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# Case Notes & Comments

## **Can a Jury Believe My Eyes, and Should Courts Let Experts Tell Them Why Not: The Admissibility of Expert Testimony on Cross-Racial Eyewitness Identification in New York After *People v. Young***

**Jody E. Frampton\***

*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.\*\**

### Introduction

Eyewitness identification is one of the most powerful tools that a prosecutor has at his disposal. There is little more dramatic or damning than a confident eyewitness who is able to point at the defendant and identify him as the perpetrator; it is hardly surprising, therefore, that jurors are inclined to believe the identifications made by these key witnesses.

However, there are many problems inherent in the process by which an eyewitness perceives, stores, and recalls their memories of the defendant which can ultimately lead to an incorrect identification. A complete understanding of the factors

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\*\* FELIX FRANKFURTER, *THE CASE OF SACCO AND VENZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 30 (1927).

which can sometimes lead to misidentification is often beyond the knowledge and experience of the average juror.<sup>1</sup> As Justice Marshall pointed out in his oft-quoted dissent from *Manson v. Brathwaite*, there is an “unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony.”<sup>2</sup> This is especially true with regard to cross-racial identifications.<sup>3</sup>

One possible solution to this problem is to admit expert testimony which would educate the jury on the ways in which eyewitness accounts can be flawed. Courts which evaluate the admissibility of scientific expert testimony under both the *Frye*<sup>4</sup> “general acceptance” standard and the *Daubert*<sup>5</sup>/Federal Rules of Evidence (FRE) 702 standard have often been reluctant to allow expert testimony on eyewitness identification. These courts cite a variety of reasons for this, most often either that the testimony is within the ordinary knowledge and understanding of the average juror or that the scientific evidence is not reliable enough.<sup>6</sup>

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1. See, e.g., Heather Sonnenberg, *The Admissibility of Expert Identification Testimony in New York Courts According to People v. Lee*, 12 TEMP. POL. & CIV. RTS. L. REV. 231 (2002); Joy L. Lindo, *New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification*, 30 SETON HALL L. REV. 1224 (2000); Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237, 242-43 (1996); ELIZABETH LOFTUS & JAMES DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 86-88 (3d ed. 1997).

2. *Manson v. Brathwaite*, 432 U.S. 98, 119-20 (1977) (Marshall, J., dissenting). Justice Marshall goes on to state that “[t]his [the untrustworthiness of eyewitness identification testimony], combined with the fact that juries unfortunately are often unduly receptive to such evidence, is [a] fundamental fact of judicial experience.” *Id.* at 120.

3. Sonnenberg, *supra* note 1, at 241.

4. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

5. *Daubert v. Merrell Dow Pharm.* 509 U.S. 579 (1993).

6. See, e.g., *People v. Valentine*, 385 N.Y.S.2d 545 (App. Div. 1976) (allowing expert testimony on eyewitness identification would “trespass on the jury’s domain”); *People v. Brown*, 479 N.Y.S.2d 110 (Sup. Ct. 1984) (the science underlying the theory did not meet the *Frye* “general acceptance” standard); *People v. Legrand*, 747 N.Y.S.2d 733 (Sup. Ct. 2002) (did not meet the *Frye* standard); *People v. Smith*, 2004 N.Y. Misc. LEXIS 255 (Sup. Ct. Mar. 26, 2004) (did not meet *Frye* standard); *People v. Carrieri*, 777 N.Y.S.2d 627 (Sup. Ct. 2004) (expert testimony was within the knowledge and understanding of the average juror and the science underlying the theory did not meet the *Frye* standard); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996) (it was not an abuse of discretion for the trial court to exclude testimony where there was not enough evidence to determine scientific validity under *Daubert*); *United States v. Hicks*, 103 F.3d 837 (9th Cir.

This Note argues in part that the lack of uniform standards for New York courts to follow when deciding the admissibility of expert testimony on cross-racial eyewitness identification evidence under the *Frye* standard has led to inconsistency in precedent and confusion for defendants, a condition which will likely continue notwithstanding the recent Court of Appeals decision in *People v. Young*.<sup>7</sup> Part I will identify the problems inherent in both ordinary eyewitness identification and cross-racial identifications. Part II discusses the difference between the *Frye* “general acceptability” and *Daubert*/FRE 702 standards, and looks at the question of whether the admissibility of expert testimony on eyewitness identification depends on the standard that is used. Parts III-VI will summarize the history of expert testimony on eyewitness and cross-racial identifications in New York State under the *Frye* standard, including the law as it currently exists through the recent Court of Appeals cases *People v. Drake*<sup>8</sup> and *People v. Young*.<sup>9</sup> Part VII looks at *People v. Williams*,<sup>10</sup> a recent trial court decision which applied the Court of Appeals’ test from *Young*. Finally, Part VIII will decide if *Young* provides clear guidelines for admissibility in the lower courts, thus eliminating the problems of inconsistency and confusion.

## I. What are the Problems Inherent in Eyewitness Identification?

### A. *The Problem of Eyewitness Testimony, Generally*

Once before the jury, eyewitness testimony is very difficult for a criminal defendant to rebut. Cross-examination of a wit-

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1996) (trial court had discretion to exclude testimony if it felt it would not help the jury).

7. 850 N.E.2d 623 (N.Y. 2006). The March 2007 Court of Appeals decision in *People v. Legrand*, while articulating a test for when exclusion of expert testimony on eyewitness identification by a trial court is an abuse of discretion, applies this test only “where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime.” No. 39, 2007 N.Y. LEXIS 325 at \*2 (N.Y. Mar. 27, 2007). As will be suggested *infra*, this does not solve the problem remaining after *People v. Young* of what standard will be used to determine what constitutes an abuse of discretion outside this narrow situation.

8. 850 N.E.2d 630 (N.Y. 2006).

9. 850 N.E.2d 623 (N.Y. 2006).

10. No. 8989/05, 2006 N.Y. Misc. LEXIS 4329, (Sup. Ct. Nov. 29, 2006).

ness and jury instructions are very often not enough to overcome the power that a strong and confident eyewitness identification can have.<sup>11</sup> The testimony of an expert witness is often necessary to educate the jury on the types of factors that can affect eyewitness memory and perception.<sup>12</sup>

Eyewitness testimony is the product of "input, retention, and retrieval processes."<sup>13</sup> The first stage, input, occurs as the witness observes the event. The accuracy of the witness' perception can be affected by any number of factors unique to that individual or the circumstances surrounding it—the emotions (like fear or stress) felt by the witness while observing, or external factors like the length of the event, the distance the witness is from the event, or lighting.<sup>14</sup> It is therefore possible that the witness has inaccurately input the information into their memory even before he or she has been asked to recall it.<sup>15</sup>

Information can also be retained incorrectly. An eyewitness stores the information he or she input from the initial observation in their memory until it needs to be recalled.<sup>16</sup> The accuracy of this information may be affected by time, and by "post-event information."<sup>17</sup> It is also possible that "suggestive questioning" (by a police officer or prosecutor in advance of testimony) may have the same effect.<sup>18</sup>

The final stage in the process, retrieval, requires the witness to remember or recall the information that he or she has retained during the event.<sup>19</sup> The ability of a witness to do so can be affected by a number of factors, like the clever questioning of a prosecutor (who leads the witness to the conclusion the prosecutor wants them to reach) or the confidence level of the witness while testifying.<sup>20</sup>

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11. Sonnenberg, *supra* note 1, at 231.

12. *Id.*

13. Lindo, *supra* note 1, at 1224.

14. Cohen, *supra* note 1, at 242-43.

15. Sonnenberg, *supra* note 1, at 239.

16. Cohen, *supra* note 1, at 242-43.

17. *Id.* at 243. Post-event information can include reading newspaper accounts of the crime or hearing that other evidence (such as another witness identification of the defendant or a defendant's confession) exists to corroborate their identification. *Id.* at 246-47.

18. Sonnenberg, *supra* note 1, at 239.

19. Cohen, *supra* note 1, at 246-47.

20. *Id.* at 247-48.

There are a number of “sensory defects” that can cause inaccuracies at any stage of this process.<sup>21</sup> Another factor affecting perception is “weapon focus,” where the witness’ primary focus during the event is on the gun, knife, or other deadly weapon used by the perpetrator rather than on the perpetrator himself.<sup>22</sup> Finally, as will be discussed *infra*, cross-racial identification (the identification of an individual of one race by an eyewitness of another race) can decrease the accuracy of perception.<sup>23</sup>

While some jurors may be aware of a few of these defects, others can be misunderstood and/or counterintuitive.<sup>24</sup> As mentioned above, an eyewitness can become focused on a weapon during a violent event. However, many jurors are unaware that a violent event can affect not only a witness’ initial perceptions but can also cause a “retrograde amnesia” that can alter or erase these initial perceptions once retained.<sup>25</sup>

Another complicated situation that jurors often do not fully understand is that of transference. Transference describes the idea that the expectations of a witness often color what he or she perceives; if a witness expects to see something (whether because of a personal/cultural bias or previous experience), it is likely that is what the witness will remember seeing.<sup>26</sup> Unconscious transference may also occur; this is where outside factors like newspaper/television news reports or conversation with other individuals about the event can alter a witness’ retention of his or her initial perception without the witness even being aware of it.<sup>27</sup>

These factors can affect any or all of the three stages in the memory process. As they are often beyond the understanding of the average juror (and may actually be counterintuitive), expert

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21. Sonnenberg, *supra* note 1, at 240. These can include “speed and movement, stimulus overload, the fact that the perpetrator is a stranger to the witness, diversion of attention, excessive arousal, surprise, and limitations on the opportunity to observe the face.” Lindo, *supra* note 1, at 1226 (internal citation omitted).

