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Comment

The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony

I. Introduction

Through innocent eyes, there must be nothing more terrifying than having an eyewitness respond to the prosecutor's request to indicate the perpetrator of the crime by pointing directly at you. Yet, these misidentifications happen quite often and result in a majority of the miscarriages of justice in our court systems.¹ Certainly since the Sacco and Vanzetti case,² lawyers and judges have struggled to solve the problem of mis-

1. United States v. Wade, 388 U.S. 218, 228 (1967) ("[T]he annals of criminal law are rife with instances of mistaken identification."); Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275, 306 n.107 (1989) (citing C. Ronald Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQUENCY 518, 524 (1986)) ("[E]yewitness misidentification is the single most important factor leading to conviction."); see, e.g., State v. Adams, No. F-77-1286-I (Crim. Dist. Ct., No. 2, Dallas County), *aff'd*, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev'd sub nom.* Adams v. Texas, 448 U.S. 38 (1980), *on remand*, 624 S.W.2d 568 (Tex. Crim. App. 1981), *habeas corpus granted*, *Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) (vacating murder conviction due to much doubt as to defendant's guilt and illegal action on the part of prosecutor); People v. Dabbs, 154 Misc. 2d 671, 587 N.Y.S.2d 90 (Sup. Ct. Westchester County 1991) (vacating rape conviction when DNA analysis of physical evidence made nine years after rape indicated that the defendant was not the perpetrator even though the victim had identified the defendant as the rapist, claiming that she knew him and was certain of the identification).

2. Commonwealth v. Sacco, 151 N.E. 839 (Mass. 1926) (finding the two defendants, Nicola Sacco and Bartolomeo Vanzetti, guilty of murder). The trial was filled with fabrication and knowing falsity because of the defendants' Italian-American immigrant status and their anarchist views. David Starkman, *The Use of Eyewitness Identification Evidence in Criminal Trials*, 21 CRIM. L. Q. 361, 365 (1979). One witness testified to seeing the two perpetrators in a car driving by her some 60 to 80 feet away for a brief time, yet she made an extremely accurate iden-

identification.³ However, common misconceptions⁴ and ignorance about the identification process allow the problem to persist, notwithstanding constitutional guarantees⁵ and proper police practice.⁶ The remaining protection against the danger of judicial miscarriage due to misidentification is courtroom education. This education is one that only an expert can adequately provide.

Years of studies into the human mind's ability to perceive a visual image, retain it, and finally retrieve it upon recollection have revealed many counterintuitive results.⁷ Applied to identification testimony at trial, these results reveal the probability of juror misconception in the courtroom. An expert in the field of memory and perception could dispel some of the common misconceptions if permitted to testify in a criminal proceeding regarding the reliability of the identification process.⁸

The New York courts have been reluctant to come to terms with this increasingly accepted area of science.⁹ This reluctance was highlighted by the Court of Appeals' summary decision regarding expert identification testimony in *People v. Mooney*.¹⁰ Under the guise of discretion, New York courts have frequently found various inconsistent reasons for excluding this type of expert identification testimony offered on the defendant's behalf.¹¹ Additionally, there seems to be an apparent discretionary inequity that exists between decisions involving the admissibility of

tification of both which "border[ed] on the incredible [under] the circumstances." *Id.*

3. See *infra* notes 79-82 and accompanying text.

4. See *infra* notes 73-78 and accompanying text.

5. Such as due process and the right to counsel. U.S. CONST. amends. V and VI.

6. Such as the elimination of suggestiveness in line-ups. See *infra* note 79.

7. See *infra* notes 14-78 and accompanying text.

8. Starkman, *supra* note 2, at 377 ("Expert testimony concerning the inherent unreliability of eyewitness identification evidence may prove to be the only effective method of alerting jurors to the inherent weakness of this sort of evidence . . .").

9. James J. Brosnahan & Carl H. Loewenson, Jr., *Expert Testimony Concerning Eyewitness Identification*, N.Y. L.J., Oct. 19, 1993, at 1 ("New York appellate decisions condemn this [expert] testimony virtually without exception . . ."); see *infra* notes 133-85 and accompanying text.

10. 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990); see *infra* notes 235-48 and accompanying text.

11. See discussion *infra* part II.C.

psychological expert testimony for the prosecution and that for the defense.¹²

This Comment describes the uncertainty involving the admission of expert identification testimony in New York State courts and analyzes the main arguments against its admissibility. Part II.A. of this Comment summarizes the extensive body of research that has developed over the years in the area of memory and perception. Part II.B. highlights the background federal and state law regarding the admissibility of both general scientific expert testimony and psychological expert testimony in the area of memory and perception, or expert identification testimony. Part II.C. presents the New York courts' handling of the admissibility question and the apparent effect of the only Court of Appeals opinion to deal with expert identification testimony.¹³ Part III provides an analysis of the New York courts' discretionary decisions in this area and how they compare to the courts' decisions involving psychological expert testimony proffered by prosecutors. Part IV concludes that the New York courts' treatment of admissibility issues in this area is inconsistent with its rich history of providing full rights to defendants and suggests that the Court of Appeals reconsider its muteness on the subject in light of recent developments.

II. Background

A. *The Studies*

Psychological research studies over the last twenty years or so have produced interesting results concerning the human memory process and how it is affected by outside stimuli.¹⁴ These experiments constitute a large body of research that can be drawn upon by expert witnesses in criminal cases.¹⁵ The entire area of science is complex and often well beyond the layperson's common understanding. Thus, the results are often counterintuitive, revealing the likelihood of public misconception.

12. See discussion *infra* part III.B.

13. *Mooney*, 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115.

14. See *infra* notes 16-72 and accompanying text.

15. ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 277-318 (1987).

1. *The Memory Process*

Comparing human memory to a camera or videotape machine is a faulty analogy.¹⁶ The human mind does not simply take in all toward which the eyes are pointed and, unlike the camera, the eyes may not perceive all that they see.¹⁷ Additionally, the videotape system does not interpret what it shoots like the mind does.¹⁸ The videotape has no expectations or interests.¹⁹ The videotape cartridge can be stored in a safe place for years without affecting the contents. However, memory generally fades as time passes and is often "supplemented" by inferences while in storage.²⁰ Finally, to see the tape, one need only play it back. The mind's ability to retrieve accurate information from memory depends on many factors.²¹ We cannot simply play it back.

a. *Perception*

Many factors affect a person's ability to perceive an object or event. The factors can be divided into those which are inherent in the outside circumstances surrounding the event itself (event factors) and those which are inherent in the perceiver (witness factors).²²

Event factors include lighting conditions, event duration, and violence of the event.²³ While it may seem obvious that better lighting probably results in more accurate perception, the relationship between perception and lighting is more complex than most would think.²⁴ Observations made after sudden changes in lighting often present special problems at the level of the eye's retina.²⁵ However, even generally good viewing conditions such as constant lighting only allow for accurate percep-

16. GARY L. WELLS, EYEWITNESS IDENTIFICATION 1 (1988).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. See *infra* notes 22-63 and accompanying text.

22. LOFTUS & DOYLE, *supra* note 15, at 32-33.

23. *Id.* at 33-47.

24. *Id.* at 33.

25. *Id.* at 34-36 (explaining that receptor cells, called rods and cones, take time to recover from shifts in lighting levels).

tion if other factors, such as stress and expectation,²⁶ do not interfere.²⁷

People generally overestimate the time duration of events.²⁸ Studies have shown that, depending upon the stress and complexity of the event, the overestimation varies substantially.²⁹ While the longer the duration of an event, the more accurate the perception of that event, it is less clear whether the subject remembers how long the event actually lasted.³⁰

Finally, people are generally less capable of accurate perception of a violent event.³¹ Violent events adversely affect not only the perception of the event itself, but details preceding the event as well.³² Studies have shown that a "retrograde amnesia" of earlier events can occur after the viewing of a violent event.³³ Memory may also be impeded in the traumatic or emotional event because the viewer's attention is narrowed in these instances.³⁴

The other factors that affect perception are those involving the viewer, or witness factors. One of these factors is the wit-

26. See *infra* notes 28-63 and accompanying text.

27. WELLS, *supra* note 16, at 20; see, e.g., A. Daniel Yarmey, *Verbal, Visual, and Voice Identification of a Rape Suspect Under Different Levels of Illumination*, 71 J. APPLIED PSYCHOL. 363, 368 (1986) (revealing difficulties in accurate identification of suspect even in bright lighting).

28. LOFTUS & DOYLE, *supra* note 15, at 37.

29. *Id.* at 37-38 (citing JAMES MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 41-81 (1966) (viewers, on average, estimated a 42 second film in which man rocks a baby carriage and then flees when a woman approaches to last a minute and a half); Elizabeth F. Loftus et al., *Time Went By So Slowly: Overestimation of Event Duration by Males and Females*, 1 APPLIED COGNITIVE PSYCHOL. 36, 10 (1987) (average estimate of duration of 30 second simulated bank robbery was 152 seconds and the higher stress version of the robbery resulted in longer estimates)).

30. *Id.* at 36-37.

31. *Id.* at 43 (citing Brian R. Clifford & Clive R. Hollin, *Effects of the Type of Incident and the Number of Perpetrators on Eyewitness Memory*, 66 J. APPLIED PSYCHOL. 364 (1981) (subjects who viewed videotapes of different versions of an event showed a decreased accuracy in both testimony and identification as the violence of the witnessed event increased)).

32. *Id.* at 43-47.

33. *Id.* at 44 (citing Elizabeth F. Loftus & Terrence E. Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 MEMORY & COGNITION 318 (1982) (subjects who viewed mentally shocking event (a young boy violently shot in the face) at the end of a film showed poorer perception of earlier details of film)).

34. *Id.* at 46 (citing J.A. Easterbrook, *The Effect of Emotion on Cue Utilization and the Organization of Behavior*, 66 PSYCHOL. REV. 183 (1959)).

ness's stress level.³⁵ While violent events have their own influence on perception, depending on the individual, the stress caused by the event can affect memory to an even greater extent.³⁶ The effect of stress on the efficiency of an individual's perception is demonstrated by the Yerkes-Dodson Law.³⁷ The law provides that, as the level of stress initially increases, the ability to accurately perceive also increases.³⁸ However, when the stress level gets too high, the efficiency of memory declines dramatically.³⁹ Studies have shown that simulated dangerous situations bring about an anxiety level that hinders the subject's ability to remember or follow detailed instructions.⁴⁰

Another witness factor involves a phenomenon called weapon focus.⁴¹ Weapon focus is the term used to describe a crime witness's tendency to concentrate on the weapon used by the assailant.⁴² This focusing results in a reduced ability to recall other details of the event.⁴³ Studies have revealed that weapon focus, perhaps along with the anxiety caused by the event, results in a greater recollection of the weapon and a decreased recollection of the other surrounding images, including the identity of the person bearing the weapon.⁴⁴ However, this phenomenon of weapon focus seems to apply even in nonstressful situations.⁴⁵

35. *Id.* at 47.

36. *Id.*

37. *Id.* at 48. Yerkes and Dodson were two psychologists who discovered the theory underlying this law in 1908. *Id.*

38. *Id.* at 48-49.

