Tennessee Journal of Law and Policy

Volume 2 | Issue 3 Article 3

March 2014

On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation

Tanja Rapus Benton
University of Tennessee at Chattanooga

Stephanie A. McDonnell
University of Tennessee at Chattanooga

Neil Thomas
Justice, Tennessee Circuit Court

David F. Ross
University of Tennessee at Chattanooga

Nicholas Honerkamp
University of Tennessee at Chattanooga

ON THE ADMISSIBILITY OF EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION: A LEGAL AND SCIENTIFIC EVALUATION

Tanja Rapus Benton,[*] *Stephanie A. McDonnell*,[+] *Judge Neil Thomas*,[±] *David F. Ross*,[*] *& Nicholas Honerkamp*[+ ±]

I. Introduction

This article is a state-by-state and circuit-by-circuit analysis of judicial decisions on the admissibility of expert testimony on eyewitness identification problems. The basis for the admission of expert testimony is analyzed, and then the rationale used in those decisions is considered with regard to the current data from psychological studies. This

[*] Postdoctoral Research Associate, Department of Psychology, University of Tennessee at Chattanooga; B.Sc., Trinity College, University of Toronto, 1995; Ph.D., McGill University, 2001.

[+] Research Associate, Department of Psychology, University of Tennessee at Chattanooga; B.A., University of Florida, 2002; M.S. University of Tennessee at Chattanooga, 2005.

[±] Justice, Tennessee Circuit Court; B.A., University of North Carolina at Chapel Hill, 1966; J.D., University of Michigan, 1969.

[*] Professor of Psychology, Department of Psychology, University of Tennessee at Chattanooga; B.S., Cornell University, 1982; M.S. Cornell University, 1984; Ph.D., Cornell University, 1989.

[+] Acting Head & Professor, Department of Sociology, Anthropology, and Geography, University of Tennessee at Chattanooga; B.A., University of Florida, 1972; M.A., University of Florida, 1975; Ph.D., University of Florida, 1980.

[±] Acknowledgements: This article was prepared by the above named authors in conjunction with the Multidisciplinary Council on Judicial Studies at the University of Tennessee at Chattanooga. The Council includes the judicial discipline through a sitting judge, the legal discipline through trial attorneys, and the psychology, anthropology, and medical disciplines through doctorates. We acknowledge the contribution made by the members of the MCJS, including the above named authors as well as: Paul Campbell III, Esq., Cindy Hall, Esq., Stan Kessler, M.D., Karen McGuffee, Andy Noblinski, Ph.D., Hal North, Esq., Joseph Tomain, Esq., and James Ward, Ph.D.

article also addresses the apparent disregard of social science research by the judicial system.

II. Issues Raised in *Daubert* and *McDaniel*

Under both the Federal Rules of Evidence and the Tennessee Rules of Evidence, a witness generally may not give "testimony in the form of opinions."[1] An exception is contained, however, in Rule 702 of the Federal version, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."[2] The Tennessee version of that rule is the same with the exception of one addition; the word "substantially" precedes the word "assist."[3] Additionally, Rule 703 of the Tennessee Rules of Evidence provides that expert testimony shall be disallowed where "the underlying facts or data indicate lack of trustworthiness,"[4] a requirement not contained in Rule 703 of the Federal Rules.[5]

Under Rule 104(a), whether a witness will be permitted to testify as an expert is first a determination for the court.[6] Both Rules 104 and 702 are silent concerning how that determination is to be made.[7] Under the Federal Rules, the United States Supreme Court gave the necessary guidance to the trial court in *Daubert v. Merrell Dow Pharmaceuticals*.[8] The Tennessee Supreme Court

---

[1] FED. R. EVID. 701(a); TENN. R. EVID. 701(a).
[2] FED. R. EVID. 702.
[3] TENN. R. EVID. 702.
[4] TENN. R. EVID. 703.
[5] FED. R. EVID. 703.
[6] FED. R. EVID. 104(a).
[7] FED. R. EVID. 104, 702.
[8] 509 U.S. 579 (1993).

provided similar assistance in *McDaniel v. CSX Transportation, Inc.*[9] Or did they?

In *Daubert,* the case went before the United States Supreme Court after the trial court granted summary judgment to the defendant. The trial court did so because the opinions expressed in the expert affidavits submitted by the plaintiffs did not "have general acceptance in the field to which it belongs"[10] under the test articulated in *United States v. Kilgus.*[11] The Court of Appeals affirmed, relying upon *Frye v. United States.*[12] After a granting certiorari, the United States Supreme Court reversed and established a new rule with respect to the admissibility of expert opinions. Holding that the *Frye* test was superseded by the Federal Rules of Evidence, the Supreme Court first examined Rule 402 to determine whether it required "general acceptance" and found that neither Rule 402 nor Rule 702 required such an analysis.[13] The Court held that the *Frye* test was a rigid requirement "at odds with the liberal thrust of the Federal Rules, and their general approach of relaxing the traditional barriers to opinion testimony."[14] In its analysis of the factors that must be applied to determine admissibility, the Court held that the subject of the expert's testimony must be scientific knowledge.[15] The Court used Webster's Third New International Dictionary to define what constituted

---

[9] 955 S.W.2d 257 (Tenn. 1997).

[10] Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989).

[11] 571 F.2d 508 (9th Cir. 1978).

[12] 293 F. 1013 (1923).

[13] Rule 402 provides that all relevant evidence is admissible, and defines relevant evidence as that evidence which has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 402.

[14] *Daubert,* 509 U.S. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)) (internal quotation marks omitted).

[15] *Id.* at 590.

scientific knowledge. The Court emphasized that science is a process, and "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method."[16] The Court held that the use of scientific knowledge as the basis of expert opinion "establishes a standard of evidentiary reliability."[17] In a footnote to that statement, the Court found that "evidentiary reliability will be based upon scientific validity."[18]

The Court then examined the "assistance" language of Rule 702 and stated that requirement goes to relevance.[19] The Court returned to the requirement under Rule 702 that there should be "a valid scientific connection to the pertinent inquiry."[20]

Next, the Court turned to the factors that should be considered by the trial court in ruling on the admissibility of the expert's opinion. The preliminary assessment, which the trial court must use, is "whether the reasoning or methodology underlying the testimony is scientifically valid."[21] The Court expressed confidence that federal judges possess the capacity to make this assessment, an assumption that will be placed severely in doubt later in this article.

The first of four factors listed by the Court was whether the theory or technique can be and has been tested, also known as falsifiability.[22] Next, the Court listed peer review as a factor, though the decision then stated that in some cases "well-grounded but innovative theories will not

---

[16] *Id.*
[17] *Id.*
[18] *Id.* at 591, n.9 (emphasis omitted).
[19] Interestingly, as will be discussed later, the citation given by the Court for this issue is *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), a case admitting expert testimony on eyewitness identification.
[20] *Daubert*, 509 U.S. at 592.
[21] *Id.* at 592-93.
[22] *Id.* at 593.

have been published."[23] Although the Court relied upon whether the theory has been published in a peer reviewed journal, it failed to define the factors under which a journal will be considered a peer review journal. The third factor identified by the Court was the known or potential rate of error, which the Court again failed to state how that determination is to be made.[24] Finally, the Court listed "general acceptance" as a factor, citing *Downing*,[25] but again giving no guidance on how to define this factor.[26] In its opinion, the Court stressed that the determination made by the trial court should focus on the methodology, not the conclusion.[27]

At the end of its decision, the Court made a significant comparison between science and law, the ramifications of which could be momentous. The Court stated, "There are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly."[28] This statement implies that law is not subject to perpetual revision, and, therefore, it implies that under stare decisis the law should change little, even though science may change dramatically.

This article will now address the assistance provided by the Tennessee Supreme Court in *McDaniel*.[29] Although the Tennessee Supreme Court has provided more guidance on this issue than the United States Supreme Court, certain critical issues remain, especially when considering cases decided after *Daubert*. One such issue is the preliminary issue of the role of the trial judge under

---

[23] *Id.*
[24] *Id.* at 594.
[25] 753 F.2d at 1224.
[26] *Daubert*, 509 U.S. at 594.
[27] *Id.* at 595.
[28] *Id.* at 596-97.
[29] *McDaniel*, 955 S.W.2d at 257.

Rule 104. After *Daubert*, some suggest that the role of the trial judge is not to become expert enough in the science under consideration or to choose between conflicting scientific theories, but simply to keep an opinion in the form of pure speculation from the jury. On that issue, however, Tennessee is more restrictive as compared to the language in the Federal Rules of Evidence because of the language contained in Rules 702 and 703 of the Tennessee Rules of Evidence. Thus, Tennessee requires the following assessment by the trial court:

> The rules together [702 and 703] necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.[30]

After making this statement, the court suggested that the trial court "need not weigh or choose between two legitimate but conflicting scientific views."[31] The Tennessee Supreme Court then held that "it is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact."[32]

Thus, if there are competing opinions which are admitted because the methodologies are correct, the jury must determine which conclusion is valid. The procedural fact pattern in *McDaniel* was similar to that in *Daubert*. In

---

[30] *Id.* at 265.
[31] *Id.*
[32] *Id.*

McDaniel, the trial court held a hearing on the defendant's motion *in limine* to determine the admissibility of plaintiff's experts.[33] After the hearing, the trial court ruled that the evidence was admissible, but certified the issue to the Court of Appeals, which declined to take the interlocutory appeal.[34] Upon application, the Tennessee Supreme Court granted the appeal.[35] Although the court declined expressly to adopt *Daubert*, it gave a list of non-exclusive factors for a trial judge to consider which are almost identical to the factors in *Daubert*:

> A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.[36]

In adopting the foregoing list, the Tennessee Supreme Court declined to adopt a standard for an epidemiological study as a matter of law.[37] The defendant contended that on a scale of 1.0 to 4.0, where 4.0 shows a high correlation of causation between exposure and disease, the court should adopt a relative risk of greater than 2.0.[38] The court

---

[33] *Id.* at 258.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 265.
[37] *Id.* at 258.
[38] *Id.* at 259, n.3.

declined.[39]

Finally, the Tennessee Supreme Court directed the issue back to the trial court, stating:

> We recognize that the burden placed on trial courts to analyze and to screen novel scientific evidence is a significant one. No framework exists that provides for simple and practical application in every case; the complexity and diversity of potential scientific evidence is simply too vast for the application of a single test . . .. Nonetheless, the preliminary questions must be addressed by the trial court, *see*, Tenn. R. Evid. 104, and they must be addressed within the framework of rules 702 and 703.[40]

Thus, the Tennessee Supreme Court, like the United States Supreme Court, expresses great confidence in the ability of trial judges, despite their lack of scientific training, to properly sort out conflicting scientific opinions (often at opposite ends of the spectrum) and make a decision on admissibility. Then, to compound matters, if the judge decides that the conflicting opinions are admissible, the jury, often with even less training, is asked to make a decision as to which applies, all because, according to the decisions discussed later in this review, rigorous cross examination and instructions by the court will help them sort it out.[41]

---

[39] *Id.* at 260.