22. Sonnenberg, *supra* note 1, at 240.

23. Lindo, *supra* note 1, at 1226; Sonnenberg, *supra* note 1, at 240.

24. Sonnenberg, *supra* note 1, at 240.

25. *Id.*

26. David M. Shofi, Comment, *The New York Courts’ Lack of Direction and Discretion Regarding the Admission of Expert Identification Testimony*, 13 PACE L. REV. 1101, 1107 (1994).

27. Sonnenberg, *supra* note 1, at 241.

testimony is one solution to the problem of inaccurate eyewitness testimony.

B. *The Specific Problem of Cross-Racial Identification*

Cross-racial eyewitness identification is another area in which concerns "operate contrary to most jurors' common sense."<sup>28</sup> The cross-racial phenomenon has been studied by many investigators over the years, both in a laboratory and a real-world setting, with the conclusion that witnesses identify suspects of their own race more accurately than those of another race.<sup>29</sup> This "own race bias" (ORB) may result because individuals of different races process faces differently,<sup>30</sup> or it may be because witnesses are "more willing to guess at the identity of a criminal in a cross-race identification than they are when a same-race identification takes place."<sup>31</sup>

Regardless of the cause, most researchers in the field agree that the ORB phenomenon is reliable and consistent across cul-

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28. *Id.* According to the author, many commentators suggest that without expert testimony, jurors will believe that an eyewitness who is not racially prejudiced toward defendant will be less likely to experience (or even be immune to) cross-racial misidentification. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979).

29. LOFTUS & DOYLE, *supra* note 1, at 86-88. Loftus and Doyle describe several key studies, including one conducted by Malpass and Kravits where white and black subjects looked at photographs of white and black individuals. That study concluded that subjects correctly identified those members of their own race more frequently than members of other races (interestingly, white subjects who attended the predominantly black Howard University made false identifications of black subjects two to three times more frequently than with white subjects, indicating that proximity and exposure to another race does not erase the own-race bias or potential for misidentification). Loftus also cites a study by Brigham *et al* where clerks in a Florida convenience store were asked to identify photographs of black and white customers who had been in the store two hours earlier. The clerks were predominantly white. 76% of the clerks tried to identify a white customer and 82% to identify a black customer; 55% misidentified the black customer while 35% misidentified the white customer. The overall pattern, that witnesses identify suspects of their own race more accurately than that of other races, is "clear." *Id.* at 87. See also Roy S. Malpass & Jerome Kravits, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330 (1969); John C. Brigham *et al.*, *Accuracy of Eyewitness Identification in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673 (1982).

30. LOFTUS & DOYLE, *supra* note 1, at 88.

31. *Id.* (citing Tooley *et al.*, *Facial Recognition: Weapon Effect and Attention Focus*, 17 J. APPLIED SOC. PSYCHOL. 845 (1987)).

tural and racial groups.<sup>32</sup> Recent studies have also failed to find a link between the racial attitude or prejudice of an individual and his or her memory for the faces of other races.<sup>33</sup> While “a fair degree of empirical support exists for the notion that interracial contact has some degree of influence on the magnitude of the ORB,” it is still unknown exactly why this occurs.<sup>34</sup>

At least two studies have suggested that “cross-examination has not been shown effective in allowing jurors to distinguish accurate from inaccurate eyewitnesses.”<sup>35</sup> This is especially true in the context of a cross-racial identification. Another commentator suggests a potential solution: based on the reliability of and the general agreement in the community on the importance of ORB, expert testimony should be used in cases where cross-racial eyewitness identification is an issue.<sup>36</sup>

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32. Christian Meissner & John Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 5 (2001). Some courts acknowledge this as well: the Maryland Court of Appeals stated in a recent decision that “there is a strong consensus among researchers conducting both laboratory and field studies on cross-racial identification that some witnesses are more likely to misidentify members of other races than their own.” *Smith v. State*, 880 A.2d 288, 296 (Md. 2005).

33. Meissner & Brigham, *supra* note 32, at 7.

34. *Id.* at 8-9. The authors suggest that perceptual learning is the most popular explanation. In perceptual learning, practice and experience lead to an increased ability to perceive and retain information obtained in a particular environment. In other words, as an individual becomes more familiar with a stimulus through exposure, his ability to quickly and accurately process the features of the stimulus which do not change increase.

35. *Id.* at 25 (citing R. C. L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 L. & HUM. BEHAV. 333 (1989); R. C. L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?* 66 J. OF APPLIED PSYCHOL. 79 (1981)).

36. *Id.* at 26-27. The authors go on to cite several studies which demonstrate that the factors affecting the ORB and cross-racial eyewitness testimony are often beyond the ken of the average juror. See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 19 (1983); Jennifer L. Devonport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997). Another commentator has suggested that, based on the results of recent scientific studies, defense expert testimony on cross-racial eyewitness identification alone may not actually have any effect on the decision of the jury. She emphasizes that only by reinforcing the testimony through jury instructions and closing arguments can such expert testimony have the desired effect. See Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1912-18 (2005).

Many courts do not allow the use of expert testimony on cross-racial identifications,<sup>37</sup> although the Supreme Court has “tacitly acknowledged”<sup>38</sup> that race is a factor in making an accurate identification.<sup>39</sup> This subject will be discussed in more detail *infra*, but one reason why courts tend to exclude the testimony is because they do not believe the factors affecting misidentification are beyond the knowledge of the lay juror.<sup>40</sup> One commentator has suggested that jurors’ beliefs about cross-racial identification are largely incorrect and that “expert testimony affects the beliefs and judgments of individual jurors, increases jury deliberation time and modestly increases the number of acquittals and hung juries.”<sup>41</sup>

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37. See, e.g., *People v. Legrand*, 747 N.Y.S.2d 733 (Sup. Ct. 2002), *aff’d*, 814 N.Y.S.2d 37 (1st Dept. App. Div. 2006), *rev’d*, No. 39, 2007 N.Y. LEXIS 325 (N.Y. Mar. 27, 2007); *People v. Carrieri*, 777 N.Y.S.2d 627 (Sup. Ct. 2004); *State v. Cromedy*, 727 A.2d 457 (N.J. 1999); *Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995); *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996); *United States v. Hicks*, 103 F.3d 837 (9th Cir. 1996); *United States v. Rincon*, 28 F.3d 921 (9th Cir. 1994). These courts, while allowing expert testimony on cross-racial identification in theory (with the exception of *Cromedy*, which held that such testimony was *per se* inadmissible in New Jersey, and *Simmons*, which held that expert testimony on eyewitness identification in general was inadmissible in Pennsylvania), hold that an appellate court can only review the decision of a trial court to exclude the testimony for abuse of discretion. Trial courts often exclude testimony because they do not believe it would be helpful to the jury, because the factors affecting cross-racial identification are not beyond the ken of the ordinary juror, or because they believe the scientific research is not conclusive enough.

38. Jules Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 WIDENER L. REV. 327, 348 (2006).

39. In *Mason v. Braithwaite*, the Court stated that “Glover [the police officer who had contact with the defendant and identified him] himself was a Negro and unlikely to perceive only ‘general features of hundreds of Hartford black males.’” 432 U.S. 98, 115 (1977) (internal citation omitted). The implication of this statement is that had Glover been white, his identification of the black defendant would have been more suspect.

40. See, e.g., *Carrieri*, 777 N.Y.S.2d 627, 628; *but see Commonwealth v. Zimmerman*, 804 N.E.2d 336, 344 (Mass. 2004) (Cordy, J., concurring) (two justices on the Massachusetts Supreme Court, in concurrence, stating that the problems with cross-racial identification are “beyond the ordinary experience and knowledge of the average juror”).

41. Johnson, *supra* note 28, at 946-51. The author cites three classic studies in this area: LOFTUS, *supra* note 28; A. YARMY, *PSYCHOLOGY OF EYEWITNESS TESTIMONY* (1979); George Rahaim & Stanley Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 L. & PSYCHOL. REV. (1982). In the Loftus study, the following multiple-choice questions were asked to 500 college students at the University of Washington:

## II. How Do We Evaluate the Admissibility of Expert Testimony On Eyewitness Identification?

Testimony on eyewitness identification is a type of scientific expert evidence, and will be evaluated by a court under one of two approaches: the *Frye* “general acceptability” standard or the *Daubert*/FRE 702 standard.<sup>42</sup>

### A. The Frye Standard

*Frye v. United States*<sup>43</sup> articulated a four-part test to be used by a trial court when determining the admissibility of scientific expert testimony. In *Frye*, the defendant was tried for second-degree murder and wanted to introduce expert testimony at trial on a new scientific technique, a systolic blood

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Two women are walking to school one morning, one of them is Asian and the other white. Suddenly, two men, one black and one white, jump into their path and attempt to grab their purses. Later, the women are shown photographs of known purse snatchers in the area. Which statement best describes your view of the woman’s ability to identify the purse snatchers?