39. *Id.*

40. *Id.* at 50 (citing Mitchell M. Berkun et al., *Experimental Studies of Psychological Stress In Man*, 76 PSYCHOLOGICAL MONOGRAPHS (unpaginated) (1962) (army recruits failed to remember how to repair radios after they had been told that they were being mistakenly shelled with live ammunition)).

41. *Id.* at 51.

42. *Id.*

43. *Id.*

44. *Id.* at 51-52. One study compared the recollection of subjects who viewed two versions of an event showing a customer on line in a cafeteria. *Id.* at 52. One version had the customer pull a gun on the cashier and the cashier return some money. The other version had the customer hand the cashier a check in return for money. Recorded eye movements revealed that the subjects who viewed the "weapon" version clearly focused on the gun and suffered from poorer memory than the subjects who viewed the other version. *Id.*

45. *Id.* at 52 (citing Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus"*, 11 L. & HUM. BEHAV. 55 (1987)).

Expectations of the witness can also greatly affect the perception of an event.⁴⁶ Studies indicate that depending on the prior expectation of the viewer, his recollection of what occurred in the witnessed event varies substantially.⁴⁷ Guy M. Whipple, a noted psychologist, commented that "observation is peculiarly influenced by expectation, so that errors amounting to distinct illusions or hallucinations may arise from this source We tend to see and hear what we expect to see and hear."⁴⁸ Expectations that influence perception, studies show, can come from cultural bias,⁴⁹ past experience,⁵⁰ or personal prejudice.⁵¹ In any case, the expectation of the witness cannot be ignored in judging the accuracy of her perception.

b. *Retention*

Once information has been perceived, the ability to retain it becomes crucial to the memory process. Forgetting can be caused by several factors. Studies have revealed that, while the measure of forgetting may differ depending on the individual, everyone's memory clearly fades as time elapses since the perceived event.⁵² Another instance of forgetting is when the mem-

46. *Id.* at 54.

47. *Id.* (citing M.A. Peterson, *Witnesses: Memory of Social Events* (1976) (unpublished Ph.D. dissertation, University of California (Los Angeles)) (viewers provided with two different explanations for the motives of actors they were about to see on same videotape recalled details consistent with their respective explanations)); see *infra* notes 44-47 and accompanying text.

48. ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 37 (1979) (citing Guy M. Whipple, *The Obtaining of Information: Psychology of Observation and Report*, 15 *PSYCHOL. BULL.* 218, 228 (1918)).

49. *Id.* at 37-38 (citing GORDON W. ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* 70-72 (1947) (subjects revealed an unthinking cultural stereotype that the black man pictured in the scene was hot-tempered and prone to using weapons)).

50. *Id.* at 39-40 (citing Jerome S. Bruner & Leo Postman, *On the Perception of Incongruity: A Paradigm*, 18 *J. OF PERSONALITY* 206 (1949) (study revealed that subjects claimed that they saw only three aces of spades when they were actually shown five, three in traditional black color and two colored red)).

51. *Id.* at 40-42 (citing Albert H. Hastorf & Hadley Cantrill, *They Saw a Game: A Case Study*, 49 *J. OF ABNORMAL AND SOC. PSYCHOL.* 129 (1954) (study revealed vastly different versions of a football game by students of rival schools)).

52. LOFTUS & DOYLE, *supra* note 15, at 70-73 (citing HERMANN EBBINGHAUS, *MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY* (1964) (intricate study of memory and of memory loss as time elapses); Harry P. Bahrick, *Memory For People, in* *EVERYDAY MEMORY ACTIONS AND ABSENT-MINDEDNESS* 19 (1983) (accuracy of recognition by professor of students' faces dropped from 69% two weeks after class

ory system does not store the information when it is perceived due to a lack of adequate attention.⁵³ Here, the information is lost in seconds.⁵⁴ However, even when the attention and perception of an event are apparently substantial, individuals are often unable to remember it after they have perceived further events.⁵⁵

Information perceived subsequent to an earlier perception can affect or "interfere" with the retention of the earlier information.⁵⁶ Witnesses of an event can receive this "interference" by talking to others, hearing questions posed to them about the event, or reading media accounts of the event.⁵⁷ Studies indicate that merely mentioning nonexistent objects to the witness of an event can introduce that object into their recollection.⁵⁸ While psychologists differ as to why postevent information affects memory of an event, research indicates that the memory apparently retained is clearly modified by postevent information.⁵⁹

c. Retrieval

The individual's ability to accurately retrieve information from memory once it has been perceived, stored, and retained greatly depends upon the manner in which the information is elicited.⁶⁰ Research has shown that the best way to obtain accurate information is to allow the individual to report the event freely.⁶¹ This method is the most accurate because the wording

ended to 31% four years later); Roger N. Shepard, *Recognition Memory for Words, Sentences and Pictures*, 6 J. VERBAL LEARNING & VERBAL BEHAV. 156, 158 (1967) (clerical workers recognition of pictures fell from almost 100% correct after two-hours to only 57% correct after a four month period)).

53. *Id.* at 73.

54. *Id.*

55. *Id.* at 74.

56. *Id.*

57. *Id.* at 78.

58. LOFTUS, *supra* note 48, at 58-62 (1979) (citing several experiments showing that suggestive questioning and inaccurate information can become incorporated into the witnesses' memories when the information was nonexistent in the film or scene).

59. LOFTUS & DOYLE, *supra* note 15, at 79-80.

60. *Id.* at 86.

61. *Id.* (citing Jack P. Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOL. 90 (1977)).

of a question can influence the individual's response.⁶² Thus, researchers have concluded that it is best to allow the individual to tell his story and then, with careful questions, fill in the gaps.⁶³

2. *Face Recognition*

While most people do not have much trouble picking out the face of a friend in a crowd, several phenomena create problems with identifying strangers.⁶⁴ Two phenomena that fall in this category are cross-racial identification and unconscious transference.

People of one race have greater difficulty recognizing and identifying persons of races different from their own.⁶⁵ Research has proven this to be more than a myth.⁶⁶ Members of one race also find face reconstruction of subjects from other races to be difficult.⁶⁷ Possible explanations of these effects include differing background and experience of the races, prejudices toward members of other races, and differing manners in which faces are processed.⁶⁸ Regardless of the theory, cross-racial identifications involve undertones of racism that may be difficult to communicate to others without discomfort.⁶⁹

Unconscious transference is a "phenomenon in which a person seen in one situation is confused with or recalled as a person seen in a second situation."⁷⁰ For example, a ticket agent may incorrectly recognize a sailor in a line-up as the person who

62. *Id.* at 87 (asking "How fast were the cars going when they smashed into each other?" will result in higher estimates than the question, "How fast were the cars going when they hit each other?").

63. *Id.* at 86.

64. *Id.* at 98.

65. *Id.* at 105.

66. *Id.* (citing Roy S. Malpass & Jerome Kravits, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330 (1969)) ("most widely cited study" in this area that used subjects from predominantly white University of Illinois and predominantly black Howard University revealed that white students made two to three times as many false identifications of black students as white students).

67. *Id.*

68. *Id.* at 106-07.

69. It is not easy to imagine a jury, deliberating over a case involving a cross-racial identification, comfortably discussing the possibility of a misidentification caused by the difference between the defendant's and the witness's races.

70. LOFTUS & DOYLE, *supra* note 15, at 108.

robbed him at gunpoint because the sailor had bought tickets three times before the robbery.⁷¹ While this phenomenon has been documented in research studies,⁷² its cause is not understood. In any event, unconscious transference must be taken into consideration as a possible factor in an eyewitness identification.

3. *Misconception*

The foregoing research results indicate that an individual untrained in the field of memory and perception is bound to misconceive much of the identification process. A major misconception by laypersons is that eyewitness confidence corresponds directly with identification accuracy.⁷³ Researchers in this area agree that "there is little or no relationship between eyewitness identification accuracy and eyewitness confidence."⁷⁴ In fact, a compilation of studies indicated that only thirteen out of thirty-one experiments revealed a significant relationship between confidence and accuracy.⁷⁵

The lack of a direct relationship between eyewitness confidence and identification accuracy is due to the fact that each is caused by different factors.⁷⁶ Identification accuracy is determined by factors affecting memory and perception,⁷⁷ while eyewitness confidence is determined by social and personality traits of the witness, independent of the event itself.⁷⁸ Therefore, to conclude that a confident eyewitness is an accurate one is clearly a misconception.

71. *Id.* (citing PATRICK M. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* 119-20 (1965)).

72. *See* LOFTUS, *supra* note 48, at 142-44 (citing several studies on this subject).

73. WELLS, *supra* note 16, at 15.

74. *Id.* (citing A. Daniel Yarmey & Hazel P. Tressillian Jones, *Is the Study of Eyewitness Identification a Matter of Common Sense?*, in *EVALUATING WITNESS EVIDENCE* (Salley M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983)).

75. *Id.* (citing Gary L. Wells & D.M. Murray, *Eyewitness Confidence*, in *EYE-WITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 155-70 (Gary L. Wells & Elizabeth F. Loftus eds., 1984)).

76. *Id.*

77. *Id.*; *see supra* notes 16-72 and accompanying text.

78. *Id.*

B. *The Law*

As this body of research in the field of memory and perception grew, defense lawyers began to look to "eyewitness identification" experts as witnesses. However, because the practice involves considerations traditionally thought to be satisfied by other trial procedure techniques, the expert testimony in this area was only grudgingly embraced until recently. The following portion of this Comment tracks the law's development in this area. Subpart one explains the courts' awareness of the problem of misidentification. Subpart two discusses how the general standard of admissibility for scientific expert witnesses has developed. Finally, subpart three addresses the development of the courts' acceptance of expert identification testimony.

1. *Recognizing the Problem*

In the 1960s, the United States Supreme Court recognized the dangers of eyewitness identification and imposed safeguards to protect the defendant against unconstitutional government action associated with the problem.⁷⁹ Although more recently, in *Manson v. Brathwaite*,⁸⁰ the Court limited these procedural protections by admitting eyewitness identification evidence even if the procedures used suffered from suggestiveness,⁸¹ the essential safeguards developed ten years earlier remained intact. However, courts realized that these protections were unsatisfactory when government or police procedures were not a cause of the mistaken identification.⁸² Thus, an in-

79. *United States v. Wade*, 388 U.S. 218 (1967) (holding that the presence of counsel for the defendant is required at all pretrial line-ups and show-ups). In *Wade*, the Court stated that "[t]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." *Id.* at 228; see also *Gilbert v. California*, 388 U.S. 263 (1967) (holding that the admission of evidence of a pretrial line-up without counsel where no showing was made of an independent basis for identification required a new trial); *Stovall v. Denno*, 388 U.S. 293 (1967) (stating that unnecessarily suggestive police procedures may violate due process).

80. 432 U.S. 98 (1977).

81. *Id.* at 104, 114 (holding that if, under the "totality of the circumstances," the identification is reliable, it is admissible).