[40] *Id.*

[41] J.L. Devenport et al., *How Effective are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. APPLIED PSYCHOL. 1042-1054 (2002).

III. Issues Raised in *State v. Coley*[42]

In 1996, defendant Eddie V. Coley sought to introduce testimony from Dr. Michael G. Johnson, an expert in the field of eyewitness identification in a Williamson County Circuit Court.[43] The proffered testimony included: information on the relationship between stress and memory for an event; cross-racial identification; the relationship between confidence and accuracy; the effect of time on remembering; and the suggestibility of the photographic lineup used in the case.[44] The State objected to the testimony on the ground that it was unnecessary to help the jury decide the issue of identification.[45] The trial court agreed and excluded the expert's testimony.[46] Coley was subsequently convicted of aggravated robbery and sentenced to twelve years in jail.[47] In 1998, the defendant appealed his conviction to the Court of Criminal Appeals, arguing that the trial court erred in excluding expert testimony regarding eyewitness identification.[48] Upon review, the court referred to its past statement in *State v. Ward*,[49] which stated that the "great weight of authority in this country is that the study of the reliability of eyewitness identification has not attained that degree of exactitude which would qualify it as a specific science."[50] Although the court recognized that this statement may no longer be true, it found no abuse of discretion in the trial court's refusal to admit the

---

[42] 32 S.W.3d 831 (Tenn. 2000) [hereinafter *Coley*].
[43] *Id.* at 833.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 832-33.
[47] *Id.* at 833.
[48] State v. Coley, No. 01C01-9707-CC-00270, 1998 WL 712838, at *1 (Tenn. Crim. App. Oct. 13, 1998) [hereinafter *Coley Appeal*].
[49] 712 S.W.2d 485 (Tenn. Crim. App. 1986).
[50] *Id.* at 487.

testimony.[51] At this point, the court did not adopt a per se rule of exclusion of expert testimony regarding eyewitnesses, but instead, stated that the issue was one that should remain a matter for the trial court's discretion on a case-by-case basis.[52] In 2000, Coley renewed his request for permission to appeal from the Supreme Court of Tennessee.[53] This court, however, dealt a much harsher ruling on the issue, proclaiming that the testimony was per se inadmissible under Rule 702 of the Tennessee Rules of Evidence.[54] The Tennessee Supreme Court held that:

> Expert testimony regarding eyewitness identification arguably fails to satisfy the plain meaning of this language. Eyewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not necessary to help jurors "understand" the eyewitness's testimony. Moreover, expert testimony about the eyewitness's accuracy does not aid the jury in determining a fact in issue because the question whether an eyewitness should be believed is not a "fact in issue" but rather a credibility determination.[55]

In reaching this decision, the Tennessee Supreme Court cited two cases, *State v. Ward*[56] and *State v. Wooden*,[57] previously decided in the Tennessee Court of Criminal

---

[51] Coley Appeal, 1998 WL 712838, at *3.
[52] *Id.*
[53] *Coley*, 32 S.W.3d at 831.
[54] *Id.* at 838.
[55] *Id.* at 833-34.
[56] *Ward*, 712 S.W.2d at 485.
[57] 658 S.W.2d 553 (Tenn. Crim. App. 1983).

Appeals. Interestingly, *State v. Ward*[58] is the same case that the Court of Appeals cited in Coley's initial appeal stating that the unreliability of this sort of testimony was no longer accurate.[59] The Tennessee Supreme Court apparently overlooked this comment when it referred to the case as a rationale for its holding. While the Court of Criminal Appeals appeared to take a more liberal step towards admitting this type of testimony, the Tennessee Supreme Court did just the opposite. The court found that (1) "expert testimony concerning eyewitness identification simply offers generalities" and lacks scientific or technical underpinnings; (2) "the subject of reliability of eyewitness identification is within the common understanding of reasonable persons"; (3) the testimony might "mislead and confuse" the jury causing undue prejudice because of its aura of special reliability and trustworthiness; and (4) cross-examination and jury instructions are appropriate aids in protecting the rights of the defendant.[60]

This decision shut the door on expert testimony regarding eyewitness identification in the State of Tennessee. Therefore, defendants will never be permitted to introduce this type of testimony at trial. How valid are these conclusions reached by the Tennessee Supreme Court?

IV. Overview of State and Federal Decisions on the Admissibility of Eyewitness Testimony

The decision reached in Tennessee, and the rationale used in making that decision, leads one to wonder if this logic is representative of the thinking of judges across the nation. If the decision in Tennessee was reached

[58] *Ward*, 712 S.W.2d at 485.
[59] *Coley Appeal*, 1998 WL 712838, at *3.
[60] *Coley*, 32 S.W.2d at 837-38.

using the standards outlined in *Daubert*[61] and *McDaniel*,[62] then should similar trends be found in other jurisdictions? In order to answer this query, we took the most direct approach by delving into an extensive search of recent rulings made across the nation on this exact issue. This research analyzed published cases from each state and federal circuit to determine how other courts are ruling on the issue of the admissibility of expert eyewitness testimony. While the most recent authoritative cases on the issue are presented, it should be recognized that they may or may not constitute cases in which the rule is established. However, there will be some discussion of prior precedent. This section will report the results of our comprehensive search. Overall, the results indicate that judicial reasoning and decisions for admitting or excluding eyewitness experts are very inconsistent across the states and federal circuits.

Each case was analyzed for content and sorted according to the ruling made by the court. There are two broad approaches that can be taken by a court when ruling on this issue. The first is known as the *discretionary* approach. This approach leaves the admissibility and limits of expert testimony to the discretion of the trial court, under which appellate judges can affirm the admission or exclusion of the testimony or remand the case to the trial court for further analysis. This is the broadest category and has been adopted by a majority of the courts. Within this approach, several different decisions may be made, all of which allow the appellate court to rationalize its reasons for admitting or excluding the expert testimony on a case-by-case basis. There are five types of decisions under the discretionary approach: (1) those which admit the testimony and declare that the trial court did not abuse its discretion in admitting the evidence, (2) those which admit the testimony and declare that the trial court *did* abuse its

[61] 509 U.S. at 579.
[62] 955 S.W.2d at 257.

discretion in excluding the testimony, (3) those which do not admit the testimony and declare that the trial court did not abuse its discretion in excluding the testimony, (4) those which do not admit the testimony but claim that, in general, the testimony could be admissible under other circumstances, or (5) those which remand the case to the trial court for further review.

The second type of approach taken by courts is known as the *prohibitory* approach. This is a per se rule of exclusion, prohibiting the exercise of discretion and the admission of expert eyewitness testimony under any circumstances. While it initially may appear that courts are turning away from this approach to adopt the approach of the majority in a discretionary view, our analysis reveals that many courts are using the "discretionary" approach as a guise, but are basically still operating in a manner that is nearly per se exclusionary. Table 1 provides further clarification for how a court may rule on the issues.

A. State Analysis

In the most recent cases involving an attempt to introduce an eyewitness expert, the court admitted the testimony in only four states (9%) and excluded it in thirty-eight states (83%). The reviewing court remanded the case back to the trial court for further review in four states (9%).[63] As shown in Table 2, the majority of states (98%) take a discretionary approach to the issue, while only one state (Tennessee) takes a prohibitory approach, ruling the testimony per se inadmissible under all circumstances. Of the states that take a discretionary approach, however, fifteen states (33%) ruled that the testimony was

[63] The review is based on only forty-six states because the issue of eyewitness experts was not addressed in published opinions in the District of Columbia and four states: Hawaii, Montana, New Hampshire, and New Mexico.

inadmissible, using harsh language to suggest a nearly per se rule of exclusion. Twenty-two states (43%) ruled that, in general, the testimony is admissible, but for the circumstances of the particular case, it was not admissible. It should be noted that in four of these cases, partial testimony was admitted. These are marked with an asterisk in the table.

Each court's rationale is shown in Table 3. A review of the rationale used for exclusion of the testimony quickly makes it clear that the problem of variability in judicial decision-making on this topic largely lies in the discretionary approach. The problem is that courts rarely overrule a trial court's exercise of discretion. If the defendant appeals a trial court's decision, the appellate court will only review the lower court decision under an "abuse of discretion" rule. This approach means that, even though the evidence may be otherwise admissible, the trial court decision will only be overturned if the court has abused its discretion in refusing to admit the evidence or if the exclusion was not harmless to the outcome of the case. With this type of review, trial court decisions are rarely overturned, which aids in keeping expert identification testimony out of the court.

By looking at some examples of the rationale used within each category, it is obvious that the rationale used is inconsistent and varies widely. In Tennessee, the only state with a prohibitory approach, the court was very forceful and stringent in its logic in *State v. McKinney*,[64] a decision made subsequent to and making reference to *Coley*.[65]

> Eyewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not

[64] 74 S.W.3d 291 (Tenn. 2002).
[65] 32 S.W.3d at 833-34.

> necessary to help jurors "understand" the eyewitness's testimony. Moreover, expert testimony about the eyewitness's accuracy does not aid the jury in determining a fact in issue because the question whether an eyewitness should be believed is not a "fact in issue" but rather a credibility determination.[66]

With this type of reasoning, Tennessee will never admit expert testimony on eyewitness issues. Now, turning to the rationale used within the discretionary approach, unfortunately some of the same logic used in *State v. Coley* is evident.[67] Fifteen states claim that they hold a discretionary view, yet they use language similar to the language used in *Coley*. For example, in *Utley v. State*, the Supreme Court of Arkansas held, "The question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer."[68] Thus, the expert's testimony was a matter of common understanding and would not assist the trier of fact. A similar example is *Johnson v. State*, where the Florida Supreme Court found that "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions."[69] In this case the court ruled, "Reliability of eyewitness identification is within the realm of jurors' knowledge and experience."[70] Similarly, in *State v. Gaines*, the Kansas Supreme Court "continue[d] to follow the previous line of cases and h[e]ld that expert testimony regarding eyewitness identification

---

[66] *McKinney*, 74 S.W.3d at 302 (quoting State v. Coley, 32 S.W.3d 831, 833-34 (Tenn. 2000)) (internal quotation marks omitted).
[67] 32 S.W.3d at 831.
[68] 826 S.W.2d 268, 270 (Ark. 1992).
[69] Johnson v. State, 438 So. 2d. 774, 777 (Fla. 1983).
[70] *Id.*

should not be admitted into trial."[71] In the Oregon decision, *State v. Goldsby*, the court even recognized that "eyewitness identification evidence has a built-in potential for error, but concluded that the law does not deal with that potential by allowing experts to debate the quality of evidence for the jury."[72] This rationale makes it quite clear that the court renders this type of testimony unnecessary, implying that the court would be highly unlikely ever to admit it.