- (a) Both the Asian and the white woman will find the white man harder to identify than the black man;
- (b) The white woman will find the black man more difficult to identify than the white man;
- (c) The Asian woman will have an easier time than the white woman making an accurate identification of both men;
- (d) The white woman will find the black man easier to identify than the white man.

LOFTUS, *supra* note 28, at 122. The correct answer, (b), was chosen by little more than half (58%) of the respondents. The Rahaim & Brodsky study asked an almost identical question to forty-five lawyers and twenty-eight non-lawyers. 39% of the non-lawyers selected the correct answer, while more than 40% of the lawyers chose an incorrect answer. Rahaim & Brodsky, *supra* note 41, at 9, 13.

42. There is a third approach followed in Wisconsin. Courts in that state apply a unique “relevancy test” for the admission of expert evidence:

Simply put, expert testimony is admissible if it is relevant, the witness is qualified based on his or her ‘specialized knowledge,’ and the testimony will assist the trier of fact in better understanding the evidence or determining a fact in issue. The reliability of the expert’s reasoning, methodology, or tests are left to the trier of fact as matters of weight.

Daniel Blinka, *Expert Testimony and the Relevancy Rule in the Age of Daubert*, 90 MARQ. L. REV. 173, 174 (2006).

43. 293 F. 1013 (D.C. Cir. 1923).

pressure deception test (an early version of the modern-day lie detector) to demonstrate his innocence.<sup>44</sup>

The court set forth four factors for a trial court to consider when determining admissibility. First, the witness should be competent in his field of expertise.<sup>45</sup> Second, the "expert testimony [must] be based on a scientific principle or procedure which has been 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'"<sup>46</sup> Third, the court must inquire "whether the proffered expert testimony is beyond the ken of the jury."<sup>47</sup> However, "even if the proposed testimony [is] not beyond the jury's ken, [the Court of Appeals has] upheld the admission of expert testimony for the purpose of clarifying an area of which the jurors have a general awareness."<sup>48</sup> Finally, the testimony must be "relevant to the issue and facts of the individual case."<sup>49</sup>

To a certain extent, the *Frye* standard defers to the scientific community. As noted above, a judge does not have to determine the reliability, truth, or validity of the novel theory under *Frye*; instead, he must look to the consensus of the relevant scientific community. However, a judge still has discretion to exclude expert testimony he feels is within the common knowledge of the average juror. New York State adheres to the

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44. *Id.* at 1013. The Court of Appeals for the District of Columbia, after articulating the test for admissibility of scientific expert testimony, excluded the proffered testimony and affirmed the defendant's conviction. *Id.* at 1014.

45. *Id.* Thus, "the expert should be possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *People v. Legrand*, 747 N.Y.S.2d 733, 740 (Sup. Ct. 2002) (quoting *Matott v. Ward*, 399 N.E.2d 532, 534 (N.Y. 1979)).

46. *People v. Wernick*, 674 N.E.2d 322, 324 (N.Y. 1996) (quoting *Frye*, 293 F. 1013, 1014). Under the *Frye* "general acceptance" standard, a judge does not inquire into whether the theory is accurate or reliable; rather, he must determine only whether there is a consensus in the appropriate scientific community as to the theory's reliability or accuracy. *Legrand*, 747 N.Y.S.2d 733, 740.

47. *Legrand*, 747 N.Y.S.2d 733, 741. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *DeLong v. County of Erie*, 457 N.E.2d 717, 722 (N.Y. 1983).

48. *People v. Mooney*, 559 N.E.2d 1274, 1277 (N.Y. 1990) (Kaye, J., dissenting).

49. *Legrand*, 747 N.Y.S.2d 733, 741.

*Frye* standard, even though *Daubert* has become the rule at the federal level.<sup>50</sup>

### B. *The Daubert Standard*

*Daubert v. Merrell Dow Pharmaceuticals*<sup>51</sup> settled an issue that had been debated in the legal community since the Federal Rules of Evidence were enacted in 1976: did the *Frye* “general acceptance” standard survive Rule 702’s enactment?<sup>52</sup> The Supreme Court’s holding in *Daubert* (that *Frye* was “incompatible with the Federal Rules and should not be applied in federal trials”)<sup>53</sup> altered the standards for scientific expert testimony at the federal level.

*Daubert* involved the admissibility of expert testimony on the effects of a certain drug, Bendectin, offered by the plaintiffs at trial.<sup>54</sup> The evidence was excluded by the trial court and the Ninth Circuit on appeal, on the basis of the *Frye* “general acceptance” test; the Supreme Court vacated and remanded.<sup>55</sup>

When confronted with proposed scientific expert testimony, *Daubert* requires the trial judge to determine if the expert will testify as to “scientific knowledge that . . . will assist the trier of fact to understand or determine a fact in issue.”<sup>56</sup> To do this, the judge must “make a preliminary assessment of whether the

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50. See *People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994) (holding that *Frye* would remain the standard in New York). The holding in *Daubert* has been codified by the 2000 Amendments to Federal Rule of Evidence 702.

51. 509 U.S. 579 (1993).

52. ROGER PARK, DAVID LEONARD, & STEVEN GOLDBERG, *EVIDENCE LAW* 517 (2d ed. 2004). Federal Rule of Evidence 702 currently reads:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

53. *Daubert*, 509 U.S. 579, 589.

54. *Id.* at 582. There were over thirty published studies on the drug, none of which concluded that it actually caused birth defects. *Id.* However, the plaintiffs wanted eight expert witnesses to testify that, based on the results of animal studies and re-evaluations of the prior published studies, Bendectin did cause birth defects. *Id.* at 583.

55. *Id.* at 583-85, 598.

56. *Id.* at 592.

testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue."<sup>57</sup>

This "preliminary assessment" is essentially within the discretion of the trial judge.<sup>58</sup> The Court, while stating that it does not "presume to set out a definitive checklist or test," nevertheless suggested certain criteria that the judge should consider when deciding to allow scientific expert testimony.<sup>59</sup> First, has the theory been tested?<sup>60</sup> Second, has it been subjected to peer review?<sup>61</sup> Third, is there a known or potential error rate?<sup>62</sup> Finally, is there general acceptance in the appropriate scientific community?<sup>63</sup>

The Court states that the "test" it articulated is a flexible one, where the "overarching subject is the scientific validity . . . of principles [underlying] a proposed submission," and where the focus is on "methodology."<sup>64</sup> This is the key distinction between *Frye* and *Daubert*: "the single most important 'guidepost' contained in *Daubert* is the Court's directive to judges to actively evaluate scientific evidence."<sup>65</sup> *Daubert* has turned the trial judge into a "gatekeeper" of sorts, who has the final say on whether the proffered scientific testimony is valid and reliable.

### C. *Frye or Daubert: Does it Matter?*

One ever-popular question among commentators is whether the outcome is really affected by which standard for

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57. *Id.* at 593.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 593-94.

62. *Id.* at 594.

63. *Id.* Note how the *Frye* "general acceptance" standard is now one of several factors to be considered by the trial court.

64. *Id.* at 594-95. One commentator emphasizes, however, that criticisms of a study's methodology go to its weight, rather than its admissibility, and is a question of fact for the jury rather than a question of law for the court. "*Daubert* requires only scientific validity for admissibility, not scientific precision." Robert Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 384-85 (1998) (quoting *United States v. Bonds*, 12 F.3d 540, 558 (6th Cir. 1993)).

65. David Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 555 (1995).

the admission of scientific evidence is used.<sup>66</sup> More important for the topic of this Note, does the admissibility of expert testimony on eyewitness identification hinge on what standard is used?

Federal courts applying the *Daubert* standard remain divided on whether they will allow expert testimony on eyewitness and cross-racial identifications. Some district courts hold that expert testimony will be admitted under the facts of a particular case,<sup>67</sup> and some appellate courts have reversed a district court's exclusion of the testimony under the stringent abuse of discretion standard.<sup>68</sup> However, there are also many appellate courts that will sustain a district court's exclusion of the expert testimony at the trial level.<sup>69</sup> It is also worth point-

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66. See, e.g., Edward Cheng & Albert Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005). The authors' conclusion is that "the skirmishing between the champions of *Frye* and *Daubert* yields few benefits and creates more confusion than anything else." *Id.* at 503-04.

67. See, e.g., *United States v. Norwood*, 939 F. Supp. 1132 (D. N.J. 1996) (expert testimony on the reliability of eyewitness identification was admissible in a carjacking prosecution); *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999) (a psychologist's expert testimony on cross-racial identification was necessary to assist the jury where a white witness identified a black defendant and was therefore admissible). *Hines* emphasizes that "even if the inferences may be drawn by the lay juror, expert testimony may be admissible as an 'aid' in that enterprise." *Hines*, 55 F. Supp. 2d 62, 64. See also *United States v. Sullivan*, 246 F. Supp. 2d 696, 700 (E.D. Ky. 2003) (holding that a expert testimony on eyewitness identification was admissible and that there was a trend toward allowing the admission of such evidence in federal courts); *United States v. Beck*, 393 F.3d 1088, 1092 n.2 (9th Cir. 2005) (noting that the district court had allowed expert testimony on eyewitness identification).

