

I'LL BELIEVE IT WHEN YOU SEE IT

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"[T]he annals of criminal law are rife with instances of mistaken identification."

*United States v. Wade*¹

"Memory, like liberty, is a fragile thing"

Dr. Elizabeth Loftus²

I. INTRODUCTION: WRONGFUL CONVICTIONS AND EYEWITNESS TESTIMONY

On May 17, 1982, in Shreveport, Louisiana, Calvin Willis was sentenced to life in prison without the possibility of parole for a crime he did not commit.³ The jury convicted him of brutally beating and raping a child based on three eyewitness identifications of him at trial.⁴ The case against him was substantively weak: there was no physical evidence linking him to the crime, circumstantial evidence indicated that he was not the intruder, and his pregnant wife testified at trial that he was home with her at the time.⁵ But eyewitness testimony is viscerally powerful evidence, and the jury found Calvin guilty

1. *United States v. Wade*, 388 U.S. 218, 228 (1967).

2. *Loftus Receives AAAS Scientific Freedom Award*, ASS'N FOR PSYCHOL. SCI., <http://www.psychologicalscience.org/index.php/publications/observer/2011/april-11/memory-like-liberty-is-a-fragile-thing.html> (last visited Dec. 30, 2014). Dr. Loftus is a renowned cognitive psychologist and former president of the American Psychology-Law Society. See *id.*

3. See *Calvin Williams*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Calvin_Willis.php (last visited Dec. 30, 2014).

4. *Id.*

5. *Id.*

beyond a reasonable doubt.⁶ Twenty-two years later, after DNA evidence conclusively excluded Calvin from having committed the crime, he was released.⁷ The actual perpetrator has never been discovered.⁸

Unfortunately, this travesty of justice is a recurring problem.⁹ The National Registry of Exonerations currently lists 1,551 exonerations since 1989.¹⁰ Yet a 2012 report from the registry notes that “[e]xonerations are unlikely, uncommon and unrepresentative of the mass of invisible false convictions.”¹¹ According to the report, when adjusted for population, Louisiana ranks second in the nation for its number of exonerations.¹²

6. *Calvin Williams*, *supra* note 3.

7. *Id.*

8. *Id.* See generally Andrew Corsello, *The Wronged Man*, GQ.COM (Nov. 2007), <http://www.gq.com/news-politics/big-issues/200711/calvin-willis-exonerated-dna-evidence-freedom?currentPage=1> (outlining the story of Calvin Willis's conviction, imprisonment, and eventual exoneration and release).

9. The precise rate at which wrongful convictions occur is highly debatable. Scholarly estimates range from 0.5% of all convictions to as high as 10% of all convictions. See Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 278 (2012); Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 809-10 (2007). Exoneration statistics form the foundation of reputable estimates, but this is a severely limited pool of information. For instance, 95% of exonerations occur in cases of murder or rape. Samuel R. Gross & Barbara O'Brien, *Letters to the Journal*, 8 OHIO ST. J. CRIM. L. 273, 275 (2010). Yet these types of offenses account for only 2% of all felonies. *Id.* According to a report by the National Registry of Exonerations, “there is every reason to believe that several times more defendants are falsely convicted of robbery than of rape, but without an equivalent to DNA evidence for robbery cases, only a tiny fraction are exonerated.” SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 15 (2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. Moreover, about 95% of all felony convictions in the United States are based on guilty pleas. *Id.* at 16. Of these convictions, the registry report noted: “We know very little about false convictions based on guilty pleas . . . yet the number of undetected false convictions among these cases must dwarf the number for more extreme crimes.” *Id.* There are approximately one million felony convictions in the United States each year, 40% of which result in prison sentences. Zalman, *supra*, at 225. Even a conservative estimate that there is a 1% wrongful conviction rate would mean that 10,000 people are wrongfully convicted and 4,000 people are sent to prison each year for crimes they did not commit. *Id.*

10. *About the Registry*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Feb. 17, 2015).

11. GROSS & SHAFFER, *supra* note 9, at 9.

12. *Id.* at 35. Since this report came out in June of 2012, Louisiana has had ten more exonerations. See *Browse the National Registry of Exonerations*, NAT'L

According to the Innocence Project, there have been 325 post-conviction DNA exonerations in the United States.¹³ The Innocence Project New Orleans has been involved in twenty-five of those cases.¹⁴

Thousands of people are wrongfully convicted of felonies each year in the United States.¹⁵ Eyewitness misidentification is the leading cause of wrongful conviction.¹⁶ It played a role in 72% of convictions that have been overturned since 1989 based on DNA evidence.¹⁷ Thousands of studies have confirmed that eyewitness testimony is shockingly inaccurate,¹⁸ with a mistaken identification rate of roughly 40%.¹⁹ This has led several courts to lament that eyewitness testimony is “hopelessly unreliable.”²⁰ The United States Court of Appeals for the Third Circuit has even concluded that “mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined.”²¹

REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=Exonerated&SortDir=Asc> (last visited Dec. 31, 2014). According to the report, Orleans Parish ranks 1st in the nation per capita among metropolitan counties. GROSS & SHAFFER, *supra* note 9, at 36.

13. *DNA Exoneree Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/known/> (last visited Jan. 28, 2015).

14. INNOCENCE PROJECT NEW ORLEANS, <http://www.ip-no.org/> (last visited Feb. 17, 2015).

15. See Zalman, *supra* note 9, at 225.

16. See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 3 (2007); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 100 (2011).

17. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jan. 29, 2015); *Browse the Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/known/Browse-Profiles.php> (last visited Jan. 29, 2015) (showing that 1989 marks the first year that DNA evidence was used to exonerate a wrongfully convicted person); see also *First DNA Exoneration*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> (last visited Jan. 29, 2015) (stating that Gary Dotson was the nation's first DNA exoneree in 1989).

18. See Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 28-29 (2009).

19. Fradella, *supra* note 16, at 4.

20. See, e.g., *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995); *State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005).

21. *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006).

In 1908, psychologist Hugo Munsterberg conveyed a timeless truth when he wrote, “[I]n a thousand courts at a thousand places all over the world, witnesses every day affirm by oath . . . mixtures of truth and untruth, combinations of memory and of illusion, of knowledge and of suggestion, of experience and wrong conclusions.”²² To compound the problem, jurors over-believe eyewitnesses, have difficulty differentiating accurate from inaccurate eyewitness testimony, and lack adequate understanding of the factors related to eyewitness reliability.²³

This Comment addresses witness testimony that is earnest but mistaken and argues that, because jurors are ill equipped to spot mistaken identifications, expert testimony should be permitted to inform jurors of factors that can cause earnest-but-mistaken eyewitness testimony. Jurors may spot a witness that is trying to fool them, and diligent cross-examination can be an especially effective tool for ferreting out lies. But jurors will almost certainly *not* spot witnesses who believe their statements are the truth and have fooled themselves. When testimony is plausible, how can jurors tell whether it is true or false? Jurors should know the factors that impact eyewitness reliability so that they can make more informed decisions about the trustworthiness of such testimony. Moreover, jurors routinely attribute far greater weight to eyewitness testimony than is prudent, making expert testimony on the issue all the more critical.²⁴ Louisiana is currently one of two states to apply a *per se* bar on admitting expert testimony to inform jurors of factors related to eyewitness reliability.²⁵ This Comment contends that expert testimony regarding eyewitness reliability (expert eyewitness testimony) is an effective way of improving jury determinations and should be admissible in Louisiana at the discretion of trial court judges for that purpose.²⁶

22. HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* 43 (1909).

23. See Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL’Y & L. 817, 830 (1995).

24. See *infra* Part III(B)(2)(c).

25. See Vallas, *supra* note 16, at 124 (“As of 2011, only five states—Kansas, Louisiana, Nebraska, Oregon, and Pennsylvania—still maintain a rule of complete exclusion.”). Since the Vallas article was published, Oregon, Pennsylvania, and Kansas have moved from *per se* exclusion to discretionary jurisdictions. See *State v. Lawson*, 291 P.3d 673, 696-97 (Or. 2012); *Commonwealth v. Walker*, 92 A.3d 766, 769, 788 (Pa. 2014); *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014).

26. Louisiana law appears to permit trial court judges to hear expert testimony as

Part I of this Comment briefly discusses the admissibility of eyewitness testimony. Part II outlines the reasons that eyewitness testimony is often inaccurate and presents a short summary of how courts around the country have admitted expert testimony to talk about eyewitness reliability to juries. Part III focuses on Louisiana law, and in particular on *State v. Young*, the most recent Louisiana Supreme Court case affirming a per se ban on expert eyewitness testimony at trial. Part IV argues that *Young* should be overturned in favor of making expert eyewitness testimony admissible at trial at the discretion of trial court judges.

II. EYEWITNESS TESTIMONY ADMISSIBILITY

Permitting experts to inform jurors of factors related to eyewitness reliability is necessary because there is very little judicial screening of eyewitness testimony, meaning that unreliable eyewitness evidence is still likely to be admissible.

In the 1970s, the U.S. Supreme Court articulated the due process standard for admitting eyewitness testimony against criminal defendants in *Neil v. Biggers* and *Manson v. Braithwaite*.²⁷ The standard in Louisiana is identical.²⁸ These cases held that due process concerns only arise when police use identification procedures that are both suggestive and unnecessary.²⁹ “A lineup is unduly suggestive if the identification

to factors of reliability during a pre-trial suppression hearing, because the per se exclusionary rule laid out by the Louisiana Supreme Court appears only to restrict a jury from hearing such testimony at trial. See *State v. Collins*, 2009-0050, p. 14 n.3 (La. App. 1 Cir. 8/12/09); 2009 WL 2461288, at *6 n.3. Part V(E) discusses whether a judge’s ability to hear expert eyewitness testimony during a suppression hearing limits the need for such testimony again at trial. See *infra* Part V(E). Whether a judge would be permitted to hear such testimony during a bench trial is less clear. There is very little Louisiana case law on this issue, but *Daubert* safeguards (discussed *infra* Part IV(A)), upon which *Young* based the inadmissibility of such testimony, may not be as essential in a bench trial. See, e.g., *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000). The focus of this Comment is on the use of such testimony at trial before a jury; a judge conducting a bench trial may not be constrained by the rules of evidence that this Comment discusses.

27. *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972); *Manson v. Braithwaite*, 432 U.S. 98, 105-07, 114 (1977).

28. *State v. Guillot*, 353 So. 2d 1005, 1008-09 (La. 1977).

29. See *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *Manson v. Braithwaite*, 432 U.S. 98, 99 (1977). In both *Biggers* and *Manson* the Court held that the use of “showups” was suggestive, but in both cases determined that the “totality of the circumstances” indicated that the identifications were reliable. *Biggers*, 409 U.S. at 198-201; *Manson*, 432 U.S. at 99, 116. A showup is a practice whereby investigators

procedure displays the defendant so that the witness' attention is focused on the defendant."³⁰ If a defendant can show this to be the case, a court must then consider the "totality of the circumstances" to determine whether there is a "substantial likelihood of irreparable misidentification."³¹ Factors for the court to use in making this determination include:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.³²

Scientific study has shown that a number of other factors can be significant.³³ For reasons discussed below,³⁴ the use of witness confidence as a factor of reliability under *Manson* is problematic and has been heavily criticized by many legal scholars.³⁵

In *Perry v. New Hampshire*, the U.S. Supreme Court revisited the issue and upheld *Manson*.³⁶ In that case, a witness identified the defendant, Perry, in suggestive circumstances, but

present only the suspect to the eyewitness for an identification. See Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 458 (2012). These are suggestive because witnesses will often make the assumption that the police must have some reason for suspecting that specific person already.

30. *State v. Neslo*, 433 So. 2d 73, 78 (La. 1983). A few examples of procedures that could be considered unnecessarily suggestive are: a lineup procedure in which only the suspect resembles an earlier description given by the eyewitness; a lineup or showup in which an officer says, "we caught the guy, we just need you to identify him for us"; or a picture lineup in which only the suspect's photograph is in color and the others appear to be very dated photographs in black and white. Ultimately, what constitutes "unnecessarily suggestive" is a question of law for a judge to decide. In Louisiana, it is difficult to have identification evidence suppressed under this standard. See *infra* note 41 and accompanying text.

31. *Manson*, 432 U.S. at 106-07.

32. *Biggers*, 409 U.S. at 199-200.

33. See *infra* Part III.

34. See *infra* Part III(B)(2)(c).

35. See, e.g., Wise et al., *supra* note 9, at 816-17; Calvin TerBeek, *A Call for Precedential Heads: Why the Supreme Court's Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step with the Empirical Reality*, 31 LAW & PSYCHOL. REV. 21, 35 (2007) ("[T]he fourth Biggers/Manson factor—the confidence of the eyewitness—bears a tenuous, at best, relationship to the accuracy of the identification.").

