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Eyewitness Identification: Should Psychologists be Permitted to Address the Jury

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COMMENTS

EYEWITNESS IDENTIFICATION: SHOULD PSYCHOLOGISTS BE PERMITTED TO ADDRESS THE JURY?

I. INTRODUCTION

The unreliability of eyewitness testimony[1] is inconsistent with the criminal justice system's reliance upon it. Many dangers arise from inaccurate identification evidence; the most serious is that a conviction based on a mistaken identification is a gross miscarriage of justice.[2] The Supreme Court noted in *United States v. Wade*[3] that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identifica-

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[1] *See* Watkins v. Sowders, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting) (eyewitness identification notoriously unreliable); State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981) (cases of mistaken identificiation are not infrequent and the problem of misidentification has not been alleviated). *See also* United States v. Wade, 388 U.S. 218, 228 n.6 (1967). For extensive research in this area see E. LOFTUS, EYEWITNESS TESTIMONY (1979); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979). *See also generally* Brigham, *The Accuracy of Eyewitness Evidence: How do Attorneys See It?*, 55 FLA. B.J. 714 (1981); Brigham & Bothwell, *Ability of Perspective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983); Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23 (1974); Convis, *Testifying About Testimony: Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579 (1983); Loftus, *The Eyewitness on Trial*, 16 TRIAL 31 (1980); Loftus & Fishman, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOLOGY Rev. 87 (1978); Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications*, 64 J. APPLIED PSYCHOLOGY 440 (1979); Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identifications*, 29 STAN. L. REV. 969 (1977).

[2] *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). *See also* McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235 (1970) ("The vagaries of visual identification evidence have traditionally been of great concern to those involved in the administration of criminal law. It has been thought by many experts to present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." *Id.* at 238).

[3] 388 U.S. 218 (1967).

tion."[4] Injustices resulting from unreliable eyewitness testimony also harm those working in the criminal justice system and society as a whole.[5]

Although the dangers of eyewitness testimony are well documented,[6] the need for eyewitness identification testimony guarantees its continued legal acceptance. For example, eyewitness identifications in criminal prosecutions can lend certainty in cases that might otherwise depend upon weak circumstantial evidence.[7] Common sense tells us that witnesses do, on many occasions, correctly identify individuals. The importance and acceptance of eyewitness testimony, despite its shortcomings, is illustrated under the "one-witness" rule. "This rule, adhered to by a majority of jurisdictions in the United States, sustains a conviction upon the uncorroborated identification testimony of a single eyewitness."[8]

The United States Supreme Court, in recognition of the problems associated with the legal system's dependence upon eyewitness testimony, has attempted to identify and reduce causes of unreliable eyewitness testimony.[9] The Court's major concern has been to develop legal standards and remedies that would substantially reduce erroneous misidentification.[10]

Recently, however, psychologists have argued that the problems of eyewitness testimony have not been sufficiently controlled by courts or understood by jurors.[11] Reforms suggested to mitigate these problems include the admission of expert psychological testimony on the reliability of eyewitness identification.[12] This suggested reform is the subject of this Comment.

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4 *Id.* at 228.

5 Such miscarriages of justice are disastrous not only for defendants but also for those working in the criminal justice system, such as, for example, police, attorneys, and judges, who have invested a great deal of time and effort in an unproductive or inefficient direction. *See* Brigham, *supra* note 1, at 714.

6 *See, e.g.*, E. BORCHARD, CONVICTING THE INNOCENT (1932). Borchard described the erroneous criminal prosecution and conviction of 65 persons in 27 different states. *See also* Convis, *supra* note 1, at 585-87.

7 *See* Purcell, Manson v. Brathwaite: *Looking for the Silver Lining in the Area of Eyewitness Identifications*, 35 WASH. & LEE L. REV. 1079 (1978).

8 Comment, *Eyewitness Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1391-92 (1982). *See generally* 7 J. WIGMORE, EVIDENCE § 2034, at 343 (Chadbourne Rev. 1979). *See also* United States v. Telfaire, 469 F.2d 552, 554 (D.C. Cir. 1972) (Corroboration is required, however, for particular crimes, notably "sex" offenses, in which the urge to fantasize or motive to fabricate increases the risk of unjust conviction).

9 *See infra* notes 23-52 and accompanying text.

10 *See* Levine & Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U. PENN. L. REV. 1079 (1973).

11 *See generally* E. LOFTUS, *supra* note 1; Buckhout, *supra* note 1; Convis, *supra* note 1.

12 *See infra* notes 183-238 and accompanying text.

Whether psychological experts should be permitted to testify on factors affecting eyewitness testimony is unresolved. The traditional rule has been to exclude psychological testimony regarding the unreliability of eyewitness testimony.[13] The Arizona Supreme Court reached the opposite conclusion, however, in its January 11, 1983 decision in *State v. Chapple*,[14] and many criminal trial juries have been permitted to hear testimony from psychological experts in recent years.[15]

This Comment divides into four sections the examination of expert testimony on eyewitness identification. Section II will consider the present judicial protections governing the admission of eyewitness testimony. Section III will focus on the substance of the proposed psychological testimony and the current case law supporting and rejecting expert psychological testimony. In Section IV the question of whether expert psychological testimony should be admitted will be addressed and the unprecedented decision of *State v. Chapple*[16] will be analyzed. Finally, Section V will conclude that while the integration of psychological research into the legal system is valuable and necessary, eyewitness testimony is not a proper subject for expert testimony.

This conclusion is based on several premises. First, expert psychological testimony does not meet the present standards governing the admission of expert testimony. Second, additional research is needed before this reform is considered. Finally, unrecognized dangers associated with expert psychological testimony make this solution as potentially unjust as unreliable eyewitness testimony.

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[13] *See, e.g.*, United States v. Fosher, 590 F.2d 381, 383 (lst Cir. 1979); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976); Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977); State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980).

This Comment will henceforth use the phrase "expert psychological testimony" as a shortened version of "expert psychological testimony about eyewitness testimony." The above phrase will refer only to expert testimony about eyewitnesses and not to other types of expert psychological testimony.

[14] 135 Ariz. 281, 660 P.2d 1208 (1983).

[15] Psychologist Elizabeth Loftus has been permitted to testify in over 90 trials. Telephone interview with Elizabeth F. Loftus, a professor of psychology at the University of Washington and author of EYEWITNESS TESTIMONY, *supra* note 1 (Jan. 20, 1984). *See also* State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980) (there are trial courts around the country that, in criminal cases, have admitted testimony of experts on the subject of eyewitness testimony). For a list of cases in which Psychologist Dr. Robert Buckhout has testified, see Buckhout, *Nobody Likes a Smartass: Expert Testimony by Psychologists*, 3 SOC. ACTION & LAW 39, 43 n.13 (1976).

[16] 135 Ariz. 281, 660 P.2d 1208 (1983).

II. SUPREME COURT EFFORTS TO CONTROL THE UNRELIABILITY OF EYEWITNESS TESTIMONY

A. CONSTITUTIONAL PROTECTIONS

Traditionally, the public and the courts have not questioned the reliability of eyewitness testimony. Courts once ruled that all eyewitness identifications would be admissible at trial and allowed the defense to attack only the weight of the evidence.[17] Recently, however, research has indicated that the accuracy of eyewitness identification is questionable; as a result, courts now treat eyewitness testimony more cautiously. Under present law, eyewitness testimony is admissible provided that its reliability outweighs "the corrupting effect of the suggestive identification itself."[18]

One factor affecting the reliability of eyewitness testimony is the nature of pre-trial identification procedures.[19] The identification process used in the criminal justice system typically begins with a witness' description of the suspect.[20] Once a suspect is arrested and charged with a crime, the witness is asked to make either an in-person or a photo identification. During an in-person identification the witness may be asked to recognize the suspect from either a showup—the presentation of the suspect alone to the witness, or a lineup—the presentation to the witness of several people, including the suspect.[21]

Inherent in the identification process is a potential for injustice and mistaken identification.[22] In *United States v. Wade*,[23] the Supreme Court noted some of the dangers associated with identification procedures: (1) the manner in which the prosecution presents the suspect to witnesses for pre-trial identification may be overly suggestive;[24] (2) once a witness has picked out the accused at the

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17 *See* Stovall v. Denno, 388 U.S. 293, 299-300 (1967); *see also* Comment, *supra* note 8, at 1400 n.60 ("In general, courts view the post-admission problem as one of the weight and credibility to be assigned to the identification testimony. This is traditionally a function within the province of the jury, and courts, as a result, are reluctant to usurp any of the jury's functions.").

18 Manson v. Brathwaite, 432 U.S. 98, 114 (1976).

19 *See* United States v. Wade, 388 U.S. 218, 228-29 (1967) (" '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor . . . .' " *Id.* (quoting P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)). *See also* Starkman, *The Use of Eyewitness Identification Evidence in Criminal Trials*, 21 CRIM. L.Q. 361, 370 (1979).

20 *See* E. LOFTUS, *supra* note 1, at 180.

21 *Id.*

22 *See Wade*, 388 U.S. at 228.

23 388 U.S. 218 (1967).

24 *Id.* at 228.

lineup he is not likely to go back on his word later on;[25] and (3) it is difficult to reconstruct at trial what actually occurred during the procedure.[26] The likelihood of erroneous identification is further increased where a showup or single photo display of the suspect is involved.[27] Finally, a defendant who engages in plea bargaining following a pre-trial identification loses the protection of having that identification verified by cross-examination at trial.[28]

In response to a growing awareness that pre-trial procedures may cause identification inaccuracies, the Supreme Court in 1967 recognized two constitutional protections against unfair identification procedures.[29] These constitutional protections were designed to prevent mistaken convictions by minimizing the possibility of unfairness inherent in identification procedures.[30]

In *United States v. Wade*,[31] the first Supreme Court case reversing a conviction based on suggestive identification procedures, the Court guaranteed the sixth amendment right of counsel[32] to criminal defendants at any critical confrontation by the prosecution,[33] including lineups.[34] Under the exclusionary rule of *Wade*, identifications made in violation of the sixth amendment are per se inadmissible. The Court also held that an in-court identification made after the suggestive lineup was inadmissible,[35] unless there

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25 *Id.* at 229.

26 *Id.* at 230.

27 *See* Simmons v. United States, 390 U.S. 377, 383 (1968).

28 *See* E. LOFTUS, *supra* note 1, at 180.

29 *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967) (right to due process of law upheld in conduct of an identification confrontation); United States v. Wade, 388 U.S. 218, 237 (1967) (the sixth amendment right to counsel applies to criminal defendants at pre-trial hearings).

30 *See Stovall*, 388 U.S. at 297-98.

31 388 U.S. 218 (1967).

32 The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defense*." U.S. CONST. amend. VI (emphasis supplied). In *Wade* the Court held that the guarantee applied whenever necessary to assure a meaningful defense, i.e., at the "critical stages" of criminal proceedings. *Wade*, 388 U.S. at 224-25.

33 *Wade*, 388 U.S. at 224. The defendant, Wade, was convicted of robbing a bank on the basis of eyewitness testimony. Prior to trial, an FBI agent arranged a lineup including Wade without notifying Wade's attorney. Each person in the lineup was required to wear strips of tape on his face and to say certain words as the robber allegedly had done. The Fifth Circuit Court of Appeals reversed Wade's conviction on the grounds that holding a lineup without the accused's counsel violated his sixth amendment right. *Id.* at 221.

34 *Id.* at 237. The Court held that a lineup was a critical part of a criminal proceeding at which a suspect was entitled to the assistance of counsel. *Id.*

35 *Id.* at 239-40. The *Wade* exclusionary rule was applied to state prosecutions in Gilbert v. California, 388 U.S. 263 (1967), where the defendant was subjected to a suggestive lineup without the assistance of counsel.

was "clear and convincing evidence" showing that the identification had a basis independent of the pre-trial proceedings.[36]

The Court subsequently has required that certain conditions be met before the sixth amendment right to counsel applies to pre-trial identification procedures. The right to counsel now attaches only at or after the initiation of formal judicial criminal proceedings.[37] For example, there is no right to counsel at a display of photos or other reproductions, including one of the suspect to witnesses.[38] Lineups and showups, on the other hand, are critical stages in pre-trial proceedings because of the potential unfairness to the accused at that point.[39]

Counsel's presence during pre-trial identification proceedings is required to ensure fairness to the accused.[40] The requirement operates under two assumptions: (1) that the likelihood of an unacceptably suggestive identification is reduced when the suspect is assisted by counsel; and (2) that if impermissible conduct occurs at an identification lineup or showup, counsel will be able to effectively challenge the identification evidence at trial to prevent a conviction based on an unreliable identification.[41]

In *Stovall v. Denno*,[42] the Court recognized the constitutional right of due process of law in connection with pre-trial identification procedures. The suspect in *Stovall* was subjected to a showup in a hospital room before the sole eyewitness to the crime.[43] The Court

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[36] *Wade*, 388 U.S. at 240. The Court in *Wade* thus recognized that evidence free from the "illegal taint" of the pre-trial procedure should be presented to the trier of fact. The crux of the independent basis test is whether the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime, or whether he is merely remembering the person he picked out in a pre-trial identification. The Court enumerated criteria in *Wade* to determine whether the in-court identifications by witnesses who attended the illegal lineup were nevertheless admissible:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, a failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. at 241.

[37] Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). In *Kirby* the Court affirmed the Illinois Appellate Court finding that the per se exclusionary rule of *Wade* and *Gilbert* did not apply to pre-indictment confrontations.

[38] *See* United States v. Ash, 413 U.S. 300, 321 (1973).

