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The Experts Aren't Reliable Either: Why Expert Testimony on the Reliability of Eyewitness Testimony is Unwarranted in Alabama State Courts

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Introduction

Over the past twenty years, the legal community and the American public have witnessed the exposure of several cases of wrongful convictions in the past through the use of DNA evidence and other modern scientific techniques exonerating the accused.[2] This has lead to the founding of several organizations designed to combat wrongful convictions and to lobby for the correction of the factors contributing to such convictions, as well as investigations and recommendations concerning criminal procedural safeguards and other measures by federal and

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[2] *See, e.g.*, BARRY C. SCHECK, ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000). *See also* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 14 (2003); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61 (2003); David L. Feige, *"I'll Never Forget that Face": The Science and the Law of the Double-Blind Sequential Lineup*, 26 Champion 28 (2002); Margery Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 Ohio St. L.J. 263 (2002); Paul G. Cassell, *Criminal Law: Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997); Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 ST. THOMAS L. REV. 547 (1997). *But see* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

Alabama has had its own share of recently exposed wrongful convictions, most notably the cases of Dale and Ronnie Mahan, who were convicted in Alabama for the 1983 abduction and rape of a young woman. The victim was taken from a shopping mall, taken to the woods, forced to use drugs, and raped several times. The victim later identified the brothers from a photo lineup, having gotten a look at the perpetrators when they had lifted their masks. Based largely on her identification, Ronnie and Dale Mahan were convicted in 1984. Ronnie was sentenced to life without parole and Dale to thirty-five years in prison. At trial, the prosecution contended that Dale Mahan raped the victim while Ronnie watched. The Mahans gained access to the biological evidence in 1998. Swabs from the rape kit were tested and excluded both brothers, the victim's husband, and another man named as a possible contributor. Examination of pubic hairs collected also excluded the Mahan brothers. The actual perpetrator has yet to be found. The Cardozo Innocence Project, http://www.innocenceproject.com/ case/search_profiles.php [Dale Mahan] (last visited Nov. 1, 2005). In all, Alabama has exonerated over twenty-six wrongly convicted persons. Center on Wrongful Convictions: The Exonerated, http://www. law.northwestern.edu/depts/clinic/wrongful/exonerations/ AlabamaList.htm (last visited Nov. 1, 2005).

state authorities.[3] One factor consistently identified as problematic is erroneous eyewitness testimony or identification, which is found to be a factor in over two-thirds of the documented cases of wrongful conviction in the United States.[4] Commentators, courts, and others have offered several approaches to the problem of faulty eyewitness identifications, ranging from the exclusion of questionable eyewitness testimony altogether to the prohibition of any conviction based solely on uncorroborated eyewitness testimony.[5]

Another suggested solution and recent trend of the criminal defense bar in Alabama and elsewhere, is to call expert testimony to rebut the testimony of eyewitnesses proffered by the state.[6] These experts are usually psychiatrists or psychologists who testify to the fallibility of

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[3] *See, e.g.*, The Innocence Project at Cardozo University, homepage *at* http://www.innocenceproject.org (last visited Oct. 27, 2005), documenting 163 exonerations of innocent defendants at first convicted and later exonerated after the discovery of new evidence, usually DNA evidence; NAT'L INST. OF JUST. REP., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (June 1996) (Eds. Edward Connors, et al.).

[4] Edward Imwinkeried, *Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards*, 18 CRIM. JUST. 28, 29 (Spring 2003).

[5] *See, e.g.*, Jack B. Weinstein, *Elizabeth Loftus's Eyewitness Testimony*, 81 COLUM. L. REV. 441, 454–55 (1981) (book review).

[6] Telephone Interview with Alan Baty, Deputy District Attorney for Jefferson County, Alabama (Oct. 28, 2005).

