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UNITED STATES V. SMITH: AN EXAMPLE TO OTHER COURTS FOR HOW THEY SHOULD APPROACH EYEWITNESS EXPERTS

Maureen Stoneman⁺

In 2000, after Frank Lee Smith spent fourteen years on death row for the murder of eight-year-old Shandra Whitehead, he was exonerated by DNA evidence.¹ Smith had been wrongly convicted based primarily on the misidentification by two eyewitnesses.² Unfortunately, Smith's exoneration occurred eleven months after he died of cancer on death row.³ This miscarriage of justice provides yet another example of what occurs all too often: convictions based on the inaccuracy of eyewitness identification.⁴ Juries rely heavily upon eyewitness identifications, as proven by studies demonstrating that jurors rely on such testimony even though it is often wrong.⁵

To combat this issue, defense counsel have sought to introduce experts to testify regarding the inaccuracy of eyewitness testimony and the factors that often affect an eyewitness's perception and memory.⁶ Prosecutors have objected to such expert testimony,⁷ asserting either that such witnesses do not meet the requirements that experts must meet in order to testify under Federal Rule of Evidence 702 (Rule 702)⁸ or that, even if such witnesses do qualify as

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1. Amy Driscoll, Lesley Clark & Charles Savage, *DNA Test Clears 'Killer' After His Death; Man Spent Years on Death Row*, MIAMI HERALD, Dec. 15, 2000, at 1A.

2. *Id.* at 2A. The first eyewitness was the victim's mother who testified that she had seen Smith standing outside her home on the night of the murder, and the second eyewitness was a woman who testified that as she drove past the victim's home on the night of the murder, Smith signaled her to stop and asked her for fifty cents. Supplemental Brief of Appellant at 1-2, *Smith v. Florida*, 708 So.2d 253 (Fla. 1997) (No. 78,199).

3. Driscoll, Clark & Savage, *supra* note 1, at A1.

4. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. OF CRIM. L. & CRIMINOLOGY 523-24 (2004) (discussing the high number of persons exonerated from 1989 through 2003 who were convicted based on eyewitness misidentification).

5. See ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 123-24 (4th ed. 2007) (discussing the weight that juries give eyewitness testimony, even eyewitness testimony that defense counsel proves is inaccurate).

6. See, e.g., *United States v. Smith*, 621 F. Supp. 2d 1207, 1208-09 (M.D. Ala. 2009) (allowing defense counsel to introduce an expert to discuss factors that affect eyewitness testimony, such as confidence, cross-racial identifications, stress, and post-event conditions).

7. See, e.g., *id.*

8. See, e.g., *id.*; see also FED. R. EVID. 702; *United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996).

experts and can testify under Rule 702, such experts violate Federal Rule of Evidence 403 (Rule 403) because the prejudice that the testimony creates substantially outweighs its probative value.⁹

Rule 702 outlines the requirements that expert testimony must meet in order to be admitted at trial.¹⁰ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court, for the first time, interpreted Rule 702 and decided what standards expert testimony must meet in order to be admissible.¹¹ *Daubert* held that even if an expert witness is found to satisfy Rule 702, his testimony can still be excluded under Rule 403.¹² Rule 403 permits exclusion of otherwise relevant evidence “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.”¹³

Prior to *Daubert*, some courts uniformly excluded expert testimony regarding the reliability of eyewitnesses.¹⁴ However, by setting out specific guidelines for determining the admissibility of expert testimony, *Daubert* seems to prohibit a blanket exclusion of an entire group of expert witnesses.¹⁵ Therefore, post-*Daubert* courts have applied the *Daubert* guidelines to determine whether expert-eyewitness testimony is admissible under Rule 702, and, if it is admissible, then courts conduct a balancing test under Rule 403 to

9. See, e.g., *Smith*, 621 F. Supp. 2d at 1209; see also FED. R. EVID. 403; *United States v. Lumpkin*, 192 F.3d 280, 288–89 (2d Cir. 1999).

10. FED. R. EVID. 702. Rule 702 states:

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

Id.

11. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585–89, 592 (1993) (stating that in order to admit expert testimony the testimony must, in addition to being relevant under Federal Rule of Evidence 402, (1) be scientific knowledge, and (2) aid the jury in determining the issue presented).

12. *Id.* at 595.

13. FED. R. EVID. 403.

14. See, e.g., *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984) (stating that it would not consider whether the district court improperly excluded expert testimony on the reliability of eyewitnesses because such testimony is not admissible in the Eleventh Circuit).

15. *United States v. Smith*, 621 F. Supp. 2d 1207, 1211 (M.D. Ala. 2009) (interpreting *Daubert* as a prohibition against a blanket exclusion of a whole body of expert testimony); see *Daubert*, 509 U.S. at 595 (holding that courts should examine each case individually to systematically apply the factors set out in the opinion, rather than coming to conclusions prior to applying the factors).

determine whether any danger of prejudice or confusion that the testimony might cause substantially outweighs the probative value of such testimony.¹⁶

Courts have reached mixed outcomes on the admissibility of eyewitness-expert testimony¹⁷ under Rules 702 and 403.¹⁸ Nearly every jurisdiction has held that the decision to admit or exclude eyewitness-expert testimony is within the discretion of the trial court.¹⁹ Courts are becoming increasingly receptive to eyewitness-expert testimony as scientific knowledge that is admissible under Rule 702.²⁰ However, even if they find that such testimony constitutes scientific knowledge, many courts continue to exclude eyewitness-expert testimony under Rule 702 because they do not believe that such testimony aids the trier of fact.²¹

Additionally, although a few courts have held that eyewitness-expert testimony should not be excluded under Rule 403 because it provides juries with a more complete picture and allows jurors to make better-informed and more accurate decisions,²² many courts have found that eyewitness experts cause unfair prejudice and confusion by interfering with the role of the jury in determining witness credibility, and have thus excluded such testimony.²³

16. See, e.g., *United States v. Mathis*, 264 F.3d 321, 338–40 (3d Cir. 2001) (deciding that the expert evidence could be admitted under Rule 702, and then deciding that the testimony did not violate Rule 403 and could therefore be admitted).

17. In this Note, “eyewitness-expert testimony” is used as shorthand for expert testimony on the reliability of eyewitnesses.

18. Compare *Mathis*, 264 F.3d at 335–38 (finding that the eyewitness expert’s testimony could not be excluded under Rule 702 because the evidence aided the trier of fact), with *United States v. Kime*, 99 F.3d 870, 883–84 (8th Cir. 1996) (finding that the eyewitness expert did not satisfy Rule 702 because the evidence offered by the eyewitness expert was not scientific knowledge, nor did such evidence aid the trier of fact); compare *United States v. Smithers*, 212 F.3d 306, 315–17 (6th Cir. 2000) (holding that eyewitness-expert testimony should not have been excluded under Rule 403), with *Kime*, 99 F.3d at 884 (holding that the dangers of prejudice and confusion that eyewitness-expert testimony would cause the jury substantially outweighed any benefit of such testimony, and the evidence was properly excluded under Rule 403).

19. See, e.g., *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993); *United States v. Curry*, 977 F.2d 1042, 1050, 1052 (7th Cir. 1992); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986).

20. See *Moore*, 786 F.2d at 1312 (noting that recent courts were more willing to accept eyewitness-expert testimony as scientific knowledge). However, even after *Moore* noted this change, courts have continued to exclude eyewitness-expert testimony on the grounds that it is not scientific knowledge. See, e.g., *Kime*, 99 F.3d at 883.

21. See, e.g., *Kime*, 99 F.3d at 884.

22. See *Mathis*, 264 F.3d at 340; *Smithers*, 212 F.3d at 315–16; *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (per curiam); see also *United States v. Downing*, 753 F.2d 1224, 1231 (3d Cir. 1985) (avoiding discussion of Rule 403, but nevertheless stating that eyewitness experts have a high probative value in that they provide the jury with a more complete picture of eyewitness identification).

23. See *United States v. Lumpkin*, 192 F.3d 280, 288–89 (2d Cir. 1999); *Kime*, 99 F.3d at 883–84; *United States v. Curry*, 977 F.2d 1042, 1051–52 (7th Cir. 1992).

In *United States v. Smith*,²⁴ the United States District Court for the Middle District of Alabama held that the value of eyewitness-expert testimony far outweighs any prejudice or confusion that it causes.²⁵ In *Smith*, the court systematically and convincingly stated why eyewitness experts aid the judicial process rather than detract from it.²⁶

This Note examines *United States v. Smith*. First, this Note discusses the inaccuracy of eyewitness testimony and the weight that juries give to such testimony. Second, this Note examines the history of expert witness testimony and the rules governing who can testify and when expert witnesses can be excluded. Third, this Note reviews the case law dealing with the admissibility of eyewitness experts and the factors courts have considered in deciding whether to admit or, much more often, exclude eyewitness-expert testimony. Finally, this Note concludes that there is a great need for eyewitness experts in the justice system. *United States v. Smith* is a typical case where eyewitness-expert testimony was at issue. However, the court in *Smith* responded with an atypical holding by admitting the eyewitness-expert testimony. Although *Smith* is not the first case to admit eyewitness-expert testimony, it is an excellent example of a court considering the research on the reliability of eyewitnesses, applying the law and the research to the facts and comprehensively explaining why the expert eyewitness testimony should be admitted. Most courts have ruled that the decision to admit or exclude eyewitness-expert testimony is within the discretion of the trial court. This Note argues that too many trial courts exclude eyewitness-expert testimony where it should be admitted; therefore, appellate courts grant trial courts *too much* discretion in excluding eyewitness-expert testimony. All courts should follow the *Smith* court's approach toward eyewitness-expert testimony. Courts should recognize that eyewitness experts meet the requirements set out in Rule 702, and, in most situations, rather than causing confusion and prejudice in violation of Rule 403, eyewitness experts can play a critical role by providing the jury with a more accurate and complete basis on which to assess the reliability of an eyewitness's identification of the defendant as the perpetrator.

24. The primary case of this Note is *United States v. Smith*, 621 F. Supp. 2d 1207 (M.D. Ala. 2009), a decision by the United States District Court for the Middle District of Alabama that systematically lays out the case for the necessity of eyewitness-expert testimony. This case should not be confused with *United States v. Smith*, 736 F.2d 1103, 1108 (6th Cir. 1984), a Sixth Circuit decision that held that the district court erred in excluding eyewitness-expert testimony, or with *United States v. Smith*, 122 F.3d 1355, 1360 (11th Cir. 1997), an Eleventh Circuit decision that held that it was within the district court's discretion to admit or exclude eyewitness-expert testimony. Neither should these cases be confused with the opening story regarding Frank Lee Smith. See *supra* text accompanying notes 1–3. All four of these *Smith* defendants are different people, unconnected to one another.

