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Evaluating Eyewitness Testimony in Criminal Trials: Can Jurors Use Help from Experts - United States v. Downing

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EVALUATING EYEWITNESS TESTIMONY IN CRIMINAL TRIALS: CAN JURORS USE HELP FROM EXPERTS?

United States v. Downing
753 F.2d 1224 (3d Cir. 1985)

INTRODUCTION

In the late 1970's, one Ronald Quick was tried twice in the Kansas courts and convicted of aggravated robbery of a liquor store. At both trials two eyewitnesses positively identified the defendant as the perpetrator of the crime. The two convictions were reversed for trial errors.[1] The case was dismissed during the third trial after another man who looked like the defendant confessed to the crime.[2]

The miscarriage of justice that Ronald Quick suffered is not an isolated example. Commentators have extensively documented wrongful convictions resulting from mistaken identifications,[3] and the courts have long recognized the unreliability of eyewitness identifications.[4] Yet, de-

1. State v. Quick, 226 Kan. 308, 597 P.2d 1108 (1979); and 229 Kan. 117, 621 P.2d 997 (1981).

2. The *Quick* case and its final disposition are noted in State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981). Similarly, the court in *Warren* notes the following unreported case. In 1979, Rev. Bernard T. Pagano, a Roman Catholic priest, was charged with the robberies of six Delaware stores in the winter of 1978. At the trial, he was falsely identified by several prosecution witnesses as the robber. After the State rested its case, the prosecution was dismissed on motion of the State because another man confessed to the crimes. *Id.*

3. *See, e.g.*, E. BORCHARD, CONVICTING THE INNOCENT (1932) (discusses sixty-five convictions of innocent defendants, twenty-nine of which resulted from the erroneous identification of the accused by the victim of a violent crime); F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN (1927). *See generally* P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965). Wall's book, in which he called for reform in identification procedures in criminal cases, is a classic work on the subject. As one recent book noted, "Ever since the United States Supreme Court in United States v. Wade [388 U.S. 218, 229 (1967)] took note of Wall's book on eyewitness identification, literature on the subject has come forth in a flood." E. ARNOLDS, W. CARROLL, M. LEWIS, & M. SENG, EYEWITNESS TESTIMONY: STRATEGIES AND TACTICS at v (1984) [hereinafter STRATEGIES AND TACTICS].

Legal commentators who advocate the use of expert testimony on eyewitness identification in criminal trials have unearthed interesting evidence to support their position. For example, one commentator relates the following experiment:

> A judge in New York City developed his own system to check on the frequency of mistaken identifications. In ten cases in which the identification of the accused was virtually the only evidence, the judge permitted defense attorneys to seat a look-alike alongside the defendant. In only two of the ten cases was the witness able to identify the defendant.

Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 969 n.3 (1977) (citing TIME, April 2, 1973, at 59).

4. *See, e.g.*, United States v. Wade, 388 U.S. 218, 228 (1967) where the Court stated: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."

spite attempts by the United States Supreme Court to establish constitutional safeguards governing the admission of eyewitness identifications in federal and state criminal trials,[5] the problem of unreliable identifications persists.[6]

One method of alleviating the problem is the use at trial of expert testimony on the unreliability of eyewitness identifications. Although many defense lawyers and commentators vigorously advocate this method,[7] the overwhelming majority of state and federal appellate courts have upheld the exclusion of such expert testimony.[8] In *United States v.*

5. These constitutional safeguards protecting defendants from erroneous and impermissibly suggestive identifications are beyond the scope of this Comment. Briefly, the landmark *Wade* trilogy, decided by the Supreme Court in 1967, established a constitutional right to have counsel present at certain "critical stages" of a criminal prosecution, including pre-trial lineups. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967). However, subsequent decisions of the Court, particularly Kirby v. Illinois, 406 U.S. 682 (1972) and United States v. Ash, 413 U.S. 300 (1973), have seriously undermined the effectiveness of the protections set up by the *Wade* trilogy. Commentators have expressed this erosion in blunter terms. "The right to counsel at identification procedures established in *Wade* has become virtually a dead letter owing to two decisions." N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 1.5, at 1-10 (2d ed. 1981 and 1985 rev.) (referring to *Kirby* and *Ash*). For detailed analyses of the Supreme Court's constitutional decisions in this area, see N. SOBEL, *supra*, §§ 1-2 and Note, *supra* note 3, at 989-1000.

The fact that the Court has virtually eliminated the constitutional safeguards provided in the *Wade* trilogy is one of the reasons commentators advance in advocating the use of expert testimony on eyewitness identifications at trial. *See, e.g.*, Note, *supra* note 3, at 999-1000. Furthermore, *Wade* and subsequent Supreme Court decisions primarily address the problem of suggestive police procedures, not the inherent limitations of witnesses' perception and memory. *See id.*

6. In a recent decision, the Supreme Court of Kansas, after reviewing the literature on the subject and the steps taken in other countries to correct the injustices resulting from mistaken identifications, stated:

> In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it. . . . [C]ases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated.

State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981). The court concluded that the answer to the problem is not the use of expert testimony at trial, but rather a cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony. *Id.* at 397, 635 P.2d at 1243.

7. *See, e.g.*, STRATEGIES AND TACTICS, *supra* note 3, § 8.01-8.20; N. SOBEL, *supra* note 5, §§ 9.6-9.8; Note, *supra* note 3; *see also* Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (author concludes that while expert testimony is not a perfect solution to the problem of cross-racial identification errors, judicial reluctance to admit such testimony is unwarranted). *But see* Note, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?*, 26 ARIZ. L. REV. 399 (1984) (author concludes that the limited benefits of expert testimony are substantially outweighed by its potential harm); Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 744 (1985) (author acknowledges that "a number of psychologists and some legal commentators" advocate the use of such expert testimony at trial, but concludes that, while psychologists can assist the defense in a criminal case in a number of ways, such assistance should not take the form of expert testimony at trial).

No citation is necessary to support the proposition that defense attorneys, not prosecutors, are fighting for the admissibility of expert testimony on eyewitness identification.

8. Some of the more recent decisions include the following: United States v. Thevis, 665 F.2d

Downing,[9] an appeal from a criminal conviction, the Third Circuit joined a minority of jurisdictions which have approved the introduction of such testimony.[10] *Downing* held that under the "helpfulness" test set forth in Federal Rule of Evidence 702,[11] expert testimony on eyewitness perception and memory is admissible "at least in some circumstances."[12] The Third Circuit announced a new standard for the evaluation of novel scientific evidence, such as the expert testimony at issue in the case.[13] It instructed the trial court to conduct a preliminary hearing to determine whether, under the appellate court's new standard, the expert testimony

616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981). For a more exhaustive list of federal and state appellate decisions finding no abuse of discretion in the trial court's exclusion of the proffered testimony, see Note, *supra* note 7, at 400 n.12.

9. 753 F.2d 1224 (3d Cir. 1985).