36. See generally *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

there was no police misconduct.³⁷ Perry argued that it was the reliability of an identification that mattered, not whether there was police misconduct.³⁸ The Court disagreed, explaining that “a primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.”³⁹ So, although defendants have a due process right to suppress testimony that has been improperly induced or manufactured by police misconduct if it creates a substantial risk of misidentification, in the absence of misconduct, there is no right of suppression. Absent police misconduct, *any* relevant eyewitness testimony against a criminal defendant is admissible no matter how dubious.⁴⁰

The result is that, under the current *Manson* standard, the bar for suppression is very high, and “[t]he vast majority of eyewitnesses proceed to testify before a jury.”⁴¹ Heightening the

37. *Perry v. New Hampshire*, 132 S. Ct. 716, 722, 725 (2012). (stating that “[the defendant] concedes that . . . law enforcement officials did not arrange the suggestive circumstances”). Police caught the suspect holding two car stereo amplifiers that had just been stolen from a car in an apartment complex parking lot. *Id.* at 721. The suspect claimed that he simply found them on the ground. *Id.* While the police questioned the suspect, an officer went to a nearby apartment to ask the resident if they saw the man that was breaking into cars. *Id.* The witness questioned could see the suspect being questioned by police in the parking lot at the time and positively identified him as the man that was breaking into cars. *Id.* at 721-22.

38. *Perry v. New Hampshire*, 132 S. Ct. 716, 725 (2012).

39. *Id.* at 726.

40. *Id.* at 728 (“The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.”).

41. *Id.* at 737 (Sotomayor, J., dissenting). The rather lax *Manson* standard can be seen in a variety of Louisiana cases. See, e.g., *State v. Higgins*, 2003-1980, pp. 20-21 (La. 4/1/05); 898 So. 2d 1219, 1233 (identification evidence admissible when witness was told prior to a photo lineup array that perpetrator was in one of the pictures); *State v. Brown*, 2003-0897, p. 20 (La. 4/12/05); 907 So. 2d 1, 17 (identification evidence admissible even when the witness told police that the perpetrator had one eye, and the suspect was the only person in the lineup with a missing eye); *State v. Guillot*, 353 So. 2d 1005, 1008 (La. 1977) (identification evidence admissible when only one or two other persons in a lineup physically resembled the suspect); *State v. Prudholm*, 446 So. 2d 729, 739 (La. 1984) (three-and-one-half month period between crime and identification did not automatically cause the identification to be unreliable); *State v. Broadway*, 96-2659, pp. 14-15 (La. 10/19/99); 753 So. 2d 801, 812-13 (eyewitness's identification of defendant during photographic lineup conducted more than one year after murder was not suggestive, even though eyewitness saw photograph of defendant in newspaper during that year following murder).

standard of admissibility for eyewitness testimony could be an effective way of limiting wrongful convictions.⁴² Some states have done so.⁴³ However, in light of the Supreme Court's recent decision in *Perry* to not expand upon the *Manson* requirements, the constitutional standard of admissibility for eyewitness testimony seems unlikely to change in the near future. Likewise, the Louisiana Supreme Court recently declined to expand upon the *Manson* standard.⁴⁴

Because the *Manson* standard continues to permit inaccurate eyewitness testimony to be given in court, the vast majority of jurisdictions have recognized the usefulness of additional safeguards, such as jury instructions and expert testimony, to improve jury determinations.⁴⁵ Indeed, part of the Court's rationale in *Perry* was that some states permit expert testimony on the issue of eyewitness reliability as a safeguard.⁴⁶

III. FACTORS OF UNRELIABILITY

To understand why expert testimony is useful in this context, it will be helpful to discuss the reasons that eyewitnesses "get it wrong" so often. If the reasons for eyewitness unreliability were a matter of common sense, it would be superfluous to permit experts to talk about those reasons during a trial. As the following subsections show, however, these factors are not always intuitive or common sense. In fact, they are often counter-intuitive and belie common sense.

A. THE INHERENT CONSTRAINTS OF PERCEPTION AND MEMORY

In 1902, renowned German criminologist Franz von Liszt

42. See TerBeek, *supra* note 35, at 46-51; Suedabeh Walker, Comment, *Drawing on Daubert: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Testimony*, 62 EMORY L.J. 1205, 1228 (2013). At least one law review article has even proposed excluding *all* eyewitness identification evidence in felony cases when the eyewitness is a stranger to the defendant because it is so unreliable. Noah Clements, *Flipping A Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271, 288 (2007).

43. For instance, in both New Jersey and Oregon, a court can properly suppress identification evidence if officials gathered it in a suggestible way regardless of whether there was police misconduct. See *State v. Henderson*, 27 A.3d 872, 919 (N.J. 2011); *State v. Lawson*, 291 P.3d 673, 693 (Or. 2012).

44. See *State v. Young*, 2013-1069, p. 1 (La. 6/28/13); 117 So. 3d 96, 96 (per curiam).

45. See Vallas, *supra* note 16, apps. A-B at 136-46.

46. See *Perry v. New Hampshire*, 132 S. Ct. 716, 729 (2012).

was teaching at a university when two students suddenly erupted into an argument.⁴⁷ One student pulled a gun and fired a shot.⁴⁸ Nobody was injured, but Liszt implored his students to carefully remember what had happened so that they could tell the police.⁴⁹ What none of these students knew was that the professor had staged the event to study eyewitness accuracy.⁵⁰ The results were dismaying. The most accurate witness in the class got more than a quarter of the significant details wrong.⁵¹ Some were wrong about 80% of what they had seen.⁵² Thousands of studies performed since have confirmed that eyewitnesses perceive and remember with a high degree of error.⁵³

From start to finish, the life of a memory can be described in four stages.⁵⁴ The first is perception.⁵⁵ The next three stages are processes of memory: acquisition, retention, and retrieval.⁵⁶ Both perception and memory are largely unconscious processes.⁵⁷

1. PERCEPTION

Perception is not reality; it is merely our brains' best interpretation of it.⁵⁸ Human brains constantly make assumptions based on past experiences, biases, and expectations.⁵⁹ Furthermore, human brains can only perceive a portion of the "mass of stimuli that impinges upon their senses" each day.⁶⁰ This gives people a logical, yet sometimes incorrect, perception of reality. In other words, people only sense part of the world around them. The human brain makes up for this by

47. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 41 (2000).

48. *Id.* at 42.

49. *See id.*

50. *Id.*

51. *Id.*

52. SCHECK ET AL., *supra* note 47, at 42-43.

53. *See* Leo & Gould, *supra* note 18, at 28-29.

54. *See* Frederick Emerson Chemay, Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 723 (1985).

55. *Id.* at 723-24.

56. *Id.* at 724-25.

57. *Id.* at 725.

58. *See* MICHAEL P. SENG & WILLIAM K. CARROLL, EYEWITNESS TESTIMONY: STRATEGIES AND TACTICS § 2:2 (2d ed. 2003).

59. Chemay, *supra* note 54, at 724.

60. SENG & CARROLL, *supra* note 58, § 2:4.

unconsciously filling in the gaps as logically as it can.⁶¹ Perceptions are thus created with partial information, assumptions, and invented details.

2. MEMORY

Not only do people frequently perceive incorrectly from the start, but the process of remembering and recalling past perceptions is also often rife with additional errors. Unfortunately, acquisition, retention, and retrieval of memory do not work like recording and playing back a video.⁶² Instead, memories are like works of art, created with imagination and interpreted subjectively.

The acquisition stage occurs when the brain encodes perception.⁶³ Of everything that we hear, see, smell, taste, and feel during the day, we are only able to remember a portion.⁶⁴ A person remembers some information and discards some as well.⁶⁵ Most of this decision-making is unconscious.⁶⁶ Therefore, what a person unconsciously thinks is important in each moment heavily influences the acquisition stage. We process the sensory data we perceive “in light of experience, learning, preferences, biases, and expectations.”⁶⁷ And, as discussed above, people also fill in the gaps perceptually, causing them to remember things that they never actually sensed.⁶⁸

During the retention state people retain the memories they have acquired until they need to retrieve them.⁶⁹ Two factors have an obvious impact on how well people are able to retain information at this stage. First, greater amounts of information are more difficult to retain than smaller ones.⁷⁰ Second, the

61. Chemay, *supra* note 54, at 724 (“Another implication of the selectivity of perception is that gaps in information will exist, which the observer will fill by choosing details which may logically but incorrectly complete the picture.”).

62. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (1979).

63. *Id.*

64. Benton J. Underwood, *Memory*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/374487/memory> (last updated Mar. 24, 2015).

65. *Id.*

66. *Id.*

67. Fradella, *supra* note 16, at 5.

68. Chemay, *supra* note 54, at 724.

69. *Id.* at 724-25.

70. Fradella, *supra* note 16, at 7.

longer the span of time between acquisition and retrieval, the higher the likelihood that some information will be lost, although forgetting happens rapidly at first and gradually less over time.⁷¹

A third memory-retention factor has a less obvious but far more problematic effect. This pernicious factor is known as the post-event misinformation effect.⁷² Being exposed to post-event information can have a dramatic effect on how a person retains memory of an event.⁷³ Studies show that people will adjust their memories to accommodate new information. For instance, a witness to an accident who is later exposed to information indicating that one of the drivers was drunk may then remember that driver as having driven more erratically.⁷⁴ If someone mentions the existence of a stop sign to them, that person may suddenly remember having seen the stop sign.⁷⁵ This can be true even if there never was a stop sign.⁷⁶ In one study, examiners presented subjects with a photograph of a man reading a book with a green cover. The examiners later exposed the subjects to information indicating that the book had a blue cover. Many subjects then remembered seeing a man reading a book with a blue cover.⁷⁷ So post-event information can alter memories, enhance memories, and even cause brand new memories to spring into being.⁷⁸ To the person remembering, these changes are imperceptible.⁷⁹

Retrieval is the process of searching our brains for retained memories and communicating the information to others.⁸⁰ One pitfall of the retrieval process is the phenomenon known as "unconscious transference."⁸¹ Essentially, this is when our memories jumble together. It is "a byproduct of the integrative, malleable nature of human memory."⁸² For instance, imagine that a hypothetical witness to a robbery also observes a

71. Fradella, *supra* note 16, at 7; *see also infra* Part III(B)(2)(a).

72. Fradella, *supra* note 16, at 7-8.

73. LOFTUS, *supra* note 62, at 54-55.

74. *Id.* at 54.

75. *Id.* at 56.

76. *Id.* at 58.

77. LOFTUS, *supra* note 62, at 120.

78. *Id.* at 54-58.

79. Chemay, *supra* note 54, at 724.

80. *Id.* at 725.

81. LOFTUS, *supra* note 62, at 142.

82. *Id.* at 143.

bystander. Later that week, officials show that witness a police lineup including that bystander. The witness may recognize the bystander's face, unconsciously associate him with the crime, and given the circumstances, immediately conclude that he is the robber. Moreover, in this case, any further identifications of the "robber" made by the witness will not be based on her original memory of the crime but on her memory of picking him out of the lineup.⁸³ The U.S. Supreme Court noted that "once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then."⁸⁴ Oftentimes, subsequent identifications strengthen witness certainty, even as the witness forgets the original memory of the perpetrator.⁸⁵

The legal system should recognize the common causes of error and limit their impact on the course of justice. If the legal system continues to rely on jurors who base their verdicts on eyewitness testimony, it only makes sense that jurors be aware of the common causes of eyewitness error so that they may adjust their feelings of reasonable doubt accordingly. This Comment next discusses more specific causes of error in eyewitness perception and memory that jurors may benefit from being aware of.

83. The story of John Jerome White is one striking case on point. The victim identified White in a photo array six weeks after the crime. *John Jerome White*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/John_Jerome_White.php (last visited Jan. 2, 2015). At a later live lineup, the victim confidently picked White again, despite the fact that *the actual perpetrator* was, unbeknownst to the investigators at the time, standing in the very same lineup. *Id.*; see also Vallas, *supra* note 16, at 106. In the words of one rape victim that identified the wrong man as her attacker: "As soon as I picked out a photo, that became my mental image of my rapist. From that moment on, that's the face I was remembering, not the face of the man who attacked me . . ." KATHRYN SCHULZ, *BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR* 240 (2010).

84. *United States v. Wade*, 388 U.S. 218, 229 (1967).

85. See *supra* note 83. In another case, rape victim Jennifer Thompson went from "I think" to "absolutely sure" in her misidentification of Ronald Cotton. Brandon Garret, *Getting It Wrong: Convicting the Innocent*, SLATE.COM (Apr. 12, 2011, 5:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2011/getting_it_wrong_convicting_the_innocent/how_eyewitnesses_can_send_innocents_to_jail.html. At a post-conviction hearing, officials showed Thompson a photograph of the actual rapist. *Id.* Shocked, she said: "I have never seen him in my life. I have no idea who he is." *Id.*

B. SPECIFIC FACTORS AFFECTING EYEWITNESS RELIABILITY

Factors that affect eyewitness accuracy can be divided into two basic categories: “system” and “estimator” variables. System variables are those within the control of the legal system. These include the police procedures used to elicit information and identifications from witnesses through questioning and lineups. Estimator variables are those outside of the legal system’s control. These are unavoidable; they are the result of the inherent flaws of human perception and memory.

1. SYSTEM VARIABLES

System variables can be controlled through proper police procedures, with the goal of limiting the post-event misinformation effect. Generally, this means investigators should present lineups for identification in ways that are not suggestive and ask witnesses open-ended questions.