Within the largest category, *May Be Admissible: Discretion Not Abused in Excluding*, twenty-two states decided that while under some circumstances this type of testimony may be admissible, under the facts of the particular case, the testimony was not admissible. The rationale used in this category generally suggests that admission of eyewitness experts is possible, but not probable. The barrage of reasoning amounts to little more than general excuses. For example, in *In re Williams*, the Alabama Supreme Court excluded evidence on the basis that the expert was not familiar with facts of case and had no personal contact with victim or knowledge of the event.[73] Similarly, in *State v. McClendon*, the Connecticut Supreme Court held that the expert could not state his opinion to a "reasonable degree of scientific certainty." [74] Also, in *State v. Miles*, the Minnesota Supreme Court decided that there was nothing to suggest that expert testimony would be particularly helpful to the jury in evaluating the specific eyewitness testimony.[75] A number of courts (Indiana, Massachusetts, and Nevada) found that there was other corroborating evidence, which eliminated

[71] 926 P.2d 641, 649 (Kan. 1996).
[72] 650 P.2d 952, 954 (Or. Ct. App. 1982) (quoting State v. Calia, 514 P.2d 1354, 1356) (Or. Ct. App. 1973) (internal quotation marks omitted).
[73] 594 So. 2d 1225, 1227 (Ala. 1992).
[74] 730 A.2d 1107, 1115 (Conn. 1999).
[75] 585 N.W.2d 368, 370-71 (Minn. 1998).

the need for an expert.[76] In summary, all thirty-eight states that would not admit the expert testimony explain the exclusion with reasons which are both general and inconsistent.

However, four states did admit expert testimony pertaining to eyewitness reliability. Three states (Alaska, California, and South Carolina) found that the exclusion of the testimony by the trial court constituted an abuse of discretion, holding that the testimony should have been admitted. As any number of judges would attest, reaching this decision on an issue speaks volumes. Note that the rationale used by these judges is in direct opposition to the rationale used by judges who exclude the experts. For example, in California's landmark case of *People v. McDonald*, the court reasoned,

> It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most. . . . We conclude that although jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, the body of information now available on these matters is "sufficiently beyond common experience" that in appropriate cases expert opinion thereon could at least "assist the trier of fact."[77]

Additionally, in the Alaska case, *Skamarocius v. State*, the

[76] State v. Cook, 734 N.E.2d 563 (Ind. 2000); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997); Fraternal Order v. Denver, 926 P.2d 589 (Colo. 1996).
[77] 690 P.2d 709, 720-21 (Cal. 1984).

court explained that the identification of the assailant was the main issue of the case, and that the expert testimony was relevant and would have been helpful to the jury.[78] The court concluded that the error in exclusion was not harmless.[79] Finally, the same issue was addressed in *State v. Whaley*, in which the South Carolina Supreme Court found that the main issue was identification, and numerous factors existed that could have affected the witness identifications.[80] These three decisions hold great weight on the admissibility of expert eyewitness testimony because these appellate courts decided that the trial court's exclusion of the testimony was arbitrary.

It is interesting to note that while the facts in many cases are similar, judges manage to reach completely contradictory decisions. Unfortunately, an analysis of the most recent decisions in the federal circuits paints just as bleak a picture.

B. Federal Analysis

An analysis of eleven circuits reveals that expert testimony on eyewitness identification was not admitted in any circuit.[81] The decisions within the circuits are broken down in the same manner as the states.[82] As shown in Table 4, none of the circuits currently take the prohibitory approach on this issue. Three circuits (25%) found the testimony inadmissible, using such harsh language that the decisions can be construed as a per se rule of inadmissibility. In *United States v. Kime* in the Eighth Circuit, for example, the court concluded that the testimony failed under the *Daubert* prongs because the scientific

---

[78] 731 P.2d 63, 66-67 (Alaska Ct. App. 1987).
[79] *Id.* at 66.
[80] 406 S.E.2d 369, 372 (S.C. 1991).
[81] No published cases were found in the U.S. Court of Appeals for the District of Columbia.
[82] *See* Table 2.

evidence would not assist the trier of fact.[83] All three of these circuits (Eighth, Ninth, and Eleventh) defer to the issue that cross-examination and jury instruction are sufficient tools to address problems related to eyewitness identifications.[84] With this rationale in place, just like the rationale of the states in the same category, the expert's testimony is unlikely to ever be admitted.

While recognizing that in certain situations this type of expert testimony may be admissible, over half of the circuits (64%) do not find an abuse of discretion in the exclusion of the expert testimony.[85] The rationale used in this category varies widely, just as we have observed with the states' reasoning. For example, in *United States v. Brien*, the Court of Appeals for the First Circuit held that the defense offered nothing as far as literature or data to affirm the expert's conclusions after being repeatedly asked for it.[86] Other reasons for exclusion include the presence of corroborating evidence (Fifth and Seventh Circuits), no limited circumstances that call for expert eyewitness testimony were present (Fourth Circuit), and the presence of multiple eyewitnesses (Tenth Circuit).[87]

One circuit stands apart from the rest in that it decided that the exclusion of the testimony was an abuse of discretion. However, in its decision in *United States v. Mathis*, the Third Circuit decided that it was an abuse of discretion to exclude the expert, but ultimately found the exclusion to be harmless error.[88] The defendant's conviction was upheld, after the court found that "portions of [the expert's] proffered testimony should have been

---

[83] 99 F.3d 870, 883 (8th Cir. 1996).

[84] *See* Table 4 for an example of a case from each circuit along with a description of the decision.

[85] Namely, the 1st, 2nd, 4th, 5th, 6th, 7th and 10th Circuits.

[86] 59 F.3d 274, 277 (1st Cir. 1995).

[87] *See* Table 4 for an example of a case from each circuit along with a description of the decision.

[88] 264 F.3d 321, 342-44 (3d Cir. 2001).

admitted, [but] in the context of the record as a whole, his testimony was highly unlikely to have caused a different result."[89]

In summary, this article has revealed significant variability in the decisions of courts as to whether to admit or exclude testimony from eyewitness experts. The problem lies in the fact that the decisions reached are not based primarily on the facts of the case, but instead based on other factors like jurisdictional characteristics, personal views of the judge, broad discretion granted to the trial judge, and the ambiguity of admission criteria.

V. Scientific Literature on the Issues Raised in *Coley*, *Daubert*, and *McDaniel*

Four main issues which need to be addressed emerge from this review. First, can trial judges, who have little scientific training, adequately evaluate the scientific validity of expert testimony in order to make a decision on admissibility? Second, is the subject of reliability of eyewitness identifications common knowledge to reasonable people—what, in fact, does the average juror, or even the average judge know about eyewitness issues? Third, does rigorous cross-examination and instruction by the court serve as effective safeguard to prevent wrongful convictions based on errors in eyewitness testimony? Fourth, what can be said about the scientific integrity of social science research—is eyewitness memory research sufficiently reliable and valid to warrant expert testimony on the subject? Fortunately, a large body of empirical research exists that can inform and help clarify each one these issues.

[89] *Id.* at 343.

A. The Evaluation of Scientific Testimony

The existing rules and guidelines, such as Rules 702 and 703 of the Tennessee Rules of Evidence, place great responsibility on trial judges because they require judges to evaluate the merit and validity of scientific testimony across diverse domains of knowledge without the benefit of scientific training. Recent findings indicate that judges do not possess the detailed and accurate understanding of scientific methodology necessary to perform this task effectively. In a 2001 study, researchers Gatowski, Dobbin, Richardson, Ginsberg, Merlino, and Dahir surveyed a national sample of state court judges about their knowledge of the *Daubert* factors used to evaluate scientific testimony.[90] These factors included: falsifiability, error rate, peer review, and general acceptance.[91] When asked to define these concepts, a clear lack of comprehension was evident. Only four percent were able to define falsifiability; similarly, only four percent were able to define error rate.[92] While judges showed a better understanding of peer review and general acceptance, there was little consensus about which factors were most important or how to combine the four guidelines in evaluating expert testimony.[93]

Research also shows that judges' evaluations are not sufficiently sensitive to problems in the quality of expert testimony. For example, in a study where judges were presented with expert testimony that varied in terms of the presence or absence of methodological problems and whether or not the research was peer reviewed, the quality of the expert testimony had no impact on judges'

---

[90] Sophia Gatowski et al., *Asking Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 L. & HUM. BEHAV. 433-458 (2001).
[91] *See id.* at 433.
[92] *Id.*
[93] *Id.*

evaluations.[94] When judges were given training in scientific methodology, however, their evaluations of expert testimony increased in accuracy compared to those of their untrained counterparts even though serious errors in evaluation were still made.[95] Judges are forced to use the *Daubert* standard to evaluate the scientific integrity of expert testimony, although most lack adequate scientific training and requisite knowledge of scientific principles. Whether judges can adequately evaluate expert testimony in general, and more specifically, expert testimony about eyewitness memory, is open to serious debate.

B. Is Knowledge of Eyewitness Memory Really Common Sense?

One of the most commonly cited reasons for excluding eyewitness expert testimony is that knowledge of factors that can affect eyewitness accuracy is a matter of common sense, and thus, jurors do not require assistance in understanding eyewitness testimony.[96] The large body of research that has examined people's understanding of eyewitness memory has revealed significant shortcomings, not only in the scope of the knowledge evidenced, but also in terms of its general accuracy. In survey studies, where jury-eligible citizens complete questionnaires about eyewitness issues, large deficits have been found in what people commonly believe to be true about eyewitness

---

[94] *See* M. Kovera et al., *The Effects of Peer-Review and Evidence Quality on Judge Evaluation of Psychological Science: Are Judges Effective Gate-Keepers?* 85 J. APPLIED PSYCHOL. 574 (2000).