10. State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) (holding that it was an abuse of discretion to preclude the expert testimony under the circumstances of this case); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) (same); *see also* United States v. Smith, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984) (where trial court excluded the proffered expert testimony, appellate court held that error, if any, was harmless; however, appellate court in clear dicta indicated that it approved of the admissibility of such testimony in appropriate circumstances).

After *Downing* was decided, another jurisdiction adopted the minority view approving of the use of such expert testimony at trial. In State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1986), the Ohio Supreme Court held that the expert testimony of an experimental psychologist concerning the factors that may impair the accuracy of a typical eyewitness is admissible under Ohio's counterpart to Federal Rule of Evidence 702. 22 Ohio St. 3d 124, 131, 489 N.E.2d 795, 803. The court also held that expert testimony regarding "the credibility of the identification testimony of a *particular* witness is inadmissible, . . . absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events." *Id.* at 133, 489 N.E.2d at 804 (emphasis in original). These holdings are in accord with the decisions in *Downing*, *Chapple*, *McDonald*, and *Smith*, which the court in *Buell* expressly followed. *Id.* at 132, 489 N.E.2d at 801-03. However, the court in *Buell* held that the exclusion of the proffered testimony was not an abuse of discretion because "the evidence of defendant's guilt was based primarily on physical evidence rather than identification testimony." *Id.* at 133, 489 N.E.2d at 804.

11. FED. R. EVID. 702 states: "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." The Advisory Committee's Note to Rule 702 states in pertinent part:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There 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 in the dispute." Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The Federal Rules of Evidence are referred to herein as the Federal Rules or the Rules.

12. *Downing*, 753 F.2d at 1232.

13. *Id.* at 1232-43.

should be admitted in *Downing*.[14]

This Comment will review the case law representing the traditional view that expert testimony on eyewitness identifications is inadmissible. It will explore the reasons for this judicial reluctance, despite the large body of scientific research on the subject and the potential benefits to the administration of criminal justice that such expert testimony offers. This analysis will demonstrate that the Third Circuit's approach is consistent with the Federal Rules of Evidence and represents a significant and effective step toward alleviating the problem of mistaken identifications and wrongful convictions. Finally, it will be shown that the Third Circuit goes beyond prior case law that also approved the admission of expert psychological testimony, in that *Downing* sets forth a flexible and workable standard for the evaluation of "novel" types of scientific evidence.

HISTORICAL BACKGROUND

The Expert Testimony

Before turning to the case law on the subject of expert testimony on eyewitness identifications, a brief overview of the experts' qualifications and the substance of their testimony is necessary. The experts typically hold doctoral degrees in psychology and are experts in the fields of human perception, memory and recall. They are sometimes referred to as cognitive psychologists. In all the cases reviewed, the prosecution did not challenge the *qualifications* of the expert. That is, the prosecution typically concedes that the proffered witness is an expert in the field of perception and memory but argues that the subject matter is not a proper one for expert testimony.

Not coincidentally, defendants' efforts to present the expert testimony to the trier of fact have been accompanied by a growing body of professional literature on the subjects of human perception and memory, and the unreliability of eyewitness identifications.[15] Basically, the psy-

14. On remand, the trial court conducted the required evidentiary hearing. The court carefully followed the Third Circuit's guidelines and concluded that the proffered testimony should not be admitted. Therefore, in accord with the appellate court's instructions, the trial court reinstated the judgment of conviction and affirmed the court's prior sentence of defendant. United States v. Downing, 609 F. Supp. 784 (E.D. Pa.), *aff'd mem.*, 780 F.2d 1017 (3d Cir. 1985).

15. The acknowledged leader in the field, Dr. Elizabeth Loftus, estimates that over 85% of the published literature on the psychology of eyewitness identification has surfaced since 1978, although the earliest research on the subject dates back to 1908. Wells & Loftus, *Eyewitness Research Then and Now*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 1, 3 (1984) [hereinafter PSYCHOLOGICAL PERSPECTIVES]. In addition to that book, the following works discuss the results of scientific research on the subject: STRATEGIES AND TACTICS, *supra* note 3; E. LOFTUS, EYEWITNESS TESTIMONY (1979); THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (S. Kassin & L. Wrightsman eds. 1985); N. SOBEL, *supra* note 5. *See also* Note, *Did Your Eyes Deceive You?*

chologists and lawyers who advocate the use of this expert testimony at trial advance two main points: first, that jurors give eyewitness testimony undue weight, even in the face of substantial evidence discrediting that testimony,[16] and second, that experts can present to the jury factors bearing on eyewitness identification which "may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most."[17]

Some of the factors which, according to psychological tests and research, affect human perception and memory are the following: (1) the "forgetting curve," which indicates that forgetting occurs rapidly and then tends to level out and that therefore immediate identification is much more trustworthy than delayed identification; (2) "unconscious transfer," which occurs when the witness confuses a person seen in one situation with a person seen in a different situation; (3) "post-event information," which occurs when a witness talks to others about the incident, and then incorporates new information into his reconstruction of the incident; (4) the effects of stress upon perception: some psychologists maintain that, contrary to what most laymen believe, stress causes inaccuracy of perception; (5) contrary to laymen's intuitive beliefs, some studies indicate that there is no relationship between an eyewitness's confidence in his identification and the accuracy of that identification; and (6) the "own-race effect," which indicates that persons of one race have

Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 STAN. L. REV. 969, 1005-30 (1977).

It should be noted that not all psychologists active in this field advocate the use of expert testimony at trial. The principal critics of the approach taken by Dr. Loftus and others are Drs. Egeth and McCloskey. *See* Egeth & McCloskey, *Expert Testimony About Eyewitness Behavior: Is It Safe and Effective?*, in PSYCHOLOGICAL PERSPECTIVES, *supra*, at 283. These two psychologists maintain that insufficient research has been conducted to conclude that expert psychological testimony would improve jurors' ability to evaluate eyewitness testimony, and that it is possible that the testimony would have detrimental effects. *Id.* at 301. In People v. McDonald, 37 Cal. 3d 351, 369 n.15, 690 P.2d 709, 721 n.15, 208 Cal. Rptr. 236, 248 n.15 (1984), the California Supreme Court characterized the view of Egeth and McCloskey as a minority view within the psychological community.

