was no way she could make a reliable identification of him. That's why she couldn't identify my client at the photo lineup. That's why she

269. *Id.* § 10-7 (emphasis in original).

270. The hapless attorney who asked this question would be well advised to remember the equally hapless Christopher Darden suggesting O.J. Simpson try on the bloody gloves!

> couldn't identify him until a month later, when her memory may have started to get hazy, just like any of us, and after the police told her they already had a the criminal in custody. The other witnesses just glanced at someone in passing, in less than ideal circumstances, a rainy night and a dimly lit hallway. How could they be expected to remember him accurately?"

In this way, the attorney educates the jury at least to some degree about a few of the factors that may affect identification, while tying in some of the admittedly less-effective cross-examination. Many judges would find this sufficient to safeguard the interests of the defendant. Others, however, would find that still one more procedure could be effectuated. But, one prominent jurist has come up with an intriguing, albeit unique, alternative to expert testimony.

D. *The "Easterbrook" Plan*

United States v. Hall is a relatively typical case where the court affirms the discretion of the trial judge to exclude expert testimony.[271] The majority opinion, written by Judge Kanne, offers an interesting, if not particularly original, discussion of the issue and focuses the relationship between cross-examination, argument, and jury instructions as being sufficient to justify a trial court's exclusion of expert testimony.[272] It is the concurrence of Judge Easterbrook, however, that is of real interest, for it provides an original alternative that does not appear to have been discussed previously.

First, Easterbrook states that there are any number of "empirical propositions that may be investigated, and sometimes refuted, through scientific means."[273] If this is so, experts could be presented to teach the jury how to see through lawyering tricks, the weak correlation between lying and apparent discomfort on the witness stand, or various issues in group (i.e. jury) dynamics.[274] The possibilities are virtually endless, and would result in a trial about trial, diverting attention away from the issues of guilt or innocence.[275] In fact, experts could testify about the effect of experts themselves on an empirical basis, the ultimate in circular logic.[276] Thus, Easterbrook argues against utilizing this kind of social science evidence at the trial level. Instead, he would have judges "employ social science to *improve* the trial process."[277]

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271. 165 F.3d 1095 (7th Cir. 1999).
272. *Id.* at 1107.
273. *Id.* at 1119.
274. *Id.*
275. *Id.*
276. *Id.* at 1120.
277. *Id.* at 1119.

Judges informed in various areas of social science could utilize this knowledge to draft better instructions or, with the aid of linguistics experts, interpret a statute. But Easterbrook would take this process a giant step further. In his perfect scenario, judges would acquire specialized scientific knowledge and then pass that knowledge directly to the jury. For example, the judge could "inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delay and pitfalls of expert testimony."[278] Easterbrook even suggests that jurors would more likely accept that information from a judge than a scholar, who, at least in Easterbrook's view, would be a fidgety, unpersuasive witness in most cases.[279] Apparently, the risks of under-informed judges handing out half-baked and scurrilous scientific theories is of little concern, for they could learn what they need through "continuing judicial education programs and read[ing] the scholarly literature . . . ."[280]

This rather astounding theory is difficult to apply to the hypothetical. One could only hope that the judge would have performed well in his undergraduate science classes and done more research than a cursory glance at "Nova" on PBS or a skim through the pages of *Psychology Today*. Easterbrook's plan is intriguing, but seems to show an elitist disdain for the abilities of scholars to educate a lay jury. A judge has discretion to exclude testimony and provide jury instructions, but Easterbrook's "Judge as Expert" theory smacks of judicial activism and should be viewed with skepticism.

E. *Limiting Testimony*

Another option for the court is to limit the testimony allowed in court. Under the Rule 702 inquiry, the court would be justified in limiting testimony to that which would be helpful to the jury. A number of the discretionary rule cases cited *supra* have utilized this technique. The fit requirement would allow the judge to specifically tailor the testimony to best assist the jury in its deliberations. This is in line with Justice Breyer's *Kumho* search for reliability and accuracy, that is correctness, in determining admissibility. In the hypothetical, testimony could be limited in virtually any manner at the discretion of the judge, hopefully one who had investigated the subject to the extent recommended by Judge Easterbrook.