82. *LOFTUS*, *supra* note 48, at 180 (the Supreme Court decisions "apply only to those crimes where the police had to establish the identity of the perpetrator by means of a photo identification, a showup . . . or a lineup . . .").

creasing number of courts began to permit expert witnesses to testify to the general dangers of eyewitness unreliability.⁸³

2. *Admissibility Standard for Scientific Expert Testimony*

Depending on the court, the standard for expert witness admissibility varies.⁸⁴ Some courts require that the expert's subject matter be "beyond the ken of laymen," while others permit the testimony if it would aid the fact-finder's understanding of the facts.⁸⁵ When faced with a proffer of scientific expert testimony, however, many courts, before 1993, utilized special rules for admissibility.⁸⁶

a. *Federal Courts*

Before 1993, the federal law regarding the admissibility of expert psychological testimony⁸⁷ was not clear. Two tests for the admissibility of scientific or technical expert testimony seemed to be utilized. The first test was derived from *Frye v. United States*.⁸⁸ The *Frye* court held that expert testimony concerning scientific subject matter may be admitted only after it has "gained general acceptance in the particular field in which it belongs."⁸⁹ Applying this "general acceptance" test, the court excluded polygraph evidence from an early "deception test."⁹⁰

The second, more liberal test followed Professor Charles McCormick's view that "[a]ny relevant conclusions supported by a qualified expert witness should be received unless there are

83. See, e.g., *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986) (modern inclination toward admissibility of expert identification testimony); *United States v. Langford*, 802 F.2d 1176, 1183 (9th Cir. 1986) (Ferguson, J., dissenting) (trend toward admissibility exists in state and federal courts), *cert. denied*, 483 U.S. 1008 (1987).

84. MCCORMICK ON EVIDENCE § 13, at 21 (John W. Strong ed., 4th ed. 1992).

85. *Id.*

86. *Id.* § 203, at 362; see *infra* notes 87-132 and accompanying text.

87. Experts in the field of memory and perception or "eyewitness identification" fall within this category. See MCCORMICK ON EVIDENCE § 206, at 372 (John W. Strong ed., 4th ed. 1992).

88. 293 F. 1013 (D.C. Cir. 1923).

89. *Id.* at 1014.

90. *Id.* (holding that the deception test "has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting it").

distinct reasons for exclusion."⁹¹ This view was in line with the belief shared by some commentators that the *Frye* test did not survive the Federal Rules of Evidence.⁹²

The Federal Rules of Evidence, adopted in 1975, provide in part that an expert witness's testimony should be admitted if his or her "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue"⁹³ The rule is to be read broadly such that "the fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge."⁹⁴ This language led to the view that the *Frye* test had been abandoned by the Rules' drafters.

Prior to 1993, the federal courts were divided as to the issue of what was the appropriate standard for determining the admissibility of scientific expert testimony.⁹⁵ Some circuits continued to apply the *Frye* test.⁹⁶ Others concluded that the Federal Rules of Evidence superseded the standard set forth in *Frye*, establishing a lower threshold of admissibility for expert testimony.⁹⁷

91. MCCORMICK ON EVIDENCE, *supra* note 84, § 203, at 364 (reasons for exclusion are limited to issues of relevance, prejudice, and expense).

92. *Id.* § 203, at 363-64; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 702[03], at 702-36 (1993).

93. FED. R. EVID. 702. "If scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* In May 1992, an advisory committee proposed an amendment to Rule 702 which would require the testimony to "substantially assist" the trier of fact. JACK B. WEINSTEIN ET AL., EVIDENCE, RULES, STATUTE AND CASE SUPPLEMENT 81 (1992). This proposal, which has not been adopted, would further confuse an already murky area of law.

94. FED. R. EVID. 702 advisory committee's note.

95. See *Mustafa v. United States*, 479 U.S. 953 (1986) (White, J., dissenting from denial of *cert.*).

96. See, e.g., *United States v. Two Bulls*, 918 F.2d 56, 60 n.7 (8th Cir. 1990); *United States v. Smith*, 869 F.2d 348, 351 (7th Cir. 1989); *United States v. Shorter*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987).

97. See, e.g., *United States v. Jakobetz*, 955 F.2d 786, 794 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992); *DeLuca v. Merrill Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (3d Cir. 1990).

On October 13, 1992, the United States Supreme Court granted certiorari on this very issue.⁹⁸ Less than a year later, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁹⁹ the Court finally settled the split in the circuits. The Court agreed with the lower courts and commentators who had read the Federal Rules of Evidence as abandoning the seventy-year-old *Frye* test for admissibility.¹⁰⁰

The federal district court in *Daubert* had granted the defendant's motion for summary judgment, finding that the expert testimony proffered by the plaintiff was inadmissible because it was based on principles not "sufficiently established to have general acceptance in the field to which it belongs."¹⁰¹ The Ninth Circuit had affirmed, citing the *Frye* test.¹⁰² The Supreme Court reviewed the *Frye* "general acceptance" test and interpreted the language¹⁰³ and drafting history¹⁰⁴ of the Federal Rules of Evidence.¹⁰⁵ The Court concluded that the *Frye* "general acceptance" test should not be applied as the exclusive standard for the admissibility of expert testimony.¹⁰⁶ Rather, the Court proceeded to establish a modern standard for admissibility.¹⁰⁷

The Court held that Rule 702 of the Federal Rules of Evidence requires that any scientific expert testimony must be relevant and reliable to be admissible.¹⁰⁸ Citing the rule's "helpfulness" standard, the Court equated relevance with "a

98. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991), cert. granted, 113 S. Ct. 320 (1992).

99. 113 S. Ct. 2786 (1993).

100. *Id.* at 2793.

101. *Id.* at 2792 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989) and quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)).

102. *Id.* (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (1991)).

103. *Id.* at 2794 ("Nothing in the text of this Rule [702] establishes 'general acceptance' as an absolute prerequisite to admissibility.").

104. *Id.* ("The drafting history makes no mention of *Frye*, and a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.") (citations omitted).

105. *Id.* at 2792-94.

106. *Id.* at 2794.

107. *Id.* at 2795-99.

108. *Id.* at 2795.

valid scientific connection to the pertinent inquiry" and a consideration of "fit."¹⁰⁹ The Court stated further that the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability based on the concept of "good grounds."¹¹⁰ The testimony must be scientifically valid and trustworthy.¹¹¹

The Court suggested several questions that may be helpful in deciding the issue of reliability.¹¹² They are: 1) whether the scientific theory or technique "can be (and has been) tested"; 2) "whether the theory or technique has been subjected to peer review and publication"; 3) what is "the known or potential rate of error" of the theory or technique; and 4) whether the theory or technique has been "generally accepted" in the "relevant scientific community."¹¹³ Rejecting the defendant's concern that abandoning the *Frye* test will result in "free-for-alls" which would confound juries, the Court stated that conventional devices, such as vigorous cross-examination, presentation of contrary evidence, careful instructions on the burden of proof, and directed judgments, "are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702."¹¹⁴ Thus, while the "general acceptance" test still exists as a valid inquiry into the admissibility of an expert's testimony, it is not a necessary precondition to admission. Furthermore, the existence of other conventional precautions should alleviate the concerns associated with the testimony's admission.

b. *New York Courts*

Early on, the New York courts admitted expert testimony only in cases where the facts, or the inferences to be drawn from the facts, depended "upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence."¹¹⁵ However, two New York Court of Appeals cases, *De-*

109. *Id.* at 2796 (the "fit" considers whether the facts of the case are tied to the purpose of the proffered expert testimony).

110. *Id.* at 2795.

111. *Id.*

112. *Id.* at 2796-97.

113. *Id.* "The focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 2797.

114. *Id.* at 2798.

115. *Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900).

*long v. County of Erie*¹¹⁶ and *People v. Cronin*,¹¹⁷ indicate that, during the early 1980s, the standard for admissibility of expert testimony became more lenient.¹¹⁸

In *Delong*, one of the two issues facing the court was whether the trial court correctly permitted an expert to testify to the monetary value of the services of a housewife-mother not employed outside the home.¹¹⁹ The court held that the testimony was properly admitted.¹²⁰ The court reasoned that "[t]he 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."¹²¹ Because it is unlikely that jurors are knowledgeable of the monetary equivalent of a housewife's services, the expert could speak.¹²²

In *Cronin*, the same court was faced with the issue of whether the trial court applied an incorrect standard when it refused to permit the admission of a psychiatrist's opinion regarding the defendant's state of mind during the crime's commission.¹²³ The court concluded that the psychiatrist should have been permitted to give his opinion as to the defendant's ability to form intent because "the facts could not be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon"¹²⁴ The court stated that the "admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court

116. 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

117. 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983).

118. See generally JEROME PRINCE & RICHARD T. FARRELL, RICHARDSON ON EVIDENCE § 367 (10th ed. Supp. 1985).

119. *Delong*, 60 N.Y.2d at 306, 457 N.E.2d at 722, 469 N.Y.S.2d at 617. The plaintiff's wife had been killed by a burglar after the 911 complaint writer negligently dispatched the police to the wrong home. *Id.* at 300-01, 457 N.E.2d at 718-19, 469 N.Y.S.2d at 613-14.

120. *Id.* at 308, 457 N.E.2d at 723, 469 N.Y.S.2d at 618.

121. *Id.* at 307-08, 457 N.E.2d at 722-23, 469 N.Y.S.2d at 617-18 (citations omitted) (emphasis added).

122. *Id.* at 307, 457 N.E.2d at 723, 469 N.Y.S.2d at 617.

123. *Cronin*, 60 N.Y.2d at 431-32, 458 N.E.2d at 351-52, 470 N.Y.S.2d at 110-11. The expert psychologist was to give his opinion as to whether the defendant could have formed the required intent for burglary and related offenses after he drank almost a case of beer, smoked several marijuana cigarettes, and swallowed 5 to 10 valium pills. *Id.*

124. *Id.* at 433, 458 N.E.2d at 352, 470 N.Y.S.2d at 111.

. . . ."¹²⁵ However, the court held that the trial court failed to exercise its proper discretion by assuming that opinions going to the ultimate issue of the case usurp the jury's function and are, thus, inadmissible.¹²⁶ It stated that trial courts must determine when jurors "would be *benefitted* by the specialized knowledge of an expert witness."¹²⁷

Both *Delong* and *Cronin* presented a more liberal admissibility standard tied to "helpfulness" much like the "assistance" language in Rule 702 of the Federal Rules of Evidence. However, neither case mentioned the federal *Frye*¹²⁸ test although the subject matter of the expert testimony in each was specialized or scientific in nature to some degree. Generally, though, New York courts have utilized *Frye*'s "general acceptance" test when dealing with scientific expert testimony.¹²⁹ Since the recent United States Supreme Court *Daubert* decision,¹³⁰ the New York courts have continued to apply the *Frye* test while mentioning in the opinions that the Court rejected *Frye*.¹³¹ These allusions to *Daubert* could be indicative of changes to come in New York law.¹³²

3. *Admissibility of Expert Identification Testimony*

Before the early 1980s, federal decisions involving expert identification testimony reflected the general confusion concerning the proper standard for the admissibility of scientific

125. *Id.*

126. *Id.*

127. *Id.* (emphasis added).

128. *See supra* notes 88-90 and accompanying text.

129. *See, e.g.,* *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983) (evidence of hypnotically induced statements inadmissible); *People v. Middleton*, 54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581 (1981) (evidence of bite mark tests admissible); *People v. Allweiss*, 48 N.Y.2d 40, 396 N.E.2d 735, 421 N.Y.S.2d 341 (1979); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969) (lie detector evidence inadmissible); *Beuschel v. Manowitz*, 271 N.Y.S. 277 (Sup. Ct. Kings County 1934) (first New York case to cite *Frye* permitting use of blood test for paternity proof).

130. *See supra* notes 98-114 and accompanying text.