25. *Smith*, 621 F. Supp. 2d at 1220–21.

26. See *id.* at 1214–17, 1220–21.

I. THE ROLE OF EYEWITNESS EXPERTS IN THE COURTROOM

A. Inaccuracy of and Reliance on Eyewitness Testimony

In 2004, researchers at the University of Michigan compiled data regarding post-conviction exonerations in the United States between 1989 and 2003; they found 340 exonerations within this fifteen-year period.²⁷ Sixty-four percent of those defendants exonerated were wrongly identified by at least one eyewitness as the person who committed the crime.²⁸ The researchers found that “[t]he most common cause of wrongful convictions [was] eyewitness misidentification.”²⁹

There are nearly five times more robberies committed each year than forcible rapes.³⁰ Yet, the University of Michigan study found that out of the exonerations of those who were convicted based on misidentifications, 107 of them had been convicted of forcible rape, while only six of them had been convicted of robbery.³¹ The study points out that it is unlikely that there are that many more misidentifications in rape cases than in robbery cases.³² In fact, the researchers argue that the results should be the opposite due to how many more robberies occur each year than rapes,³³ the fact that victims are much more likely to know their assailants in rape offenses than they are in robbery offenses,³⁴ and the fact that victims usually have a longer period of exposure and a better view of the perpetrators during rape offenses than during robbery offenses.³⁵ However, persons who were convicted of rape based on misidentifications were exonerated at a rate of about eighteen times that of those who were convicted of robbery based on misidentification.³⁶

This anomaly exists because DNA evidence is so often available in rape cases, but not in robbery cases.³⁷ Therefore, although DNA evidence has

27. Gross et al., *supra* note 4, at 523–24.

28. *Id.* at 524.

29. *Id.* at 542.

30. Compare Fed. Bureau of Investigation, *Forcible Rape*, CRIME IN THE UNITED STATES, 2008 (Sept. 2009), http://www.fbi.gov/ucr/cius2008/offenses/violent_crime/forcible_rape.html (estimating 89,000 forcible rapes in 2008), with Fed. Bureau of Investigation, *Robbery*, CRIME IN THE UNITED STATES, 2008 (Sept. 2009), http://www.bjs.gov/ucr/cius2008/offenses/violent_crime/robbery.html (estimating 441,855 robberies in 2008).

31. Gross et al., *supra* note 4, at 530.

32. *Id.* at 530–31.

33. *Id.* at 530.

34. *Id.*; see MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CRIMINAL VICTIMIZATION, 2008 at 5 (2009), available at <http://www.ojp.usdoj.gov/content/pub/pdf/cv08.pdf> (finding that in 2008, seventy percent of forcible rape offenses were committed by someone the victim knew, while only forty-two percent of robberies were committed by someone the victim knew).

35. Gross et al, *supra* note 4, at 530.

36. See *id.*

37. *Id.* at 531.

corrected some of the errors that misidentifications have caused, it does not help with those crimes where little DNA evidence is usually left behind at the crime scene.³⁸ The researchers stated, “[i]f we had a technique for detecting false convictions in robberies that was comparable to DNA identification for rapes, robbery exonerations would greatly outnumber rape exonerations, and the total number of falsely convicted defendants who were exonerated would be several times what we report.”³⁹

Despite evidence that eyewitness identifications are unreliable and lead to vast numbers of wrongful convictions, jurors rely heavily upon eyewitness identification testimony.⁴⁰ In one study, researchers divided students into three groups of jurors in a criminal prosecution.⁴¹ All groups received the same fact pattern regarding a robbery of a grocery store.⁴² The researchers told the first group that there were no eyewitnesses to the crime; the researchers told the second group that the store clerk had identified the defendant as the robber, and the defense attorney merely argued that the eyewitness was wrong; and the researchers told the third group that the store clerk had identified the defendant as the robber, but that the defense attorney had proven that the store clerk was not wearing his glasses at the time of the crime and could not possibly have seen the defendant’s face.⁴³ Eighty-two percent of the first group, which did not have an eyewitness, acquitted the defendant.⁴⁴ Conversely, seventy-two percent of those in the second group who heard from an eyewitness convicted the defendant.⁴⁵ Sixty-eight percent of those in the third group convicted the defendant despite defense counsel successfully discrediting the eyewitness.⁴⁶ In other words, without the eyewitness testimony only eighteen percent of jurors convicted the defendant.⁴⁷ However, when an eyewitness testified, even one who was discredited by the defense, the conviction rate more than tripled.⁴⁸ Therefore, research has shown that eyewitness identifications, even

38. *Id.*

39. *Id.*

40. Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188, 188–90 (1975).

41. *Id.* at 189.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 189–90.

47. *Id.* at 189.

48. *Id.* Similarly, in another study, researchers separated participants into different groups. Joanna D. Pozzulo et al., *The Influence of Eyewitness Identification Decisions and Age of Witness on Jurors’ Verdicts and Perceptions of Reliability*, 12 PSYCHOL., CRIME & L. 641, 645 (2006). Each group received a trial transcript from a trial where the defendant was accused of stealing a car that he later used in a bank robbery. *Id.* The transcripts were identical except regarding whether the eyewitness was able to accurately identify the defendant as the person he saw stealing the car. *Id.* One group of participants received a transcript where the eyewitness picked the defendant out of a line-up as the person he saw stealing the car. *Id.* Another group received a

eyewitness identifications that are shown to be faulty, are highly influential to jurors.⁴⁹

As prominent researchers in eyewitness identification have stated, “[f]ew moments are more dramatic than when a courtroom witness, upon questioning by the prosecutor, extends an arm, points a finger, and declares with rock-solid certainty that the accused is the person she saw fleeing the scene of the crime with bloodied hands.”⁵⁰ Evidently, this type of identification is incredibly convincing to jurors despite the inaccuracy of such identifications.⁵¹

B. The Use of Eyewitness Experts at Trial

Defense counsel have sought to combat the weight that juries give eyewitness testimony by having eyewitness experts, usually psychologists who specialize in memory or perception, testify at trial regarding the factors that affect memory and perception and therefore often prove eyewitness identification unreliable.⁵²

Rule 702 governs who can testify as an expert witness and when expert testimony is allowed.⁵³ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the

transcript where the eyewitness was unable to pick the defendant out of a line-up and thus identified no one as the perpetrator. *Id.* A third group received a transcript where the eyewitness did not pick the defendant out of the line-up and instead chose someone out of the line-up known to be innocent. *Id.* Researchers found that mock jurors were more likely to render a guilty verdict if an eyewitness positively identified the defendant as the perpetrator than if he could not identify the defendant as the perpetrator. *Id.* at 646, 649. Further, the study also found that eyewitness identifications increased the number of guilty verdicts, even when the eyewitness identification was shown to be incorrect. *Id.* at 649. Researchers found that the participants were just as likely to render a guilty verdict when the eyewitness chose the wrong person out of the line-up than when the eyewitness chose the defendant out of the line-up. *Id.*; see also Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. AM. J. OF PSYCHOL. 143, 146 (2002) (finding that in a mock trial experiment, mock juries convicted forty-nine percent of the time, but when an eyewitness testified, the conviction rate rose to sixty-eight percent).

49. Loftus, *supra* note 40, at 189; Pozzulo et al., *supra* note 48, at 649. *But see* Sigler & Couch, *supra* note 48, at 146 (finding that the rate of conviction decreased significantly when the eyewitness was discredited).

50. LOFTUS, DOYLE & DYSART, *supra* note 5, at 84; see also *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (discussing the “powerful impact” eyewitness identification has on witnesses “despite its inherent unreliability”); *Manson v. Brathwaite*, 432 U.S. 98, 119–20 (1977) (Marshall, J., dissenting) (discussing the “untrustworthiness of eyewitness identification” and “the fact that juries unfortunately are often unduly receptive to such evidence”).

51. See LOFTUS, DOYLE & DYSART, *supra* note 5, at 123–24; Loftus, *supra* note 40, at 189; Pozzulo et al., *supra* note 48, at 649.

52. See, e.g., *United States v. Downing*, 753 F.2d 1224, 1226 (3d Cir. 1985) (ruling that the trial court erred in refusing to admit testimony of an expert in perception and memory on the inaccuracy of eyewitness identifications).

53. See *supra* note 10.

Court interpreted Rule 702 for the first time.⁵⁴ The Court set out a two-part test for complying with Rule 702: first, the expert testimony had to be “scientific knowledge,” and second, the testimony had to “assist the trier of fact to understand or determine a fact in issue.”⁵⁵ The Court added that even if expert testimony survived both prongs of the *Daubert* test, a judge could still exclude the evidence if it violated another Rule of Evidence, such as Rule 403.⁵⁶ Rule 403 states that, “[a]lthough 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.”⁵⁷

Prosecutors often argue that the type of information that eyewitness experts provide is not scientific, so it fails to meet the first prong of Rule 702 as set out by *Daubert*.⁵⁸ Further, prosecutors argue that even if the information is scientific, the information is common sense to the lay juror; therefore, such testimony does not assist the trier of fact and fails to meet the second prong of Rule 702 as set out in *Daubert*.⁵⁹ Prosecutors also frequently invoke Rule 403 in objecting to expert testimony about eyewitness identifications, arguing that the unfair prejudice and confusion that eyewitness-expert testimony has on the jury substantially outweighs any small benefit that it serves.⁶⁰

Prosecutors argue that an eyewitness expert’s testimony that questions the accuracy of eyewitness identifications confuses jurors as to their role in determining eyewitness credibility and as to whether they should accept the

54. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582, 589 (1993). Prior to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the District of Columbia Circuit held in *Frye v. United States* that in order for expert testimony to be admissible, it had to be “generally accepted” within the scientific community. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), superseded by rule, FED. R. EVID. 702, as recognized in *Daubert*, 509 U.S. at 587. In *Daubert*, two minors and their parents sued the manufacturer of a drug that the mothers had taken while pregnant, alleging that it was the cause of birth defects in the minors. *Daubert*, 509 U.S. at 582. Both sides introduced experts to testify regarding the harmfulness or lack of harmfulness of the drug. *Id.* at 582–83. The trial court granted the pharmaceutical company’s motion for summary judgment, and the Ninth Circuit, applying the “general acceptance” standard from *Frye*, affirmed, holding that the methods of the expert witnesses presented by the minors and their parents were not “generally accepted” in the scientific community. *Id.* at 583–84; see also *Frye*, 293 F. at 1014. The Supreme Court overruled the Ninth Circuit, holding that the “general acceptance” standard was “superseded by the adoption of the Federal Rules of Evidence,” and that Rule 702 did not require a “general acceptance” standard. *Daubert*, 509 U.S. at 587–88.

