THE THIRD CIRCUIT'S UNIQUE RESPONSE TO EXPERT TESTIMONY ON EYEWITNESS PERCEPTION: IS WHAT YOU SEE WHAT YOU GET?

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I. INTRODUCTION

The overriding significance jurors normally give to eyewitness testimony,[1] coupled with the grave consequences of incorrect identifications,[2] has recently compelled courts to consider

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[1] Courts have long recognized the "overwhelmingly influential" impact eyewitness identifications have on juries. E. LOFTUS, EYEWITNESS TESTIMONY 9 (1979). *See* Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[M]uch eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime."); Manson v. Brathwaite, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) ("[J]uries unfortunately are often unduly receptive to [identification] evidence."); United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) (Ferguson, J., dissenting) ("[J]uries almost unquestioningly accept eyewitness testimony."); United States v. Greene, 591 F.2d 471, 475 (8th Cir. 1979) ("[T]he in-court testimony of an eyewitness can be devastatingly persuasive.").

Indeed, numerous psychological studies demonstrate that jurors "seem[] to find it proof enough when a single person implicates another with a remark such as 'I am certain that's the man!' . . . [They also] have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence." LOFTUS, *supra*, at 9. *See also* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965) ("[E]vidence of identification, however untrustworthy, is 'taken by the average juryman as absolute proof.' ") (footnote omitted). As the Second Circuit has explained:

> There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, *doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "that's the man!"*

Kampshoff v. Smith, 698 F.2d 581, 585 (2d Cir. 1983) (citation and footnote omitted) (emphasis added). *See also* United States v. Russell, 532 F.2d 1063, 1067 (6th Cir. 1976) ("[O]f all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive.").

[2] Erroneous convictions based on mistaken identifications not only insulate the guilty but, more significantly, imprison the innocent. *See In re* Winship, 397 U.S.

adopting additional safeguards against the increasingly recognized unreliability inherent in such testimony.[3] Over twenty years ago, the Supreme Court of the United States recognized the "vagaries"[4] of eyewitness testimony in establishing constitutional protections against the admission of identifications made

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358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free."); United States v. Greer, 538 F.2d 437, 441 (D.C. Cir. 1976) ("[B]etter ten guilty persons should go free than one innocent person be convicted.") (footnote omitted). As one commentator has noted, unreliable identifications constitute "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970) (footnote omitted).

[3] Courts have traditionally regarded eyewitness identification evidence as reliable. That view is best demonstrated by their adherence to the "one-witness rule," which sustains convictions based upon a single eyewitness' uncorroborated identification. *See, e.g.*, United States v. Holley, 502 F.2d 273, 274 (4th Cir. 1974) ("It is now settled beyond argument that the identification of a criminal actor by one person is itself evidence sufficient to go to the jury and support a guilty verdict and that application of this rule is not so fundamentally unfair as to be per se a denial of due process.") (citations omitted). Rejected in Great Britain, the one-witness rule underscores American courts' longheld adherence to the trustworthiness of eyewitness testimony. *See* People v. McDonald, 37 Cal.3d 351, 359, 208 Cal. Rptr. 236, 244, 690 P.2d 709, 717 (1984) ("The rule that the testimony of a single eyewitness is sufficient to prove identity . . . is premised in part on the assumption that an eyewitness identification is generally reliable.").

Increasingly, however, courts have recognized that "eyewitness identification evidence is notoriously unreliable." *Watkins*, 449 U.S. at 350 (Brennan, J., dissenting) ("At least since [1967 the Supreme Court] has recognized the inherently suspect qualities of eyewitness identification evidence.") (footnote and citation omitted). *See also Kampshoff*, 698 F.2d at 585 ("[T]he experience of law and psychology has been that eyewitness testimony may sometimes be the least trustworthy means to identify the guilty.") (footnote omitted); Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978) ("Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness . . . [are] highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence."). Despite that growing judicial skepticism, however, public policy concerns compel continued judicial adherence to the one-witness rule. *See* United States v. Telfaire, 469 F.2d 552, 554 (D.C. Cir. 1972) ("The one witness rule recognizes that certain crimes are solitary, and as to such crimes both the deterrence of punishment and the rehabilitation of offenders are proper concerns of the state."). *But see* United States v. Smith, 563 F.2d 1361, 1365 (9th Cir. 1977) (Hufstedler, J., concurring) (urging reassessment of the rule because its reliability rationale is, "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable").

[4] United States v. Wade, 388 U.S. 218, 228 (1967). In so doing, the Court explained that the unreliability "of eyewitness identification [is] well-known; the annals of criminal law are rife with instances of mistaken identification." *Id.* (citing F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927)) (footnote omitted).

at or arising from certain unduly suggestive pretrial procedures.[5] Despite that recognition, however, the Court has subsequently dismantled the scope of those constitutional protections. Specifically, the Court has insulated certain pre-trial procedures and shifted the focus of the admissibility determination from the suggestiveness of the procedure to the reliability of the resulting identification.[6] Hence, eyewitness identifications solicited

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[5] On June 12, 1967, the Court, speaking through Justice Brennan, issued three landmark decisions which extended two constitutional protections to certain pretrial identification procedures. First, in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court held that the sixth amendment guarantees criminal defendants the right to counsel at lineups, that pretrial identifications made at illegal lineups are per se inadmissible, and that subsequent in-court identifications are inadmissible unless the prosecution establishes by clear and convincing evidence that the prior sixth amendment violation did not taint the in-court identification. Second, in Stovall v. Denno, 388 U.S. 293 (1967), the Court held that the due process clause mandates the exclusion of identification evidence which the totality of the circumstances demonstrates arose from pretrial procedures unnecessarily suggestive and conducive to irreparable mistaken identification.

Significantly, the Court expressly recognized that its holdings "were not foreshadowed in our cases" and that "[t]he overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury." *Stovall*, 388 U.S. at 299-300 (citation omitted). However, the Court explained that "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification" compelled its departure from that majority position and its adoption of the constitutional protections enunciated in the *Wade* trilogy. *Wade*, 388 U.S. at 235. *See also Manson*, 432 U.S. at 111-12 ("The driving force behind . . . [the *Wade* trilogy] was the Court's concern with the problems of eyewitness identification.").

The following year, the Court, in extending the due process rule of *Stovall* to pretrial photographic identification procedures, reiterated that the *Wade* trilogy represents the Court's "first depart[ure] from the rule that the manner of an extrajudicial identification affects only the weight, not the admissibility, of identification testimony at trial." Simmons v. United States, 390 U.S. 377, 382 (1968). In *Simmons*, the Court held that an in-court identification resulting from pretrial photographic confrontations violates due process "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

[6] The Court has limited the sixth amendment right to counsel recognized in *Wade* and *Gilbert* to procedures occurring after initiation of the formal criminal process. In Kirby v. Illinois, 406 U.S. 682 (1972), the Court held that the sixth amendment applies only to those line-ups conducted post-indictment. In dissent, Justice Brennan, who wrote the majority opinion in *Wade*, emphasized that the majority of state courts and "*every* United States Court of Appeals that has confronted the question has applied *Wade* and *Gilbert* to pre-indictment [lineup] confrontations." *Id.* at 704 n.14 (Brennan, J., dissenting) (emphasis in original). In United States v. Ash, 413 U.S. 300 (1973), the Court refused to extend *Wade* and *Gilbert* to photographic identification procedures at *any* stage of a criminal proceeding. *Id.* at 321. Because they address procedures which precede postindictment lineups, *Kirby* and *Ash* constitute an indisputable retreat from *Wade*, which had expressly recognized that wit-

through unnecessarily suggestive procedures are nevertheless admissible should they bear sufficient indicia of reliability as demonstrated by five factors.[7] Although those very factors have been criticized as lacking an empirical basis,[8] their emphasis on reliability has established an independent foundation for admitting identifications made at or arising from pretrial procedures recognized as overly suggestive.[9]

Even before their subsequent dilution, the original constitutional safeguards offered no protection against the inherent unreliability of *admitted* eyewitness testimony. Courts have traditionally refused to adopt additional protections by finding

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nesses rarely change prior identifications. *Wade*, 388 U.S. at 229 ("[O]nce a witness has picked out the accused . . ., he is not likely to go back on his word later on.").