68. See, e.g., *United States v. Smithers*, 263 F.3d 306 (6th Cir. 2000) (holding that the district court abused its discretion where it excluded eyewitness expert testimony without conducting a full *Daubert* hearing). See also *United States v. Mathis*, 264 F.3d 321 (3d Cir. 2001) (holding that the exclusion of the expert testimony was an abuse of discretion); *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001) (although expert testimony on eyewitness identification was held not *per se* inadmissible, in that case it should have been excluded because the specific theory the expert would testify to had not been proven).

69. See, e.g., *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996) (where it was not an abuse of discretion for the trial court to determine under the facts of the case that defendant had not satisfied *Daubert* where he did not present enough information to determine scientific validity); *United States v. Hicks*, 103 F.3d 837 (9th Cir. 1996) (even if the proposed testimony on eyewitness identification satisfied *Daubert*, the trial court still had the discretion to exclude it as unhelpful); *United States v. Harris*, 955 F.2d 532 (4th Cir. 1993) (excluding expert testimony on cross-racial identification is within the discretion of the trial judge); *United*

ing out that not all courts agree on the reasons for exclusion: some indicate in their decisions that the testimony will be excluded under the facts of the case at bar, implying that it is likely these courts are excluding the evidence because they feel it will not assist the trier of fact rather than out of concern about the validity of the underlying science,<sup>70</sup> while others do question the science itself.<sup>71</sup> As will be discussed *infra* with respect to New York, courts which apply the *Frye* standard also remain divided on the issue of admissibility.

It is certainly true that there are differences between the two tests, key among them the role of the judge. Under *Frye*, judges will generally defer to the scientific community and allow the evidence to be admitted if there is general acceptance of the theory in the relevant community.<sup>72</sup> A judge determining admissibility under the *Frye* standard does not himself evaluate the science; rather, he looks at the scientific community's evaluation of the science to determine general acceptance. In contrast, the *Daubert* judge is a "gatekeeper" who actively evaluates the evidence rather than relying on the opinion of the relevant community and determines admissibility under several criteria, of which "general acceptance" is only one.<sup>73</sup>

One of the main criticisms of *Frye* is that it is "unreceptive to new science."<sup>74</sup> If a judge cannot admit science until it is generally accepted in the field, there is a period of time in which theories which ultimately will be accepted cannot be admissible in court since they have not had the opportunity to be fully evaluated and accepted by the relevant community. *Daubert*, on the other hand, allows the judge to look at all the available studies and data to determine for himself if the science meets the Rule 702 criteria.

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States v. Rincon, 28 F.3d 921 (9th Cir. 1994) (it was not an abuse of discretion to exclude expert testimony on eyewitness identification where the jury instructions were comprehensive enough to address many of the same factors).

70. See FED. R. EVID. 702 ("[i]f scientific . . . knowledge will assist the trier of fact to understand the evidence or determine a fact in issue . . ."). See generally *Hicks*, 103 F.3d 837; *Rincon*, 28 F.3d 921.

71. See generally *Langan*, 263 F.3d 613; *Kime*, 99 F.3d 870.

72. PARK ET AL., *supra* note 52, at 522.

73. See FED. R. EVID. 702.

74. PARK ET AL., *supra* note 52, at 523 (internal citations omitted).

At least one commentator has suggested that *Frye* should be inapplicable to expert testimony on eyewitness identification for precisely that reason: since *Frye* is concerned with weeding out novel scientific theories or “junk science” that have not gained general acceptance in the current field, it should not apply in this area since the relevant theories are not novel.<sup>75</sup> Much of the work in the area of eyewitness expert testimony dates back to the late 1970s and was comprehensively written about by psychologist Dr. Elizabeth F. Loftus at that time.<sup>76</sup> This commentator also points out several other areas where expert testimony is so established in New York that a *Frye* hearing is deemed unnecessary and argues that eyewitness expert testimony should be given the same treatment.<sup>77</sup>

In terms of actual admissibility, it seems to matter little whether *Frye* or *Daubert* is used.<sup>78</sup> While the use of *Daubert*, at least in theory, would produce uniform standards for admissibility, federal courts which use the *Daubert*/FRE 702 standard yield results as inconsistent as those obtained by New York courts using the *Frye* standard. And while scientific research on eyewitness expert testimony under the *Daubert* standard would be evaluated by the judge rather than by determining whether there is general acceptance in the field, the trial judge has the discretion under the *Daubert* standard to exclude the evidence anyway by determining it would not assist the trier of fact.<sup>79</sup>

### III. History of Expert Testimony on Eyewitness Identification in New York State (Before *People v. Lee*)

Before the Court of Appeals’ 2001 decision in *People v. Lee*,<sup>80</sup> expert testimony on eyewitness identification had a

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75. Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323, 348-49 (2003/2004).

76. See generally LOFTUS, *supra* note 28.

77. Woller, *supra* note 75, at 349. Woller cites several New York cases in which experts on rape trauma syndrome, battered woman’s syndrome, and sexually abused child syndrome were allowed to testify without a *Frye* hearing.

78. See, e.g., Cheng & Yoon, *supra* note 66.

79. See FED. R. EVID. 702.

80. 750 N.E.2d 63 (N.Y. 2001).

checkered history in New York. Beginning with *People v. Valentine*<sup>81</sup> in 1976 and continuing through *People v. Drake*<sup>82</sup> in 2001, various New York courts have dealt with issues relating to the admissibility of such expert testimony and have reached varying results.

Before *Lee*, many New York courts held that expert testimony on eyewitness identification was not admissible. For example, in *Valentine*, the Appellate Division held that “expert opinions were not necessary to enable the jury to comprehend the potential for unreliability.”<sup>83</sup> In *People v. Brown*, the court also denied the use of an expert on eyewitness identification.<sup>84</sup> *People v. Mooney*, the first Court of Appeals case to consider the admissibility of such expert testimony, did not resolve the issue; however, the majority affirmed the defendant’s conviction because the decision whether to admit the testimony was within the discretion of the trial court and, absent an abuse of that discretion, the court did not need to reach the substantive issue.<sup>85</sup>

In some cases, however, New York courts have admitted expert testimony on eyewitness identification. The court in *People v. Lawson* granted the defendant’s motion to admit expert testimony on the issue of cross-racial identification because the testimony met the requirements of reliability, relevancy, and was a proper subject for expert testimony.<sup>86</sup> Similarly, *People v.*

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81. 385 N.Y.S.2d 545 (App. Div. 1976).

82. 728 N.Y.S.2d 636 (Sup. Ct. 2001), *aff’d*, 850 N.E.2d 630 (N.Y. 2006). See discussion *infra* Part VI for the discussion of the Court of Appeals decision in *Drake*.

83. *Valentine*, 385 N.Y.S.2d 545, 546 (the testimony would “trespass on the jury’s domain.”).

84. *People v. Brown*, 479 N.Y.S.2d 110 (Sup. Ct. 1984). Interestingly, this is the only case I have found before *Lee* which expressly uses the *Frye* “general acceptance” standard to deny the testimony.

85. *People v. Mooney*, 559 N.E.2d 1274 (N.Y. 1990). “On this appeal, we need not decide whether the expert testimony sought to be presented was of the type that could, as a matter of law, properly be excluded.” *Id.* at 1274. *Mooney* is most distinctive for its strong dissent by Judge Kaye, in which she countered all the trial court’s reasons for exclusion (including that the testimony was unreliable, not generally accepted, and would usurp the role of the jury). She also sharply criticized the majority for their unwillingness to review the discretionary decision of the trial court. *Id.* at 1275-78.

86. *People v. Lawson*, 463 N.Y.S.2d 99 (Sup. Ct. 1983). In *Lawson*, the eyewitness at trial was Japanese and the defendant was Hispanic. The court allowed

*Brooks* held that expert opinions on eyewitness testimony “when limited to an explication of the factors which studies have shown are relevant to making a reliable identification [are proper]. . . and will enhance the ability of the jury to reach its decision . . . .”<sup>87</sup> One of the areas mentioned by the court in *Brooks* that would be appropriate for expert testimony is the “cross-racial aspect of the identification.”<sup>88</sup> Other cases in which expert testimony on eyewitness identification was allowed include *People v. Lewis*,<sup>89</sup> *People v. Beckford*,<sup>90</sup> and *People v. Drake*.<sup>91</sup>

#### IV. *People v. Lee*

*People v. Lee*<sup>92</sup> was the first case since *Mooney* in which the Court of Appeals considered the admissibility of expert testimony on eyewitness identification. In *Lee*, the defendant was accused of stealing a car. There was an eyewitness, who spoke with the defendant before the crime occurred in a well-lit area and later identified the defendant on two separate occasions-

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the defendant's expert to testify generally as to studies and methodology, not the accuracy of this particular eyewitness' identification. *Id.*

87. *People v. Brooks*, 490 N.Y.S.2d 692, 694-95 (Sup. Ct. 1985). The court in *Brooks* points out that the Court of Appeals' standard for the admissibility of expert testimony was whether “it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert, and beyond the ken of the typical juror.” *Id.* at 697 (quoting *DeLong v. County of Erie*, 457 N.E.2d 717, 722 (N.Y. 1983)).