16. As one court recently expressed it, "because eyewitness testimony is such powerful stuff and can decide a case on its own strength, it can blind a jury to other exculpatory evidence or inferences." Kampshoff v. Smith, 698 F.2d 581, 587 (2d Cir. 1983). In *Kampshoff*, the court held that the erroneous admission of certain eyewitness testimony was reversible error. (It was conceded that the identification testimony had been unconstitutionally obtained.) The eyewitness was twelve years old at the time of the crime and had seen the offender from a distance of about 130 feet. It was clear from the circumstances that the eyewitness's identification was actually based on two television broadcasts in which defendant's picture was televised as that of a suspect in the crime; the police had asked the eyewitness to view those broadcasts. The court rejected the argument that the admission of this testimony was harmless error because it merely corroborated the testimony of an accomplice, noting that "eyewitness testimony is among the most influential, even as it is among the least reliable, forms of proof." *Id.*

17. People v. McDonald, 37 Cal. 3d 351, 368, 690 P.2d 709, 720, 208 Cal. Rptr. 236, 247 (1984).

difficulty accurately identifying persons of another race.[18]

The proffered expert would not render an opinion that a particular eyewitness's testimony is unreliable. Rather, the expert would present to the jury scientific data on one or more of the factors outlined above. The goal is to provide the jurors with information which may assist them in evaluating a witness's testimony.[19]

The Federal Rules of Evidence and "Novel" Scientific Evidence

Article VII of the Federal Rules of Evidence[20] addresses the admissibility of opinions and expert testimony.[21] Rule 702 and the Advisory Committee's Note[22] make it clear that the test for admissibility of expert testimony is whether that testimony will assist the trier of fact. Even before the enactment of the Federal Rules of Evidence, helpfulness to the trier of fact was seen as an essential condition of admissibility.[23] In addressing the admissibility of expert testimony, courts often note that the guiding principle is the question posed by Wigmore: "On *this subject* can a jury from *this person* receive appreciable help?"[24] In addition, Rule 704 provides: "Testimony 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."[25] Rule 704 thus abolished the so-called

18. For more detailed explanations of these factors, see PSYCHOLOGICAL PERSPECTIVES, *supra* note 15. A concise list of these and other factors, including references to the relevant psychological studies, is found in Greene, Schooler & Loftus, *Expert Psychological Testimony*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 201, 204-20 (1985). *See also* Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) for a thorough discussion of the "own-race effect." For convenience, expert testimony of psychologists on the unreliability of eyewitness identification is referred to herein as expert psychological testimony.

19. *See* People v. McDonald, 37 Cal. 3d 351, 362, 690 P.2d 709, 716, 208 Cal. Rptr. 236, 243 (1984).

20. FED. R. EVID. 701-706.

21. Many states have enacted evidence rules identical or substantially similar to the Federal Rules of Evidence. The multi-volume treatise by Judge Weinstein and Professor Berger presents an exhaustive survey of the case law under each Federal Rule of Evidence and under the states' counterparts to the Federal Rules. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1985). The two principal state court decisions to be discussed herein are State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) and People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). Arizona has adopted Federal Rule of Evidence 702 verbatim; the counterpart rule in California is substantially the same as Federal Rule 702.

22. *See supra* note 11.

23. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[01], at 702-7 (1985) (citations omitted).

24. 7 WIGMORE, EVIDENCE § 1923 (Chadbourn rev. 1978) (emphasis in original). *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) ("general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony").

25. FED. R. EVID. 704. The Advisory Committee's Note to the Rule gives the following as examples of ultimate issues: intoxication, speed, handwriting, and value. The Advisory Committee Note further states:

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions.

ultimate issue rule, which barred opinion testimony on an ultimate issue to be decided by the jury.

There is no disagreement that the test governing the admissibility of expert testimony is whether that testimony will assist the trier of fact. However, special problems arise when a party seeks to introduce so-called novel scientific evidence, such as expert psychological testimony, because the Federal Rules are silent on novel scientific evidence.[26] Prior to the adoption of the Federal Rules, many courts used the test set forth in *Frye v. United States*.[27] Under the *Frye* test, the underlying scientific principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[28]

There is considerable debate over whether the *Frye* "general acceptance test" survived (or should survive) the enactment of the Federal Rules. As the *Downing* court observed, because the *Frye* test was the dominant view among the federal courts at the time the Rules were drafted, "one might expect that the rules themselves would make some pronouncement about the continuing vitality of the [*Frye*] standard."[29] However, neither the text of the Rules nor the accompanying notes set forth a standard for determining the admissibility of novel scientific evidence. Commentators agree that this legislative silence is significant, but they disagree about its meaning.[30] A number of the circuit courts of appeals have rejected the *Frye* standard since the enactment of the Federal

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

FED. R. EVID. 704 advisory committee's note, *reprinted in* FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Rule 704, at 95 (West 1984).

26. The underlying scientific principle of some scientific evidence—for example, fingerprint and x-ray evidence—is so well-established that the evidence is readily admissible, provided the witness who is to testify qualifies as an expert. *See* United States v. Downing, 753 F.2d 1224, 1234 (3d Cir. 1985). Examples of novel scientific evidence include evidence on the rape trauma syndrome, the battered woman syndrome, and voice identification. *See generally* Greene, Schooler, & Loftus, *Expert Psychological Testimony*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 201 (1985) (discussing the rape trauma and battered woman syndromes, as well as eyewitness identifications).

27. 293 F. 1013 (D.C. Cir. 1923).

28. *Id.* at 1014. The defendant in *Frye* sought to introduce test results from a machine that was an early version of the modern polygraph. The court excluded the evidence under its newly announced standard, and the defendant was convicted. He was subsequently pardoned when someone else confessed to the crime. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1204 n.42 (1980).

29. 753 F.2d at 1234.

30. One group of commentators interprets the legislative silence as an implicit adoption of the *Frye* test. *See, e.g.*, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 452 (3d ed. 1982) ("It would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence as lie detectors without explicitly stating so."). Other commentators have reached the opposite conclusion. *See, e.g.*, 3 J. WEINSTEIN & M. BER-

Rules of Evidence, but an apparently equal number of circuits continue to adhere to it or to a variation of it.[31] Some courts have rejected the use of expert testimony on eyewitness identification on the ground that it fails to meet the *Frye* test.[32] Generally, jurisdictions which follow *Frye* find that such expert testimony is not based on a generally accepted explanatory theory, although one court which does follow *Frye* appeared to reach the opposite conclusion.[33]

Whether a jurisdiction follows the *Frye* test or some other standard appears to be of less significance in a court's determination to admit or exclude expert testimony on eyewitness identification than formerly. One commentator, after reviewing the four recent decisions approving the admission of such expert testimony,[34] observed that "[i]t begins to appear that arguments over the admission of eyewitness expert testimony may now begin to focus not on the scientific worth of the testimony in general but on its probative force and its prejudicial effect in each case."[35]

The Case Law Prior to Downing

Criminal defendants, particularly in cases where the primary evidence against them is eyewitness testimony, have in recent years increasingly urged trial courts to permit the introduction of expert testimony on the unreliability of eyewitness identifications. Trial courts *have* admitted

GER, WEINSTEIN'S EVIDENCE ¶ 702[03], at 702-16 (1985) ("The silence of [Rule 702] and its drafters should be regarded as tantamount to an abandonment of the general acceptance standard.").

For an excellent analysis of the *Frye* test, including the problems with it, its advantages, and proposed solutions, see Giannelli, *supra* note 28. *See also* Note, *supra* note 3, at 1021-23 (author criticizes the *Frye* test, noting that "courts have applied it quite selectively, if somewhat inconsistently due to difficulties in distinguishing scientific evidence from other expert testimony, in deciding to which particular field of science the evidence belongs and in determining a standard for 'general acceptance.' " *Id.* at 1022. [Footnotes omitted]).