More significantly, the Court has diluted the right to due process articulated in *Stovall* by changing the focus of the admissibility determination. In Neil v. Biggers, 409 U.S. 188 (1972), the Court refocused its admissibility analysis from procedural fairness to the accuracy of the identification, prescribing factors which may demonstrate sufficient reliability to admit an identification demonstrably tainted by an unnecessarily suggestive procedure. *See infra* note 7. In Manson v. Brathwaite, 422 U.S. 98 (1977), the Court reaffirmed that refocusing, explaining that "reliability is the linchpin in determining the admissibility of identification testimony" and concluding that the *Biggers* reliability factors should be weighed against "the corrupting effect of the suggestive identification itself." *Id.* at 114.

[7] The so-called *Biggers* factors are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness prior description of the criminal; (4) the level of certainty demonstrated by the witness' at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199.

[8] For example, several psychologists have argued that no direct correlation exists between accuracy and a witness' level of confidence or certainty. *See, e.g.*, Uelmen, *Testing the Assumptions of* Neil v. Biggers*: An Experience in Eyewitness Identification*, 16 CRIM. L. BULL. 358, 368 (1980); Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship*, in LAW AND HUMAN BEHAVIOR 243, 250-52 (1980). Lower courts have cited those studies and echoed that criticism. *See, e.g.*, United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) ("In fact, the data reveal no correlation between witness certainty and accuracy.").

[9] Indeed, Foster v. California, 394 U.S. 440 (1969), constitutes "the only case in which the Supreme Court has found identification procedures violative of due process." Thigpen v. Cory, 804 F.2d 893, 903 (6th Cir. 1986) (Nelson, J., dissenting). In *Foster*, the Court addressed a pretrial procedural history in which the victim failed to identify the defendant from a three-person lineup in which he "stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber"; tentatively identified him in a one-to-one showup, a practice which the Court recognized had been "widely condemned"; and positively identified him from a second lineup in which the defendant was the only repeat participant. *Id.* In reversing the defendant's conviction, the Court explained that the suggestiveness of the underlying procedures "so undermined the reliability of the eyewitness identification as to violate due process" because, "[i]n effect, the police repeatedly said to the witness, '*This* is the man.' " *Id.* (emphasis in original).

that the post-admission problem of unreliability is sufficiently addressed by existing trial mechanisms such as cross-examination, closing argument and cautionary jury instructions.[10] However, the increasing amount of psychological evidence suggesting that eyewitness testimony is inherently untrustworthy[11] has created a growing call for the adoption of additional procedures aimed at reducing the risk of erroneous convictions based upon mistaken identifications.

This article discusses the most effective, and most controversial, procedure: expert testimony on eyewitness perception. Although the vast majority of appellate courts have rejected such testimony as an improper subject of expert commentary, the Third Circuit, in its "trailblazing opinion"[12] in *United States v. Downing*,[13] rejected a blanket inadmissibility rule and instead held

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[10] Most notably, the Supreme Court has rejected the contention that eyewitness identifications are so inherently unreliable that "special considerations justify a departure" from those normal protective devices. Watkins v. Sowders, 449 U.S. 341, 348-49 (1981). In so doing, the Court reiterated that "[w]hile identification testimony is significant evidence, such testimony is still only evidence, and . . . is not a factor that goes to the very heart—the 'integrity'—of the adversary process." *Id.* at 348 (quoting Manson v. Brathwaite, 432 U.S. 98, 114 n.14 (1977)). Accordingly, the Court held that the admissibility of pretrial identification evidence may be determined in the jury's presence because cross-examination, closing argument and cautionary jury instructions constitute sufficient protections against any undue prejudice which might result should the identification subsequently be deemed inadmissible.

In dissent, Justice Brennan, joined by Justice Marshall, argued that both cautionary jury instructions and cross-examination are insufficient protective devices against unreliable eyewitness testimony. Regarding the former, he noted that "[t]o expect a jury to engage in the collective mental gymnastic of segregating and ignoring such testimony upon instruction is utterly unrealistic." *Id.* at 356 (Brennan, J., dissenting). Regarding the latter, he stated that "cross examination is both an ineffective and a wrong tool for purging inadmissible identification evidence from the jurors' minds . . . because all of the scientific evidence suggests that much eyewitness identification testimony has an unduly powerful effect on jurors." *Id.* at 356-57 (Brennan, J., dissenting). Justice Brennan then posited that such normal protective devices are as demonstrably inadequate against the unreliability of identification evidence as they are against the unreliability of involuntary confessions. Noting that the Court had previously recognized the latter inadequacy in Jackson v. Denno, 378 U.S. 368 (1964), which mandated a "fair hearing" of the exact type rejected in *Watkins*, he concluded that because "jury instructions [and cross-examination] can ordinarily no more cure the erroneous admission of powerful identification evidence than they can cure the erroneous admission of a confession. . . [t]he separate judicial determination of admissibility required by *Jackson* for confessions is equally applicable for eyewitness identification evidence." *Watkins*, 449 U.S. at 350 (Brennan, J., dissenting).

[11] *See infra* notes 15-20 and accompanying text.

[12] United States v. Dowling, 855 F.2d 114, 118 (3d Cir. 1988).

[13] 753 F.2d 1224 (3d Cir. 1985).

that "expert testimony on eyewitness perception may be admitted at least in some circumstances."[14] In so holding, the Third Circuit in 1985 became, and today remains, the sole United States court of appeals to reverse a district court's exclusion of such testimony.

This article analyzes the majority position, which in effect rejects absolutely the use of expert identification testimony, and the alternative admissibility standard articulated by the Third Circuit. It concludes that the latter standard properly conforms to the liberal requirements of the Federal Rules of Evidence and recommends the increased admission of such testimony as the most effective protective device against the inherent unreliability of admitted identifications. However, it posits that the vast majority of trial courts, including those within the Third Circuit, will continue to improperly exclude such expert testimony as a matter of course.

II. EXPERT IDENTIFICATION TESTIMONY: ITS CONTENT AND CONTROVERSIAL ROLE

Expert testimony on eyewitness perception focuses on specific factors affecting memory and perception. Experts generally recognize three stages of identification: acquisition (the initial perception of the event), retention (the time elapsed between the event and the eventual recollection), and retrieval (the recall of stored information).[15] They also identify factors at each stage which may affect reliability. Several such factors fall into three broad categories: (i) those particular to the witness, such as training;[16] (ii) those particular to the event, such as stress;[17] and (iii) those particular to the suspect, such as race.[18] Additional factors include the "forgetting curve," which describes the disuniform rate at which memory diminishes; the "assimilation factor," which recognizes that eyewitnesses often improperly incorporate

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[14] *Id.* at 1232.

[15] *See* United States v. Blade, 811 F.2d 461, 464 n.2 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 124 (1988).

[16] For instance, contrary to common belief, "research show[s] that police officers have no greater accuracy than laypersons in making identifications." *Id.* at 464.

[17] As the Third Circuit has recognized, "contrary to common understanding, stress causes inaccuracy of perception and distorts one's subsequent recall." *Downing*, 753 F.2d at 1230.

[18] Studies have consistently demonstrated that cross-racial identifications are inherently unreliable. *See, e.g.*, Johnson, *Cross-Racial Identification Errors In Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

into their identifications inaccurate information acquired after, but confused with, the event; the "feedback factor," which explains that eyewitnesses who discuss the case with one another improperly reinforce their individual identifications; and, contrary to judicially endorsed understanding,[19] the absence of any correlation between confidence and accuracy.[20] To varying degrees, each such factor "goes beyond what an average juror might know as a matter of common knowledge, and indeed some of them directly contradict 'common sense.' "[21] Accordingly, expert identification testimony is proffered to persuade jurors that certain circumstances may render an eyewitness identification unreliable or, at a minimum, less reliable than laypersons would otherwise believe.

As one commentator has explained, the controversy surrounding the admissibility of such testimony primarily arises from differences between its source and subject matter and those of other forms of expert evidence.[22] Its source is distinct in two significant respects. First, the judiciary has largely perceived it as emanating not from technical experts but from academicians and psychologists whose simulated experiments lack practical significance.[23] Second, criminal defendants are virtually the only litigants who proffer it.[24]

More significantly, its subject matter is unusual in three primary aspects. First, despite its counter-intuitive nature,[25] expert identification evidence addresses topics about which lay persons have some experience and opinion; indeed, courts most frequently justify its exclusion by deeming its subject matter within

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19 *See supra* note 8.

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

21 *Id.* at 1231. *See also* United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) ("Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge" but rather a description of tested conclusions which "are largely *counter-intuitive*, and serve to 'explode common myths about an individual's capacity for perception.' ") (emphasis in original); State v. Moon, 45 Wash. App. 692, 699, 726 P.2d 1263, 1267 (1986) (deeming expert identification evidence "critical in some cases since its results are best described as counter-intuitive; that is, contrary to the common understanding or belief of most people").