88. *Id.* at 694.

89. 520 N.Y.S.2d 125 (Sup. Ct. 1987). The court in *Lewis* allowed expert testimony on eyewitness identification under the specific circumstances of that case (an artificially lit parking lot, a nighttime identification, and a short identification time). *Id.*

90. 532 N.Y.S.2d 462 (Sup. Ct. 1988). In *Beckford*, the court allowed a psychology professor, an expert in the field of memory and perception, to testify as the stress of identification, which scientific research demonstrated affected memory, as well as the lack of correlation between witness confidence and accuracy. “Admission of such testimony would not usurp the jury's function in determining the guilt or innocence of the defendant. They can ultimately reject or accept such testimony.” *Id.* at 464.

91. 728 N.Y.S.2d 636 (Sup. Ct. 2001). The court in *Drake* also allowed expert testimony on eyewitness identification. “The jury can be greatly assisted by an expert's explanation of factors that scientific research has shown can profoundly influence a witness' ability to accurately identify.” *Id.* at 639. The court reproduced the same list of factors from *Brooks*, which included cross-racial identification.

92. 750 N.E.2d 63 (N.Y. 2001).

once in a photo array, and once in a police lineup.<sup>93</sup> Before trial, the defendant moved to introduce the testimony of an expert on eyewitness testimony. This motion was denied by the trial judge.<sup>94</sup> The defendant was convicted at trial and appealed, arguing that the expert testimony should have been admitted at trial.<sup>95</sup>

The Court of Appeals held that “while such expert testimony [on the reliability of eyewitness testimony] is not inadmissible per se, the decision whether to admit it rests in the sound discretion of the trial court.”<sup>96</sup> The reviewing court looks at the decision of the trial judge to exclude in order to determine only whether there was an abuse of discretion; absent such an abuse, the reviewing court will affirm the exclusion.<sup>97</sup>

The most important statement made in *Lee* is “despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the ordinary juror.”<sup>98</sup> Since some courts’ rationale for excluding expert testimony on eyewitness identification (especially in the area of cross-racial identification) is that the factors affecting reliability are within the experience of the ordinary juror,<sup>99</sup> the statement in *Lee* potentially calls this reasoning into question.

However, while *Lee* is important for the propositions that expert testimony on eyewitness identification can be admitted by the trial court and that factors affecting identification are not necessarily beyond the understanding of the ordinary juror, the standard of review to be employed makes it unlikely that a trial court’s refusal to admit the expert testimony will be overturned on appeal absent a blatant abuse of discretion.

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93. *Id.* at 65.

94. *Id.*

95. *Id.* at 65-66.

96. *Id.* at 65.

97. *Id.* at 66. “It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.” *Id.* (quoting *People v. Cronin*, 458 N.E.2d 351, 352 (N.Y. 1983)).

98. *Id.* at 66.

99. *See, e.g., People v. Carrieri*, 777 N.Y.S.2d 627 (Sup. Ct. 2004); *People v. Valentine*, 385 N.Y.S.2d 545 (App. Div. 1976).

V. From *Lee* to *Carrieri*

There are few New York criminal cases after *Lee* which deal with the admissibility of expert testimony on eyewitness identification, and fewer still which involve cross-racial identifications. This section discusses five of those cases, four of which deal with cross-racial identification.<sup>100</sup>

In *People v. Radcliffe*, the defendant was charged with attempted murder. In a pre-trial motion, he asked for permission to call an expert witness on eyewitness identification.<sup>101</sup> Specifically, the expert would testify as to the cross-racial nature of the identification.<sup>102</sup> The court, after noting that the law in New York is not clear on the “parameters of expert identification,” set forth five criteria that an application to submit such testimony should contain:

An application to admit expert identification testimony should: (1) to the extent known, set forth the pertinent alleged facts of the identification and any corroborative evidence; (2) set forth the name and qualifications of the witness and the ‘proffered’ testimony; (3) correlate the proffered testimony with the facts of the case to demonstrate the relevance of the expert testimony; (4) explain whether the testimony involves ‘novel scientific theories and techniques,’ and if it does, include an offer of proof as to its general acceptance by the relevant scientific community; and (5) explain why the testimony is warranted if an existing standard jury instruction . . . appear to cover the area of the proffered expert testimony.<sup>103</sup>

Although holding that defendant’s application was incomplete under this standard, the court granted defendant leave to amend so as to comply with the court’s criteria.<sup>104</sup>

*Radcliffe* is significant for two reasons: first, because it sets forth some type of criteria from which to judge the admissibility of expert testimony in this area, and second, for the court’s

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100. These five cases are: *People v. Radcliffe*, 743 N.Y.S.2d 229 (Sup. Ct. 2002); *People v. Smith*, 743 N.Y.S.2d 246 (Sup. Ct. 2002); *People v. Legrand*, 747 N.Y.S.2d 733 (Sup. Ct. 2002); *People v. Smith*, 2004 N.Y. Misc. LEXIS 255 (Sup. Ct. Mar. 26, 2004); *People v. Carrieri*, 777 N.Y.S.2d 627 (Sup. Ct. 2004).

101. *Radcliffe*, 743 N.Y.S.2d 229, 230.

102. *Id.* at 233. The defendant was black while the victim/eyewitness was Hispanic.

103. *Id.* at 232.

104. *Id.* at 234.

statement that “‘cross-racial identification’ is an area not covered by the current standard jury instruction and is an area that may lend itself to expert testimony.”<sup>105</sup> *Radcliffe* correctly realizes that, since the Court of Appeals in *Lee* held that an appellate court can only review a trial court’s decision to exclude expert testimony for abuse of discretion, some type of procedural standards must exist for a trial judge to properly consider the testimony’s admissibility.<sup>106</sup> If each court relies on its own criteria to decide admissibility, the law will remain unsettled and inconsistent; as well, criminal defendants will continue to be deprived of an opportunity to attack the credibility of eyewitnesses. It is also significant that *Radcliffe* does not foreclose the possibility of expert testimony on the issue of cross-racial identification, even though the average juror may be aware of some of the factors that affect eyewitness testimony in that situation.<sup>107</sup>

The court in *People v. Smith* rejected the *Radcliffe* criteria, finding that such a standard was too strict and put a burden on the defense that the prosecution would not have when seeking to introduce their own experts.<sup>108</sup> In *Smith*, the defendant was charged with three robberies. There were two eyewitnesses, one of who was able to pick defendant out of both a photo array and a lineup; the other witness was only able to identify defendant in a police lineup.<sup>109</sup> At trial, defendant intended to introduce the testimony of an expert witness in the field of memory and perception who would testify as to the cross-racial nature of the witness identification; the prosecution made a pre-trial motion to preclude the expert witness’ testimony.<sup>110</sup>

The *Smith* court began by noting that a pre-trial *Frye* hearing to determine whether the proffered expert testimony was

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105. *Id.* at 233. The court also states cites *People v. Lee* for the proposition that, “expert identification testimony, while confirming something a typical juror may know or be told in jury instructions, may nonetheless be required in order to add specialized information . . . that is beyond the ken of the juror and relevant to the facts at hand.” *Id.* at 231.

106. *Id.* at 232.

107. *Id.* at 233.

108. *People v. Smith*, 743 N.Y.S.2d 246, 250 (Sup. Ct. 2002).

109. *Id.* at 247. Four other witnesses were unable to identify Smith in a police lineup. The case against Smith rested entirely on the identification by the first two witnesses. *Id.*

110. *Id.*

“generally accepted” by the scientific community was unnecessary in this situation, since the theory at issue was not novel and was supported by a wide range of studies.<sup>111</sup> Other New York courts which previously considered the same issue had also concluded that testimony met the *Frye* test.<sup>112</sup>

Therefore, the question the *Smith* court considered was whether the expert testimony on eyewitness identification should be admitted in this particular case.<sup>113</sup> While calling the criteria developed by the *Radcliffe* court “thoughtful,”<sup>114</sup> the *Smith* court disagreed with this proposed standard for several reasons, most notably the fact that since “a prosecution frequently proceeds without any description of the complainant,”<sup>115</sup> a defendant will be unable to meet the third criteria of the *Radcliffe* test (“correlat[ion of] the proffered testimony with the facts of the case to demonstrate the relevance of the expert testimony”)<sup>116</sup> without “guesswork.”<sup>117</sup> The court in *Smith* also pointed out that the *Radcliffe* criteria impose another burden on defendant- he must “explain why the testimony is warranted if an existing standard jury instruction would appear to cover the area of the proffered testimony.”<sup>118</sup> The *Smith* court noted that the Court of Appeals in *Lee* makes it clear that the real question is whether the expert testimony would be helpful to the jury.<sup>119</sup> The court concluded that the opportunity for cross-

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111. *Id.* at 248 (“Where, as here, it is clearly demonstrated that certain recurring phenomena and derivative patterns of human behavior have been observed, studied, recorded, analyzed, and published in academic literature and pervasively subjected to peer review, the court will permit conclusions and opinions offered by a recognized expert in the field of study without the necessity of a pre-trial *Frye* hearing.”).

