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The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony

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THE UNFORTUNATE FAITH: A SOLUTION TO THE UNWARRANTED RELIANCE UPON EYEWITNESS TESTIMONY†

INTRODUCTION

"The purpose of evidence is to establish the truth at legal tribunals, in order that justice might be done . . . ."[1] Eyewitness testimony is often critical to finding the path to the truth. Throughout history from Moses[2] to Plato[3] until today there have been concerns over the accuracy of eyewitness testimony.[4] Eyewitness testimony is the greatest tool for the factfinder to discover the truth; simultaneously, it can be the factfinder's foremost deceiver.[5] In modern times, we have lessened our reliance upon the oath and placed our faith in the jury to find the truth from the testimony presented at trial.[6] The jury is an admirable mechanism in finding the truth, but it is not faultless. Countless cases with dubious eyewitness testimony have persuaded juries to render unjust guilty verdicts. A primary example of the hazard with eyewitness testimony is the case of Sacco and Vanzetti,[7] two immigrant anarchists, unjustly convicted. Regarding this infamous case,[8] Supreme Court Justice Felix Frankfurter[9] said:

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† The author would like to dedicate the publication of this article to his mother, Josephine Gross.

1. James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1533 (1997).

2. *See Exodus* 20:16 (King James). "Thou shalt not bear false witness against thy neighbour." *Id.*

3. *See* PLATO, PORTRAIT OF SOCRATES, BEING THE APOLOGY, CRITO, AND PHAEDO OF PLATO, (R.W. Livingstone, ed. 1938). "[H]ave sight and hearing any truth in them? Are they not, as the poets are always telling us, inaccurate witnesses?" *Id.* at 99.

4. *See* SIEGFRIED L. SPORER ET AL., PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION, 3 (1966).

5. *See id.*

6. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 582 (1997).

7. *See* Commonwealth v. Sacco, 151 N.E. 839 (Mass. 1926). In 1920, two men committed a payroll robbery netting over $15,000.00, killing a guard and the paymaster. *See id.* at 843. *See also* United States v. Wade, 388 U.S. 218 (1967). Justice Brennan comments on the case of Sacco and Vanzetti: "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identifications." *Id.* at 228.

8. *See generally* EDWIN BORCHARD, CONVICTING THE INNOCENT (1932). The district attorney of Worcester County, Massachusetts said, "Innocent men are never convicted. Don't worry about it. It is a physical impossibility." *Id.* at v.

9. *See id.* At the request of Justice Frankfurter and after the obvious error in the execution of Sacco and Vanzetti, Borchard analyzed sixty-five cases. All were cases of innocent people wrongfully convicted. Twenty-nine of these cases were due to eyewitness misidentification.

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> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.[10]

Consider the analogy of a crime as a "play" in the National Football League ("NFL"). In the reality of everyday life, witnesses rarely have the foresight that a crime will occur. At the event's critical hour trained observers will be lacking. In football, the opposite is true. Officials prepare for predictable events. Though trained and experienced, these officials continue to make mistakes. From 1986 to 1991, NFL football experimented with "instant replay."[11] This allowed officials to review plays on television after the action to evaluate the correctness of their calls. Usually, the official was correct in his interpretation of the events occurring on the field; however, dramatic errors surfaced. Consider the impact of a testifying official, a cool and competent professional, on a jury. It is unfortunate that crimes do not occur before the steadfast, unbiased eye of an instant replay camera. We have only the occasional "human cameras" recording the heady event with their errant memories, faulty eyesight, and prejudicial baggage.[12] Experts should inform the jury respecting these frailties.[13] Suprisingly, such expert testimony is at the discretion of the court in specific jurisdictions and inadmissible *per se* in others.[14]

The reason for nondiscretionary admission of this expert testimony upon request is to counter the power of direct, eyewitness testimony. "Because misidentifications are commonly understood to be a leading cause of the system's miscarriages of justice,"[15] the issue is supremely important. The mistaken eyewitness, just as the incorrect NFL offi-

10. *Wade*, 388 U.S. at 228 (discussing problems with mistaken identity).

11. Frederick C. Klein, *On Sports: Instant Nothing*, WALL ST. J., Feb. 19, 1999, at W7.

12. *See The Death of a Perfectionist: Japan's Kurosawa Akira—A Man for all Cultures*, ASIAWEEK, Sept. 19, 1998, *available in* 1998 WL 13699821. The Japanese director, Akira Kurosawa, explored these issues as the theme of his 1951 Oscar-winning film, "Rashomon." His concept was that different people have varying perceptions of events. In "Rashomon," four different protagonists give conflicting accounts of a rape and a murder. None of the accounts were true. *Id.*

13. *See* United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973). "The theory upon which expert testimony is excepted from opinion evidence rule is that such testimony serves to inform the court [and jury] about affairs not within the full understanding of the average man." *Id.* at 1152-1153.

14. *Compare* United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Green, 548 F.2d 1261 (6th Cir. 1977); United States v. Watson, 587 F.2d 365 (7th Cir. 1978); United States v. Brown 540 F.2d 1048 (10th Cir. 1976); *with* United States v. Calloway, 971 F.2d 675 (11th Cir. 1992).

15. David M. Shofi, Comment, *The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 13 PACE L. REV. 1101, 1141 (1994).

cial, is a powerful witness. The jury recognizes that the witness has the best vantage point to describe what occurred. The average juror is unaware of the unreliability of eyewitness testimony because the issues are complex and counterintuitive.[16] Recent research tends to run contrary to the training of most members of the judiciary.[17] The jury, hindered by this lack of knowledge, must attempt to ascertain the truth of what transpired from the evidence at trial.

The purpose of this Comment is to argue for the mandatory admission of expert testimony on eyewitness testimony in criminal trials with a jury as the finder of fact. Juries have a preference for direct testimonial evidence.[18] But, the impact of direct eyewitness testimony is often misleading to jurors. The rule of law allows eyewitness testimony in most cases but does not require expert testimony to illuminate it.[19] This idea requires a change in the Federal Rules of Evidence. The nondiscretionary admission of expert witness testimony will aid the jury when the accuracy of eyewitness testimony is the pivotal proof.

Part I chronicles historical mistaken identification cases that exemplify major failures in the criminal justice system. Part II presents the unique reasons why eyewitness testimony creates the need for special expert testimony. Part III analyzes the current state of the law in Texas, allowing admission of expert testimony on the accuracy of eyewitness testimony. Part IV argues for the proposed solution to unreliable eyewitness testimony and the jury's unreasonable dependence upon it. The Conclusion explains why the recommended change in the law is prudent and necessary for the cause of justice.

I: OUR HERITAGE OF MISTAKEN IDENTITY LEGAL TESTIMONY

It was not "until the second half of the nineteenth century [that] accused criminals anywhere in the common law world [could] testify under oath in their own trials."[20] The oath was the guarantor of truth because of the "perceived divine power of the oath to compel truthful

16. *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995). Commenting on the tricks of the mind that cause witness inaccuracy, Leippe writes, "Is it all common sense that jurors know already? The data suggest otherwise." *Id.* at 921.

17. *See* Heather G. Hamilton, Note, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS J. 201 (1998). "Judges not motivated to invest the energy and resources necessary to attain a sophisticated and critical knowledge of the methods of science will be tempted to transfer the responsibility for evaluating science to expert witnesses or jurors." *Id.* at 201.

18. *See* Leippe, *supra* note 16, at 910.

19. *See* United States v. Brien, 59 F.3d 274 (5th Cir. 1995) ("[E]xpert evidence involves costs and risks—too obvious to need recounting—that distinguish it from lay evidence about 'what happened here.'"). *Id.* at 274. This Comment disputes the distinction drawn by the Fifth Circuit. An expert might testify directly about the perception of "what happened here."