22 *See* Sanders, *Expert Witnesses In Eyewitness Facial Identification Cases*, 17 TEX. TECH. L. REV. 1409, 1422-25 (1986).

23 *Id.* at 1413. *See infra* notes 40 and 42.

24 Sanders, *supra* note 22, at 1413. *Cf.* Robertson v. McCloskey, 680 F. Supp. 408, 410 (D.D.C. 1988) (in excluding expert identification testimony in a civil case, explaining that those courts which have admitted it have done so on the "fundamentally different premise[]" of "protecting the constitutional rights of criminal defendants").

25 *See supra* note 21.

common knowledge.[26] Second, because identification experts are prohibited from addressing the accuracy or reliability of a specific witness' identification,[27] their testimony is necessarily quite general, often to such a degree that its relevance is questioned.[28] Third, the underlying clinical conclusions are not universally accepted,[29] and some psychologists argue that the practical effect of expert identificaiton testimony is to hinder, rather than to assist, jurors by creating overskepticism or confusion.[30]

III. THE TRADITIONAL EXCLUSION OF EXPERT IDENTIFICATION TESTIMONY: *UNITED STATES V. AMARAL*

The vast majority of appellate courts have held either that expert testimony on eyewitness perception is inadmissible or that a trial court does not abuse its discretion by refusing to admit

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26 *See infra* notes 36-37.

27 As many courts have recognized, expert testimony regarding the reliability of a particular eyewitness's identification would constitute an improper attack on credibility by extrinsic evidence of a collateral matter. *See, e.g.*, State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795, 804 (1986) ("[E]xpert testimony . . . regarding the credibility of the identification testimony of a *particular* witness is inadmissible. . . absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events.") (emphasis in original). *See generally* State v. Cooper 708 S.W.2d 299, 303 (Mo. Ct. App. 1986) (recognizing that in cases where such expert testimony had been admitted it "was generally confined to an analysis of the psychological factors affecting eyewitness identifications, and avoided commenting upon the credibility of any particular witness").

28 *See infra* note 45.

29 *See infra* note 30. *But see* People v. McDonald, 37 Cal.3d 351, 360, 690 P.2d 709, 718, 208 Cal. Rptr. 236, 245 (1984) (noting that "[t]he consistency of the results of these studies [demonstrating the inherent unreliability of eyewitness identifications] is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice"). *See also infra* note 51.

30 *See, e.g.*, McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell A Jury*, 38 AM. PSYCHOLOGIST 550 (1983). McCloskey and Egeth dispute the contentions that (1) jurors "overbelieve" eyewitnesses and require expert evidence to increase their skepticism, and (2) that expert identification testimony actually improves a juror's ability to distinguish between accurate and inaccurate identifications. *Id.* at 551.

Several courts have expressly relied upon their studies to exclude expert identification testimony. For instance, the Ninth Circuit—which has consistently excluded such testimony, *see infra* note 35—has cited McCloskey & Egeth for the proposition that "[p]sychologists do not generally accept the claimed dangers of eyewitness identification in a trial setting." United States v. Christophe, 833 F.2d 1296, 1299 (9th Cir. 1987). However, at least one court has argued that their conclusions "ha[ve] been vigorously disputed by their peers" and dismissed their concerns as an improvident plea for additional research. *McDonald*, 37 Cal.3d at 369 n.15, 208 Cal. Rptr. at 248 n.15, 690 P.2d at 721 n.15.

it.[31] In "probably the leading case on the subject,"[32] the Ninth Circuit affirmed the exclusion of such testimony sixteen years ago in *United States v. Amaral*[33] by holding that it failed to satisfy a four-pronged standard for the admission of expert evidence.[34]

Although purporting to frame its holding in terms of deferring to trial court discretion, *Amaral* in effect held such testimony inadmissible as a matter of law by finding that it was not a "proper subject" of expert evidence.[35] Most courts which have

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[31] *See, e.g.*, People v. Brooks, 128 Misc. 2d 608, 610, 490 N.Y.S.2d 692, 695 (Co. Ct. 1985) ("Courts have traditionally been reluctant to permit expert testimony as to the reliability of identification testimony."); State v. Kemp, 199 Conn. 473, 476, 507 A.2d 1387, 1389 (1986) ("Almost uniformly, state and federal courts have upheld the trial court's exercise of discretion to exclude such testimony."); Bloodsworth v. State, 307 Md. 164, 172, 512 A.2d 1056, 1064 (1986) ("The vast majority of courts have rejected such evidence."); United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980) ("The admissibility of this type of expert testimony is strongly disfavored by most courts."). *See generally* Annotation, "Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony," 46 ALR 4TH 1047 (1987).

However, as criminal defendants are essentially the only parties who proffer such testimony, *see supra* note 24, "the virtual unanimity of appellate decisions on the topic may well be misleading" because the admissibility determination is appealed only where the trial court excludes the testimony and the defendant is subsequently convicted. *McDonald*, 37 Cal.3d at 360 n.10, 690 P.2d at 718 n.10, 208 Cal. Rptr. at 245 n.10. The prosecution cannot appeal an acquittal, and neither party will appeal the testimony's admission should the defendant be convicted. *Id.* Hence, "appellate courts ordinarily confront the issue only when the testimony has been *excluded*." *Id.* (emphasis in original).

Appellate decisions addressing other issues demonstrate that trial courts have admitted expert identification testimony. *See, e.g.*, United States v. Booth, 669 F.2d 1231, 1240 (9th Cir. 1981) (Although "sympathetic with the government's position" on appeal of the trial court's pretrial order admitting expert identification testimony, the court refused to address its merits for lack of jurisdiction.). *See generally* State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1243 (1981) (describing a proffered expert's affidavit detailing that she had previously testified in more than 34 trials and that another such expert had testified in more than 20 trials).

[32] State v. Chapple, 135 Ariz. 281, 291, 660 P.2d 1208, 1218 (1983).

[33] 488 F.2d 1148 (9th Cir. 1973). *Amaral* deemed the admissibility of expert identification testimony "a novel question" and noted that counsel had cited "[n]o appellate or trial court decision . . . resolving the issue." *Id.* at 1153.

[34] The four criteria articulated in *Amaral* for the admissibility of expert testimony are whether the expert is qualified, whether the subject matter is proper for expert testimony, whether the proffered testimony conforms with a generally accepted theory, and whether its probative value outweighs its potential prejudicial effect. *Id.*

[35] Indeed, "[d]espite the multi-tiered framework it established, *Amaral* addressed only the . . . [proper subject] factor" of its four-prong test. United States v. Langford, 802 F.2d 1176, 1181 (9th Cir. 1986) (Ferguson, J., dissenting). Specifically, *Amaral* described the relevant issue as whether expert identification testimony would "appreciabl[y] help" the jury. *Amaral*, 488 F.2d at 1152. *See also infra* note 59. In answering that issue negatively, the court stated that "[c]ertainly effective

adopted the *Amaral* standard have similarly relied upon that criterion to exclude expert identification testimony.[36] Two distinct rationales underlie the position that such testimony is an improper subject for expert comment. The most prevalent justification, adopted on at least one occasion by five United States courts of appeals,[37] is that the testimony's subject matter is within the common knowledge of laymen and, hence, would not assist jurors.[38] Another rationale often articulated is that such

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cross-examination is adequate to reveal any inconsistencies or deficiencies in the eye-witness testimony." *Id.* at 1153. See *supra* note 10, *infra* note 118. Theoretically, that rationale should apply equally to all cases and, hence, direct the blanket exclusion of expert testimony on eyewitness perception.

Jurists have subsequently recognized that *Amaral*, despite its language to the contrary, effectively eliminated any discretion to admit expert identification testimony. *See Langford*, 802 F.2d at 1184 (Ferguson, J., dissenting) (criticizing *Amaral*'s "blanket rule of exclusion in every case" and chiding its abuse-of-discretion standard as "a meaningless charade"). *But see* United States v. Poole, 794 F.2d 462, 468 n.7 (9th Cir. 1986) (rejecting a suggestion that *Amaral* and its progeny led the district court to believe that it had no discretion to admit such testimony). Despite increasing judicial criticism of *Amaral*, however, the Ninth Circuit most recently reaffirmed its holding by "adher[ing] to the position that skillful cross[-]examination of eyewitnesses, coupled with appeals to the experience and common sense of jurors, will sufficiently alert jurors to specific conditions that render a particular eyewitness identification unreliable." *Christophe*, 833 F.2d at 1300.