Although most commentators argue that this should be a widespread solution, this paper argues against the admission of expert eyewitness evidence in the case of Alabama for the reasons explored in Parts III and IV *infra*. For arguments concerning the admission of expert eyewitness evidence, see Scott Ehlers, *Eyewitness Identification: State Law Reform*, 29 CHAMPION 34 (2005); Lisa Steele, *Identification Law Reform*, 29 CHAMPION 24 (2005); Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 CHAMPION 12 (2005); Brooke Whisonant Patterson, *The "Tyranny of the Eyewitness"*, 29 LAW & PSYCHOL. REV. 195 (2004); Barry C. Scheck, *Mistaken Eyewitness Identification: Three Roads to Reform*, 28 CHAMPION 4 (2004); Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323 (2004); Robert P. Burns, *A Response to Four Readings of a Theory of the Trial*, 28 LAW & SOC. INQUIRY 553, 563 (2003); James M. Doyle et al., *The Eyes Have It—Or Do They? New Guides for Better Eyewitness Evidence Procedure*, 16 CRIM. JUST. 12 (2001); William David Gross, Note, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307 (1999); Peter J. Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237 (1996); Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237 (1995); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909 (1995); Cindy J. O'Hagan, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741 (1993); Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93 (1992); Brenda J. Hamilton, *Expert Testimony on the Reliability of Eyewitness Identifications: A Critical Analysis of Its Admissibility*, 54 MO. L. REV. 734 (1989); Richard J. Nelson, *Identifications*, 76 GEO. L.J. 650 (1988); Maureen A. Gorman, Note, *Evaluating Eyewitness Testimony in Criminal Trials: Can Jurors Use Help from Experts?*, 63 CHI.-KENT L. REV. 137 (1987); Frederick Emerson Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985).

eyewitness testimony generally, and may testify to certain phenomenon particular to the case (e.g., weapon focus, transference, etc.).[7] In a few cases, these expert witnesses will actually interview the eyewitnesses involved, but this is often the exception rather than the rule.

Both state and federal courts have largely split on whether this expert evidence is admissible under the "substantially more prejudicial than probative" evidentiary standard found in Rule 403 of the Federal Rules of Evidence,[8] the "helpful to the trier of fact" standard embodied in Rule 702 of the Federal Rules of Evidence,[9] or under the "reliability of scientific methods and principles" standard of the same Rule 702.[10] Although such expert testimony may be helpful in cases where the only evidence against the accused is eyewitness testimony or there is some salient psychological aspect of such testimony that may mislead the jury (and there is a consensus in the scientific community on this finding), such expert testimony seems superfluous in the majority of cases. This is especially the case in Alabama, where there is a split in circuit criminal courts as to whether this testimony should be admissible.[11]

Part I of this paper will summarize the possible sources of error found in eyewitness testimony according to psychological and cognitive science research. In Part II, I explore the admissibility of this expert testimony under the existing rules of evidence according to both federal law and Alabama state law, as well as court commentary on its admissibility. Part III argues that the liberal admission of such testimony is not warranted in the case of Alabama.

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[7] *See, e.g.*, Commonwealth v. Simmons, 662 A.2d 621, 630–31 (Pa. 1995) (holding that expert testimony on the general reliability of eyewitness identification and factors that may affect such an identification generally was improper as it would "intrude upon the jury's basic function of deciding credibility"); Ex Parte Williams, 594 So.2d 1225 (Ala. 1992) (ruling that expert testimony from a psychologist intending to testify on eyewitness identification was inadmissible because the psychologist had not interviewed the particular eyewitness in the case)

[8] The correlating rule in Alabama is AL. R. EVID. 403, discussed *infra*.

[9] The correlating rule in Alabama is AL. R. EVID. 702, discussed *infra*.

[10] *Id*.