20. Fisher, *supra* note 6, at 579.

testimony."[21] Our judicial system became "more and more willing to declare that the jury—and not the oath—had the job of screening untrustworthy evidence from the decision making process."[22] The demeanor of the witness and their testimonial content during direct and cross-examination are the jury's principle devices to ascertain the truth.[23]

The ancient Egyptians utilized expert witnesses in the search for the truth.[24] "Roman law required the factfinder to accept the expert's conclusions as definitive (i.e., probably as part of the final judgment, as opposed to the modern view that the expert evidence is purely advisory and can be accepted or rejected by the court)."[25] Trial by battle, as a legal institution, arose in the fifth century and continued through the Norman Conquest in 1066.[26] The rise of medieval trial by battle and trial by ordeal[27] eliminated the use of expert testimony.[28] In 1215, the Church forbade priests to take part in trial by ordeal, giving rise to jury trials.[29] Gradually, the use of experts resumed. "Experts were not always under direction and control of contending adversaries," instead the initial served an advisory role in early English courts.[30] Expert witnesses have resurfaced in modern times to "help" the jury,[31] but expert witnesses upon eyewitness testimony "have not been warmly embraced by all courts."[32]

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21. *Id.*

22. *Id.* at 582.

23. *See* Gregory G. Sarno, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R.4th 1047 (1987). "The adversary system of justice has historically relied on cross-examination as a mechanism to alert the jury to any inaccuracies or inconsistencies in the testimony of an eyewitness. . . ." *Id.* at 1072.

24. *See* Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L. J. 181, 184 (1996).

25. *Id.* at 185.

26. *See* Stephen A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983). "Trial by battle was a means of settling conflicts that required the disputants or their champions to engage in physical combat until one side yielded (by speaking the word 'craven'), was decisively defeated, or, in certain serious criminal matters, was slain." *Id.* at 717.

27. *See id.* "[I]n England the primary forms of ordeal required the litigant to carry a red-hot iron bar, place an arm in boiling water, or be immersed in deep water." *Id.* at 718. The premise was that God would intervene by a miraculous sign indicating the litigant undergoing the ordeal was in the right. *See Id.*

28. *See* Taylor, *supra* note 24, at 185.

29. *See* Fisher, *supra* note 6, at 583.

30. *See* Stephan Landsman, *One Hundred Years of Rectitude: Medical Witnesses at the Old Bailey, 1717-1817*, 16 LAW & HIST. REV. 445, 446 (1998).

31. *See* Taylor, *supra* note 24, at 186.

32. Howard J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 How. L.J. 237, 240 (1995).

History is replete with illustrations proving that experts on eyewitness testimony would help juries reach just results.[33] The robbery case of Sergeant Joseph Lesurques[34] was such an example. Five men escaped with considerable plunder from the holdup of a postal coach.[35] What followed was a series of trials based upon eyewitness testimony.[36] Sound reasoning would preclude Lesurques as a suspect. The prosperous Lesurques had a wife and three children. He was an honorably discharged soldier. Lesurques had an alibi for the robbery but was tried and executed[37] upon the basis of eyewitness testimony. The postal coach robbery spawned a sum of five independent trials resulting in seven executions. The result is a "glaring instance[ ] of . . . tragedy"[38] in which Lesurques "cannot be made whole."[39]

Testimony by eyewitnesses is unreliable even when the witness has a prolonged time to observe the suspect. On Christmas Day in 1800, Catherine Secor married Thomas Hoag.[40] By March of 1801, Hoag had left and never returned.[41] The abandoned wife pressed a bigamy suit arising from this marriage against a resident of New York – Joseph Parker. Both sides of the controversy offered direct eyewitness testimony.[42] Secor and an array of witnesses swore that Hoag and Parker were the same person. Secor and her witnesses had known this man for several months, convinced that he was Mr. Hoag. Parker's witnesses stated that Parker was in New York at the time of the short marriage and did not leave the city, making it an impossibility that Parker was Hoag. The court held against Secor and her witnesses. The decision hinged upon the fact that Thomas Hoag had a scar on the bottom of his foot and Parker did not.[43] Incredibly, Catherine Secor had testified mistakenly concerning the identity of her own husband.

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33. *See* United States v. Wade, 388 U.S. 218 (1967). "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Id.*

34. *See* SPORER, *supra* note 4, at 3. This infamous case took place in France in 1796. *See id.*

35. *See id.* The intrepid bandits stopped to dine at a nearby tavern before their final escape into the countryside. The tavern management and customers were the eyewitnesses. *See id.*

36. *See id.*

37. *See id.*

38. United States v. Keegan, 71 F. Supp. 623, 626 (S.D.N.Y. 1947) (considering the remedy for those unjustly accused and convicted of a crime).

39. *Id.*

40. *See* James K. Riley, *A Remarkable Case of Disputed Identity*, 70 FEB. N.Y. ST. B.J. 8 (1998) Riley mentions the similar facts of the 1991 novel *Sommersby* by William Least Heat-Moon. In the movie, made from the book, actress Jody Foster, who plays Mrs. Sommersby states, "A woman knows her own husband." *Id.*

41. *See id.*

42. *See id.*

43. *See id.*

More recently, identity testimony has been provocative, as in the case of John Demjanjuk.[44] Demjanjuk was a retired automobile factory worker in the United States and was a law abiding family man.[45] Many eyewitnesses asserted that Demjanjuk's previous employment was as a guard at Treblinka, a Nazi death factory.[46] This guard sank to a depth of inhumanity earning the name "Ivan Grozny" ("Ivan the Terrible") by the Treblinka inmates.[47] Witnesses had numerous physical encounters with "Ivan" and had observed him closely; however, many years had passed.[48] The United States allowed Demjanjuk's extradition to Israel.[49] After receiving a death sentence from a lower court, the Supreme Court of Israel overturned Demjanjuk's sentence.[50] The Supreme Court of Israel decided that the evidence of the eyewitnesses in the previous trial contradicted other evidence proving that Demjanjuk was not "Ivan the Terrible."[51] The identity of Ivan the Terrible remains unresolved.

Many trials of crimes committed in our own country have involved mistaken identity. In *Michigan v. Anderson,*[52] the court discussed the conviction of Louis Nasir of robbery by eyewitness testimony. Six of his co-workers testified that Nasir was at his job at the time the robbery occurred.[53] The power of the eyewitness at the scene of the crime overcame his coworkers' testimony, sending the defendant to prison.[54] His vindication came later. Due to mistaken eyewitness tes-

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44. *See generally* Joshua Muravchik, *Demjanjuk: A Summing-Up*, 103 COMMENTARY 46, April 1997.

45. *See Judge Restores U.S. Citizenship of Man Cleared of Being Nazi War Criminal*, BUFF. NEWS, Feb. 1, 1998 at A2.

46. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 365-73 (6th Cir. 1994).

47. *See id.* at 371. The prosecutor stated:

> Finally, we can reasonably expect to present the following evidence that Demjanjuk was at Treblinka: (1) the testimony of two or three Israeli police and one German, each of whom was initially interviewed by the Israeli Police. Each will identify the defendant as Ivan the Ukrainian who worked at the gas chambers and brutally beat Jews solely on the basis of the defendant's visa photograph taken in 1952.

48. *See id.* at 368. Otto Horn, a German national was stationed at Treblinka from September 1942 until September 1943. He was seventy-six when interviewed on November 14, 1979. Horn picked Demjanjuk from a photo line-up. *See id.*

49. *See* Muravchik, *supra* note 44, at 49.

50. *See id.* at 50.

51. *See id.* It is clear that Demjanjuk was not "Ivan the Terrible." The dual edged sword of mistaken identity testimony which can convict the innocent can also free the guilty for it is certain that Demjanjuk was a Nazi Death Camp collaborator if not "Ivan the Terrible." *See id.*

52. *See* People v. Anderson, 205 N.W.2d 461 (Mich. 1973). Mr. Nasir spent 375 days in prison for another man's crime. Dimples Anderson, the victim, gave eyewitness testimony convicting Mr. Nasir. The defense attorney asked Anderson, "It's possible that you could have made a mistake today?" To which he replied, "No." *Id.* at 483.