[39] *Wade*, 388 U.S. at 237. A preliminary hearing at which the defendant is identified also is a critical state at which the right to counsel exists. *See* Moore v. Illinois, 434 U.S. 220, 231-32 (1977).

[40] *See Wade*, 388 U.S. at 237.

[41] *See Stovall*, 388 U.S. at 298.

[42] 388 U.S. 293 (1967).

[43] *Id.* at 295. The suspect in *Stovall* was handcuffed to a police officer and was re-

held that evidence obtained by an identification procedure that was "unnecessarily suggestive and conducive to irreparable mistaken identification" was inadmissible.[44] The use of such evidence would violate a defendant's right to due process of law.[45] The Court found that the showup procedure in *Stovall* was suggestive, but not unnecessarily so under the "totality of the circumstances."[46] In *Stovall*, the identification procedure was justified only because the police were unsure how long the witness would live. Because the Court in *Stovall* did not find a due process violation, the per se exclusionary rule did not apply. A similar result was reached in *Simmons v. United States*[47] where the Court held that a suggestive photographic identification procedure was not violative of due process given the factual circumstances of the case.[48]

After the decisions in *Stovall* and *Simmons* a suggestive identification procedure did not violate a defendant's due process rights as long as it could be justified by necessity.[49] Identification evidence was rarely inadmissible under this approach.[50] After *Stovall*, the

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quired to say words similar to those used by the assailant at trial. The witness testified at trial about the hospital identification and made an in-court identification. *Id.*

44 *Id.* at 302 (citing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966)).

45 *Stovall*, 388 U.S. at 302. The Court in *Stovall* first decided that the *Wade* and *Gilbert* right to counsel principles would not apply retroactively. The suspect's right to challenge the identification evidence, however, was upheld independent of any right to counsel claim.

46 *Id.* at 302. The Court condemned the use of the showup procedure but found that the need for immediate identification had made it imperative. The assault victim in *Stovall* was the sole eyewitness to the murder and could not attend the usual police station lineup. The Court found no due process violation in the conduct of the confrontation. *Id. See also* Purcell, *supra* note 7, at 1082 n.34.

47 390 U.S. 377 (1968).

48 The photographic identification in *Simmons* was held in connection with a bank robbery that had occurred the previous day. Witnesses were shown a series of photos, consisting mostly of group photographs where Simmons was prominently featured several times. The Court upheld the witnesses' in-court identifications on the grounds that the possible prejudice in the earlier identifications was unavoidable under the circumstances where a serious felony had been committed, and it was important for the FBI to determine whether to continue their search for the criminals. *Simmons*, 390 U.S. at 384-85.

49 Legal commentators have argued that the standards in *Stovall* and in *Simmons* are not the same. Justice Marshall, for example, in his dissent to Manson v. Brathwaite, 432 U.S. 98 (1977), stated that *Stovall* governed the introduction of evidence of a pre-trial out-of-court identification while Simmons pertained to possible due process violations in the introduction of in-court identifications that were "tainted" by improper pre-trial procedures. *Id.* at 120-21 (Marshall, J., dissenting). Furthermore, in *Simmons* the Court seemed to emphasize the reliable nature of the evidence obtained, rather than the suggestive nature of the procedure involved. *See* Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1109 n.82 (1974).

50 *But see* Foster v. California, 394 U.S. 440 (1969). In *Foster*, the one Supreme Court

Supreme Court considered another approach to the admission of eyewitness testimony in *Neil v. Biggers*.[51] In *Biggers*, the Court shifted its due process focus from the suggestiveness of the identification procedure itself to the likelihood of misidentification in the particular case.[52]

B. CURRENT STANDARDS GOVERNING ADMISSION OF EYEWITNESS TESTIMONY

The *Biggers* approach to the admission of eyewitness testimony balances the prosecution's need for reliable identification evidence against the defendant's right to be free from suggestive procedures causing misidentification. Thus, the scope of due process protection in the modern line of identification cases focuses on whether the identification is reliable.

In *Neil v. Biggers*,[53] the Supreme Court stated that it was the "likelihood of misidentification" that violates a defendant's right to due process.[54] *Biggers* involved a showup identification between a rape victim and a suspect held seven months after the incident.[55] The *Biggers* Court held that all the identification testimony, including in-court identifications and testimony as to out-of-court identifications, was admissible despite any claims of suggestive identification procedures[56] if the identification was shown to be reliable. Justice Powell, writing for the majority[57] in *Biggers*, outlined five factors that affect the reliability of an identification:

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case in which evidence was excluded under *Stovall*, the Court held that a series of confrontations between the witness and the suspect were so suggestive as to violate due process of law.

51 409 U.S. 188 (1972).

52 *Id.* at 199.

53 409 U.S. 188 (1972).

54 *Id.* at 198. The district court in *Biggers* held that a confrontation constituted a due process violation where it was "so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification." *Id.* The court of appeals affirmed the district court. The Supreme Court decided in *Biggers* that unnecessarily suggestive procedures alone do not require exclusion of identification evidence. *Id.* at 199.

55 *Id.* at 201. The Court noted that the witness had viewed numerous suspects during the seven months prior to her identification and had never found anyone resembling the suspect. *Id.*

56 *Id.* at 200-01. The *Biggers* Court thus eliminated the distinction between in-court and out-of-court identification testimony by applying *Simmons*, which involved the admissibility of an in-court identification in the wake of a suggestive out-of-court identification, to the admissibility of testimony of the pre-trial identification itself. *Biggers* reasoned that one standard should apply in both cases, because in either case, "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' " *Id.* at 198.

57 Powell was joined in his majority opinion by Burger, C.J., White, Blackmun, and Rehnquist, J.J. *Id.* at 189.

(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and confrontation.[58]

The *Biggers* guidelines were adopted in *Manson v. Brathwaite*[59] where the Court held that "reliability is the linchpin in determining the admissibility of identification evidence."[60] At the trial in *Brathwaite*, the witness testified as to his prior out-of-court identification of the suspect.[61] The Court did not deny that the identification procedure had been unduly suggestive,[62] but noted that the evidence nonetheless possessed qualities of reliability.[63] The *Brathwaite* Court evaluated two approaches to the admissibility of identification evidence—the per se exclusion rule[64] and the "totality of the circumstances" approach.[65] The per se rule rejected the ad-

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[58] *Id.* at 199. The Court applied these factors, finding that the victim spent a considerable period of time with her assailant—up to one-half an hour. The victim directly observed the suspect indoors and under a full moon outdoors, and testified that she had "no doubt" that respondent was her assailant. Her description to the police was thorough. The Court thus concluded that there was "no substantial likelihood of misidentification" in the case. *Id.* at 201.

This test is similar to the *Wade* independent basis test. *See Wade*, 388 U.S. at 241. The difference between the *Wade* and *Biggers* approaches is that *Biggers* would overlook the suggestiveness of the procedure if the witness claims to be certain. *Biggers*, 409 U.S. at 199. This illustrates the Supreme Court's shift from emphasizing the suggestiveness of the procedure to considering the reliability of the identification itself.

[59] 432 U.S. 98 (1977).

[60] *Id.* at 114.

[61] *Id.* at 102. In *Brathwaite*, a narcotics agent identified the suspect as the person who had sold him drugs. He made the identification from a single photo. *Id* at 101. The court of appeals held that the identification was unnecessarily and impermissibly suggestive, and thus should have been excluded. Manson v. Brathwaite, 527 F.2d 363 (2d Cir. 1975), *rev'd*, 432 U.S. 98 (1977). Because the *Biggers* identification occurred prior to the decision in *Stovall*, courts were unsure whether *Biggers* would apply to post-*Stovall* out-of-court identification evidence. *Brathwaite* thus established that the *Biggers* reliability standard also controlled in cases after *Stovall*. *Brathwaite*, 432 U.S. at 114.

[62] 432 U.S. at 99.

[63] *Id.* at 114-16. The qualities of reliability relied on by the Court in *Brathwaite* were determined by use of the factors set out in *Biggers*. *See supra* note 58 and accompanying text.

The evidence was reliable because: (1) the witness had a good opportunity to view the defendant at the apartment door; (2) the witness had a high degree of attention, because he was not a casual observer as is often the case with eyewitnesses; (3) the description of the criminal was accurate; (4) the witness demonstrated a high degree of certainty at the identification; and (5) the witness' photographic identification took place only two days after the crime. *Brathwaite*, 432 U.S. at 114-16.

[64] *Id.* at 110. The court of appeals relied upon the per se exclusionary rule and held that the showing of only one photograph to the witness was unnecessarily and impermissibly suggestive. Under this approach, all identification evidence resulting from the tainted procedure was excluded. *See Brathwaite*, 527 F.2d at 366-71.

[65] *Brathwaite*, 432 U.S. at 110. The totality approach, in contrast to the per se ap-

mission of any identification evidence based on an unnecessarily suggestive identification procedure. The totality approach permitted admission of identification evidence if, despite the suggestive procedure involved, the evidence was likely to be accurate. The Court examined whether the approaches served the interests of preserving reliable eyewitness evidence and deterring improper police procedures, and examined the effects on the administration of justice.[66] Justice Blackmun, writing for the majority, concluded that the per se approach did not serve these interests to the same extent as did the totality approach.[67] He stated that the per se approach suffered particular drawbacks with regard to its effect on the administration of justice because "it denies the trier reliable evidence, it may result, on occasion, in the guilty going free."[68]

Brathwaite, however, qualified the *Biggers* Court's exclusive use of reliability as the admissibility standard for eyewitness testimony. The Court held that the reliability of the testimony, as determined by the factors announced in *Biggers*, must be weighed against the suggestiveness of the procedure used.[69] If a court concluded that the corrupting effects of a suggestive identification procedure outweighed the indicators of reliability surrounding the testimony, the identification testimony would be excluded.[70] This method allows

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proach, permitted admission of identification evidence if, despite the suggestive procedure involved, the evidence possessed qualities of reliability. *Id.* Thus, neither out-of-court nor in-court identifications were inadmissible merely because suggestive procedures were used.

66 *Id.* at 111-13.

67 *Id.* at 112. Justice Blackmun thought that both approaches would encourage presenting reliable eyewitness testimony to the jury. He noted, however, that the per se rule would go too far in automatically excluding certain testimony without regard to other competing interests. *Id.*

68 *Id.*

69 *Id.* at 114. After *Brathwaite*, some courts have employed a two-step analysis in which the defendant must prove that the identification procedure used was unduly suggestive before the court will consider reliability under *Biggers*. *See* Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982*, 71 GEO. L.J. 339, 421 n.504 (1982). Other courts explicitly balance the suggestiveness of the identification procedure against the reliability of the evidence. *Id.* at 421 n.505.

In a recent case, Mata v. Sumner, 696 F.2d 1244 (9th Cir.) *cert. granted, judgment vacated as moot*, 464 U.S. 957 (1983) *appeal dismissed* 721 F.2d 1251 (9th Cir. 1983), the court seemed to reject the two-step approach. In *Sumner*, the court indicated that it was concerned only with the reliability of the evidence in question: "the need, or lack of it, for the identification procedures employed by the prosecution's officers plays no part in the determination of the admissibility of identification evidence, a determination that focuses solely on reliability." *Id.* at 1254.

70 Courts have developed guidelines to determine when suggestive identification procedures have occurred. In United States v. Field, 625 F.2d 862 (9th Cir. 1980), the court suggested that indicia of improper influence would be shown by: (1) the presence and influence of other witnesses at the pre-trial identification procedure; and (2) the

the manner of the identification procedure to be considered in the due process calculus, but avoids the effects of a stricter rule that could prevent critical evidence from reaching a jury.[71]

Commentators have criticized recent cases for abandoning the early protections guaranteed by the Supreme Court against suggestive identification procedures.[72] In *Kirby v. Illinois*,[73] for example, the Court held that the *Wade* right to counsel does not arise until the initiation of formal proceedings against a defendant.[74] More recently, in *Watkins v. Sowders*,[75] the Court held that hearings on questionable identification testimony are not required to be held outside the presence of the jury.[76] Critics of these cases have argued that the decisions have dismantled the constitutional safeguards set up to prevent mistaken eyewitness identifications.[77] Even *Biggers* and *Brathwaite* are considered to undermine the earlier due process protections against unnecessarily suggestive identification procedures.[78] Furthermore, a number of psychologists have argued that the "reliability factors" used by the Supreme Court in *Biggers* lack an empirical basis and are inconsistent with psychological data.[79]

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conduct of government agents tending to focus the witness' attention on the defendant. *Id.* at 867.

71 The Court in *Brathwaite* relied in part upon "the good sense and judgment of American juries" in reaching its decision. *Brathwaite*, 432 U.S. at 116. The Court concluded that the danger in allowing identification evidence with questionable features is mitigated by jurors' abilities to weigh the evidence. *Id.*

72 *See, e.g.*, Levine & Tapp, *supra* note 10, at 1079-81; Pulaski, *supra* note 49, at 1103; Woocher, *supra* note 1, at 996-98.

73 406 U.S. 682 (1972).

74 *Id.* at 690. Critics of the Supreme Court's decision in *Kirby* claim that police now often delay bringing formal charges against a defendant until after the identification has been made. *See* E. LOFTUS, *supra* note 1, at 187.

75 449 U.S. 341 (1981).

76 *Id.* at 349. *Watkins* involved two cases where the defendants were convicted in state court on the basis of eyewitness identifications. *Id.* at 342-46. In both cases, the Court denied the defendants' request for *in camera* suppression hearings on the identification evidence and refused to reverse the convictions. *Id.* at 349. The Court in *Watkins* distinguished this situation from that of a hearing for the suppression of a possible involuntary confession, where an *in camera* hearing is required. *Id.* at 347. This procedure was not considered necessary in *Watkins* because the determination of the reliability of the evidence was entrusted to the jury and because cross-examination would be sufficient to preserve the defendant's due process rights. *Id.* at 349. The Court in *Watkins*, however, left open the possibility that *in camera* hearings on identification evidence might be permitted in other cases; the court concluded only that such hearings were not constitutionally required in every case. *Id.*

77 *See supra* note 72.