[95] *Id.*

[96] Benton, T. Rapus et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony, in* 2 INTERNATIONAL HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., in press).

memory.[97] Second, what people believe are important factors affecting eyewitness accuracy are often not diagnostic of, and sometimes are even irrelevant to, eyewitness accuracy.[98] For example, the relationship between witness confidence and accuracy has consistently posed a problem for lay persons.[99] While confident witnesses are perceived to be more accurate, research findings show that confidence is not a reliable indicator of eyewitness accuracy.[100] A large number of experimental

---

[97] *See id. See also* ELIZABETH E. LOFTUS, EYEWITNESS TESTIMONY (1979); R.C.L. Lindsay, *Expectations of Eyewitness Performance: Jurors' Verdicts Do Not Follow from Their Beliefs, in* ADULT EYEWITNESS TESTIMONY (D. F. Ross et al. eds., 1994); A. Daniel Yarmey & Hazel P. Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in* EVALUATING WITNESS EVIDENCE 13-40 (Sally Lloyd-Bostock & Brian R. Clifford eds., 1983); John C. Brigham & Melissa P. WolfsKeil, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 337, 349 (1983); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?* 6 L. & HUM. BEHAV. 15, 30 (1982); Marcus D. Durham & Francis C. Dane, *Juror Knowledge of Eyewitness Behavior: Evidence for the Necessity of Expert Testimony*, 14 J. SOC. BEHAV. & PERSP. 299, 308 (1999); Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED SOC. PSYCHOL. 1241, 1249 (1992); Kevin McConkey & Suzanne Roche, *Knowledge of Eyewitness Memory*, 24 AUSTL. PSYCHOL. 377, 384 (1989); Elizabeth Noon & Clive Hollin, *Lay Knowledge of Eyewitness Behavior: A British Survey*, 1 APPLIED COGNITIVE PSYCHOL. 143, 153 (1987); George Rahaim & Stanley Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 L. & PSYCHOL. REV. 1, 15 (1982); John S. Shaw et al., *A Lay Perspective on the Accuracy of Eyewitness Testimony*, 29 J. APPLIED SOC. PSYCHOL. 52, 71 (1999).

[98] Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications,* 64 J. APPLIED PSYCHOL. 440-448 (1979).

[99] *Id.*

[100] *Id.*; R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 L. & HUM. BEHAV. 333-339 (1989).

studies have demonstrated that eyewitness confidence is a better predictor of mock juror verdicts than eyewitness accuracy, indicating that jurors are swayed by the believability of eyewitnesses.[101] Even more problematic is that experiments show that laypeople have great difficulty distinguishing between accurate and inaccurate witnesses. Mock jurors show a high level of belief in the testimony of both accurate and inaccurate witnesses.[102] Mock jurors also tend to overestimate accuracy rates in eyewitness identification situations, revealing an underlying belief that eyewitnesses tend to be fairly accurate.[103] Brigham and Bothwell found that a majority of their survey respondents (63%) believed that more than fifty percent of eyewitness identifications made are correct. [104]

Third, lay persons underestimate the importance of

---

[101] *See* Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 L. & HUM. BEHAV. 353, 364 (2002); Brian L. Cutler et al., *Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL. 1197, 1207 (1990); Steven Fox & H. A. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 L. & HUM. BEHAV. 215, 228 (1986); R.C.L. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?* 66 J. APPLIED PSYCHOL. 79, 89 (1981); Lindsay, *Mock-Juror Belief, supra* note 100; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUB. POL'Y & L. 817, 845 (1995).

[102] Lindsay, *Mock–Juror Belief, supra* note 100; R.C.L. Lindsay et al., *Mock-Juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APPLIED SOC. PSYCHOL. 447-459. (1986).

[103] Brewer & Burke, *Effects of Testimonial Inconsistencies, supra* note 101; Cutler et al., *Nonadversarial Methods, supra* note 101; Fox & Walters, *The Impact of General, supra* note 101; Lindsay et al., *Mock-Juror Belief, supra* at note 100; Penrod & Cutler, *Witness Confidence, supra* note 101.

[104] John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 19, 30 (1983).

good indicators of eyewitness accuracy. For example, when mock jurors are presented with information such as lineup instructions and fairness, exposure to mug shots, retention interval, lighting conditions, cross-race identifications, and weapon presence, which are all factors relevant to witness accuracy, this information often fails to impact verdicts.[105] Overall, this body of research shows a clear lack of correspondence between lay knowledge of eyewitness issues and the preponderance of scientific evidence. Thus, it follows that knowledge of eyewitness memory is not a matter of common sense.

More recently, research has focused on the knowledgeability of various professional groups who interact directly with eyewitnesses, specifically assessing what judges, attorneys, and law enforcement professionals know about eyewitness memory issues.[106] Unfortunately, the research findings reveal similar deficits in knowledge among professional groups as those observed with jury-

---

[105] Jordan Abshire & Brian H. Bornstien, *Juror Sensitivity to the Cross-Race Effect*, 27 L. & HUM. BEHAV. 471-80 (2003); Cutler et al., *Nonadversarial Methods, supra* note 101; Cutler et al., *The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables*, 11 L. & HUM. BEHAV. 233-58 (1987); Lindsay et al., *Mock-Juror Evaluations, supra* note 102.

[106] A.D. Yarmey & H.P. Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in* EVALUATING WITNESS EVIDENCE 13-40 (S. Lloyd-Bostock & B.R. Clifford eds., 1983); Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APP. COGNITIVE PSYCHOL. 115-129; Brigham & WolfsKeil, *Opinions of Attorneys, supra* note 97; S.M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOL. 1089-98 (1989); S.M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 50 AM. PSYCHOL. 405-416 (2001); Noon & Hollin, *Lay Knowledge, supra* note 97; Rahaim & Brodsky, *Empirical Evidence, supra* note 97; Richard A. Wise & Martin A. Safer, *What U.S. Judges Know and Believe about Eyewitness Testimony*, 18 APP. COGNITIVE PSYCHOL. 427-443 (2004).

eligible citizens.[107]

Across questionnaire surveys, attorneys as well as law enforcement officers showed similar levels of overall accuracy as potential jurors (approximately 45%).[108] Further, like lay persons, attorneys and law enforcement personnel expressed the belief that eyewitness identification is relatively accurate. For example, in a 1983 study, Brigham and WolfsKeil found that a majority of their sample of prosecuting attorneys (84%) and law officers (63%) believed that ninety percent or more of the eyewitness identifications they had observed were probably accurate.[109] Furthermore, the great majority of both these groups believed that witness confidence is positively related to accuracy.[110]

Recent studies of judicial knowledge present a similar pattern. Across studies, judges averaged approximately sixty percent correct on eyewitness knowledge questions, which is comparable to accuracy rates obtained from lay jurors whose performance across similar questionnaires ranged from thirty-five percent to sixty-one percent.[111] Furthermore, judges tend to overestimate the accuracy of eyewitness identifications. In a 2004 study, for example, Richard A. Wise and Martin A. Safer surveyed judges about their perceptions of the reliability of eyewitness testimony and its relation to wrongful convictions.[112] Less than half the judges (43%) indicated that eyewitness error contributes to at least half of

---

[107] Benton et al., *Eyewitness Memory*, *supra* note 106; R. Seltzer et al., *Juror Ability to Recognize the Limitations of Eyewitness Identifications*, 3 FORENSIC REP. 121-137 (1990).

[108] Noon & Hollin, *Lay Knowledge*, *supra* note 97; Yarmey & Jones, *Is the Psychology of Eyewitness*, *supra* note 106.

[109] Brigham & WolfsKeil, *Opinions of Attorneys*, *supra* note 97, at 342.

[110] *Id.*

[111] Benton et al., *Eyewitness Memory*, *supra* note 106; Wise & Safer, *What U.S. Judges Know*, *supra* note 106 .

[112] Wise & Safer, *supra* note 106, at 428.

all wrongful convictions.[113] It should be noted that greater knowledge of eyewitness issues in this particular sample of judges was also associated with a more cautious assessment of the value of eyewitness testimony in general.[114]

On the basis of these results, we conclude that not only are the limitations of eyewitness memory not common sense to jurors, these limitations are also not common sense to judges, attorneys, and law enforcement officers. This body of research clearly shows that the lack of knowledge is diffused through the legal system, from the law officers who are responsible for collecting and preserving the integrity of eyewitness identification evidence to the judges and jurors who are faced with evaluating the credibility of eyewitness testimony. This conclusion raises an important issue: if judges, attorneys, and jurors have insufficient knowledge about factors affecting eyewitness accuracy, are there effective safeguards in the legal system to detect errors in eyewitness testimony and prevent erroneous convictions?

C. Are Cross-Examination and Judicial Instructions Effective Safeguards?

The legal system has historically recognized the fallible nature of eyewitness testimony and, therefore, has implemented various constitutional safeguards to protect defendants from wrongful convictions based on erroneous eyewitness identification.[115] The most commonly used safeguard is the cross-examination of a witness, which is widely believed to effectively protect defendants from erroneous conviction.[116] While it is also the most

---

[113] *Id.* at 435.

[114] *Id.*

[115] Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529 (2003).

[116] Christopher Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1430 (1985).

commonly used rationale for the exclusion of expert testimony, research findings challenge the use of cross-examination as an effective protective tool.[117] In a 1979 study, Gary Wells, R.C.L. Lindsay, and T.J. Ferguson[118] showed that mock jurors were unable to differentiate between accurate and inaccurate eyewitnesses based on cross-examination.[119] In a further experiment, professional attorneys were used to cross-examine witnesses in a mock trial, but this still did not improve jurors' ability to discriminate between accurate and inaccurate eyewitnesses.[120]

More recently, Devenport, Stinson, Cutler, and Kravitz examined the effectiveness of this safeguard by testing juror sensitivity to three types of bias in lineup procedures—foil, instruction, and presentation format.[121] These types of bias consistently affect the suggestiveness and quality of the lineup procedures.[122] Foil bias is present when the lineup foils do not match the description of the culprit as given by the witness.[123] Instruction bias occurs when the witness is explicitly told that the culprit is in the lineup, or is not given the option to *not* choose a foil.[124] Presentation bias is related to showing witnesses simultaneous lineups (where all the lineup members are presented at the same time) versus sequentially presented lineups (where each lineup member is shown one at a time).[125] Sequential presentation allows the witness' identification decision to be based on the comparison of the