53. *See id.* at 483.

54. *See id.*

timony the defendant suffered a great loss (time in prison) that he can never recoup.[55]

These are a few mistaken identity cases. Ruefully, such cases are easy to find because eyewitness testimony is the premier cause of the conviction of innocent persons.[56] Because convicting the innocent is the most tragic injustice possible in our criminal justice system, unwarranted reliance upon eyewitness testimony is, arguably, our greatest predicament.[57]

II: THE UNIQUE DIFFICULTY OF EYEWITNESS TESTIMONY

Juries have an unfortunate faith in the accuracy of eyewitnesses.[58] Frequently eyewitnesses make mistakes.[59] Therefore, juries should not believe them unquestioningly. The Supreme Court recognized that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries."[60] "All evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[61] Eyewitness misidentification is the chief cause of wrongful conviction.[62] The propensity for blunder is so great that it is nearly equal to all other forms of error combined.[63] The preference for direct eyewitness testimony, with its inherent degree of mistake, is the "greatest single threat to the achievement of our ideal that no innocent man shall be punished."[64]

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55. *See id.*

56. *See generally* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (NATIONAL INSTITUTE OF JUSTICE, 1996) (explaining the cause of twenty-eight convictions of rapist-murders later vindicated by DNA evidence. Twenty-six convictions were primarily by eyewitness testimony.); Arye Rattner, *Convicted But Innocent*, 12 LAW & HUM. BEHAV. 283, 291 tbl.6 (1988) (identifying nine major categories of errors.) In 191 cases, eyewitness misidentification is the number one cause of error at 52.3 %.

57. *See* State v. Thomas, 586 A.2d 250 (N.J. 1990) ("Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed." *Id.* at 254.

58. Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 167 (1989/90). "[M]ounting empirical data from psychological studies suggest that lay persons such as jurors inadequately evaluate the testimony of others." *Id.*

59. *See* Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547, 552 (1997) (quoting C. Ronald Huff, "[T]he single most important factor leading to wrongful conviction in the United States and England is eyewitness misidentificaiton . . . in good faith.").

60. Watkins v. Sowders, 449 U.S. 341, 352 (1981).

61. *Id.*

62. *See* SPORER, *supra* note 4, at 4, tbl. 1.1.

63. *See id.*

64. Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970).

Although the reliability of expert witness testimony has been questioned in the past, recent scientific findings into the nature of eyewitness testimony is the pivotal reason for a change in the current law. Eyewitness testimony depends upon the ability of an individual to perceive the event in question and record those events in memory.[65] The witness must also be able to articulate those recollections to others.[66] The jury's task is to discern the truth from the testimony; however, some witnesses receive more credibility than their testimony warrants. Memory tricks that evade common knowledge deceive the jury. Imagine the analogy of the jury being the audience to a magic show. This is an audience that is not likely to have seen a magic show (trial) in the past and has no experience in magic. This audience is deluded because the mental prestidigitation evades the strength of the jury—their reasoning ability. The presentation often beguiles the magician (witness) too.[67] The discussion below is of this hocus-pocus of the mind that defeats the jury's fact-finding ability. We should help the jury by allowing the testimony of an expert to explain these potential deceptions.

Problems with memory are common to all people.[68] "[M]ost of the forgetting tak[es] place within the first hours following the event and certainly within the first few days following the event."[69] Essentially, witnesses forget faster than the average juror believes. The rate of forgetting varies over time and the typical juror may not be aware of this proven fact.

One counterintuitive riddle with perception is a factor known as "weapon focus."[70] Use of a deadly weapon in a crime, notably when aimed at a perceiver, causes the focus to be on that weapon. This is weapon focus. "Weapon focus can cause a narrowing of percep-

65. *See* Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53 (1991).

66. *See id.*

67. *See* Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 120 (1997) (quoting one of Peter Brown's thirty maxims of cross-examination,"Witnesses Sometimes Brainwash Themselves.").

68. *See* United States v. Moore, 786 F.2d 1308 (5th Cir. 1986).

> A "forgetting curve," exists which shows which memory decreases at a geometric rather than an arithmetic rate; the "assimilation factor," that indicates that witnesses sometimes incorporate inaccurate post-event information into their identifications; the "feedback factor," that demonstrates that witnesses who discuss the case with each other unconsciously may reinforce mistaken identifications.

Id. at 1311.

69. United States v. Norwood, 939 F. Supp. 1132, 1138 (D.N.J. 1996). In *Norwood*, the court permitted expert testimony on eyewitness testimony on all of the following topics: (1) cross-racial identification; (2) weapon focus; (3) effect on stress on identification; (4) forgetting curve; (5) transference; (6) witness confidence-accuracy correlation; (7) suggestiveness in identification procedures; and (8) the exposure duration effect. *See id.*

70. *Id.* at 1137.

tion."[71] "[E]yewitness identifications are less accurate when a weapon was present on the crime scene, than when a weapon was not present."[72] This oddity of perception deceives eyewitnesses. Unfortunately, the common juror is unaware of weapon focus.

A significant determinant degrading accurate perception of prospective witnesses is their own internal systems. A famous study demonstrated witness inaccuracy due to internal beliefs by presenting to witnesses a drawing of two men, one white and one black, in a heated discussion.[73] The white man was holding a straight razor.[74] When recalling the drawing, a fair percentage of the witnesses mistakenly recalled the razor as being in the hand of the black man.[75] The study provides insight into the transformation of the witnesses' perception. How we see an event depends upon what we believe. Beliefs that form long before the perceived event may alter the perception of the event.

People v. McDonald[76] is one of the few cases overturned because the lower court failed to allow the testimony of an expert witness on eyewitness testimony. The central issue in *McDonald* was cross-racial identification.[77] Often derided as a racial stereotype, scientific proof exists that people have difficulty in identifying people of other races.[78] In *McDonald*, the state accused a black male of killing an Hispanic male. Six defense witnesses testified that McDonald was not in the state at the time of the killing. Still, the trial court convicted McDonald. The California Supreme Court overturned the decision stating:

> [S]ome jurors may deny the existence of the own-race effect in the misguided belief that it is merely a racist myth exemplified by the derogatory remark, "they all look alike to me," while others may believe in the reality of this effect but be reluctant to discuss it in jury deliberations for fear of being perceived as bigots . . . .[79]

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71. Jordan v. State, 928 S.W.2d 550, 552 (Tex. Crim. App 1996).

72. *Norwood,* 939 F. Supp. at 1137.

73. *See* GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR, 71 (1947).

74. *See id.*

75. *See id.*

76. 690 P.2d 709 (Cal. 1984).

77. *See id.* at 712.

78. *See* United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

> The data available, while not exhaustive, unanimously supports the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race. The problem is by no means insubstantial; a significant percentage of the identifications in this jurisdiction are inter-racial. Yet, we have developed a reluctance—almost a taboo—to even admit the existence of the problem, let alone provide the jury with the information necessary to evaluate its impact.

Id. at 559. *See also* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (holding "studies demonstrate the inherent unreliability of cross-racial identifications.").

79. *McDonald*, 690 P.2d at 721.

Another phenomenon hampering eyewitness identification is "unconscious transference."[80] Unconscious transference occurs when a person observed later is confused with a person seen in a prior situation.[81] For example, a witness sees a person an hour after a robbery and then later sees the same person in a lineup, the witness may mistakenly identify the innocent person as the robber. This trick of the mind is prevalent in photographic identifications.[82] A witness participating in a photographic identification "may relate . . . her familiarity with the picture to the crime instead of to the previous identification session."[83] The mutation of the witness's recollection results because memory is not a static imprint, but is effected by events occurring after the initial perception. Memory is constantly changing, and with each flux, the reliability of the eyewitness diminishes.[84]

Another imprecise widespread notion concerning memory is the effect of stress on memory.[85] The predominant belief is that stress aids memory.[86] However, stress impairs memory.[87] A 1998 study conducted at the University of South Florida by Psychology Professor David M. Diamond placed mice into a controlled environment.[88] In the environment was a pool of water and, just below the surface of the waterline, a "secret" exit to another chamber of the environment. The mice learned the location of the exit and perfected their method of escape through the hidden chamber. Then a cat—an element of stress—entered the environment. All of the mice forgot the location of the secret exit, proving that stress effaces memory. Dr. Diamond

80. *See* United States v. Norwood, 939 F. Supp. 1132, 1137 (D.N.J. 1996).