112. *Id.* The court cited *People v. Drake*, 728 N.Y.S.2d 636 (Sup. Ct. 2001); *People v. Beckford*, 532 N.Y.S.2d 462 (Sup. Ct. 1988); *People v. Lewis*, 520 N.Y.S.2d 125 (Sup. Ct. 1987); and *People v. Lewis*, 490 N.Y.S.2d 692 (Sup. Ct. 1985) to support this statement.

113. *Smith*, 743 N.Y.S.2d 246, 249.

114. *Id.*

115. *Id.* at 251.

116. *People v. Radcliffe*, 743 N.Y.S.2d 229, 232 (Sup. Ct. 2002).

117. *Smith*, 743 N.Y.S.2d 246, 251. The court believed the limited pre-trial discovery accorded to a defendant would make such correlation difficult, if not impossible. *Id.*

118. *Id.*

119. *People v. Lee*, 750 N.E.2d 63, 66 (N.Y. 2001) (“courts should be wary not to exclude such [expert] testimony merely because, to some degree, it invades the jury’s province”).

examination and jury instructions “are not alternatives to testimony by a defense expert,”<sup>120</sup> and denied the prosecution’s motion to exclude the defendant’s expert.

The decision in *Smith* is interesting for two reasons: first, because it implicitly accepts the “general acceptability” of expert testimony on eyewitness identification, and second, because, while it rejects the *Radcliffe* criteria as too strict, it does not offer any alternate standard for admissibility.

Four months after *Smith*, another New York County Supreme Court rejected the premise that such expert testimony satisfies the *Frye* “general acceptability” test and noted with approval the procedure set out by *Radcliffe*.<sup>121</sup> In *People v. Legrand*, the defendant was charged with second-degree murder.<sup>122</sup> After the first trial ended in a mistrial, the defendant moved for permission to introduce expert testimony on eyewitness identification.<sup>123</sup> After a hearing, the trial court denied defendant’s motion.<sup>124</sup>

The *Legrand* court began by analyzing the only two post-*Lee* trial court decisions to deal with the admissibility of expert eyewitness testimony: *Radcliffe* and *Smith*. *Legrand* cites the *Radcliffe* criteria with approval, noting that the procedure does much to provide an admissibility standard in an area which remained unsettled in New York.<sup>125</sup> In contrast, the *Legrand* court rejected the conclusion in *Smith* that this type of expert testimony is generally accepted,<sup>126</sup> and noted that the cases

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120. *Smith*, 743 N.Y.S.2d 246, 252.

121. *People v. Legrand*, 747 N.Y.S.2d 733 (Sup. Ct. 2002).

122. *Id.*

123. *Id.* at 736-37. The defendant was actually arrested in connection with a burglary charge in 1998, and was subsequently linked to a 1991 homicide. Three of the witnesses to the 1991 murder identified defendant in a photo array, and one also identified him in a police lineup. *Id.* at 737. The expert testimony defendant wished to introduce at the second trial related to the confidence-accuracy correlation, weapon focus, and “post-event information and confidence malleability.” *Id.* at 736. Cross-racial identification was not an issue in this case.

124. *Id.* at 737. This ruling was recently overturned by the New York Court of Appeals as an abuse of discretion. *People v. Legrand*, No. 39, 2007 N.Y. LEXIS 325 (N.Y. Mar. 27, 2007). See Conclusion, *infra*.

125. *People v. Legrand*, 747 N.Y.S.2d 733, 739 (Sup. Ct. 2002).

126. *Id.* “*Smith* concluded that there was nothing novel about the proposed testimony, implicitly accepting its general acceptability.” *Id.* The court goes on to say that this “ignored” the Court of Appeals statement in *Lee* that this issue “remains . . . unresolved . . . in this State.” *Id.*

*Smith* cited for this proposition did not admit the testimony after an explicit finding that *Frye* was satisfied.<sup>127</sup>

What is interesting about the decision in *Legrand* is that it appears to consider as settled the issue of whether this type of expert testimony is beyond the knowledge and experience of the average juror. *Legrand* cites *Lee* for the proposition that such testimony is not within the “ken of the jury” and considers this prong of the *Frye* test satisfied.<sup>128</sup> Although the *Legrand* court ultimately excluded the testimony, it did so because it believed the “general acceptability” prong had not been satisfied as to the specific eyewitness factors to which defendant’s expert would testify.<sup>129</sup>

The fourth case after *Lee* to deal with the admissibility of expert testimony on eyewitness identification is *People v. Smith*.<sup>130</sup> In *Smith*, the defendant was indicted for murder in the second degree. There were three eyewitnesses to the crime, all of whom were able to pick the defendant out of a police lineup.<sup>131</sup> The defendant made a pre-trial motion to introduce the testimony of an expert witness on eyewitness identification, who was prepared to testify as to various factors affecting identification, one of which was the cross-racial nature of the identi-

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127. *Id.* at 739 n.3. This is also true for the cases which rejected the testimony (these cases tended to reject the testimony on the basis that it was within the knowledge and experience of the average juror). *Id.* at 739 n.4. However, the *Legrand* court fails to mention *People v. Brown*, 479 N.Y.S.2d 110 (Sup. Ct. 1984), which did mention the *Frye* general acceptability standard as the reason for its rejection.

128. *Id.* at 742 (“Moreover, there is no need for me to determine whether the evidence is beyond the ken of the jury, since this question apparently has been put to rest by the statement in *Lee*, that although ‘jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observations and identifications, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.’” (quoting *People v. Lee*, 750 N.E.2d 63, 66 (N.Y. 2001))).

129. *Id.* at 742-57. The First Department recently affirmed the lower court decision in *People v. Legrand*, stating that the record supported the trial court’s determination that the expert testimony offered was not accepted by the scientific community and that it was not an abuse of discretion to exclude it. 814 N.Y.S.2d 37, 38 (App. Div. 2006). However, the Court of Appeals reversed the First Department in late March 2007, holding that the trial court decision was an abuse of discretion. No. 39, 2007 N.Y. LEXIS 325 (N.Y. Mar. 27, 2007).

130. 2004 N.Y. Misc. LEXIS 255 (Sup. Ct. Mar. 26, 2004). This case is unrelated to the first *Smith* case referred to *supra* note 108.

131. *Id.* at \*1. One of the eyewitnesses also picked defendant out of a photo array.

fication.<sup>132</sup> After a hearing, the court denied without opinion the motion as to several of the factors, including cross-racial identification. Although a *Frye* hearing was held as to the remaining factors, the court ultimately denied the motion to admit the testimony as to these factors as well.<sup>133</sup>

The court in *Smith*, as in *Legrand*, assumed that the proffered testimony was beyond the knowledge and experience of the average juror.<sup>134</sup> The only remaining question was “whether the proffered expert testimony is considered generally reliable in the relevant scientific community.”<sup>135</sup> The *Smith* court therefore spent the remainder of its opinion assessing the available data, and seemed to focus on the methodology of the studies rather than its general acceptance in the community.<sup>136</sup>

It is worth noting, however, that at least one commentator has stated that the methodology of a study is relevant to the weight the results will be given by the jury rather than its admissibility.<sup>137</sup> All *Frye* requires the trial judge to do when assessing admissibility is to determine whether the theory is generally accepted in the relevant scientific community; both the *Smith* and *Legrand* courts seem to determine the admissibility, at least in part, on their personal assessment and rejection of the scientific studies’ methodology. Such an inquiry, while perhaps appropriate in a court which adheres to *Daubert*, is inappropriate in a court which must apply the *Frye* standard.

In its conclusion, the *Smith* court states, “although not before this court, the area of cross racial identification may indeed be ripe for expert testimony.”<sup>138</sup> Notwithstanding this comment, one of the next cases to consider the issue, *People v. Carrieri*,<sup>139</sup> excluded such expert testimony.

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132. *Id.* The defendant was black. Presumably, at least one of the witnesses was not, but the opinion does not specify the race of the eyewitnesses.

133. *Id.* at \*1-2, 11.

134. *Id.* at \*3-4.

135. *Id.* at \*4.

136. *Id.* at \*4-11. For example, the court critiques the number of participants in the Kassin study, the fact that many studies take place in a laboratory setting with mock juries, and the characteristics of the participants. The court in *Legrand* assessed the available studies in a very similar manner. See *People v. Legrand*, 747 N.Y.S.2d 733 (Sup. Ct. 2002).

137. Murrian, *supra* note 64, at 384-85.

138. *Smith*, 2004 N.Y. Misc. LEXIS 255, \*11.

139. 777 N.Y.S.2d 627 (Sup. Ct. 2004).