78 *See* Pulaski, *supra* note 49, at 1103; Comment, *supra* note 8, at 1398-99. These commentators suggest that the due process protection of *Stovall* has been destroyed by the *Bigger* and *Brathwaite* focus on reliability of identification procedures.

79 *See, e.g.*, Uelman, *Testing the Assumptions of* Neil v. Biggers: *An Experiment in Eyewitness Identification*, 16 CRIM. L. BULL. 358, 368 (1980).

As Section IV of this Comment will demonstrate,[80] the current standards governing the admission of eyewitness testimony, while imperfect, at present are useful in controlling unreliable eyewitness testimony. The more recent cases such as *Kirby* and *Watkins* have defined the scope of a defendant's constitutional rights in a manner compatible with other competing interests.[81] The standards in *Brathwaite* provide an all-encompassing due process test that considers the degree of suggestiveness surrounding an identification procedure as well as the likely reliability of the identification.[82] Furthermore, the *Brathwaite* standards uphold the function of the jury by allowing reliable evidence to be presented to the trier of fact.

Although the present standards for admission of eyewitness testimony are sufficient, the problem remains that mistaken identifications may also result from the inherent unreliability of eyewitness testimony itself. The failure of the legal system to address this problem suggests that there is little that courts can do about eyewitness inaccuracy. Thus, until the present, questions about the reliability of eyewitness testimony have been left to the jury.[83] Psychologists, however, in increasing numbers, now argue that the legal system can control errors in eyewitness testimony by admitting into the courtroom psychological evidence on eyewitness testimonial accuracy.[84] Exclusion of this evidence, in their opinion, is tantamount to depriving the jury of relevant information necessary to determine what weight to give to the eyewitness testimony.

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80 *See infra* notes 239-309 and accompanying text.

81 In *Kirby*, for example, the Court reasoned that the right to counsel should not apply before the start of formal criminal proceedings because it was only then that a suspect's right to be protected from suggestive procedures outweighed society's interest in investigating and limiting crime. *Kirby*, 406 U.S. at 691.

82 Reliability thus remains the deciding criterion of admissibility. *See* United States v. Phillips, 640 F.2d 87, 94 (7th Cir.), *cert. denied*, 451 U.S. 991 (1981). Yet courts continue to find that procedures are occasionally so suggestive as to give rise to misidentifications in violation of due process. *See, e.g.*, Mata v. Sumner, 696 F.2d 1244, 1255 (9th Cir.) *cert. granted, judgment vacated as moot*, 464 U.S. 957 (1983) *appeal dismissed*, 721 F.2d 1251 (9th Cir. 1983); United States v. Field, 625 F.2d 862, 865 (9th Cir. 1980); Green v. Loggins, 614 F.2d 219, 223-25 (9th Cir. 1980) .

83 Once evidence has been admitted, the determination of its proper weight and credibility is a function traditionally considered within the province of the jury. Courts are generally reluctant to usurp any of the jury's functions. *See* Watkins v. Sowders, 449 U.S. 341, 347 (1981).

84 *See infra* notes 183-238 and accompanying text.

III. EXPERT PSYCHOLOGICAL TESTIMONY ON EYEWITNESS TESTIMONY

A. SUBSTANCE OF TESTIMONY

The proposed psychological expert testimony on eyewitness testimony would concern "those factors which scientific research has shown to be critically important in affecting the ability to make a correct identification."[85] Psychologists argue that their presentation of relevant research on "forgetting" and the reasons that witnesses deviate from perfect recall would aid the jury in evaluating identification testimony.[86]

Psychological research on eyewitness accuracy is concerned with the operation of the human memory[87] and with specific factors affecting memory.[88] Psychologists recognize three stages of human memory: (1) perception;[89] (2) storage;[90] and (3) retrieval.[91] The reliability of an eyewitness identification may be affected by various psychological factors at each stage of the memory process.

Psychologists could explain that factors affecting memory during the perception stage may be related to the conditions of an observation,[92] or to the emotions and experiences particular to a witness.[93] Studies have shown, for example, that a subject's ability to remember a face increases with the length of time allowed for observation.[94] Yet in many eyewitness reports identifications are

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85 Brigham, *supra* note 1, at 720.

86 *See supra* note 11; *see also* E. LOFTUS, *supra* note 1, at 191; Convis, *supra* note 1, at 588.

87 *See* E. LOFTUS, *supra* note 1, at 21. Loftus writes that nearly all of the theoretical analyses of the memory process divide into three stages. Factors affecting identification accuracy at each stage are not particular to eyewitness testimony but affect the accuracy of all testimony. *Id.*

88 Loftus further divides factors affecting memory into two groups. One group includes those factors affecting person recognition in general, e.g., cross-racial identification and unconscious transference. In the second group are factors that are particular to individuals, e.g., the sex, age, and "training" of the witness. *See id.* at 136-52, 153-70.

89 *See infra* notes 92-109 and accompanying text.

90 *See infra* notes 110-14 and accompanying text.

91 *See infra* notes 115-129 and accompanying text.

92 Factors related to the observation or to the nature of the encounter itself are known as "event" factors. *See* E. LOFTUS, *supra* note 1, at 23.

93 Those factors inherent in the observer are known as "witness factors." *Id.* at 32.

94 *Id.* at 23-24. Loftus reports a study where 128 subjects viewed slides showing a particular human face; several subjects viewed these slides for ten seconds, while others viewed them for thirty-two seconds. Approximately eight minutes later, the subjects were asked to try to remember the faces from a series of 150 slides. The investigators found that subjects were much more accurate in remembering a face they had seen for the longer period of time. *Id.* at 23. Buckhout has reported similar results in his studies. *See* Buckhout, *supra* note 1, at 25.

based on fleeting glimpses alone.[95]

Research has indicated that stress and anxiety have inhibited subjects' performance abilities in several areas, including perception and recall.[96] Psychologists could reveal studies displaying a negative relation between stress and eyewitness accuracy; knowledge of great potential import to jurors.[97] Psychologists also could show that danger and violence, conditions often found during the commission of a crime, decrease witnesses' perception and memory abilities.[98] They argue that stress and emotion inhibit perception and may prevent testimonial accuracy because after a certain point stress has a debilitating effect on memory.[99]

Elizabeth Loftus, a University of Washington psychology professor, is a leading authority on eyewitness identification. Loftus has conducted extensive research on identification and memory; she has assisted lawyers in hundreds of cases and testified in over 90 of

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95 Such "glimpses" may be common in fast moving, threatening situations. In the *Sacco-Vanzetti* case in the 1920's, for example, a witness gave a detailed description of one defendant on the basis of a fraction-of-a-second glance. Psychologist Robert Buckhout, a researcher in the area of eyewitness identification has concluded that with regard to the above case, "[t]he description must have been a fabrication." Buckhout, *supra* note 1, at 25.

Another "event factor" is the significance at the time and to the witness of the events that were observed. Witnesses may be asked to recall seeing the accused at a time when they were not attaching importance to the event. This occurrence may make an eyewitness report incomplete or unreliable, because insignificant events do not motivate a person to use his or her most selective processes of attention. *Id.* at 24-25.

96 Psychologist Robert Buckhout has explained the physiological relation behind this phenomenon: "There is a response [to stress] that includes an increased heart rate, breathing rate and blood pressure and a dramatic increase in the flow of adrenalin." *Id.* at 25. In experimental situations, observers under stress are less capable of remembering details, less accurate in reading dials, and less accurate in detecting signals than when under normal circumstances. Buckhout's research conducted with Air Force flight crew members confirms that even highly trained people become poor observers under stress. *Id.*

For various studies relating effects of stress on performance, see E. LOFTUS, *supra* note 1, at 33-35 (danger situations increase anxiety and reduce performance level). For a related study suggesting that mentally shocking episodes may disrupt the lingering process necessary for full storage of information in memory, see Loftus & Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 MEMORY & COGNITION, 318, 318-23 (1982).

97 This concept was first stated in the Yerkes-Dodson law formulated in 1908. The law states that strong motivational states such as stress or other emotional arousal facilitate learning and performance up to a point, after which point learning decreases. The location of the point at which performance begins to decline is determined by the difficulty of the task. *See* E. LOFTUS, *supra* note 1, at 33. *See also* Buckhout, *supra* note 1, at 25 ("Research confirms that even highly trained people become poorer observers under stress."); Convis, *supra* note 1, at 543 (two studies show effect that emotional factors have on witnesses' perception).

98 *See* Convis, *supra* note 1, at 593-94. Research also has indicated that subjects tend to overestimate distance and the passage of time when under stress. *Id.*

99 *See supra* note 97.

those.[100]

Loftus has found that witnesses tend to concentrate on only a few striking features of an event when they are highly aroused.[101] This concentration results in the exclusion of certain details from memory. Loftus has studied this phenomenon in connection with the observation of suspects carrying guns or other weapons. In one study on the effects of the presence of a weapon on eyewitnesses, witnesses' descriptions of suspects were more accurate when the suspect held a nonthreatening item than when he held a threatening one.[102]

Expert psychologists could also discuss another source of misperception resulting from witness expectations.[103] Two types of expectations studied by psychologists are those based on past experience and those based on biases or stereotypes.[104] Two Harvard psychologists conducted an experiment involving playing cards in the 1930's to show how expectations can influence judgment.[105] Observers were asked to report the number of aces of spades they had seen in a display of cards. After a brief glance the majority of subjects believed they had seen only three aces of spades, five were actually shown in the display. Two of the aces, however, were colored red rather than the usual black. The observers, when making a judgment, had relied on their expectations not on what they had actually seen.[106]

Biases held by individuals provide another example of how expectations influence perception. Stereotypes about groups of people based on cultural or situational differences, while often

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100 *See supra* note 15.

101 *See* E. LOFTUS, *supra* note 1, at 35.

102 *Id.* at 35-36. Loftus conducted an experiment in which she divided subjects into two groups and had each subject act as a "witness" to the fleeing departure of a target individual. The situations for the groups were identical except that in one case the target suspect carried a bloodied letter opener in hand while in the other he held a pen. The witnesses tended to give less accurate and less detailed descriptions in the situation where the "weapon" was present. Loftus concluded that "[t]he weapon appears to capture a good deal of the victim's attention, resulting in, among other things, a reduced ability to recall other details from the environment." *Id.*

103 *See* E. LOFTUS, *supra* note 1, at 36; Buckhout, *supra* note 1, at 26.

104 *See* E. LOFTUS, *supra* note 1, at 37-40.

105 *Id.* at 39. Jerome S. Bruner and Leo Postman of Harvard theorized that when expectations are violated by the environment, the subject's behavior is a form of resistance to the recognition of the unexpected. *Id.* at 40.

106 *Id.* at 39. Observers tend to rely on expectations as a way to make judgments in everyday life. Thus, witnesses may not spend time checking their expectations against what they actually observed, and consequently, may report facts that were not present but that they think should have been present. *See also* Buckhout, *supra* note 1, at 25-26.

inaccurate, affect the way people perceive and remember.[107] Experiments have demonstrated, for example, that eyewitnesses are more likely to associate blacks than whites with violent scenes or situations.[108] These expectancies and others[109] are especially dangerous because they may alter a witness's perception without any awareness of that alteration.

Once information is acquired, it is subject to further modification during the period when it is stored in memory. An important factor affecting memory at this stage is the amount of time that has lapsed since the event.[110] Psychologists express this phenomenon with a "forgetting curve" which shows that the greatest amount of memory loss occurs within minutes of an event.[111]

Psychologists assert that what is less well-known is that post-event external information can enhance and even change memory.[112] In one experiment conducted by Loftus, subjects viewed a filmed car accident and were tested on their observations after receiving new information about the accident in the form of misleading questions.[113] When subjects were asked questions using the word "smashed" as opposed to "hit" they gave higher estimates of speed and were more likely to later report having seen broken glass—although there was no broken glass.[114] New information had become integrated into previously stored data about the event, cre-

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107 *See* E. LOFTUS, *supra* note 1, at 37.

108 *Id.* at 38. Loftus described a 1948 experiment where subjects were shown a picture of a scene on a subway; a black man and a white man holding a razor blade were standing on the train. In over half of the experiments, observers indicated that the black man, not the white man, had been holding the razor blade. Loftus noted that the cultural stereotype demonstrated by the 1947 experiment might not be as strong today. *Id.* at 38-39.

109 Other expectancies described by Loftus are those resulting from personal prejudices and from temporary biases (e.g., hunting tragedies have occurred where hunters become separated and one shoots the other, mistaking the lost hunter for the animal he is expecting to see and kill). *Id.* at 37-40.

110 *See* E. LOFTUS, *supra* note 1, at 52-53.

111 *Id.* at 53. The curve basically shows that a person's capacity to remember decreases as time since the event increases. Loftus reviewed one study where 34 subjects were tested for recognition of pictures after intervals of two hours, three days, one week, and about four months. The retention of the pictured material dropped from 100 percent correct identification after a two-hour delay to only 57 percent correct after four months. *Id.*

112 *Id.* at 55.

113 Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 589 (1974). For a related study on the effectiveness of inducing resistance to misleading information, see Greene, Flynn, & Loftus, *Inducing Resistance to Misleading Information*, 21 J. VERBAL LEARNING & VERBAL BEHAV., 207, 218 (1982).