81. *See id.*

82. *See Some Doubt Has Been Raised*, TIME, Dec. 26, 1983, at 14. Unconscious transference is a theory for the conviction of Lenell Geter of Greenville, Texas. Mr. Geter was teetotaling, nonsmoking, quiet, and religious. He was an engineer recruited by E-Systems of Greenville, Texas. Henry Wade's (of *Roe v. Wade* fame) Dallas District Attorney office prosecuted him for robbing a Kentucky Fried Chicken of $615.00. The jury convicted Mr. Geter. Key evidence against him was eyewitness testimony. Police investigators showed pictures of Mr. Geter to witnesses after the robbery. He spent 18 months in prison. The State of Texas released Mr. Geter after he appeared on an episode of "60 Minutes." *See id.* at 14.

83. Arizona v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1983).

84. *See* Peter J. Neusfeld, *Have You No Sense of Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189, 197 (1993). A probable example of unconscious transference is the case of Walter Snyder, Jr. After the rape of his neighbor, the police photographed Mr. Snyder. From the photograph the victim failed to identify Mr. Snyder as the perpetrator. Seeing Mr. Snyder washing his car a few days later, she became convinced that he *was* the rapist. Six and one-half years after his jury conviction, the prosecutor consented to a re-examination of the rape kit using DNA testing. DNA testing proved him innocent. Under Virginia law, Mr. Snyder was ineligible for a new trial. On April 23, 1993, Governor Douglas Wilder pardoned Mr. Snyder. Mr. Snyder served seven years of a forty-five year sentence for rape. *See id.* at 197-98.

85. *See Norwood,* 939 F. Supp. at 1138.

86. *See* United States v. Sebetich, 776 F.2d 412, 419 (5th Cir. 1997).

87. *See Norwood,* 939 F. Supp. at 1137.

88. *See How Quickly They Forget*, USF MAGAZINE, Winter 1998, at 14.

suggests that his experimentation is relevant to humans.[89] A victim or witness of a crime may give mistaken testimony as a result of the stress of the event.[90] Subjecting people to the holdup or the murder acutely diminishes their ability to perceive, remember, and recall.[91] Jurors naturally empathize with the personal account of one who has endured horrendous hardship; however, the victims have impediments to accurately recount the events in question.[92] Jurors inappropriately give the witness or victim enhanced credibility.[93] The Fifth Circuit in *United States v. Moore*[94] observed, "[I]t is commonly believed that witnesses remember better when they are under stress. The data indicates the opposite is true."[95]

The difficulty in obtaining accurate testimony under fair and normal circumstances is evident. Infer the added complexity in finding the truth from the intentional clouding of the witnesses' recollection. In *Miranda v. Arizona*,[96] the court described several police techniques of altering recollections of the witness or accused. The police manipulated photo identifications, lineups, and reverse lineups to obtain positive witness identifications or confessions from the accused. These suggestive techniques build witness agreement with police suspicion.[97] Repetition of the witnesses's story alters their memory. Suggestion causes the account to become progressively stronger.[98]

One method to fashion the outcome of a lineup is the alteration of the lineup instruction. Telling the prospective witness to pick someone or no one based upon their personal perception and recollection

89. *See* DAVID M. DIAMOND ET AL., NEW FRONTIERS IN STRESS RESEARCH MODULATION OF BRAIN FUNCTION, 117 (Aharon Levy et al. eds., 1998).

90. *See Norwood,* 939 F. Supp. at 1137.

91. *See* State v. Thomas, 586 A.2d 250, 436 (N.J. Super. Ct. App. Div. 1991) (finding, "Victim identification, however sincere, is notoriously unreliable."

92. *See id.*

93. *See* Underwood, *supra* note 67, at 122. "The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his mistakes, if you can make them apparent, but are slow to believe him guilty of perjury." *Id.*

94. 786 F.2d 1308 (5th Cir. 1986).

95. *See Moore*, 786 F.2d at 1312.

96. 384 U.S. 436 (1966).

97. *See* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649 (1996). "[C]learly, the impact of the prosecutor and the manner in which he or she assesses and handles the witnesses in a homicide case can result in an effective prosecution of the guilty or a tragic persecution of the innocent." *Id.* at 663.

98. *See* James M. Doyle, *Confidence and Accuracy in Eyewitness Trials*, MASS. L. WKLY., June 2, 1997, at 39.

> An eyewitness's confidence is so malleable that even the most sincere search for the truth on the part of law enforcement has no basis in reliability. Police, who tend to model their interviewing techniques on those used to interrogate suspects, can unconsciously bolster an eyewitness confidence in a hundred ways.

Id.

of an incident is the fair technique. Alternatively, the biased instructor tells the witness to "pick the 'one who did it.'"[99] Biased instruction increases the likelihood of the witness making a positive identification. "Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness's opportunity for observation is insubstantial and, thus, his susceptibility to suggestion was the greatest."[100]

Another technique to procure a desired identification is to degrade the line up fairness. "The level of similarity between the suspect and the foils defines the lineup fairness."[101] The witness's selection of a suspect deviates with the number and quality of foils.[102] In *Biggers v. Neil,*[103] the police utilized a "show up" technique. In a "show up," the police "bring a single suspect before a victim of a crime for identification purposes."[104] Bringing the witness before a *single* suspect who is in custody is manifestly suggestive of the suspect's guilt. Amazingly, the "show up" is still a viable technique for identification. In *Stovall v. Denno*,[105] the state prosecuted the attacker of a woman and her husband. With the husband murdered and the wife near death, police brought the defendant to the woman's hospital room.[106] She identified the defendant as the attacker. The standard for evaluating the "show up" is to determine if the identification technique was suggestive and then to evaluate the "totality of circumstances."[107] This test requires that the court contemplate all circumstances involved with the identification. The rule permits the trial court to accept highly suggestive identifications, as in *Stovall*, if the court feels that the circumstances are acceptable.

Witnesses are susceptible to suggestive cues and comments before and after the lineup, prompting psychologists to acknowledge dilemmas with the lineup.[108] The adversarial system tempts protagonists to influence witnesses. Not only do eyewitnesses have natural sensory defects, they are subject to intentionally introduced deception and innocently interposed suggestion.[109] The United States Supreme court has recognized:

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99. Leippe, *supra* note 16, at 916.
100. United States v. Wade, 388 U.S. 218, 229 (1967).
101. Leippe, *supra* note 16, at 909.
102. *See* Gary Wells, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 771 (1995). A foil is a known innocent person put into the lineup to test the memory of the witness. A fair lineup should have numerous foils that resemble the accused. *See id.*
103. 448 F.2d 91, 94 (6th Cir. 1971), *rev'd on other grounds*, 409 U.S. 188 (1972).
104. *Id.*
105. 388 U.S. 293, 302 (1967).
106. *See id.*
107. *See* United States v. Tyler, 714 F.2d 664 (6th Cir. 1983).
108. *See* Wells, *supra* note 102, at 771.
109. *See* Mullane, *supra* note 65, at 53.