[36] *See Chapple*, 135 Ariz. at 293, 660 P.2d at 1220 (recognizing that the "basis for the view that eyewitness identification is not a proper subject to expert testimony is the same as that adopted in [*Amaral*] and in the great majority of cases which have routinely followed *Amaral*").

[37] *See Amaral*, 488 F.2d at 1153 ("[T]he jury was 'superbly equipped' to evaluate the impact of stress . . . on the perception of the identification witness."); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984) (concluding that such testimony is "not sufficiently beyond the understanding of lay jurors"); United States v. Thevis, 665 F.2d 616, 641 (5th Cir.) ("[T]he jury can adequately weigh these problems through common sense evaluation."), *cert. denied*, 459 U.S. 825 (1982); United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978) (noting that such testimony would be of "little use to the jury"), *cert. denied*, 439 U.S. 1132 (1979); United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978) ("[A]verage lay jurors, on the basis of their own life experience and common sense, can make an informed evaluation of eyewitness testimony without the assistance of a psychologist."), *aff'd*, 590 F.2d 381, 383 (1st Cir. 1979) (agreeing that such testimony is "no[t] sufficiently beyond the ken of lay jurors").

[38] State v. Kemp, 199 Conn. 473, 475, 507 A.2d 1387, 1389 (1986) ("Matters such as these, however, have generally been found to be within the realm of common experience and can be evaluated without expert assistance."). *See also* Nelson v. State, 362 So.2d 1017, 1021 (Fla. Dist. Ct. App. 1978) ("[I]t is within the common knowledge of the jury that a person being attacked and beaten undergoes stress that might cloud a subsequent identification of the assailant by the victim."); State v. Ammons, 208 Neb. 812, 813, 305 N.W.2d 812, 814 (1981) ("[A]ccuracy or inaccuracy of eyewitness observation is a common experience of daily life."); Dyas v. United States, 376 A.2d 827, 832 (D.C.) ("[T]he subject matter of the proffered testimony is not beyond the ken of the average layman nor would such testimony

testimony would usurp the jury's function, or invade its exclusive domain, by touching on an ultimate fact in issue.[39]

Other courts, including the First and Seventh Circuits, have excluded expert identification testimony by finding that it has not attained general acceptance in the legal and scientific communities.[40] In so finding, those courts, relying upon the test enunciated in *Frye v. United States*[41] for determining the admissibility of novel scientific evidence, have focused on the laboratory nature of the underlying research experiments[42] and their occasionally

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aid the trier in a search for the truth."), *cert. denied*, 434 U.S. 973 (1977); People v. Plasencia, 168 Cal. App. 3d 546, 555, 214 Cal. Rptr. 316, 321 (1985) ("The jury did not need edification on the obvious fact that an unprovoked gang attack is a stressful event or that the passage of time frequently effects one's memory."); State v. Fernald, 397 A.2d 194, 197 (Me. 1979) (stating that reliability factors regarding facial identifications are "part of the day-to-day experiences of ordinary lay people").

[39] *See, e.g.*, *Thevis*, 665 F.2d at 641 ("To admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses."); United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976) (affirming the exclusion of expert identification testimony because "opinion evidence cannot usurp the functions of the jury or be received if it touches the very issue before the jury"), *cert. denied*, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974) (affirming such an exclusion based on the trial court's finding that the proffered testimony "would invade the province of the jury"), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); Caldwell v. State, 594 S.W.2d 24, 29 (Ark. Ct. App. 1980) (deeming such testimony "an invasion into the province of the trier of fact"); People v. Brooks, 51 Cal. App. 3d 602, 608, 124 Cal. Rptr. 492, 498 (1975) (noting that such testimony would "take over the jury's task."); State v. Stucke, 419 So.2d 939, 945 (La. 1982) ("such testimony invades the province of the jury and usurps its function"); State v. Goldsby, 59 Or. App. 66, 69, 650 P.2d 952, 954 (1982) (rejecting such testimony because it would improperly allow "expert witnesses to debate the quality of the evidence for the jury"); State v. Malmrose, 649 P.2d 56, 61 (Utah 1982) ("[S]uch testimony would amount to a lecture to the jury about how they should perform their duties."); State v. Poland, 144 Ariz. 388, 397, 658 P.2d 183, 193 (1985) (such testimony "invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony").

[40] *See, e.g.*, *Fosher*, 590 F.2d at 383 ("[T]he offer did not make clear that the testimony . . . would be based upon a mode of scientific analysis that meets any of the standards of reliability applicable to scientific evidence."); *Watson*, 587 F.2d at 369 ("[W]ork in that field still remains inadequate to justify its admission into evidence."). *See also Caldwell*, 594 S.W.2d at 28 (Although the "field of perception and memory is alleged to be a science . . . [t]he science of human perception testimony is new."); *Plasencia*, 168 Cal. App. 3d 555, 214 Cal. Rptr. at 320 (such testimony "had not yet reached a state of acceptability in the legal community and therefore could not be used at trial").

[41] 293 F. 1013 (D.C. Cir. 1923). In affirming the exclusion of a precursor to the lie detector, the court in *Frye* held that "scientific principle or discovery . . . from which the deduction is made must . . . have gained general acceptance in the particular field." *Id.* at 1014.

[42] *See, e.g.*, *Stucke*, 419 So.2d at 945 ("[T]he crimes are staged [in the research

contradictory results.[43] Finally, many courts have excluded such testimony on the basis of undue prejudice resulting from the anxiety that the jury will place too much weight on the expert's testimony,[44] the confusion that might result from its necessarily general content,[45] and the time it would consume,[46] particularly should a feared "battle of experts" result.[47]

IV. ANALYZING THE *AMARAL* CRITERIA

The rationales utilized to support the exclusion of expert identification testimony under the *Amaral* criteria are either out-

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experiments]; the person acting as the criminal and very often the victim are both actors. No actual crime has been an issue in [the] studies and none of [the] victims have been shot in [the] staged crimes."). *See generally* State v. Buell, 22 Ohio St. 3d 124, 129, 489 N.E.2d 795, 801 (1986). ("The statistical likelihood of eyewitnesses to err . . . would not assist the trier of fact to determine whether a *particular* eyewitness . . . is telling the truth.") (emphasis in original).

43 *See supra* note 30.

44 *See, e.g.*, United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1985) ("[T]he unfair prejudice which might have resulted because of the aura of reliability and trustworthiness that surrounds scientific evidence outweighed any small aid the expert testimony might have provided.") (quoting United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979)); United States v. Collins, 395 F. Supp. 629, 637 (M.D. Pa. 1975) ("[T]here was a substantial risk that the credentials and persuasive powers of the expert would have had a greater influence on the jury than the evidence presented at trial, thereby interfering with the jury's special role as fact finder.").

45 *See, e.g.*, United States v. Blade, 811 F.2d 461, 465 (8th Cir. 1987) (affirming such testimony's exclusion based partially on its "abstract, general nature"); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (noting that because the expert "did not comment specifically on the identification . . . but instead testified generally as to problems with eyewitness identification," his testimony would be "marginally relevant"); *Fosher*, 590 F.2d at 382 (noting that the "written offer did not make clear the relationship between the scientific evidence offered and the specific testimony of the eyewitnesses").

46 *See, e.g.*, United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974) ("[T]he undue consumption of time would substantially outweigh its probative value.").

47 In *Downing*, the Third Circuit explained that

> [s]ome courts, concerned with the prospect of creating a new 'cottage industry' of psychological experts who will be asked to testify in every case involving eyewitness testimony, and with the spectre of criminal cases turning into a 'battle of the experts' that misleads the jury and confuses the issues, have excluded this expert testimony on the grounds that its prejudicial effect outweighs its probative value.

United States v. Downing, 753 F.2d 1224, 1243 n.27 (3d Cir. 1985). *See also Thevis*, 665 F.2d at 641 ("To admit such testimony in effect would . . . open the door to a barrage of" identification experts.); *Fosher*, 590 F.2d 383-84 ("We can add to the trial court's articulated concerns our own conviction that a trial court has the discretion to avoid imposing upon the parties the time and expense involved in a battle of experts."); State v. Porraro, 121 R.I. 882, 892, 404 A.2d 465, 471 (1979) ("[A]dmitting this testimony would open a floodgate whereby experts would testify on every conceivable aspect of a witness' credibility.").

dated or erroneous. For instance, an increasing number of courts, including the Third Circuit,[48] have questioned whether the *Frye* admissibility test survived the adoption of the liberal admissibility standard prescribed in Federal Rule of Evidence 702.[49] Other courts have correctly argued that *Frye* is inapplicable to such expert testimony.[50] Moreover, even assuming that *Frye* retains validity and applies to expert identification testimony, the present state of the psychological evidence underlying such testimony satisfies its requirements.[51]

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[48] In *Downing*, the court exhaustively reviewed the pros and cons of *Frye* and concluded that

> the *Frye* test suffers from serious flaws. The test has proved to be too malleable to provide the method for orderly and uniform decision-making envisioned by some of its proponents. Moreover, in its pristine form the general acceptance standard reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence. For these reasons, we conclude that "general acceptance in the particular field to which [a scientific technique] belongs," should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique.