31. See the decisions catalogued in 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03] nn. 7-8. Because the courts vary in their formulations of the applicable test, it is not possible to arrive at an exact number of which circuits accept or reject the *Frye* test.

32. *See, e.g.*, United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (affirmed the exclusion of expert testimony on the difficulty of cross-racial identifications because the scientific field was inadequately developed).

33. In United States v. Smith, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984), the court held that even if it were error to exclude expert testimony on eyewitness identification, such error was harmless. The court remarked that "[t]he day may have arrived . . . when [the expert's] testimony can be said to conform to a generally accepted explanatory theory." *Id.* at 1107.

34. United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); United States v. Smith, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); People v. McDonald, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). For the holdings of the latter three decisions, see *supra* note 10.

35. N. SOBEL, *supra* note 5, § 9.6(b), at 9-30.2. *See also* Note, *supra* note 3, at 1022 ("In fact, recent cases on expert testimony seem to ignore the *Frye* test altogether and to apply only the requirements of proper subject matter and qualified expert." [Footnotes omitted]).

such testimony in a number of cases.[36] Thus, the virtual unanimity of appellate court decisions affirming the exclusion of expert psychological testimony is somewhat misleading, since it suggests that the holding of *Downing* and the few decisions like it represent a truly unprecedented position, which is simply not the case. Nevertheless, it is true that until 1983, when *State v. Chapple*[37] was decided, no reviewing court, state or federal, had reversed the trial court's exclusion of proffered expert testimony.

Several interrelated reasons have been given by appellate courts in holding that the exclusion of expert testimony was not reversible error. The primary rationale appears to be that the subject of the opinion offered is not beyond the knowledge and experience of the average juror.[38] Thus, the expert testimony would invade the province of the jury. The invasion of the province of the jury rationale is based upon the premise that it is solely the province of the trier of fact to determine the eyewitness's credibility and his ability to perceive and recall.[39]

Other reasons courts have given for excluding the testimony are that it would not assist the jury in determining the issue of identification; that the jury is capable of assessing reliability, given the help of cross-examination and cautionary instructions, without the aid of expert testimony; that the expert testimony may be unfairly prejudicial because of its aura of reliability; and that the testimony's probative value is outweighed by its potential for prejudice.[40] As noted above, some courts rely on the *Frye* test to exclude the evidence.[41] Finally (and predictably enough), the "floodgates" argument and the prospect of a "battle of the experts" in every criminal trial have been given as grounds for affirming the exclu-

36. A few reported appellate court decisions note that the defendant's expert was permitted to testify at trial. United States v. Booth, 669 F.2d 1231, 1240 (9th Cir. 1981); People v. Brown, 110 Ill. App. 3d 1125, 1129, 443 N.E.2d 665, 668 (1982). *See also* State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981), where the court noted that in the case before it, when the expert testimony of Dr. Elizabeth Loftus was proffered by the defense, her affidavit stated that she had personally been allowed to testify before judges and juries in more than thirty-four cases in various states. Her affidavit also stated that another expert, Dr. Robert Buckhout, had been permitted to testify in more than twenty state court trials on the subject.

37. 135 Ariz. 281, 660 P.2d 1208 (1983).

38. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973).

39. *See, e.g.*, United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975). *Cf.* People v. Johnson, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974), *overruled by* People v. McDonald, 37 Cal. 3d 351, 370-71, 690 P.2d 709, 722, 208 Cal. Rptr. 236, 249 (1984) (the court in *McDonald* expressly rejected the *Johnson* court's invading-the-province-of-the-jury rationale for the exclusion of expert testimony on eyewitness identification).

40. *See, e.g.*, United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

41. *See supra* note 32.

sion of the expert testimony.[42]

State v. Chapple [43] was the first decision at the appellate level to hold that the trial court had abused its discretion in refusing to admit the testimony of an expert on eyewitness identification. *Chapple* involved three drug-related murders; the two eyewitnesses who testified for the State had been involved in the drug transaction and at the time had reason to fear that they would be victims as well. The eyewitness testimony was the only evidence offered against the defendant. The first time the eyewitnesses identified the defendant from a photograph was a year after the crime, although they had been shown the defendant's photograph several times previously.

The Supreme Court of Arizona reversed the conviction and remanded. The court stated that it could not assume that the average juror would be aware of the factors about which the expert was qualified to testify.[44] Thus, the court held that under the helpfulness test of Rule 702, the proffered evidence was a proper subject for expert testimony and should have been admitted in this case.[45] However, the court attempted to limit its holding to the "peculiar facts" of the case, which included the considerable stress on the eyewitnesses at the time of the crime, the length of time that had elapsed between the crime and the photographic identifications and the possibility that the perception of the eyewitnesses was impaired due to their use of drugs on the day of the crime. The court emphasized that in the "usual case" (which it did not define), the rule would continue to be that the supreme court would support the trial court's discretionary ruling on the admissibility of expert psychological testimony.[46]

Similarly, in 1984, the California Supreme Court in *People v. McDonald*[47] reversed a criminal conviction, holding that the trial court abused its discretion in excluding defendant's proffered expert testimony

42. United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982) (admitting such testimony would "open the door to a barrage of marginally relevant psychological evidence").

43. 135 Ariz. 281, 660 P.2d 1208 (1983).

44. *Id.* at 294, 660 P.2d at 1221.

45. *Id.*

46. *Id.* at 297, 660 P.2d at 1224.

47. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984). The precise holding of the court is as follows:

> When an eyewitness identification of the defendant is a key element 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 to or understood by the jury, it will ordinarily be error to exclude that testimony.

Id. at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

on eyewitness identification. The defendant was convicted of murder and sentenced to death. The principal issue at trial was the identity of the offender; the State's case consisted solely of eyewitness testimony. The trial court, basing its decision on *People v. Johnson*,[48] concluded that to allow the expert to testify would be an invasion of the province of the jury.[49]

In a lengthy opinion, the California Supreme Court carefully analyzed each rationale articulated in *People v. Johnson*, and found each no longer persuasive in light of the scientific literature on the subject[50] and the standard for admissibility of expert testimony under the state's Evidence Code.[51] The court also emphasized that, in *McDonald*, identification was the crucial issue and the case was very close.[52]

In addition to Arizona and California, prior to *Downing*, two other jurisdictions had indicated that it may be an abuse of discretion to exclude expert psychological testimony.[53] Thus, at the time *Downing* was decided, a small minority of jurisdictions had rather abruptly departed from the previously unanimous view on this testimony. The Third Circuit in *Downing* was the first circuit court of appeals to squarely hold that the district court erred in its conclusion that expert psychological testimony is never admissible.