> The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and little or no effective appeal from the judgment rendered by the witness—"that's the man."[110]

The factors mentioned previously in this section pertain to the witness's ability to perceive, record the event into memory, and recollect that event. One significant factor that pertains to the jury's ability to weigh the credibility of a witness is the confidence of the witness during testimony. "One study found that eighty percent of the all jurors concluded a witness had correctly identified the culprit. Unfortunately, the percentage did not significantly vary when the witness identified the wrong person."[111] Witness confidence may be the strongest factor influencing the jury.[112] The traditional safeguards of cross-examination and judge's instructions are unaffected by the potency of the confident witness testimony.[113]

III: THE CURRENT RULE FOR EXPERT TESTIMONY ADMISSION IN TEXAS

In trial, the lawyer may encounter mistaken eyewitnesses. If the eyewitness testimony violates due process, it requires exclusion. The Supreme Court precludes inclusion of testimony where identification procedures were so unnecessarily suggestive[114] as to create a substantial likelihood of an incorrect identification or where counsel was absent at an identification proceeding.[115] This prevents the worst of abuses, but the lawyer has concern because:

> (1) Jurors appear to overbelieve eyewitnesses.
> (2) Jurors apparently have difficulty reliably differentiating accurate from inaccurate eyewitnesses.
> (3) Jurors are not adequately sensitive to aspects of witnessing and identification conditions . . . .

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110. United States v. Wade, 388 U.S. 218, 235 (1967).

111. Mullane, *supra* note 65, at 53.

112. *See* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 825 (1995).

113. *See id.* at 817.

114. *See* Wade, 388 U.S. at 229.

115. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259 (1990). This safeguard does not provide an ample assurance of justice. Justice Rosenberg observed:

> Courts are reluctant to exclude eyewitness evidence on due process grounds. Repeatedly, confronted by suggestive identification procedures, courts conclude that eyewitness evidence cannot be excluded on due process grounds unless the pretrial procedure caused a "very substantial likelihood of irreparable misidentification."

Id.

> (4) A major source of juror unreliability is their reliance on witness confidence . . . .[116]

The lawyer decides whether to use an expert to contest the expected eyewitness testimony. The lawyer believes that "[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes."[117]

In *Frye v. United States*[118] the principles for admission of expert testimony at trial were formulated. In *Frye*, the central issue was the reliability of the test for finding truth using systolic blood pressure.[119] The question before the Court was the admissibility into evidence of the test results.[120] The *Frye* rule states that scientific evidence was admissible if the technique has "gained general acceptance in the particular field in which it belongs."[121]

In *Daubert v. Merrell Dow Pharmaceuticals., Inc*,[122] the Supreme Court acknowledged that it had moved away from the *Frye* test to the position congruent with the Federal Rules of Evidence.[123] Thus, the Federal Rules of Evidence usurped the common law regarding expert testimony admissibility. Consider Federal Rule 401,[124] which requires relevant evidence. "Relevant evidence is defined as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence."[125] Courts have barred expert testimony on eyewitnesses if eyewitness testimony is not a key issue.[126] Rule 402 applies public policy limitations to relevant evidence stating, "[A]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."[127] Expert testimony has no public policy impediment to admission and, therefore, should be admitted.

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116. Penrod, *supra* note 112, at 825.

117. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 51 (1902).

118. 293 F. 1012, 1014 (D.C. Cir. 1923).

119. *See id.* at 1013.

120. *See id.* at 1013-14. Frye was on trial for murder. In a decision from the Court of Appeals of the District of Columbia, the court ruled that the precursor of the lie detector failed the test of admission into evidence because it had not received recognition and approval from a significant portion of the scientific community. *Id.*

121. *Id.* at 1014.

122. 509 U.S. 579 (1993).

123. *See id.* at 587.

124. *See* FED. R. EVID. 401. (" 'Relevant evidence' means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.").

125. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 587 (1993) (quoting FED. R. EVID. 401).

126. *See* United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986).

127. *Daubert*, 509 U.S. at 587 (quoting FED. R. EVID. 402).

Rule 403 allows exclusion of evidence on grounds of prejudice, confusion, or waste of time.[128] This is a critical decision for the judge because expert testimony on eyewitness testimony is held by antagonists to be confusing and a waste of time, but it is vital to clarity. The judge's ruling on admissibility of the expert witness testimony can directly impact the accuracy of the jury's decision. "It is important for juries to render accurate decisions because inaccurate decisions can have devastating consequences."[129]

Finally, Federal Rule of Evidence 702[130] states:

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

The court in *Daubert*, acknowledged that "[n]othing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility."[131] With that sentence the *Frye* test met its death knell in most states,[132] and the Federal Rules became the definitive test to evaluate the admissibility of expert witnesses.

Texas is typical of states using the *Daubert* standard. The leading Texas criminal case on the admission of expert witnesses is *Kelly v. State*.[133] In *Kelly*, the court applied Texas Rule of Evidence 702,[134] which is identical to the Federal Rule 702. In addressing novel scientific evidence, the court requires three criteria of reliability.[135] In *Nations v. State*[136] the court provided a concise summary of *Kelly*: "Novel scientific evidence must prove: (1) the underlying scientific evidence must be valid; (2) the technique applying the theory must be

128. *See* FED. R. EVID. 403. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.")

129. Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1067-68 (1995).

130. FED. R. EVID. 702.

131. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587 (1993).

132. *See* Heather G. Hamilton, Note, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS J. 201 (1998) (providing a determination on expert testimony admission by state).

133. 824 S.W.2d 568 (Tex. Crim. App. 1992).

134. TEX. R. EVID. 702.

> Testimony by Experts, 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, or training, or education, may testify thereto in the form of an opinion or otherwise.

Id.

135. *See* Nations v. State, 944 S.W.2d 795, 797 (Tex. App.—Austin 1995, pet ref'd).

136. *Id.*

valid; and (3) the technique must have been properly applied on the occasion in question.[137]

In Texas, admissibility of expert testimony falls within the broad discretion of the trial judge.[138] The decision will stand unless viewed as an abuse of discretion.[139] Federal Rule of Evidence 702 allows testimony assisting the trier of fact but does not mandate this assistance.[140] The Fifth Circuit concludes that "[a]s complex scientific and technical evidence becomes more commonplace, in this ever-advancing computer age, the need for the trial court generalist to seek expertise in discharging *Daubert* responsibilities becomes increasing[ly] evident and compelling."[141]

The test formulated in *Daubert*[142] and *Kelly*,[143] with the trial judge as the arbiter, has several components. The first element of this test is whether the technology is testable.[144] Second, the court considers the amount and type of publication of scientific research on the topic.[145] The court values the peer review of the expert's ideas.[146] A third consideration is the known or potential rate of error with the scientific evidence.[147] A fourth element of the decision of the court is the qualifications of the expert and the nature of the testimony that she is seeking to present.[148] Finally, the court could consider the acceptance within the scientific community of the technique or technology offered

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137. *Id.* The court in *Nations* further summarized other points in *Kelly*:

> The court went on to suggest a nonexclusive list of factors that might influence liability.
>
> (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;
>
> (2) the qualifications of the testifying expert;
>
> (3) the existence of literature supporting or rejecting the underlying scientific theory and technique;
>
> (4) the potential rate of error of the technique;
>
> (5) the availability of other experts to test and evaluate the technique;
>
> (6) the clarity with which the underlying scientific theory and technique can be explained to the court;
>
> (7) the experience and skill of the person who applied the technique on the occasion in question.

Id.

138. *See* United States v. Lopez, 543 F.2d 1156, 1158 (5th Cir. 1976).

139. *See* Joiner v. General Elec. Co., 78 F.3d 524, 535 (5th Cir. 1996); *rev'd*, 522 U.S. 136 (1997).

140. *See* FED. R. EVID. 702 (regarding admission of expert witness the court's position is the expert "may testify").

141. *Joiner*, 78 F.3d at 535 (Birch, J., concurring).

142. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579, 589 (1993).

143. *See* Kelly v. State, 824 S.W.2d 568, 571 (Tex. Crim. App. 1992).

144. *See Daubert*, 509 U.S. at 589.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

into evidence.[149] Without a change in the Federal Rules of Evidence, it seems reasonable that expert testimony on eyewitness testimony will pass the *Daubert*[150] and *Kelly*[151] tests and be admitted.