55. *Daubert*, 509 U.S. at 592.

56. *Id.* at 595.

57. FED. R. EVID. 403.

58. See, e.g., *United States v. Kime*, 99 F.3d 870, 883–84 (8th Cir. 1996).

59. See, e.g., *id.* at 884–85.

60. See, e.g., *United States v. Lumpkin*, 192 F.3d 280, 288–89 (2d Cir. 1999); *United States v. Kime*, 99 F.3d 870, 884–85 (8th Cir. 1996); *United States v. Curry*, 977 F.2d 1042, 1051–52 (7th Cir. 1992).

expert's determination that eyewitness identification is inaccurate to mean that they must altogether discount the eyewitness identification in their case.⁶¹ On the other hand, supporters of eyewitness-expert testimony argue that allowing eyewitness experts provides the jury with all of the information necessary to make an informed decision and, thus, increases the likelihood of a just result.⁶²

C. Researchers Argue a Need for Eyewitness Experts in the Courtroom

Courts generally have held that eyewitness experts are unnecessary because the information they provide is common sense and therefore, not helpful to the jury.⁶³ Academic research, however, suggests that both judges and jurors lack sufficient understanding of factors affecting memory and perception of eyewitness accounts.⁶⁴ For example, the United States Supreme Court in *Neil v. Biggers* upheld a rape conviction even though the victim identified the defendant seven months after the attack and only after highly suggestive police conduct during the identification.⁶⁵ The Court supported its decision, in part, by emphasizing the confidence with which the victim identified the defendant

61. See *Lumpkin*, 192 F.3d at 288–89 (precluding an expert's testimony on the basis that it might confuse or mislead the jury); *Kime*, 99 F.3d at 884–85 (recognizing the danger that expert testimony could either confuse the jury or cause it to substitute the expert's opinion for its own); *Curry*, 977 F.2d at 1051–52 (affirming the district court's opinion finding eyewitness-expert testimony unhelpful because the jury was generally aware of the problems with eyewitness testimony).

62. See *United States v. Mathis*, 264 F.3d 321, 340 (3d Cir. 2001) (finding that eyewitness-expert testimony could be helpful in prompting the jury to view the eyewitness testimony in a different light); *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000) (citing *United States v. Smith*, 736 F.2d 1103, 1105 (6th Cir. 1984) (finding that expert testimony aids jurors in fully comprehending the complex issues they must decide)); *United States v. Downing*, 753 F.2d 1224, 1231 (3d Cir. 1985) (finding that expert testimony can assist the jury in making the correct decision).

63. See *Kime*, 99 F.3d at 884 (stating that the jury was capable of determining eyewitness credibility without the aid of an eyewitness expert); *Curry*, 977 F.2d at 1051 (affirming the trial court's determination that eyewitness experts were not needed because the jury was "generally aware" of problems with eyewitness identification); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) ("Moreover, we conclude . . . that the jury can adequately weigh these problems through common-sense evaluation.").

64. See Brian L. Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 BEHAV. SCI. & L. 215, 222–23 (1989) (finding that mock jurors were not "sensitive" to the factors affecting eyewitness identification, and mock jurors were, overall, "unknowledgeable" about what to look for during eyewitness-identification testimony); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 204 (2006) (finding that potential jurors were ignorant of the factors that affect an eyewitness's perception).

65. *Neil v. Biggers*, 409 U.S. 188, 198–201 (1972). The police were unable to locate anyone in the county jail resembling the defendant to put in the police line-up. *Id.* at 195. Therefore, police officers walked the defendant, by himself, past the victim, who identified him as her attacker. *Id.*

as the assailant.⁶⁶ Similarly, a study conducted by the Public Defender Service for the District of Columbia, in conjunction with Dr. Elizabeth Loftus and a private research firm, found that mock jurors believed that confidence and accuracy are directly correlated; in other words, mock jurors believed that a confident identification is an accurate identification.⁶⁷ Research, however, shows that confidence in identification and accuracy of identification are, at best, weakly correlated.⁶⁸ An eyewitness's strong confidence in her identification does not make her any more likely to be accurate in her identification.⁶⁹

Additionally, the study by the Public Defenders Service for the District of Columbia found that jurors thought that the presence of a weapon during a crime made the eyewitness more reliable or had no effect;⁷⁰ that stress made

66. See *id.* at 200–01 (stating that the victim gave a detailed description of her attacker and had “no doubt” that the defendant was her assailant).

67. Schmechel et al., *supra* note 64, at 193–94, 199. Thirty-one percent of participants believed that persons who were “absolutely certain” in their identifications were “much more reliable” than persons with less confidence. *Id.* at 199. Only seventeen percent correctly believed that confidence and accuracy in eyewitness identifications are weakly correlated. *Id.* Forty percent of respondents believed that confidence was an “excellent indicator” of accuracy in eyewitness identification. *Id.*; see Cutler et al., *supra* note 64, at 222 (finding that jurors were unaware that confidence was a poor predictor of accuracy in eyewitness identifications); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 189–90 (1990) (finding that participants heavily relied on the eyewitness's confidence in her identification when determining the accuracy of the identification) see also *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979) (stating that jurors place a great deal of weight on eyewitness confidence regardless of the fact that confidence is not a good indicator of accuracy)).

68. See Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 246 (1987) (finding that, in a study relating eyewitness factors and eyewitness performance, the confidence-accuracy correlation was weak); Schmechel et al., *supra* note 64, at 199 (discussing that confidence is a function of personality and does not predict identification reliability). Some people are simply more confident in their ability to identify an assailant, which does not necessarily make them more accurate in their identification. Schmechel et al., *supra* note 64, at 199; see also Brian L. Cutler & Steven D. Penrod, *Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence*, 74 J. OF APPLIED PSYCHOL. 650, 651–52 (1989) (determining through a meta-analysis that the correlation between pre-line-up confidence and accuracy in identifications is weaker than the correlation between post-line-up confidence and accuracy).

69. See Cutler et al., *supra* note 68, at 246.

70. Schmechel et al., *supra* note 64, at 196–97. Thirty-seven percent of survey participants thought that the presence of a gun strengthened the eyewitness's ability to identify the assailant, while an additional thirty-three percent were either unsure of the effect of a weapon or thought that the presence of a gun would have no effect on eyewitness identification. *Id.* at 197. Only thirty percent of participants correctly believed that weapon presence actually decreases one's attention to detail, thus lowering one's eyewitness-identification reliability. *Id.*; see also Cutler et al., *supra* note 67, at 188, 190 (finding that jurors were “insensitive” to the fact that weapon presence negatively impacts eyewitness identification).

the eyewitness more reliable or had no effect;⁷¹ and that cross-racial identifications were at least as reliable, if not more reliable, than same-race identifications.⁷² Further, the study found that participants agreed with statements such as, “I never forget a face,” which implies that jurors believe that memory remains constant over time, regardless of post-event occurrences and the passage of time.⁷³

Numerous other studies, however, prove that all of these assumptions are wrong.⁷⁴ The presence of a weapon actually makes an eyewitness identification less reliable;⁷⁵ high stress levels can decrease the reliability of an identification;⁷⁶ cross-race identifications are far less reliable than same-race identifications,⁷⁷ particularly when a white witness is attempting to identify a non-white perpetrator;⁷⁸ and memory often deteriorates or changes

71. Schmechel et al., *supra* note 64, at 197. Thirty-nine percent of participants believed that increased stress levels caused by witnessing a crime of violence were likely to produce more reliable eyewitness identifications, while thirty-three percent felt that it would have no effect or were unsure of the effect. *Id.* Only thirty percent of participants correctly believed that the presence of stress caused by a violent crime reduced one’s reliability in identifying the perpetrator. *Id.*

72. *Id.* at 200. Forty-eight percent of participants believed that cross-racial identifications were equally as reliable as same-race identifications, while an additional eleven percent believed that cross-racial identifications were actually more reliable or were unsure of the effect of cross-racial identifications. *Id.* Only thirty-six percent of participants correctly believed that cross-racial identifications are less reliable than same-race identifications. *Id.*

73. *Id.* at 195–96; see LOFTUS, DOYLE & DYSART, *supra* note 5, at 65 (stating that memory fades with time, and therefore the longer the time in between the eyewitness event and identifying the assailant, the poorer the memory).

74. See, e.g., LOFTUS, DOYLE & DYSART, *supra* note 5, at 58–59 (explaining that the passage of time and post-event experiences negatively affect memory); Brian R. Clifford & Clive R. Hollin, *Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory*, 60 J. OF APPLIED PSYCHOL. 364, 368 (1981); Cutler et al., *supra* note 68, at 244 (stating that identification accuracy is negatively affected by the visibility of a weapon); Carol Kraska & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. OF PERSONALITY & SOC. PSYCHOL. 58, 58 (1985) (stating that there is no relation between confidence and accuracy); Schmechel et al., *supra* note 64, at 196 (finding that the presence of a weapon and stress both negatively affect identification accuracy); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139, 149 (1986) (highlighting a negative cross-race identification effect on accuracy).

75. Cutler et al., *supra* note 68, at 244. The presence of a weapon usually causes witnesses to focus on the weapon rather than the assailant, resulting in poorer ability to identify the assailant. Schmechel et al., *supra* note 64, at 196.

76. Clifford & Hollin, *supra* note 74, at 368 (finding that the presence of stress narrows the eyewitness’s focus, making her less likely to remember more than a few details).

77. Shapiro & Penrod, *supra* note 74, at 149. The University of Michigan study on exonerations found that, although only ten percent of all rapes are cross-racial (that is, an African American male raping a Caucasian woman), fifty percent of those exonerated for rape were convicted of raping someone of a different race. Gross et al., *supra* note 4, at 547–48. In other words, there was a much higher rate of misidentifications leading to wrongful convictions in cross-racial identifications than in same-race identifications. *Id.*

78. Shapiro & Penrod, *supra* note 74, at 149.

dramatically with the passage of time or with the introduction of new information.⁷⁹ As the court in *United States v. Moore* noted, jurors are often either ignorant of the effects of certain circumstances on eyewitness identification or unable to assess these effects correctly because many are counterintuitive to their beliefs.⁸⁰

Courts have held that any misconception concerning the various factors influencing eyewitness testimony can be dispelled by cross-examination⁸¹ or jury instructions.⁸² Researchers, however, argue that neither cross-examination nor jury instructions are adequate to combat unreliable or inaccurate eyewitness testimony.⁸³ Both case law and anecdotal evidence suggest that defense attorneys are generally not present when an eyewitness identifies the defendant from photographs, and defense attorneys are only sometimes present when the eyewitness identifies the defendant from a line-up.⁸⁴ Therefore, defense attorneys may be unaware that the police elicited an identification tainted by suggestive behavior, whether through unscrupulous methods or

79. See LOFTUS, DOYLE & DYSART, *supra* note 5, at 58–59 (stating that the introduction of new evidence between witnessing the event and recalling the event may distort one’s memory).