UNITED STATES V. DOWNING

FACTS OF THE CASE

Defendant John Downing was indicted for mail fraud, wire fraud,

48. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

49. People v. McDonald, 37 Cal. 3d 351, 362-63, 690 P.2d 709, 716, 208 Cal. Rptr. 236, 243 (1985). The trial court did not publish an opinion.

50. The court pointed to the proliferation of empirical studies on the subject, noting that in recent years at least five treatises discussing "literally scores of studies on the pitfalls of [eyewitness] identification" have been published. The court concluded that "[t]he consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." *Id.* at 365-66, 690 P.2d at 718, 208 Cal. Rptr. at 245.

51. CAL. EVID. CODE § 801(a) limits expert opinion testimony to subjects "*sufficiently* beyond common experience *that the opinion of an expert would assist the trier of facts.*" (Italics added by the *McDonald* court.) According to the court, the statute does not flatly limit expert testimony to subjects "beyond common experience." Rather, the italicized portions of the statute show that admissibility is a question of degree, and the "jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission." 37 Cal. 3d at 367, 690 P.2d at 720, 208 Cal. Rptr. at 247.

52. At trial, the prosecution presented seven eyewitnesses who identified defendant as the offender with varying degrees of certainty, and one eyewitness who categorically testified that defendant was not the offender. The defense presented six alibi witnesses, two of whom were unrelated to the defendant. The defendant also introduced into evidence letters and a telephone bill tending to show that he was in another state on the day of the crime.

53. United States v. Smith, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984) (discussed *supra* note 10); State v. Contreras, 674 P.2d 792, 822 (Alaska Ct. App. 1983) (dictum), *rev'd on other grounds*, 718 P.2d 129 (Alaska 1986).

and interstate transportation of stolen property. All counts of the indictment arose from a scheme to defraud numerous vendors by a group of individuals calling themselves the Universal League of Clergy (U.L.C.). U.L.C. sent representatives, identifying themselves as U.L.C. clergy, to national trade shows where they expressed interest in the product lines of various manufacturers. When a vendor took an order for his product, the U.L.C. representative would provide the vendor with a list of nonexistent credit references. U.L.C. established mail drops where it collected inquiries sent by the credit departments of the manufacturers. U.L.C. itself then provided positive credit reports to the manufacturers, who then shipped the goods to U.L.C. on credit. U.L.C. disposed of the goods without making payment to the manufacturers. One of the U.L.C. representatives involved in these transactions identified himself as Reverend Claymore.[54]

The government's case against Downing consisted primarily of the testimony of twelve eyewitnesses who, with varying degrees of confidence, testified that the defendant was the man they knew as Reverend Claymore. Those witnesses personally observed Claymore for periods ranging from five to forty-five minutes during the course of business dealings that later were discovered to be fraudulent. Downing contended that he was not Reverend Claymore and that the eyewitnesses were mistaken.[55]

The defense proffered the testimony of a psychologist on the unreliability of eyewitness identification. After a brief on-the-record discussion, the district court denied the motion to permit the expert to testify on the ground that it is the function of the jury to determine the credibility of witnesses.[56] Defendant was convicted and he appealed, asserting that the district court's exclusion of his expert's testimony was erroneous and harmful within the meaning of Federal Rule of Evidence 103(a).[57]

REASONING OF THE COURT

The Third Circuit formulated the issue presented by the appeal as follows: "whether Fed. R. Evid. 702 permits a defendant in a criminal prosecution to adduce, from an expert in the field of human perception and memory, testimony concerning the reliability of eyewitness identifi-

54. *Downing*, 753 F.2d at 1227.

55. *Id.*

56. *Id.* at 1228.

57. FED. R. EVID. 103(a) provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."

cations."[58] The court answered yes, and further held that the admission of such testimony is not automatic but conditional.[59] The court essentially conducted a two-part inquiry. First, it addressed the question of whether Rule 702 ever permits the introduction of expert psychological testimony.[60] Second, the court addressed the question of when such testimony is admissible, *i.e.*, the "conditions" under which a district court should admit the testimony.[61] Under this second inquiry, the court fashioned its standard for evaluating novel scientific evidence, including expert psychological testimony.[62] These two inquiries are considered separately below.

The "Helpfulness" Standard of Rule 702

The court began its analysis by examining the reason the district court gave for excluding the testimony—namely, that credibility is a question for the jury. Although the district court did not discuss Rule 702, the appellate court thought that the court's ruling excluding the testimony was based on an erroneous interpretation of Rule 702. According to the appellate court, the district court in effect concluded that expert testimony on eyewitness identifications is never admissible in federal court "because such testimony concerns a matter of common experience that the jury is itself presumed to possess."[63] Under that interpretation, expert psychological testimony can never meet Rule 702's test for the admissibility of expert testimony.[64]

The Third Circuit rejected the foregoing interpretation, pointing to the fact that Rule 702 favors the admissibility of relevant expert testimony.[65] Despite this policy of liberal admissibility, the court noted that several circuit courts of appeals have upheld the exclusion of expert psychological testimony.[66] The court doubted whether the conclusion

58. *Downing*, 753 F.2d at 1226.
59. *Id.*
60. *Id.* at 1228-32.
61. *Id.* at 1232-43.
62. *Id.* at 1237.
63. *Id.* at 1229.
64. *Id.*
65. The court relied on the Advisory Committee's Note to Rule 702, *supra* note 11, and on case law, including *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 279 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986). It is generally agreed that the Rules on expert testimony favor admissibility. *See, e.g.*, 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[0], at 702-14 (1985) ("Because of the Federal Rules' emphasis on liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility. . . .").
66. *Downing*, 753 F.2d at 1229-30. *See supra* note 8 for recent decisions upholding the exclusion of the expert testimony at issue.

reached by those courts "is consistent with the liberal standard of admissibility mandated by Rule 702."[67] Instead, it found persuasive the decisions in *State v. Chapple*,[68] *United States v. Smith*,[69] and *People v. McDonald*,[70] which the court in *Downing* discussed rather briefly. The court agreed with jurisdictions holding that expert psychologists can explain to the jury factors affecting perception and memory which the average juror does not necessarily understand.[71] Thus, expert psychological testimony can assist the jury in reaching a correct decision, and therefore it may meet the helpfulness test of Rule 702.[72]

Finally, the court acknowledged the judicial resistance to expert psychological testimony, due to its novelty and the fear of trial delay. However, the court concluded, "[t]he logic of Fed. R. Evid. 702 is inexorable, . . . and requires, as the *Smith*, *Chapple*, and *McDonald* courts recognized, that expert testimony on eyewitness perception and memory be admitted at least in some circumstances."[73]

The Standard for Evaluating Novel Scientific Evidence

The court then turned to the second part of its analysis, comprising the bulk of its opinion, in which it set forth its standard for evaluating novel scientific evidence.

First, the court discussed the evidentiary problems posed by novel forms of scientific expertise and analyzed the *Frye*[74] test, which attempts to deal with those problems. The court noted that courts and commentators are divided over the issue of the foundational requirements for the admission of scientific testimony.[75] After describing the two opposing views on whether the *Frye* test survived the enactment of the Federal Rules of Evidence,[76] the court concluded that the Rules neither incorpo-

67. *Downing*, 753 F.2d at 1230.