“Showups,” in which the suspect alone is presented to the witness, are highly suggestive and produce high levels of false identification.⁸⁶ Intuitively, showups are suggestive because they present an eyewitness with only one person to choose from, and people will often assume that the police have a good reason for suspecting that specific person. Showups, sometimes used in Louisiana and elsewhere, “are not favored, [but] due process is not violated if the ‘totality of the circumstances’ indicates that the identification was reliable.”⁸⁷ “[T]he inherent suggestiveness of a showup requires careful use of procedural safeguards.”⁸⁸ The use of showups should be limited as much as possible in favor of properly carried out lineups.⁸⁹

Lineups are tremendously valuable investigative tools, but certain lineup procedures can be suggestive and thus unreliable.⁹⁰ Lineup procedures can be considered impermissibly suggestive and thus create inadmissible identification evidence in Louisiana in a number of circumstances. These include, but are

86. Fradella, *supra* note 16, at 15-16.

87. *State v. Jackson*, 337 So. 2d 508, 510 (La. 1976) (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

88. NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 27 (1999) [hereinafter EYEWITNESS EVIDENCE], available at <https://ncjrs.gov/pdffiles1/nij/178240.pdf>.

89. See Fradella, *supra* note 16, at 16.

90. See LOFTUS, *supra* note 62, at 144-52.

not limited to: the defendant being pointed out prior to the lineup; the defendant being required to do or say some unique thing that the others in a lineup do not do; the defendant being grossly dissimilar from others in the lineup; or the witness being shown a photograph of the defendant immediately prior to the lineup.⁹¹

Implementing additional procedural requirements would help rectify many of these problems.⁹² For instance, sequential presentation of persons in lineups has been shown to increase accuracy.⁹³ Double-blind administration of lineups, in which both the witness and the investigator administering the lineup do not know which person is the suspect, can significantly limit mistaken identifications.⁹⁴ Oftentimes, investigators give unconscious clues to the witness during a lineup; double-blind procedures eliminate the risk that this will occur. Also, prior to making identifications in a lineup, investigators should instruct eyewitnesses that the perpetrator may or may not be in the lineup.⁹⁵ Investigators can reduce the so-called foil bias by making sure that the foils (the non-suspects in the lineup) actually look like the suspect.⁹⁶ Police do not need to find perfectly identical people to serve as foils, but the foils should be the same race, around the same weight and height, be similarly dressed, and lack visibly distinctive features.⁹⁷ Experts recommend using at least six people in a lineup to decrease the rate of chance misidentifications.⁹⁸ The National District Attorneys Association also recommends electronic recordings of any statements made by suspects to police and ongoing training for police and prosecutors regarding identification procedures.⁹⁹

When considering the accuracy of a lineup identification, one significant factor is how quickly the witness is able to make the identification. Remarkably, studies have shown that identifications made within ten to twelve seconds have a 90% rate

91. See LOFTUS, *supra* note 62, at 144-52.

92. Wise et al., *supra* note 9, at 842-65.

93. Fradella, *supra* note 16, at 17.

94. *Id.*

95. *Id.*

96. See Wise et al., *supra* note 9, at 833-34.

97. Fradella, *supra* note 16, at 16.

98. *Id.*

99. Nat'l Dist. Attorneys Ass'n, *Task Force Recommendations on Eyewitness Identification*, PROSECUTOR, Mar.-Apr. 2005, at 16, 45, available at Westlaw, 39-APR Prosecutor 16.

of accuracy.¹⁰⁰ Identifications that take longer than this have an accuracy rate of less than 50%.¹⁰¹ Both investigators and courts should be aware of this striking correlation.¹⁰²

Additionally, investigators should ask open-ended questions.¹⁰³ Studies have shown that more errors occur when investigators force people answer questions than when people are allowed to freely narrate what happened.¹⁰⁴ The wording of questions also matters.¹⁰⁵ In one study, examiners showed subjects a movie. Afterwards, some were asked, "How long was the movie?" Their average answer was 130 minutes. Others were asked, "How short was the movie?" Their average answer was 100 minutes.¹⁰⁶ The questions "did you see *the* gun?" and "did you see *a* gun?" could very well render different answers from the same person.¹⁰⁷

Sound police procedures are the most effective way to limit errors caused by system variables. However, expert testimony may also play an important role regarding system variables. Serious procedural errors or police misconduct in the course of gathering eyewitness evidence will impel the judge to exclude it if under the totality of the circumstances there is a substantial likelihood of misidentification.¹⁰⁸ Less serious errors will not render identification evidence inadmissible, but may still be important enough for the jury to fully understand at trial. Expert eyewitness testimony discussing system variables may provide a much-needed safeguard when it comes to eyewitness testimony that passes muster under the *Manson* standard, yet is still suspect in its reliability.

100. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 284 (2003), available at http://www.innocenceproject.org/docs/Eyewitn ess_Testimony_Ann_Rev.pdf.

101. *Id.*

102. Suggestive procedures can also result in quicker identifications but without any corresponding increase in accuracy. *State v. Lawson*, 291 P.3d 673, 704 (Or. 2012). In these cases the speed of identification is not good evidence of accuracy.

103. See EYEWITNESS EVIDENCE, *supra* note 88, at 23.

104. LOFTUS, *supra* note 62, at 91.

105. See EYEWITNESS EVIDENCE, *supra* note 88, at 23.

106. LOFTUS, *supra* note 62, at 94.

107. See *id.* at 96.

108. See *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977); see also *supra* Part II.

2. ESTIMATOR VARIABLES

Estimator variables—those outside of the control of the criminal justice system—can be subdivided into three categories: event variables, witness variables, and jury variables. Event variables include how long an observation lasted, the distance from a witness to the event, lighting, how fast something happened, and how much time passed since the time of the observation.¹⁰⁹ Witness variables are those specifically related to the witness, including stress, distraction, bias, age, race, unconscious transference, and sensory impairment.¹¹⁰ Jury variables are variables that cause jurors to err in assessing witness testimony. Expert testimony discussing estimator variables is especially important because these types of factors will not prompt any judicial screening under *Manson* as they are not the result of police misconduct.¹¹¹

a. Event Variables

Event factors are all very intuitive, but jurors continually trust eyewitness testimony despite poor observation conditions.¹¹² Jurors appear to have a general but unsophisticated understanding of these factors and may be unaware of how they interplay with each other to affect perception.¹¹³

109. Fradella, *supra* note 16, at 9.

110. *Id.*

111. *See supra* Part II.

112. *See, e.g.,* State v. Pease, 163 P.3d 985, 987 (Alaska Ct. App. 2007) (a jury convicted the defendant of robbery and murder based solely on a single eyewitness who was very drunk at the time, over 400 feet away from the crime, and observed the robbery at night); State v. Clopten, 223 P.3d 1103, 1109 (Utah 2009) (citing a mock trial, at which the majority of jurors voted to convict despite the sole witness being legally blind and identifying a total stranger).

113. For instance, in *Pease*, the sole witness testified that it was "dark outside" and that from about 450 feet away he "got a clear look at all four men for approximately three or four seconds while they were hurrying back to the car." State v. Pease, 163 P.3d 985, 996-98 (Alaska Ct. App. 2007) (Stewart, J., dissenting). The jurors in this case conducted an unauthorized, out-of-court experiment so that they could see what visibility is like at 450 feet. *Id.* at 997-98. One juror paced off roughly 400 feet and then the others looked to see if they could recognize him. *Id.* at 997. When later asked why they did this, one juror explained that some of them "were kind of confused about how far is that distance." *Id.* at 998. Another stated, "I remember I kept thinking that's just—I don't have any reference point." *Id.* The jurors all later agreed that they had conducted this experiment in daylight. *Id.* at 997. The jurors did not control for the other "event variables" surrounding the eyewitness account, namely that the crime occurred when it was dark outside and that the witness saw a fast moving event for only 3–4 seconds. *See id.* While the

The longer a witness sees something, the better his perception and memory of that thing will be.¹¹⁴ The same is true regarding hearing.¹¹⁵ Interestingly, witnesses consistently overestimate the duration of an event that they have witnessed, which can lead courts to believe that witnesses saw a perpetrator for a longer period than is actually the case.¹¹⁶ A variable related to duration is the rate at which an event happens. Things that occur quickly are more difficult to perceive and remember.¹¹⁷ Even if the total time of observation is adequate, if the event is comprised of a series of fast-moving actions, memory can be negatively affected.¹¹⁸

A witness's ability to make an accurate identification also depends on how close the witness is to the event. "When an image is far away, the image shrinks in size on the retina and, as a result, loses details."¹¹⁹ Even at ten feet, some facial details are imperceptible.¹²⁰ The ability to distinguish one person from another "is essentially nil beyond 200 feet."¹²¹

One particularly interesting application of expert testimony to address the effect of distance on reliability could be the use of visual aids. By studying people with 20/20 vision, researchers can see exactly how blurry, and how small, an image becomes to the person viewing it at varying distances.¹²² Experts can then

intention of being better informed is certainly laudable, the apparent disregard of the other variables was prejudicial. Although this was later determined to be jury misconduct because the jury left the courtroom without approval, it did not give rise to any post-conviction relief because the Court of Appeals thought the experiment was appropriate. *Id.* at 993-94 (majority opinion).

114. Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 331 (2006).

115. Lawrence M. Solan & Peter M. Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 HASTINGS L.J. 373, 398 (2003).

116. See Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1139 (2011).

117. Fradella, *supra* note 16, at 10.

118. *Id.*

119. Zak Stambor, *How Reliable is Eyewitness Testimony?: Psychologists are Helping Police and Juries Rethink the Role of Eyewitness Identifications and Testimony*, MONITOR ON PSYCHOL., Apr. 2006, at 26, available at <http://www.apa.org/monitor/apr06/eyewitness.aspx>.

120. *Id.*

121. See *State v. Pease*, 163 P.3d 985, 987 (Alaska Ct. App. 2007) (internal quotation omitted).

122. Stambor, *supra* note 119.

create visual aids for the jury that show the best possible view that a witness might have at a given distance by adding the appropriate amount of blurriness and size reduction to the image shown.¹²³

The time between an event and the memory recall of that event are also factors. Memory decays over time, but the rate of decay changes over time.¹²⁴ In a phenomenon known as the “forgetting curve,” or the “Ebbinghaus curve” (named for the man who discovered it), memory rapidly diminishes immediately following an event and then the rate of decay lessens over time.¹²⁵ Ebbinghaus discovered that people forget over half of what they have observed within the first hour. Within two days, they forget 75% of the original memory. But after the lapse of a month, the observer loses only another 5–6% from memory.¹²⁶

b. Witness Variables

Expectations can have a significant impact on what a person perceives and remembers.¹²⁷ People tend to have a confirmation bias, meaning that they actively seek out information that matches their expectations. People are more likely to remember something that conforms to their expectations.¹²⁸ “[O]bservation is peculiarly influenced by expectation [People] tend to see and hear what we expect to see and hear.”¹²⁹ Personal prejudices and cultural expectations can affect perception and memory as well.¹³⁰ For instance, in one experiment, subjects were shown a picture of a New York subway train filled with people.¹³¹ The picture showed several seated individuals, as well as two men standing and talking to each other—“a black man wearing a tie

123. Stambor, *supra* note 119.

124. LOFTUS, *supra* note 62, at 53.

125. *Id.*

126. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence – Memory*, 41 HARV. L. REV. 860, 866 (1928).

127. LOFTUS, *supra* note 62, at 36-37.

128. *Id.* at 39-40 (“[In one study,] investigators briefly showed subjects a display of playing cards After a brief glance, most subjects reported that they saw three aces of spades. Actually, there were five, but two of them were colored red instead of black. People did not see the red aces of spades because they are not used to seeing spades that are red; when they see one that is red, they apparently dismiss it immediately.”).

129. *Id.* at 37 (internal quotation omitted).

130. *Id.* at 37-38, 40.

131. *Id.* at 37-38.

and a white man holding a razor.”¹³² After viewing the picture, subjects relayed all that they had seen to a second subject, the second subject relayed this information to a third, and so on until the sixth subject heard the final message.¹³³ The study used over forty groups of subjects.¹³⁴ More than half of the final subjects reported that there was a black man holding a razor.¹³⁵ Several described the black man as “threatening the white man with it” or “brandishing it wildly.”¹³⁶ It is worth noting that this experiment is dated because it took place in 1947.¹³⁷ A modern test group may not be as susceptible to the *same* cultural bias. But this experiment stands as solid evidence that cultural biases can shift the way people observe, interpret, and explain things to others. Expectations and confirmation bias present an especially dangerous problem for the criminal justice system because “there is evidence that some people may in fact incorporate their stereotype of ‘criminal’ in their identification of suspects One study suggests that many people have stereotypes about how ‘deviants’ and criminals are supposed to look.”¹³⁸

Additionally, a witness is more likely to be in error when identifying someone of a different race.¹³⁹ This is true for people of all races.¹⁴⁰ But this appears to be particularly true when the witness is white and is attempting to identify a black person.¹⁴¹ Studies further reveal that a witness that is not racially prejudiced is just as likely to be mistaken in making a cross-racial identification as a witness that is prejudiced.¹⁴² Even considerable contact with members of another race will not

132. LOFTUS, *supra* note 62, at 38.

133. *Id.*

134. *Id.* at 37.

135. *Id.* at 38.

136. *Id.*

137. LOFTUS, *supra* note 62, at 37.

138. Chemay, *supra* note 54, at 727 (internal quotation omitted).

139. Cutler, *supra* note 114, at 330; Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1493 (2008) (“The phenomenon of unreliable cross-racial identifications is universally accepted as fact by psychologists.”).