[11] *Compare* State v. Edwards, CC 01-183, CC 01-184, Jefferson Co., Ala. Cir. Ct. (Nov. 1, 2001) (allowing the admission of expert testimony on eyewitness identification) *and* State v. Bonner, CC 00-1271, CC 00-1272, Jefferson Co., Ala. Cir. Ct. (Mar. 1, 2000) (allowing the admission of expert testimony on eyewitness identification) *with* State v. Frank, CC 04-4329, Mobile Co., Ala. Cir. Ct. (June 6, 2005) (prohibiting the admission of expert testimony on eyewitness identification).

Taking into consideration the policies which constitute the state's provision of legal services to indigent defendants as discussed in Part IV, five arguments counsel against the admission of expert testimony, including: the trial court's discretion in admitting such evidence; the evidence's limited utility; the evidence can be more prejudicial than probative in a jury trial setting; there is considerable disagreement within the scientific community about the accuracy and value of such evidence; and efficacious safeguards already exist or more effective safeguards should take priority over the admission of such evidence. The paper concludes in Part V that Alabama's criminal justice system and Alabama defendants would be better served by implementing a presumption against the admissibility of expert testimony on the reliability of eyewitness evidence. This presumption coupled with a bright line test for when the evidence should be admitted in certain cases would allow the state to concentrate on improving its provision of legal entitlements to all indigent defendants.

I. Sources of Error in Eyewitness Testimony

A. General Theories of Why Eyewitness Testimony May Be Inaccurate

There are various contributing factors to mistaken eyewitness identification, including most fundamentally the functioning of human perception, memory, and recollection systems in the brain and nervous systems. This section will not analyze the scientific data in detail, as this is not the focus of the paper. However, a brief exposition of the most common sources of error in eyewitness testimony is warranted.

Generally, the human memory process occurs in three stages: acquisition stage (acquiring and encoding the information), retention stage (the information is retained in the memory), and the recognition or recall stage (the information is retrieved from the memory from some specific

purpose).[12] Each stage may be vulnerable to a variety of factors that may make the memory of a particular event less accurate.

Several psychological studies have focused on characteristics endemic to the human memory process, attempting to isolate and analyze those factors within the human memory process itself that will affect the accuracy of eyewitness recall. The "theory of forgetting" states that humans forget information for several reasons, including: memory capacity is not infinite and thus some information is lost, someone may deliberately choose to forget some information, or post-event interference (from trauma, external sources, etc.) can affect one's ability to retain information or may alter the memory of that information.[13] Some studies have found that stress and accurate memory have a U-type relation (graphically), such that at low and high stress levels, the lack or overload of stress may impair a person's ability to accurately encode and retain information, but a certain amount of stress is usually necessary for accurate encoding and retention.[14] The "self-motivation factor" or "self-protective notion" comes into play where a witness feels that he is personally threatened, and therefore concentrates less on remembering different aspects of the event, including the assailant's features.[15] Certain feelings, such as wanting to feel more secure or wanting to aid the police in suspect identification, may cause a

[12] *Human Memory*, *available at* http://human-factors.arc.nasa.gov/cognition/tutorials/ModelOf/Knowmore1.html (last accessed Oct. 31, 2005).
[13] F. Heuer & D. Reisberg, *Emotion, Arousal, and Memory for Detail*, *in* THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY (S. A. Christianson, ed., 1992).
[14] *See generally* S.M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of Experts*, 44 AM. PSYCHOL. 1089 (1989). Some studies have shown that stress and accurate memory have a U-type relation graphically—at low and high stress levels, the lack or overload of stress may impair a person's ability to accurately encode and retain information (the first two stages of the human memory process). Most of these studies test the relation of stress and memory accuracy first developed in 1908 and referred to as the Yerkes-Dodson Law. *See* ELIZABETH LOFTUS, EYEWITNESS IDENTIFICATION 8–19 (1979).
[15] S. A. Christianson, *Emotional Stress and Eyewitness Memory: A Critical Review*, 112 PSYCHOL. BULLET. 284 (1992).