---

[117] Devenport et al., *Jurors' Perceptions*, *supra* note 41; Gary Wells et al., *Accuracy*, *supra* note 98.
[118] Wells, *Accuracy*, *supra* note 98.
[119] *Id.*
[120] *See* Lindsay et al., *Mock-Juror Belief*, *supra* note 100.
[121] Devenport et al., *Jurors' Perceptions*, *supra* note 41.
[122] *See* Devenport et al., *Jurors' Perceptions*, *supra* note 41.
[123] *Id.*
[124] *Id.*
[125] *Id.*

lineup member to his or her memory of the culprit rather than to the other lineup members.[126] If the purpose of cross-examination is to focus on the credibility and accuracy of an eyewitness identification, then its effectiveness hinges on both attorneys' and jurors' ability to recognize suggestiveness. This procedural problem can detrimentally affect the accuracy of eyewitness identifications. Research has found that jurors are most sensitive to foil bias, somewhat sensitive to instruction bias, and insensitive to presentation bias.[127] Overall, jurors were weak in their ability to perceive suggestiveness when bias was present in the identification procedure.[128]

Thus, several reasons explain why cross-examination may not be a truly effective safeguard. First, as evidenced earlier, jurors, attorneys and judges all have insufficient knowledge about factors affecting eyewitness accuracy. Second, and more importantly, attorneys and judges also lack awareness of specific factors, such as those affecting the suggestiveness of lineup procedures. In a study designed to examine whether attorneys are sensitive to factors affecting lineup suggestiveness, Stinson, Devenport, Cutler, and Kravitz found that while attorneys rated foil-biased lineups as more suggestive than foil-unbiased lineups, they rated sequential lineups as *more* suggestive than simultaneous lineups.[129] This stands in direct opposition to the research findings.[130] Further, attorneys had difficulties detecting and correcting biases in

---

[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *See* Veronica Stinson et al., *How Effective Is the Presence-of-Counsel Safeguard? Attorney Perceptions of Suggestiveness, Fairness, and Correctability of Biased Lineup Procedures*, 81 J. APPLIED PSYCHOL. 64, 75 (1996).
[130] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603-47 (1998).

lineup instruction and presentation.[131]

Similar results have been found among judges, who rated foil-biased and instruction-biased lineups as more suggestive than foil-unbiased and instruction-unbiased lineups.[132] However, judges also rated sequential lineups as more suggestive than simultaneous lineups.[133] If attorneys are not fully aware of the issues that can compromise witness accuracy, then it is much more difficult to cross-examine properly with respect to them. Consequently, an attorney's ability to develop a truly effective cross-examination strategy is impaired in cases where eyewitness testimony plays a pivotal role.

Given the tremendous importance that accurate eyewitness testimony has in relation to the justice system, over the last few decades, federal and state courts have encouraged judges to instruct jurors about the factors that should be considered in the evaluation of eyewitness evidence.[134] Such judicial instructions represent another safeguard relied upon by the court, assumed to be effective in preventing errors. In *Neil v. Biggers*, the United States Supreme Court recommended five criteria on which evaluations of eyewitness evidence should be based.[135] These include: (1) the certainty of the identification; (2) the quality of the eyewitness' view of the culprit; (3) the amount of reported attention paid to the culprit; (4) the match between the description of and the actual appearance of the defendant; and (5) the time elapsed between

---

[131] Veronica Stinson et al., *How Effective is the Presence*, *supra* note 129.
[132] *Id.*
[133] *See* Veronica Stinson et al., *How Effective is the Motion-to-Suppress Safeguard? Judges Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 82 J. APPLIED PSYCHOL. 211, 216-17 (1997).
[134] Neil v. Biggers, 409 U.S. 188, 199 (1972).
[135] *Id.*

witnessing the crime and the identification.[136] Unfortunately, research findings indicate that some of the *Biggers* criteria are not reliable indicators of eyewitness accuracy; yet these criteria are relied on by the court system and, when they are satisfied, they are assumed to imply eyewitness accuracy.[137] As previously delineated, research shows that eyewitness certainty or confidence is not a reliable indicator of identification accuracy, but this belief is represented among the *Biggers* criteria!

The most widely used set of standardized instructions arises from *United States v. Telfaire*.[138] The intent of these instructions is to assist jurors' evaluation of eyewitness identification evidence, emphasizing to jurors the importance of assessing whether the circumstances of identification are, in fact, convincing in determining the guilt of the defendant.[139] To this end, jurors are further instructed to evaluate the credibility and truthfulness of the eyewitness and to consider factors such as: (1) the length of time the witness had to view the offender; (2) the lighting conditions at that time; (3) any previous acquaintance with the offender; and (4) the circumstances surrounding the lineup identification.[140] What impact do these cautionary instructions by the court have on jury decision-making? Research has shown that judges' presentation of *Telfaire* instructions neither sensitized mock jurors to potential

---

[136] *Id.* at 199–200.

[137] *See* Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 L. & HUM. BEHAV. 581, 582 (2000); Gary L. Wells & Amy L. Bradfield, *"Good You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessed Experience*, 83 J. APPLIED PSYCHOL. 360, 361 (1998); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 348-49 (1983).

[138] 469 F.2d 552, 558 (D.C. Cir. 1972).

[139] *Id.*

[140] *Id.*

problems with eyewitness testimony, nor increased their skepticism.[141]

As a result, these findings have raised the question of how comprehensible these instructions are to jurors. When the *Telfaire* instructions were modified to be more understandable to mock jurors, Edith Greene observed an increase in skepticism towards eyewitness testimony.[142] Gabriella Ramirez, Dennis Zemba, and R. Edward Geiselman, however, obtained less optimistic results in comparing the impact of presenting both the *Telfaire* instructions and the modified version on mock jurors' evaluations of eyewitness testimony.[143] Rather than improving decision-making, the *Telfaire* instructions reduced mock jurors' sensitivity to the quality of eyewitness evidence and either created skepticism in or over reliance on the testimony depending on when these instructions were presented to jurors.[144] The more comprehensible version of the instructions did not adversely affect juror sensitivity, nor did it serve to significantly improve it.[145] On the basis of these findings, instructions by the court do not appear to have the desired effect of improving jurors' ability to assess eyewitness evidence because they do not seem to provide a clear path for jurors to follow in evaluating an eyewitness.

Further, these findings speak to a more general question related to juror decision-making—how well does the average juror assimilate and comprehend the plethora of information presented in a case? Research indicates that instructions presented to jurors are often misunderstood,

---

[141] Cutler et al., *Nonadversarial Methods*, *supra* note 101, at 1205.
[142] Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 276 (1988).
[143] *See* Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Memory*, 14 AM. J. FORENSIC PSYCHOL. 31, 66 (1996).
[144] *Id.* at 31.
[145] *Id.*

either because they include numerous legal terms or because they are often embedded within other lengthy judicial instructions.[146] A large survey study of citizens called for jury duty found that actual jurors understood fewer than half the instructions they received at trial.[147] More generally, jurors often have difficulty comprehending complex legal cases and the evidence presented to them.[148] These notable problems with interpretation and comprehension of the information and instructions presented in court appear to undermine the effectiveness of judicial instructions as a legal safeguard.

D. On The Scientific Status of Research on Eyewitness Issues

From this review, it becomes evident that courts have created and followed rules that often contradict what the accumulation of empirical research demonstrates on a variety of fronts; yet, the legal system remains skeptical of social science research.[149] It has been observed that the system has failed to integrate procedures recommended by leading social science researchers, thereby making the courts an ineffective solution to a serious problem.[150]

---

[146] *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Greene, *supra* note 142; LOFTUS, *supra* note 97.

[147] *See* Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 554 (1992).

[148] *See* Jane Goodman et al., *What Confuses Jurors in Complex Cases*, TRIAL, Nov. 1985, at 65-68; Sonya Ivkovic et al., *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L. & SOC. INQUIRY 441 (2003).

[149] Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

[150] Collins, *supra* note 115.

Keith A. Findley states, "[C]ourts have created rules or followed procedures that ignore or even contradict what the empirical evidence shows."[151] He specifically addresses the issue of expert testimony:

> [H]ard evidence shows that jurors do not understand the psychological processes at work in an eyewitness identification and tend to rely an unwarranted extent on such identifications. . . . Nonetheless, courts in many jurisdictions routinely continue to exclude expert testimony designed to educate jurors on these matters, often on the ground that such information is within the common knowledge of jurors . . ..[152]

In addition, Donald P. Judges notes that despite the years of research that social scientists have devoted to the study of eyewitness identification evidence, experts within the legal community remain "skeptical."[153] "The law's generic skepticism of social science risks deteriorating into a counter-productive bias if the legal system fails to recognize the genuine strides that social science has made in recent decades."[154]

This skepticism and lack of knowledge about the factors that affect eyewitness accuracy underlies not only the misguided assumption that the understanding of these issues is within the purview of "common sense," but also the recurrent reasoning that eyewitness expert testimony is not helpful to the trier of fact. Research indicates that courts tend to be more critical of and look less favorably upon expert testimony from social science researchers.

---

[151] Findley, *supra* note 149, at 333.
[152] *Id.* at 334.
[153] Judges, *supra* note 149, at 236-37.
[154] *Id.* at 237.

Researchers Jennifer L. Groscup and Steven D. Penrod conducted a study to assess how courts evaluated different types of testimony, comparing testimony from police officers to testimony from clinical and experimental psychologists.[155] Groscup and Penrod found that testimony from psychologists was admitted only about fifty percent of the time, whereas testimony from police officers was admitted about eight-six percent of the time.[156] Additionally, courts treated clinical and experimental psychologists differently—testimony from experimental psychologists was the least likely to be admitted, with an admissibility rate of twenty-two percent, whereas their clinical counterparts had an admissibility rate of fifty-six percent.[157] Questionnaire surveys further revealed a tendency for judges to dismissively and negatively view the field of social science.[158]

This negative perception of psychological testimony is probably a reflection of the courts' difficulty in evaluating the reliability of scientific testimony in general, and more specifically, the reliability of this particular type of scientific testimony.[159] Several important aspects of research on eyewitness memory need to be highlighted and clarified in order to promote a change in attitude toward eyewitness expert testimony and improve its evaluation by the legal system. All of these aspects speak to the issues of reliability and validity in this field of research. First, the existing body of research on eyewitness memory is large and well-established. To date, 469 eyewitness experiments have been conducted in just the last four decades.[160]

---

[155] Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141 (2003).
[156] *Id.* at 1151.
[157] *Id.*
[158] *Id.* at 1144-45.
[159] *Id.* at 1145.
[160] Steven Penrod & B. Bornstein, *Generalizing Eyewitness Research*,

Second, a fairly substantial level of agreement exists among eyewitness experts. Surveys of the opinions of eyewitness experts on a large number of eyewitness phenomena have demonstrated a relatively broad consensus with regard to which variables do and do not impact eyewitness performance.[161] Further, most of these issues were viewed as reliable enough to be presented in court by the majority of the experts.