68. 135 Ariz. 281, 660 P.2d 1208 (1983).

69. 736 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

70. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

71. The court gave as an example the situation in *Chapple*, where the two eyewitnesses viewed the murders under the belief that they might soon become victims as well. Most people probably believe that stress increases the accuracy of one's perception; eyewitnesses, and particularly victims, frequently testify to the effect that "I will never forget that person's face." However, studies indicate that the exact opposite is true. Thus, the court in *Downing* noted, the effect of stress on the eyewitnesses in *Chapple* was certainly relevant to an evaluation of the reliability of their identifications, and the expert's testimony, if reliable, would have assisted the jury. *Downing*, 753 F.2d at 1231-32.

72. *Id.* at 1232.

73. *Id.*

74. United States v. Frye, 293 F. 1013 (D.C. Cir. 1923). *See supra* notes 27-35 and accompanying text for a discussion of the *Frye* test.

75. *Downing*, 753 F.2d at 1232.

76. Those two views are set forth *supra* note 30.

rated nor repudiated the test.[77] The court then analyzed the *Frye* test. It noted that critics of the test have cited two general problems with it: its vagueness[78] and its conservatism.[79] Ultimately, the court squarely rejected the *Frye* test "as an independent controlling standard of admissibility"[80] because of those two problems. Instead, according to the Third Circuit, a particular degree of acceptance of a scientific technique within the scientific community is simply one factor that a district court should consider in deciding whether to admit evidence based upon the technique.[81]

The court then fashioned its alternative standard, derived from the helpfulness standard of Rule 702. According to the court, its standard is consistent with the language and spirit of the Federal Rules and has the advantage of flexibility.[82] Under the Third Circuit's standard, the district court should conduct a preliminary inquiry on the admissibility of novel scientific evidence. This inquiry should focus on the following three factors.

The first factor is the soundness and reliability of the process or technique used in generating the evidence. The court noted that a number of recent cases have focused on reliability of the evidence as a critical element of admissibility.[83] The court emphasized that in contrast to what it called the "nose-counting" approach required by the *Frye* standard, the reliability inquiry envisioned by the court is flexible and may turn on a number of considerations.[84]

The second factor is the possibility that admitting the evidence would overwhelm or mislead the jury. Thus, after assessing the reliabil-

77. *Downing*, 753 F.2d at 1235.

78. The court, primarily relying on Professor Giannelli's article (*supra* note 28), discussed the vagueness criticism. The vague terms of the test have allowed courts to manipulate the parameters of the relevant "scientific community" and the level of agreement needed for "general acceptance," leading to inconsistent results. *Downing*, 753 F.2d at 1236.

79. For example, one commentator maintains that jurisdictions following *Frye* will always lag behind advances in science. Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 265 (1984), *cited in Downing*, 753 F.2d at 1237.

80. *Downing*, 753 F.2d at 1237.

81. *Id.*

82. *Id.*

83. *Id.* at 1238. Among the cases cited by the court is State v. Kersting, 50 Or. App. 461, 623 P.2d 1095, 1101 (1981) (novel scientific evidence may be admitted if there is credible evidence from which the trial judge may make a determination that the technique is reasonably reliable), *aff'd*, 292 Or. 350, 638 P.2d 1145 (1982).

84. *Downing*, 753 F.2d at 1238. The court referred to a list of such considerations compiled by Judge Weinstein and Professor Berger which may guide the district court in its determination of the reliability of evidence. These considerations include the following: (1) the relationship of the new technique to more established modes of scientific analysis; (2) the existence of a specialized literature on the subject; and (3) the frequency with which a technique leads to erroneous results. *Id.* at 1238-39 (citing 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03], at 702-18 to -20).

ity of the evidence, the district court must then balance that assessment against the danger that the evidence, though reliable, might confuse or mislead the jury.[85]

The third factor is the "fit," *i.e.*, "the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case."[86] The court explained the "fit" factor as ensuring that the proffered testimony is sufficiently tied to the facts so as to aid the jury in resolving a factual dispute.[87] Finally, the district court retains discretion under Federal Rule of Evidence 403 to exclude relevant evidence that would unduly waste time or confuse the issues.[88]

After setting forth the above standard, the Third Circuit expressly left for the trial court's determination whether or not the expert testimony should be admitted in *Downing* on remand. The appellate court did, however, make the following observations. It appeared to the court that the scientific basis for the expert testimony in question is sufficiently reliable to satisfy Rule 702.[89] The court cited the *McDonald* case, which had reviewed the professional literature on the subject and concluded that "the consistency of the results of these studies is impressive."[90] With respect to the factor described by the court as the "fit," on remand the defendant's offer of proof should establish the presence of factors which researchers have found impair the accuracy of eyewitness identifications.[91] The court pointed to both *McDonald* and *Chapple* which also required this connection between the expert testimony and the facts of the case.[92] Finally, while the balancing test of Rule 403 may justify exclusion in a given case, the court clearly rejected the notion that the prospect of a "battle of the experts" in every criminal case in itself justifies the exclusion of expert testimony on eyewitness identification.[93]

The court vacated the judgment of conviction and remanded. Because the crucial evidence against the defendant consisted solely of eye-

85. *Downing*, 753 F.2d at 1239-40.

86. *Id.* at 1237.

87. *Id.* at 1242.

88. *Id.* at 1242-43. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

89. *Downing*, 753 F.2d at 1241.

90. People v. McDonald, 37 Cal. 3d at 365, 690 P.2d at 718, 208 Cal. Rptr. at 245, *cited in Downing*, 753 F.2d at 1242.

91. For example, if the eyewitness and the defendant are of different races, that fact would be sufficiently tied to one of the psychological factors that has been found to affect the reliability of eyewitness identifications to satisfy the "fit" factor. *See Downing*, 753 F.2d at 1242.

92. *Id. See also supra* note 71.

93. 753 F.2d at 1243 n.27.

witness testimony, the district court's error in excluding the expert testimony could not be deemed harmless.[94]

ANALYSIS

The courts have long recognized the hazards of eyewitness identifications.[95] In fact, those who oppose the use of expert testimony on the subject point to that fact as support for their position: since "everybody knows" that witnesses can be mistaken, there is no need for an expert to testify to that phenomenon.[96] However, that position ignores three important considerations: (1) the fact that eyewitness testimony is so powerful that it can cause a jury to disregard other exculpatory evidence, a fact that has been noted by courts[97] and is supported by psychological research;[98] (2) the existence of numerous scientific studies that indicate that several factors affecting perception, memory and recall are not known to the average juror and in fact are contrary to commonly-held intuitive beliefs;[99] and (3) the obvious importance of what is at stake—the liberty and even life of the defendant on trial.