131. *See People v. Moore*, No. 65971, 1993 WL 511845, at *1 (N.Y. App. Div. 3d Dep't Dec. 9, 1993); *People v. Swamp*, No. 68447, 1993 WL 495517, at *2 n.1 (N.Y. App. Div. 3d Dep't Dec. 2, 1993); *People v. Kral*, No. 63718, 1993 WL 477097, at *1-2 n.1 (N.Y. App. Div. 3d Dep't Nov. 18, 1993).

132. "The potential impact of *Daubert* is vast, and courts will have to reconsider the admissibility of many types of scientific evidence." David O. Stewart, A *New Test*, A.B.A. J., Nov. 1993, at 48, 51.

expert testimony and indicated a hesitancy to admit expert testimony due to a lack of understanding of the field.¹³³ As the science of memory and perception matured and the research expanded, the weight of modern authority in federal as well as state courts began to lean toward admission of this evidence.¹³⁴ During the 1980s, some federal and state courts clearly established persuasive reasoning for the admission of expert testimony regarding eyewitness identification.¹³⁵

a. *Federal Courts*

Although the United States Supreme Court has never dealt directly with an admissibility question regarding expert identification testimony, some of its decisions have provided indications of a possible future disposition on that issue. In *Neil v. Biggers*,¹³⁶ the Court endorsed the idea of using eyewitness confidence as a useful factor in judging eyewitness accuracy.¹³⁷ In *Biggers*, the Court held that evidence of the victim's identification of the defendant at a show-up seven months after her rape was properly admitted due to, among other factors, the fact that "[s]he had 'no doubt' that [the defendant] was the person who raped her."¹³⁸

Almost a decade later in *Watkins v. Sowders*,¹³⁹ the Court found that eyewitness reliability can be assessed adequately

133. See *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *Dyas v. United States*, 376 A.2d 827 (D.C. Cir.), cert. denied, 434 U.S. 973 (1977); *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974), rev'd sub nom. *United States v. Nobles*, 422 U.S. 225 (1975).

134. See *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), cert. denied, 469 U.S. 868 (1984); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *State v. Moon*, 726 P.2d 1263 (Wash. Ct. App. 1986).

135. See *infra* notes 147-85 and accompanying text.

136. 409 U.S. 188 (1972).

137. *Id.* at 199-200 ("[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness[s] degree of attention, the accuracy of the witness[s] prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.") (emphasis added).

138. *Id.* at 200-01.

139. 449 U.S. 341 (1981).

from competent cross-examination.¹⁴⁰ Thus, the Court held that a pretrial judicial determination of the admissibility of identification evidence is not per se constitutionally required.¹⁴¹ However, a strong dissenting opinion by Justice Brennan countered that cross-examination is inadequate to test the reliability of eyewitness testimony.¹⁴² He urged that "the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination."¹⁴³

Because the major premise underlying arguments for the admission of expert identification testimony is that, according to studies, there is often no correlation between eyewitness confidence and eyewitness accuracy, these Supreme Court decisions indicate a possible suspicion of the research results.¹⁴⁴ However, these positions by the Court can now be more firmly challenged by the large body of research that has continued to develop in the field since the time those cases were decided.¹⁴⁵ Furthermore, the Court's *Daubert* decision may be read to implicitly accept studies from the field of memory and perception as valid expert subject matter.¹⁴⁶ In any case, the Supreme Court's view on the matter is unclear.

The law in this area has more specifically developed in the circuit courts. The case that may have opened the door to sub-

140. *Id.* at 348-49. "[U]nder our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth." *Id.* at 349.

141. *Id.* at 349. One of the store employees identified Watkins in a line-up as the gunman who attempted to rob the store after which the other injured store employee also identified him in a hospital room show-up. *Id.* at 342-43. Both were extensively cross-examined as were the police officers who arranged the identifications. *Id.*

142. *Id.* at 356-57 (Brennan, J., dissenting) ("[C]ross-examination is both an ineffective and a wrong tool for purging inadmissible identification evidence from the jurors' minds . . . because all of the scientific evidence suggests that much eyewitness identification testimony has an unduly powerful effect on jurors.").

143. *Id.* at 347.

144. The suspicion of this underlying premise is evident by the Court's seeming reliance on the common misconception that a confident witness is an accurate one. See *supra* notes 73-78 and accompanying text.

145. See discussion *supra* part II.A.

146. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2797 (1993) (citing *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985)). In *Daubert*, the Court cited with approval the Third Circuit's reasoning in *Downing*. *Id.* The *Downing* case specifically dealt with the admissibility of expert testimony regarding eyewitness identification. See *infra* notes 154-64 and accompanying text.

sequent rulings on discretionary decisions regarding admissibility is *United States v. Smith*.¹⁴⁷ While the Sixth Circuit, in *Smith*, did not reverse the trial court conviction because of the harmless error doctrine, it found that psychological expert testimony in the area of eyewitness identification had become acknowledged as a reliable science.¹⁴⁸ The court reasoned that not only does the field of eyewitness identification surpass common knowledge, but also that it questions the common-sense evaluation of jurors.¹⁴⁹ By citing an earlier court of appeals case,¹⁵⁰ the court reaffirmed that it would "not hesitate to step in" where it can be shown that the trial court erred in excluding expert testimony.¹⁵¹ Furthermore, the court warned that the language of Rule 702 of the Federal Rules of Evidence indicates that the term "expert" should be construed broadly.¹⁵² As long as the expert's offer of proof is related to the facts of the case, the court held that the testimony should be admitted.¹⁵³

While *Smith* did not directly address the applicability of the *Frye* test, the Third Circuit clearly rejected the *Frye* standard in *United States v. Downing*.¹⁵⁴ The trial court had rejected the defendant's request to offer the testimony of a psychologist who would address the problems associated with identifications.¹⁵⁵ The court held that Rule 702 of the Federal Rules of Evidence permits a defendant to call an expert in the field of memory and perception to testify to the reliability of eyewitness identifications.¹⁵⁶ Further, it held that the trial court's

147. 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984).

148. *Id.* at 1106-07; *see also* *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.") (citation omitted).

149. *Id.*

150. *Mannino v. International Mfg. Co.*, 650 F.2d 846 (6th Cir. 1981).

151. *Smith*, 736 F.2d at 1107.

152. *Id.*

153. *Id.* at 1106. Since the bank employees who witnessed the robbery were Caucasian while the defendant was black, it was a case of cross-racial identification. *Id.* Since the witnesses were shown a photographic array three weeks after the robbery in which the defendant's picture was included, and then four months later, they were asked to identify the perpetrator in a line-up that included the defendant, it was a matter of unconscious transference. *Id.*

154. 753 F.2d 1224 (3d Cir. 1985).

155. *Id.* at 1228.

156. *Id.* at 1226.

error in excluding this evidence could not be harmless because of the prosecutor's apparent reliance on the eyewitness testimony for the case-in-chief.¹⁵⁷

The *Downing* court fashioned an analytical framework for testing admissibility.¹⁵⁸ The threshold inquiry is whether the reliability of the scientific principles and potential to aid the jury outweigh the likelihood that the testimony will overwhelm or mislead the jury.¹⁵⁹ If so, the second question is whether a "fit" exists between the proffered testimony and the facts of eyewitness identification in the particular case.¹⁶⁰ The court reasoned that the "general acceptance standard" of the *Frye* test should be abandoned as an independent test for admissibility of scientific expert testimony.¹⁶¹ It explained that the *Frye* test "proved to be too malleable to provide the method for orderly and uniform decision-making"¹⁶² The analytical framework set forth in its opinion, the court noted, was more in line with the language and spirit of Rule 702 than the conservative approach of *Frye*.¹⁶³ Further, the court rejected the argument that cross-examination of the expert would be adequate to allow the jury to properly weigh the eyewitness's testimony.¹⁶⁴

While there have been some differences of opinion among the circuits concerning the general admissibility of "novel" expert testimony,¹⁶⁵ generally the federal courts have continued to apply the *Downing* standard to cases involving expert identification testimony.¹⁶⁶ Reflecting the emerging trend toward ad-

157. *Id.*

158. *Id.* at 1237-42.

159. *Id.* at 1237-41.

160. *Id.* at 1242; see *supra* note 109 and accompanying text.

161. *Id.* at 1237.

162. *Id.*

163. *Id.*

164. *Id.* at 1230 n.6.

165. The United States Supreme Court's *Daubert* decision seems to have settled the law in this area for federal courts. See *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186-87 (7th Cir. 1993); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1013-14 (6th Cir. 1993); *Datskow v. Teledyne Continental Motors Aircraft Prods.*, 826 F. Supp. 677, 682 n.1 (W.D.N.Y. 1993).

166. *United States v. Curry*, 977 F.2d 1042, 1051 (7th Cir. 1992), *cert. denied sub nom. Holland v. United States*, 113 S. Ct. 1357 (1993); *United States v. Stevens*, 935 F.2d 1380, 1383 (3d Cir. 1991); *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir. 1988); *United States v. Blade*, 811 F.2d 461, 465 (8th Cir.), *cert. denied*, 484 U.S. 839 (1987); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir.

missibility, these courts have found that the field of memory and perception, as it relates to the eyewitness identification process, is a reliable and useful subject matter for expert assistance in the courtroom.¹⁶⁷

b. *State Courts*

Similarly, certain state courts embraced the science of expert identification testimony by providing clear guidelines to its admission. In *State v. Chapple*,¹⁶⁸ the Arizona Supreme Court reversed a lower court decision to exclude expert testimony relating to eyewitness reliability. Applying a fairly strict admissibility test from *United States v. Amaral*,¹⁶⁹ the court found that the expert was qualified, the subject was proper, the testimony conformed to a generally accepted theory, and the probative value outweighed the prejudicial effect.¹⁷⁰ Like the Federal Rules, the Arizona Rules of Evidence require that the expert's "specialized knowledge will assist the trier of fact to understand the evidence"¹⁷¹ The court reasoned that the probative value of the expert's testimony would outweigh any prejudice because of the "generality" of the testimony.¹⁷² It also noted that the expert would not draw a conclusion or present an opinion.¹⁷³ The average juror, the court held, would not be aware of the variables concerning identification and memory about which the expert was qualified to testify.¹⁷⁴ Finding that one of

1986); *United States v. Ferri*, 778 F.2d 985, 988-90 (3d Cir. 1985). *But see United States v. Langford*, 802 F.2d 1176, 1181-84 (9th Cir. 1986) (Ferguson, J., dissenting), *cert. denied*, 483 U.S. 1008 (1987). Since the United States Supreme Court incorporated much of the *Downing* reasoning into its *Daubert* decision, it can be assumed that federal courts will continue to admit expert identification evidence where appropriate. *See supra* notes 98-114 and accompanying text.

167. "[M]ost persons do not understand the intricacies of perception, retention, and recall." *Curry*, 977 F.2d at 1051.

168. 660 P.2d 1208 (Ariz. 1983).

169. 488 F.2d 1148 (9th Cir. 1973) (holding that the exclusion of expert identification testimony was within the trial court's discretion). The *Amaral* court set forth four criteria for determining the admissibility of such expert testimony. *Id.* at 1153. This testimony is admissible if: 1) the expert is qualified; 2) the subject is a proper one; 3) the testimony conforms to a generally accepted explanatory theory; and 4) the probative value outweighs the prejudicial effect. *Id.*

170. 660 P.2d at 1218.