Id., 753 F.2d at 1237.

[49] *See infra* note 57. In dissenting from the denial of *certiorari* in Mustafa v. United States, 479 U.S. 953 (1986), Justice White, joined by Justice Brennan, recognized a "conflict" among the circuits regarding the effect of Rule 702 upon *Frye* and urged the Court to resolve "an obviously recurring and important issue." *Id.* (White, J., dissenting).

[50] *See, e.g.*, People v. McDonald, 37 Cal.3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) (distinguishing between expert identification testimony and the scientific evidence, such as "novel devises or processes," to which *Frye* was intended to apply); Bloodsworth v. State, 307 Md. 164, 184, 512 A.2d 1056, 1066 (1986) ("[T]he [*Frye*] test is not properly applicable to [expert identification] evidence."). One commentator has argued that "the *Frye* standard has no relevance to such expert testimony . . . [because] [t]he psychologist will not testify about novel devices that the jury may view as 'magic' but will point out basic human perceptual and mnemonic abilities that have been the subject of extensive research." Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1022-23 (1977).

[51] Two United States Courts of Appeals have effectively concluded that eyewitness identification testimony satisfies *Frye*. *See* United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986) ("This Court accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper. . . . We cannot say such scientific data is inadequate or contradictory."); United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984) (noting that since the First Circuit's 1979 decision in *Fosher*, which held that such testimony lacked "the standards of reliability applicable to scientific evidence," the "science had gained reliability" and that "the day may have arrived therefore, when [such] testimony can be said to

The argument that such testimony usurps the jury function "has been discredited and rejected by scholars, the Federal Rules of Evidence, and the Supreme Court."[52] Specifically, Dean Wigmore has labelled that argument a "mere bit of empty rhetoric . . . so misleading, as well as so unsound, that it should be entirely repudiated";[53] Rule 704 of the Federal Rules of Evidence provides that expert testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact";[54] and the Supreme Court, in addressing similar expert testimony, has recognized that jurors are "competent to uncover, recognize, and take due account of its shortcomings."[55]

Similarly, courts have increasingly rejected the rationale that the subject matter of expert identification testimony is common knowledge and, hence, would not assist jurors. Instead, those courts have concluded that its subject matter is largely counter-

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conform to a generally accepted explanatory theory"). *See also* United States v. Langford, 802 F.2d 1176, 1184 (9th Cir. 1986) (Ferguson, J., dissenting) ("As the most recent court decisions have found, the scientific study of eyewitness identification has become a respected and sophisticated one.").

52 *Langford*, 802 F.2d at 1183. The usurpation argument, which essentially claims that the testimony would improperly override the factfinder's duty of determining credibility, is obviously at odds with the position that such testimony is too general to assist the jury. *See supra* note 45. One court has recognized that its necessarily generalized nature precludes any finding that expert identification testimony improperly invades the jury's province:

> The expert testimony in question does *not* seek to take over the jury's task of judging credibility: as explained above, it does not tell the jury that any particular witness is or is not truthful or accurate in his identification of the defendant. Rather, it informs the jury of certain factors that may affect such an identification in a typical case; and to the extent that it may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effect of those circumstances on the powers of observation of a typical eyewitness.

McDonald, 37 Cal.3d at 370-71, 690 P.2d at 722, 208 Cal. Rptr. at 249 (emphasis in original).

53 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920, at 18 (J. Chadbourn rev. ed. 1978). *See* WALL, *supra* note 1, at 213 ("[T]he objection based upon the 'province of the jury' is no more than a shibboleth which, if accepted, would deprive the jury of important information useful and perhaps necessary for a proper decision on a difficult issue.").

54 FED. R. EVID. 704. The rule's primary purpose is to facilitate the admission of expert testimony which will assist the jury. *See* FED. R. EVID. 704 Advisory Committee note ("In order to render [the helpfulness] approach [of FED. R. EVID. 702] fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is specifically abolished by [FED. R. EVID. 704].").

55 Barefoot v. Estelle, 463 U.S. 880, 899 (1983).

intuitive.[56] Beyond its inaccuracy, that rationale is inconsistent with the liberal admissibility standard prescribed in Rule 702 of the Federal Rules of Evidence,[57] which allows "an expert [to] be employed if his testimony will be helpful to the trier of fact in understanding evidence that is simply difficult, [though] not beyond ordinary understanding."[58] Accordingly, to the extent *Amaral* and its progeny excluded proffered expert testimony by finding that it would not "appreciabl[y] help" the jury,[59] these decisions applied an overly stringent standard.[60]

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56 See *supra* note 21. *See also* United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984) (concluding that the proffered expert testimony regarding three psychological factors—unconscious transference, cross-racial identification and the effect of stress—"not only might have assisted the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification"); *McDonald*, 37 Cal. 3d at 367-68, 690 P.2d at 720, 208 Cal. Rptr. at 247 ("It appears from the professional literature, however, that [certain] factors may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most."); State v. Chapple, 135 Ariz. 281, 294, 660 P.2d 1208, 1221 (1983) ("We cannot assume that the average juror would be aware of the variables concerning identification and memory about which [the proffered expert] was qualified to testify.").

57 FED. R. EVID. 702 provides in full:

> If scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. (emphasis supplied).

58 United States v. Downing, 753 F.2d 1224, 1229 (3d Cir. 1988) (quoting S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 451 (3d ed. 1982)). *See also* FED. R. EVID. 702 Advisory Committee note (explaining that the Rule is designed to permit expert testimony to inform jurors "to the best possible degree").

59 United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) ("The general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony.") (quoting 7 WIGMORE, EVIDENCE § 1923 (3d ed., 1940). The court explained that expert testimony cannot provide the requisite help unless it "serves to inform the court [and jury] about affairs not within the full understanding of the average man." *Id.* at 1152-53 (quoting Farris v. Interstate Circuit, 116 F.2d 409, 412 (5th Cir. 1941)).

Although *Amaral* was decided prior to the enactment of FED. R. EVID. 702, subsequent decisions which adopted and applied its four-criteria standard have held that expert identification testimony is not "sufficiently beyond the ken of lay jurors to satisfy Rule 702." *Fosher*, 590 F.2d at 383. On at least one occasion, the Ninth Circuit has expressly refused to determine whether the *Amaral* standard "survive[s] the enactment of Rule 702 as additional judicial requirements regarding the admissibility of expert testimony in criminal cases." United States v. Fleishman, 684 F.2d 1329, 1337 n.5 (9th Cir. 1982).

60 *See Downing*, 753 F.2d at 1230 ("We have serious doubts about whether the conclusion reached by [*Amaral* and its progeny] is consistent with the liberal standard of admissibility mandated by Rule 702."); *McDonald*, 37 Cal.3d at 369, 690 P.2d at 721, 208 Cal. Rptr. at 248. (After emphasizing that the applicable state

Finally, the reasons underlying the expressed concern that expert identification testimony is unduly prejudicial are largely meritless.[61] First, the argument that identification experts would overwhelm jurors restates the usurpation contention and is obviously contrary to the position that the testimony's subject matter is within common knowledge. More fundamentally, as one court has persuasively remarked, "it would be ironic to exclude such [expert] testimony . . . on the theory that the jurors tend to be unduly impressed by it, when jurors are far more likely to be unduly impressed by the eyewitness testimony itself."[62]

Also unwarranted is the fear that the general nature of expert identification testimony, which again does not comment on a particular witness' credibility but rather identifies factors which affect the reliability of identifications under various conditions,[63] would render its probative value minimal.[64] Although some nexus surely must be established between the proffered expert testimony and the particular identification at issue,[65] criminal de-

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evidence rule "declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury," the court concluded that "although jurors may not be totally unaware of the foregoing psychological factors . . . 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.' "); *Langford*, 802 F.2d at 1182 (Ferguson, J., dissenting) ("The evidence is overwhelming that the *Amaral* conclusion—that juries could not gain from such expert testimony—is untenable today.").