80. *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986); see also *United States v. Downing*, 753 F.2d 1224, 1230–31 (3d Cir. 1985) (“Each of these ‘variables’ goes beyond what an average juror might know as a matter of common knowledge, and indeed some of them directly contradict ‘common sense.’”).

81. See *United States v. Harris*, 995 F.2d 532, 536 (4th Cir. 1993) (holding that any inaccuracies in eyewitness testimony could be overcome through cross-examination); *United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (stating that “vigorous cross-examination” of the witness could counter any weaknesses in eyewitness identification); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (“[W]e conclude . . . that the problems of perception and memory can be adequately addressed in cross-examination”); *United States v. Fosher*, 590 F.2d 381, 382 (1st Cir. 1979) (affirming the trial court’s determination that cross-examination was adequate to combat a potentially unreliable eyewitness identification); *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973) (“Certainly effective cross-examination is adequate to reveal any inconsistencies or deficiencies in the eye-witness testimony.”).

82. See *United States v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996) (holding that proper jury instructions help combat the dangers of eyewitness testimony); *United States v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994) (holding that a “comprehensive instruction on eyewitness identifications” sufficiently addressed the various factors influencing the reliability and accuracy of such testimony); *Fosher*, 590 F.2d at 382 (affirming the trial court’s holding that proper jury instruction, in part, mitigated possible weaknesses in eyewitness testimony).

83. See BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 155–57, 263–64 (1995).

84. See *id.* at 155–56 (discussing the case law governing when a defendant has the right to have counsel present during identifications); see also *United States v. Ash*, 413 U.S. 300, 300–02, 317, 321 (1973) (holding that a defendant does not have a right to have defense counsel present during an identification by an eyewitness using a photo array, even if that photo array occurs post-indictment, as long as the defendant is not physically present during the photo array); *Kirby v. Illinois*, 406 U.S. 682, 690–91 (1972) (holding that a suspect does not have a right to counsel during a line-up that occurs post-arrest but pre-indictment). But see *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (holding that a defendant has a right to have an attorney present during a post-indictment line-up).

inadvertent actions.⁸⁵ The defense is thus at a distinct disadvantage to uncover this behavior during cross-examination.⁸⁶ Furthermore, defense counsel often must rely heavily upon police records and potentially biased police accounts of the witness's demeanor when identifying the defendant to determine the conditions under which the identification occurred.⁸⁷ Even more daunting for the defense, multiple studies have found that once a defense attorney successfully discredits an eyewitness during cross-examination, jurors still find that eyewitness testimony unduly persuasive.⁸⁸ Researchers also argue that jury instructions are more likely to confuse jurors by presenting a limited number of factors affecting eyewitness accounts without explaining their effects and by including irrelevant factors or excluding relevant factors.⁸⁹

Researchers argue that eyewitness experts can educate juries on the potential weaknesses of eyewitness testimony and can prevent misidentifications in a way that jury instructions and cross-examination cannot.⁹⁰ Research has shown that mock jurors exposed to eyewitness-expert testimony were better informed about the effects of various factors on eyewitness identification and used this knowledge when rendering verdicts.⁹¹ In one study, mock jurors who heard an eyewitness expert testify spent significantly more time discussing the eyewitness identification testimony in deliberation than mock jurors who were not exposed to the expert.⁹² Additionally, those mock jurors who heard expert testimony discussed the entire body of evidence for a significantly longer

85. See *Wade*, 388 U.S. at 228–29; CUTLER & PENROD, *supra* note 83, at 156. In *Wade*, the eyewitnesses glimpsed the defendant standing with FBI agents in the hallway prior to the line-up. *Wade*, 388 U.S. at 233–34. The Court recognized that the defendant being accompanied by law enforcement prior to the line-up may have tainted the eyewitness identification because it suggested that the defendant was the perpetrator. *Id.* Thus, there are numerous ways in which a police officer may introduce an improper suggestion while conducting a line-up.

86. CUTLER & PENROD, *supra* note 83, at 155–56.

87. *Id.*

88. See *supra* notes 40–51 and accompanying text.

89. CUTLER & PENROD, *supra* note 83, at 256–57, 263.

90. See *id.* at 250, 264.

91. Harmon M. Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287, 294 (1980); see also Cutler et al., *supra* note 64, at 222–23 (finding that while jurors still found eyewitness testimony persuasive, after hearing eyewitness-expert testimony regarding the weak correlation between confidence and accurate identifications, jurors did not weigh confidence as heavily when determining the credibility of the eyewitness); Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 322–23 (1989) (finding that jurors who heard eyewitness-expert testimony were better informed as to the effects of weapon presence than those who did not hear the expert testimony, and jurors who heard expert testimony rated confidence of the eyewitness as less relevant than those who did not hear the expert witness).

92. See Hosch et al., *supra* note 91, at 293. The group that heard testimony from the eyewitness expert spent 27.9% of its total deliberation time discussing the eyewitness testimony, while the group that did not hear the expert testimony spent only 9.58% of its total deliberation time discussing the eyewitness testimony. *Id.*

period than those mock jurors who did not.⁹³ Based on these findings, the researchers argued that eyewitness-expert testimony not only informed mock jurors of the weaknesses in eyewitness testimony and prompted more critical evaluation of eyewitness testimony, but that eyewitness-expert testimony also caused mock jurors to examine all evidence more critically.⁹⁴

D. Courts' Positions on the Admissibility of Eyewitness Experts

1. Courts Have Excluded Expert-Eyewitness Testimony for Failure to Pass the Daubert Test

Although many courts, even those that ultimately exclude eyewitness-expert testimony, recognize the scientific legitimacy of such evidence, other courts refuse to do so and have held that eyewitness-expert testimony fails to satisfy the first prong of the *Daubert* test.⁹⁵ Other courts have excluded eyewitness-expert testimony under the second prong of the *Daubert* test, stating that the jury is well aware of the information within the expert's testimony and that the evidence does not assist the trier of fact in its determination.⁹⁶ Thus, courts have used both prongs of the *Daubert* test to justify barring eyewitness-expert testimony.

93. *Id.*

94. *Id.* at 294.

95. Compare *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (stating that the eyewitness expert qualified as an expert and would have provided scientific knowledge, but excluded the testimony for other reasons), *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (noting that the lower court held that expert eyewitness testimony is scientific knowledge and the parties did not raise that issue on appeal), *United States v. Curry*, 977 F.2d 1042, 1051–52, 1052 n.5 (7th Cir. 1992) (stating that the eyewitness-expert testimony was not excluded because there was doubt concerning its scientific legitimacy), and *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (stating that it was proper to consider eyewitness-expert testimony as scientific knowledge), with *United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996) (holding that defense counsel had not proven that the evidence to be offered by the eyewitness expert was scientific knowledge), and *United States v. Rincon*, 28 F.3d 921, 923–26 (9th Cir. 1994) (holding that, in this particular case, defense counsel failed to establish that eyewitness-expert testimony was “scientific knowledge,” but noting that such testimony is not *per se* unscientific).

96. See *Kime*, 99 F.3d at 884 (holding that the jury was perfectly capable of properly weighing the evidence without the testimony of the eyewitness expert, and that the testimony thus would not have aided the trier of fact); *Rincon*, 28 F.3d at 925 (holding that the district court did not err in finding that eyewitness-expert testimony would not assist the trier of fact in the decision-making process); *United States v. Harris*, 995 F.2d 532, 534–35 (4th Cir. 1993) (affirming the lower court's exclusion of eyewitness-expert testimony because it failed to assist the trier of fact); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (finding that the lower court had not abused its discretion by excluding eyewitness-expert testimony as within the knowledge of lay jurors and therefore expert testimony did not assist the jurors).

2. Courts Have Excluded Eyewitness-Expert Testimony for Violating Rule 403

Courts have also held that eyewitness-expert testimony substitutes the jury's determination of eyewitness credibility with that of the expert's opinion, thereby violating Rule 403 by undermining the prosecution's eyewitnesses and confusing the jury's role.⁹⁷

In *United States v. Foshier*, the defendant was convicted of bank robbery and assault almost solely on the identification of two eyewitnesses.⁹⁸ At trial, the defendant sought to have an eyewitness expert testify as to the unreliability of such identifications.⁹⁹ The trial court excluded this testimony.¹⁰⁰ In affirming the trial court's ruling, the First Circuit stated that the testimony of an expert has the "aura of special reliability and trustworthiness."¹⁰¹ Such testimony would unduly prejudice the eyewitness because the jury would substitute its own credibility determination with that of the expert's.¹⁰²

In *United States v. Lumpkin*, the eyewitness expert for the defense testified that confidence and accuracy in eyewitness identifications are, at best, weakly correlated.¹⁰³ The Second Circuit held that the testimony of the expert witness was rightfully excluded because it was the jury's job to consider all of the factors, including demeanor and confidence, when determining witness credibility.¹⁰⁴ By discounting the eyewitness's confidence, the expert was, to an extent, expressing his opinion on the eyewitness's credibility.¹⁰⁵ The expert testimony would confuse and influence the jury in its assessment of the eyewitness's credibility.¹⁰⁶

97. See *Kime*, 99 F.3d at 884 ("This line of testimony intrudes into the jury's domain."). The Second Circuit in *United States v. Lumpkin* stated that eyewitness experts assess witness credibility and invade the jury's role. *Lumpkin*, 192 F.3d at 289.

98. *Foshier*, 590 F.2d at 382. The state's case was built almost exclusively on two eyewitnesses who testified that they had seen the defendant near the crime scene around the time of the crime. *Id.*

99. *Id.*

100. *Id.* The trial court held that the eyewitness-expert testimony would not assist the jury in judging the issues, any danger of misidentification could be addressed through other means, such as cross-examination and jury instructions, and the level of prejudice that such testimony created was extremely high and substantially outweighed any probative value. *Id.*

101. *Id.* at 383.

102. *Id.*

103. *United States v. Lumpkin*, 192 F.3d 280, 288 (2d Cir. 1999). Convicted of drug charges based primarily on the identifications of two undercover police officers, the defendant argued that the officer identifications were inaccurate because there were discrepancies in the report, and police officer identifications are no more reliable than average citizen identifications, and he offered eyewitness-expert testimony regarding the weak correlation between confidence and reliable identifications to support these arguments. *Id.*

104. *Id.* at 289.