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278. *Id.*

279. *Id.*

280. *Id.*

VII. CONCLUSION

The overwhelming majority of jurisdictions frown upon admission of this type of expert testimony and with good reason. There is little reason to turn a criminal trial into a battle of the experts with other, more traditional safeguards already existing within the system.[281] Cross-examination and argument, in conjunction with well-crafted jury instructions along the lines of *Rincon*[282] should be sufficient in most circumstances.

There are circumstances, however, where this testimony should be admitted. In cases where there is little or no other corroborative evidence, this testimony is critical toward a fair adjudication on the merits. Yet, in most cases, admitting this testimony poses the likelihood of creating reasonable doubt simply by having an expert testify to general factors that may very well not be applicable in any given instance. The fact that *some* eyewitnesses may not reflect a correlation between confidence and accuracy should not give an expert a broadsword with which to destroy the credibility of all such witnesses. This testimony lacks the crucial element of fit, even post-*Kumho*. The witness would fail the Rule 702 requirement of applying the "principles and methods reliably to the facts of the case.[283] Nonetheless, while the courts should retain a certain amount of discretion, it is important that guidelines be in place so that, when certain threshold conditions are satisfied, this testimony will be admitted.

The *Moon* test, discussed in detail *supra*, provides the clearest exposition of the factors that a court should consider. *Moon* provides for admissibility where identity is the principal issue, an alibi is presented, and there is little or no corroborative evidence. Although *Moon* is a non-exclusive framework, the presence of minimum standards provides a level of protection in close cases while leaving the trial judge the authority to avoid turning trials into Judge Easterbrook's worst nightmare;[284] a terminal battle of dueling experts hopelessly confusing the jurors and leading to results incompatible with the weight of the evidence.

Critics would argue that trial judges are given too much discretion and, in fact, are given *carte blanche* to reach their own conclusions as to guilt or innocence before allowing this testimony to be admitted. A

281. Some might argue that trials have already degenerated into this type of battle. Thus, I would argue that it is incumbent upon the courts to limit this and attempt to reverse this trend, lest Judge Easterbrook's fears of experts testifying on the trial process itself become a reality.

282. 28 F.3d 921 (9th Cir. 1994).

283. FED. R. EVID. 702.

284. The author shares Judge Easterbrook's sentiments in this regard.

more cogent way of looking at the discretion vested in the trial judge is to consider that, under the Federal Rules of Evidence, there is no compulsion to allow this testimony to be admitted. By determining whether the circumstances are such as to provide a "close call" where, under the *Moon* test or some other standard, testimony is admissible, the courts are engaging in the type of ad hoc balancing explicitly allowed under Federal Rule of Evidence 403. The court is considering not only the Rule 403 prejudice versus probative value analysis but whether the interests of judicial efficiency are being served. Prosecutors would have every right to call contrary experts to refute the defense expert, and, once again, Easterbrook's model of experts testifying on juror deliberations does not seem far off.

As seen in the alternatives presented *supra*, there are any number of safeguards already built into the system protecting the rights of the defendant and allowing her to challenge the veracity or clarity of identifications. Moreover, many judges are willing to give a fairly detailed instruction regarding eyewitness identifications, and the *Telfaire* instruction or a variant thereof is commonly given in numerous jurisdictions. It is critical to the integrity of the system that judges be permitted to exercise their discretion in fashioning the proper instructions, and that attorneys utilize their skills to effectively cross-examine and argue. The system is not served by allowing experts merely by dint of the undue influence they exert as court-approved experts to cast generalized doubt potentially skewing an impressionable jury toward finding reasonable doubt where none exists. Only in the rare circumstances where either the *Moon* factors are met or the judge believes that the interests of justice would be best served in a unique circumstance should this testimony be admitted. Thankfully, the Kafkaesque nightmare of public defender staff experts roaming the hallways of the courthouse in search of the next opportunity to spew boilerplate does not appear likely to materialize. While per se exclusion is too harsh a rule, only the most limited of circumstances call for admissibility.

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