61 Of course, FED. R. EVID. 403 grants district courts broad discretion to exclude otherwise admissible evidence where its prejudicial effect substantially outweighs its probative value. However, by its unambiguous language that Rule envisions a case-by-case application of its balancing standard, not a blanket rejection in all cases of a particular class of evidence deemed unduly prejudicial as a matter of law.

62 *McDonald*, 37 Cal.3d at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251 (1984).

63 *See supra* notes 27 and 52.

64 This position similarly arises from the misconception that jurors are aware of the specific psychological factors which undercut the reliability of identifications. *See* State v. Kemp, 199 Conn. 473, 480, 507 A.2d 1387, 1390 (1986), ("[T]he introduction of expert [identification] testimony would be 'a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.' "). *See also* United States v. Collins, 395 F. Supp. 629, 637 (M.D. Pa. 1975) (opining that such expert testimony "would have done little more than add a scientific luster to the facts and ideas" already in evidence); Commonwealth v. Francis, 390 Mass. 89, 101, 453 N.E.2d 1204, 1209 (1983) (although conceding that "[o]bviously there are aspects of these general principles which might make some contribution in particular cases," excluding the proffered testimony because "juries are not without a general understanding of these principles and . . . [must] have the opportunity to assess the witnesses' credibility on the basis of what is presented at trial and not solely on general principles").

65 *See infra* notes 104-06 and accompanying text.

fendants cannot be denied the opportunity to prove that nexus by a blanket exclusionary rule. To blindly exclude all such testimony as unduly prejudicial is entirely unsupportable.[66]

Finally, the expressed judicial anxiety of a "battle of the experts" which might result from the more liberal admission of expert identification testimony is obviously insufficient to justify the exclusion of probative defense evidence.[67] Moreover, because courts retain the discretion to exclude such testimony having insufficient probative value and to limit the number of experts who may testify and the duration of the testimony, that anxiety has been grossly overstated.[68]

V. THE THIRD CIRCUIT'S RESPONSE: *UNITED STATES V. DOWNING*

Until recently, no appellate court had reversed a trial court's exclusion of expert identification testimony.[69] In 1985, however, the Third Circuit became the first—and today, remains the only—United States court of appeals to do so. In *Downing*, the court repudiated several of the exclusionary rationales previously articulated in *Amaral* and its progeny, reasoned that such expert testimony is appropriate and should be admitted in certain cases, and prescribed an admissibility standard for district courts to utilize.[70]

Three significant decisions preceded *Downing*. In 1983, the Arizona Supreme Court vacated a jury's guilty verdict and ordered a new trial because the trial court had erroneously excluded a proffered identification expert.[71] After analyzing the psychological factors which the expert testimony would have encompassed, the court concluded that the evidence "was a proper

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66 *See supra* note 61.

67 *See* United States v. Downing, 753 F.2d 1224, 1243 n.27 (3d Cir. 1985) ("[I]f the testimony is highly probative and meets the [specified] conditions . . . the parties are entitled to present it, whether or not it adds to the length of the trial; presumably such evidence will add clarity and enhance the truth-seeking function of the trial, thereby offsetting the disadvantage of delay.").

68 *Id.* Indeed, although prosecutors will attempt to use rebuttal identification experts where defense experts are admitted, the resultant "battle" will presumably diminish the exculpatory effect of the expert testimony, which diminution should in turn cause defense counsel to reserve their use of such testimony to cases in which the psychological evidence clearly favors their clients. Hence, the prospect of having multiple experts proffered, let alone admitted, in every case involving an eyewitness identification is quite remote.

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

70 *See infra* notes 86-105 and accompanying text.

71 State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983).

subject for expert testimony" and "would have been of considerable assistance" to the jury.[72] The court then disagreed with the trial court's conclusion that those factors "could be developed on cross-examination and effectively argued without evidentiary foundation" because they are within common knowledge.[73] Rather, the court held that "the unusual facts of this case compel the contrary conclusion"[74] and reveal that the proffered testimony "would have been of significant assistance" to the jury.[75]

The following year, the California Supreme Court also reversed a jury conviction because the trial court had improperly excluded proffered expert identification testimony.[76] In so doing, the court disagreed with the existing rationales for excluding such testimony, concluding that it is not subject to *Frye*, does not usurp the jury's function, and is sufficiently beyond common experience so as to assist jurors.[77] The court then articulated the specific circumstances under which a trial court should admit proffered identification experts:[78]

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have af-

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72 *Id.* at 291, 660 P.2d at 1221-22.

73 *Id.* at 293, 660 P.2d at 1224.

74 *Id.* at 292, 660 P.2d at 1223. Emphasizing that it did "not intend to 'open the gates' to a flood of expert evidence on the subject," the court went to great lengths to limit its ground-breaking holding to "the peculiar facts of this case." *Id.* at 293, 660 P.2d at 1224. Indeed, the court expressly approved the four-criteria admissibility test enunciated in *Amaral* and explained that it "ha[d] no quarrel with the result[s] reached in" *Amaral* and its progeny, which the court recognized had "uniformly affirmed trial court rulings denying admission of this type of testimony." *Id.* at 288, 293, 660 P.2d at 1218, 1224.

However, other than vaguely remarking that "many of [the prior decisions] contain fact situations which fail to meet the *Amaral* criteria or are decided on legal principles which differ from those we follow in Arizona," the court made no effort to distinguish its holding from those prior decisions. *Id.* at 288, 600 P.2d at 1218. In reality, *Chapple* explicitly rejects the precise rationale upon which *Amaral* rested: that cross-examination is a sufficient protective device against the inherent unreliability of eyewitness identifications. *See supra* notes 10 and 35, *infra* note 118.

75 *Chapple*, 135 Ariz. at 293, 660 P.2d at 1224.

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

77 *Id.* at 367-73, 690 P.2d at 718-24, 208 Cal. Rptr. at 245-51.

78 However, in emphasizing that the trial court retains broad discretion in the admissibility determination, the court cautioned that "such evidence will not often be needed," and approvingly quoted the *Chapple* court's intention not to open the floodgates to this type of expert evidence. *Id.* at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

> fected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.[79]

In so doing, the court in effect held that trial courts should admit such testimony only in the "narrow circumstances"[80] where the identification is not "substantially corroborated" and the "specific psychological factors" proffered are both not fully known by the jury and sufficiently relevant to the identification to possibly affect its accuracy.[81]

Finally, that same year the Sixth Circuit concluded that the trial court had erroneously excluded expert identification testimony by improperly determining that it was within common knowledge and not sufficiently established in the scientific community.[82] On the contrary, the court found that such testimony satisfied the helpfulness standard of Rule 702[83] and "conform[ed] to a generally accepted scientific theory."[84] Nevertheless, the court affirmed the defendant's conviction by holding that corroborating evidence rendered the erroneous exclusion harmless.[85]

Against this backdrop, the Third Circuit confronted the conviction of John Downing.[86] At trial, Downing's counsel had proffered an identification expert to undercut the substantial impact of twelve prosecution witnesses who had testified, with varying degrees of certainty, that Downing was a man they knew as Reverend Claymore.[87] The witnesses claimed to have observed Claymore for periods ranging between five and forty-five minutes during business dealings later proven fraudulent.[88] Downing countered that their observations were unreliable "because of the short period of time in which the witnesses had to view Claymore, the innocuous circumstances of

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79 *Id.*

80 *Downing*, 753 F.2d at 1231.

81 *McDonald*, 37 Cal.3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254. *See also supra* note 78.

82 United States v. Smith, 736 F.2d 1103 (6th Cir. 1984).

83 In so finding, the court distinguished its case, in which the proffered testimony "might have been relevant to the exact facts before the court," and the First Circuit's decision in *Fosher*, in which the proffer did not make clear the relationship between the scientific evidence offered and the specific testimony of the eyewitnesses. *Id.* at 1106-07. *See supra* note 45.

84 *Id.* The court also distinguished *Fosher* on this issue. *See supra* note 51.

85 Specifically, the court explained that the prosecution had presented three identifying eyewitnesses and other evidence placing the defendant at the scene, thereby "wholly discrediting the defendant's alibi." *Id.* at 1107-08.

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

87 *Id.* at 1227-28.