105. *Id.*

106. *Id.*

The Second Circuit determined that the confusion created by eyewitness experts was great enough to substantially outweigh any probative value of such testimony.¹⁰⁷ Like the First¹⁰⁸ and Second¹⁰⁹ Circuits, the Fifth,¹¹⁰ Seventh,¹¹¹ Eighth,¹¹² and Ninth¹¹³ Circuits have also excluded eyewitness-expert

107. *Id.*

108. *United States v. Foshier*, 590 F.2d 381, 383 (1st Cir. 1979).

109. *Lumpkin*, 192 F.3d at 289.

110. *United States v. Moore*, 786 F.2d 1308, 1311–13 (5th Cir. 1986). *Moore* is a bit of an anomaly in that it upholds the lower court's exclusion of eyewitness-expert testimony while speaking very favorably and extensively about the probative value of eyewitness-expert testimony. *Id.* at 1312–13. In *Moore*, armed men entered the home of a bank president and strapped fake bombs to the president, his wife, and his daughter. *Id.* at 1310. The men then threatened to detonate the bombs strapped to his wife and daughter if the bank president did not take the men to the bank and give them money. *Id.* The president took the men to the bank and gave them \$48,000. *Id.* After later being arrested, one of the co-defendants confessed, implicating the other defendants. *Id.* at 1310–11. In addition to this confession, the United States produced two eyewitnesses: one testified that he had seen the defendants casing the president's home shortly before the extortion, and the other testified that she had seen one of the defendants driving a delivery truck leaving the president's residence moments after the extortion took place. *Id.* at 1311. The trial judge refused to allow the defense's eyewitness expert to testify regarding factors that may affect eyewitness identifications. *Id.* The judge stated that such testimony was unnecessary and was within his discretion to exclude. *Id.* The defendants were convicted and appealed to the Fifth Circuit. *Id.* at 1310.

The Fifth Circuit discussed at length the trend toward admitting eyewitness experts and the probative value of such testimony to counter lay jurors' ignorance on the subject. *Id.* at 1312. However, the court went on to affirm the lower court's exclusion of such testimony, holding that the trial court had not abused its discretion. *Id.* at 1312–13. The Fifth Circuit emphasized that there was strong evidence against the defendants in addition to the eyewitness identifications. *Id.* at 1313. The court suggested that if the United States' sole evidence was the eyewitness identifications, then the outcome may have been different. *Id.*

111. *United States v. Curry*, 977 F.2d 1042, 1051–52 (7th Cir. 1992). In *Curry*, the defendants were convicted of "conspiracy to manufacture and possess with intent to distribute in excess of fifty kilograms of marijuana." *Id.* at 1046. At trial, the United States introduced testimony from eyewitnesses who identified the defendants as persons who were seen at the farm where the marijuana was discovered. *Id.* at 1050–51. To combat this testimony, the defense introduced an eyewitness expert. *Id.* The trial court excluded this testimony because it would introduce information of which the jury was "generally aware," which impliedly meant that the testimony would not be helpful, would be confusing and misleading, or both. *Id.* at 1051. The Seventh Circuit affirmed this ruling, stating that the trial judge had discretion to exclude this evidence under either Rule 702 or Rule 403. *Id.* at 1052.

112. *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996). The defendants were convicted of multiple drug charges for their involvement in a drug distribution ring. *Id.* at 876–77. At trial, a witness identified the defendants as the men who robbed him of drugs. *Id.* at 882. The district court denied the defendants' attempt to introduce an eyewitness expert. *Id.* at 883. The district court held that the eyewitness expert did not pass either prong of the *Daubert* test (the testimony did not consist of scientific knowledge and did not assist the trier of fact), nor did it meet the requirements of Rule 403. *Id.* The Seventh Circuit held that the probative value of such testimony was minimal because it was common sense and the jury was likely to be confused and substitute its own credibility determination with the expert's determination. *Id.* at 884.

113. *United States v. Rincon*, 28 F.3d 921, 925–26 (9th Cir. 1994). In *Rincon*, the defendant was convicted of unarmed bank robbery and sought to introduce an eyewitness expert to counter

testimony for causing confusion or undue prejudice in the jury's assessment of eyewitness credibility in violation of Rule 403.

3. Courts Have Refused to Adopt a Blanket Exclusion of All Eyewitness Experts

Although these courts have held that eyewitness-expert testimony should be excluded in the particular cases before them,¹¹⁴ the overall trend in the country over the past twenty years has been a more accepting attitude toward eyewitness-expert testimony.¹¹⁵ Even the courts that have excluded eyewitness-expert testimony have stated that the determination of the admissibility of eyewitness-expert testimony lies within the discretion of the trial judge.¹¹⁶ Further, most courts state that their exclusion of such testimony is not a blanket exclusion of all eyewitness-expert testimony.¹¹⁷ Some of these courts also recognize situations where they would admit, or at least be more

eyewitness identifications. *Id.* at 922. The trial court excluded the evidence, holding that the evidence failed to meet either prong of the *Daubert* test and was likely to cause jury confusion. *Id.* at 923. The Ninth Circuit affirmed the lower court's holding, and although it never explicitly cited Rule 403, the opinion advanced Rule 403 principles, stating that any helpfulness of the testimony was substantially outweighed by the danger of the testimony confusing or misleading the jury. *Id.* at 926.

114. *See supra* notes 108–13.

115. *See* United States v. Harris, 995 F.2d 532, 534 (4th Cir. 1993) (noting a modern trend to allow eyewitness-expert testimony); *Moore*, 786 F.2d at 1312 (stating that recent court opinions have been more willing to uphold lower court decisions admitting eyewitness-expert testimony and to scrutinize lower court decisions excluding such testimony). *Compare* United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984) (stating that eyewitness-expert testimony was not admissible in the Eleventh Circuit), with United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (refusing to state a blanket rule that eyewitness-expert testimony was never admissible).

116. *See supra* note 19 and accompanying text.

117. *See* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (“A decision to exclude expert testimony rests soundly with the discretion of the trial court . . .”); *Harris*, 995 F.2d at 534 (“Most courts allowing such expert testimony, however, recognize that the ultimate determination of admissibility . . . rests within the sound discretion of the trial court.”); United States v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992) (“Although it is likely that it was within the discretion of the trial court to allow the eyewitness-expert testimony here, we decline to hold that the court was required to do so.”); *Moore*, 786 F.2d at 1312 (“We therefore recognize that the admission of this type of testimony is proper, at least in some cases.”). In fact, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* seems to imply that such a blanket exclusion of all eyewitness-expert testimony violates Rule 702. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). By setting out factors to be weighed, the Court implies that these factors should be weighed in every case and expert testimony should not be excluded without applying the factors. *Id.* at 589–93; *see also* United States v. Mathis, 264 F.3d 321, 335–36 (3d Cir. 2001) (finding that Rule 702 prescribes the criteria expert witnesses must meet in order to be allowed to testify under the *Daubert* test); United States v. Smithers, 212 F.3d 306, 314 (6th Cir. 2000) (holding that the district court abused its discretion by excluding an eyewitness expert from testifying without first applying the *Daubert* test).

likely to admit, eyewitness-expert testimony, such as a situation where no other corroborating evidence was present.¹¹⁸

4. Courts Have Admitted Eyewitness-Expert Testimony, Holding that It Passes the Daubert Test and Does Not Violate Rule 403

Although the First, Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have excluded eyewitness-expert testimony because it did not meet the requirements set out in Rule 702 or Rule 403,¹¹⁹ the Third¹²⁰ and Sixth¹²¹ Circuits have both accepted eyewitness-expert testimony.

The Third and Sixth Circuits have held that eyewitness-expert testimony can be scientific and can assist the trier of fact, thus passing the *Daubert* test.¹²² Additionally, these courts have recognized that the probative value of eyewitness experts can outweigh any prejudice or confusion they might cause.¹²³

118. See *Moore*, 786 F.2d at 1313 (“We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged.”); see also *United States v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996) (“We are ‘especially hesitant to find an abuse of discretion [in denying expert eyewitness identification testimony] unless the government’s case against the defendant rested exclusively on uncorroborated eyewitness testimony.’” (alteration in original) (quoting *United States v. Blade*, 811 F.2d 461, 465 (8th Cir. 1987))); *Curry*, 977 F.2d at 1052 (finding that the majority of the state’s case rested on other corroborating evidence and suggesting that had there not been corroborating evidence, the court’s decision may have been different); *United States v. Smith*, 736 F.2d 1103, 1107–08 (6th Cir. 1984) (per curiam) (refusing to disturb the district court’s holding because there was such strong evidence corroborating the eyewitnesses’ testimony).

119. See *supra* notes 108–13.

120. See *Mathis*, 264 F.3d at 339–40, 42 (holding that the probative value of the eyewitness expert in this case was far greater than any abstract danger of prejudice or confusion that such testimony might cause the jury); see also *United States v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 1999) (admitting expert eyewitness testimony under Rule 702, although not explicitly addressing Rule 403); *United States v. Downing*, 753 F.2d 1224, 1230–32 (3d Cir. 1985) (discussing the strong probative value eyewitness experts have by informing the jury of relevant factors affecting eyewitness identification, but leaving the Rule 403 issue to be addressed by the district court on remand).

121. See *United States v. Smithers*, 212 F.3d 306, 312, 318 (6th Cir. 2000) (noting that eyewitness-expert testimony is generally admissible in the Sixth Circuit and remanding the case to the district court because the it had erred in excluding eyewitness-expert testimony without performing the *Daubert* analysis). *But see* *United States v. Smith*, 736 F.2d 1103, 1107–08 (6th Cir. 1984) (per curiam) (affirming the lower court’s exclusion because, although the eyewitness-expert testimony may have been admissible and had probative value, exclusion did not prejudice the defendant).

122. See *Smithers*, 212 F.3d at 315 (holding that the lower court did not properly apply the *Daubert* test, and if it had it likely would have found that the eyewitness-expert testimony satisfied both prongs of the *Daubert* test).

123. *Mathis*, 264 F.3d at 339–40 (discussing the value that eyewitness-expert testimony has in educating and assisting the jury while also stating that it does not believe that the prosecution’s argument that eyewitness experts create prejudice and confusion has any merit); *Smith*, 736 F.2d at 1107 (discussing the probative value of eyewitness-expert testimony).