140. See LOFTUS, *supra* note 62, at 138.

141. See James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POLY & L. 253, 253 (2001) (“Whites may apply more lenient criteria to the recognition or identification of Blacks, resulting in a higher rate of false-alarm responses.”).

142. See *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984).

necessarily improve a person's ability to identify cross racially.¹⁴³

Stress also has a negative impact on memory formation.¹⁴⁴ According to what is known as the Yerkes–Dodson Law, mild to moderate arousal enhances memory, but memory function deteriorates with high levels of stress.¹⁴⁵ If a person experiences high levels of stress, the stress compromises her ability to focus and concentrate and hence her capacity to form memory is impaired. High levels of stress are not conducive to highly productive thought, and this includes creating detailed, accurate memories. Similar to stress, sleep deprivation can negatively impact the ability to form memory in some cases.¹⁴⁶ Disturbingly, sleep deprivation may not only inhibit memory formation but also increase the risk of false memory creation under certain circumstances.¹⁴⁷

One consequence of our perceptual selectivity¹⁴⁸ is the “weapons-focus effect.” Weapons tend to draw the attention of an observer.¹⁴⁹ Numerous studies show that there is a statistically significant negative effect on witness identification accuracy when a perpetrator commits a crime with a weapon.¹⁵⁰ For example, in one experiment, two groups of subjects were shown a video of a crime being acted out.¹⁵¹ One group saw the crime committed with weapons visible, while the other group saw the crime committed without any weapons visible.¹⁵² One week later, examiners showed each subject a lineup to identify the perpetrator.¹⁵³ The weapon-absent group made a correct

143. See *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984).

144. Cutler, *supra* note 114, at 334 (“A very recent meta-analysis . . . examined the effect of stress in twenty-seven separate tests involving over 1700 participant-witnesses. The results clearly showed that stress had a negative impact on identification accuracy.”).

145. *Id.* (“[E]xtreme stress has a debilitating effect on subsequent identification accuracy.”); LOFTUS, *supra* note 62, at 33.

146. Steven J. Frenda et al., *Sleep Deprivation and False Memories*, 25 PSYCHOL. SCI. 1674, 1679–80 (2014), available at <http://pss.sagepub.com/content/25/9/1674.full>.

147. *Id.* at 1680.

148. See *supra* Part III(A)(1).

149. LOFTUS, *supra* note 62, at 35 (stating that a weapon captures a good deal of attention, resulting in “a reduced ability to recall other details from the environment, to recall details about the assailant, and to recognize the assailant at a later time”).

150. Cutler, *supra* note 114, at 333–34.

151. *Id.* at 334.

152. *Id.*

153. *Id.*

determination 55% of the time, while the weapon-present group made a correct determination only 37% of the time.¹⁵⁴ It is significant to note that, as this study shows, the presence of a weapon still distracts observers that are not under any threat.¹⁵⁵

Age is also a factor affecting witness accuracy.¹⁵⁶ From about the age of five, children can make a correct identification as frequently as adults.¹⁵⁷ But children are *highly* suggestible.¹⁵⁸ Elderly witnesses are able to remember as well as younger adults but are more suggestible and susceptible to the post-event misinformation effect.¹⁵⁹

c. Jury Variables

Studies show that jurors overestimate the reliability of eyewitness testimony significantly.¹⁶⁰ In one study conducted as a mock trial, real eyewitnesses to a staged crime made lineup identifications and then testified to mock jurors.¹⁶¹ The mock jurors believed correct testimony and mistaken testimony at an identical rate.¹⁶² Not only do jurors over-believe eyewitnesses, they overvalue eyewitness testimony in comparison to other evidence.¹⁶³ As Justices Brennan and Marshall once noted in a dissenting opinion, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"¹⁶⁴ Jurors are much more

154. BRIAN L. CUTLER, OVERVIEW OF ESTIMATOR VARIABLES: FINDINGS FROM RESEARCH ON THE EFFECTS OF WITNESS, CRIME AND PERPETRATOR CHARACTERISTICS ON EYEWITNESS ACCURACY 4 (2004), available at <http://acdlaonline.com/zoomdocs/presentations/Mistaken%20Identity%20Dr%20Bruce%20Cutler.pdf>.

155. See Cutler, *supra* note 114, at 334.

156. See LOFTUS, *supra* note 62, at 159-63.

157. See Fradella, *supra* note 16, at 13.

158. See LOFTUS, *supra* note 62, at 161-63.

159. Brian H. Bornstein, *Memory Processes in Elderly Eyewitnesses: What We Know and What We Don't Know*, 13 BEHAV. SCI. & L. 337, 346 (1995), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1199> ("[E]lderly eyewitnesses are disadvantaged less in what they can remember than in how they respond to certain types of testing procedures.").

160. See Wise et al., *supra* note 9, at 825.

161. Clark, *supra* note 116, at 1148.

162. *Id.*

163. See LOFTUS, *supra* note 62, at 9 ("Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence."); see also Penrod & Cutler, *supra* note 23, at 817, 819 (discussing jurors' tendencies to over-believe eyewitness testimony).

164. *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting)

likely to convict when there is an eyewitness to a crime, even if that eyewitness is severely unreliable.¹⁶⁵

Jurors also place a heavy emphasis on witness confidence, though numerous studies show that there is little link between confidence levels and accuracy.¹⁶⁶ At least one court noted that this problem is compounded by the fact that witnesses themselves often exude more confidence than they rationally should, given what they actually know.¹⁶⁷ Some studies even show that, under certain circumstances, a person can be more confident when *incorrect*.¹⁶⁸ "A major source of juror unreliability is reliance on witness confidence"¹⁶⁹

Assessing eyewitness evidence is a heavy burden to place on jurors. Event, witness, and system variables can all impact eyewitness evidence, separately or in tandem. From an eyewitness's perspective, the effects of these variables on their own perception and memory are imperceptible. Jurors viewing the testimony at trial would likewise have no way of knowing how variables affected the testimony just by watching it and listening to it. Given the breadth and complexity of all of the above-discussed factors, jurors should be given as much information as possible to make their determination. This is especially true considering jurors' natural tendency to overvalue and over-believe eyewitness testimony.

C. NATIONAL TRENDS IN ADMISSIBILITY OF EXPERT EYEWITNESS TESTIMONY

For the past two decades, expert eyewitness testimony has been admitted with increasing frequency in both federal and state

(quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

165. See *State v. Clopten*, 223 P.3d 1103, 1109 (Utah 2009).

166. See *Penrod & Cutler*, *supra* note 23, at 819-30.

167. *Clopten*, 223 P.3d at 1110 ("[E]yewitnesses are likely to use their expectations, personal experience, biases, and prejudices to fill in the gaps created by imperfect memory. Because it is unlikely that witnesses will be aware that this process has occurred, they may express far more confidence in the identification than is warranted." (internal quotation omitted)).

168. LOFTUS, *supra* note 62, at 101.

169. *Penrod & Cutler*, *supra* note 23, at 817; *accord* *Perry v. New Hampshire*, 132 S. Ct. 716, 732 (2012) (Sotomayor, J., dissenting) ("[A]n eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability.").

courts at trial.¹⁷⁰ Louisiana is currently one of only two states to apply a per se bar on this expert testimony at trial.¹⁷¹ In May of 2014, the Pennsylvania Supreme Court concluded a lengthy opinion with the decision that it was finally “time to take the step of joining those jurisdictions which allow the admission” of expert eyewitness testimony.¹⁷² Kansas became the most recent state to begin permitting expert eyewitness testimony in July of 2014, commenting that “[t]he time has come to eschew [the] automatic rule of exclusion in favor a more flexible approach.”¹⁷³ Expert eyewitness testimony is admissible at trial in all of the federal circuits except the Eleventh Circuit.¹⁷⁴ Even in the Eleventh Circuit, such testimony appears to be discouraged rather than completely forbidden.¹⁷⁵

In at least thirteen states and three federal circuits, judges are either mandated or advised to admit expert testimony when there is no corroborating evidence or when the eyewitness was observing a stranger.¹⁷⁶ For instance, the Utah Supreme Court

170. Vallas, *supra* note 16, at 114-15.

171. *See id.* at 124; *see also supra* note 25 (explaining that Oregon, Pennsylvania, and Kansas ceased to be per se exclusion jurisdictions after the Vallas article was published). Nebraska holds that expert eyewitness testimony is per se inadmissible because factors related to eyewitness accuracy are a matter of common knowledge. *State v. George*, 645 N.W.2d 777, 790 (Neb. 2002).

172. *Commonwealth v. Walker*, 92 A.3d 766, 788 (Pa. 2014).

173. *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014).

174. Vallas, *supra* note 16, at 125.

175. The Eleventh Circuit held in 1992, one year prior to *Daubert*, that expert testimony on eyewitness reliability is per se inadmissible. *United States v. Holloway*, 971 F.2d 675, 679 (11th Cir. 1992). The Eleventh Circuit held in 1997 that expert testimony regarding eyewitness reliability was properly held inadmissible by a district court under *Daubert* because such testimony would not assist trier of fact, but left unaddressed whether such testimony remained per se inadmissible under *Daubert*. *United States v. Smith*, 122 F.3d 1355, 1357 (11th Cir. 1997). More recently, a district court has admitted such testimony as “helpful, and even essential, to assisting the jury.” *United States v. Smith*, 621 F. Supp. 2d 1207, 1220 (M.D. Ala. 2009), *aff’d*, 370 F. App’x 29 (11th Cir. 2010). The Eleventh Circuit affirmed the district court’s decision without comment on the expert testimony. *United States v. Smith*, 370 F. App’x 29 (11th Cir. 2010). The Eleventh Circuit has even more recently denied a petition for rehearing on the exclusion of such evidence. *See United States v. Owens*, 682 F.3d 1358, 1359 (11th Cir. 2012). In dissent, Justice Barkett wrote “[o]ur continued adherence to a rule that disfavors this form of testimony is indefensible in light of the science supporting its usefulness.” *Id.* (Barkett, J., dissenting).

176. *See Vallas, supra* note 16, apps. A-B at 136-46 (including Alaska, Arizona, California, Delaware, District of Columbia, Idaho, Indiana, Massachusetts, Montana, New York, Ohio, South Carolina, Utah, and the Federal Third, Fourth, and Sixth

has held that:

[It is] imperative that the jury's decisionmaking abilities are supported by the best information available. If unreliable identifications are not addressed properly at trial, then there exists an unacceptable risk of the innocent being punished and dangerous criminals remaining at large. We therefore hold that, in cases where eyewitnesses are identifying a stranger and one or more established factors affecting accuracy are present, the testimony of a qualified expert is both reliable and helpful, as required by rule 702. Such eyewitness expert testimony should therefore be routinely admitted¹⁷⁷

In most states, this type of testimony is admissible at the discretion of the trial court judge.¹⁷⁸ A few courts favor exclusion, only giving judges the discretion to admit such testimony in certain cases.¹⁷⁹

Courts have admitted expert eyewitness testimony to discuss the effects of observational conditions,¹⁸⁰ witness stress,¹⁸¹ the weapons-focus effect,¹⁸² cross-racial identifications,¹⁸³ the post-event misinformation effect,¹⁸⁴ unconscious transference,¹⁸⁵ memory decay and distortion,¹⁸⁶ suggestible identification procedures,¹⁸⁷ and the relationship between witness confidence

Circuits). Connecticut is not represented in the Vallas article appendix because the deciding case came after the article was published. *See id.* app. B at 139; *State v. Guilbert*, 49 A.3d 705, 731-32 (Conn. 2012). Additionally, based on recent state Supreme Court language, Florida seems poised to join these jurisdictions. *See Peterson v. State*, No. SC12-1442, 2014 WL 2882801, at *5-6 (Fla. June 26, 2014); *see also id.* at *8-11 (Pariente, J., concurring).

177. *State v. Clopten*, 223 P.3d 1103, 1118 (Utah 2009).

178. *See Vallas, supra* note 16, at 116.

179. *See id.* at 125-26.

180. *E.g.*, *State v. Pease*, 163 P.3d 985, 987 (Alaska Ct. App. 2007).

181. *United States v. Smith*, 621 F. Supp. 2d 1207, 1215-16 (M.D. Ala. 2009), *aff'd*, 370 F. App'x 29 (11th Cir. 2010).

182. *State v. Copeland*, 226 S.W.3d 287, 302 (Tenn. 2007); *Blasdell v. State*, 384 S.W.3d 824, 830-31 (Tex. Crim. App. 2012).

183. *State v. Clopten*, 223 P.3d 1103, 1113 & n.22 (Utah 2009); *People v. McDonald*, 690 P.2d 709, 726-27 (Cal. 1984).

184. *State v. Guilbert*, 49 A.3d 705, 732 (Conn. 2012).

185. *Id.*; *State v. Almaraz*, 301 P.3d 242, 251-52 & n.5 (Idaho 2013).

186. *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992); *see also State v. Holmes*, No. 11050100172, 2012 WL 4097296, at *11-12 (Del. Super. Ct. 2012).

187. *McDonald*, 690 P.2d at 716, 721.

and accuracy.¹⁸⁸ The preceding is not meant to be an exhaustive list. Moreover, as scientific research in this area increases, the number of factors courts will permit expert testimony on is also likely to increase.