171. *Id.* (citing ARIZ. R. EVID. 702).

172. *Id.* at 1219.

173. *Id.*

174. *Id.* at 1221.

the case's major issues was the accuracy of the eyewitness identification,¹⁷⁵ the court concluded that the study of memory and identification was a proper subject for expert testimony and should have been admitted.¹⁷⁶

In *People v. McDonald*,¹⁷⁷ the California Supreme Court held that the trial court prejudicially abused its discretion in excluding expert testimony on the psychological factors affecting the accuracy of eyewitness testimony.¹⁷⁸ The court noted that the trial court's discretion to admit or exclude expert testimony is not absolute.¹⁷⁹ It reasoned that the *Frye* standard does not apply to expert testimony which lacks the "aura of infallibility" that surrounds novel scientific devices or processes.¹⁸⁰ Instead, the court stated that expert identification testimony should be admitted when the facts of the case indicate a dependence by the prosecution on the identification as a key element and when no substantially corroborating evidence exists.¹⁸¹

In *State v. Moon*,¹⁸² the Washington Court of Appeals held that the trial court's exclusion of expert identification testimony constituted reversible error.¹⁸³ The court reasoned that the testimony would not invade the province of the jury because the trial court has broad discretion in limiting the expert's testimony (such as by excluding an opinion) and "that an expert cannot usurp the jury's duty of deciding facts because the jury may always accept or reject the expert's evidence or opinion . . ."¹⁸⁴ Thus, the court stated that if the expert testimony will be helpful to the jury, the court should admit it.¹⁸⁵

C. *New York Courts and Expert Identification Testimony*

Prior to *People v. Mooney*,¹⁸⁶ the only New York Court of Appeals case to deal with the admissibility of expert identifica-

175. *Id.* at 1222.

176. *Id.* at 1221.

177. 690 P.2d 709 (Cal. 1984).

178. *Id.* at 726.

179. *Id.* at 724.

180. *Id.* at 723-24.

181. *Id.* at 727.

182. 726 P.2d 1263 (Wash. Ct. App. 1986).

183. *Id.* at 1268.

184. *Id.* at 1267.

185. *Id.* at 1268.

186. 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990).

tion testimony, lower courts in New York shared the same confusion as other jurisdictions regarding the standard of admissibility to apply to this evidence. While some courts admitted the expert testimony,¹⁸⁷ others rejected it outright.¹⁸⁸ Even when courts were in agreement regarding the question of admissibility, rarely did they agree as to the rationale for admission or exclusion.¹⁸⁹ However, unlike federal and other state courts, New York courts have not begun to open their doors to these experts.¹⁹⁰

1. *Pre-Mooney Decisions*

In *People v. Brown*,¹⁹¹ the Westchester County Court held that expert testimony in the field of memory, perception and identification testimony was inadmissible.¹⁹² The case involved a robbery and the use of a firearm.¹⁹³ Among other factors affecting identifications, the expert was to testify to the phenomena of "weapon focus" and loss of memory.¹⁹⁴ Revealing the early skepticism of the field, the court reasoned that the expert's research had not reached the level of general acceptance required under the *Frye v. United States*¹⁹⁵ standard.¹⁹⁶ In any event, the court added, "the ultimate determination of the credibility of an identification witness[s] testimony is, quite properly the sole province of the jury"¹⁹⁷

187. *People v. Beckford*, 141 Misc. 2d 71, 532 N.Y.S.2d 462 (Sup. Ct. Kings County 1988); *People v. Lewis*, 137 Misc. 2d 84, 520 N.Y.S.2d 125 (Monroe County Ct. 1987); *People v. Brooks*, 128 Misc. 2d 608, 490 N.Y.S.2d 692 (Westchester County Ct. 1985).

188. *People v. Schor*, 135 Misc. 2d 636, 516 N.Y.S.2d 436 (Dist. Ct. Nassau County 1987); *People v. Brown*, 117 Misc. 2d 587, 459 N.Y.S.2d 227 (Westchester County Ct. 1983).

189. See *infra* notes 191-263 and accompanying text.

190. Brosnahan & Loewenson, Jr., *supra* note 9, at 1 ("While some courts have shown an increasing tolerance for expert testimony on this subject, New York State . . . [has] remained hesitant to take this step.").

191. 117 Misc. 2d 587, 459 N.Y.S.2d 227 (Westchester County Ct. 1983).

192. *Id.* at 593-94, 459 N.Y.S.2d at 232.

193. *Id.* at 587, 459 N.Y.S.2d at 228.

194. *Id.* at 593, 459 N.Y.S.2d at 232; see *supra* notes 41-45, 52-59 and accompanying text.

195. 293 F. 1013 (D.C. Cir. 1923); see *supra* notes 88-90 and accompanying text.

196. *Brown*, 117 Misc. 2d at 593, 459 N.Y.S.2d at 232.

197. *Id.* at 594, 459 N.Y.S.2d at 232.

Two years later in *People v. Brooks*,¹⁹⁸ the same court held that expert identification testimony was admissible when it was limited to an explanation of the studies relevant to the facts of the case such that no opinions were to be given.¹⁹⁹ The court reasoned that the testimony will present a system of analysis that is likely to add to the jury's common understanding of the identification issue.²⁰⁰ The court addressed both concerns raised by the court in the *Brown* decision, where such testimony was excluded.²⁰¹

Citing the national trend to include such evidence, the court found that the *Frye* test was now satisfied if it was still, indeed, the law.²⁰² The court stated that "a proper analysis of the propriety of expert testimony . . . involves inquiry into the relationship among: (a) the subject of the expert's testimony; (b) the issue presented to the jury; and (c) the information possessed by the average juror."²⁰³ Because the body of information now available is sufficiently beyond common experience, the court held that the expert testimony does not usurp the function of the jury.²⁰⁴ Instead, the court determined that the evidence assists the jury in making a more informed decision.²⁰⁵

Two years after *Brooks*, however, the Nassau County District Court in *People v. Schor*,²⁰⁶ held that the testimony by a psychologist regarding the reliability of eyewitness identification of defendants was not admissible.²⁰⁷ In *Schor*, two victims were assaulted by ten unknown assailants.²⁰⁸ Because they believed the perpetrators to be college students, the victims were permitted to view student photographs and football pictures.²⁰⁹

198. 128 Misc. 2d 608, 490 N.Y.S.2d 692 (Westchester County Ct. 1985).

199. *Id.* at 621, 490 N.Y.S.2d at 702.

200. *Id.* at 618-19, 490 N.Y.S.2d at 700-01.

201. *See infra* notes 202-05 and accompanying text.

202. *Id.* at 612, 490 N.Y.S.2d at 696.

203. *Id.* at 614, 490 N.Y.S.2d at 697-98.

204. *Id.* at 618, 490 N.Y.S.2d at 700.

205. *Id.* at 618-19, 490 N.Y.S.2d at 700-01; *see supra* notes 115-32 and accompanying text.

206. 135 Misc. 2d 636, 516 N.Y.S.2d 436 (Dist. Ct. Nassau County 1987).

207. *Id.* at 642, 516 N.Y.S.2d at 440.

208. *Id.* at 637, 516 N.Y.S.2d at 437.

209. *Id.*

The victims independently identified the defendants as the attackers.²¹⁰

Because there was no evidence indicating that the eyewitnesses had been emotionally or psychologically scarred as a result of the crime, the court reasoned that the expert testimony would not assist the jurors.²¹¹ The court distinguished *Brooks* because that case involved the crime of rape and sexual assault.²¹² This type of expert testimony might be admissible, the court noted, in a rape or sexual assault case because they "are both heinous crimes which would give rise to perhaps an emotional and psychologically impaired victim."²¹³ In the case of a simple assault, the court concluded that an identification is not so suspect as to require expert testimony.²¹⁴

Later that year, in *People v. Lewis*,²¹⁵ the Monroe County Court held that expert testimony was admissible in a case that hinged on identification testimony of a witness who viewed the suspect for a matter of a minute or less.²¹⁶ The case involved a robbery at knifepoint, and the eyewitness identification was the only evidence tying the defendant to the crime.²¹⁷ The expert was to testify to such factors as stress of the victim, violence of the event, and cross-racial identification.²¹⁸ In an apparent endorsement of the field, the court implicitly rejected the *Brown* and *Schor* reasoning by citing *People v. McDonald*²¹⁹ and *State v. Chapple*²²⁰ finding that "there now appears to be an extensive body of scientific studies that details the processing of information, perception, memory and recall."²²¹ Citing *People v. Cronin*²²² and *DeLong v. County of Erie*,²²³ the court reasoned

210. *Id.*

211. *Id.* at 641, 516 N.Y.S.2d at 440.

212. *Id.*

213. *Id.*

214. *Id.*

215. 137 Misc. 2d 84, 520 N.Y.S.2d 125 (Monroe County Ct. 1987).

216. *Id.* at 86, 520 N.Y.S.2d at 127.

217. *Id.* at 85-86, 520 N.Y.S.2d at 126.

218. *Id.* at 85, 520 N.Y.S.2d at 126.

219. 690 P.2d 709 (Cal. 1984); see *supra* notes 177-81 and accompanying text.

220. 660 P.2d 1208 (Ariz. 1983); see *supra* notes 168-76 and accompanying text.

221. *Lewis*, 137 Misc. 2d. at 86, 520 N.Y.S.2d at 127.

222. 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983); see *supra* notes 123-27 and accompanying text.

that the expert testimony, with proper limitations,²²⁴ would be "helpful" in clarifying the issue of identification reliability, which calls for professional knowledge.²²⁵

Similarly, in *People v. Beckford*,²²⁶ the New York Supreme Court held that expert identification testimony is admissible in a robbery case if there is a limit to the testimony and a limiting charge to the jury.²²⁷ The expert testimony was to explain the concepts of unconscious transference and cross-racial identifications, to discuss the effects of stress and delay on the identification process and to explain the lack of correlation between the confidence and accuracy of the eyewitness's memory.²²⁸ The court reasoned that the testimony will clarify and assist jurors in areas that are not within their typical understanding without invading their fact-finding province.²²⁹ In an even stronger endorsement of the field, the court stated that the processes and factors that the expert will testify to are "essential" and "not in accord with common perceptions . . ."²³⁰ The court specifically noted that the testimony regarding cross-racial identifications would provide a basis for the jurors to comfortably speak of the subject in deliberations.²³¹

Finally, after *Beckford*, the Second Department decided three cases concerning expert identification testimony before the Court of Appeals addressed this issue.²³² In each case, the

223. 60 N.Y.2d 296, 459 N.E.2d 717, 469 N.Y.S.2d 611 (1983); see *supra* notes 119-22 and accompanying text.

224. The court required that: 1) the expert's qualifications be established outside the jury's presence; 2) the expert discuss the factors generally; 3) the expert give no opinion; 4) the expert not testify that undue emphasis is placed on laymen identification; 5) the expert be prohibited from testifying that cross-examination is ineffective in discerning the reliability of eyewitness testimony; and 6) the expert not speak of studies familiar to jurors. *Lewis*, 137 Misc. 2d at 86-87, 520 N.Y.S.2d at 127.

225. *Lewis*, 137 Misc. 2d at 86, 520 N.Y.S.2d at 127.