88 *Id.* at 1227.

their meetings with him, and the substantial lapse of time between the meetings and the subsequent identifications."[89]

In excluding the proffered identification expert, the district court reasoned that his testimony would improperly usurp the jury's function and that there existed sufficient inculpatory evidence beyond the identifications.[90] Because Rule 704 precisely repudiated the former rationale[91] and no such additional inculpatory evidence in fact existed,[92] Judge Becker, writing for the Third Circuit panel,[93] adjudged that the district court had in effect

> conclud[ed] that expert testimony concerning the reliability of eyewitness identifications is *never* admissible in federal court because such testimony concerns a matter of common experience that the jury is itself presumed to possess. Under this approach, an expert's testimony on the reliability of eyewitnesses can never meet the test for the admissibility of expert testimony contained in Fed. R. Evid. 702.[94]

Accordingly, the court framed the issue on appeal as "whether Rule 702 permits a defendant in a criminal prosecution to adduce, from an expert in the field of human perception and memory, testimony concerning the reliability of eyewitness identifications."[95]

After comprehensively reviewing the state of the psychological evidence and prior judicial reactions to such testimony, the court agreed with the "more recent cases"[96] and concluded that "under certain circumstances expert testimony on the reliability of eyewitness identifications can assist the jury in reaching a correct decision and therefore may meet the helpfulness requirement of Rule

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89 *Id.* at 1227-28.

90 *Id.* at 1228.

91 *See supra* note 52.

92 *Downing*, 753 F.2d at 1228-29.

93 Judges Gibbons, Becker, and Judge Dumbauld, sitting by designation from the Western District of Pennsylvania, sat on the panel. Judge Dumbauld filed a concurring opinion. *Id.* at 1244 (Dumbauld, J., concurring).

94 *Id.* at 1229 (emphasis supplied).

95 *Id.* at 1226.

96 *Id.* at 1230 (citing State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); People v. McDonald, 37 Cal. 3d 351, 660 P.2d 709, 208 Cal. Rptr. 236 (1984); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984)). The court further expressed "serious doubts about whether the conclusion reached by [*Amaral* and other circuits] is consistent with the liberal standard of admissibility mandated by Rule 702." *Id.* However, the court explained that those decisions, most of which rested on more than one ground, "do not clearly indicate" their position vis-a-vis Rule 702. *Id.* at 1230 n.5. *But see supra* note 59. Focusing on their purported reliance on trial court discretion, the court also refused to interpret those decisions "as erecting an absolute bar to the admission of [such] testimony." *Id. But see supra* note 35 and accompanying text.

702."[97] In so concluding, the court relied upon the "inexorable" logic of that Rule's liberal admissibility standard to characterize prior judicial resistance to such testimony as "understandable given its innovativeness and the fear of trial delay" but erroneous as a matter of law.[98]

The court then established a three-prong standard under which district courts should determine, at an in limine hearing, the admissibility of proffered expert testimony.[99] The first inquiry requires a district court to balance "(1) the reliability of the scientific principles upon which the expert testimony rests, [and] hence the potential of the testimony to aid the jury in reaching an accurate resolution of a disputed issue; and (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury."[100] That inquiry replaced the *Frye* standard, which the court rejected as an overly "conservative approach to the admissibility of scientific evidence,"[101] with a policy-based determination designed to effectuate the helpfulness standard of Rule 702 and its presumption of admissibility.[102] Although the court left the district court to apply this inquiry to expert identification testimony on remand, it directly stated that such testimony "is sufficiently reliable to satisfy Rule 702."[103]

The second inquiry focuses upon the "fit" between the proffered expert testimony and the identification at issue and requires "a specific proffer showing that scientific research has established that particular features of the eyewitness identifications involved may have impaired the accuracy of those identifications."[104] Stated differently, the proffer must provide "an explanation of precisely

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97 *Id.* at 1231.

98 *Id.* at 1232.

99 *Id.* at 1226.

100 *Id.*

101 *Id.* at 1237. *See supra* note 48. Unlike *McDonald*, however, which deemed testimony on eyewitness perception an unremarkable type of expert medical testimony to which *Frye* did not apply, *Downing* broadly "define[d] 'novel' scientific evidence in terms of whether judicial notice can be used to validate the scientific premises on which the evidence rests." *Id.* at 1233 n.11. Accordingly, *Downing* did not entirely repudiate the rationale of *Frye* or its application to expert identification testimony. Rather, *Downing* held that its concerns should merely be a part of a balancing test rather than a dispositive prerequisite. *Id.* at 1237.

102 *Id.* at 1241.

103 More precisely, the court, despite remarking that "it would appear that the scientific basis for the expert evidence in question is sufficiently reliable to satisfy Rule 702," refused to so hold, as the Fifth and Sixth Circuits previously had. *Id.* at 1241. Instead, the court remanded the issue to allow the government an opportunity to brief the issue. *Id.* at 1242. *See infra* notes 120-25 and accompanying text.

104 *Id.* at 1226.

how the expert's testimony is relevant to the eyewitness identifications under consideration" to ensure that such testimony is "sufficiently tied to the case."[105] That requirement satisfies the concerns expressed by numerous courts about the necessarily general nature of the testimony and its relevance to specific identifications.[106]

Finally, assuming the proffered testimony is deemed sufficiently helpful under Rule 702 by satisfying the first two inquiries, the district court "retains discretionary authority under Rule 403 of the Federal Rules of Evidence to exclude any relevant evidence that would unduly waste time or confuse the jury."[107] However, the court intimated that such discretionary exclusion would be appropriate only where physical evidence corroborated the identification at issue.[108]

The *Downing* admissibility standard for expert identification testimony closely resembles that adopted by the California Supreme Court[109] and reflects the concerns of both the Sixth[110] and Fifth[111] Circuits. Specifically, the Third Circuit encouraged its admission where it is sufficiently: (1) reliable, as demonstrated by a balancing

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105 *Id.* at 1242.

106 *See supra* notes 45 and 64 and accompanying text.

107 *Downing*, 753 F.2d at 1226.

108 *Id.* at 1243 ("The availability of Rule 403 is especially significant when there is evidence of a defendant's guilt other than eyewitness evidence, *e.g.*, fingerprints, or other physical evidence.").

Significantly, the court explained that "[t]he availability of other methods" alternative to expert identification testimony is not a "viable[]" exclusionary rationale. *Id.* The court specifically denounced cross-examination, the alternative method endorsed by *Amaral*. *Id.* *See infra* note 118. Moreover, the court stated that the mere fact that challenged identifications may be multiple in number or "more than brief in duration" would not justify exclusion except "[i]n exceptional circumstances." *Id.*

109 *See supra* notes 76-81 and accompanying text.

110 *See supra* notes 82-85 and accompanying text.

111 In a decision rendered after *Downing*, the Fifth Circuit, despite recognizing that it had in *Thevis* previously "held that any problems with perception and memory are easily understood by jurors and can be adequately addressed through cross-examination," acknowledged the *Smith* and *Downing* decisions and "accept[ed] the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper." United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986). Nevertheless, as in *Smith*, the court affirmed the defendant's conviction because substantial evidence corroborating the challenged identifications existed. *Id.* at 1313. In so doing, the court implied that a trial court's exclusion of such testimony will be reversed as an abuse of discretion only where the challenged identification is so "critical" that it represents "the entire difference between a finding of guilt or innocence." *Id.* The court concluded by "emphasiz[ing] that in a case in which the *sole* [inculpatory] testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification may be encouraged." *Id.* (emphasis supplied).

test involving the scientific principles proffered; (2) relevant, as demonstrated by the nexus between those principles and the identification at issue; and (3) critical, as demonstrated by the absence of physical evidence corroborating the identification.[112] However, the court emphasized that a district court may exclude such testimony simply by finding that it fails to satisfy any one of those three criteria.[113] More significantly, the court held that its review of district court findings regarding any of the three factors is limited to determining whether the lower court abused its discretion.[114]

VI. ANALYZING *DOWNING*: THE FUTURE OF EXPERT IDENTIFICATION TESTIMONY

The admissibility standard articulated in *Downing*, unlike the blanket exclusionary rule effectively announced in *Amaral* and adopted by the vast majority of courts, gives proper effect to the liberal requirements of Rule 702, which encourages the admission of expert testimony that will assist the trier of fact and affords all such testimony a "presumption of helpfulness."[115] By finding that expert identification testimony can "under certain circumstances . . . assist the jury"[116] and that alternative methods of conveying its subject matter to the jury lack "viability,"[117] *Downing* directly and correctly repudiates the two primary rationales underlying *Amaral* and its progeny.[118] Since *Downing*, many courts have relied upon its reasoning to reject *Amaral* and deem

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112 *Downing*, 753 F.2d at 1226.

113 *Id.*

114 *Id.*

115 *Id.* at 1241 (citing *In re* Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 279 (3d Cir. 1983)).

116 *Id.* at 1231.

117 *Id.* at 1243.