IV. LOUISIANA LAW

A. A BRIEF BACKGROUND OF LOUISIANA EVIDENCE LAW AS IT RELATES TO EXPERT TESTIMONY USED AT TRIAL

All relevant evidence is normally admissible in Louisiana courts.¹⁸⁹ But relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.”¹⁹⁰ Under Article 702 of the Louisiana Code of Evidence (LCE), if “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue” then “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.”¹⁹¹ In 1993, the U.S. Supreme Court established the standard of admissibility for expert testimony in federal courts in *Daubert v. Merrell Dow Pharmaceuticals*.¹⁹² That same year, in *State v. Foret*, Louisiana adopted this standard, incorporating it into Article 702 of the Louisiana Code of Evidence.¹⁹³ The standard set forth in *Daubert* and *Foret* has two components: a trial court must (1) ensure that the expert testimony is scientifically sound¹⁹⁴ and (2) determine that the

188. *United States v. Smith*, 621 F. Supp. 2d 1207, 1217-18 (M.D. Ala. 2009), *aff'd*, 370 F. App'x 29 (11th Cir. 2010).

189. LA. CODE EVID. ANN. art. 402 (2006).

190. *Id.* art. 403.

191. LA. CODE EVID. ANN. art. 702 (2006 & Supp. 2015). Expert testimony is thus admissible only if it passes both the balancing test of LA. CODE EVID. ANN. art. 403 and the Article 702 standard. *See id.* art. 702 cmt. (f).

192. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

193. *State v. Foret*, 628 So. 2d 1116, 1121-23 (La. 1993).

194. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). Factors include whether the scientific theory offered has been tested and peer reviewed, the rate of error associated with the particular field of study, and the degree to which the theory offered is generally accepted in that field of study and in the scientific community. *Id.* at 593-94. Because there seems to be a near unanimous consensus in the courts, including the Louisiana Supreme Court, that the study of eyewitness testimony is a scientifically sound field, this Comment does not further address the issue. Of course, some specific factors that an eyewitness expert may wish to testify

testimony will assist the trier of fact.¹⁹⁵ In *Cheairs v. DODT*, the Louisiana Supreme Court articulated that Article 702 of the LCE article 702 requires a “three pronged inquiry,” asking whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.¹⁹⁶

The third *Cheairs* prong must be read in conjunction with comment (c) to Article 702 of the LCE, which states that experts may testify to issues within the knowledge of ordinary citizens, so long as the testimony will be helpful to the trier of fact.¹⁹⁷

Under Article 704 of the LCE, an expert may not express an opinion as to the guilt or innocence of the accused in a criminal case, but a court should not exclude otherwise admissible testimony solely because it embraces an ultimate issue of fact to be decided by the jury.¹⁹⁸ Therefore, although the guilt or innocence of an accused may hinge on the accuracy of an identification, expert testimony on the issue is admissible under Article 704 of the LCE as long as the expert refrains from giving an opinion as to guilt or innocence itself.¹⁹⁹

B. EXPERT EYEWITNESS TESTIMONY IN LOUISIANA: *STATE V. STUCKE* AND ITS PROGENY

The Louisiana Supreme Court first addressed the issue of admitting expert eyewitness testimony over thirty years ago in *State v. Stucke*.²⁰⁰ In *Stucke*, the defendant sought to introduce

on could lack the testing, peer review, or acceptance within the field to be admissible under this prong of the standard. See *State v. Chauvin*, 2002-1188, pp. 14-18 (La. 5/20/03); 846 So. 2d 697, 707-09. See generally *infra* app. B.

195. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

196. *Cheairs v. State ex rel. Dep't of Transp. & Dev.*, 2003-0680, p. 9 (La. 12/3/03); 861 So. 2d 536, 542 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)).

197. LA. CODE EVID. ANN. art. 702 cmt. (c) (2006 & Supp. 2015).

198. *Id.* art. 704.

199. See *id.*; *State v. Young*, 2009-1177 (La. 4/5/10); 35 So. 3d 1042, 1052 (Johnson, J., concurring).

200. *State v. Stucke*, 419 So. 2d 939, 944 (La. 1982).

expert testimony regarding eyewitnesses' ability to perceive and recall events.²⁰¹ The court affirmed the trial court's decision that the expert testimony was inadmissible.²⁰² The court gave three interrelated but discrete reasons for this holding. First, it held that "the prejudicial effect of such testimony outweigh[ed] its probative value because [there is a] substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial."²⁰³ Second, the court stated that "[s]uch testimony invades the province of the jury and usurps its function."²⁰⁴ Finally, the court determined that "[t]he testimony sought to be elicited from him would not have been an aid to the jury."²⁰⁵ In sum, *Stucke* held that expert eyewitness testimony would confuse jurors, interfere with the jury's role as the trier of fact, and would not aid them in making a determination.²⁰⁶ *Stucke* was decided prior to the modern LCE, but subsequent decisions found that *Stucke* comports with Articles 403 and 702.²⁰⁷ *Stucke* seemingly discouraged, rather than completely forbade, admitting expert eyewitness testimony at trial. However, subsequent cases upholding *Stucke* have increasingly been interpreted by Louisiana courts as creating a per se bar, culminating in the most recent decision of *State v. Young*.²⁰⁸

The Louisiana Supreme Court last visited the issue of expert

201. *State v. Stucke*, 419 So. 2d 939, 942 (La. 1982).

202. *Id.* at 945.

203. *Id.*

204. *Id.*

205. *Stucke*, 419 So. 2d at 945.

206. *See id.*

207. *See, e.g., State v. Ford*, 608 So. 2d 1058, 1061 (La. Ct. App. 1992); *State v. Higgins*, 2003-1980, pp. 33-34 (La. 4/1/05); 898 So. 2d 1219, 1240.

208. *See State v. Chapman*, 436 So. 2d 451, 453 & n.6 (La. 1983) (showing that shortly after *Stucke*, courts permitted an expert to discuss eyewitness reliability at trial, and finding that "the trial judge may (as was done here) exercise his discretion in favor of admitting such evidence"); *State v. Henry*, 2013-0059 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143, 1164-65 (Tobias, J., concurring) ("Thus, my reading of *Stucke* is that it stands for the proposition that a trial court has the discretion in certain undisclosed circumstances on a case-by-case basis to allow an expert to testify about the reliability of eyewitness identifications. . . . As I read *Young*, the Court directed that no expert witness may address at trial the issue of the unreliability of eyewitness identification."); *Commonwealth v. Walker*, 92 A.3d 766, 783 (Pa. 2014) (noting that under *Young*, Louisiana "continue[s] to adhere to a *per se* exclusionary approach"). *But see State v. Young*, 2009-1177 (La. 4/5/10); 35 So. 3d 1042, 1052 (Johnson, J., concurring) ("It is my view, that expert witness testimony regarding the reliability of eyewitness identification is not *per se* inadmissible in every case.").

eyewitness testimony in 2010 in *State v. Young*, which upheld *Stucke*.²⁰⁹ In *Young*, the trial court admitted expert eyewitness testimony on the issues of cross-race identification, weapon focus, the effects of stress on memory, and the relationship between witness confidence and accuracy.²¹⁰ The supreme court held this to be an abuse of discretion and vacated the decision.²¹¹ The court recognized that there were "touted" advances in the social sciences regarding eyewitness accuracy.²¹² But the court held that this does not "render obsolete the underlying premise" of *Stucke*.²¹³ The *Young* court held that "[t]here is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial."²¹⁴ Thus, the logic of the *Young* holding rests on the incorrect assumption that factors of eyewitness reliability are "within a juror's common knowledge and experience."²¹⁵

The *Young* court held that expert eyewitness testimony does not satisfy the standard for admissibility under Article 702 of the LCE as articulated in *Cheairs*.²¹⁶ Although the language of *Young* expressed some skepticism,²¹⁷ it did not hold that expert eyewitness testimony is scientifically invalid under the *Daubert* standard or Article 702 of the LCE.²¹⁸ Rather, *Young* held that expert eyewitness testimony does not pass the third prong of the *Cheairs* analysis because it would not assist the jury.²¹⁹ Essentially, according to *Young*, such testimony merely confuses

209. *State v. Young*, 2009-1177, pp. 13-14 (La. 4/5/10); 35 So. 3d 1042, 1050.

210. *Id.* at 1046.

211. *Id.* at 1050.

212. *See id.* at 1049.

213. *Id.* at 1049-50.

214. *Young*, 35 So. 3d at 1050.

215. *See id.*; *see also infra* Part V(A).

216. *Young*, 35 So. 3d at 1050 (showing that expert eyewitness testimony is likely admissible under LA. CODE EVID. ANN. art. 403 because although such testimony is more prejudicial than probative, the court does not hold that the probative value is *substantially* outweighed).

217. "By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the 'education' process" *Young*, 35 So. 3d at 1050.

218. *Id.* Justice Knoll's concurrence did, however, have the opinion that the entire field of eyewitness study was "junk science." *Id.* at 1052 (Knoll, J., concurring).

219. *Id.* at 1050 (majority opinion).

a common-sense question of fact.²²⁰

The court also reasoned that such expert testimony would “invad[e] what is considered the essential province of the jury” because it allows experts to “offer opinions on the credibility of another witness.”²²¹ Here, the court confused generalized testimony about factors of reliability with the issue of individual credibility. As discussed in Section V, reliability and credibility are quite different.²²²

The *Young* court also held that “effective cross-examination and artfully crafted jury instructions” are effective enough safeguards to eyewitness unreliability.²²³ This reasoning is problematic for at least two reasons. First, research indicates that expert testimony is a more effective way of improving jury determinations than both cross-examination and special jury instructions.²²⁴ Second, there are no mandatory “artfully crafted jury instructions” in Louisiana regarding eyewitness testimony.²²⁵ Defendants may request special jury instructions on eyewitness testimony under Article 807 of the Louisiana Code of Criminal Procedure,²²⁶ but judges frequently deny these instructions.²²⁷ When judges do grant these instructions, they are not permitted to include much detail.²²⁸ Consequently, only a very basic jury instruction is usually used, which does nothing to alert jurors to various factors that may impact eyewitness reliability.²²⁹

220. *State v. Young*, 2009-1177, pp. 7, 13 (La. 4/5/10); 35 So. 3d 1042, 1046, 1050.

221. *Id.* at 1050.

222. *See infra* V(B).

223. *Young*, 35 So. 3d at 1050.

224. *See Penrod & Cutler, supra* note 23, at 842.

225. *See generally* 17 CHENEY C. JOSEPH, JR. & P. RAYMOND LAMONICA, LOUISIANA CIVIL LAW TREATISE: CRIMINAL JURY INSTRUCTIONS AND PROCEDURES (3d ed. 2012).

226. *See* LA. CODE CRIM. PROC. ANN. art. 807 (2013).

227. *See, e.g., State v. Foy*, 439 So. 2d 433, 437 (La. 1983); *State v. Velez*, 588 So. 2d 116, 137 (La. Ct. App. 1991); *State v. Wilson*, 27,228, p. 2 (La. App. 2 Cir. 8/23/95); 660 So. 2d 571, 573; *State v. Lively*, 2013-883, pp. 13-15 (La. App. 3 Cir. 2/12/14); 2014 WL 551058, at *8-9.

228. LA. CODE CRIM. PROC. ANN. art. 807 (2013) (stating that instructions may not consist of “qualification, limitation, or explanation”).

229. A typical jury instruction in Louisiana, in a criminal case involving eyewitness testimony, reads as follows:

As jurors you alone determine the weight and credibility of the evidence. As the sole judges of the credibility of witnesses and of the weight their testimony deserves, you should scrutinize carefully the testimony and the circumstances

More recently, the Louisiana Fourth Circuit Court of Appeal addressed the issue of expert eyewitness testimony in *State v. Henry*.²³⁰ In *Henry*, the sole purpose of an expert witness was to rebut testimony by a police investigator that officials had properly conducted identification procedures.²³¹ The trial court did not admit the expert to testify.²³² The defense argued that a defendant had a right to rebut testimony of an investigating police officer testifying for the prosecution under the Sixth Amendment's Confrontation Clause.²³³ In addition, they argued that the exclusion rule of *Young* should not apply because their expert was strictly addressing the identification procedures and not the reliability of eyewitness testimony.²³⁴ The *Henry* court declined to see a distinction, however, and citing the defense's own words from an earlier filed motion, wrote that "the issue for the expert is to *educate* the jury about how [the eyewitness's] memory was affected by the suggested lineup." Thus, the defense's stated purpose for the expert testimony would violate the prohibition."²³⁵ The court held that, under *Young*, the lower court correctly excluded the expert testimony.²³⁶

The concurring opinion in *Henry* could have serious legal implications. In the concurrence, two of the three judges who heard the case made clear that the fourth circuit was following *Young* with reservations.²³⁷ The concurrence fully agreed that, under *Young*, the trial court properly excluded the expert testimony.²³⁸ But the concurrence questioned why Louisiana disallows such testimony, while nearly all other jurisdictions

under which the witness has testified. In evaluating the testimony of a witness, you may consider his [her] ability and opportunity to observe and remember the matter about which he [she] testified, his [her] manner while testifying, any reason he [she] may have for testifying in favor of or against the state or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

17 JOSEPH & LAMONICA, *supra* note 225, § 3:4.

230. *State v. Henry*, 2013-0059, pp. 25-26 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143, 1158.