114 Loftus & Palmer, *supra* note 113, at 586-87. Loftus suggests that, over time, information from actual perception and external information become integrated. This pro-

ating a memory of the accident that was more serious than what had actually occurred.

Testimony from psychological experts could further reveal that witnesses, when asked to make an identification, tend to fill in memory gaps by adjusting their recollections or guessing.[115] This phenomenon may fulfill a psychological need to reduce uncertainty and conform to social pressures.[116] This tendency has serious implications in the courtroom where identification procedures may encourage guessing so that witnesses may unconsciously "conform" their memories to fit available suspects or photographs.

Psychologists have discovered that during the retrieval stage of the memory process, conditions surrounding recollection affect the reliability of what a witness remembers. Such conditions include the types of questions asked,[117] the wording of questions,[118] and who is asking them.[119] Numerous studies have been conducted on the relationship between confidence and accuracy in recollection.[120] A witness' confidence in the identification traditionally has been accepted as an indication that the identification is an accurate one. Loftus and others argue that little positive correlation exists between the two variables.[121]

While the above factors may cause an eyewitness to deviate from perfect recall of certain events or situations, the psychological expert could explain that there are other more specific problems

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cess may also happen in the courtroom where introduction of "external" information could distort witness reports. *See* E. LOFTUS, *supra* note 1, at 78.

115 *See* E. LOFTUS, *supra* note 1, at 82-84; Buckhout, *supra* note 1, at 27.

116 *See* Buckhout, *supra* note 1, at 28.

117 *See* E. LOFTUS, *supra* note 1, at 90-94. Loftus reports that the narrative form of reporting, while often less complete, is more accurate than the interrogatory form. *Id.* at 91.

118 *Id.* at 94-97. For example, the use of the definite article increases suggestibility. There is a different effect when a questioner states: "Did you see *the* car?" and "Did you see a car?" A speaker uses "the" when he assumes that the object referred to exists. *Id.* at 95-96. *See also* Dale, Loftus & Rathbun, *The Influence of the Form of the Question on Eyewitness Testimony of Preschool Children*, 7 J. PSYCHOLINGUISTIC RES. 269 (1978).

119 *See* E. LOFTUS, *supra* note 1, at 97-100.

120 *Id.* at 100-04. *See also* Wells, Lindsay & Ferguson, *supra* note 1, at 440-48.

121 E. LOFTUS, *supra* note 1, at 101. In general, the literature in cognitive psychology shows a strong positive relationship between confidence and accuracy on a variety of memory tasks. In eyewitness identification, however, Loftus and others maintain that the confidence/accuracy relation may be nill or even negative. *Id.* One study revealed that witnesses who make a false identification of a suspect can be as confident in their identifications as are witnesses who made accurate identifications. *See* Wells, Lindsay & Ferguson, *supra* note 1, at 440. Recently, psychological studies have indicated that additional factors must be considered before drawing conclusions about the relationship between confidence and accuracy. *See* Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 243-60 (1980).

associated with person recognition. Racial differences in facial identification have been traditionally noted by psychologists; racial groups find it easier to identify members of their own race.[122] Another problem relevant to suspect identifications is that a person seen in one situation may be easily confused with or recalled as the person seen in a second situation. This occurs because an otherwise insignificant event may, upon recall, become merged with a more significant event.[123] Upon recollection a witness may confuse the face of someone seen during a non-critical situation with that of a person involved in a later critical incident.

This phenomenon is referred to by psychologists as "unconscious transference."[124] In one example where such a "transference" occurred, a ticket agent in a railway station was held up at gunpoint. Subsequently, the agent identified a sailor in a lineup as the guilty party. The sailor had a good alibi, however, and was subsequently released from custody. The ticket agent was interviewed to discover why he had misidentified the sailor. He answered that when he saw the sailor in a lineup, his face looked familiar. The sailor's base happened to be near the railroad station and on several occasions prior to the robbery he had purchased tickets from the agent. The ticket agent had mistakenly assumed that the familiarity was based on the robbery when it was actually based on the three times that the sailor bought train tickets.[125]

Characteristics in witnesses such as age[126] and sex[127] also can affect eyewitness accuracy. Research in this area is complex and has

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122 *See* E. LOFTUS, *supra* note 1, at 136-42. Loftus describes four studies where subjects recognized faces of their own race better than faces of the other races. Whether personal prejudice affects racial identification is disputed among psychologists. *Id.* at 138-39.

123 *Id.* at 142.

124 *See* Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCHOLOGY REV. 93 (1976). An experiment demonstrated that people may misidentify a face seen in another context as that of a suspect. Fifty subjects were presented, via tape recorder, a story concerning six fictitious college students. As each character was introduced on tape, a photograph of that character was shown for approximately two seconds. Only pictures of white males with medium length brown hair were used. After three days the subjects attempted to identify the criminal in the story from a set of five photographs presented to them. For one-half of the subjects, the criminal's face was included in the photographs. Only the face of an incidental character was included in the photos for the other subjects. If the tendency to choose the incidental character was no greater than the tendency to choose one of the other non-criminals, then 20% of those who made a selection should have chosen the incidental character. In fact, 79% of those making a selection chose the incidental character. *Id.* at 94-96. The transference phenomenon is exceptionally dangerous because in any given case it may be nearly impossible to tell whether it has occurred or not. *Id.* at 98. *See* E. LOFTUS, *supra* note 1, at 142-44.

125 See P. WALL, *supra* note 19, at 119-20.

126 *See* E. LOFTUS, *supra* note 1, at 159-63. Much of the research in this area is incon-

produced mixed results; there are, however, a few generally recognized findings with regard to age.[128] Children, for example, are known to be the least reliable and the most suggestible witnesses.[129] The critical point, psychologists maintain, is that these influences on eyewitness accuracy exist and that their existence should be conveyed to jurors.

The role of the psychologist in relating the above information is to aid jurors in evaluating the credibility of a particular witness. While most persons could recognize whether a particular factor was operating at the time of the crucial incident, their ability to determine whether the factor actually distorted the original memory so as to render the testimony erroneous is limited. The psychologist does not judge whether any particular witness is telling the truth. The expert could describe only the aforementioned scientific phenomena and indicate the extent to which, given particular facts and circumstances, such phenomena might have affected an eyewitness identification in the case.

B. CASES REJECTING ADMISSION OF EXPERT PSYCHOLOGICAL TESTIMONY

The majority rule in American courts is that expert psychological testimony is inadmissible or that it is not reversible error for a trial court to refuse to admit it.[130] Until the Arizona Supreme

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sistent. Under some circumstances, for example, elderly subjects have been as reliable as younger ones. *See* Convis, *supra* note 1, at 591.

127 *See* E. LOFTUS, *supra* note 1, at 156-59. Several studies are consistent with research showing the existence of "female-oriented" and "male-oriented" items. Women tend to be better at recollecting female items (e.g., women's clothing, accessories, etc.) and the opposite is true for men. *See* Powers, Andriks & Loftus, *Eyewitness Accounts of Females and Males*, 644 J. APPLIED PSYCHOLOGY 334 (1979).

128 *See* E. LOFTUS, supra note 1, at 159-63.

129 *Id.* at 60.

130 *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 382-84 (1st Cir. 1979); United States v. Watson, 587 F.2d 365, 368-69 (7th Cir. 1978), *cert. denied, sub nom.* Davis v. United States, 439 U.S. 1132 (1979); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977).

For examples of state court opinions upholding trial judges' exclusion of eyewitness testimony, see People v. Plascencia, 140 Cal. App. 3d. 853, 189 Cal. Rptr. 804, 807-09 (1983); Dyas v. United States, 376 A.2d 827, 831-32, (D.C.), *cert. denied*, 434 U.S. 973 (1977); State v. Hoisington, 104 Idaho 153, 165, 657 P.2d 17, 29 (1983); State v. Galloway, 275 N.W.2d 736, 741-42 (Iowa 1979); State v. Warren, 230 Kan. 385, 393-95, 635 P.2d 1236, 1241-43 (1981); State v. Stucke, 419 So. 2d 939, 944-45 (La. 1982); State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980); State v. Porraro, 121 R.I. 882, 892-93, 404 A.2d 465, 471 (1979); State v. Onorato, 142 Vt. 99, 104-05, 453 A.2d 393, 395-96 (1982).

Court's January 1983 decision in *State v. Chapple*,[131] "no reported appellate court decision had ever held that a lower court abused its discretion in refusing to admit expert psychological testimony on eyewitnesses."[132] In excluding expert psychological testimony, state court opinions generally conclude that juries have a general understanding of the subject matter of the expert's testimony and that the defendant's rights can be adequately protected by cross-examination. Federal cases have uniformly affirmed trial judges' exclusion of the expert testimony.[133] Other typical grounds relied upon for excluding or upholding exclusion of psychological testimony are that it invades the province of the jury, unduly discredits eyewitnesses' testimony, and may result in a "battle of the experts" that will confuse the jury.[134]

The Ninth Circuit's 1973 decision in *United States v. Amaral*[135] is the seminal case holding that a trial court's exclusion of expert psychological testimony was not in error. The defendant in *Amaral* was charged with the robbery of two national banks. Three witnesses had observed the robber during the crime and later made positive identifications of the defendant.[136] At trial the defendant sought to introduce expert psychological testimony, consisting of a description of the effects of stress on perception and the unreliability of eyewitness testimony.[137] In excluding the proposed testimony, the trial court concluded that it was up to the jury to make their own determination as to what weight or effect to give to the evidence of the eyewitness and identifying witness rather than to have that determination put before them by the expert witness.[138]

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131 135 Ariz. 281, 660 P.2d 1208 (1983).

132 State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980).

133 *See* Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204, 1208 (1983) (citing United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 382-84 (1st Cir. 1979); United States v. Watson, 587 F.2d 365, 368-69 (7th Cir. 1978), *cert. denied, sub nom.* Davis v. United States, 439 U.S. 1132 (1979); United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975)).

134 *See* Comment, *supra* note 8, at 1401 n.66 and cases cited therein.

135 488 F.2d 1148 (9th Cir. 1973).

136 *Id.* at 1153.

137 *Id.* The facts in *Amaral* resemble those in the majority of cases in this area. Typically, the cases are dependent upon eyewitness testimony. Defense counsel will attempt to admit the expert psychological testimony. Following the trial court's denial of the testimony and the subsequent conviction of the defendant, the defendant will appeal on the grounds that refusal to admit the testimony constituted prejudicial error. *See* E. LOFTUS, *supra* note 1, at 199-200.

138 488 F.2d at 1153. Courts are generally reluctant to usurp any of the jury's func-

The *Amaral* court adopted a liberal standard for the admissibility of expert testimony; testimony is admissible as long as it gives the jury "appreciable help."[139] The criteria established in *Amaral* were that: (1) the expert must be qualified as such; (2) the expert testimony must pertain to a proper subject; (3) the testimony must be in accordance with a generally accepted explanatory theory; and (4) the testimony's probative value must outweigh its prejudicial effect.[140]

In *Amaral* the court determined that the proposed testimony did not meet the "proper subject" requirement because the expert's testimony would not assist the jury in evaluating the eyewitness testimony.[141] The court held that the jury was competent to evaluate the reliability of the eyewitness testimony and the effect of stress on the perception of witnesses through counsel's use of cross-examination and through its own good sense.[142] Four years after *Amaral*, in *Dyas v. United States*,[143] the court relied heavily on the *Amaral* analysis in upholding the lower court's exclusion of the expert psychological testimony.[144] The *Dyas* court noted further that "the admission of expert testimony is committed to the broad discretion of the trial court and . . . will not be disturbed unless 'manifestly

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tions. One reason for this policy is a fear of tipping the scales favorably toward either the defendant or the prosecution. Expert psychological testimony, as viewed by most courts, amounts to an invasion of the jury's province in favor of the defendant. *See* Comment, *supra* note 8, at 1400 n.60. *See also* Watkins v. Sowders, 449 U.S. 341, 347 (1981) ("[T]he *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." (emphasis in original)).

139 *Amaral*, 488 F.2d at 1152. Other courts have allowed expert testimony only when the subject was one about which a lay jury could not make a rational decision without the aid of expert opinion. For a discussion of the development of the expert opinion exception, see Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 GEO. WASH. L. REV. 774, 774-75 (1980).

140 *Amaral*, 488 F.2d at 1153. In upholding the trial court's decision, the *Amaral* court incorporated the general acceptance test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), for admission of scientific evidence into its own four-part admissibility test. In *Frye*, the court held inadmissible testimony based upon the results of a lie detector examination because the technique had not achieved general scientific recognition. The court argued that until a scientific technique reaches a point where it is accepted as valid by other scientists in the field, testimony based on novel scientific techniques is too untrustworthy to be admitted into evidence. *Id.* at 1014.

141 *Amaral*, 488 F.2d at 1153.

142 *Id.* The *Amaral* court did not address the questions of whether the testimony met the general acceptance standard or caused unfair prejudice or confusion. *Id.* at 1153-54.