witness to make a quicker and, consequently, less accurate identification.[16] Additionally, expert testimony will often point to the arguably counter-intuitive notion that the confidence exhibited by an eyewitness does not necessarily correlate to the accuracy of the identification.[17] Some authors suggest that post-event information, discussed in the paragraph below, will make a witness more confident in their description or identification of an accused over time, while others

Other studies have focused on the collection of eyewitness evidence and what effects these procedures may have on the reliability of eyewitness accounts. For example, some studies suggest that post-event information provided to a witness may make them more confident in their identification of an assailant over time or alter their perception of the event such that this post-event information is incorporated into the eyewitness's actual memory.[18] Therefore, the way in which the police collect eyewitness testimony, the way that a photographic or live line-up is set up, or even the way that a question is asked may influence someone's memory of a particular event.[19] Eyewitness susceptibility to misinformation or suggestion from police or other officials after the event will affect the accuracy of an eyewitness account, and these inaccuracies can be induced at any of the three stages of the human memory process.[20] Structural biases in a

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[16] Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 248–49 (2000); D. J. Hilton, *The Social Context of Reasoning: Conversational Inference and Rational Judgment*, 118 PSYCHOL. BULL. 248 (1995).

[17] T. J. Perfect et al., *Accuracy of Confidence Ratings Associated with General Knowledge and Eyewitness Memory*, 78 J. APPLIED PSYCHOL. 144 (1993); M. L. Fleet et al., *The Confidence-Accuracy Relationship: The Effects of Confidence Assessment and Choosing*, 17 J. APPLIED SOC. PSYCHOL. 171 (1987).

[18] *See* LOFTUS, *supra* note 14, at 94–97.

[19] Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L. J. 685–88 (2002).

[20] *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE 259 (1993) (noting that inaccuracies can be introduced at any stage of the human memory process); Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529 (2003); D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002); Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L & SOC. CHANGE 507, 514–15 (2002).

The Supreme Court recognized the potential for the corruption of the pre-trial lineup in *United States v. Wade* and held that a defendant may be deprived of his constitutional right to cross-examination insofar as he is helpless to subject the fruits of a suspect trial pretrial identification to effective scrutiny at trial. 388 U.S. 218, 235

photograph lineup or live lineup presented to a witness (such as a different background color for one of the mugshots or variance in height of the live individuals) may cause an inaccurate identification.[21] Additionally, if a live lineup follows the photograph identification, the identification in the live lineup may not be accurate or based on the original memory in that the witness was just exposed to the photographic lineup.[22]

Perhaps more intuitively, external factors are known to affect the accuracy of eyewitness identifications. Changes in lighting may affect the eye's ability to accurately view something as the eye needs a period of adjustment time to new lighting, and may, therefore, affect the accurate encoding of information in the memory.[23] Less exposure time to an event may cause a witness's memory to be less accurate.[24] Related to the duration of a witness's exposure to the event is that

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(1967). The court suggested that the presence of defense counsel may protect the integrity of any pretrial lineup and aid the defense at trial to effectively counter any identification evidence.

> [When] it appears that there is grave potential for prejudice, intentional or not, in a pretrial lineup, which may not be capable of reconstruction at trial, and when presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that post-indictment lineup is a critical stage of the prosecution at which an accused is as much entitled to the aid of counsel as the trial itself.

Id. at 236.

[21] EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, NAT'L INST. OF JUST. (Oct. 1999) [hereinafter "Law Enforcement Guide"] , *available at* National Institute of Justice website, http://www.ncjrs.org/pdffiles1 /nij/178240.pdf (last visited Oct. 29, 1999). For a discussion of this guide, see Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000). *See also* Michael R. Headley, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681 (2002).

[22] *See* Law Enforcement Guide, *supra* note 21. *See generally*, Jessica Lee, Note, *No Exigency, Not Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755 (2005); Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L & SOC. CHANGE 507 (2002); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765 (1995).