226. 141 Misc. 2d 71, 532 N.Y.S.2d 462 (Sup. Ct. Kings County 1988).

227. *Id.* at 73-74, 532 N.Y.S.2d at 463.

228. *Id.* at 74, 76-77, 532 N.Y.S.2d at 464-65; see *supra* notes 35-40, 52-59, 64-78 and accompanying text.

229. *Id.* at 75-76, 532 N.Y.S.2d at 464.

230. *Id.* at 75, 532 N.Y.S.2d at 464.

231. *Id.* at 76-77, 532 N.Y.S.2d at 465; see *supra* note 69 and accompanying text.

232. See *People v. Wright*, 161 A.D.2d 743, 558 N.Y.S.2d 842 (2d Dep't 1990); *People v. Gibbs*, 157 A.D.2d 799, 550 N.Y.S.2d 400 (2d Dep't 1990); *People v. Foulks*, 143 A.D.2d 1038, 533 N.Y.S.2d 619 (2d Dep't 1988).

court upheld the trial court's exclusion of the testimony, stating that it was not a proper expert subject because "it pertains to matters of common knowledge . . . not beyond the ken of lay jurors."²³³ The Second Department had apparently ignored or chosen to disagree with the large body of research on the subject of eyewitness identification that had developed up to that point in time.²³⁴

2. *The Mooney Decision*

The New York Court of Appeals' first and only review of a decision concerning expert identification testimony was in *People v. Mooney*.²³⁵ The case involved four robberies of taxi cab drivers.²³⁶ In each robbery, the assailant requested a destination, then grabbed the driver from behind, putting a knife to his neck.²³⁷ Next, the assailant took the driver's money, hopped into the front seat, pushed the driver out of the cab and drove off.²³⁸ Each of the drivers identified the defendant, sometime after the robberies, as the assailant and each one claimed that they were "positive" or "sure" of the identifications.²³⁹

The supreme court, without granting a hearing, held that expert identification testimony was inadmissible as a matter of law.²⁴⁰ The defendant was later convicted on the four robbery counts and sentenced to five to eighteen years in prison.²⁴¹ After the First Department affirmed, the defendant appealed to the Court of Appeals.

In three sentences, the Court of Appeals held that the trial court acted within its sound discretion in excluding the expert identification testimony and that the court need not decide whether the expert testimony sought to be presented was of the

233. *Wright*, 161 A.D.2d at 743, 558 N.Y.S.2d at 842; *Gibbs*, 157 A.D.2d at 799, 550 N.Y.S.2d at 400; *Foulks*, 143 A.D.2d at 1039, 533 N.Y.S.2d at 620.

234. See *supra* notes 14-78 and accompanying text.

235. 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990).

236. Appellant's Brief at 11-16, *People v. Mooney*, 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990) (Nos. 2504-85 & 1726-85).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 10; *People v. Mooney*, Nos. 2504-85 & 1726-85, slip op. at 4 (N.Y. Sup. Ct. Bronx County Jan. 14, 1987).

241. Appellant's Brief at 25, *Mooney*, (Nos. 2504-85 & 1726-85).

type that could be presented.²⁴² Refusing to decide whether expert identification testimony may, generally, be admitted, the court reasoned that no question of law existed because the trial court based its decision upon the exercise of its discretion.²⁴³

A lengthy dissent written by then-Judge Judith S. Kaye argued that the trial court's conviction should have been reversed.²⁴⁴ She reasoned that the trial court failed to exercise its proper discretion.²⁴⁵ The trial court had given three reasons for disallowing the expert testimony and the dissent criticized each as not including an assessment of the facts of the case.²⁴⁶ The dissent stressed that the trial court decision "was not the result of . . . a discretionary assessment of the probative value of the testimony in relation to the facts of th[e] case."²⁴⁷ Instead, Judge Kaye provided, the decision was based upon generality and mistaken legal analysis.²⁴⁸

242. *Mooney*, 76 N.Y.2d at 828, 559 N.E.2d at 1274, 560 N.Y.S.2d at 115.

243. *Id.*

244. *Id.* at 833, 559 N.E.2d at 1277, 560 N.Y.S.2d at 118 (Kaye, J., dissenting).

245. *Id.* at 828-29, 559 N.E.2d at 1275, 560 N.Y.S.2d at 116. Judge Kaye, citing *Cronin*, stated that the New York Court of Appeals has "power to review even a trial court's discretionary decision where the legal claim is made that, through application of an incorrect standard, the court failed to exercise its discretion or that the decision was so unreasonable as to constitute clear abuse." *Id.* (citing *People v. Cronin*, 60 N.Y.2d 430, 433, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983)).

246. The three reasons stated by the trial court were: 1) "The accuracy and reliability of psychological tests regarding perceptual factors in identification have not been accept[ed] by the scientific community" (Judge Kaye countered that even if the *Frye* test is still the law, it is satisfied here.), *id.* at 829-30, 559 N.E.2d at 1275-76, 560 N.Y.S.2d at 116-17 (brackets in original) (quoting *People v. Mooney*, Nos. 2504-85 & 1726-85, slip op. at 2 (N.Y. Sup. Ct. Bronx County Jan. 14, 1987); 2) "[S]uch testimony . . . would be cumulative" (Judge Kaye countered that the cross-examination and jury charge will not adequately describe phenomena that the expert would testify to.), *id.* at 830-32, 559 N.E.2d at 1276-77, 560 N.Y.S.2d at 117-18 (brackets in original) (quoting *Mooney*, slip op. at 3); and 3) "Expert testimony must by the very nature, be beyond the ken of jurors whose basic intelligence should not be underestimated." (Judge Kaye countered that research has demonstrated that the subject matter is often beyond the common understanding of laypersons often resulting in misconception.), *id.* at 832-33, 559 N.E.2d at 1277, 560 N.Y.S.2d at 118 (quoting *Mooney*, slip op. at 3).

247. *Mooney*, 76 N.Y.2d at 833, 559 N.E.2d at 1278, 560 N.Y.S.2d at 119.

248. *Id.*

3. Post-Mooney Decisions

Following the *Mooney* decision, the New York decisions revealed a continued, possibly more divergent, pattern of reasoning regarding the expert admissibility question. In *People v. Knighton*,²⁴⁹ the Third Department held that there was no abuse of discretion in the trial court's refusing to admit the expert identification testimony.²⁵⁰ The case involved a supermarket robbery.²⁵¹ Three market employees identified the defendant from a photographic array.²⁵² The court reasoned that the trial court was within its discretion in finding that the expert testimony would not be helpful because the subject matter of the testimony was within the common understanding of laypersons.²⁵³ Because traditional direct and cross-examination techniques and a charge that urged the jury to carefully scrutinize eyewitness identifications would suffice in bringing out factors bearing on the reliability of identifications, the court stated that, generally, this type of expert would only invade the province of the jury if permitted to testify.²⁵⁴

Later in *People v. Wong*,²⁵⁵ the supreme court held that the expert identification testimony was inadmissible and that no sufficient basis for presenting the reliability expert was made.²⁵⁶ While the court reached the same decision as the *Knighton* court regarding admissibility, the rationale was considerably different. The prosecutor's murder case in *Wong* rested upon a single eyewitness who allegedly observed the defendant for about twenty seconds.²⁵⁷ In substantially relying on the *Mooney* dissent, the court found that:

(1) The testimony of an expert witness in the field of memory and perception is a matter of discretion which should be determined by the facts of each individual case[;] (2) This discretion is . . . clearly not applicable to the average case since the issue of identification is within the scope and understanding of the normal ju-

249. 165 A.D.2d 904, 560 N.Y.S.2d 514 (3d Dep't 1990).

250. *Id.* at 906, 560 N.Y.S.2d at 516.

251. *Id.* at 904, 560 N.Y.S.2d at 515.

252. *Id.*

253. *Id.* at 906, 560 N.Y.S.2d at 516.

254. *Id.*

255. 150 Misc. 2d 554, 568 N.Y.S.2d 1020 (Sup. Ct. Queens County 1991).

256. *Id.* at 559, 568 N.Y.S.2d at 1024.

257. *Id.* at 555, 559, 568 N.Y.S.2d at 1021, 1024.

ror[; and] (3) Such a witness may be utilized only after a discretionary assessment of the probative value of such testimony is made in relation to the facts of the specific case.²⁵⁸

The court reasoned that, in the *Wong* case, there was no showing of a need for expert testimony based on the facts of the case.²⁵⁹ The court concluded that the jury could assess the identification on its own since it is within their common knowledge.²⁶⁰

Finally, in *People v. McCray*,²⁶¹ the First Department was faced with a case involving the admissibility of expert identification testimony, but failed to follow the *Wong* court's rationale. The court held that no error was committed by the trial court in not permitting the defendant charged with rape, sodomy and sexual abuse to call an expert witness in the field of memory and perception.²⁶² Rather than give any reasoning indicating a close review of the trial court's discretionary decision, the court simply referenced the *Mooney* decision as authority.²⁶³ Thus, the New York courts' most recent decisions regarding the admissibility of expert identification testimony provide no clear direction as to where the law is headed.

III. Analysis

The New York Court of Appeals' majority opinion in *People v. Mooney*²⁶⁴ fails to comport with the state's fair system of justice and its corresponding search for the truth. There are two reasons for this conclusion. First, the Court of Appeals refused

258. *Id.* at 558, 568 N.Y.S.2d at 1023.

259. *Id.* at 559, 568 N.Y.S.2d at 1024 (witness's viewing was not "quick", indistinct, or made on city streets at night" and the victim and defendant were of the same race). *But see* *People v. Mateo Lawson*, N.Y. L.J., Feb. 26, 1993, at 26 (Sup. Ct. New York County) (holding that, where defendant was Hispanic and witness was Japanese, expert testimony regarding cross-racial misidentification phenomena was admissible); *People v. Green*, 151 Misc. 2d 194, 198, 573 N.Y.S.2d 113, 115 (1991) (admitting expert testimony on confidence/accuracy relationship and the impact of stress on identifications where victim was violently accosted in building hallway).

260. *Id.* at 556, 559, 568 N.Y.S.2d at 1022, 1024.

261. 184 A.D.2d 250, 585 N.Y.S.2d 192 (1st Dep't), *appeal denied*, 80 N.Y.2d 906, 602 N.E.2d 240, 588 N.Y.S.2d 832 (1992).

262. *Id.*

263. *Id.*

264. 76 N.Y.2d 827, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990).

to take the opportunity to pronounce a common standard for the admissibility of expert identification testimony where one was needed.²⁶⁵ Prior to the *Mooney* decision, the New York trial courts were sometimes reluctant to admit defendants' identification experts due to confusion regarding the applicable standard for admissibility.²⁶⁶ While federal courts and other state courts were following a trend toward admissibility,²⁶⁷ the New York trial courts admitted and excluded the testimony with no apparent uniformity of reasoning.²⁶⁸ Furthermore, the Appellate Division showed no interest in questioning trial court decisions excluding such testimony.²⁶⁹ As a result of the *Mooney* decision's silence on the matter, the lower courts continue to use *ad hoc* types of reasoning in their decisions regarding the admissibility of expert identification testimony.²⁷⁰ Therefore, the Court of Appeals could have used the *Mooney* case to settle the law in this area, but chose not to do so.