In *Weatherred v. Texas,*[152] the court inquired into the scientific validity of this form of expert testimony. The court employed a survey of experts on eyewitness testimony. The survey found a consensus of issues that had the scientific validity for admission in court. These topics were: [1] the wording of questions; [2] lineup instructions; [3] misleading post-event information; [4] the accuracy-confidence correlation; [5] attitudes and expectations; [6] exposure time; [7] unconscious transference; [8] showups; and, [9] the forgetting curve.[153] Clearly, the scientific community has accepted this information as valid.[154] However, when the trial judge rejects the testimony, it is usually for other reasons than scientific invalidity.

Contrary to mounting scientific evidence, the Eleventh Circuit *per se* rule is "[t]hat such testimony is not admissible."[155] Because of the high propensity for eyewitness error and the weight of the tragedy in finding an unjust result, this rule is implausible. The other circuits leave the question of admissibility to the discretion of the trial judge.[156] Occasionally, the circuits have overturned the trial judge who abused discretion.[157] Commonly, the trial judge excludes the testimony under Rule 702 or Rule 403.[158] The general approach taken by the circuits, as with most evidentiary rulings involving judicial discretion, is not to disturb the lower court's exclusion of expert witness testimony on eyewitness testimony.[159]

The leading case is the Ninth Circuit's decision in *United States v. Amaral.*[160] In *Amaral,* the court excluded the testimony of the expert witness. The court avoided the question as to the competency of the

149. *See id.*

150. *See id.*

151. *See* Kelly v. State, 824 S.W.2d 568, 571 (Tex.Crim. App. 1992).

152. 963 S.W.2d 115, 129-30 (Tex. App.—Beaumont 1998), *vacated,* 975 S.W.2d 323 (Tex. Crim. App. 1998) (en banc), *rev'd,* 985 S.W.2d 234 (Tex. App.—Beaumont 1999). *See also* Saul M. Kassin et al., *The General Acceptance of Psychological Research on Eyewitness Testimony: A Survey of the Experts,* 44 AM. PSYCHOLOGIST 1089 (1989).

153. *See id.*

154. *See* United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986). The 5th Circuit has verified that "[s]cientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." *Id.*

155. United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992).

156. *See* cases cited *supra* note 14.

157. *See* United States v. Downing, 753 F.2d 1224 (3rd Cir. 1985).

158. Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury,* 32 AM. CRIM. L. REV. 1013, 1033 (1995).

159. *See* United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Watson, 587 F.2d 365 (7th Cir. 1978); United States v. Brown, 540 F.2d 1048 (10th Cir. 1976).

160. 488 F.2d 1148 (9th Cir. 1973).

expert. The court relied "for the ascertainment of truth on the 'test of cross-examination.'"[161] The court stated that the testimony of the expert might cause dangers "in terms of confusing the jurors and undue delays."[162] In *Amaral* and its progeny,[163] the courts adopted a four criteria test to aid the "gatekeeping"[164] responsibility of the trial judge evaluating expert testimony. These four criteria are: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect.[165]

Despite the fact that expert witness testimony on eyewitness testimony satisfies the Supreme Court's scientific validity test for admission, it is not mandatory.[166] It is critical to make a wise choice of a qualified witness. The case must have eyewitness testimony as a central issue. The routine impasse for admitting expert testimony is the "delicate balance between the probative value of this testimony and its capacity to . . . confuse the issues."[167] Undue prejudice is an opportune method to bar the testimony since there is *always* a danger of undue prejudice with expert testimony "because of its aura of special reliability and trustworthiness."[168] Should the court fail to apply the *Daubert* requirements in the request for admission, that court could face remand.[169] However, "[t]he admissibility of this type of expert testimony is strongly disfavored by most courts."[170] "Most courts . . . have long deplored the ability of 'Paladin-type'[171] experts—who see in

161. *Id.* at 1153.

162. *Id.* at 1154.

163. *See generally* United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); Moore v. Ashland Chem. Co., 151 F.3d 269 (5th Cir. 1998); United States v. Watson, 587 F.2d 365 (7th Cir. 1978); United States v. Brown 540 F.2d 1048 (10th Cir. 1976); United States v. Green, 548 F.2d 1261 (6th Cir. 1977); United States v. Halloway, 971 F.2d 675 (11th Cir. 1992).

164. *See Moore*, 151 F.3d 269.

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

166. *See* United States v. Brien, 59 F.3d 274 (1st Cir. 1995). The court stated, "We are unwilling to adopt a blanket rule that qualified expert testimony on eyewitness identification must routinely be admitted or excluded." *Id.* at 277.

167. United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977).

168. United States v. Rahm, 993 F.2d 1405, 1415 (9th 1993). (Emphasis added).

169. *See* United States v. Amador-Galvan, 9 F.3d 1414, 1418 (9th Cir. 1993).

170. United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980).

171. *See* DeCosta v. Viacom Int'l, Inc., 758 F. Supp. 807 (D.C.R.I. 1991).

> [A] western hero named 'Paladin.' [Paladin] had a mustache and wore a black outfit that included a hat affixed with a medallion. He also carried calling cards bearing facsimiles of a chess piece (i.e., a 'knight') and the slogan 'Have Gun Will Travel, Wire Paladin.' The chess piece logo was imprinted on the holster of his six-shooter as well. In addition, Paladin carried an antique derringer concealed under his arm.

Id. at 808. *See also* In Re Fre Le Poole Griffiths, 413 U.S. 717 (1973). The expert in the cynic's view is a "hired gun." This derogatory label is applied to other noble professions, such as lawyers. The Supreme Court states that some "view the lawyer much as the 'hired gun' of the Old West. In less flamboyant terms the lawyer in his relation to the client came to be called a 'mouthpiece' in the gangland parlance of the

the given case just what the lawyer needs—to contribute to *scandalous verdicts.*"[172]

IV: AN ARGUMENT FOR A CHANGE IN THE FEDERAL RULES OF EVIDENCE

A few scholars fear that the testimony of expert witnesses on eyewitness testimony will permit a well educated speaker to confuse or overpower the jury. This archaic fear, based in the days of chivalry, still permeates modern evidence law.[173] The argument follows that it is the jury's province to weigh the credibility of witnesses.[174] The expert's testimony will make it more difficult for the jury to find the truth. Many practitioners oppose this view.[175] The strength of the jury is the difficulty to hoodwink twelve average Americans in rational matters. It is the *counterintuitive* evidence that deludes the jury. The cloaking of critical information causes these justice system *faux pas* to continue.[176] The jury never hears recent findings on memory

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1930's." *Id.* at 731. This label is unfair to experts and to lawyers who have a long history of helping society find the truth.

172. Clifton T. Hutchinson and Danny S. Ashby, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Redefining the Bases for Admissibility of Expert Scientific Testimony*, 15 CARDOZO L. REV. 1875, 1881 (1994) (Emphasis added).

173. *See* Mullane, *supra* note 65 (noting that a jury of common people lack the reasoning and sophistication to find the truth without protection from noble guardians).

> The law of evidence began to emerge in the late seventeenth century. The jury had evolved from a body of witnesses to a fact-finding body having no pre-existing knowledge of the case. This change occurred in the context of English society highly structured along class lines. Judges and barristers were members of the upper class. In time, service on juries expanded downward through the social structure. Individuals considered less than peers by court and counsel were called to serve as jurors. . . . This led to a paternalistic desire to protect jurors from evidentiary influences exceeding their limited abilities and rationality.

Id. at 77.

174. *See* United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994). *See also* United States v. Gambino, 818 F. Supp. 536 (E.D.N.Y. 1993). In *Gambino,* the court reasoned that the threshold inquiry is whether expert testimony subject matter is "reasonably perceived as beyond the ken of the jury." *Id.* at 538. Eyewitness testimony evaluation is typically found to be within the "ken of the jury."