[23] B.R. Clifford & J. Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCHOL. 352 (1978).

[24] Robert Buckhout, *Eyewitness Testimony*, 231 Sci. Am. 23, 25 (1974). *See also* David Nachshon, *Editor's Page*, 24 MED. & L. I (2005). However, there are studies on "flashbulb memory" that suggest that certain memories may imprint on the brain like a picture after only one exposure. *See, e.g.*, R. Brown & J. Kulik, *Flashbulb Memories*, 5 COGNITION 73 (1977). Additionally, a 1986 study by Shapiro and Penrod found that variance in exposure time will affect the rate of "hits" (correctly identifying suspect from line-up) versus "misses" (failing to identify the suspect from line-up), but has little or no affect on the rates of "false alarms" (falsely identifying a person from the line-up

people tend to overestimate their exposure time to an event, especially if under stress, which is referred to as "time expansion" by the literature.[25] Typically, the more of an assailant that a witness is able to view, the more accurate the identification will be.[26] When there is more than one perpetrator, or "multiple targets," the witness generally has less time to focus on a particular target and may confuse the features of individual targets; thus, the identification of any particular target tends to be less accurate.[27] Intoxication from drugs and/or alcohol impairs an individual's ability to accurately encode information (acquire the information and commit it to memory) at the time of the event.[28] People may not recognize how impaired they are by drugs and/or alcohol, thereby causing them to give erroneous descriptions or make faulty identifications later. Finally, a witness's lack of prior familiarity with an assailant may increase the inaccuracy of an identification,[29] and the confidence of an eyewitness's identification will not necessarily be indicative of the accuracy of the identification.[30]

Other studies suggest that the presence of a weapon or the ethnicity of the witness and/or suspect may affect eyewitness accuracy. A phenomenon known as "weapon focus", on which there are "robust" findings in studies, suggests some eyewitness or victim testimony may be unreliable due to the person focusing more on the weapon as opposed to the assailant or other

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whom the witness had not seen before; misidentification). P.N. Shapiro & S. Penrod, *Meta-analysis of Facial Identification Studies*, 100, PSYCHOL. BULL. 139 (1986).

[25] Ebbe B. Ebbesen & Vladimir J. Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, 5 EXPERT EVIDENCE: THE INT'L DIG. OF HUM. BEHAV., SCI., & THE L. 2, 17 (1997).

[26] ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 202 (1997).

[27] M.M. Chun & M.C. Potter, *A Two-Stage Model for Multiple Target Detection in Rapid Serial Visual Presentation*, 21 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE, 109.

[28] E. A. Maylor & P. M. A. Rabbitt, *Effect of Alcohol on Rate of Forgetting*, 91 PSYCHOPHARMACOLOGY 230 (1987).

[29] C. BARTOL, PSYCHOLOGY AND THE AMERICAN LAW 181 (1983).

[30] *See* Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817 (1995); Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165 (1990).

events surrounding the incident.[31] Cross-racial identifications may be more likely to be inaccurate than same-race identifications, as the witness's identification of the assailant may be based on my stereotypical features of the other race.[32] Psychologists and cognitive scientists testifying will typically claim that the more of the factors discussed above that are present in the circumstances surrounding the encoding of a memory and the subsequent identification, the more likely an inaccurate identification will result.

B. Problems with the Science of Detecting Errors in Eyewitness Testimony

The paramount arguments against the admission of expert testimony on eyewitness accuracy are found within the psychology literature itself. There are four main themes in scientific peer criticism: the relevance of the studies to the actual eyewitnesses involved; the interaction problem; consistency amongst the studies; and criticisms of specific theories. Again, the aim of this section is not to exhaust all criticisms of the cognitive theories emerging from the studies of eyewitness situations, but only to provide a brief counter-argument to the justifications set forth in Part I.A.