Third, numerous meta-analyses of the eyewitness research summarize and compare the findings across studies, even those using different methodologies.[162] This

---

in 2 INTERNATIONAL HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., in press).

[161] Kassin et al., *The "General Acceptance," supra* note 106; Kassin et al., *On the "General Acceptance," supra* note 106.

[162] BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); Brian Cutler et al., *Conceptual, Practical and Empirical Issues Associated with Eyewitness Identification Test Media, in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 163 (Ross et al. eds., 1994); Tara Anthony et al., *Cross-Racial Facial Identifications: A Social Cognitive Integration*, 18 PERSP. & SOC. PSYCHOL. BULL. 296, 301 (1992); Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691, 695 (1987); Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687 (2004); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Facts: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL'Y & L. 3, 35 (2001); Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 L. & HUM. BEHAV. 549 (1998); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*. 100 PSYCHOL. BULL. 139, 156 (1986); Siegfried L. Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 327 (1995); Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413, 424 (1992); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523 (2003); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review*

approach permits broader and more confident conclusions to be drawn, not only about what variables affect eyewitness accuracy, but also how they relate to each other because the information from many studies has been combined. By submitting research results to meta-analyses, the reliability of research findings can be empirically determined.

In addition to providing information about the reliability of research findings, meta-analyses also provide us with information about the external validity of this field of research. External validity defines how well experiments, in their structure and design, correspond with real-world situations.[163] Researchers have consistently found that a number of important eyewitness variables, such as lineup presentation (i.e., sequential v. simultaneous), weapon focus, stress, and the cross-race effect, can actually have a larger impact on the performance of eyewitnesses when the experimental context more closely matches real witnessing situations.[164] The implications of this finding are substantial. As Penrod and Bornstein reason, this result indicates that eyewitness research not only possesses external validity, it also reveals that eyewitness research may actually *underestimate* the magnitude of the impact that certain variables have on eyewitness performance.[165]

Consequently, several conclusions can be drawn from this review of eyewitness research. First, contrary to the Court's statement in *Coley*, the field clearly has the

---

of Lineup Instruction Effects, 21 L. & HUM. BEHAV. 283 (1997); Ralph N. Haber & Lyn R. Haber, *A Meta-Analysis of Research on Eyewitness Lineup Identification Accuracy: Paper Presented at the Annual Convention of the Psychonomics Society*, Orlando, Fl. November 16, 2001.

[163] DAVID ELMES, BARRY KANKOWITZ, & HENRY ROEDIGER, METHODS IN EXPERIMENTAL PSYCHOLOGY (1981).

[164] Penrod & Bornstein, *supra* note 160.

[165] *Id.* at 543.

"scientific or technical underpinnings which would be outside the common understanding of the jury," as it meets the criterion for scientific knowledge as delineated in *Daubert* and *McDaniel*. Specifically, in order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Second, researchers compile the eyewitness research data derived from the scientific method, and use it to create a *scientific knowledge* base than can be generalized to real-world eyewitness situations. Third, as Penrod and Bornstein concluded, the empirically established reliability of a number of eyewitness phenomena warrants not only the general consensus observed among eyewitness experts but also the admission of expert testimony on these issues.[166] More pointedly, the admission of expert testimony on eyewitness issues is warranted as *scientific knowledge*.

Fourth, the idea that eyewitness experts will not assist the trier of fact because eyewitness testimony is common sense to jurors, and that research in this area has no scientific or technical basis, is clearly wrong. When viewed in light of research showing that errors in eyewitness memory are the single greatest cause of wrongful convictions, the omission of expert testimony is dangerous to our justice system. This finding dates back to the 1930s and continues to be a major problem facing the legal system.[167] For example, in a National Institute of Justice study conducted by Conners, Lundregan, Miller, and McEwen, DNA analyses were used to exonerate

---

[166] *Id.* at 551.

[167] EDWIN MONTEFIORE BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS IN CRIMINAL JUSTICE (Garden City Publishing Co. 1932); R. BRANDON & C. DAVIES, WRONGFUL IMPRISONMENT (1973); BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); J. FRANK & B. FRANK, NOT GUILTY (1957); R. Huff et al., *Guilty Until Proven Innocent*, 32 CRIME & DELINQ. 518 (1986).

twenty-eight individuals.[168] It was found that ninety percent of these wrongful convictions were due to errors in eyewitness identification.[169] Analyses of an additional twelve DNA exonerations by Gary Wells, Mark Small, Steven Penrod, Roy Malpass, Solomon Fulero, and C.A.E. Brimcombe found a similar result.[170] Across these two studies, the sample of wrongful identifications included five individuals who were convicted of capital crimes, received the death penalty, and were awaiting execution.

The magnitude of this problem was sufficiently large enough to warrant the attention of Attorney General Janet Reno. A group of thirty-four professionals, including research psychologists, attorneys, investigators, and police, were commissioned to develop guidelines that could be used by law enforcement officials to properly collect identification evidence.[171] The product of the commission was a 1999 Department of Justice publication entitled, *Eyewitness Evidence: A Guide for Law Enforcement.*[172] This Guide is based on a compilation of research that depicts how to properly conduct investigatory lineups and reduce identification bias.[173] In September of 2003, the government published a companion manual entitled, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement.*[174] The manual was developed, in part, from a previous set of guidelines for collecting identification

---

[168] Edward T. Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 1996 U.S. Dept. of Just. Rep., NCJ 161258.

[169] *Id.*

[170] Gary Wells et al., *Eyewitness Identification*, *supra* note 130.

[171] *Technical Working Group for Eyewitness Evidence, Eyewitness Evidence: A Guide for Law Enforcement*, United States Dept. of Just., Office of Justice Programs (1999) [hereinafter *Guide*].

[172] *Id.*

[173] *Id.*

[174] John Ashcroft, Deborah J. Daniels, Sarah V. Hard, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement,* U.S. Dep't Just. NIJ Special Report (2003).

evidence published by the American Psychology and Law Society and the American Psychological Association.[175] Clearly, these significant developments indicate that not only is eyewitness evidence not a matter of common sense, but highlight the strong scientific contribution that eyewitness research has already made to social policy.

VI. Conclusion

Some of the conclusions to be drawn from the above discussion are disturbing. First, a majority of courts, both state and federal, appear to reject the data collected and the conclusions reached by eyewitness researchers in the area of social science. This rejection tends to confirm the notion that the operation of the judicial branch of government is largely insular, relying on its own conclusions in areas more properly left to the expertise of others.

Second, the *Daubert* decision has put judges in an extremely difficult position because they are now required to evaluate the validity and reliability of scientific research. This requires judges to comprehend and apply difficult concepts such as peer review, falsifiability, and error rate in their evaluation of science. Judges, however, typically receive no formal training with respect to these concepts; they are rarely taught these in law schools, and the research reviewed here demonstrates judges have very poor comprehension of these concepts. Even in the judicial dissent of the decision reached in *Daubert*, Chief Justice Rehnquist said,

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its

[175] Wells et al., *supra* note 130.

> teaching to particular offers of expert testimony.. . . I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.[176]

Thus, without out a solid understanding of science, how could one expect consistency in the judicial evaluation of scientific expert testimony or scientific evidence in general, much less across divergent disciplines that use different research tools and methodologies?

This situation would appear to guarantee a judicial system that lacks reliability, consistency, and validity in terms of reaching proper and accurate conclusions regarding the credibility of scientific evidence. Consequently, it may lead judges to simply "let it all in and let the jury sort it out." Yet, as the eyewitness research reviewed here reveals, jury members lack knowledgeability, and, to compound matters further, they obviously have less training than the trial judge. Thus, it appears that neither the judge nor the jury serve as a safeguard to the system with respect to the evaluation of scientific testimony. This problem is further exacerbated by the appellate standard of review, which affords almost total deference to the trial judge under the abuse of discretion standard. These types of decisions then seem to be made for self-protection and result in a judicial system that is highly resistant to change. With the reasoning of Justice Rehnquist ringing loud and clear, the stare decisis system of common law tends to lock in an incorrect decision for a protracted period of time, thereby rendering the system inflexible.

Perhaps one solution to this problem is to amend

[176] 509 U.S. 579, 600.

Rule 702, return to the *Frye* standard, and look to the acceptability of a scientific finding among experts in the field. Another solution is to provide a stronger mechanism for a trial court to utilize Rule 706, as suggested by Justice Blackmun in *Daubert*.[177] Under Rule 706, a trial judge, faced with completely opposing opinions on an issue, whether medical, engineering, or otherwise, may call an independent expert to assess the methodology used by the opposing experts, and who then provide the trial judge with his opinion on admissibility of the scientific evidence.[178] This action would place the expert in the role of being a "friend of the court" versus being viewed by the court as a hired gun or advocate for the side who is paying his or her fee.

Further, this article's analysis of this issue has revealed additional problems. For example, we learn from this investigation that appellate courts use terminology not contained in Rule 702 time and time again. What does it mean to "invade the province of the jury"? What is the common or ordinary knowledge of a juror? How should a battle of the experts occur if the gatekeeper is watching the gate? If there is a battle of the experts, why is it bad if the jury obtains more knowledge? Why does the system err in favor of keeping information from the jury? How can a court, in retrospect, possibly know if an error was harmless?

Finally, if eyewitness memory were common sense, then why are errors in eyewitness identification the leading cause of wrongful convictions? Furthermore, why would the Department of Justice perceive the problem to be of such magnitude that it would develop and distribute a Guide for law enforcement and a training manual for how to use the Guide? In light of these developments and the eyewitness research on which they are founded, to claim

[177] *Id.* at 582.
[178] FED. R. EVID. 706.

that eyewitness memory is common sense to a jury and non-scientific is simply nonsensical. Interestingly, the Guide was not mentioned in a single case of our case-by-case analysis.

One obvious solution to the problem is to admit eyewitness experts, allow them to testify about the difference between estimator and system variables, and about how these variables impact eyewitness identifications. Estimator variables are not under the control of the legal system, but are related to characteristics of the witness and the circumstances in which the remembered event was experienced, such as the presence or absence of a weapon, age of the witness, and lighting conditions.[179]

System variables, in contrast, involve the procedures used by law enforcement to collect identification evidence, such as how the lineup is constructed and presented, as well as the nature of the instructions that witnesses are given.[180] The expert could also testify about whether or not the procedures used in a particular case were consistent with the Guide, thus providing an important source of information to the jury concerning the procedural flaws that can adversely affect eyewitness accuracy. Even if this information does not eventually reach a jury, it still can play a pivotal role in earlier stages of the legal process.