In *Carrieri*, the defendant was charged with robbery.<sup>140</sup> There was one witness who identified the defendant as the robber, and this identification was cross-racial in nature.<sup>141</sup> At trial, the defendant filed a motion to call an expert witness who would testify as to the accuracy of cross-racial eyewitness identification.<sup>142</sup>

The court first found that a *Frye* hearing would be called for in this case, as the scientific knowledge regarding expert testimony on cross-racial identifications was “novel.”<sup>143</sup> The court cites the 1999 New Jersey case *State v. Cromedy* for the proposition that scientists disagree about the extent to which own-race bias affects eyewitness identification and its application to specific racial groups.<sup>144</sup> One thing that is significant about this conclusion is that the court in *Carrieri* did not conduct any of its own research or review any of the studies which existed (as the courts in *Radcliffe*,<sup>145</sup> *Smith*,<sup>146</sup> and *Legrand*<sup>147</sup> had) to reach it.

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140. *Id.*

141. *Id.*

142. *Id.* at 627-28. The defendant also wanted a jury instruction that would allow the jury to take the cross-racial nature of the identification into account during deliberations. *Id.*

143. *Id.* at 628.

144. *Id.* (citing *State v. Cromedy*, 727 A.2d 457, 461-62 (N.J. 1999)). In *Cromedy*, the defendant was convicted of sexual assault. *Cromedy*, 727 A.2d 457, 460. The eyewitness in the case was the victim, who initially gave police a description of her attacker but was unable to pick him out of a photo line-up. *Id.* at 459. She later saw an individual on the street she believed to be the attacker, notified police, and later identified him in a police line-up. *Id.* Eyewitness testimony was the only evidence offered at trial, since blood and saliva samples did not link defendant to the crime. *Id.* at 459-60. Defendant requested a jury instruction on the nature of the cross-racial identification (the defendant was black and the witness white), which was denied. *Id.* at 460. On appeal, the state Supreme Court reversed the conviction, holding that the jury instruction should have been given. *Id.* at 459. More importantly, the state Supreme Court held that expert testimony on cross racial identification was within the common knowledge and understanding of the jurors and was inadmissible *per se* under New Jersey law. *Id.* at 467-68. At the time, Rule 702 of the New Jersey Rules of Evidence required that:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

*State v. Kelly*, 97 N.J. 178, 208 (1984); see also *Cromedy*, 727 A.2d 457, 467-68; compare *Smith v. State*, 880 A.2d 288, 296 (Md. 2005) (finding that the science regarding the fallibility of cross-racial eyewitness identifications was sound).

145. 743 N.Y.S.2d 229 (Sup. Ct. 2002).

146. 743 N.Y.S.2d 246 (Sup. Ct. 2002).

Instead, the court relied on a five-year old case from another jurisdiction to reach the conclusion that the underlying science was not currently accepted.<sup>148</sup> This decision seems to conflict with pre-*Lee* cases like *Brooks*, *Beckford*, and *Drake* which identify the cross-racial nature of the identification as a factor that expert testimony may be appropriate to clarify or explain.<sup>149</sup>

The *Carrieri* court also stated that even if the science is generally accepted, the question of whether the evidence is beyond the experience of the ordinary juror still remained. In addition to conflicting with the Court of Appeals' decision in *People v. Lee* (where the court noted that "it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the ordinary juror"),<sup>150</sup> this conclusion ignores the cases which came after *Lee*, including *Legrand* and *Smith*.<sup>151</sup> These post-*Lee* cases either explicitly or implicitly accepted the proposition that expert testimony on eyewitness identification does not rely on knowledge within the experience of the average juror.<sup>152</sup>

#### VI. The Court of Appeals Weighs In: *People v. Drake* and *People v. Young*

In May 2006, the New York Court of Appeals decided two cases in which they attempted to provide guidance to the lower courts concerning the scope of their discretion in excluding or allowing expert testimony on eyewitness identification.<sup>153</sup> The facts of the first, *People v. Drake*, are discussed *supra*; recall

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147. 747 N.Y.S.2d 733 (Sup. Ct. 2002).

148. *People v. Carrieri*, 777 N.Y.S.2d 627, 628 (Sup. Ct. 2004). It is also worth noting that *Cromedy* was decided in 1999, two years before the Court of Appeals in *People v. Lee* held that psychological studies on factors dealing with eyewitness testimony are not necessarily within the experience of the average juror. *People v. Lee*, 750 N.E.2d 63, 66 (N.Y. 2001).

149. See *People v. Brooks*, 490 N.Y.S.2d 692, 694-95 (Sup. Ct. 1985); *People v. Beckford*, 532 N.Y.S.2d 462, 464 (Sup. Ct. 1988); *People v. Drake*, 728 N.Y.S.2d 636, 639 (Sup. Ct. 2001).

150. *Lee*, 750 N.E.2d 63, 66.

151. *People v. Legrand*, 747 N.Y.S.2d 733, 742-57 (Sup. Ct. 2002); *People v. Smith*, 2004 N.Y. Misc. LEXIS 255 (Sup. Ct. Mar. 26, 2004).

152. *Legrand*, 747 N.Y.S.2d 733, 742-57; *Smith*, 2004 N.Y. Misc. LEXIS 255, at \*3-4.

153. *People v. Drake*, 850 N.E.2d 630 (N.Y. 2006); *People v. Young*, 850 N.E.2d 623 (N.Y. 2006).

that the trial court had allowed an expert witness on eyewitness identification to testify.<sup>154</sup> The Court of Appeals dealt largely with an issue relating to the jury charge and the weight the jury was allowed to give the expert testimony,<sup>155</sup> but stated that the trial court had allowed the expert testimony “as courts are encouraged to do in appropriate cases,”<sup>156</sup> and referred to their decision in *People v. Young*, issued on the same day.

In *People v. Young*, the defendant was arrested on robbery charges stemming from a home invasion in which one of the victims subsequently identified the defendant in a line-up (after first failing to do so in a photo array).<sup>157</sup> At trial,<sup>158</sup> the defendant sought to introduce expert testimony from an expert who studied the factors which affected eyewitness identification accuracy; one of the factors the expert proposed to testify on was other-race bias and cross-racial identification (the defendant in *Young* was black and the victim was white).<sup>159</sup> The evidence was excluded by the trial court “in the exercise of its discretion,” and the defendant was once again convicted of robbery and burglary.<sup>160</sup>

The Court of Appeals affirmed defendant’s conviction, holding that the trial court did not abuse its discretion by excluding the expert’s testimony.<sup>161</sup> In reaching the conclusion that, in accordance with *People v. Lee*, the trial court had the discretion to admit or exclude the evidence and that it was not an abuse in this case to exclude it, the Court of Appeals considered two factors: “[T]he extent to which the research findings discussed by Brigham [the expert] were relevant to Mrs. Sykes’ [the victim] identification of defendant; and the extent to which that identi-

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154. *People v. Drake*, 728 N.Y.S.2d 636 (Sup. Ct. 2001).

155. *People v. Drake*, 850 N.E.2d 630, 632-33 (N.Y. 2006).

156. *Id.* at 631.

157. *People v. Young*, 850 N.E.2d 623, 624 (N.Y. 2006).

158. This trial was actually the defendant’s second: in his first, defendant was convicted and the conviction later overturned on appeal because certain evidence, including the victim’s lineup identification, followed from an arrest without probable cause. *Id.* An independent source hearing held after the reversal found the victim could identify the defendant based on her observations during the break-in itself, and defendant was re-tried. *Id.* at 624-25.

159. *Id.* at 625.

160. *Id.*

161. *Id.*

fication was corroborated by other evidence.”<sup>162</sup> While the first factor weighed in favor of admitting the testimony, the identification was so strongly corroborated that the trial court could have reasonably concluded that the proffered testimony would be of “minor importance.”<sup>163</sup>

Judge Smith dissented in *Young*, stating, “[t]he majority’s ruling misses the opportunity to hold that here, as a matter of law, where eyewitness identification is attenuated and possibly tainted, and corroborating evidence is weak, courts should allow expert testimony concerning eyewitness identification.”<sup>164</sup>

### VII. Applying *Young*: *People v. Williams*

The question of the status of expert testimony on cross-racial eyewitness identifications in New York remains after *Drake* and *Young*. Although these cases, particularly *Young*, have provided trial courts with some guidance as to when exclusion may constitute an abuse of discretion, Judge Smith’s dissent raises a good point: if in the situation he outlines, the Court of Appeals would not necessarily find an abuse of discretion, in what situation *would* they?<sup>165</sup> The majority opinion states that the trial court clearly could have admitted the expert testimony in this case, but that exclusion was not an abuse of discretion.<sup>166</sup> Although *Young* gives some guidance to lower courts as to when exclusion might not be acceptable, the opinion seems to imply that so long as there is some evidence corroborating the identification, exclusion will not be an abuse of discretion.

It is also worth noting that *Young* seems to re-frame the longstanding debate over why courts exclude such evidence. As discussed *supra*, trial courts in New York which exclude expert testimony on cross-racial eyewitness identification tend to do so

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162. *Id.* at 626.

163. *Id.* The Court of Appeals went on to state that “if this case turned entirely on an uncorroborated eyewitness identification, it might well have been an abuse of discretion to deny the jury the benefit of Brigham’s opinions.” *Id.* at 626-27.

164. *Id.* at 629. Judge Smith also dissented in *Drake*.

165. The Court of Appeals, in their March 2007 decision in *People v. Legrand*, does adopt Judge Smith’s suggestion in situations where there is “little or no corroborating evidence,” but fails to provide guidance on exactly what “little” corroboration might consist of. No. 39, 2007 N.Y. LEXIS 325 at \*2 (N.Y. Mar. 27, 2007).