175. *See* Jeffery J. Parker, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. CAL. L. REV. 1363, 1378-79 (1991). Practitioners do not fear this possibility. Parker observes:

> The fear of impeachment is in fact so pronounced that a manual for selecting and using expert witnesses cautions attorneys to "beware of 'hired guns'—experts who will work for anyone provided that they get paid" because "[i]t's very easy for a[n] . . . attorney to bring out the fact that these witnesses are mercenaries whose . . . opinions are custom-made for sale."

Id. Jurors will not be overpowered by an expert witness and will discard his advice if it is not pertinent.

176. *See* State v. Warren, 635 P.2d 1236 (Kan. 1981).

> In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psycholo-

and perception even though that may be the central issue in the case. Presumably, they would grasp the concepts described by a competent expert witness. The direct testimony of the eyewitness overcomes the traditional safeguard of cross-examination.[177] The uninformed jury is credulous and prone to deception.

Using experts increases the costs of trials. Trials will take more time. Fewer wrongful convictions would not be free. Because the current utilization of expert eyewitnesses upon eyewitness testimony is discretionary and infrequent, the cost of such testimony is high. Wider courtroom use will encourage more scholars to develop the skills to supply the need. Natural competition in the market place will reduce the cost. These additional experts and their research into the science of the eyewitness will be a catalyst for improved trials in the future. We are not so miserly to exchange injustice for thrift. We hold justice dearer than coins.

It has been argued that the use of one expert is bad and the use of two is a horror. But the opposition must have the opportunity to use an expert to present their view. Some would contend this would result in a "traditional battle of experts,"[178] doubling the cost and allowing confusion to reign. The more logical position is that science is helpful in explaining eyewitness testimony. Having two experts giving pertinent, if opposing, data is preferable to ignorance. If one believes that the jury of common people is easily misled, the battle of experts results in a wasteland of bewilderment.[179] By hearing the issues, the informed jury can find the path to truth. It is far better to have this battle of ideas than to leave the jury ignorant of the issues of eyewitness testimony when the stakes are a person's liberty or life.

Would criminals gain from this rule? The hindmost desire of the political system is the electorate finding it accommodating to crime. Those that would advance this objection fail to rely on the jury. The jury makes mistakes because it lacks the facts needed to find the truth. The paradox exposed in this Comment is society's reliance upon the jury when it is improper and failure to rely upon the jury when it is. Do those who feel the jury would be confused by having relevant information favor our legal system? Requiring the testimony of expert witnesses on eyewitness testimony will reduce a fraction of the tragic errors without the intolerable price of increased crime. It would *reduce* crime because the irony of the current situation is that *by con-*

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gist in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it.

Id. at 393.

177. *See* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 825 (1995).

178. Barefoot v. Estelle, 463 U.S. 880, 934 (1983).

179. *See* Mullane, *supra* note 65, at 77.

victing the innocent, we let the guilty go free.[180] The reason for adoption of the proposed rule is because "the central objective of litigation is clear: the accurate determination of the defendant's guilt is the central concern that outweighs any other possible procedural objective."[181]

Appraise the alternative of retaining the current system. Courts have concluded that the juror can acquire the exact mental position with reasoning as one could through the tutoring of experts.[182] "[T]he problems of perception and memory can be adequately addressed in cross-examination and . . . the jury can adequately weigh these problems through common-sense evaluation."[183] Traditional safeguards[184] have not solved the problem of unreliable testimony. It is unsound that a communication system with the transmitter and receiver having proven faults should remain unmended. Without assistance for the jury, the injustice will continue. Voices from the graves and prison cells of innocent victims of our legal system plead for this change.[185]

Less costly methods exist to communicate the tenets of eyewitness misidentification without the expert testifying. A standard document read into the record describing the scientific proof of eyewitness ineptitude is an option. However, "[o]n the whole, the judges' instructions do not serve as an effective safeguard against mistaken identifications

180. *See* Kampshoff v. Smith, 698 F.2d 581 (2d Cir. 1983). "[O]nce the state has focused its investigation and prosecution on an innocent defendant, it is less likely that the real culprit will ever be found; the percentage of defendants accused and convicted, jailed or hanged by unreliable eyewitness identifications, will never fully be known." *Id.* at 586.

181. Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345, 1352 (1994).

182. *See* United States v. Thevis, 665 F.2d 616 (5th Cir. 1982).

183. *See id.* at 641.

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

> [S]afeguards [exist] to prevent convictions of the innocent based on unreliable eyewitness identification. Prosecutors do not have to prosecute if they think the evidence is unreliable. Trial courts may suppress identification testimony if the identification procedures rendered the evidence unreliable. Effective cross-examination and persuasive argument by defense counsel are additional safeguards. Proper instruction of the jury on factors in evaluating eyewitness identification testimony and on the state's burden beyond a reasonable doubt are other safeguards. The requirement of jury unanimity is also a safeguard. Finally, this court has the power to grant relief if it is convinced that the evidence of a convicted defendant's guilt was legally insufficient.

Id. at 549.

185. *See* Id. at 547.

See Michael L. Radelet et. al., *Prisoners Released from Death Rows Since 1970 Because of Doubts about Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996). Additionally, some people from free society such as David R. Keaton might agree with this change. Despite the traditional safeguards, he was convicted on the basis of mistaken identity and coerced confessions. Mr. Keaton spent two years on death row in Florida. He was released when the true culprits were identified and convicted. *Id.* at 946.

and conviction[s]."[186] "[E]xpert testimony appears to improve [juror] sensitivity to the factors that influence memory without enhancing skepticism toward the accuracy of eyewitness identifications."[187] The impact of an expert is incomparable to an instruction via a standard document.

Another alternative is to ban all eyewitness testimony on the ground that it is unreliable. This extreme measure is unworkable because "[i]t is fundamental that the testimony of witnesses, both in civil and criminal cases, is admissible if predicated upon concrete facts within their own observation."[188] Many highly relevant acts occur before eyewitnesses that are impossible to corroborate by other means. However, both ancient Jewish[189] and Roman Law[190] banned testimony by an uncorroborated single witness. The lamentable certainty is that multiple witnesses can be as inaccurate as a single witness.[191] However, *these ancient rules document the skepticism our ancestors had of eyewitness testimony.* Since the inclusion of eyewitness testimony is imperative, data clarifying it should be too.

The best solution available is to tutor the jury. Courts have been reluctant to concede this. One of the common reasons for rejecting the admissibility of expert testimony of eyewitnesses has been that it is the jury's province to weigh the credibility of witnesses.[192] Because "conclusions of psychological studies are largely counter-intuitive, and serve to 'explode common myths about an individual's capacity for perception'"[193] the system should help juries when they lack critical

186. Penrod, *supra* note 112, at 835.

187. *Id.* at 842.

188. United States v. Brown, 540 F.2d 1048, 1053 (10th Cir. 1976).

189. *See Deuteronomy* 17:6 (King James). "At the mouth of two witnesses, or three witnesses, shall he . . . be put to death; but at the mouth of one witness he shall not be put to death." *Id.*

190. *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 546 (1994). "*Unus testis nullus testis* — one witness is no witness" is a Roman proverb and rule of law. CASSELL'S LATIN DICTIONARY 624, 601, 398 (5th ed. 1968). Requiring more than one witness to testify pertaining to an incident in a trial was the evidentiary rule. *See id.*

191. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*, 49 RUTGERS L. REV. 1317, 1384 (1997). *See also* Hugo Adam Bedau and Michael L. Radelet, 40 STAN. L. REV. 21 (1987) (providing an example of multiple witness mistake.) Mr. Robert Ballard Bailey was tried and sentenced to death on the strength of testimony from two direct eyewitnesses. This occurred even though he was under arrest for drunken driving at the time of the murder. Two police officers provided an alibi. The United States Supreme Court refused to review the case. *Forty-eight hours before his scheduled execution* warden Oral Skeen called Erle Stanley Gardner for help. Gardner was the creator of the character Perry Mason and author of over 100 books. Gardner was the driving force behind a group of sleuths called The Court of Last Resort. In 1966, Mr. Bailey obtained release after sixteen years in prison. *See* 30 STAN. L. REV. at 93.