It is time for the judicial system to stop being an island and start building bridges to other repositories of information. After all, if a social science has enough credibility to find its way into colleges, universities, and government policy, why can it not be permitted to find its way into our judicial system?

---

[179] Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1557 (1978).
[180] *Id.*

Appendix

Table 1: *Judicial Admissibility Decisions on Eyewitness Expert Testimony*

Approach	Decision type	Result	Explanation
PROHIBITORY	**Per se inadmissible**	**Testimony not admitted**	**The testimony will be excluded under all circumstances.**
DISCRETIONARY	**Inadmissible: Discretion not abused in excluding**	**Testimony not admitted**	**The trial court did not abuse its discretionary powers in excluding the evidence; strong language suggests per se inadmissibility.**
	May Be Admissible: Discretion not abused in excluding	**Testimony not admitted**	**Although the testimony is admissible in general, it was not admitted in this case; rationale suggests admissibility of testimony is possible but not probable. This category can also include cases in which some testimony was admitted but the defendant appealed the exclusion of the remaining testimony.**
	May Be Admissible: Discretion not abused in admitting	**Testimony admitted**	**The trial court did not abuse its discretionary powers in admitting the testimony.**

	May Be Admissible: Discretion abused in excluding	**Testimony admitted**	**The trial court abused its discretionary powers in excluding the testimony when it should have been admitted.**
	May Be Admissible; Discretion may or may not have been abused	**Case Remanded**	**The reviewing court finds that the trial court did not properly review the expert testimony and remands it back to the trial court to conduct the proper analysis.**

Table 2: *State and Federal Categorization by Approach*

Type of Approach		States in Each Category		Circuits in Each Category
PROHIBITORY	***Prohibitory***: Court explicitly declares a per se inadmissibility rule.	Tennessee		None
DISCRETIONARY	***Inadmissible***: Under discretionary view, these courts find that discretion was not abused in excluding the testimony. These decisions use strong language which suggests a per se rule of inadmissibility.	Arkansas Florida Kansas Louisiana Maine Maryland Michigan Mississippi	Missouri Nebraska Oregon Pennsylvania Rhode Island Texas Vermont	Eighth Ninth Eleventh
	May Be Admissible, but not admitted in this case: Under discretionary view, although the testimony is admissible in general, the court found that discretion was not abused in refusing to admit, and rationale often suggests admissibility of testimony is possible but not probable. *Partial testimony was admitted in these cases	Alabama Arizona* Connecticut Delaware* Georgia Idaho Illinois Indiana Massachusetts Minnesota Nevada New York	North Carolina North Dakota* Ohio Oklahoma Utah Virginia* Washington West Virginia Wisconsin Wyoming	First Second Fourth Fifth Sixth Seventh Tenth

	May Be Admissible: **Discretion Abused in Refusing to Admit the testimony.**	**Alaska** **California** **South Carolina**	**Third**
	May Be Admissible: **Discretion Not Abused in Admitting testimony.**	**South Dakota**	**None**
	May Be Admissible**: Case Remanded for Further Review.**	**Colorado** **Iowa** **Kentucky** **New Jersey**	**None**

Table 3: *Decisions and Rationale by State*

State	Most Recent Case	Ruling
1. Alabama	*Ex parte Williams*, 594 So. 2d 1225 (Ala. 1992).	Discretionary – **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Expert not familiar with facts of case, had no personal contact with victim or knowledge of event.
2. Alaska	*Skamarocius v. State*, 731 P.2d 63 (Alaska Ct. App. 1987).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court ruling overturned, testimony should have been admitted. Trial court abused its discretion in excluding the expert testimony because the identification of defendant as the assailant by the witness was weak and uncorroborated.
3. Arizona	*State v. Nordstrum*, 25 P.3d 717 (Ariz. 2001).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** The expert was permitted to testify at length about a variety of eyewitness variables, but was not permitted to express any opinion about the accuracy of the defendant's eyewitness testimony or to address the specifics of this case.
4. Arkansas	*Utley v. State*, 826 S.W.2d 268 (Ark. 1992).	Discretionary - **Inadmissible.** The question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer. The experts testimony was a matter of common understanding and would not assist the trier of fact.
5. California	*People v. McDonald*, 690 P.2d 709 (Cal. 1984).	Discretionary – **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court judgment reversed. The exclusion the eyewitness expert was not harmless error. The court found it reasonably probable that a result more favorable to the defendant would have been reached in absence of this error, and the judgment must be reversed.

6. Colorado	*People v. Campbell*, 847 P.2d 228 (Colo. Ct. App. 1992).	Discretionary – **May Be Admissible. Case Remanded.** The trial court erred in relying on Frye as a basis for excluding the proffered testimony. This error was not harmless, and the case was remanded to vacate judgment and reevaluate the admissibility of the expert's testimony.
7. Connecticut	*State v. McClendon*, 730 A.2d 1107 (Conn. 1999).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The general principles should come as no surprise to the average juror. He was unable to state his opinion to a reasonable degree of scientific certainty.
8. Delaware	*Garden v. State*, 815 A.2d 327 (Del. 2003).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit but was Harmless Error.** Partial testimony allowed. Expert testified on a variety of estimator variables but was not permitted to testify on the confidence/accuracy relationship. The exclusion was ruled an abuse of discretion but found to be harmless error.
9. District of Columbia		No cases found.
10. Florida	*Johnson v. State*, 438 So. 2d 774 (Fla. 1983).	Discretionary - **Inadmissible.** Held that a jury is capable of assessing a witness' ability to perceive and remember, given assistance of cross-examination and cautionary instruction.
11. Georgia	*Johnson v. State*, 526 S.E.2d 549 (Ga. 2000).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Abundance of corroborating evidence.
12. Hawaii	No Cases Found	No Cases found.
13. Idaho	*State v. Pacheco*, 2 P.3d 752 (Idaho Ct. App. 2000). *See also State v. Hoisington*, 657 P.2d 17 (Idaho 1983).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** Court refused to allow expert to testify on the memory or perceptions of witnesses relative to the presence of a firearm on the ground that such testimony would not assist the trier of fact. This court does recognize, however, that in certain circumstances such testimony may be of assistance to the jury.

14. Illinois	*State v. Tisdel*, 788 N.E.2d 1149 (Ill. App. Ct. 2003).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The record shows that the judge considered the reliability and potential helpfulness of the testimony, balanced the proffered testimony against cases in which this court has upheld the exclusion of such evidence, and found that the testimony would not assist the jury. The court notes, however, that had the trial court allowed the testimony, it would not have been an abuse of discretion.
15. Indiana	*Cook v. State*, 734 N.E.2d 563 (Ind. 2000).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** Defendant failed to establish the factual predicate upon which his expert's testimony would have rested. The number of witnesses identifying defendant as the shooter supports the view that expert testimony in this case would not have assisted the jury in understanding the evidence or determining any fact in issue.
16. Iowa	*State v. Schutz*, 579 N.W.2d 317 (Iowa 1998).	Discretionary – **May Be Admissible. Discretion Abused in Refusing to Admit, Case Remanded.** Per se exclusionary rule overturned. The exclusion of expert testimony is a matter committed to the sound discretion of the trial court, and it was error to apply the per se rule of exclusion. Case remanded to the district court for a new trial.
17. Kansas	*State v. Gaines*, 926 P.2d 641 (Kan. 1996).	Discretionary - **Inadmissible**. Reliability of eyewitness identification is within the realm of jurors' knowledge and experience. We continue to follow the previous line of cases and hold that expert testimony regarding eyewitness identification should not be admitted.
18. Kentucky	*Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit, Case Remanded.** Per se exclusionary rule overturned. Lack of direct evidence against defendant so expert testimony should have been

		admitted. Blanket exclusion of expert testimony was due to the trial court's incorrect belief that that the testimony was inadmissible per se. Case remanded for new trial to determine the relevancy and reliability of the testimony under a proper analysis.
19. Louisiana	*State v. Gurley*, 565 So. 2d 1055 (La. Ct. App. 1990).	Discretionary - **Inadmissible.** Prejudicial effect outweighs its probative value and usurps jury's function. The testimony would not have been an aid to the jury.
20. Maine	*State v. Kelly*, 752 A.2d 188 (Me. 2000). *See also State v. Rich*, 549 A.2d 742 (Me. 1988).	Discretionary - **Inadmissible.** The trial court found that the testimony would not be helpful to the jury, and the court did instruct the jury. Therefore, the court's conclusion that the expert's testimony would not be helpful is not clearly erroneous, and its decision to deny funds for that reason was within its broad discretion.
21. Maryland	*Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986).	Discretionary - **Inadmissible**. Reliability of the witnesses and the identification is better tested by cross-examination than by the opinion of an expert. Defendant failed to make a case for the use of an expert by failing to persuade the court that the technique has general acceptance in the relevant scientific community, and the proffer is not sufficient to persuade exactly what is even being offered to the jury other than some generalized explanation of the studies that have been made. Nothing that has been proffered suggests that it will be helpful.
22. Massachusetts	*Commonwealth v. Santoli*, 680 N.E.2d 1116; (Mass. 1997).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** No error in excluding the testimony where the physical evidence and other facts provided significant corroboration of the victim's identification.
23. Michigan	*People v. Hill*, 269 N.W. 2d 492 (Mich. Ct. App.	Discretionary – **Inadmissible**. The court rejected defendant's assertion that the trial court erred in excluding expert

	1978).	testimony on the process by which people perceive and remember events and how pretrial identification procedures could affect this process. The expert did not interview the eyewitnesses about whom he was to testify and only observed them in the courtroom. Also, the trial court offered to let defendant pursue the matter in closing argument.
24. Minnesota	*State v. Miles*, 585 N.W.2d 368 (Minn. 1998).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** There is nothing to suggest that expert testimony on the accuracy of eyewitness identification in general would be particularly helpful to the jury in evaluating the specific eyewitness testimony. Numerous safeguards are in place, and there was other corroborating evidence.
25. Mississippi	*White v. State*, 847 So. 2d 886 (Miss. Ct. App. 2002).	Discretionary – **Inadmissible.** Evidence did not rely on proven scientific principles and court held that they had been shown nothing to suggest that the science about which the expert was to testify is generally accepted.
26. Missouri	*State v. Whitmill*, 780 S.W.2d 45 (Mo. 1989).	Discretionary – **Inadmissible.** Relates to the credibility of witnesses and constitutes an invasion of the province of the jury.
27. Montana		No cases found.
28. Nebraska	*State v. George*, 645 N.W.2d 777 (Neb. 2002). *See also State v. Ammons*, 305 N.W.2d 812 (Neb. 1981).	Discretionary - **Inadmissible.** Expert testimony on reliability of eyewitness identifications is unnecessary.
29. Nevada	*White v. State*, 926 P.2d 291 (Nev. 1996). *See also Echavarria v.*	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** There was corroborating evidence of identification.