118 As previously described, *Amaral* concluded that expert identification evidence is an improper subject of expert testimony by finding that such evidence would be no more helpful to jurors than cross-examination. *See supra* note 35. *See also* State v. Porraro, 121 R.I. 882, 893, 404 A.2d 465, 471 (1979) ("The jury was perfectly capable of assessing the witness credibility by weighing the inconsistencies and deficiencies elicited in cross-examination."). However, *Downing* properly recognized that, "[t]o the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event." *Downing*, 753 F.2d at 1230 n.6. *See also supra* note 108. Numerous jurists have rejected cross-examination as a viable alternative to expert identification testimony. *See, e.g., Watlkins*, 449 U.S. at 356-57 (Brennan, J., dissenting); *Langford*, 802 F.2d at 1183 (9th Cir. 1976) (Ferguson, J., dissenting) ("[C]ross-examination cannot uncover the reasons for misidentification because the witness honestly does not believe he or she has misidentified the defendant.").

expert identification testimony admissible in some cases.[119]

Unfortunately, two flaws in its analysis render *Downing* unlikely to cause any significant increase in the admission of such testimony, even among district courts within the Third Circuit. The first such flaw arises from the court's inexplicable refusal to hold, despite directly stating, that expert identification testimony satisfies Rule 702. By leaving resolution of that issue to the lower courts and limiting its review of those resolutions to an abuse-of-discretion inquiry,[120] *Downing* effectively insulates all exclusionary determinations sufficiently developed on the record. Trial courts, of course, are entitled to broad discretion when weighing probative value against prejudice.[121] However, no such discretion should protect from appellate review a trial court's balancing of the reliability of certain scientific principles against their potential to confuse or mislead, the first criterion of the *Downing* standard.[122]

Indeed, despite Judge Becker's overt suggestion that "it

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[119] Most notably, the New Jersey Appellate Division recently reversed a conviction because the trial court, in excluding proffered expert identification testimony by finding that its subject matter was within the common knowledge of jurors, had failed to conduct a pretrial hearing. State v. Gunter, 231 N.J. Super. 34 (App. Div. 1989). In remanding, the appellate division reviewed the "proliferating [judicial] consideration of this evidential issue during the last half-decade" and concluded that it "cannot foreclose the possibility that the requisite criteria for admissibility would be met were a proper opportunity to establish them afforded." *Id.* at 44. The court recognized that "[i]n the four years since *Downing*, several jurisdictions have either held that such testimony was admissible based on the showing made in the trial court or that the proponent was entitled to the opportunity to make such a showing." *Id.* at 46. *See, e.g.*, Skamarocius v. State, 731 P.2d 63 (Alaska Ct. App. 1987); People v. Brooks, 128 Misc. 2d 608, 490 N.Y.S.2d 692 (Co. Ct. 1985); People v. Beckford, 141 Misc. 2d 71, 532 N.Y.S.2d 462 (Crim. Ct. 1988); People v. Schor, 516 N.Y.S.2d 436 (Dist. Ct. 1987); People v. Lewes, 137 Misc. 2d 84, 520 N.Y.S.2d 125 (Co. Ct. 1987); State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1986). *But see contra* United States v. Blade, 811 F.2d 461 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 124 (1988); People v. Beaver, 725 P.2d 96 (Colo. Ct. App. 1986); State v. Kemp, 199 Conn. 473, 507 A.2d 1387 (1986); Bloodsworth v. State, 307 Md. 164, 512 A.2d 1056 (1986).

The Washington courts have articulated the most precise position concerning the admissibility of expert identification testimony, holding such testimony admissible where the challenged identification is the principal issue at trial, the defendant presents an alibi witness, and little or no other inculpatory evidence exists. *See* State v. Taylor, 50 Wash. App. 481, 749 P.2d 181 (1988); State v. Hanson, 46 Wash. App. 656, 731 P.2d 1140 (1987); State v. Moon, 45 Wash. App. 692, 726 P.2d 1263 (1987).

[120] *Downing*, 753 F.2d at 1226.

[121] *See, e.g.*, United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986) (describing the broad discretion afforded trial courts under Rule 403).

[122] *Downing*, 753 F.2d at 1226.

would appear that the scientific basis for [expert identification testimony] is sufficient to satisfy Rule 702,"[123] the district court in *Downing* held on remand that the proffered testimony was unreliable, citing "the inconsistent results produced by the studies and the lack of testimony regarding either the methodology of those studies or the underlying data on which the test results are based."[124] Despite that apparent inconsistency with its prior opinion, the Third Circuit affirmed that second exclusionary holding without opinion.[125]

In so doing, the court opened the door to the exact evil *Downing* sought to eradicate: the blanket exclusion of expert identification testimony based not on its relevance to particular cases but rather on its perceived unreliability in general. By insulating district court rulings under the protective cloak of abuse-of-discretion review, *Downing* also renders incongruous admissibility determinations readily foreseeable. Such an intra-circuit divergence on what is essentially a question of law cannot be justified and should not be tolerated. However, by needlessly remanding the question and limiting its subsequent scope of review, *Downing* invites the conflict.

The second flaw by which *Downing* improperly limits the future admissibility of expert testimony on eyewitness perception is its unmistakable message to lower courts that the existence of physical evidence corroborating the challenged identification justifies excluding such testimony.[126] The rationale underlying that justification apparently is that corroborating evidence renders the potential unreliability of a challenged identification sufficiently insignificant to make expert testimony establishing that unreliability both unnecessary and needlessly time-consuming.

That rationale is simply unsupportable. Applied literally, such an exclusionary rule would bar expert testimony addressing

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[123] *Id.* at 1241.

[124] United States v. Downing, 609 F. Supp. 784, 791 (E.D. Pa.), *aff'd*, 780 F.2d 1017 (3d Cir. 1986).

[125] On remand, the district court also found that the "risk of misleading the jury" and the lack of any "fit" between the proffered testimony and the identification also compelled its conclusion that the testimony did not satisfy Rule 702. *Downing*, 609 F. Supp. at 791-92.

[126] *Downing*, 753 F.2d at 1243. In a subsequent decision, Judge Becker suggested that *any* amount of corroborating evidence may be sufficient to exclude such testimony. United States v. Sebetich, 776 F.2d 412, 419 n.10 (3d Cir. 1985) (explaining that the district court's error in excluding the proffered expert testimony could not be deemed harmless "[b]ecause the crucial evidence against appellant consisted *solely* of [the] identification") (emphasis supplied), *cert. denied*, 108 S. Ct. 725 (1988).

identifications wanting any indicia of reliability solely by virtue of corroborating evidence which itself may lack any such indicia. More fundamentally, even where apparently reliable corroborating evidence exists, that mere existence cannot justify the exclusion of otherwise relevant defense evidence, particularly in light of the demonstrably persuasive impact identifications have on juries.[127] Stated differently, the significance jurors attach to eyewitness identifications,[128] even to those fraught with unreliability, is so demonstrably overwhelming that it effectively renders all other evidence—both inculpatory and exculpatory—irrelevant by comparison. Given the overriding influence of eyewitness identifications, the mere existence of corroborating evidence cannot support the exclusion of expert testimony which may reveal the identification as unreliable, and, hence, exculpate the defendant.

VII. CONCLUSION

The inherent unreliability of eyewitness identification evidence, combined with the dilution of constitutional protections designed to exclude unreliable identifications, necessitates the adoption of additional judicial safeguards where such evidence is both critical and disputed. The most effective such safeguard, expert identification testimony, should be admitted far more frequently than presently allowed by the majority *Amaral* standard. Enunciated over fifteen years ago by the Ninth Circuit, that standard is inconsistent with the more liberal criteria of the Federal Rules of Evidence and has resulted in the near-blanket exclusion of such testimony.

In *Downing*, the Third Circuit recognized the flaws of the *Amaral* standard and recommended more lenient admission of expert identification testimony. However, the tremendous discretion *Downing* afforded district courts, coupled with its open invitation to exclude such testimony in all cases except those based solely upon a single uncorroborated identification, will regrettably prevent any significant increase in its admission. Hence, criminal defendants who require expert testimony to attack unreliable identifications shall continue to face closed doors needlessly shut by a judiciary intent on limiting the scope and

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[127] Of course, the reliability of such evidence frequently will not be ascertainable at the time of the in limine hearing prescribed by *Downing*.

[128] *See supra* note 1. Indeed, studies demonstrate that the powerful impact of eyewitness identifications frequently overrides seemingly dispositive exculpatory evidence. *Id.*

duration of trials. Given the dismantling of the constitutional protections developed twenty-two years ago to ensure the exclusion of unreliable identification evidence arising from unduly suggestive pretrial procedures, those closed doors will almost certainly and tragically facilitate the conviction of innocent defendants.