166. *Id.* at 626.

for one of two reasons: the science underlying the testimony is not sound and reliable, or the testimony covers factors within the ordinary knowledge and experience of the lay juror. While not specifying exactly what factors they are referring to, the Court of Appeals in *Young* noted that some of the expert's proposed testimony concerned aspects of identification which are "'counter-intuitive' [sic]—or, at least not so obvious or well-known that ordinary jurors would not benefit from hearing them," specifically that "jurors may also find it useful to know Brigham's general conclusion that human recollection of the faces of strangers is, on the whole, rather poor."<sup>167</sup> Such a statement goes far in laying to rest the lingering concern of lower courts after *Lee* that expert testimony on eyewitness identification is within the knowledge and experience of the average juror. The Court of Appeals also appears to assume that the science underlying the expert's proposed testimony is sound, as it did not mention this as a basis upon which the trial court could have reasonably excluded the evidence.

What then is the justification for exclusion of expert testimony on eyewitness identification after *Young*? The Court of Appeals seems to frame the issue in terms of how likely it is that the eyewitness could be wrong. In other words, if the identification is corroborated by other evidence, the trial court will have more latitude in excluding the evidence than it will have if the corroborating evidence is weak. The importance attached to the eyewitness identification and the need to fully understand the factors affecting its accuracy is greater where the corroboration is less.

One case which has applied the Court of Appeals' test in *Young* is *People v. Williams*.<sup>168</sup> In *Williams*, the defendant was indicted on robbery charges stemming from the robbery of a laundromat.<sup>169</sup> The defendant was identified by one of the victims from a photo array, then by both victims in a police lineup.<sup>170</sup> Other than the identifications, which were cross-racial in nature (the defendant was black and the victims were His-

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167. *Id.*

168. No. 8989/05, 2006 N.Y. Misc. LEXIS 4329, (Sup. Ct. Nov. 29, 2006).

169. *Id.* at \*1.

170. *Id.* at \*2.

panic),<sup>171</sup> there was no independent evidence corroborating the victims' identification testimony.<sup>172</sup> Prior to trial, the defendant moved to introduce the testimony of an expert on eyewitness identification, who proposed to explain the problems associated with, among other factors, cross-racial identifications.<sup>173</sup>

After a *Frye* hearing, the trial court allowed the expert to testify at trial. The opinion set forth at great length the scientific basis for the witness' opinion, as well as her impressive credentials and personal research,<sup>174</sup> concluding that the research underlying the testimony was sound and that the witness' expert testimony was not within the knowledge of the ordinary juror.<sup>175</sup>

As the court in *Williams* noted, a *Frye* hearing was hardly necessary in this case, in light of the Court of Appeals decision in *Young*.<sup>176</sup> After all, *Williams* is the paradigmatic example given in *Young*: the case with uncorroborated eyewitness testimony, in which "it might well . . . [be] an abuse of discretion to deny the jury the benefit of [an expert's] opinions."<sup>177</sup> The court in *Williams* seems to accept that in this situation, an in-depth *Frye* hearing assessing the underlying science of the testimony and whether it was within the experience of the average juror was unnecessary; all that was required was to assess whether the testimony would assist the jury in light of the other evidence present in the case.

### VIII. Conclusion: Beyond *Young* and *Williams*

The question that remains is whether the test articulated by the Court of Appeals in *Young* really solves the problem of

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171. *Id.* at \*6.

172. *Id.* at \*2.

173. *Id.* at \*1 n.2.

174. *Id.* at \*3-7.

175. *Id.* at \*14-15. The opinion notes that a full *Frye* hearing was only held in light of the recent decision of the First Department in *People v. Legrand*, 814 N.Y.S.2d 37 (App. Div. 2006), which was decided after *Young* and still rejected defendant's argument that exclusion of expert testimony in that case was an abuse of discretion. *Id.* at \*13. The *Williams* court criticizes the *Legrand* court for criticizing the methodology of some of the studies relied on, as well as their definition of the relevant scientific community, and concludes that *Legrand* is not a bar to allowing testimony in this case. *Id.* at \*15 n.46.

176. *Id.* at \*13.

177. *People v. Young*, 850 N.E.2d 623, 626-27 (N.Y. 2006).

inconsistent standards for admissibility of expert testimony on cross-racial eyewitness identification. *Williams* is an easy case because there was no evidence corroborating the eyewitness identification at all. Nevertheless, does *Young* really help a trial court decide what is admissible outside of this extreme situation?<sup>178</sup>

As noted in Part V, the lack of uniform standards by any trial court in New York to use prior to *Young* (and perhaps even after) when deciding the admissibility of eyewitness expert testimony has led to inconsistent precedent in the past. *Radcliffe* is the only case that has attempted to remedy this situation. It recognized that without some type of admissibility criteria, a trial court has no real guideposts on which to rely.<sup>179</sup>

Have these guideposts been improved by *Young*? On the one hand, *Young* is fairly clear on what will be considered an abuse of discretion (excluding expert testimony on eyewitness identification when there is no independent evidence corroborating the identification, as in *Williams*) and what will not be considered an abuse of discretion (excluding the testimony

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178. Returning briefly to the *Daubert* or *Frye* controversy of Part II, *supra*, one commentator has argued that adopting the *Daubert* standard in New York would also solve the problem of eyewitness expert testimony admissibility; cases like *Legrand* would be decided differently under *Daubert*, because *Daubert* would “provide trial courts with a reasonable standard to control the admissibility of expert testimony.” See Woller, *supra* note 75, at 350-51.

179. At least one commentator has suggested that disallowing expert testimony on cross-racial eyewitness identification presents a very real constitutional issue: exclusion of the testimony is a deprivation of a defendant’s due process rights under the Fourteenth Amendment. See Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identification*, 78 N.Y.U. L. REV. 182, 1823-24; cf. U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”). This theory presupposes that the science behind the own-race bias (ORB) theory discussed in Part I, *supra*, is sound enough to necessitate additional process to guard against the “racialized nature of memory,” and argues that expert testimony may not be enough since many courts continue to exclude it. See Natarajan, *supra*, at 1821, 1824. This is an interesting and potentially troubling argument, especially in light of the fact that the Supreme Court has never specifically dealt with the issue of whether there are admissibility standards for cross-racial eyewitness identifications. *Id.* at 1823-24. While the Supreme Court did adopt a two-prong test in *Manson v. Braithwaite* to determine what standard an eyewitness identification must meet in order to comport with the Due Process Clause, they have never considered whether the nature of a cross-racial identification requires special protection, nor did they specifically address the cross-racial nature of the identification as a factor in *Manson*. 432 U.S. 98, 114 (1977).

where there is corroboration “strong enough for the trial court to reasonably conclude that the expert’s testimony would be of minor importance,” as in *Young*).<sup>180</sup> At the same time, the majority opinion is clear that the testimony in *Young* could have been admitted by the trial court, even with the strong corroborating evidence, and that such inclusion would also not have been an abuse of discretion.<sup>181</sup> While “discretion” does mean that trial judges have the ability to make independent decisions based on the facts within certain parameters, the Court of Appeals decision in *Young* gives extremely wide latitude to judges on inclusion or exclusion of expert testimony on eyewitness identification, requiring only that there be some undefined amount of evidence corroborating the identification for the judge to exercise his discretion.

Perhaps recognizing the problems which still remain after *Young*, the Court of Appeals again took up the issue of a trial court’s discretion in the area of expert testimony on eyewitness identification in late March 2007. While reviewing the decision of the trial court in *People v. Legrand* to exclude such expert testimony, the Court of Appeals articulated a four-part test which, if satisfied, would render a trial court’s decision to exclude expert testimony an abuse of discretion where the case turned upon the accuracy of an identification and there was little or no additional evidence which would tend to implicate the defendant:

[I]t is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness’s identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.<sup>182</sup>

However, the Court of Appeals only provides a test for a trial court’s exclusion of expert testimony on eyewitness identification where there is “little or no corroborating evidence connecting defendant to the crime.”<sup>183</sup> While clarifying what an abuse

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180. *People v. Young*, 850 N.E.2d 623, 626-27 (N.Y. 2006).

181. *Id.* at 626.

182. *People v. Legrand*, No. 39, 2007 N.Y. LEXIS 325, at \*2 (N.Y. Mar. 27, 2007).

183. *Id.*

of discretion is under those limited circumstances, *Legrand* still leaves unresolved the questions of: (1) what “little” corroborating evidence is; and (2) what could constitute an abuse of discretion when that unknown amount of corroboration is exceeded.

Even after *Legrand*, judges still have almost unfettered discretion in the decision to include or exclude expert testimony, especially where some corroboration exists. By allowing such discretion, the result is that defendants remain uncertain as to their chances of success in introducing expert testimony at trial. Rather than solving the problem of inconsistent standards for admissibility that cases like *Smith* and *Carrieri* posed, *Young* merely complicates the puzzle by introducing a new grey area between the poles of “strong corroboration” and “no corroboration” that gives judges broad discretion in their choices regarding expert testimony and leaves defendants as confused as ever.