231. *Id.*

232. *Id.*

233. See Original Brief on Behalf of Defendant-Appellant at 30, *State v. Henry*, 2013-0059 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143 (No. 2013-0059), 2013 WL 8022858, at *30.

234. *Id.* at 34-35.

235. *Henry*, 147 So. 3d at 1158.

236. *Id.*

237. See *id.* at 1161-69 (Tobias, J., concurring).

238. *Id.* at 1168.

permit it.²³⁹ The concurrence wrote "that many studies exist that call into question the validity of eyewitness identification."²⁴⁰ The concurrence then disagreed with the proposition asserted in *Young* that an expert in this context would have an undue influence on a jury.²⁴¹

Henry may portend another Louisiana Supreme Court review of this issue in the near future.²⁴² The defendant has filed a writ of certiorari to the supreme court requesting that they hear the case.²⁴³ The case presents the opportunity for the court to overturn *Young* and render expert eyewitness testimony admissible. The court could, however, consider the defense's argument that *Henry* should be distinguished from *Young*. Therefore, a ruling in favor of the defendant-appellant may not have the sweeping effect of rendering all expert eyewitness testimony admissible. The court, in agreeing with the defendant's proposition, could hold more narrowly that expert testimony rebutting the State's claims about identification procedures is admissible without removing the exclusion as to other types of expert eyewitness testimony.

In *Young*, there were multiple eyewitnesses and an abundance of corroborating evidence to support a conviction.²⁴⁴ For this reason, the judgment rendered in *Young* was probably appropriate.²⁴⁵ Had there been a single eyewitness and no corroborating evidence, this would not have been the case. A *per se* ban ignores that the facts of each individual case are

239. *State v. Henry*, 2013-0059 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143, 1168 (Tobias, J., concurring).

240. *Id.*

241. *Id.* Judge Tobias mockingly wrote "just because the witness has been qualified as an expert does not make him a 'super' witness." *Id.* at 1169.

242. Since *Young* in 2010, there has been only one change of position on the court: Justice Hughes replacing the retired Justice Kimball. However, Justice Kimball did not take part in the *Young* decision. See *State v. Young*, 2009-1177 (La. 4/5/10); 35 So. 3d 1042.

243. No reference for this existed on Westlaw at the time of this Comment's publication, but the attorney for the defendant confirmed this reference via telephone. While the court could decline to grant a writ of certiorari requesting that it hear the case, given the timely question of law at issue and the concern voiced by the fourth circuit regarding Louisiana jurisprudence, as well as the fact that the defendant in question was sentenced to life without parole, this author thinks such a request has a fair chance of being granted.

244. See *State v. Young*, 2009-1177, p. 13 (La. 4/5/10); 35 So. 3d 1042, 1052 (Johnson, J., concurring).

245. See *id.*

important.

V. WHY *YOUNG* SHOULD BE OVERTURNED OR ABROGATED IN FAVOR OF A DISCRETIONARY APPROACH

A. FACTORS RELATING TO EYEWITNESS RELIABILITY ARE NOT COMMON SENSE

"As the research makes clear, the topics covered by eyewitness experts are often beyond the common knowledge of ordinary jurors"

State v. Clopten ²⁴⁶

The court premised *Young* on the faulty assumption that factors relating to eyewitness reliability are "within a juror's common knowledge and experience."²⁴⁷ Studies overwhelmingly show that many of the discussed factors are not commonly known, much less appropriately considered, by jurors.²⁴⁸ Laypeople are often misguided at the most fundamental level. For example, more than half of respondents to a survey agreed that "[h]uman memory works like a video camera, accurately recording the events we see and hear so that we can review and inspect them later."²⁴⁹ Of the scientific experts that took the survey, none agreed.²⁵⁰ It is troubling that over half of potential jurors believe eyewitnesses are able to narrate events to them with the accuracy of playing back a video recording.

Common-sense reasoning is even more flawed when it comes to many particular factors. In a survey, less than a third of people were aware of the weapons-focus effect. A greater number, 37%, believed that the presence of a weapon would make

246. State v. Clopten, 223 P.3d 1103, 1113 (Utah 2009).

247. State v. Young, 2009-1177, p. 13 (La. 4/5/10); 35 So. 3d 1042, 1050.

248. See Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 167 (1990) ("[M]ounting empirical data from psychological studies suggest that lay persons such as jurors inadequately evaluate the testimony of others. These psychological studies, in effect, suggest that common sense is a myth.").

249. Elizabeth F. Loftus, *Juries Don't Understand Eyewitness Testimony*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2011/08/31/can-we-trust-eyewitness-identifications/juries-dont-understand-eyewitness-testimony> (last updated Sept. 1, 2011, 11:32 AM).

250. *Id.*

a witness more reliable.²⁵¹ Similarly, less than a third of respondents in that study were aware that high stress makes memory less reliable.²⁵² Only 36% were aware that cross-racial identifications are generally less reliable.²⁵³ That familiarity and prejudice have little relationship to the cross-racial identification bias is also very counter-intuitive.²⁵⁴ Juror understanding of the effects of observation duration and event speed are equally poor.²⁵⁵ Other surveys have shown that only 17% correctly understand that confidence is a poor predictor of accuracy.²⁵⁶ Forty percent believe it to be an "excellent" indicator of accuracy.²⁵⁷ In one survey, experts were asked whether thirty different factors that can affect eyewitness reliability were common sense. Of these, only eleven were deemed common sense by more than half of the respondents.²⁵⁸

The overwhelming number of jurisdictions that have seriously considered the issue have wisely concluded that most of these factors are not within the common knowledge of the jury.²⁵⁹ In the words of the New York Court of Appeals, "[d]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror."²⁶⁰ It has been over three decades since the Arizona Supreme Court recognized that "[e]xperimental data indicates that many jurors may reach intuitive conclusions about the reliability of such testimony that psychological research would show are misguided. . . . We cannot assume that the average juror would be aware of the variables concerning identification and memory"²⁶¹

251. Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 197 (2006).

252. *Id.*

253. *Id.* at 200.

254. *See* *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984).

255. Schmechel et al., *supra* note 251, at 198.

256. *Id.* at 199.

257. *Id.*

258. *See infra* app. B.

259. *See* Vallas, *supra* note 16, apps. A-B at 136-46.

260. *People v. Lee*, 750 N.E.2d 63, 66 (N.Y. 2001).

261. *State v. Chapple*, 660 P.2d 1208, 1220-21 (Ariz. 1983) (internal citations omitted).

B. EXPERT EYEWITNESS TESTIMONY DOES NOT INVADE THE PROVINCE OF THE JURY

"The expert testimony in question does not seek to take over the jury's task of judging credibility"

People v. McDonald ²⁶²

Another rationale for the *Young* holding was that expert eyewitness testimony invades the province of the jury. It is important to note that expert eyewitness testimony informs the jury of factors relating to eyewitness reliability *generally*. The expert does not attack the *credibility* of an individual witness, which cannot be attacked by expert testimony in Louisiana.²⁶³ The California Supreme Court has described this distinction well:

[Expert eyewitness testimony] does not tell the jury that any particular witness is or is not truthful or accurate in his identification of the defendant. Rather, it informs the jury of certain factors that may affect such an identification in a typical case; and to the extent that it may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness. The jurors retain both the power and the duty to judge the credibility and weight of all testimony in the case²⁶⁴

Expert eyewitness testimony also does not infringe on the jury's role as the determiner of ultimate issues of fact. Article 704 of the LCE explicitly says that testimony "is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact."²⁶⁵ Moreover, expert testimony on the issue does not seek to give an absolute opinion as to the truth of any eyewitness testimony but rather to give opinion as to various factors that may have affected it.²⁶⁶ As a Massachusetts federal

262. *People v. McDonald*, 690 P.2d 709, 722 (Cal. 1984).

263. LA. CODE EVID. ANN. art. 702 cmt. (e) (2006 & Supp. 2015); *State v. Foret*, 628 So. 2d 1116, 1130 (La. 1993).

264. *McDonald*, 690 P.2d at 722.

265. LA. CODE EVID. ANN. art. 704 (2006).

266. In the words of Geoffrey Loftus, a psychologist that has testified multiple times as an expert on eyewitnesses, "[a]s an expert witness, my aim is not to use absolute judgment, but to provide as much information as possible." Stambor, *supra* note 119.

district court described it: "The function of the expert here is not to say to the jury—'you should believe or not believe the eyewitness.' . . . All that the expert does is provide the jury with more information with which the jury can then make a more informed decision."²⁶⁷

Ironically, not admitting expert eyewitness testimony invades the province of the jury by supplanting the jury's judgment of evidence for that of the judge's. As one commentator noted, the concept of the "province of the jury" arose out of the concern that judges sometimes unduly interfere with a jury's fact-finding duty; so it is strange for judges to use this logic to "defend the jury's authority against the intrusions of scientific experts by expanding the authority of judges themselves."²⁶⁸ A per se bar does not even allow trial court judges to base admissibility on the facts of a case. In Louisiana, the supreme court has usurped the fact-finding duty of jurors, as well as trial court judges' duty of admitting evidence.

C. ADMITTING EXPERT EYEWITNESS TESTIMONY WILL AID THE JURY

"Depriving the jurors of the benefit of scientific research on eyewitness testimony forced them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevented the jurors from having the best possible degree of understanding the subject toward which the law of evidence strives."

*State v. Chapple*²⁶⁹

Because factors affecting eyewitness accuracy are not a matter of common sense, it should be the legal presumption that informing the jury of these factors will improve their determinations. Studies show that expert testimony has the ability to improve jury determinations despite the risk that such testimony may also be somewhat confusing.²⁷⁰ Even proponents of admitting expert eyewitness testimony must concede that it

267. *United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999).

268. Note, *The Province of the Jurist: Judicial Resistance to Expert Testimony on Eyewitnesses as Institutional Rivalry*, 126 HARV. L. REV. 2381, 2394 (2013).

269. *State v. Chapple*, 660 P.2d 1208, 1221 (Ariz. 1983) (internal citations omitted).

270. See Penrod & Cutler, *supra* note 23, at 842.

could possibly confuse jurors. This is inevitably true of all expert testimony. Yet our system recognizes that withholding information and asking jurors to make a decision based purely on intuition is hardly a better solution.

Two leading scholars on the issue noted that “[c]onfusion seems plausible given that jurors have difficulty understanding and applying legal concepts at virtually every stage of the trial process.”²⁷¹ But these same scholars concluded that:

In light of the empirical evidence concerning the weak relation between confidence and accuracy, jurors’ heavy reliance on witness confidence as a guide to witness accuracy, their tendency to overbelieve eyewitnesses, their insensitivity to the many factors known to influence eyewitness performance, and the inability of traditional safeguards such as cross-examination and cautionary instructions to remedy these problems, we are left with one alternative: eyewitness expert testimony.²⁷²

Thousands of studies show that eyewitnesses often get it wrong and that jurors are not always equipped to know when errors are happening. Eyewitness reliability is so difficult to assess that an enormous body of research has been conducted to better understand it. Louisiana law holds that jurors are fully capable of assessing eyewitness testimony, while simultaneously holding that jurors are incapable of properly assessing expert testimony on the issue. It is a backwards proposition. After all, it is the eyewitness testimony that is so difficult to assess that it demands expert information in the first place. In the astute words of the U.S. Sixth Circuit Court of Appeals, critiquing a dissenting opinion with the same view as that in *Young*, “the Dissent’s selective faith in the collective intelligence, common sense and decision-making ability of the jury is disheartening, and is also inconsistent with the Dissent’s deference to the jury on other matters, including judging the credibility of eyewitness identifications.”²⁷³

Moreover, studies show conclusively that jurors overvalue eyewitness testimony.²⁷⁴ It is thus unpersuasive that expert

271. Penrod & Cutler, *supra* note 23, at 831.

272. *Id.* at 842.

273. *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000).

274. *See, e.g.*, Penrod & Cutler, *supra* note 23, at 817.

testimony on the issue should be inadmissible based on the fear that jurors will overvalue it as well. At worst, the jury must simply consider two types of persuasive evidence. In other words, the jury will do exactly what juries are supposed to do.²⁷⁵

Only by understanding the factors bearing on eyewitness accuracy can jurors apply the facts to the testimony and come to a reasoned conclusion about its reliability. Expert testimony on this issue, therefore, may not just be crucially useful in aiding proper jury determinations regarding eyewitness testimony but absolutely necessary. Louisiana must stop valuing juror ignorance of such an important topic and begin to trust jurors with all of the information necessary to adequately assess eyewitness testimony.

D. JURY INSTRUCTIONS AND CROSS-EXAMINATION ARE INSUFFICIENT SAFEGUARDS

"[T]he research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification."