Second and more disconcerting, the lower courts may have interpreted the *Mooney* decision as discrediting the admissibility of expert testimony offered by the defense for the purpose of securing a fair trial.²⁷¹ For a state court system that prides itself on the added protections provided to its citizens over and above those provided by the federal system and other state court systems,²⁷² the *Mooney* decision is an aberration.²⁷³ The New York court decisions following *Mooney* indicate that a possibly unintended message was delivered by the decision. The Court of Appeals' failure to settle the law in this area, in light of the confused discretionary decisions leading up to the case, implicates what could be an inherent social bias against defendants existing even in this most progressive of jurisdictions.

265. See *infra* notes 274-322 and accompanying text.

266. See *supra* notes 191-234 and accompanying text.

267. See *supra* notes 133-85 and accompanying text.

268. See *supra* notes 191-234 and accompanying text.

269. See *supra* notes 232-34 and accompanying text.

270. See *supra* notes 249-63 and accompanying text.

271. See *infra* notes 323-42 and accompanying text.

272. See, e.g., *People v. Scott*, 79 N.Y.2d 474, 488, 593 N.E.2d 1328, 1337, 583 N.Y.S.2d 920, 929 (1992) (rejecting United States Supreme Court "open fields" doctrine by interpreting greater privacy rights in state constitutional provision than in Fourth Amendment, and citing "New York's tradition of tolerance of the unconventional").

273. See *infra* notes 323-42 and accompanying text.

A. *Lack of Direction*

Each of the major premises invoked by the proponents of excluding expert identification testimony has been refuted by years of experience and well-thought-out judicial reasoning. In *United States v. Downing*²⁷⁴ and *State v. Chapple*,²⁷⁵ both the federal and state courts responded to the emerging field of memory and perception relating to eyewitness testimony.²⁷⁶ Those courts also responded to the evolving rules of evidence that began to reflect a more liberal policy of admissibility of expert testimony in general.²⁷⁷

Two arguments have been primarily employed in support of excluding expert identification testimony. The first argument is that the science of memory and perception relating to eyewitness identification is not generally accepted within the scientific community.²⁷⁸ This argument is countered by the large body of experimental psychology research that has developed over the last decade and a half.²⁷⁹ While some psychologists debate the conclusions and applications, the basic methodology of the science and the resulting data are accepted as reliable sources of information.²⁸⁰ Any concern that experts will ultimately "battle" in the courtroom disregards the fact that expert "battles" occur in any complex trial including nearly every medical malpractice trial.²⁸¹ Certainly medicine is a generally accepted science regardless of the disagreements among experts. Therefore, the "general acceptance" standard from *United*

274. 753 F.2d 1224 (3d Cir. 1985); see *supra* notes 154-64 and accompanying text.

275. 660 P.2d 1208 (Ariz. 1983); see *supra* notes 168-76 and accompanying text.

276. See *supra* notes 14-78 and accompanying text.

277. See *supra* notes 84-114 and accompanying text. That more liberal policy was seemingly embraced by the United States Supreme Court in *Daubert*. See *supra* notes 98-114 and accompanying text.

278. See *supra* note 89 and accompanying text.

279. See discussion *supra* part II.A.

280. LOFTUS & DOYLE, *supra* note 15, at 295.

281. See, e.g., *Kramer Serv., Inc. v. Wilkins*, 186 So. 625 (Miss. 1939) (early case featuring one such "battle" between one medical expert who testified that the plaintiff's trauma could not cause cancer and the other who testified that the possibility of causation did exist).

States v. Frye,²⁸² if it is still acceptable law in New York,²⁸³ is satisfied by the field of memory and perception.

The second objection to admissibility is that, because the testimony relates to the credibility of the eyewitness, it necessarily "invades the province of the jury."²⁸⁴ This argument actually has two parts. One part of the argument is that the testimony is not probative²⁸⁵ and the other part is that the testimony is unfairly prejudicial to the jury.²⁸⁶

All expert testimony invades the province of the jury to some extent.²⁸⁷ However, as long as courts leave ultimate decisions to the jury, including whether to accept or reject the expert testimony itself, the role of the jury is not disturbed. Expert testimony in the field of memory and perception is probative in most cases involving eyewitness identifications because it refutes certain commonly held misconceptions.²⁸⁸ The testimony refutes the videotape metaphor by describing the complex process of identification and undermines the juror's absolute confidence in the eyewitness's accuracy.²⁸⁹ Other methods such as cross-examination and jury instructions are not sufficient to reveal such information as the relationship between stress and the overestimation or underestimation of an

282. 293 F. 1013 (D.C. Cir. 1923); *see supra* notes 88-90 and accompanying text.

283. Because the United States Supreme Court, in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), abandoned the *Frye* test of admissibility, the likelihood of a state's maintaining the ancient rule is minimal considering the standard was first espoused by a federal court. *See supra* notes 98-114 and accompanying text. For state decisions that have acknowledged *Daubert*, see *People v. Leahy*, 22 Cal. Rptr. 2d 322, 324-25 (Cal. Ct. App. 1993) (stating that the state's *Frye* rule "might be ripe for reexamination"); *Public Serv. Co. v. Willows Water Dist.*, 856 P.2d 829, 831 n.1 (Colo. 1993) (citing *Daubert's* rejection of *Frye* test); *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993) (stating that Delaware law not governed by *Frye*); *People v. Mehlberg*, 618 N.E.2d 1168, 1191 n.1 (Ill. App. Ct. 1993) (noting that the state supreme court must decide whether the state will continue to recognize the *Frye* standard); *State v. Alt*, 504 N.W.2d 38, 46 (Minn. Ct. App. 1993) (stating that *Daubert's* persuasive force in state may be strengthened by the fact that state's rules of evidence are modeled after the federal rules).

284. *See supra* note 197 and accompanying text.

285. LOFTUS & DOYLE, *supra* note 15, at 295-97.

286. *Id.* at 297-99.

287. *People v. Cronin*, 60 N.Y.2d 430, 432, 458 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983).

288. *See supra* notes 73-78 and accompanying text.

289. LOFTUS & DOYLE, *supra* note 15, at 280; *see supra* notes 16-21 and accompanying text.

event's duration.²⁹⁰ Considering the fact that misidentifications are blamed for causing the most miscarriages of justice,²⁹¹ it can hardly be said that a method for eliminating injustice caused by ignorance or misinformation is not probative.

The second part of the argument to exclude the identification expert is that the testimony would have an unfair prejudicial effect on the jury.²⁹² This argument is faulty. Because they feel that their assessment of a witness's credibility is largely based on common sense, jurors place less weight on the identification expert's testimony.²⁹³ Because most jurors consider themselves to be "amateur psychologists," cross-examination of the expert can be easy and effective due to what the jurors believe to be "common sense" subject matter.²⁹⁴

There are also various methods for controlling the effect of expert testimony. Usually, the identification expert will only testify to the general studies and results of the field of memory and perception, such as the phenomenon of "unconscious transference."²⁹⁵ The expert may also be precluded from commenting on the accuracy of specific identifications in the case.²⁹⁶ Further, the court can instruct the jury that the ultimate decision of the defendant's guilt is theirs, even regarding their acceptance of the expert testimony.²⁹⁷ Finally, the expert can be cross-examined and contradicted by other experts if required.²⁹⁸ Thus, the jury's role as the ultimate fact-finder is not prejudiced, but is instead maintained and enhanced by the presence of the expert and an appropriate limiting methodology by the court.

In New York, however, the courts still have not distilled their approach toward this exceedingly important expert subject matter.²⁹⁹ Given its opportunity to provide guidance in the

290. See *supra* notes 28-30, 35-40 and accompanying text.

291. See *supra* note 1 and accompanying text.

292. LOFTUS & DOYLE, *supra* note 15, at 297-99.

293. *Id.* at 281-82.

294. *Id.* (citing Charles L. Convis, *Testifying About Testimony: Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 DUQ. L. REV. 579, 584 (1983)).

295. See *supra* notes 70-72 and accompanying text.

296. See *supra* notes 172-74 and accompanying text.

297. LOFTUS & DOYLE, *supra* note 15, at 298.

298. *Id.*

299. See *supra* notes 186-263 and accompanying text.

area, the New York Court of Appeals did not act.³⁰⁰ Ironically, by taking the "hands-off" approach, the *Mooney* court may have affected subsequent lower court decisions more than it had anticipated.

While the early decision of *People v. Brown*³⁰¹ reflected the common arguments against admissibility,³⁰² *People v. Brooks*³⁰³ revealed the appropriate responses to those concerns.³⁰⁴ Unfortunately, though, the decision in *People v. Schor*³⁰⁵ included language indicating an unwillingness to accept expert identification testimony.³⁰⁶ By claiming that only victims of sexual crimes can make mistaken identifications,³⁰⁷ the court, in *Schor*, revealed its ignorance of the subject. Certainly, the cases and studies have shown that misidentifications occur in all types of circumstances, including simple robbery.³⁰⁸ Interestingly, the decisions in *People v. Lewis*³⁰⁹ and *People v. Beckford*³¹⁰ established a continued line of acceptance of expert identification testimony. The use of words like "extensive"³¹¹ and "essential"³¹² to describe the identification expert's subject matter indicated the emerging acceptance. This seemed an appropriate time for the highest court in the state to give some sort of endorsement of the field.

The New York Court of Appeals, in *Mooney*, decided not to comment.³¹³ Judge Kaye's strong dissent suggested that the effect of "[t]he court's cursory treatment of [the] defendant's claim

300. See *supra* notes 235-48 and accompanying text.

301. 117 Misc. 2d 587, 459 N.Y.S.2d 227 (Westchester County Ct. 1983); see *supra* notes 191-97 and accompanying text.

302. See *supra* notes 195-97 and accompanying text.

303. 128 Misc. 2d 608, 490 N.Y.S.2d 692 (Westchester County Ct. 1985); see *supra* notes 198-205 and accompanying text.

304. See *supra* notes 201-05 and accompanying text.

305. 135 Misc. 2d 636, 516 N.Y.S.2d 436 (Dist. Ct. Nassau County 1987); see *supra* notes 206-14 and accompanying text.

306. See *supra* notes 211-14 and accompanying text.

307. See *supra* notes 213-14 and accompanying text.

308. See *supra* notes 14-78 and accompanying text.

309. 137 Misc. 2d 84, 520 N.Y.S.2d 125 (Monroe County Ct. 1987); see *supra* notes 215-25 and accompanying text.

310. 141 Misc. 2d 71, 532 N.Y.S.2d 462 (Sup. Ct. Kings County 1988); see *supra* notes 226-31 and accompanying text.

311. See *supra* note 221 and accompanying text.

312. See *supra* note 230 and accompanying text.

313. See *supra* notes 235-48 and accompanying text.

... [was] to render any right of review virtually meaningless ... [and to sanction] an unwillingness to deal realistically with the concerns" of emerging research regarding eyewitness reliability.³¹⁴ While the first effect stated by Judge Kaye probably indicated her frustration with the court's inaction at a time ripe for judicial clarification, the court decisions following *Mooney* do reveal that future courts may indeed be less willing to admit expert testimony when they probably should.³¹⁵ The reason is apparently because a uniform method of dealing with the admissibility question has not been adopted by the courts and faulty legal reasoning still exists.