143 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

144 *Id.* at 832. The eyewitness in *Dyas* was the victim of an armed robbery. He gave a detailed description of the suspect to the police immediately after the event and identified the defendant in a lineup several days later and in court. *Id.* at 829.

erroneous.' "[145]

In addition to the criteria set out in *Amaral*, the admission of all expert testimony in federal courts after the 1975 adoption of the Federal Rules of Evidence[146] is governed by Rule 702.[147] Approximately one-half of the states have adopted Rule 702 or have a rule of evidence closely related to it.[148] Rule 702 permits the introduction of expert testimony in the form of an opinion or otherwise when it will help the jury to understand the evidence presented or to decide an issue in the case.[149] A liberal standard exists for determining when science will "assist" the jury.[150] If the subject of the testimony is wholly within ordinary experience, however, expert testimony would not be helpful to a jury and will be disallowed.[151] The Ninth Circuit has continued to use both Rule 702 and the *Amaral* standard in determining the admissibility of scientific evidence.[152]

The expert must be properly qualified to testify in court before a jury will be allowed to hear the expert testimony. In *United States v. Dyas*,[153] the court restated this criteria: " '[T]he witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference *will probably aid the trier in his search for truth.*' "[154] A similar standard exists under Rule 702.[155] Expert testimony on eyewitness identification generally is not excluded on the basis of the expert's qualifications because their

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145 *Id.* at 831. *See also* Taylor v. United States, 451 A.2d 859 (D.C. 1982); Brooks v. United States, 448 A.2d 253 (D.C. 1982); Smith v. United States 389 A.2d 1356 (D.C. 1978). These cases all applied *Dyas* and affirmed lower court decisions to exclude expert testimony on the subject of eyewitness identification.

146 Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1296 (codified at 28 U.S.C. App. A. (1976)).

147 Rule 702 provides: "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." FED. R. EVID. 702.

148 *See* Convis, *supra* note 1, at 585 ("It appears, then, that the rule is a popular one and contains a statement about the admission of expert testimony agreeable to the Legislatures or courts in about half the country.").

149 *See supra* note 147.

150 *See* United States v. Fosher, 590 F.2d 381-83 (lst Cir. 1979) ("Courts and commentators view Rule 702 as admitting testimony liberally."). *See also* Note, *supra* note 139, at 782.

151 *See Fosher*, 590 F.2d at 383.

152 *See* Note, *supra* note 139, at 778 n.26. Federal cases affirming lower courts' exclusion of expert psychological testimony have used the same reasoning whether they deal with matters arising before or after the effective date of Rule 702 of the Federal Rules of Evidence. *See supra* note 133.

153 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

154 *Id.* at 832 (quoting C. MCCORMICK, EVIDENCE § 13, at 29-31 (E. Cleary, 2d ed. 1972)) (emphasis added in *Dyas*).

155 *See supra* note 147.

training can be shown like that of any expert's.[156]

Psychological testimony has been excluded by courts because it failed to meet the "generally accepted scientific theory" requirement announced in *Amaral*. In *United States v. Fosher*,[157] the First Circuit Court of Appeals stated that "the offer did not make clear that the testimony . . . would be based upon a mode of scientific analysis that meets any of the standards of reliability applicable to scientific evidence."[158] Similarly, in *People v. Plasencia*,[159] a California trial court concluded that the subject matter of the expert's testimony "had not yet reached a state of acceptability in the legal community and therefore could not be used at trial."[160] In the New York decision of *People v. Brown*,[161] the court held that there was no showing that the expert's research had reached the level of general acceptance in the field of scientific inquiry.[162] The *Brown* court stressed that special care was needed in admitting into evidence the results of tests unless their accuracy and general scientific acceptance was clearly recognized.[163]

The primary inquiry with regard to the admission of expert psychological testimony is whether it constitutes a "proper subject" of expert scientific evidence. In *United States v. Fosher*,[164] the court held that to be a proper subject of expert testimony under Rule 702, "proof offered to add to [the jurors'] knowledge must present them with a system of analysis that the court, in its discretion, can find reasonably likely to add to common understanding of the particular issue before the jury."[165] The *Fosher* court concluded that under this test the trial court had not abused its discretion in finding that the offer of expert testimony was too broad and sufficiently within the ken of lay jurors to satisfy Rule 702.[166]

Numerous cases have excluded expert psychological testimony because the testimony was not beyond the common knowledge of the jury and therefore did not constitute a proper subject of expert testimony. The court in the California case of *People v. Plasencia*[167]

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156 *See* E. LOFTUS, *supra* note 1, at 195-96 ("[T]he judge can examine the evidence for the knowledge, experience, training or education of the proffered expert.").
157 590 F.2d 381 (lst Cir. 1979).
158 *Id.* at 383.
159 168 Cal. App.3d 546, — Cal. Rptr. — (1985).
160 *Id.* at 554, — Cal. Rptr. at —.
161 117 Misc. 2d 587, 459 N.Y.S.2d 227 (1983).
162 *Id.* at 593, 459 N.Y.S.2d at 232.
163 *Id.*
164 590 F.2d 381 (lst Cir. 1979).
165 *Id.* at 383.
166 *Id.*
167 168 Cal. App. 3d 546, — Cal. Rptr. — (1985).

stated: "The jury did not need edification on the obvious fact that an unprovoked gang attack is a stressful event or that the passage of time frequently effects one's memory."[168] In *Johnson v. State*[169] the court found that it was within the jury's knowledge that " 'a person being attacked . . . undergoes stress that might cloud a subsequent identification.' "[170] In *State v. Fernald*,[171] the court held that the making of direct face-to-face judgments of identification, and an awareness of the factors bearing on the reliability of such judgments are "a part of the day-to-day experiences of ordinary lay people . . . ."[172]

The final criteria discussed in *Amaral* is the probative value of the testimony compared to its prejudicial effect. Expert psychological testimony can raise special dangers of unfair prejudice given the "aura of reliability" that accompanies scientific evidence.[173] In the Federal Rules of Evidence, the balancing of prejudice and probative value is governed by Rule 403.[174] Under Rule 403, evidence that is a proper subject of expert testimony is nevertheless inadmissible if it confuses the issues, misleads the jury or results in undue consumption of time.[175]

The subjective nature of the testimony increases courts' concern over its prejudicial effect. Scientific testimony that addresses the credibility of witnesses and the reliability of their testimony is suspect because the testimony of the expert might replace jurors' own determinations of which witnesses to believe.[176]

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168 *Id.* at 555, — Cal. Rptr. —, —.

169 393 So. 2d 1069 (Fla. 1981).

170 *Id.* at 1072 (quoting Nelson v. State, 362 So. 2d 1017, 1021 (Fla. Dist. Ct. App. 1978)).

171 397 A.2d 194 (Me. 1979).

172 *Id.* at 197.

173 *See, e.g.*, State v. Stucke, 419 So. 2d 939, 945 (La. 1982) ("[T]he prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than other evidence presented during trial. Such evidence invades the province of the jury and usurps its function.").

174 Federal Rule of Evidence 403 states: "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." FED. R. EVID. 403.

175 *Id. See Fosher*, 590 F.2d at 383-84. *See also* United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982) ("the probative value of the evidence was substantially outweighed by the possibility of prejudice emanating from this 'expert' testimony"). Courts are thus careful to limit the circumstances in which expert testimony is admissible. An overly liberal rule would allow expert testimony on subjects within the jurors' ability to evaluate.

176 *See* Note, *supra* note 139, at 777-78.

The principle underlying Rule 702 and the admission criteria of *Amaral* is that the province of the jury must be protected.[177] Admission of expert psychological testimony is considered by a majority of courts to usurp the function of a jury because it concerns a subject within jurors' common knowledge and has a prejudicial effect with regard to other evidence presented at trial. It is the jury's exclusive province to evaluate evidence presented.

The trial court has discretion to determine whether expert psychological testimony fails to meet any of the relevant admissibility criteria.[178] The role of the trial court is particularly important in the balancing of prejudice and probative value because the trial court is best situated to weigh the conflicting facts and equitable considerations that may vary from case to case.[179] The trial court's discretionary power is relied upon by appellate courts upholding lower court decisions excluding expert psychological testimony; the trial court decisions will not be disturbed unless "manifestly erroneous."[180]

In conclusion, with the exception of *State v. Chapple*,[181] appellate courts have uniformly affirmed trial judges' exercise of discretion to exclude such expert testimony. Such testimony not only fails to meet the standards for admission of scientific evidence, but also raises new administrative problems.[182] Thus, courts until now have wisely relied upon jurors' abilities to appropriately weigh the evidence presented at trial without assistance from psychological experts.

C. ARGUMENTS FAVORING THE ADMISSION OF EXPERT PSYCHOLOGICAL TESTIMONY

Despite overwhelming caselaw to the contrary, psychologists and legal authorities in increasing numbers have argued for the admission of expert psychological testimony.[183] Expert testimony on eyewitness reliability has been admitted in many state court criminal proceedings.[184] This dangerous trend culminated recently in *State*

177 *See supra* note 173.

178 *See* Salem v. United States Lines Co., 370 U.S. 31 (1962).

179 *See Amaral*, 488 F.2d at 1152.

180 *Id. See also* Commonwealth v. Francis, 390 Mass. 89, 453 N.E.2d 1204 (1983) ("When the question whether expert testimony would aid the jury is close, the likelihood of prejudice from the admission or exclusion of that testimony is slight. Thus, appellate courts have given great deference to rulings of trial judges in this area of the law of evidence." *Id.* at —, 453 N.E.2d at 1209).

181 135 Ariz. 281, 660 P.2d 1208 (1983).

182 *See infra* notes 286-89 and accompanying text.

183 See *supra* notes 11 and 15 and sources cited therein.

184 *See* cases cited in sources, *supra* note 15.

v. Chapple,[185] where the Arizona Supreme Court reversed a lower court decision refusing to permit the introduction of expert psychological testimony.

The growing number of trial courts allowing expert psychological testimony set the stage for the ground-breaking decision in *Chapple*.[186] Psychologist Elizabeth Loftus, for example, has been permitted to testify in over 90 criminal cases.[187] In one case in which Loftus testified, eyewitness identification was the sole evidence connecting the defendant to the crime. That case, *People v. Garcia*,[188] involved a store robbery in which one store clerk was shot. The surviving clerk identified the defendant as the robber three weeks later from a six-photo display.[189] Seven weeks after the incident, a security patrolman who had been driving by the store at the time of the crime identified the defendant. He later admitted to seeing the defendant's picture in the newspaper.[190]

At the defendant's trial, Loftus testified about the nature of human memory and how it was affected by factors such as lapse of time, cross-racial identification, and unconscious transference.[191] The jury then was free to apply these factors to the facts of the case. Testimony about cross-racial identification was relevant because the clerk and patrolman were white while the robber was Mexican. The jury was unable to reach a verdict in *People v. Garcia* either at the trial's conclusion or at a retrial.[192] In Loftus' opinion, this outcome most likely was due to the jurors' questions that arose after hearing Loftus testify about the identifications.[193]

The expert psychological testimony of Dr. Robert Buckhout[194] also has been admitted by numerous trial courts. Buckhout has described a murder case in Lansing, Michigan[195] where he was allowed

185 135 Ariz. 281, 660 P.2d 1208 (1983).

186 *See supra* note 15.

187 Telephone interview with Dr. Elizabeth F. Loftus (Jan. 18, 1984); *see supra* note 15.

188 *See* E. LOFTUS, *supra* note 1, at 204-15.

189 *Id.* at 210.

190 *Id.* at 212-13.

191 *Id.* at 213-14.

192 *Id.* at 214-15.

193 *Id.*

194 Dr. Buckhout, editor-in-chief of SOCIAL ACTION & THE LAW, is another leading figure on the topic of expert psychological testimony. In a phone interview, Buckhout emphasized that cases allowing expert psychological evidence have not all resulted in acquittals. Thus, he argues that expert psychological testimony is not prejudicial in the sense of being overpersuasive. Telephone interview with Robert Buckhout, PhD. (Jan. 20, 1984).

195 Michigan v. Hall & McGill, No. 75-25859-FY (County of Ingham Cir. Ct., Oct. 8, 1975). For an account of Buckhout's testimony in that trial see Buckhout, *supra* note 15, at 46-49.

to testify and where the defendant was acquitted. His testimony, like Loftus', consisted of an explanation of factors causing an eyewitness of a crime to deviate from the ideal of a "perfect witness." Buckhout discussed the contribution psychological testimony would make to the common experience of jurors:

> Our scientific contribution comes from our use of previously checked filmed crimes to test *hundreds* of eyewitnesses with the *same* crime where we can *check* the accuracy against a true record of the events. We learn much about the *typical* response of *average* normal witnesses under unique conditions inherent in viewing a crime . . . . All of these findings combine to permit an expert to provide the court and the jury a more complete understanding of the eyewitness in the scientific literature—sources of data which are not commonly read by laymen. Laymen who compare their own experiences are rarely able to check *their* eyewitness accounts against an objective standard for accuracy.[196]

The Michigan case, like other cases in which Buckhout has testified and the defendant was acquitted, was unreported. Thus, in cases where psychologists have been permitted to testify, the defendant's acquittal has meant that no record exists of the judge's reaction to the testimony. Buckhout maintains that such testimony was properly admitted in those cases because it met the criteria under *Amaral* and under the Federal Rules for the admission of novel scientific evidence.[197]

State v. Chapple[198] represents the first reported appellate court decision in which the trial court's exclusion of expert psychological testimony was deemed reversible error. The *Chapple* court concluded that the expert testimony was admissible under both Arizona Rule of Evidence 702 and the *Amaral* standards for admissibility of scientific evidence.[199]

The defendant Dolan Chapple had been convicted at trial of three counts of murder and two drug-trafficking charges. Chapple's conviction was based in large part on the identification testimony of two eyewitnesses. One of the eyewitnesses, Malcolm Scott, was acting as a middleman in a drug sale between a Washington, D.C. drug dealer and an Arizona drug supplier.[200] Scott's sister, Pamela Buck, was the other eyewitness in the case. The Washington, D.C. drug dealer, Mel Coley, flew to Arizona to participate in a drug sale ar-

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196 Buckhout, *supra* note 15, at 47-48 (based on information given by Buckhout in a deposition) (emphasis in original).

197 *See* Buckhout, *supra* note 15, at 48-49.

198 135 Ariz. 281, 660 P.2d 1208 (1983).