*State v. Copeland*²⁷⁶

Cross-examination is primarily designed to sort out truth from lies. It can only accomplish this goal if the witness is aware that she is lying. A witness that inadvertently speaks falsities will have no reason to recant under pressure. Ample study seems to prove that "a tool designed from its inception to root out liars is ill-suited for the task of exposing the risk or reality of mistaken identification."²⁷⁷ Moreover, eyewitnesses cannot possibly respond accurately to questions regarding their own biases and frailties.²⁷⁸ Imagine the absurdity of a lawyer questioning an eyewitness about his cross-race identification bias, whether he has considered the possibility that he is suffering from unconscious transference, or asking him to explain to the jury

275. As Judge Tobias stated in the concurrence of *Henry*, "I trust jurors to apply the law to the facts." *State v. Henry*, 2013-0059 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143, 1169 (Tobias, J., concurring).

276. *State v. Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007).

277. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 766 (2007).

278. See *Commonwealth v. Walker*, 92 A.3d 766, 786 (Pa. 2014) (noting that "such information would not be within the permissible scope of cross-examination").

how the effects of stress have affected his memory. These and similar questions would undoubtedly be answered with either offended sneers, dumbfounded silence, or most likely, simple confident statements such as "I got a good look" and "I remember what I saw." In any case, such lines of questioning would be a futile attempt to provide the jury with any real information. Cross-examination serves a vitally important purpose but is unable to effectively safeguard against earnest-but-mistaken testimony.

Jury instructions informing jurors of factors related to eyewitness testimony reliability have been increasingly relied on in both state and federal courts over the last few decades.²⁷⁹ In federal courts, special jury instructions are routinely given when a party makes a special request in a case involving eyewitness testimony when identification is an issue.²⁸⁰ The model for many of these jury instructions was laid out by the United States District Court for the District of Columbia in *United States v. Telfaire*.²⁸¹ The so-called *Telfaire* instructions present a relatively brief, generalized caution to jurors to take into account observational conditions and the post-event misinformation effect.²⁸²

A few jurisdictions that admit expert eyewitness testimony consider jury instructions as the primary safeguard to eyewitness unreliability.²⁸³ After a comprehensive study on eyewitness

279. Wise et al., *supra* note 9, at 830.

280. See generally 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 496 (4th ed. 2009).

281. *Id.*; see also *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972).

282. *Telfaire*, 469 F.2d at 558-59; see also *infra* app. A (setting out the *Telfaire* instructions in full).

283. See, e.g., *State v. Henderson*, 27 A.3d 872, 925 (N.J. 2011) ("We anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony."); *State v. Werner*, 851 A.2d 1093, 1103 (R.I. 2004) ("Juries give great weight to what a trial justice says, so by alerting the jury to the inherent problems with eyewitness identifications, the jury was sufficiently reminded to use common sense to determine what evidence to believe and what to question."); *State v. Cabagbag*, 277 P.3d 1027, 1038 (Haw. 2012) (mandating that district courts give specific eyewitness identification instructions when requested whenever identification evidence is a central issue in the case, and further commenting that "[i]t is apparent from both the majority's opinion and Justice Sotomayor's dissent in *Perry* that, based on the empirical studies, it cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence"). This approach is also taken in England. *R v. Turnbull*, [1977] QB 224 at 228-31 (mandating special jury instructions in English courts when the sole evidence

testimony by an appointed Special Master, in the 2011 case *State v. Henderson*, the New Jersey Supreme Court determined that mandatory detailed jury instructions were the best way to inform jurors of factors related to eyewitness reliability.²⁸⁴ The *Henderson* instructions take into account a number of factors and are *significantly* more detailed than the *Telfaire* instructions.²⁸⁵ These include specialized instructions on many of the factors discussed above, such as event variables, the weapons-focus effect, unconscious transference, and the post-event misinformation effect.²⁸⁶ Courts require the *Henderson* instructions whenever the facts of a case indicate that they are necessary.²⁸⁷ Other courts have determined that jury instructions do not suffice as a substitute for expert testimony on the reliability of such evidence.²⁸⁸

There is some research to suggest that jury instructions may be as effective at improving jury determinations as expert testimony;²⁸⁹ however, another view is that “judges’ instructions do not serve as an effective safeguard against mistaken identifications and convictions[,] and . . . expert testimony is therefore more effective than judges’ instructions as a safeguard.”²⁹⁰ In any case, there is no reason to choose between the two. If both can be beneficial, the best approach may be to use jury instructions in tandem with expert eyewitness testimony.

Mandatory jury instructions modeled after those described in *Henderson* could be an effective way to improve jury determinations. Louisiana should consider implementing them.

against a defendant is eyewitness testimony, and permitting directed verdicts of acquittal if the judge feels the eyewitness evidence is particularly poor).

284. *State v. Henderson*, 27 A.3d 872, 928 (N.J. 2011).

285. See Press Release, New Jersey Courts, Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012), available at <http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm> (providing background information on the release of the jury instructions as well as a direct link to those instructions).

286. *Id.*

287. See *State v. Henderson*, 27 A.3d 872, 925 (N.J. 2011).

288. See, e.g., *State v. Guilbert*, 49 A.3d 705, 740 (Conn. 2012).

289. Kristy A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 LAW & HUM. BEHAV. 225, 234 (2009) (concluding that there is no discernible difference between the effect of expert testimony and judicial instructions on jury performance).

290. Wise et al., *supra* note 9, at 833 (internal quotations omitted).

Absent mandatory instructions, courts should more liberally grant special instructions at the request of defendants and, at a minimum, incorporate the simple cautionary language of the *Telfaire* instructions into the general charge when eyewitness testimony is part of the prosecution's case. Because special instructions may not include "qualification, limitation, or explanation" under Article 807 of the Louisiana Code of Criminal Procedure, they are often not granted on the issue of eyewitness reliability factors.²⁹¹ Courts could simply construe this constraint more loosely so that they grant special instructions more often. Alternatively, the legislature should consider amending Article 807 to permit more detailed instructions on eyewitness testimony when requested.

While more detailed jury instructions may improve jury determinations, as of yet such instructions are not frequently given in Louisiana. Even in those jurisdictions relying heavily on jury instructions as the primary safeguard, such as New Jersey, expert eyewitness testimony is still admissible at the judge's discretion.²⁹² This is necessary because even detailed and comprehensive "jury instructions lack the flexibility and specificity of expert testimony."²⁹³ The facts of cases can vary significantly, and therefore unique needs for expert testimony can arise in a variety of circumstances in which judicial instructions may be inadequate.²⁹⁴ The Louisiana Supreme Court should consider drafting jury instructions similar to those mandated by *Henderson*. In the absence of mandatory jury instructions, courts should grant special instructions more liberally when defendants request them. Courts should consider jury instructions as a useful supplement to admitting expert eyewitness testimony.

E. OTHER CONCERNS NOT SPECIFICALLY RAISED IN *YOUNG*

"I ponder why this state does not allow such testimony"

State v. Henry (Tobias, J., concurring)²⁹⁵

291. LA. CODE CRIM. PROC. ANN. art. 807 (2013) (stating that instructions may not consist of "qualification, limitation, or explanation").

292. *State v. Henderson*, 27 A.3d 872, 925 (N.J. 2011); *State v. Werner*, 851 A.2d 1093, 1099-1100 (R.I. 2004).

293. *Wise et al.*, *supra* note 9, at 833.

294. *See id.*

295. *State v. Henry*, 2013-0059 (La. App. 4 Cir. 8/6/14); 147 So. 3d 1143, 1168 (Tobias, J., concurring).

As some legal scholars have pointed out, reforms aimed at limiting wrongful convictions carry the dual effect of increasing the chances of wrongful acquittals.²⁹⁶ This is not a sufficient reason to apply a per se bar on expert eyewitness testimony. It is true that, at times, admitting expert testimony may dissuade a jury from convicting the true perpetrator. The same can be said of permitting cross-examinations, admitting alibi witnesses to testify, or having trials at all. From a criminal justice standpoint, as William Blackstone noted long ago, "the law holds that it is better that ten guilty persons escape than that one innocent suffer."²⁹⁷ From a purely evidentiary standpoint, as with most types of relevant evidence, the balance should be tipped in favor of admissibility.²⁹⁸ Presenting the jury with all possible relevant evidence and entrusting them to make a decision is the best we can do.

The fear that expert eyewitness testimony will cause wrongful acquittals is further unwarranted because the prosecution would have an equal chance to take advantage of such expert testimony during the State's rebuttal.²⁹⁹ The prosecution can also consult with its own expert to aid in cross-examination.³⁰⁰ In a small subset of cases the prosecution may even seek to bring an eyewitness expert to testify as part of its case-in-chief.³⁰¹

296. See, e.g., Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 517-18, 521 (2005) (emphasizing that our concern should first and foremost lie with those that are harmed when our system fails to convict criminals, not with the "episodic" instances of wrongful convictions); Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 689 (2007) (underscoring that those exonerated of crimes are legally innocent but not necessarily factually innocent, and further lamenting that "[i]t also wouldn't hurt if they [legal scholars] paid some attention to the problem of wrongful acquittals").

297. Clark, *supra* note 116, at 1105 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *358).

298. See LA. CODE EVID. ANN. arts. 402, 403 (2006).

299. See 35 AM. JUR. 3D *Proof of Facts* 1, § 17 (1996).

300. *Id.*

301. For instance, in cases in which the eyewitness is a victim (usually a child) and has suffered from post-traumatic stress or memory repression, the prosecution may seek an expert to explain to the jury some abnormalities in the initial eyewitness statement or why a delay in making an accusation occurred. See generally Rola J. Yamini, Note, *Repressed and Recovered Memories of Child Sexual Abuse: The Accused As "Direct Victim"*, 47 HASTINGS L.J. 551, 564-65 (1996); see also State v. Harwood, 609 P.2d 1312, 1317 (Or. Ct. App. 1980) (expert permitted to testify to jury that young children may perceive and remember sexual abuse as though it occurred during sleep, even when they were in fact awake). In Louisiana, expert testimony

Admitting expert testimony also adds to the cost and time of a trial. The cost of an expert witness can be thousands of dollars and will necessarily add hours to a trial. Still, given the effects that mistaken eyewitness testimony can have on the course of justice, this concern seems trivial by comparison. Accurate convictions certainly warrant the added time and cost. Trial court judges may still consider the added time and cost of an expert witness as a factor in determining the admissibility of an expert witness.³⁰² But a defendant is constitutionally entitled to the resources required of an effective defense;³⁰³ if expert testimony is necessary to achieve this end, the cost should be largely irrelevant.³⁰⁴

Regarding system variables such as how officials conduct lineup and identification procedures, the law permits a judge to hear expert testimony at a pre-trial eyewitness evidence suppression hearing.³⁰⁵ This does not necessarily eliminate the need for such testimony at a later time at trial before a jury. Moreover, it must be remembered that this safeguard is limited by the rule laid out in *Manson*, adopted by Louisiana, which states that eyewitness evidence should only be reviewed for reliability pre-trial in cases where it may have been procured by

given solely to explain why a child-victim delayed reporting a sexual abuse crime is already admissible. *State v. Chauvin*, 2002-1188, p. 17 (La. 5/20/03); 846 So. 2d 697, 708.

302. See *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); LA. CODE EVID. ANN. art. 403 (2006).

303. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (felony criminal defendants are entitled to counsel at state expense); *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (felony defendants have a right to "effective" assistance of counsel, the purpose of which is "to ensure that criminal defendants receive a fair trial"); *id.* at 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (concluding that due process sometimes requires the admission of expert testimony).

304. On this issue, the Louisiana Supreme Court has held that if an indigent defendant is able to "show that it is more likely than not that the requested expert assistance will be required to answer a serious issue or question raised by either the prosecution's or the defense's case . . . [then] the trial court is to order that the funds be provided by the state." *State v. Touchet*, 93-2839, p. 14 (La. 9/6/94); 642 So. 2d 1213, 1221.

305. See *State v. Collins*, 2009-0050, p. 14 n.3 (La. App. 1 Cir. 8/12/09); 2009 WL 2461288, at *6 n.3. ("[We] recognize the importance of expert testimony for purposes of assisting a court in evaluating the effect of the procedures used by law enforcement in conducting lineups and photo arrays.").

unnecessarily suggestive police procedures.³⁰⁶ At an eyewitness evidence suppression hearing, a judge is deciding as a matter of law whether such evidence ought to be presented to a jury—whether it causes a “substantial likelihood of irreparable misidentification.”³⁰⁷ A jury must assess eyewitness evidence at trial and decide as a matter of fact whether that evidence supports a finding of guilt “beyond a reasonable doubt.”³⁰⁸ These are separate inquiries. A judicial finding that investigators did not procure eyewitness evidence by unnecessarily suggestive police procedures, or that the evidence is otherwise reliable enough to be presented at trial, does not mean that such evidence is reliable enough to support a conviction based on guilt beyond a reasonable doubt. Therefore, that a judge has already listened to expert testimony when deciding admissibility does not limit the need for a jury to also be informed of factors related to eyewitness reliability regarding the decision they must make.

Some clever attorneys may attempt to question potential jurors about factors of reliability during voir dire and strike those who are most ignorant of them.³⁰⁹ Although this tactic may have limited use in improving jury selections, it strains the purpose of voir dire and does nothing to improve jury determinations after the chosen jurors have heard the eyewitness testimony. Moreover, these types of questions appear to be disallowed in Louisiana courts. For instance, in *State v. Robinson* the Louisiana Supreme Court held that questions asking prospective jurors about their understanding of the effects of stress or violence on eyewitness memory were properly disallowed during voir dire.³¹⁰ As such, voir dire should not be considered as a safeguard that limits the need for expert eyewitness testimony.