The *People v. Knighton*³¹⁶ and *People v. McCray*³¹⁷ decisions indicate that arguments against admission that seemed to have been abandoned prior to *Mooney* may have been resurrected by the Court of Appeals' "hands-off" opinion.³¹⁸ Any apparent trend by the courts toward admissibility that existed before *Mooney* seems to have been stalled by that court's reluctance to act. However, hope may lie in the *People v. Wong*³¹⁹ decision's reliance on Judge Kaye's dissenting opinion in *Mooney*, as well as other trial court decisions that have admitted the testimony.³²⁰

Judge Kaye provided a framework for handling the admissibility issue that could have been accepted by the majority. She suggested that courts look to "the centrality of the identification issue to the particular facts, the existence of other evidence corroborating the identifications, the relevance of the

314. *Mooney*, 76 N.Y.2d at 828, 559 N.E.2d at 1275, 560 N.Y.S.2d at 116 (Kaye, J., dissenting).

315. See *supra* notes 249-63 and accompanying text.

316. 165 A.D.2d 904, 560 N.Y.S.2d 514 (3d Dep't 1990); see *supra* notes 249-54 and accompanying text.

317. 184 A.D.2d 250, 585 N.Y.S.2d 192 (1st Dep't), *appeal denied*, 80 N.Y.2d 906, 602 N.E.2d 240, 588 N.Y.S.2d 832 (1992); see *supra* notes 261-63 and accompanying text.

318. *Knighton*, 165 A.D.2d at 906, 560 N.Y.S.2d at 516 (stating that the factors relating to identification reliability can be sufficiently explored on cross-examination or in the jury charge); see *supra* notes 253-54 and accompanying text; *McCray*, 184 A.D.2d at 250, 585 N.Y.S.2d at 193 (absolving the trial court of discretionary error without analyzing applicability); see *supra* notes 262-63 and accompanying text.

319. 150 Misc. 2d 554, 556-57, 568 N.Y.S.2d 1020, 1022-23 (Sup. Ct. Queens County 1991); see *supra* notes 255-60 and accompanying text.

320. See cases cited *supra* note 259.

proposed [expert] testimony to the specific facts . . . through the trial court's power to limit the amount and type of evidence presented."³²¹ In other words, the factors to consider are: 1) the importance of the identification witness to the prosecution's case; 2) the existence of other evidence corroborating the identification; 3) the relevance of the expert's proffered testimony to the case; and 4) the availability of other court procedures (i.e., barring expert opinion). The *Wong* court's decision to exclude the expert testimony is less important than the court's weighing of these factors and basing their decision on the balance.

Therefore, an understandable standard for admitting or excluding expert identification testimony is not beyond the court's reach. Clear guidelines would provide much needed direction in the court's decisions in this area, taking into account the current law and science. Unfortunately, the development of such guidelines may be hindered by a built-in social bias of the system.³²²

B. *Lack of Discretion*

New York appellate courts may be inclined to find psychological expert testimony offered by the prosecution admissible while choosing, in most instances, to exclude psychological expert identification testimony offered by the defense.³²³ If this is true, the decisions apparently made based on discretionary powers are dangerously unfair. Furthermore, without clear guidelines regarding that discretionary decision-making process, there is no adequate check on the system.

321. *Mooney*, 76 N.Y.2d at 833, 559 N.E.2d at 1277, 560 N.Y.S.2d at 118 (Kaye, J., dissenting).

322. See *infra* notes 323-42 and accompanying text.

323. Compare *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990) (holding that expert testimony on subject of rape trauma syndrome was admissible); *People v. Gallow*, 171 A.D.2d 1061, 569 N.Y.S.2d 530 (4th Dep't 1991) (holding that admission of expert testimony concerning sexual abuse accommodation syndrome was proper); *In re Donna K.*, 132 A.D.2d 1004, 518 N.Y.S.2d 289 (4th Dep't 1987) (holding that opinion of expert in intrafamilial child abuse syndrome was admissible); *People v. Fisher*, 73 A.D.2d 886, 424 N.Y.S.2d 197 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 907, 423 N.E.2d 53, 440 N.Y.S.2d 630 (1981) (holding that expert testimony regarding the psychological phenomenon of repression or blockage was admissible); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (Sup. Ct. Kings County 1984) (holding that rape trauma syndrome expert admissible) with cases cited *supra* notes 232-63.

Interestingly, in cases that have involved offers of psychological expert witness testimony made by the prosecution, the New York courts have not only been receptive to admission, but they have used the reasoning most often rejected by them in cases involving offers of expert identification testimony for the defense.³²⁴ In *People v. Fisher*,³²⁵ for example, the First Department held that a psychiatrist's testimony was properly admitted to show that the murder witness suffered from the psychological phenomenon of "repression" of "blockage" which led to his inability to immediately identify the defendant as the killer.³²⁶ The *Fisher* court reasoned that the psychiatrist's testimony would be "helpful" in explaining a subject not commonly understood by laypersons.³²⁷ The court added that by limiting the expert to speaking only generally as to the phenomenon and not to the specific identification's reliability, the jury's function is not usurped.³²⁸

These rationales for admission are exactly those that have been urged by proponents of expert identification testimony.³²⁹ While rejected in cases such as *People v. Knighton*,³³⁰ the rationales were embraced by the *Fisher* court when offered by the prosecution. In fact, the court, in *Fisher*, seemed to embrace the less restrictive "helpfulness" standard for admissibility. The dissenting opinion, in *Fisher*, focused on the irony of this distinction by stating that because the expert testimony was used to buttress the witness's identification, "the prosecution may well have created 'a very substantial likelihood of irreparable misidentification'."³³¹ In admitting the expert so readily in *Fisher*, the court not only provided a basis for the concern of bias against defendants, but it also may have furthered the danger inherent in eyewitness identifications.

324. See *infra* notes 325-42 and accompanying text.

325. 73 A.D.2d 886, 424 N.Y.S.2d 197 (1st Dep't 1980).

326. *Id.* at 887-88, 424 N.Y.S.2d at 199.

327. *Id.*

328. *Id.* at 888, 424 N.Y.S.2d at 199.

329. See *supra* notes 292-98 and accompanying text.

330. 165 A.D.2d 904, 560 N.Y.S.2d 514 (3d Dep't 1990); see *supra* notes 249-54 and accompanying text.

331. *Fisher*, 73 A.D.2d at 892, 424 N.Y.S.2d at 204 (Bloom, J., dissenting) (citations omitted).

In *People v. Reid*,³³² the court held that the prosecution may call an expert to describe the symptoms of "rape-trauma syndrome."³³³ The court rejected the defendant's claims that "rape-trauma syndrome" was not generally accepted and that the expert testimony invades the province of the jury.³³⁴ The court found that research since 1974 had shown that the victim's response to rape is unique and beyond the common understanding of laypersons.³³⁵ Noting that in no reported case had the admission of such expert testimony been refused, the court inferred "general acceptance" based on examination of precedent.³³⁶ To allay the concern for prejudice to the jury, the court provided that proper jury instructions, limitation of the testimony and the defendant's freedom to call his own experts will adequately protect the system.³³⁷

One has to wonder whether the *Reid* court would have allowed an expert in eyewitness identification to be so "freely" called by the defendant as the language suggests. While rape-trauma syndrome may have been considered to be a "generally accepted" field of study in 1984, the courts evidently have never had occasion to exclude expert testimony in this field, even at its inception. Rather, *Reid* revealed that the courts are quite willing and able to put forth the same rationale for admission of the state's expert testimony that they so readily use to reject the defendant's identification expert testimony.

The strongest evidence that bias may exist in the system is the fact that the New York Court of Appeals has so readily spoken in a clarifying manner on the admissibility of expert psychological testimony for the prosecution³³⁸ while it failed to do so in *Mooney*.³³⁹ In *People v. Taylor*,³⁴⁰ the Court of Appeals

332. 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (Sup. Ct. Kings County 1984).

333. *Id.*

334. *Id.* at 1085, 475 N.Y.S.2d at 742.

335. *Id.* at 1085-86, 475 N.Y.S.2d at 742.

336. *Id.* at 1087, 475 N.Y.S.2d at 7432.

337. *Id.*

338. See *People v. Bennett*, 79 N.Y.2d 464, 471-73, 593 N.E.2d 279, 283-84, 583 N.Y.S.2d 825, 826 (1992) (rape trauma syndrome); *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990) (rape trauma syndrome); *People v. Keindl*, 68 N.Y.2d 410, 422-23, 502 N.E.2d 577, 583, 509 N.Y.S.2d 790, 796 (1986) (child abuse syndrome); *People v. Henson*, 33 N.Y.2d 63, 73-74, 304 N.E.2d 358, 363, 349 N.Y.S.2d 657, 664 (1973) (battered child syndrome).

339. See *supra* notes 235-48 and accompanying text.

held that the prosecution's expert in "rape trauma syndrome can assist jurors in reaching a verdict by dispelling common misconceptions about rape" ³⁴¹ The court also provided guidelines as to the discretionary decision of admissibility. ³⁴²

The New York Court of Appeals in *Mooney* could have and should have acted in the same authoritative manner as it did in *Taylor*. The court should have held that the expert in the field of memory and perception offered by the defendant is admissible because the testimony would dispel the common misconceptions about the identification process and, therefore, it would assist the jury in their truth-finding role. Alternatively, the court should have reversed and remanded the case for a hearing on the appropriateness of the proffered expert testimony. More generally, guidelines should have been provided to allay the concerns of prejudice, such as adequate limitations on admission and a requirement for a "close fit" between the testimony and the specific facts of the case. However, that did not occur. It seems more than possible that the court's hesitancy or unwillingness to act may have been driven by an underlying social bias against the defendant which has seeped into the state's judicial system.

IV. Conclusion

The New York courts have not lived up to their progressive manner of adjudication in their treatment of the area of expert identification testimony. Because misidentifications are commonly understood to be a leading cause of the system's miscarriages of justice, one would think that the New York judges would be leaders in the utilization of methods that would help prevent such disasters. A substantial body of research has developed over the past decade indicating that the identification process involves phenomena well beyond most jurors' understanding. As a result, several states and federal courts have appreciated the need for expert testimony in this area by admitting it.

340. 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990).

341. *Id.* at 292, 552 N.E.2d at 138, 552 N.Y.S.2d at 890.

342. *Id.* at 293, 552 N.E.2d at 138, 552 N.Y.S.2d at 890 (holding that "evidence of rape trauma syndrome inadmissible when it inescapably bears solely on proving that a rape occurred . . .").

The New York Court of Appeals should seriously consider addressing this matter if the court is to continue in its proud tradition of granting substantial rights to all its citizens, including those accused of crimes. The New York trial and appellate court decisions indicate that many judges have not kept abreast of the scientific and legal developments in this field. In view of the recent *Daubert* decision rejecting the *Frye* test, which has, up to now, been embraced by New York courts, and in view of Judge Kaye's promotion to the position of Chief Judge, the New York Court of Appeals should revisit this subject in a serious, responsible manner. If the court does not speak, New York citizens will be left to ponder the apparent discrepancy between the courts' willingness to allow psychologists to take the stand for the prosecution and their apparent unwillingness to do the same for defendants. Justice deserves more.

*David M. Shofi**

* This Comment is dedicated to my parents who have always given me their loving support. I wish to express my sincere gratitude to Professor Bennett Gershman and Leanne Murray, without whom this Comment would not have been completed.

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