199 *Id.* at 291-94, 660 P.2d at 1218-21.

200 *Id.* at 284, 660 P.2d at 1211.

ranged by Scott. Coley was accompanied by two strangers who were introduced as "Dee" and "Eric" to Scott.[201]

After the drugs had been delivered to Scott's trailer, the witnesses observed Dee and the drug supplier go into one of the bedrooms to count the money. Scott and Buck heard gunshots and found that the supplier and his two helpers had been killed.[202] After Dee and Eric had disposed of the bodies they each received $500.00 from Coley and left with the drugs.[203] Coley then returned by air to Washington, D.C. Scott sought the aid of a lawyer following these events.[204]

Scott and Buck subsequently identified defendant as "Dee" from a photo display, and re-identified him in a lineup and at the trial. The first identification by the witnesses took place in December 1977.[205] The witnesses were shown photographs by the police containing pictures of known acquaintances of Coley. Scott pointed to a picture of a man known as James Logan and stated that it resembled Dee, though he was not sure.[206] At this same session Scott failed to identify the defendant as "Dee" although he was shown a picture of the defendant in a photographic lineup.[207]

Thirteen months later, in January 1979, Scott identified defendant's picture as Dee in a nine-picture photo lineup.[208] This photo lineup included pictures of Eric Perry and of the defendant. Logan's picture, however, was not included.[209] When Scott was shown the picture of the defendant that he had failed to identify previously, he stated that he had no recollection of ever having seen it before. The defendant argued that the identifications were mistaken, and that certain factors relating to the time and nature of the identifications combined to make them unreliable.[210]

At trial defense counsel offered the testimony of Dr. Elizabeth Loftus to counter the eyewitnesses' testimony.[211] The trial court judge refused to admit the expert's testimony because the testimony would not relate to any matters outside the jurors' common experi-

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201 *Id.*

202 *Id.* at 285, 660 P.2d at 1212.

203 *Id.*

204 *Id.* The defendant was the sole object of prosecution in the case because Coley had entered into a plea-bargain with the State and "Eric" was never apprehended. *Id.*

205 *Id.* at 290, 660 P.2d at 1217.

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.* at 290-91, 660 P.2d at 1217-18.

211 *See supra* note 15 and accompanying text.

ence.[212] Loftus' testimony would have informed the jury that there are many specific variables that affect the accuracy of identification and that these variables applied to the facts of the case. For example, Loftus could have presented data showing that the "forgetting curve" is not uniform and that forgetting occurs most rapidly immediately after an event.[213] This phenomenon would make Scott's January 1979 identification of the defendant appear unreliable following his initial failure to identify the defendant's picture when it was first shown to him in December 1977.

Loftus also could have presented studies on the distorting effects of stress on perception and on the phenomenon of unconscious transference.[214] Scott had viewed a picture of the defendant in December, several months after the shooting, although he said that he did not remember it. His identification of the defendant at the January 1979 lineup could have been the result of an unconscious transfer of memory. Another variable affecting eyewitness testimony pertinent to the case was the feedback/post-event information.[215] Although the witnesses denied it, Scott and Buck could have discussed Dee's identification, thus strengthening their individual identifications. Finally, Loftus would have testified that there is little relationship between the confidence that a witness has in his or her identification and the accuracy of that identification.[216] Because both witnesses in *Chapple* expressed absolute certainty in their identifications, the defense argued that Loftus' testimony was relevant on this point as well.

The appellate court concluded that the above factors would not be known by average jurors without hearing the expert's testimony. The *Chapple* court's analysis began with a discussion of Rule 702 of the Arizona Rules of Evidence.[217] The court stated that Rule 702 "allows expert testimony if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' "[218] The *Chapple* majority emphasized that "the test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony 'to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understand-

212 *Chapple*, 135 Ariz. at 293, 660 P.2d at 1220.

213 *Id.* *See supra* notes 110-11 and accompanying text.

214 *Id.* at 293-94, 660 P.2d at 1221. *See supra* notes 124-25 and accompanying text.

215 *Id.* *See supra* notes 112-16 and accompanying text.

216 *Id.* *See supra* notes 120-21 and accompanying text.

217 *Id.* at 291-93, 660 P.2d at 1218-20.

218 *Id.* at 292, 660 P.2d at 1219 (quoting ARIZ. R. EVID. 702).

ing of the subject . . . .' "[219]

Under the "proper subject" test of Rule 702, the *Chapple* court determined first that the ordinary juror may not treat eyewitness testimony with appropriate caution.[220] Second, the court concluded that the expert evidence met the "assistance requirement" of Rule 702 because Loftus' discussion of factors affecting eyewitness accuracy was relevant to the facts of the case.[221] Even assuming that weaknesses in the witnesses' identifications could be elicited through cross-examination, excluding Loftus' testimony had the effect of depriving the jurors of "the best possible degree" of understanding about the accuracy of the identifications.[222] The concern over the prejudicial effect of expert testimony arises both under Rule 702 and the *Amaral* criteria. The *Chapple* court, however, did not find that any unfair prejudice would have resulted from admission of Loftus' testimony.[223]

After holding that the trial court could have admitted the testimony, the court considered whether the trial court had abused its discretion in refusing to admit it. The court noted the particular importance of eyewitness accuracy to the resolution of the primary issues in the case.[224] Reviewing the substance of Loftus' proposed testimony, and its close connection with the facts of the case, the court concluded that the expert testimony would have assisted the jury on a number of the issues raised.[225] Thus, the lower court's ruling that factors affecting human memory and perception "could be developed on cross-examination and effectively argued without evidentiary foundation" was in error.[226] The reasoning in the *Chapple* case thus suggests that where expert psychological testimony will be of significant assistance to the jury in resolving disputed issues of a particular case, it should be admitted.

Despite the lack of reported caselaw supporting the admission of expert psychological testimony, the decision in *Chapple* may give advocates of this reform new influence over courts' decisions in this area. The legal arguments favoring the admission of expert psycho-

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219 *Id.* at 292-93, 660 P.2d at 1220 (quoting FED. R. EVID. 702 advisory committee note).

220 *Id.* at 293, 660 P.2d at 1220.

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

222 *Id.*

223 *Id.* at 292, 660 P.2d at 1219. The court dismissed the problem of unfair prejudice that the State argued would arise from Loftus' testimony: "We do not believe that this raises the issue of *unfair* prejudice." *Id.* (emphasis in original).

224 *Id.* at 295, 660 P.2d at 1222.

225 *Id.*

226 *Id.* at 296, 660 P.2d at 1223.

logical testimony rests on the liberal standard of Federal Rule of Evidence 702.[227] Expert evidence must meet only the low barrier of providing "assistance" to the jury before it is admissible. Some psychologists have suggested that Rule 702 modifies the *Amaral* requirements and allows expert testimony even where it is neither beyond jurors' ordinary understanding nor conforms to a generally accepted scientific theory.[228] Furthermore, because the expert's opinion may be "in the form of an opinion *or otherwise*,"[229] supporters of expert psychological testimony argue that Rule 702 encourages non-opinion expert testimony as was offered in *Chapple*.[230]

According to proponents of expert psychological testimony, such testimony is not excludible under Rule 403.[231] They view the concern that the jury will be overwhelmed by the expert's qualifications as an insufficient reason for excluding expert psychological testimony.[232] Thus, because expert psychological testimony meets the admissibility standards and will be critical in certain cases, it should not be barred under Rule 403 in those cases for causing delay or confusing the jury. Furthermore, a number of lawyers and judges advocate the use of expert psychologists when identification disputes arise.[233]

Psychologists argue that the admissibility standards for scientific evidence now permit the introduction of expert psychological evidence. They assert that lay persons, in contrast to those in the legal profession, have shown little understanding of the hazards as-

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227 *Id.* at 292-93, 660 P.2d at 1219-20. *See also* Convis, *supra* note 1, at 583-84.

228 *See* Loftus & Fishman, *supra* note 1, at 102. Loftus argued that *Amaral* and *Brown* could have been decided differently under the Federal Rules. This contention, however, is clearly untenable in light of the decisions in *Fosher* and *Thevis*. *See supra* notes 130, 158, 164-66 and accompanying text.

229 *See supra* note 147.

230 *See* Convis, *supra* note 1, at 583-84; *see also* FED. R. EVID. 702 advisory committee note ("This forum recognizes that experts may also testify with respect to facts which they have perceived or present dissertations or explanations, leaving the trier of fact to apply them to the facts." *Id.*)

231 *See supra* note 174 and accompanying text.

232 *See* Convis, *supra* note 1, at 584. Psychologists reason that this concern would be invalid when opposing parties each offer such evidence. Even if the evidence comes from only one party, most jurors may consider themselves better amateur psychologists than amateur physicians or chemists. They are unlikely to be as swayed by psychological testimony as other forms of expert testimony. A second reason expert psychological testimony should not be excluded for fear of its persuasive weight is that the usual jury instructions remind the jury that they are not bound by the expert's testimony and should give it only the weight that they believe it is due. *Id.*

233 *See* McCloskey & Egeth, *infra* note 240 at 576 ("This negative view [toward the expert's testimony] is far from being the dominant view held by members of the legal profession.").

sociated with eyewitness testimony.[234] Their experiments on the impact that a single eyewitness can have in a courtroom show that jurors continue to believe that eyewitness testimony is reliable.[235] Furthermore, psychologists argue that several factors will adequately limit the circumstances in which expert psychological testimony would be used.[236] For example, psychologists agree that experts should be free to refuse to offer expert psychological testimony in certain cases.[237]

Finally, some psychologists contend that the legal system is simply reluctant to allow psychology to enter into the courtroom.[238] These psychologists deem that the law's response to psychology to

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234 *See* Buckhout, *supra* note 15, at 44; Convis, *supra* note 1, at 583.

235 Loftus argues that in identification cases jurors deliberate without adequate information because they are unaware of factors rendering eyewitness testimony unreliable. Jurors' lack of knowledge in this area is compounded by a tendency to rely heavily on eyewitness testimony in any form. *See* Loftus & Fishman, *supra* note 1, at 88-89 (1978).

The assumption that the jury can adequately evaluate eyewitness testimony underlies the broad discretion granted to the trial court to exclude the expert testimony. Loftus argues, however, that jurors lack any collective understanding of eyewitness behavior. In one study, Loftus presented fourteen questions, each relevant to a juror's common sense understanding about human behavior in the identification of persons, to 265 total subjects in samples in Washington, Nebraska, and Washington, D.C. The overall results, while exceeding chance levels, did not show that jurors possess adequate information about eyewitnesses. Only with respect to two items, the effect of stress on perception and memory and the effect of leading questions on response accuracy, was there any real demonstration of a collective understanding among jurors. Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior*, 6 LAW & HUM. BEHAV. 15, 24-26 (1982).

In one experiment, 150 subjects were asked to play the role of jurors trying a criminal case. They received a written description of a grocery store robbery in which two people were killed. They also received a summary of the evidence and arguments presented at the defendant's trial. Fifty jurors were told that several other pieces of circumstantial evidence were presented against the defendant; only 18% of these jurors found the defendant guilty. Fifty other jurors received these same facts with the additional information that a store clerk had made an eyewitness identification of the defendant. Out of this qroup, 72% stated that the defendant was guilty. Loftus also maintains that jurors believe eyewitness testimony more than other types of evidence. In one experiment Loftus compared the impact of eyewitness testimony upon jurors to that of evidence from polygraph, handwriting, and even fingerprint experts. Convictions were highest in the case in which simulated jurors heard eyewitness testimony (78%). *See* Loftus, *Whose Shadow is Crooked?*, AM. PSYCHOLOGIST, 576 (May, 1983).

236 Psychologists argue that in addition to the legal standards for admission of expert psychological testimony, they have personal criteria that must be met in a particular case before they will agree to testify. Telephone interview with Dr. Robert Buckhout (Jan. 20, 1984).

Exclusion of expert testimony would be appropriate, for example, where the trial judge finds that there is no psychological research pertinent to the facts in the case, if the testimony is only a minor portion of the party's case, or if the unreliability of the identification is provable by other means. *See* Loftus & Fishman, *supra* note 1, at 101.

237 *See* Loftus, *supra* note 235, at 576.

238 *See* Buckhout, *supra* note 15, at 41.

be dangerously outdated and find that it would be greatly improved by the admission of expert psychological testimony in appropriate cases.

IV. Analysis: Should Courts Admit Expert Testimony on the Reliability of Eyewitness Identification?

A. Was the Court Wrong in *State v. Chapple*?

Whether psychological expert testimony on the reliability of eyewitness testimony should be admissible is a highly controversial issue that must be resolved before other courts follow the dangerous holding of *State v. Chapple*.[239] The analysis of the Arizona Supreme Court was unsound. Furthermore, the danger associated with admission of expert psychological testimony[240] is an additional reason to reject any extension of the *Chapple* result to other cases.

The *Chapple* holding that the trial court abused its discretion in precluding expert psychological testimony under the circumstances of the case was clearly unprecedented. The *Chapple* court failed to provide a single reported case upon which it could rely in reaching its decision.[241] The *Chapple* majority nonetheless attempted to distinguish cases excluding expert psychological testimony by arguing that many of the cases contained fact situations that failed to meet the *Amaral* criteria or were decided on legal principles differing from those followed in Arizona.[242] The *Chapple* court cited and attempted to distinguish only two atypical cases, *United States v. Watson*[243] and *United States v. Brown*.[244]

The majority opinion in *Chapple* attempted to justify its holding by arguing that eyewitness identification was a critical issue in the case.[245] That distinction, however, provides no support for the court's conclusion, because identification is often a critical issue in a

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239 *Chapple*, 135 Ariz. at 291, 660 P.2d at 1218.