The Third Circuit in *United States v. Mathis* found that the testimony offered by an expert eyewitness was not only scientific, but also greatly aided the jury, thus meeting both prongs of the *Daubert* test.¹²⁴ The court then discussed the great probative value that eyewitness experts provide juries and held that the lower court abused its discretion by excluding the expert eyewitness's testimony on the relationship between confidence and accuracy and the effects of the presence of a weapon on identifications.¹²⁵ The Third Circuit stated that the effect of such factors on eyewitness identifications would not be known by a typical juror and, therefore, should not have been excluded.¹²⁶ Further, the court seemed baffled by the argument that eyewitness experts usurp the role of the jury.¹²⁷ The court questioned how eyewitness experts were different from any other type of expert witness and questioned why opponents believed that the "aura of reliability" that the jury places on eyewitness experts would be any different from the "aura of reliability" that the jury would place on, for example, an expert who testifies on his interpretation of satellite pictures.¹²⁸ The court went on to say that "experts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away."¹²⁹

Similarly, the Sixth Circuit in *United States v. Smith* held that the district court excluded an eyewitness expert from testifying at trial regarding the unreliability of eyewitness identification who could have helped the jury understand the case.¹³⁰ The court noted the danger of misidentification leading

124. *Mathis*, 264 F.3d at 338–40.

125. *Id.* at 340–42. On October 14, 1998, an officer who had just received a call reporting a bank robbery spotted a car that matched the description of the getaway car. *Id.* at 325. The officer gave chase, and upon the car stalling, three men jumped out of the car and fled. *Id.* The officer testified that the man who jumped out of the rear of the car turned and looked at him for a moment. *Id.* The officer then identified the defendant as that man. *Id.* This is the eyewitness account that the defendant intended to counter with the eyewitness-expert testimony. *Id.* at 333.

126. *Id.* at 342.

127. *See id.* at 340.

128. *Id.* at 339–40.

129. *Id.* at 340.

130. *United States v. Smith*, 736 F.2d 1103, 1106–07 (6th Cir. 1984) (per curiam). During a bank robbery, three tellers had the opportunity to view the robbers for several minutes. *Id.* at 1104. Immediately after the robbery, the tellers were unable to pick out the defendant in a photo spread as one of the robbers; however, four months later, they picked the defendant out of a line-up. *Id.* at 1105. At trial, the tellers testified that the defendant was one of the bank robbers. *Id.* The defendant sought to rebut this testimony with testimony by an eyewitness expert, which the trial court excluded on Rule 403 grounds. *Id.* Although the Sixth Circuit found that the eyewitness-expert testimony was improperly excluded, the court held that admittance of the eyewitness-expert testimony would not have affected the outcome due to the fact that officers had also recovered the defendant's palmprint from the scene of the crime. *Id.* at 1107–08.

to wrongful convictions and stated that eyewitness experts helped to better inform the jury of all aspects of the case.¹³¹

A circuit split exists regarding the admissibility of expert eyewitness testimony.¹³² The First, Second, Fifth, Seventh, Eighth and Ninth Circuits have excluded eyewitness-expert testimony due to the unfair prejudice and confusion it allegedly causes jurors,¹³³ and the Third and Sixth Circuits have admitted eyewitness-expert testimony due to its alleged helpfulness to jurors allowing them to evaluate the facts of the case accompanied by the knowledge of the unreliability of witness identification and the effect that various factors have on perception.¹³⁴

E. The Admissibility of Eyewitness-Expert Testimony in the Eleventh Circuit

In general, the Eleventh Circuit has ruled that the admission of expert testimony is within the discretion of the trial judge.¹³⁵ The more specific issue of eyewitness-expert testimony has come before the Eleventh Circuit on several occasions.¹³⁶ In cases prior to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Eleventh Circuit ruled that eyewitness-expert testimony was never admissible and that any negative effect of eyewitness testimony could be offset by cross-examination and jury instructions.¹³⁷

131. *Id.* at 1106. The prosecution conceded that the eyewitness expert was in fact an expert. *Id.* at 1105. The court first held that the information about which the expert sought to testify was information that was beyond the knowledge of the lay juror, and thus would aid the trier of fact. *Id.* at 1106–07. Finally, the court found that the evidence was more probative than prejudicial. *Id.* at 1107; see also *Mathis*, 264 F.3d at 340 (stating that eyewitness-expert testimony helped jurors to see the facts of the case in a different light, thus allowing them to make a better informed decision).

132. Compare *Mathis*, 264 F.3d at 340 (holding that eyewitness-expert testimony assists the jury by providing all of the necessary information for the jury to make a fair determination and should therefore be admitted), with *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (holding that eyewitness experts interfere with the jury's role and should therefore be excluded).

133. See *supra* notes 108–13.

134. See *supra* notes 120–21.

135. See *United States v. Bender*, 290 F.3d 1279, 1283 (11th Cir. 2002) (holding that the judge's decision regarding whether to admit expert testimony should only be reversed if found to be "manifestly erroneous").

136. See *United States v. Smith*, 122 F.3d 1355, 1357–59 (11th Cir. 1997); *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992); *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984); *United States v. Thevis*, 665 F.2d 616, 641–42 (5th Cir. Unit B 1982). Decisions by Unit B of the former Fifth Circuit, an administrative division created during the split of the Fifth Circuit, are binding precedent in the Eleventh Circuit. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

137. See *Holloway*, 971 F.2d at 679 (holding that the defendant's argument that the district court erred in refusing to allow his eyewitness expert to testify at trial had no merit because "[t]he established rule of this circuit is that such testimony is not admissible"); *Benitez*, 741 F.2d at 1315 (holding that the district court did not err in its refusal to admit eyewitness-expert testimony because "such testimony is not admissible in this circuit"); *Thevis*, 665 F.2d at 641–42 (holding

In *United States v. Smith*, the Eleventh Circuit once again examined the issue, but this time in light of the standards set out in *Daubert*.¹³⁸ The court held that its prior decisions were consistent with *Daubert* and that it was within the district court's discretion to exclude expert testimony.¹³⁹ However, the court did not go as far as it had previously because it did not state that eyewitness-expert testimony was never admissible.¹⁴⁰ Therefore, the Eleventh Circuit seemed somewhat more accepting of eyewitness-expert testimony than it had been previously.

II. THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA ADDRESSES THE ADMISSIBILITY OF EYEWITNESS-EXPERT TESTIMONY IN *UNITED STATES V. SMITH*

In *United States v. Smith*, a case before the United States District Court for the Middle District of Alabama, Andreas Jejuan Smith, an African American male, was charged with armed robbery of a bank.¹⁴¹ The only two eyewitnesses to the crime were two bank employees.¹⁴² Two weeks after the robbery, one of the eyewitnesses, Annette Gurley, a Caucasian female, identified Smith as the robber from a photographic line-up.¹⁴³

At trial, the government offered the two eyewitnesses who discussed the details of the robbery, including the high degree of stress they felt during the event.¹⁴⁴ Both eyewitnesses identified Smith as the bank robber.¹⁴⁵ Gurley stated that she was certain the defendant was the robber, while the other eyewitness testified that he was seventy to eighty percent sure that the defendant had similar features to the bank robber.¹⁴⁶ The eyewitnesses admitted that they had in fact discussed the case and the description of the robber with each other prior to trial.¹⁴⁷

that the district court was correct in excluding the eyewitness-expert testimony, and stating that cross-examination "adequately addressed" any problems with eyewitness identification).

138. *Smith*, 122 F.3d at 1357–58.

139. *Id.* at 1359.

140. *See id.* at 1357–59.

141. *United States v. Smith*, 621 F. Supp. 2d 1207, 1209 (M.D. Ala. 2009). Smith was also charged with assault of a federal officer for shooting at officers when they arrived to arrest Smith, with carrying a firearm during a crime of violence, and with being a felon in possession of a firearm. *Id.*

142. Supplemental Brief in Response to the Government's Motion In Limine to Exclude Expert Testimony at 9–10, *United States v. Smith*, 621 F. Supp. 2d 1207 (M.D. Ala. 2009) (No. 2:07cr165-MHT) [hereinafter Supplemental Brief].

143. *Id.* at 10.

144. *Smith*, 621 F. Supp. 2d at 1214–16. One of the eyewitnesses stated that the event was the "most traumatic experience of her life." *Id.* at 1216.

145. *Id.* at 1209, 1214–15.

146. *Id.* at 1218; Supplemental Brief, *supra* note 142, at 9–10 & 9 n.12.

147. *Smith*, 621 F. Supp. 2d at 1217.

Smith then called Dr. Sol Fulero, an eyewitness expert, to testify regarding the inaccuracy of eyewitness testimony and, more specifically, the inaccuracy of cross-racial eyewitness identification.¹⁴⁸ The government filed a motion to exclude Dr. Fulero's testimony, arguing first that it violated Rule 702 by not meeting the factors of the *Daubert* test and, second, that it violated Rule 403 because the prejudice created by such testimony substantially outweighed its probative value.¹⁴⁹ The defense responded to the motion to exclude and argued that there were many factors in the case that could potentially affect the eyewitness identifications and, therefore, the jury should hear the expert testimony.¹⁵⁰ Additionally, there was no evidence to corroborate the eyewitness testimony, so the defense argued that because the jury would have to decide Smith's guilt based almost exclusively on the eyewitness identifications, the jury should have all available information relating to eyewitness identifications.¹⁵¹

The court denied the government's motion in part and sustained it in part.¹⁵² Although it allowed Dr. Fulero to testify regarding the scientific knowledge of eyewitness identifications in general, the court barred him from giving his opinion regarding the witnesses in the particular case before the jury.¹⁵³ The jury convicted Smith.¹⁵⁴

After the conviction, the court provided a detailed opinion explaining its decision to allow Dr. Fulero to testify about eyewitness identifications in general.¹⁵⁵ The court first addressed whether Dr. Fulero could properly be admitted as an expert witness under Rule 702 and the *Daubert* test.¹⁵⁶ The court, considering the first prong of the *Daubert* test, concluded that Dr. Fulero's testimony was scientific knowledge.¹⁵⁷ The court then determined

148. *Id.* at 1208–09.

149. *Id.* at 1209, 1211.

150. Supplemental Brief, *supra* note 142, at 9–11. Specifically, the defense argued that there was a gun present, one of the eyewitnesses was white while the robber was black, the eyewitness did not accurately identify the defendant as the bank robber until at least two weeks after the robbery, and the eyewitness stated that she was confident in her selection. *Id.* at 10.

151. *Id.* at 10, 12–13.

152. *Smith*, 621 F. Supp. 2d at 1209.

153. *Id.*

154. *Id.* Smith was also convicted of illegally possessing a firearm. He was acquitted on the charges of assaulting a federal officer and carrying a firearm during a crime of violence. *Id.*

155. *Id.*

156. *Id.* at 1211–19.