First of all, many studies may not be able to plausibly claim relevance to real life eyewitness situations. They often involve staged films or events, the test subjects are almost

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[31] P.A. Tollerstrup et al., *Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS (D.F. Ross et al. eds., 1994); Elizabeth Loftus et al., *Some Facts About "Weapon Focus,"* 11 L. & HUM. BEHAV. 55 (1987); D. Kramer et al., *Weapon Focus, Arousal, and Eyewitness Memory*, 14 L. & HUM. BEHAV. 167 (1990); A. Maass & G. Köhnken, *Eyewitness Identification: Simulating the "Weapon Effect,"* 13 L. & HUM. BEHAV. 397 (1989); V. Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. APPLIED SOC. PSYCHOL. 845 (1987).

[32] *See* S. M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOL. 1089 (1989). *See generally*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); James M. Doyle, *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253 (2001); Siegfried L. Sporer, *The Cross-Race Effect: Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL'Y & L. 170 (2001); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230 (2001); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identification*, 78 N.Y.U.L. REV. 1821 (2003).

universally college students, and often the test subjects may be aware that they will later be evaluated for the accuracy of their memory.[33]

> Most studies from which experts seem to draw their conclusions in the eyewitness area appear to lack face validity [relevance on their surface to the legal questions for which the authors typically claim relevance]. . . . Virtually all of the studies conducted on eyewitness memory involve witnesses, whereas it is, in fact, the victims who supply the evidence in the majority of crimes (with the exception of murder) in which eyewitness identification is part of the evidence against the defendant."[34]

Thus, few studies relied upon by would-be expert witnesses on eyewitness testimony effectively replicate the situations in which actual eyewitnesses would be placed in real crimes. Furthermore, few studies use the primary witnesses often presented by the prosecution—the victims themselves. Although it may be difficult to reproduce actual crime scenarios in field experiments, other studies, have used "victims" in studies, finding them to be consistently more reliable and accurate in their identifications than witnesses otherwise unaffected by the crime.[35]

The relationship that some studies find linking one factor, for example, weapon focus, to eyewitness memory seems to depend on the levels of other factors present in the other factors.[36] Therefore, the findings of many studies may have limited validity in that they are unable to speak to the effects of any one factor on eyewitness memory without putting the results in the context

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[33] *See, e.g.*, J.C. Brigham, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673 (1982); C. Krafka & S. Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 58 (1985); S.J. Platz & H. M. Hosch, *Cross Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED PSYCHOL. 972 (1988).

[34] Ebbesen & Konecni, *supra* note 25, at 3. *See also* H.E. Egeth, *What Do We Not Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 577 (1993); G.L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553 (1993); J.C. Yuille, *Expert Evidence by Psychologists: Sometimes Problematic and Often Premature*, 7 BEHAV. SCI. & L. 181 (1989).

[35] A study by Hosch and Cooper in 1982 revealed a high rate of accuracy in identifications when someone's personal property is taken, a lower rate when it was not their personal property, but that of another, and still a lower rate of accuracy when nothing was taken. H.M. Hosch & S.D. Cooper, *Victimization as a Determinant of Eyewitness Accuracy*, 67 J. APPLIED PSYCHOL. 648 (1982).

[36] Ebbesen & Konecni, *supra* note 25, at 17.

of all other variables that may affect eyewitness memory. Most studies do not attempt to do so.[37] At least one team of scientists has recognized this failing in other studies, and argues that this is yet one more reason to exclude this expert testimony from courtroom proceedings.

> [T]estimony about the effect of a given factor on memory should be admitted only if supported across a wide variety of different methods, procedures, subject types, measures, motivational conditions, etc. However, such a requirement puts a considerable burden on judicial expertise during pre-trial motions concerning the admissibility of eyewitness expert conclusions. Similarly, to the extent that interactions among standard eyewitness memory "factors" exist, should not the admissibility of expert testimony about these factors be conditioned on full disclosure of those interactions to the jury?[38]

The scarcity of studies that are successful in isolating variables (to the extent that this is possible at all), along with the shortage of studies on each variable suggest that the scientific research in this area may be too underdeveloped to be useful in a courtroom setting.