240 *See infra* notes 262-269 and accompanying text. *See also* McCloskey & Egeth, *Eyewitness Identification, What Can a Psychologist Tell a Jury?*, Am. Psychologist, 550, 558-59 (May, 1983).

241 While Arizona is not bound by federal precedent or other states' precedent, the *Chapple* decision relies extensively on the federal cases and rules in this area. In choosing to do so, the majority opinion does not adequately explain why it failed to reach a similar result to that reached by the other cases.

242 135 Ariz. at 291, 660 P.2d at 1218.

243 587 F.2d 365 (7th Cir. 1978).

244 540 F.2d 1048 (10th Cir. 1976). In *Watson*, for example, the proposed expert testimony was excluded by the court because the proffered expert was not qualified to testify on the subject. *Watson*, 587 F.2d at 369. In many cases where the expert witness was qualified, courts have nevertheless excluded expert psychological testimony. *See, e.g.*, United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973).

245 135 Ariz. at 297, 660 P.2d at 1224.

criminal case. Justice Hays, in his dissenting opinion to *Chapple*, agreed that "[t]he fact that identification was defendant Chapple's sole defense should not compel us to carve out an exception to our rule against such testimony."[246]

The *Chapple* court also failed in its attempt to distinguish cases excluding expert psychological testimony on the basis that those cases were not decided under the same legal rules as those followed in Arizona. The Arizona laws governing the admission of expert testimony are identical to the Federal Rules. If the court had considered the reasoning of the Fifth and First Circuit Courts of Appeals in *United States v. Thevis*[247] and *United States v. Fosher*,[248] it would have discovered that the introduction of expert psychological testimony is banned under Federal Rule of Evidence 702.[249] In *Fosher*, for example, the court held that "the offer . . . was neither sufficiently focused on the issue nor sufficiently beyond the ken of lay jurors to satisfy Rule 702."[250] Because Arizona Rule of Evidence 702 repeats Federal Rule 702 verbatim,[251] the *Chapple* court's argument that the Arizona legal rules led to a different result than under the Federal Rules is untenable. Similarly, a near majority of the states have adopted rules of evidence patterned after the federal model.[252] Courts in these states have uniformly rejected appeals challenging trial courts' denials of expert psychological testimony.[253]

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246 *Id.* at 300, 660 P.2d at 1227 (Hays, J., dissenting).

247 665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

248 590 F.2d 381 (lst Cir. 1979).

249 *See supra* note 147. The Federal Rules of Evidence were intended to expand the admissibility of expert opinions as outlined in Chapter VII of the Federal Rules. *See* FED. R. EVID. 702 advisory committee note. Federal Rule 702, however, has never been interpreted by any court to permit psychological expert testimony as proposed in *Chapple*.

250 *Fosher*, 590 F.2d at 383.

251 ARIZ. R. OF 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.

Id. See also Federal Rule 702, *supra* note 147. The Chairman of the State Bar of the Arizona Committee on Rules of Evidence has stated that "[t]he Arizona Rules of Evidence are direct descendants of the Federal Rules of Evidence." Kaufman, *The Arizona Rules of Evidence—A Comparison With the Federal Rules*, 1977 ARIZ. ST. L.J. 365, 365-66. While the Arizona version of Article VII, like the federal model, expanded the admissibility of expert opinions, such expansion was intended to be kept to a minimum in Arizona. *Id.* at 366 n.4.

252 *See supra* note 148 and accompanying text.

253 *See, e.g.*, State v. Helterbridle, 301 N.W.2d 545, 547 (Iowa 1980) (court cited MINN. R. EVID. 702 in determining that trial court did not abuse its discretion in refusing to admit expert testimony).

The Arizona Supreme Court's approach toward the *Amaral* criteria for the admission of scientific evidence was misguided. The *Chapple* court approved the four-part admissibility standard of *Amaral*,[254] but incorrectly held that the *Chapple* case met that standard. The *Chapple* court may have assumed that the *Amaral* criteria were relaxed under the Federal Rules.[255] Other decisions, however, would not support this theory and suggest that under the proper application of *Amaral*, the testimony in *Chapple* would have been inadmissible.[256]

First, the court's consideration of whether the testimony reflected a level of knowledge accepted in scientific circles was inadequate.[257] The *Chapple* court neglected to determine whether the offered testimony reflected theories accepted by other experts in Loftus' field. Psychological expert testimony was precluded for this reason in *United States v. Fosher*[258] and more recently in the case of *People v. Brown*.[259] The holdings in these cases are supported by current research indicating that many of psychologists' assertions about eyewitnesses are unsupported by empirical evidence.[260] The effects of stress on identification, the relation between confidence and accuracy, the operation of the storage interval, and the occurrence of weapon focus, for example, are theories whose validity is debated among psychologists.[261]

Psychologists favoring expert psychological testimony rely on studies demonstrating little positive correlation between the variables of confidence and accuracy in identification.[262] Early research in this area, however, reached the opposite conclusion.[263] Further-

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254 135 Ariz. at 291, 660 P.2d at 1218.

255 There is little support for Loftus' argument that the *Amaral* requirements were relaxed under the Federal Rules. For an explanation of Loftus' position, see Loftus & Fishman, *supra* note 1, at 102.

Testimony is no longer objectionable because it embraces an ultimate issue to be decided by the trier of fact. The facts or data underlying the expert opinion, however, must be of a type reasonably relied on by experts in the field. *See* Kaufman, *supra* note 251, at 376.

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

257 135 Ariz. at 291, 660 P.2d at 1218.

258 590 F.2d 381 (1st Cir. 1979).

259 117 Misc. 2d 587, 459 N.Y.S.2d 227 (1983).

260 *See* McCloskey & Egeth, *supra* note 240, at 556-58.

261 *Id.* at 556-57. For retention interval, studies have shown that retention declines as a function of delay. The data, however, is mixed for full recognition. The authors state that there is little evidence about how weapon focus affects eyewitness performance. In fact, "there is virtually no evidence that the phenomenon actually occurs." *Id.* at 557.

262 *See, e.g.*, Wells, Lindsay & Ferguson, *supra* note 1, at 440.

263 *See* Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980). The author notes that support for a

more, a psychologist who recently reviewed 25 studies of the accuracy-confidence relation determined that while a confident witness is generally more accurate in his identification of a suspect, this is true only when the suspect is observed under optimal viewing conditions.[264] Thus, the positive relation between confidence and accuracy may not necessarily be invalid but rather highly dependent on other external influences.

The second and primary inquiry in *Chapple* was whether the proposed testimony met the *Amaral* proper subject requirement. The *Chapple* court held that scientific evidence will "assist the jury so long as the untrained layman would be unable 'to the best possible degree' to determine the issue by himself."[265] The *Chapple* court ignored, however, the qualification in *Fosher* that "to be a proper subject of expert testimony, proof offered . . . must present [the jurors] with a system of analysis reasonably likely to add to common understanding of the particular issue before the jury."[266] This statement suggests that expert evidence must add to jurors' common knowledge to be admissible.

Other courts have held, for example, that unaided jurors are able to evaluate, without the aid of psychological experts, the significance of a long time period between an identification and the observed incident.[267] And in *Johnson v. State*,[268] for example, the Supreme Court of Florida stated that: "[W]e believe it is within the common knowledge of the jury that a person being attacked and beaten undergoes stress that might cloud a subsequent identification of the assailant by the victim. As such, the subject matter was not properly within the realm of expert testimony."[269]

Several psychologists are critical of expert psychological testi-

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positive confidence-accuracy relation is based on a 20 year tradition of laboratory studies, "feeling of knowing" studies, and intuition. *Id.* at 244.

264 *Id.* Deffenbacher found that the confidence-accuracy relation was reliable only under ideal information processing conditions. These conditions included an adequate opportunity for observation in a low stress situation. *See also* Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 LAW & HUM. BEHAV. 261, 264-65 (1980).

265 135 Ariz. at 293, 660 P.2d at 1220.

266 *Fosher*, 590 F.2d at 383.

267 *See, e.g.*, State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981) (identification occurred about four and one-half months after robbery); State v. Galloway, 275 N.W.2d 736 (1979) (identification occurred three years after felony murder). In both cases the courts held that the expert testimony of a psychologist on the effect that the longer the period of time between an incident and a witness' recollection may have on the accuracy of that recollection may properly be excluded.

268 393 So. 2d 1064 (Fla. 1981).

269 *Id.* at 1072 (quoting Nelson v. State, 362 So. 2d 1017, 1021 (Fla. Dist. Ct. App. 1978).

mony as an aid to juries.[270] The psychologists attack in particular two rationales supporting the use of expert psychological testimony: (1) that jurors are unable to distinguish between accurate and inaccurate witnesses; and (2) that jurors are too willing to believe eyewitness testimony.[271] Many of the variables affecting the accuracy of an eyewitness identification are presently recognized by jurors. Variables such as exposure duration, time interval before identification, and cross-racial identification, for example, are generally considered by jurors when evaluating an eyewitness account.[272]

Some studies have suggested that jurors cannot always recognize unreliable eyewitness testimony and that expert psychological testimony would improve their ability to do so.[273] Other studies also have demonstrated, however, that jurors are significantly influenced by the degree to which the viewing conditions of the particular witness are favorable.[274] The less favorable the viewing conditions, the less likely are jurors to believe the witness. Thus, jurors do consider factors affecting witness accuracy. Because in *Chapple* the witnesses had ample opportunity to observe the suspect, jurors could have considered this fact in weighing the witnesses' testimony.[275] Furthermore, one study has concluded that while jurors who receive expert advice become more skeptical of the eyewitness identifications, they do not experience any improvement in their ability to discriminate between accurate and inaccurate witnesses.[276]

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270 *See generally* McCloskey & Egeth, *supra* note 240.

271 *Id.* at 551.

272 *Id.* at 556-57.

273 *Id.* at 555 ("The discrimination rationale asserts that regardless of whether jurors are generally skeptical or generally credulous of eyewitness testimony, they cannot distinguish well between accurate and inaccurate eyewitnesses." *Id.*). *See, e.g.*, Wells, Lindsay & Ferguson, *supra* note 1, at 440-48.

Several studies suggest that expert psychological testimony may serve to make jurors more skeptical of eyewitness testimony. *See, e.g.*, Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9 (1980); Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275, 282-85 (1980).

274 *See, e.g.*, Deffenbacher, *supra* note 263, at 244. Lindsay, Wells & Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOLOGY 79 (1981).

275 In *Chapple* the witnesses spent over one and one-half days with the suspect. 135 Ariz. at 284-85, 660 P.2d at 1211-12.

276 *See* McCloskey & Egeth, *supra* note 240, at 555. Only one relevant study has considered the possible effects of expert psychological testimony on jurors' ability to discriminate accurate from inaccurate eyewitnesses. The study, conducted by G.L. Wells and R.C. Lindsay, used subjects serving as jurors who judged whether or not witnesses to a staged crime accurately identified the perpetrator. Half of the "jurors" received expert psychological advice before judging the credibility of witnesses, and the remaining "jurors" received no expert advice.

The expert testimony emphasized two general points: (1) that eyewitness identifica-

Cross-examination is the appropriate method to inform jurors about any weaknesses in eyewitness testimony. The *Amaral* court stated that, "[i]t is the responsibility of counsel during cross-examination to inquire into the witness' opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention."[277] Justice Hays agreed in his dissent to *Chapple* that jurors, without expert assistance, are well-equipped to evaluate the weight to be given to eyewitness testimony on the basis of information elicited during cross-examination.[278]

The assertion that expert psychological testimony is necessary because jurors are too willing to believe eyewitness testimony also is incorrect. The results of one study of jury verdicts in 201 criminal cases showed that convictions were no more likely in cases involving identifications of the defendant by a victim or other witness(es) than in cases where there was no eyewitness identification.[279] Furthermore, juries could become overly skeptical of eyewitness testimony if psychological experts are allowed to testify.[280]

The *Chapple* court gave insufficient treatment to the third part of the *Amaral* test; the balancing of probative value and unfair prejudice.[281] Under the Federal Rules, evidence admissible under Rule 702 is excluded under Rule 403 unless its probative value outweighs its potential for unfair prejudice.[282] The court in *Chapple* gave no explanation of why admission of Loftus' testimony would not have had the same potential for prejudice.

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tion in criminal cases is quite different from recognizing one's friends and associates; and (2) that there is evidence to show that witness confidence may have little or no relationship to witness accuracy.

The expert psychological testimony reduced the jurors' overall willingness to believe eyewitnesses. The expert testimony, however, had absolutely no effect on jurors' ability to discriminate accurate from inaccurate witnesses. *Id.* at 556.

277 *Amaral*, 488 F.2d at 1153.

278 *Chapple*, 135 Ariz. at 300, 660 P.2d at 1227 (Hays, J., dissenting).

279 *See* McCloskey & Egeth, *supra* note 240, at 554. This study examined the 201 criminal cases tried by jury in Marion County, Indiana, between January 1974 and June 1976. The authors suggest that the claim that jurors rarely regard eyewitness testimony with any skepticism is doubtful because the ratio of convictions in cases with at least one eyewitness identification of the defendant to convictions in cases without identification was almost identical.

A dramatic illustration of this point is provided in one case where a man was arrested 13 times and tried five times in an 18-month period for a series of crimes that were later confessed to by another man. The suspect was acquitted in all five trials, even though one or more eyewitnesses testified against him in each. *Id.* at 554-55.

280 McCloskey and Egeth argue that absent clear evidence that jurors overbelieve eyewitnesses, jurors may not need to be made more skeptical overall. McCloskey & Egeth, *supra* note 240, at 554-55.