94. *Id.* at 1243-44. Judge Dumbauld concurred in the disposition of the case, inasmuch as the district court remained free on remand to exclude the evidence. He also agreed that there can be cases where the expert testimony at issue may be useful. But with respect to the case at bar, it seemed plain to him that any error was harmless. He contrasted the facts in *Downing*, where the eyewitnesses had spent five to forty-five minutes with "Reverend Claymore" during business transactions, with situations involving a momentary glance of a bank robber or a rape perpetrated under a ski mask. *Downing*, 753 F.2d at 1244 (Dumbauld, J., concurring).

It is indeed surprising that the Third Circuit chose to announce its new rule on the facts presented in *Downing*. A more compelling fact situation was presented to the Third Circuit in United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985). In that case, the eyewitness, a police officer, viewed the person whom he later identified at trial under the following circumstances. The police officer was pursuing a robbery suspect at speeds ranging from forty to seventy-five miles per hour. During the chase, the suspect shot at the officer several times; a fragment of one of the bullets pierced the officer's left shoulder. The officer's first identification of defendant Sebetich as the man who had fired at him during the chase was made a year and half after the incident. The government's case against Sebetich rested exclusively on the officer's identification.

The defendant sought to introduce the testimony of an expert who would have testified to the effects of stress and the lapse of time on the reliability of eyewitness identifications. The trial court excluded the testimony. (*Downing* was decided after Sebetich's trial.) On appeal, the Third Circuit vacated the judgment of conviction and remanded the case for a hearing to determine the admissibility of the expert testimony under the standard set forth in *Downing*. *Sebetich*, 776 F.2d 412, 415.

95. *See supra* notes 1-6 and accompanying text.

96. *See, e.g.*, the following statement by Irving Younger, *quoted in* Greene, Schooler, & Loftus, *Expert Psychological Testimony* in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 201, 201 (1985):

> Do you really think that the social scientists have discovered something new? Go home and ask your grandmother from Poland or your uncle from Armenia, who didn't get past third grade. Ask them and you'll have the answer. Grandmother will tell you, uncle will tell you, "Sure, perception is different, memories falter, speech fails, bias and prejudice must be allowed for, and liars exist."

97. *See supra* note 16.

98. *See* E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979).

99. *See supra* text accompanying note 18.

While the courts have articulated a number of reasons for excluding expert psychological testimony,[100] the primary rationales are that credibility is to be determined by the jury, that the subject matter is not beyond the knowledge and experience of the jury, and that the testimony would invade the province of the jury. Significantly, however, a review of the case law expressing the traditional view reveals, in the main, an uncritical acceptance of these rationales. The courts rarely analyze the issue; more often, they simply repeat the reasons that have been given by other courts and note that this is the uniform view among the circuits.[101] Of course, it is no longer a uniform view. The recent decisions which have reached the opposite conclusion have correctly inquired whether the judicial reluctance to admit such testimony remains justified.[102]

The major significance of the *Downing* decision is that it correctly recognized that expert psychological testimony is admissible under the helpfulness test of Rule 702. The *Downing* court properly focused its analysis on what would seem to be the obvious starting point: the Federal Rules of Evidence which address expert testimony. Surprisingly, most appellate court decisions representing the traditional view do *not* focus on the applicable Rules and their policy of liberal admissibility.[103]

In examining the Federal Rules and their legislative history, the *Downing* court first correctly noted that since Rule 704 abolished the "ultimate issue rule," expert psychological testimony cannot be deemed inadmissible on the ground that credibility is an ultimate issue.[104] More importantly, the court examined the district court's rationale that expert testimony on eyewitness identification is never admissible because it concerns a matter of common experience and therefore it can never meet Rule 702's test. In rejecting that rationale, the Third Circuit relied on the language of the Rule and the Advisory Committee's Note.[105] These sources could not be any clearer on the test for admissibility, nor on the fact that the Rule contemplates a broad construction and liberal admissibility.

The court also implicitly and correctly recognized that Rule 702

100. *See supra* notes 38-42 and accompanying text.

101. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

102. *See* People v. McDonald, 37 Cal. 3d 351, 365, 690 P.2d 709, 718, 208 Cal. Rptr. 236, 245 (1984).

103. This may be partially explained, however, by the fact that the standard of review on evidentiary rulings is the abuse of discretion standard, and thus appellate courts tend to defer to trial courts' determinations without conducting in-depth analyses. *See id.* at 365 n.10, 690 P.2d at 718 n.10, 208 Cal. Rptr. at 245 n.10.

104. *Downing*, 753 F.2d at 1229.

105. *See supra* note 11.

does not require that the subject matter of the testimony be *completely* outside the experience of the jury, when it quoted one of the leading treatises on evidence: "an expert can be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [though] not beyond ordinary understanding."[106] The court correctly concluded that the traditional view which rejects expert testimony on eyewitness identification is plainly inconsistent with the liberal standard of admisibility mandated by Rule 702.

Perhaps the biggest obstacle standing in the way of judicial acceptance of expert psychological testimony is the conclusory argument that such testimony would invade the province of the jury. The Third Circuit in *Downing* only briefly addressed this argument. However, the *McDonald* decision, whose rationale the *Downing* court followed, thoroughly analyzed that argument and demonstrated its fallibility. The argument is that to admit expert psychological testimony would take over the jury's task of determining credibility "—or, to put it in the more colorful language of legal cliché used by many courts, would 'invade the province' or 'usurp the function' of the jury."[107] The *McDonald* court agreed with Wigmore who said that such language "is so misleading, as well as unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric."[108]

As the *McDonald* court correctly stated, the invasion of the province of the jury rationale is unsound for the following reasons. First, expert psychological testimony does *not* seek to take over the jury's function of judging credibility: it does not tell the jury that any particular witness is or is not accurate in his identification. Rather, the expert informs the jury of certain factors that may affect such an identification.[109] Second, the expert testimony could not in fact usurp the jury's function. As is true with all expert testimony, the jury remains free to reject it entirely.[110] Finally, California, like the Federal Rules, has abolished the "ultimate issue rule."[111] The Advisory Committee's Note to Rule 704 is

106. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 451 (3d ed. 1982), *quoted in Downing*, 753 F.2d at 1229. *Accord* People v. McDonald, 37 Cal. 3d at 367, 690 P.2d at 720, 280 Cal. Rptr. at 247 (admissibility is a question of degree; the jury need not be wholly ignorant of the subject for the testimony to be admissible).

107. 37 Cal. 3d at 370, 690 P.2d at 722, 208 Cal. Rptr. at 249.

108. 7 WIGMORE, EVIDENCE § 1920 (Chadbourn rev. 1978), *quoted in McDonald*, 37 Cal. 3d at 370, 690 P.2d at 722, 208 Cal. Rptr. at 249. *See also* P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 213 (1965) ("the objection based upon the 'province of the jury' is no more than a shibboleth which, if accepted, would deprive the jury of important information useful or perhaps necessary for a proper decision on a difficult issue").

109. *McDonald*, 37 Cal. 3d at 370-71, 690 P.2d at 722, 208 Cal. Rptr. at 248.