157. *Id.* at 1212–13 (noting that a number of other courts had admitted Dr. Fulero's testimony on similar occasions, that the theories of Dr. Fulero's testimony were "well-tested in peer-reviewed publications," and that Dr. Fulero relied on methods that are generally accepted within the behavioral science community). In *United States v. Smithers*, the court found that, had the district court conducted a proper inquiry, Dr. Fulero's knowledge likely would have been found to be scientific and should have been admitted. *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000); see also *Smith*, 621 F. Supp. 2d at 1212 (noting that "[i]his court concurred at trial with [Smithers] . . . that Fulero's methods satisfied the reliability prong of *Daubert*" because

that this evidence fulfilled the second prong of the *Daubert* test by aiding the jury in reaching a verdict.¹⁵⁸

Next, the court noted the circuit split on the issue of whether admitting eyewitness-expert testimony violated Rule 403, but ultimately decided that the probative value of eyewitness-expert testimony, at least in this case, was not substantially outweighed by any prejudicial effect.¹⁵⁹ The court also discussed the Eleventh Circuit's unfavorable stance toward eyewitness-expert testimony, but concluded that the Eleventh Circuit ultimately left the decision to admit such testimony to the discretion of the trial court.¹⁶⁰ The district court in *Smith* thus felt free to apply the Supreme Court's decision in *Daubert* and abandon the Eleventh Circuit's traditional resistance toward eyewitness-expert testimony.¹⁶¹ The United States District Court for the Middle District of Alabama joined the minority of jurisdictions to admit eyewitness-expert testimony.¹⁶²

III. UNITED STATES V. SMITH GETS IT RIGHT

A. The Heightened Risk of Misidentification in United States v. Smith

Eyewitness experts provide a valuable legal service by educating jurors on issues outside of their knowledge.¹⁶³ However, trial courts habitually exclude eyewitness experts and appellate courts often affirm these exclusions.¹⁶⁴ Appellate courts allow trial courts too much discretion in excluding eyewitness experts. The United States District Court for the Middle District of Alabama

his testimony consisted of scientific knowledge). Similarly, in the Sixth Circuit's decision in *United States v. Smith*, it determined that Dr. Fulero's knowledge was scientific, and the prosecution admitted that Dr. Fulero was an expert under Rule 702, but the court declined to overturn its exclusion on other grounds. *United States v. Smith*, 736 F.2d 1103, 1105–07 (6th Cir. 1984) (per curiam).

158. *Smith*, 621 F. Supp. 2d at 1213–14, 1218–19. The court noted that many factors examined in Dr. Fulero's testimony were counterintuitive and, therefore, his testimony assisted the jury in understanding human perception and how various factors affect eyewitness identifications. *Id.* at 1215.

159. *Id.* at 1219–21. Because the jury is often unaware of the factors that affect eyewitness identifications, the court discussed the probative value of such testimony. *Id.* at 1220–21. Additionally, the court noted that it was difficult to see the prejudicial effect such testimony had because it assisted the jury in coming to a more informed decision. *Id.* at 1221.

160. *Id.* at 1210–11.

161. *Id.* Although the Eleventh Circuit had never before admitted eyewitness-expert testimony, the court admitted the evidence because the Eleventh Circuit's language, at least in the *Smith* decision, placed the determination to admit within the discretion of the trial court. *Id.* Therefore, the court could depart from the typical holding of the Eleventh Circuit—excluding eyewitness-expert testimony—while following Eleventh Circuit precedent. *Id.*

162. *See id.* at 1209–10.

163. *See supra* Part I.C.

164. *See supra* Part I.D.

should be an example to other courts for its approach to eyewitness-expert testimony.

The *Smith* court recognized the danger of eyewitness testimony unaccompanied by experts who could dispel the myths that the average person believes regarding eyewitness testimony.¹⁶⁵ In robbery convictions, as in *Smith*, the importance of an eyewitness expert is heightened.¹⁶⁶ The University of Michigan study that found robberies, although very common offenses, are at a higher risk than other crimes for eyewitness misidentification because robberies are often committed by strangers to the victim and the robber is usually within the victim's physical proximity only briefly.¹⁶⁷ Further, robberies usually do not leave much DNA evidence, at least compared with rapes and murders.¹⁶⁸ An accurate technology does not exist with the capability to identify perpetrators of robberies or rule out innocent persons the way DNA evidence does in rape and murder cases.¹⁶⁹ Once a misidentification results in a conviction, it is much less likely that the robber will be exonerated.¹⁷⁰

In *Smith*, the danger of misidentification was even more acute because there was no other corroborating evidence.¹⁷¹ Even courts highly critical of eyewitness-expert testimony have stated that they would consider admitting the testimony if there was no other corroborating evidence.¹⁷² In *Smith*, all of the dangers of which the University of Michigan study warned were present: the case at issue was a robbery, the two eyewitnesses did not know the defendant, and the two eyewitnesses had limited exposure to the defendant during the robbery.¹⁷³ Therefore, the heightened risk of misidentifications in robberies, coupled with the lowered availability of other evidence, illustrates why the *Smith* court's admittance of Dr. Fulero's testimony was so vital in this case.¹⁷⁴

B. The Eyewitness Expert Fulfills the Requirements of Rule 702

When applying the *Daubert* test, the court followed the growing trend of holdings that eyewitness-expert testimony is scientific knowledge under *Daubert*.¹⁷⁵ The second prong of the *Daubert* test—whether the evidence aids

165. See *Smith*, 621 F. Supp. 2d at 1209 (discussing the alarming combination of high reliance on eyewitness testimony and high inaccuracy of eyewitness testimony).

166. See Gross et al., *supra* note 4, at 530.

167. *Id.*

168. *Id.* at 529 tbl.3, 530.

169. *Id.* at 530–31.

170. *Id.*

171. Supplemental Brief, *supra* note 142.

172. See *supra* note 118.

173. *United States v. Smith*, 621 F. Supp. 2d 1207, 1214–15 (M.D. Ala. 2009).

174. See *supra* Part II.

175. See *supra* note 157; see also *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (discussing the rising level of acceptance of the validity of eyewitness-expert testimony);

the jury in understanding the issues¹⁷⁶—is best discussed in conjunction with Rule 403.¹⁷⁷

C. The Benefits of the Eyewitness-Expert Testimony Outweighs Any Prejudice or Confusion

1. The Benefit of Debunking Frequently Held, Yet False, Beliefs About Eyewitness Testimony

For the trial in *Smith*, Dr. Fulero testified as to a number of the factors that affect eyewitness identification.¹⁷⁸ He discussed research that has shown that confidence of eyewitness identification and accuracy of eyewitness identification are, at best, weakly correlated.¹⁷⁹ The weak correlation became particularly important in this case when the eyewitnesses reported high confidence levels in identifying the defendant as the bank robber.¹⁸⁰ Dr. Fulero also testified that stress can negatively affect one's memory.¹⁸¹ At least one of the eyewitnesses in this case reported that the bank robbery was a stressful event; she described it as "the most traumatic experience of her life."¹⁸² Additionally, Dr. Fulero testified that cross-racial identifications are more error-prone than same-race identifications.¹⁸³ Once again, this testimony was highly relevant in this case because one of the eyewitnesses who testified was Caucasian and the defendant was African American.¹⁸⁴

Dr. Fulero also testified regarding the effects of post-event information on one's memory.¹⁸⁵ He discussed that new information, introduced between the

Supplemental Brief, *supra* note 142, at 3 (discussing the history of admitting eyewitness-expert testimony and the fact that courts are gradually becoming more accepting of it).

176. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

177. *See United States v. Curry*, 977 F.2d 1042, 1051 (7th Cir. 1992) (discussing how the helpfulness element of the Rule 702 inquiry is interrelated with the Rule 403 inquiry and how it was unclear under which rule the lower court excluded the eyewitness-expert testimony). Many of the factors weighed in determining whether the testimony assisted the trier of fact would be the same as the factors weighed to determine the probative value of such testimony. *See Linda E. Cafer, Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly-Frye and Return to a Traditional Analysis*, 22 LOY. L.A. L. REV. 1103, 1137–38 (1989). Therefore, although a court would need to consider the second prong of the *Daubert* test before moving on to consider the Rule 403 issue, for the purpose of this Note, the issues are best discussed together.

178. *See Smith*, 621 F. Supp. 2d at 1215–18.

179. *Id.* at 1217–18; *see Cutler et al., supra* note 68, at 246.

180. *Smith*, 621 F. Supp. 2d at 1218.

181. *Id.* at 1216; *see Clifford & Hollin, supra* note 74, at 368 (concluding that stress could greatly impair one's recollection of events).

182. *Smith*, 621 F. Supp. 2d at 1216.

183. *Id.* at 1215–16; *see Shapiro & Penrod, supra* note 74, at 145 (concluding that cross-racial identifications were less reliable than same-race identifications).

184. *Smith*, 621 F. Supp. 2d at 1215.

185. *Id.* at 1216.

time that the event is witnessed and the time that the information is recalled, can affect memories of the event.¹⁸⁶ In this case, the fact that the two eyewitnesses spoke to each other before they identified the defendant in court is relevant.¹⁸⁷ They admitted that they possibly discussed the defendant's physical appearance with each other.¹⁸⁸ This is significant considering that one's memory is highly susceptible to suggestibility in the time between witnessing an event and recalling that eyewitness event.¹⁸⁹ Therefore, discussing the appearance of the assailant together during the impressionable time lapse potentially altered the eyewitnesses' memories.

Without Dr. Fulero's testimony educating the jury about the relationship between confidence and accuracy and about the effects that stress, the races of the eyewitness and the perpetrator, and post-event information can have on the eyewitness identification, it is likely that the jury would hold the same misperceptions that participants in research studies have held: eyewitnesses' certainty in their identifications is indisputable proof that the defendant is guilty;¹⁹⁰ cross-racial identifications are as accurate as same-race identifications;¹⁹¹ and memory remains constant over time, despite the introduction of new information.¹⁹² In reality, none of these statements is true.¹⁹³

Two factors that Dr. Fulero did not mention in his testimony—but are nevertheless relevant—are the presence of a weapon during a crime and the

186. *Id.*

187. *Id.* at 1217. Further, at least one of the eyewitnesses did not identify the defendant until two weeks after the robbery had occurred. Supplemental Brief, *supra* note 142, at 10. The long period of time between the robbery and the identification allows for more information to be introduced that alters the eyewitness's recollection of the event and the perpetrator. See LOFTUS, DOYLE & DYSART, *supra* note 5, at 58–59 (stating that exposure to true information in the post-event period can prevent forgetting while exposure to false information can distort or alter the original memory).

188. *Smith*, 621 F. Supp. 2d at 1217.

189. See LOFTUS, DOYLE & DYSART, *supra* note 5, at 58–59 (explaining the malleability of memory relating to post-event periods).

190. See Cutler et al., *supra* note 64, at 222 (finding that jurors were not aware that confidence was a poor indicator of accuracy in eyewitness identifications); Cutler et al., *supra* note 67, at 189–90 (finding that study participants heavily weighed the eyewitness's confidence in her identification when determining the accuracy of the identification); Schmechel et al., *supra* note 64, at 198–99 (finding that study participants believed that confidence was a good indicator of accuracy in eyewitness identifications).