281 For a discussion of this criteria see *supra* notes 173-76 and accompanying text.

282 *See supra* notes 174-75 and accompanying text.

Under Rule 403 evidence should be excluded not only when it is unfairly prejudicial, but whenever its probative value is outweighed by the danger of confusing the issues, misleading the jury, or by considerations of needless delay and waste of time.[283] The *Chapple* majority, however, failed to address the problems associated with expert psychological testimony that may result in the above dangers and considerations.

One of these dangers is that a serious negative inference problem may result from the admission of expert psychological testimony.[284] As this testimony is accepted more frequently at trial, its absence in a particular case might cause a jury to believe that the eyewitness testimony presented must be highly accurate. The jury may make a negative inference from the lack of expert psychological testimony and assume that the eyewitness testimony is reliable.

The administrative costs associated with the admission of expert psychological testimony would have detrimental effects on the courtroom process in terms of the time and expense involved.[285] The prosecution, for example, may attempt to introduce its own experts to rebut the expert psychological testimony of the defendant.[286] The probative value of the proposed expert testimony is further decreased by the fact that the number of mistaken convictions based on eyewitness identifications is relatively small.[287] The harms noted above, inherent in the admissibility rule approved in *Chapple*, clearly outweigh any probative value that such expert testimony may possess.[288]

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283 *See supra* note 174. The Federal Rule appears to be a broader rule on an exclusion than the prejudicial effect criteria under *Amaral*.

284 *See* Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011, 1057-59 (1978).

285 *See* McCloskey & Egeth, *supra* note 240, at 558-59.

286 *See* State v. Chapman, 410 So. 2d 689 (La. 1982). In *Chapman*, for example, the trial court allowed the State's psychiatric expert to testify about the witness' reaction to stress. The testimony contradicted Buckhout's testimony that the perceptual abilities of a person undergoing stress are decreased. *Id.* at 705.

287 *See* McCloskey & Egeth, *supra* note 240, at 552 ("[D]ocumented cases of wrongful conviction resulting from mistaken eyewitness testimony obviously represent only a small fraction of 1% of the cases in which defendants were convicted at least in part on the basis of eyewitness testimony.").

288 135 Ariz. at 296, 660 P.2d at 1224. The *Chapple* court also neglected to set out guidelines for the admission of expert psychological testimony in cases decided after *Chapple*. The majority stated that trial court discretionary rulings will for the most part continue to be supported. *Id.* at 297, 660 P.2d at 1224. This author, however, is left unsatisfied. The current developments in this area favor the admission of such evidence. Subsequent cases may adopt the *Chapple* court's questionable ruling unless real guidelines are established as to under what circumstances, if any, a trial court must admit expert psychological evidence.

As pointed out by Justice Hays in his dissenting opinion, "[w]ith little to distinguish

Thus, the court was wrong in *State v. Chapple*.[289] First, the Arizona Supreme Court ignored applicable authorities in reaching its decision. Second, the *Chapple* court misinterpreted the rules governing the admission of expert scientific evidence. Under even the most liberal construction of the rules for evaluating the proposed testimony, expert psychological evidence is inadmissible because of its questionable value and because it is generally unhelpful to a jury. Finally, even were the proposed testimony to meet all other requirements, expert psychological testimony introduces its own dangers and prejudices that ordinarily would require its exclusion.

B. ALTERNATIVES TO THE ADMISSION OF EXPERT PSYCHOLOGICAL TESTIMONY

This Comment is intended primarily as an evaluation of American courts' current indications of willingness to consider the admission of expert psychological testimony. Thus, it will consider other solutions to the problem of unreliable identification only briefly in order to show that viable alternatives to expert psychological testimony exist. Furthermore, it will suggest other less onerous ways in which psychologists might contribute to legal proceedings.

The most drastic alternative to admitting expert psychological testimony is simply to exclude all eyewitness testimony,[290] or, to reject the one-witness rule.[291] Great Britain is considering the latter reform which would require some corroborating evidence before a conviction based on eyewitness testimony could stand.[292] This approach, however, may result in over-protecting a defendant at the expense of society.[293]

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this case from the general rule against admitting eyewitness identification, we are left with no guidelines to decide the deluge of similar issues which are sure to result." *Id.* at 300, 660 P.2d at 1227 (Hays, J., dissenting).

289 135 Ariz. 281, 660 P.2d 1208 (1983).

290 *See* Comment, *supra* note 8, at 1423-24 ("Complete exclusion of eyewitness identification testimony, on the ground that its probative value is outweighed by its inherent unreliability and prejudicial impact, has not been seriously advocated by any modern commentator.").

291 *Id.* at 1424.

292 The British home secretary appointed a committee to investigate mistaken identification after two persons were independently convicted on the basis of mistaken identification. The committee recommended that a trial judge should be required by statute to direct a jury that it is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eyewitness identification is supplemented by substantial evidence of another sort. *See* Williams, *Evidence of Identification: The Devlin Report*, 1976 CRIM. L. REV. 407-22.

293 *See* Woocher, *supra* note 1, at 1001-02 n.151. Woocher explains that policy considerations prevent a rejection of the one-witness rule. This solution would allow a guilty defendant to escape conviction "despite a highly reliable, if uncorroborated, identifica-

One of the best available alternatives to admitting expert psychological testimony is the use of cautionary jury instructions. This alternative would require special instructions in criminal cases where eyewitness identification is significant. In *United States v. Telfaire*,[294] the court articulated "Model Instructions" on eyewitness identification that have become the standard prototype for such instructions.[295] The instructions state that identity is an issue in the case, that the prosecution has the burden of proving identity beyond

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tion." *Id.* at 1002. Furthermore, determining "what constitutes sufficient corroboration . . . is so difficult that this solution is impracticable." *See* Comment, *supra* note 8, at 1424 n.198.

294 469 F.2d 552 (D.C. Cir. 1972).

295 In *Telfaire* the trial court in a robbery case refused to give special instructions on eyewitness identification. The court of appeals held that the failure to give the instructions was not prejudicial under the facts of the case; the court, however, adopted model instructions to be used in future cases. In *Telfaire* the appeals court found no prejudicial error where the witness had adequate opportunity to observe and had made a spontaneous identification.

The instructions adopted by the *Telfaire* court provide:

Appendix: Model Special Instructions on Identification

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 proving 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. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not quilty.

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 reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]*

[Footnote * Sentence in brackets to be used only if appropriate. Instructions to be inserted or modified as appropriate to the proof and contentions. *Id.* at 558]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the de-

a reasonable doubt, and that certain factors should be considered in assessing the identification testimony.[296] These factors are identical to those used by the Supreme Court in *Neil v. Biggers*.[297]

The use of cautionary jury instructions would protect defendants against unreliable eyewitness testimony while imposing minimal costs on society and on the courts.[298] In comparison to expert psychological testimony, cautionary jury instructions create little danger of prejudice.[299] Critics of this reform suggest that the instructions do not provide the jury with enough information to evaluate the eyewitness testimony, that the instructions favor the defendant, and that juries do not listen to or understand the instructions.[300]

At present the *Telfaire*-type instructions seem to offer a workable compromise between excluding eyewitness testimony altogether and admitting expert psychological testimony. The advantage of this alternative lies in its minimal interference with the function of the jury.[301] Few courts have held that a refusal to give

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fendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness].

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial].

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty. *Id.* at 558-59.

296 These factors include:

"(1) the opportunity of the witness to view the defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation."

State v. Warren, 230 Kan. 385, 390, 635 P.2d 1236, 1240 (1981) (quoting Neil v. Biggers, 409 U.S. 98, 199 (1972)).

297 *See supra* note 58 and accompanying text. In *Warren*, the court noted that trial courts must often determine the admissibility of eyewitness testimony; it thus was appropriate to require the jury to consider the same factors in weighing the credibility of the eyewitness identification testimony. *Warren*, 230 Kan. at 397, 635 P.2d at 1244.

In *Telfaire*, Judge Bazelon also would have instructed the jury to consider whether the inter-racial character of an identification affected its reliability. 469 F.2d at 559-60 (Bazelon, J., concurring).

298 *See Warren*, 230 Kan. at 397, 635 P.2d at 1244.

299 *See* Comment, *supra* note 8, at 1426.

300 *Id. See also Warren*, 230 Kan. at 400, 635 P.2d at 1246 (Fromme, J., dissenting) (instructions may stack the deck against the government).

301 Advocates of cautionary jury instructions state that, unlike expert psychological

the requested instructions constitutes reversible error. A number of courts, however, have found special instructions to present a viable alternative to the problem of unreliable eyewitness testimony.[302]

Finally, there are several existing safeguards designed to prevent inaccurate witness identifications. If these protections are effective, then the rationale for expert psychological testimony is undermined. For example, trial courts may suppress identification testimony if the identification procedures rendered the evidence unreliable.[303] Effective cross-examination and argument by defense counsel reduce the likelihood that the jury will accept eyewitness testimony unquestionably.[304] These safeguards demonstrate that the legal system is aware of the problems of eyewitness testimony and has taken steps to combat those problems.

Although expert psychological testimony should be inadmissible, law and psychology could benefit mutually from a closer association. Psychologists should continue to explore the relation between psychological variables and eyewitness accuracy. Courts then should use these findings to re-evaluate the factors used to determine the admissibility of eyewitness testimony.

Psychological research has indicated that several of the factors used to determine reliability under *Brathwaite* could be improved.[305] In terms of the "opportunity to observe" factor, psychological evidence is consistent with the assumption that optimal viewing conditions result in more accurate identifications.[306] The "degree of attention" factor may be valid in some instances, but not in others.[307] Little consensus exists over whether the other factors

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testimony, the jury will not be overwhelmed by an "expert" with scientific knowledge. At the same time, the instructions are unlikely to make the jury overskeptical. *See* Comment, *supra* note 8, at 1426.

302 *See, e.g.*, United States v. Greene, 591 F.2d 471 (8th Cir. 1979); United States v. Hodges, 502 F.2d 273 (4th Cir. 1974); United States v. Barber, 442 F.2d 517 (3d Cir. 1971); State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981); Commonwealth v. Bowden, 379 Mass. 972, 399 N.E.2d 482 (1980). *See also* United States v. Anderson, 739 F.2d 1254 (7th Cir. 1984) (pattern instruction on witness identification "substantial equivalent of *Telfaire* instruction.").

303 *See* Manson v. Brathwaite, 432 U.S. 98 (1977); *see also supra* notes 59-71 and accompanying text.

304 *See* Watkins v. Sowders, 449 U.S. 341, 348-49 (1981) (cross-examination in front of the jury is adequate to test the reliability of eyewitness testimony); *see also* Convis, *supra* note 1, at 580. Courts traditionally have depended upon the cross-examination of identifying witnesses and on the final argument of defense counsel to suggest to the jury any weakness in the identification testimony. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

305 *See, e.g.*, Uelman, *Testing the Assumptions of* Neil v. Biggers: *An Experiment in Eyewitness Identification*, 16 CRIM. L. BULL. 358 (1980).

306 *Id.* at 363-65.

307 *Id.* at 362. Contrary to popular belief, a witness' "degree of attention" is not im-

used by courts for purposes of admission of eyewitness testimony are highly accurate indicators of reliability.

The use of certain factors to determine admissibility and to evaluate reliability in special jury instructions could be improved in two ways. One idea is to weigh the factors differently;[308] the other is to focus more specifically on individual variables, such as sex or age, that research indicates may be related to identification accuracy.[309]

V. CONCLUSION

Expert psychological testimony should not be admissible to support a theory of mistaken identification. This type of expert evidence fails to meet three of the criteria for the admission of expert scientific evidence: (1) the subject matter of the testimony is not outside the average juror's knowledge; (2) research on psychological factors affecting eyewitness accuracy is not sufficiently established; and (3) substantial problems of prejudice are raised by the expert psychologist's appearance in the courtroom.

At present, the perceived benefits of psychological testimony on eyewitness identification do not justify its acceptance by the legal system. The Arizona Supreme Court in *State v. Chapple*[310] recently disregarded the majority rule excluding expert psychological testimony without providing a sufficient rationale for its decision. The *Chapple* case should not be followed for the above reasons and for the threat it imposes on the integrity of the jury system.

Much eyewitness testimony is neither unreliable nor wrong. Furthermore, it is the jury's traditional role to determine the weight and credibility to be given to the evidence presented. In the recent words of the Supreme Court, "the proper evaluation of evidence . . . is the very task our system must assume juries can perform."[311]

Thus, experts whose testimony adds little or nothing to jurors' ability to determine issues in a given case should be excluded. The

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proved because he or she is a police officer or has received special training. Psychological research suggests that individual factors such as sex, age, intelligence, and race are the more significant factors in the accuracy of human perception. *Id.*

308 Studies suggest that the "opportunity to observe" factor may be the most relevant among the factors currently used in determining identification accuracy. *Id.* at 363. *See also* Convis, *supra* note 1, at 590-91.

309 *See* Uelman, *supra* note 79, at 363. Uelman found that "the most significant variable revealed by this experiment was sexual difference between the witness and the suspect." *Id.* at 365. Generally, the effects of age and sex on eyewitness accuracy are not well understood. Children are considered the most inaccurate witnesses. *See* E. LOFTUS, *supra* note 1, at 162. For a contrary opinion, see *Perception—Can Child Eyewitnesses Be Trusted*, 13 PSYCHOLOGY TODAY 3 (1979).

310 135 Ariz. 281, 660 P.2d 1208 (1983).

311 Watkins v. Sowders, 449 U.S. 341, 347 (1981).

value of expert psychological testimony must be weighed against the competing factors and caselaw discussed in this Comment. The consequences of the result reached in *Chapple* will be more damaging to our legal system than any problems associated with eyewitness testimony.

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