110. *Id.*

111. *Id.* at 371, 690 P.2d at 723, 208 Cal. Rptr. at 250.

instructive on this point. It states that the helpfulness standards of Rule 702, and Rule 403, "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach." Expert psychological testimony certainly does not tell the jury what result to reach, but rather provides it with information that may be useful in deciding the issue of identification.

The *Downing* court, after holding that Rule 702 permits the introduction of expert testimony on eyewitness identification, fashioned its standard for evaluating all types of novel scientific evidence. In this respect, the Third Circuit went beyond *Chapple* and *McDonald*, which only addressed the narrow issue of whether expert psychological testimony should have been admitted in the particular case. At the same time, it is curious that the Third Circuit, although "persuaded by" the approach in those two cases, did not, unlike those cases, determine that the expert testimony at issue is reliable enough to be admissible. Instead, the district court is free to determine the reliability of expert psychological testimony in each case. The Third Circuit did not explain why it took this approach, except to say that the record before it was inadequately developed.

Adjudication on a case by case basis obviously is not unusual; however, a case by case approach is usually taken where the *fact* patterns are likely to be quite varied. It would seem that the reliability of the evidence in question, *i.e.*, the factors affecting perception, memory, and recall, is not going to change significantly from case to case. A possible result of the Third Circuit's approach is inconsistent rulings by the district courts on the reliability of identical testimony.

On the other hand, it may be that some of the factors on which an expert proposes to testify have been the subject of more research and hence are possibly more reliable than other factors. For example, it appears that the "own-race effect" factor has been studied more extensively than some of the other factors.[112] Since obviously there is no "track record" yet, under the approach taken either by the *McDonald* court or the *Downing* court, it is difficult to predict which approach will prove to be the better one. Additionally, because the *Downing* court placed heavy emphasis on tying the facts of the case to the specific factors on which the

112. *See* Johnson, *supra* note 7, for a comprehensive review of scientific studies on the own-race effect. The author suggests that testimony on this factor is more reliable than testimony on other factors, such as the feedback factor, because the own-race effect has been studied more extensively. She concludes that "[u]nlike expert testimony on many other sources of identification error, testimony concerning the own-race effect so clearly meets evidentiary standards that permitting trial court discretion to determine its admissibility is unjustified." *Id.* at 986.

expert will testify, the differing approaches taken by the *McDonald* and *Downing* courts may not be so divergent as they seem.

In any event, the major significance of *Downing* is that it removed the largest obstacle to the admission of expert psychological testimony by holding that such testimony *may* assist the jury and thus is admissible under Rule 702. The impact of the *Downing* decision may be less than it at first appears, since the experts themselves disagree over whether such testimony should be admitted.[113] Nevertheless, the decision is another "chink in the armor" of judicial hostility toward expert psychological testimony and is commendable for a number of reasons.

First, and perhaps most importantly, *Downing* focuses on a *legal* analysis and reexamines (and exposes the fallacies of) the reasons commonly advanced for the previously unanimous view on the issue. In accord with this focus, it properly relegates to a footnote what may be the *real* reason for the majority view: courts do not want to be bothered with such testimony. The court acknowledged the concerns that every criminal case would be turned into a "battle of the experts" and of the prospect of a new "cottage industry" of psychological experts. The court responded: "We are sympathetic to these concerns but are not moved by the legal point . . . if the testimony is highly probative and meets the conditions set forth above . . . the parties are entitled to present it, whether or not it adds to the length of the trial. . . ."[114]

The court's response is entirely correct. Adequate measures exist to ensure that some courts' dire predictions will not come to pass. The trial court is required, under the court's standard, to balance the reliability of the testimony against any danger of misleading the jury, *and* it retains discretion under Rule 403 to exclude it entirely, or to limit the number of experts and the length of their testimony. Moreover, the "floodgates" argument overlooks the fact that courts have traditionally been reluctant

113. As noted *supra* note 15, Drs. McCloskey and Egeth maintain that expert psychological testimony should not be presented to the trier of fact. *See* Egeth & McCloskey, *Expert Testimony About Eyewitness Behavior: Is It Safe and Effective?*, in PSYCHOLOGICAL PERSPECTIVES, *supra* note 15, at 283. Rebuttal arguments from the "Loftus group" are found in Greene, Schooler, & Loftus, *Expert Psychological Testimony*, in THE PSYCHOLOGY OF EVIDENCE & TRIAL PROCEDURE 200, 212-22 (1985).

The court in *McDonald* addressed the position taken by McCloskey & Egeth. The court said that it appears that the main complaint of those psychologists is not so much that the expert testimony "should never be admissible, as that it is too soon to admit it: additional research is needed." The court observed that "this is a frequent conclusion of academic authors . . . . appellate judges do not have the luxury of waiting until their colleagues in the sciences unanimously agree that on a particular issue no more research is necessary. Given the nature of the scientific endeavor, that day may never come." People v. McDonald, 37 Cal. 3d 351, 369 n.15, 690 P.2d 709, 721 n.15, 208 Cal. Rptr. 236, 248 n.15 (1984).

114. *Downing*, 753 F.2d at 1243 n.27.

to admit this testimony, and there is no reason to think this attitude will change overnight. In short, the *Downing* court has indeed "opened the door," but not the "floodgates."

Second, the court properly rejected the *Frye* test. As Professor Giannelli persuasively demonstrates,[115] that test has produced anomalous results and is simply unworkable. Third, the court's alternate standard for evaluating novel scientific evidence sets up a workable framework for trial courts without sacrificing flexibility. Novel scientific evidence does present unique problems, and the court struck a proper balance between the policy of the Federal Rules, favoring the admissibility of probative evidence, and the danger of admitting unreliable evidence. Finally, the decision reflects a healthy openness to new scientific evidence on an issue of critical importance to criminal defendants.

CONCLUSION

The *Downing* decision represents a significant departure from the formerly unanimous view that the exclusion of expert testimony on eyewitness identification is not an abuse of discretion. The Third Circuit joined a small minority of jurisdictions in holding that, under the helpfulness test of Federal Rule of Evidence 702, such expert testimony is admissible under certain circumstances. The court fashioned a flexible standard for evaluating novel scientific evidence which is consistent with the policies underlying the Federal Rules, properly rejecting the vague *Frye* standard.

The court did not determine whether expert psychological testimony is sufficiently reliable to be admissible, but rather left that determination to the trial court; it held only that Rule 702 is not a bar to admissibility. In that sense, the impact of the decision may be less than it at first appears, given the traditional judicial reluctance to admit the testimony. Nevertheless, the decision is significant in that it squarely rejects the notion that because credibility is an issue to be decided by the jury, expert testimony offered to aid the jury in evaluating eyewitness testimony is inadmissible. In holding that expert psychological testimony may assist the trier of fact, the Third Circuit has taken a significant step toward correcting the serious problem of mistaken identifications and wrongful convictions.

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115. Giannelli, *supra* note 28.