		State, 839 P.2d 589 (Nev. 1992).	
30.	**New Hampshire**	No cases found	No cases found.
31.	**New Jersey**	*State v. Gunter*, 554 A.2d 1356 (N.J. Super. Ct. App. Div. 1989).	Discretionary – **May Be Admissible. Case Remanded.** Because there was no preliminary hearing, we cannot say with any assurance whether the proffered testimony would have actually assisted the jury. Nor can we begin to consider the reliability issue. Case remanded to hold preliminary hearing to determine scientific reliability of expert's testimony.
32.	**New Mexico**	No cases found	No cases found.
33.	**New York**	*People v. Lee*, 750 N.E.2d 63 (N.Y. 2001).	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** The trial court was aware of corroborating evidence in addition to the identification testimony. Given the particular facts and circumstances, we cannot say the trial court's denial constituted an abuse of discretion.
34.	**North Carolina**	*State v. Lee*, 572 S.E.2d 170 (N.C. Ct. App. 2002).	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** Testimony not case specific and lacked probative value.
35.	**North Dakota**	*State v. Fontaine*, 382 N.W. 2d 374 (N.D. 1986).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Partial testimony allowed. Expert testified on several estimator variables, but was not allowed to answer a hypothetical question concerning accuracy. The court did not abuse its discretion.
36.	**Ohio**	*State v. Buell*, 489 N.E.2d 795 (Ohio 1986).	Discretionary – **May Be Admissible; Discretion Not Abused in Refusing to Admit.** Expert testimony regarding the credibility of a *typical* witness is admissible, but testimony regarding the credibility of a *particular* witness is not.
37.	**Oklahoma**	*Torres v. State*, 962 P.2d 3 (Okla.	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to**

	Crim. App. 1998).	**Admit.** While it might be that expert testimony regarding eyewitness identification would have been admissible in this case, defendant did not present any evidence to show what that expert testimony would have revealed or how the failure to present such expert evidence prejudiced him.
38. Oregon	*State v. Goldsby*, 650 P.2d 952 (Or. Ct. App. 1982).	Discretionary - **Inadmissible.** Although eyewitness identification evidence has a built-in potential for error, the law does not deal with that by allowing experts to debate the quality of evidence for the jury.
39. Pennsylvania	*Commonwealth v. Abdul-Salaam*, 678 A.2d 342 (Pa. 1996).	Prohibitory – **Inadmissible.** Testimony would give unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess.
40. Rhode Island	*State v. Martinez*, 774 A.2d 15 (R.I. 2001).	Discretionary - **Inadmissible.** In general, the jury does not need assistance in determining the trustworthiness of an eyewitness.
41. South Carolina	*State v. Whaley*, 406 S.E.2d 369 (S.C. 1991).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court ruling reversed and case remanded. It was an abuse of discretion to exclude the expert's testimony concerning eyewitness reliability because the main issue in this case was the identity of the assailant, the only evidence establishing the defendant as the assailant was the testimony of the two eyewitnesses, and other factors existed which could have affected the identification.
42. South Dakota	*State v. McCord*, 505 N.W.2d 388 (S.D. 1993).	Discretionary - **May Be Admissible. Discretion Not Abused in Admitting.** The only case in which the prosecution called an identification expert. The court ruled that jurors do not possess an expert's comprehensive training in assessing the reliability of identification. The court found that the trial court did

		not abuse its discretion in finding this testimony as relevant.
43. Tennessee	*State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002). *See also State v. Coley*, 32 S.W.3d 831 (Tenn. 2000).	**Prohibitory.** Per se exclusionary rule. Expert testimony regarding eyewitness identification is inadmissible and the exclusion of such testimony does not violate a defendant's due process right to present a defense.
44. Texas	*Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000).	Discretionary - **Inadmissible.** Appellant failed to carry his burden of showing that the proffered testimony was scientifically reliable or relevant.
45. Utah	*State v. Maestas*, 63 P.3d 621 (Utah 2002).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The trial court is in the best position to balance the probative value of proffered testimony against the risk of intrusion upon the fact-finding functions of the jury. The trial court acted within its discretion in excluding the testimony.
46. Vermont	*State v. Percy*, 595 A.2d 248 (Vt. 1990).	Discretionary - **Inadmissible.** Juries may be made to understand psychological factors which affect accuracy of an identification through cross-examination and closing arguments.
47. Virginia	*Currie v. Commonwealth*, 515 S.E.2d 335 (Va. Ct. App. 1999).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Partial testimony allowed. It was not error to limit expert witness's testimony concerning the correlation between eyewitness certainty and accuracy, and those other areas of witness's proffered testimony which were within the common knowledge and experience of the jurors.
48. Washington	*State v. Nordlund*, 113 Wash. App. 1033 (Wash. Ct. App. 2002).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** During *voir dire*, the trial court found that the potential jurors' answers demonstrated that they already understood each of the factors the expert wanted to explain.

49. West Virginia	*State v. Taylor*, 490 S.E.2d 748 (W.Va. 1997).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The testimony would not have affected the overall outcome of the case. Fees to hire an expert were denied.
50. Wisconsin	*State v. Blair*, 473 N.W.2d 566 (Wis. Ct. App. 1991).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** All topics proffered were within the common knowledge and sense and perception of the jury.
51. Wyoming	*Engberg, v. Meyer*, 820 P.2d 70 (Wyo. 1991).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The court recognizes the modern trend more favorable to the admission of expert testimony relating to eyewitness identification, but holds that their consistent rule is that the admission of expert testimony is within the discretion of the trial court.

Table 4: *Decisions and Rationale by Federal Circuit*

First Circuit **Maine** **Massachusetts** **New Hampshire** **Rhode Island**	*United States v. Brien*, 59 F.3d 274 (1st Cir. 1995).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court of appeals sustained the district court's ruling not to admit the testimony on the ground that the defense offered practically nothing as far as a proffer of data or literature underlying the expert's assumptions and conclusions, despite being asked for it repeatedly. There is no reason it couldn't be supplied, and it was necessary since the expert's testimony "did not concern a single long-established scientific principle."
Second Circuit **Connecticut** **New York** **Vermont**	*United States v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court of appeals upheld the district court's ruling that the expert could not testify on the confidence-accuracy relationship. It "would have confused the jury's assessment of the officers' credibility, thereby usurping their role."
Third Circuit **Delaware** **New Jersey** **Pennsylvania**	*United States v. Mathis*, 264 F.3d 321 (3d Cir. 2001).	**May Be Admissible. Discretion Abused in Exclusion.** Despite finding that the government abused its discretion in not admitting several pieces of the proffered testimony, the court of appeals ultimately decided that had the testimony been admitted, the outcome of the case would not have been different. Harmless error.
Fourth Circuit **Maryland** **North Carolina** **South Carolina** **Virginia** **West Virginia**	*United States v. Harris*, 995 F.2d 532 (4th Cir. 1993).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court affirmed the district court's judgment, finding that none of the limited circumstances under which courts allow expert testimony on eyewitness identification were present in this case.

Fifth Circuit **Louisiana** **Mississippi** **Texas**	*United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The decision whether to admit this testimony is squarely within the discretion of the trial judge and properly so. This is not a case in which the eyewitness identification testimony is critical. Even if the identifications of the defendants are completely disregarded, the other evidence of guilt are overwhelming.
Sixth Circuit **Kentucky** **Michigan** **Ohio** **Tennessee**	*United States v. Langan*, 263 F.3d 613 (6th Cir. 2001).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The court of appeals affirmed the judgment of the district court in that it agreed that the testimony failed to meet the second prong of Daubert, which requires that the proposed testimony fit the issue to which the expert is testifying. The court agreed that the "hazards of eyewitness identification are within the ordinary knowledge of most lay jurors."
Seventh Circuit **Illinois** **Indiana** **Wisconsin**	*United States v. Crotteau*, 218 F.3d 826 (7th Cir. 2000).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The court denies the defendant's motion for the appointment of an eyewitness identification expert because "the facts of the case do not create an unusual or compelling situation in which the aid of an expert witness is required" and "as the Seventh Circuit has stated, cross examination, cautionary instructions, and corroborating evidence can obviate the need for expert testimony on eyewitness identification."
Eighth Circuit **Arkansas** **Iowa** **Minnesota** **Nebraska** **North Dakota**	*United States v. Kime*, 99 F.3d 870 (8th Cir. 1996).	**Inadmissible.** The court agrees with the district's court ruling to not admit the testimony for several reasons: the testimony fails to qualify as "scientific knowledge" under Daubert's first prong; it fails under the second prong because it would not assist

South Dakota		the trier of fact since the evaluation of eyewitness testimony is for the jury alone and the testimony would intrude the jury's domain; the minimal probative value is outweighed by the danger of juror confusion; the concerns were adequately addressed in jury instruction; and the testimony was supported by several other witnesses.
Ninth Circuit **Alaska** **Arizona** **California** **Hawaii** **Idaho** **Montana** **Nevada** **Oregon** **Washington**	*United States v. Labansat*, 94 F.3d 527 (9th Cir. 1996).	**Inadmissible.** The court upheld the district court's denial of the defendants request for funds to hire an expert on eyewitness identification because "as we have previously explained, 'the admissibility of this type of expert is strongly disfavored in most courts' and any weaknesses...can ordinarily be revealed by counsel's careful cross-examination." The defendant has not shown by clear and convincing evidence that he was prejudiced by the lack of expert assistance.
Tenth Circuit **Colorado** **Kansas** **New Mexico** **Oklahoma** **Utah** **Wyoming**	*United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The district court did not abuse its discretion in excluding the testimony. The district court considered the matter in detail, conducting a lengthy Daubert hearing. There were five eyewitnesses identifications, not one.
Eleventh Circuit **Alabama** **Florida** **Georgia**	*United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997).	**Inadmissible.** The court explains that, under the prior panel precedent rule, it is bound by earlier panel holdings. Expert testimony not needed because the jury could determine reliability under the tools of cross-examination and jury instruction to highlight particular problems in eyewitness recollection. The defendant was successful in this case in getting the district court to instruct the jury about cross-racial identification, potential bias

		in earlier identification, delay between even and time of identification, and stress. Therefore expert testimony not needed.
D.C. Circuit		**No cases found.**