Questioning the veracity of a victim’s identification of the perpetrator can conflict, if only on an emotional level, with the natural compassion victims assuredly deserve. Stacey Malone, executive director of the Victim Rights Law Center, has expressed the concern that “focusing on the ‘faulty memories of victims’ will

306. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); see, e.g., *State v. Young*, 2013-1069, pp. 1-2 (La. 6/28/13); 117 So. 3d 96, 96 (per curiam).

307. *Manson*, 432 U.S. at 106-07.

308. LA. CODE CRIM. PROC. ANN. art. 804 (2013).

309. For instance, asking potential jurors if they are aware of the weapons-focus effect or cross-racial identification bias, etc.

310. *State v. Robinson*, 404 So. 2d 907, 911-12 (La. 1981).

only further validate the current victim-blaming culture.”³¹¹ It is simply a mistake, however, to interpret efforts to improve the ways jurors assess eyewitness testimony as an attack on victims.³¹² Indeed, the most egregious harm that our justice system can bestow upon the victims of crimes is failing to prosecute the true perpetrators, who may go on to commit further crimes against others. Preventing wrongful convictions is a matter of justice, not just for criminal defendants, but for everyone.

F. PRINCIPLES OF EVIDENCE LAW FAVOR ADMISSIBILITY AND JUDICIAL DISCRETION

“Rather than establishing a brightline rule, our jurisprudence has determined that the admissibility of expert witness testimony should be made on a case by case basis.”

State v. Young (Johnson, J., concurring)³¹³

Evidence law generally favors admissibility.³¹⁴ The facts surrounding eyewitness reliability should be treated no differently than any other relevant facts under Louisiana law. Louisiana should recognize the probative value of expert eyewitness testimony and analyze it on a case-by-case basis under the standards of Articles 403 and 702 of the LCE in the same manner as other forms of expert testimony. Judges should not be constrained by a hardline rule but should have the discretion to admit expert eyewitness testimony based on the totality of the circumstances in the case before them. This approach is supported by Comment (d) to Article 702 of the LCE, which states that “[b]road discretion should be accorded to the trial judge in his determination as to whether expert testimony should be held admissible.”³¹⁵ The Louisiana Judicial College, which provides continuing legal education to Louisiana judges, states, “Our service in the judiciary compels us to use all the tools

311. Stacy Malone, *Doubting, and Blaming, Victims*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2011/08/31/can-we-trust-eyewitness-identifications/doubting-and-blaming-victims> (last modified Sept. 1, 2011, 11:38 AM).

312. The notion that expert testimony on the issue is an “attack” on testifying victims seems to be another result of confusing witness credibility with generalized factors of eyewitness reliability. See *supra* Part V(B).

313. *State v. Young*, 2009-1177 (La. 4/5/10); 35 So. 3d 1042, 1051 (Johnson, J., concurring).

314. See LA. CODE EVID. ANN. arts. 402, 403 (2006).

315. LA. CODE EVID. ANN. art. 702 cmt. (d) (2006 & Supp. 2015).

at our disposal to ensure fair trials for those accused of crimes, those who are victims of crime, and the citizens who are affected by crime. Ensuring accurate eyewitness identification demands our attention.”³¹⁶ Taking advantage of the huge body of scientific research on the subject of eyewitness reliability through expert testimony is a paramount tool at the courts’ disposal.

VI. PROPOSAL

Louisiana trial court judges should be entrusted to consider the totality of the circumstances and admit expert eyewitness testimony in some cases.³¹⁷ This discretionary approach will permit judges to consider the factors of reliability that the facts of each case present, as well as the corroborating evidence and the nature of the expert’s testimony, to make a reasoned decision.³¹⁸

A trial court’s discretion should not be limited to cases in which there is a single witness. In Louisiana, identification by a single witness is sufficient to support a conviction.³¹⁹ In these cases, especially when there is no corroborating evidence, the importance of properly gauging the eyewitness evidence is at its peak. As mentioned, many states and federal circuits mandate or advise the admission of expert eyewitness testimony in such cases.³²⁰ But even multiple eyewitnesses can identify the wrong

316. SUSANNE JOHNSON INMAN, EYEWITNESS IDENTIFICATION: AN OVERVIEW OF NATIONAL JURISPRUDENCE, EXPERT TESTIMONY AND JURY INSTRUCTIONS 19 (2013), available at <http://www.lajudicialcollege.org/wp-content/uploads/2013/02/Judicial-College-EyewitnessIDpaperFINAL.pdf>.

317. This Comment has focused on the use of expert eyewitness testimony at criminal trials and emphasized its use as a mechanism to prevent wrongful convictions merely because, in such instances, the moral imperative to admit it is at its highest. This author sees no reason why such testimony should not also be admissible in a civil trial. See Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL. PUB. POL’Y & L. 726, 726 (1995) (“[M]any civil trials depend on memory to reconstruct critical events from the past.”). Many courts admit eyewitness experts to testify in civil trials. See, e.g., *Cage v. City of Chicago*, 979 F. Supp. 2d 787, 839 (N.D. Ill. 2013) (“[T]he Seventh Circuit has been receptive to eyewitness identification expert testimony in the civil arena.”).

318. See BOBBY MARZINE HARGES & RUSSELL L. JONES, LOUISIANA EVIDENCE 288 (2013) (“Lower courts in Louisiana should be granted the discretion to consider the use of such expert testimony on a case by case basis using a totality of the circumstances. Under this approach, trial courts will be able to consider all relevant factors in determining if it is appropriate to allow expert testimony on eyewitness identifications.”).

319. *State v. Hughes*, 2005-0992, p. 6 (La. 11/29/06); 943 So. 2d 1047, 1051.

320. See Vallas, *supra* note 16, apps. A-B at 136-46.

person, as happened in the case of Calvin Willis.³²¹ In another case, the jury convicted Kirk Bloodsworth of rape and murder on the basis of *five* erroneous eyewitness testimonies.³²² He spent eight years in prison before DNA evidence exonerated him.³²³ According to the Innocence Project, dozens of other exoneration cases involved multiple faulty eyewitnesses.³²⁴ According to the National Registry of Exonerations, 38% of exonerations with mistaken identification included multiple eyewitnesses.³²⁵

Similarly, the presence of other corroborating evidence should not necessarily preclude expert eyewitness testimony.³²⁶ This is particularly true when the defense presents an alibi witness, when chances of factual innocence are often highest. The key question should be whether factors known to decrease eyewitness accuracy are present.

Mandatory judicial instructions modeled after those stipulated by *Henderson* would also be helpful.³²⁷ At the least, Louisiana courts should grant special instructions on eyewitness testimony more liberally. The *Telfaire* instructions, while more

321. See *supra* Part I.

322. *Kirk Bloodsworth*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php (last visited Jan. 6, 2014).

323. *Id.*

324. See *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Reevaluating_Lineups_Why_Witnesses_Make_Mistakes_and_How_to_Reduce_the_Chance_of_a_Misidentification.php (last visited Feb. 18, 2015); see also *Browse the Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Jan. 30, 2015).

325. GROSS & SHAFFER, *supra* note 9, at 46.

326. See Epstein, *supra* note 277, at 783 (“[Courts should] increase the utilization of expert testimony, particularly by recognizing that discretion is abused in excluding such proof merely because there is some corroborating evidence. Corroboration has been present in too many cases in which juries convicted and DNA subsequently exonerated an accused.”).

327. See *supra* note 283. The Massachusetts Supreme Judicial Court is currently considering whether judges must instruct jurors as to these four factors:

(1) that human memory is not like a video recording; (2) that witnesses who are highly confident of their identifications are not therefore necessarily reliable; (3) that a witness's prior viewing of a suspect in an identification procedure, without making a positive identification, reduces the reliability of the witness's later identification of the same suspect; and (4) that the jury may consider the fact that an eyewitness to the crime has failed to identify a suspect in a police lineup.

Brief of the American Psychological Association and the Center for Law, Brain & Behavior as Amici Curiae in Support of Defendants-Appellants at 6, *Commonwealth v. Gomes*, 22 N.E.3d 155 (Mass. 2015) (No. SJC-11567), 2014 WL 4261315, at *6.

descriptive than a typical Louisiana instruction, are likely too simple to effectuate much change in jury determinations.³²⁸ Yet even incorporating the *Telfaire* language would be an improvement. However, the safeguard of jury instructions should be seen as a supplement to expert eyewitness testimony rather than an alternative.

Finally, this Comment proposes that judges be more informed concerning the factors of eyewitness reliability. Making expert eyewitness testimony admissible under the discretion of trial court judges will only have the desired effect if trial court judges correctly admit it in the right instances. In a survey of both federal and state judges from around the country, 75% agreed that judges should receive more training on eyewitness testimony.³²⁹ This survey result is consistent with studies showing that judges are unfamiliar with many factors affecting eyewitness reliability.³³⁰ A change in law that allows expert eyewitness testimony should be accompanied by an effort to educate judges on the larger factors relating to the reliability of eyewitness testimony, including the way jurors interpret eyewitness testimony. The new law should task the Louisiana Judicial College with this challenge. This will better equip judges with the knowledge to appropriately admit expert eyewitness testimony. On a case-by-case basis, judges can take advantage of the huge body of case law from other jurisdictions to decide whether certain factors warrant expert testimony. And, surveys of psychologists specializing in the field of eyewitness perception and memory can provide an extremely useful tool in adjudging precisely what factors need expert testimony.³³¹

Louisiana has fallen far behind in this area of law. *Young* must be overturned or abrogated. Jurors in Louisiana should be making informed decisions in cases involving eyewitness testimony, and to do this, jurors must know about factors that affect eyewitness reliability.

328. See generally Penrod & Cutler, *supra* note 23, at 832-33.

329. Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony*, CT. REV., Spring 2003, at 6, 13, available at <http://aja.ncsc.dni.us/courttrv/cr40-1/CR40-1WiseSafer.pdf>.

330. Wise et al., *supra* note 9, at 825-26.

331. See *infra* app. B.

VII. CONCLUSION

Louisiana's complete bar of expert eyewitness testimony is out of step with both the scientific and legal communities, as well as with the traditional values of evidence law. Expert eyewitness testimony is not a complete solution to the problem of eyewitness error, but its selective use may mitigate the harm caused. At best, Louisiana law preserves a status quo that surveys and studies have shown to produce tragic wrong after tragic wrong.³³² As every state except Louisiana and Nebraska have acknowledged, admitting expert testimony in some cases will aid juries in assessing eyewitness testimony and preventing wrongful convictions.³³³ Will Louisiana be the last state in the Nation to progress on this area of law? Perhaps the Louisiana Supreme Court will appreciate the chance that *Henry* gives the state to reserve that ignominious position for Nebraska. *Young* should be overturned so that Louisiana trial court judges have the discretion to admit expert eyewitness testimony when appropriate.

Matthew S. Foster

APPENDIX A:

The *Telfaire* Instructions are as follows:

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender? Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past. [In general, a witness bases any identification he makes on his perception through the use of

332. Approximately 72% of wrongful convictions overturned by DNA evidence were the result of mistaken eyewitness testimony. *Eyewitness Misidentification*, *supra* note 17. Louisiana ranks second in rate of wrongful convictions overturned by exoneration. GROSS & SHAFFER, *supra* note 9, at 35.

333. See *supra* note 25.

his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made. If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification. [You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony. I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.³³⁴

APPENDIX B:

This survey asked professionals whether different factors were reliable as well as whether they were common sense,

334. United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972).

making it a terrific tool to help judges decide admissibility.

Table 4
Discrete Judgments and Opinions Concerning the 30 Eyewitness Topics Tested

Topic	Is it reliable?	Would you testify?	Research basis?	Common sense?
Wording of questions	98	84	97	25
Lineup instructions	98	79	95	39
Confidence malleability	95	79	95	10
Mug-shot-induced bias	95	77	97	13
Postevent information	94	83	98	17
Child suggestibility	94	81	100	73
Attitudes and expectations	92	70	94	31
Hypnotic suggestibility	91	76	90	19
Alcoholic intoxication	90	61	76	95
Cross-race bias	90	72	97	65
Weapon focus	87	77	97	34
Accuracy-confidence	87	73	97	5
Forgetting curve	83	73	93	29
Exposure time	81	68	93	97
Presentation format	81	64	93	0
Unconscious transference	81	66	92	19
Showups	74	59	85	30
Description-matched foils	71	48	82	30
Child accuracy	70	59	91	78
Lineup fairness	70	54	78	48
False childhood memories	68	52	87	25
Color perception	63	27	37	41
Stress	60	50	98	37
Older witnesses	50	38	77	66
Hypnotic accuracy	45	34	89	55
Identification speed	40	29	75	61
Trained observers	39	31	76	73
Event violence	37	29	79	14
Discriminability	32	25	89	52
Long-term repression	22	20	87	79

Note. Numbers represent the percentage of experts who responded "yes" to each question. Topics are rank ordered according to their scores on the key question, "Do you think this phenomenon is reliable enough for psychologists to present in courtroom testimony?"

335. Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 412 (2001), available at http://web.williams.edu/Psychology/Faculty/Kassin/files/kassin_tubb_hosch_memon_2001.pdf.