191. Schmechel et al., *supra* note 64, at 200.

192. *Id.* at 196.

193. See Cutler et al., *supra* note 68, at 246–47 (finding that confidence in eyewitness identification and accuracy of eyewitness identification are only weakly correlated); Shapiro & Penrod, *supra* note 74, at 145 (concluding that cross-racial identifications were less reliable than same-race identifications); see also LOFTUS, DOYLE & DYSART, *supra* note 5, at 58–59 (finding that memories are highly susceptible to suggestibility between when the event is viewed and recalled).

deterioration of memory as time passes.¹⁹⁴ Research has shown that if a weapon is present during a crime, eyewitnesses are more likely to focus on the weapon, thereby producing less accurate identifications of the assailant.¹⁹⁵ Smith was convicted of armed robbery, meaning that a weapon was present while the eyewitnesses observed the assailant.¹⁹⁶

Research has also found that one's memory and ability to be an accurate eyewitness declines over time.¹⁹⁷ In this case, two weeks passed between the bank robbery and the eyewitness identification of the defendant.¹⁹⁸ The longer the period of time between the crime and the eyewitness identification, the greater the chance of a false identification.¹⁹⁹

The effects of one's level of confidence,²⁰⁰ the level of stress,²⁰¹ the presence of a weapon,²⁰² the time elapsed between the eyewitness event and the memory recollection,²⁰³ the information introduced between the eyewitness event and the memory recollection,²⁰⁴ and the races of the victim and the assailant²⁰⁵ have on eyewitness memories are often counterintuitive to the average juror. Therefore, expert testimony that informs the jury of these factors' effects not only aids the jury but also, in most cases, is necessary to provide a fair trial.²⁰⁶ Expert testimony was particularly helpful in *Smith* because all of the aforementioned factors were present, the crime was a robbery, and there was no other evidence to corroborate the eyewitness identifications.²⁰⁷ Therefore, the eyewitness expert aided the jury in *Smith*, fulfilling the second prong of the *Daubert* test, and the testimony was highly probative.

194. See *United States v. Smith*, 621 F. Supp. 2d 1207, 1213–18 (M.D. Ala. 2009) (discussing the subjects that Dr. Fulero mentioned in his testimony). However, defense counsel's brief, arguing that the court should deny the prosecution's motion to exclude Dr. Fulero's testimony, stated that weapon focus is one of the issues about which Dr. Fulero would testify. Supplemental Brief, *supra* note 142, at 9. It is unclear whether Dr. Fulero testified regarding weapon focus, and the court failed to incorporate this testimony and information into its decision.

195. See *Cutler et al.*, *supra* note 68, at 244; *Schmechel et al.*, *supra* note 64, at 196.

196. *Smith*, 621 F. Supp. 2d at 1209.

197. *Krafka & Penrod*, *supra* note 74, at 65.

198. Supplemental Brief, *supra* note 142, at 10.

199. See *LOFTUS, DOYLE & DYSART*, *supra* note 5, at 65 (stating that memory deteriorates as time passes); *Krafka & Penrod*, *supra* note 74, at 65 (reporting that reduced memory performance in identifications resulted from the passage of time).

200. *Schmechel et al.*, *supra* note 64, at 198–99.

201. *Id.* at 197–98.

202. *Id.* at 196–97.

203. *Id.* at 195–96.

204. *Id.*

205. *Id.* at 200.

206. See *United States v. Smith*, 621 F. Supp. 2d 1207, 1209, 1213–14 (M.D. Ala. 2009) (stating that eyewitness-expert testimony aids the jury in understanding that eyewitness testimony can lead to a high rate of increased convictions).

207. See *id.* at 1209, 1215–18; Supplemental Brief, *supra* note 142.

2. Any Prejudice Created By Eyewitness Experts Is Minor

Courts that have held that eyewitness-expert testimony was inadmissible because it violated Rule 403 found that such testimony was highly prejudicial and confused the jury.²⁰⁸ The First Circuit in *United States v. Fosher* expressed concern that eyewitness experts created an “aura of special reliability and trustworthiness,” which caused jurors to accept the expert’s testimony of the inaccuracy of eyewitness identifications as an instruction to disregard any eyewitness testimony.²⁰⁹

As the Third Circuit pointed out in *United States v. Mathis*, this concern is unfounded. In that case, the court stated that there was no reason to believe that jurors would weigh eyewitness-expert testimony more heavily than any other expert testimony.²¹⁰ Just as a juror would weigh the expert testimony of a doctor regarding common symptoms of an illness to determine whether the patient had the illness, so too would the juror weigh the testimony of an eyewitness expert regarding the relevant factors to determine whether the eyewitness gave an accurate identification.²¹¹

Smith bolsters the point advanced in *Mathis*.²¹² The court admitted the eyewitness-expert testimony and allowed Dr. Fulero to testify.²¹³ And yet, the jury still convicted Smith.²¹⁴ Allowing eyewitness experts to testify does not hand the case to the defendant. Rather, it merely provides all of the information necessary for the jury to make an informed decision.²¹⁵

Further, as the court in *Smith* noted, eyewitness experts do not confuse, but rather clarify the situation and give the jury a complete picture of the events and the factors affecting those events.²¹⁶ Research has shown that juries that hear eyewitness-expert testimony discuss the eyewitness testimony longer, as well as examine all other evidence more critically.²¹⁷ Opponents of eyewitness-expert testimony argue that juries hand over all decision-making power to the expert witness and substitute the expert’s opinion for their own judgments, but in reality, eyewitness-expert testimony makes jurors more effective by causing them to examine critically each aspect of the case.²¹⁸

208. See *supra* Part I.D.2.

209. *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979).

210. See *United States v. Mathis*, 264 F.3d 321, 339 (3d Cir. 2001).

211. See *id.*

212. See *Smith*, 621 F. Supp. 2d at 1209.

213. *Id.* at 1208–09.

214. *Id.* at 1209.

215. *Id.* at 1222 (“[T]he jury, in assessing the evidence and reaching its verdict, had important and practical information that it would otherwise not have been [able] to use.”).

216. See *id.* at 1218–19.

217. Hosch et al., *supra* note 91, at 293–94.

218. See *id.* at 294.

Finally, in order to exclude evidence, Rule 403 requires the benefits of the evidence to be “substantially outweighed” by its prejudicial effect.²¹⁹ Even if eyewitness-expert testimony is prejudicial, the level of prejudice is not high enough to substantially outweigh the many benefits of the testimony.²²⁰

3. Other Safeguards That Prevent Any Prejudicial Effect

The court in *Smith* achieved the right balance by using limiting instructions to counter the ill effects of misidentification while reducing the prejudicial effects of eyewitness-expert testimony.²²¹ Although the court allowed Dr. Fulero to testify about eyewitness identifications in general and the factors that affected accuracy of identifications, it prohibited him from commenting on or sharing his opinion regarding the specific witnesses in the *Smith* case.²²² Limiting instructions allow testimony to be admitted and the expert to testify regarding the flaws of eyewitness identification. At the same time, it preserves a sphere of credibility determination solely for the jury. Although the expert can present his knowledge on the topic, the jury decides how that knowledge applies to the particular witnesses and facts in the case before it.

Courts that exclude eyewitness-expert testimony have stated that it is unnecessary because cross-examination and jury instructions can fully combat the inaccuracy of eyewitness identifications.²²³ Research has refuted this argument by showing that neither cross-examination nor jury instructions are effective in overcoming the overwhelming persuasiveness of eyewitness identification because jurors are mostly ignorant of the various factors that affect eyewitness identification.²²⁴

219. FED. R. EVID. 403.

220. See *supra* Part I.C.

221. *Smith*, 621 F. Supp. 2d at 1218.

222. *Id.* at 1209.

223. See *United States v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996); *United States v. Rincon*, 28 F.3d 921, 925 (9th Cir. 1994); *United States v. Fosher*, 590 F.2d 381, 382 (1st Cir. 1979).

224. See CUTLER & PENROD, *supra* note 83, at 143–58, 255–68. For example, if a court excludes eyewitness-expert testimony and states, as one of its reasons for doing so, that cross-examination and jury instructions will suffice to counter any dangers of misidentification, as the Eighth Circuit did in *Kime*, 99 F.3d at 335, then the defense attorney can ask the witness various questions such as how confident the eyewitness is in her identification, how much time passed between the crime and when the eyewitness identified the defendant as the assailant, whether there was a weapon present, and whether the eyewitness felt stressed during the crime. The problem, however, is that the answers to these questions have a counterintuitive effect on eyewitness identification. See *supra* notes 200–05 and accompanying text. If the defendant answers that she was extremely stressed during the crime, the jury might conclude that her identification was more reliable, rather than less. Therefore, cross-examination, which is not accompanied by an explanation as to why particular questions were asked, is not adequate to combat the dangers of misidentifications. See CUTLER & PENROD, *supra* note 83, at 157.

4. *The Court Follows Eleventh Circuit Precedent*

The court in *Smith* explained how its ruling did not contradict Eleventh Circuit precedent,²²⁵ despite the disfavor the Eleventh Circuit has shown toward eyewitness-expert testimony.²²⁶ The latest Eleventh Circuit opinion on eyewitness-expert testimony used much more nuanced language than previous Eleventh Circuit cases had, which suggested that the court was open to considering admitting expert eyewitness testimony.²²⁷ Further, the Eleventh Circuit emphasized that the decision of admitting eyewitness-expert testimony fell squarely within the discretion of the trial judge.²²⁸ Therefore, the district court in *Smith* was able to admit eyewitness-expert testimony without breaking from Eleventh Circuit precedent.²²⁹

IV. CONCLUSION

There is much confusion surrounding eyewitnesses and the factors that affect eyewitness identifications. This is a dangerous issue when lay jurors rely so heavily upon such evidence. In order to lower the number of wrongful convictions based on eyewitness identifications, the court system needs to recognize, as the court did in *United States v. Smith*, that eyewitness experts often meet the requirements set out in Federal Rules of Evidence 702 and 403, and that such experts play a vital role in producing a fair judicial process. Therefore, the appellate courts should grant the lower courts less discretion in excluding eyewitness-expert testimony.

225. *Smith*, 621 F. Supp. 2d at 1210–11.

226. *See supra* Part I.E.

227. *Compare* *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) (per curiam) (refusing to state unequivocally that eyewitness experts would never be allowed to testify), *with* *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984) (stating unequivocally that eyewitness-expert testimony was not admissible in the Eleventh Circuit).

228. *Smith*, 122 F.3d at 1359.

229. *See Smith*, 621 F. Supp. 2d at 1210–11.