192. *See* United States v. Rincon, 28 F.3d 921, 923 (9th Cir. 1994).

193. United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986).

knowledge. When information is unavailable to the juror and the information would be advantageous, it is wrong to withhold it.

One cornerstone of the American justice system is that convicting the innocent is a greater mistake than letting the guilty go free. Rules of evidence that convict the innocent are objectionable and need changing. Contemplate the facts in *Campbell v. State,*[194] indicating an innocent citizen whose

> [c]onviction was the result of mistaken identity. . . [The] claimant suffered grievously during his long term in prison and while on parole resulting from his arrest, conviction and confinement for the commission of crimes of which he was innocent. He was branded as a convict, given a prison number and assigned to a felon's cell. He was deprived of his liberty and civil rights. He was degraded in the eyes of his fellowmen. His mental anguish was great by reason of his separation from society and his wife and family and in being deprived of the opportunity to afford them a living which they were compelled to seek from public authorities. He suffered the miseries of prison life and his confinement was doubly hard because he was innocent.[195]

Our interest in protecting the good name and liberty of the innocent citizen is a reason that our legal system is more just than other systems.[196] Preserving that concept and our desire to guide our system closer to that ideal supports this rule change.

One would think that reasonable aids to jury decision making obligate admission. Yet, it must be difficult for a judge to permit a discretionary advantage to a defendant charged with terrible crimes against the people. For example, in *United States v. Thevis,*[197] the defendant ran a chain of X-rated bookstores and was accused by the state of arson, racketeering, and murder.[198] Not only does the unsavory accused benefit by the testimony of the expert, the examiner will be permitted "to give a long detailed and partisan summary of the evidence on the issue"[199] because the expert must specify the facts that spawned the opinion.

Elected judges dread accusations of leniency toward crime. No judge desires to unnecessarily extend the trial. These facts favor exclusion of expert testimony. This discretion, in the hands of the trial

194. 62 N.Y.S.2d 638 (N.Y.C.C. 1946).

195. *Id.* at 642.

196. *See* PLATO, EUTHYPHRO, APOLOGY, CRITO, PHAEDO THE DEATH SCENE (F.J. Church, trans., Bobbs-Merrill Co., Inc. 1956). Sharing Socrates' last thoughts at his trial, Plato states, "This very thing that has happened to you proves that the multitude can do a man not the least, but almost the greatest harm, if he is falsely accused to them." *Id.* at 53.

197. *See* United States v. Thevis, 665 F.2d 616, 622(5th Cir. 1982).

198. See *id.*

199. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1162 (1991).

judge, has resulted in a system with few successful appeals.[200] The lack of a bright line rule creates variations from jurisdiction to jurisdiction causing confusion as to the requirement for admission of expert witnesses upon eyewitness testimony.

CONCLUSION

Admission of expert testimony on the accuracy of eyewitness testimony improves the fairness of trials. The jury will benefit from an expert witness. Science is revealing our universe. The secrets of the stars, the bottom of the sea, and the mind are unveiled to our enlightened age. To fail to profit from this treasure-trove of knowledge is unwise. Barring of this information from the jury renders our legal system analogous to the medieval trial of ordeal rather than the enlightened search for the truth that it should be.

The trial has evolved to assist the jury in finding the truth. From the oath, to the use of defense witnesses, to allowing the defendant to speak for himself at trial, and the modern use of expert witnesses the trial has developed to discover the truth.[201] One could reason that the testimony of experts is an extension of the testimony of the defendant. This is testimony the defendant would give himself if he had training. Admit the testimony of the expert as an extension of the defendant's testimony to be fair.

This Comment has identified a significant cause of injustice. Without the proposed change the unwarranted reliance on eyewitness testimony will continue.[202] This solution will benefit the jury, the judge, and the entire legal system. Witnesses are often no more accurate than persons exploring the proverbial elephant in the dark.[203] Juror

200. *See* Thomas v. State, 748 S.W.2d 539, 541 (Tex. App.—Houston [1st Dist] 1988 no writ) (finding "[o]nly California has held that, where an eyewitness' identification is a key element of the prosecution's case, it is error to the exclude testimony of an expert on the reliability of witness' identification.").

201. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 959 (1984). Professor Johnson suggests the use of experts to explain new information on cross-racial identification to jurors. *See id.*

202. *See* Michael Higgins, *Tough Luck for the Innocent Man*, A.B.A. J. 46 (March 1999). Contributing to this perpetuation is the impunity from suit the state and its actors enjoy when the innocent are convicted. James Newsome was convicted of killing a seventy-two year old grocery clerk upon the strength of three eyewitnesses. He was convicted; though, the fingerprint evidence did not implicate him. Mr. Newsome received a life sentence and served fifteen years before being vindicated. He can file a civil rights lawsuit under 42 U.S.C. § 1983. "But, to give law enforcement officers room to do their jobs, the law grants them strong immunity from prosecution." *Id.* at 47. Another factor is that states limit the amount of damages for wrongful conviction. California has a limit of $10,000. The federal government's limit of damages is $5,000. *Id.* at 48-49.

203. *See* HAROLD LAMB, OMAR KHAYYAM, 173 (Doubleday, Doran & Company, Inc. 1934) (discussing an amusing story of witness mistake)

> Listen now to the story of the Elephant . . . . In Hind it was that the keepers of the Elephant desired to show the Elephant to curious ones. Yet it was in a

beware.[204] Instead, juries succumb to the blinding effect of their unwarranted reliance and accept eyewitness testimony. The qualified expert witness will raise the jury's skepticism resulting in enlightened verdicts.[205]

Society sends twelve average wayfarers to perceive the pathway to truth.[206] This Comment suggests we give them the lamp of science to help them find their way. Justice may be blind, but our juries should not be blinded by this unfortunate faith. If we are to solve the mystery of crime, scientific exploration of the mind will discover the solution. If we are ever to find solutions to the unfortunate faith that juries have in inaccurate eyewitnesses, we must have the courage to try innovations. *With courage and innovation, the day may come when we cannot say that only the dead have seen the end of injustice.*[207]

William David Gross

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dark room. The seekers came and felt of it, since they could not see. One, laying his hand on its trunk, said, 'This creature is like a water-pipe.' Another, feeling its ear, said, 'Verily it is a fan.' A third came upon its leg, and he said, 'Nay, beyond doubt it is a pillar.' Had anyone brought a candle to the room, all would have seen the same.

'And where,' Omar asked, 'will you find a candle to enlighten the world?'

Id.

204. *See* Letter from Abraham Lincoln to J. R. Underwood and Henry Grider (Oct. 26, 1864), in THE QUOTABLE LAWYER, at 323 (David Shrager and Elizabeth Frost, eds., 1986). "We know better there is a fire whence we see smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury but smoke cannot." *Id.* Lincoln's wise and witty words apply equally to witness honest mistake.

205. *See* Selvidge v. United States, 160 F.R.D. 153 (D. Kan. 1995)("An expert witness should be an advocate of the truth with testimony to help the court and the jury reach the ultimate truth in a case, which should be the basis of any verdict." *Id.* at 160.).

206. *See* STEPHEN CRANE, COMPLETE POEMS OF STEPHEN CRANE, at 94 (1966). Borrowed from the poem, *The Wayfarer*:

The wayfarer,
Perceiving the pathway to truth,
Was stuck with astonishment,
It was thickly grown with weeds.
'Ha,' he said,
'I see that none has passed here
In a long time.'
Later he saw that each weed
Was a singular knife,
'Well,' he mumbled at last,
'Doubtless there are other roads.'

Id.

207. ELIZABETH LOFTUS, EYEWITNESS TESTIMONY (1944). This Comment's first example of the tragedy of the unfortunate faith was Sacco and Vanzetti. "As Vanzetti was being strapped into the electric chair he said something like, 'I wish to tell you I am an innocent man. I never committed any crime but sometimes some sin. I wish to forgive some people for what they are now doing to me.' " *Id.* at 3.