Also lacking is the consistency among studies, even those testing the same variable. One indication of the lack of consistency among studies is best explored in the next paragraph dealing with specific factors. The other indication stems from how researchers measure the accuracy of eyewitness memory across various studies and whether this measurement reflects what will be important to the legal system.[39] For example, most eyewitness memory simulations measure accuracy based upon how many facts subjects may recall after the event or how many of the "important" facts witnesses may recall, the importance of a fact being determined by the researcher.[40] However, "[g]uilt [as determined by the judge or jury] will often depend not on how much a witness recalls, but on the accuracy of the witness's memory of one or two specific highly probative facts, e.g, a license plate number, which one of several different people fired a

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[37] *See, e.g.*, J.W. Shepherd, *Identification After Long Delays*, *in* EVALUATING EYEWITNESS EVIDENCE (S. Lloyd-Bostock & B. Clifford, eds.) (1983); M.R. Leippe, et al., *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 63 J. APPLIED PSYCHOL. 345 (1978); A. Maass & G. Köhnken, *Eyewitness Identification: Simulating the "Weapon Effect"*, 13 L. & HUM. BEHAV. 397 (1989).
[38] Ebbesen & Konecni, *supra* note 25, at 17–18.
[39] Ebbesen & Konecni, *supra* note 25, at 4.
[40] Ebbesen & Konecni, *supra* note 25, at 4.

gun, and so on."[41] Furthermore, many meta-analytic studies find a high rate of inconsistency among studies purporting to analyze the same factor contributing to erroneous eyewitness testimony.[42] There are several different ways to measure consistency among studies, some more stringent and some less.[43] Researchers differ over what should constitute consistency in various studies.[44] However, "if [the results of test comparisons] is not consistent at the weakest of levels, then courts should understand that nothing experts can tell jurors will improve their ability to make more accurate guilt decisions."[45]

Finally, several studies have explicitly refuted the so-called "accepted" tenets to which psychological experts will purport to testify. This paragraph will not highlight studies that rebut each factor discussed in Part I.A, but merely provide some examples. First, the theory of weapon focus, put forth by several cognitive psychologists, has been questioned by several studies. For example, one meta-analytic study reviewing nineteen different studies on weapon focus concluded that the presence of a weapon had much less of an effect on identification accuracy than the lineup procedures used in the identification process after the event.[46] Second, the relationship between stress and eyewitness memory hypothesizing that higher levels of stress negatively affects the accuracy of identifications has been repeatedly questioned. A study by Yuille and Cutshall in 1986 that used live witnesses and victims to a robbery murder revealed that witnesses under more stress were more accurate in recalling facts and making

[41] Ebbesen & Konecni, *supra* note 25, at 4.
[42] Ebbesen & Konecni, *supra* note 25, at 7. *See also* R. Elliot, *Expert Testimony About Eyewitness Identification: A Critique*, 17 L. & HUM. BEHAV. 423 (1993) (concluding that consistency across studies analyzing the accuracy of eyewitness memory recall is questionable after considering several studies claiming to test the same factor affecting the accuracy of eyewitness memory and finding that often the studies yielded results differing in statistically significant ways).
[43] Ebbesen & Konecni, *supra* note 25, at 9
[44] Ebbesen & Konecni, *supra* note 25, at 8–9; R. Rosenthal, *Cumulating Psychology: An Appreciation of Donald T. Campbell*, 2 PSYCHOL. SCI. 213 (1991).
[45] Ebbesen & Konecni, *supra* note 25, at 10.
[46] N. M. Steblay, *Meta-Analytic Study of Weapon Focus*, 16 L. & HUM. BEHAV. 413, 420 (1992).

identifications.[47] Other studies, not normally cited by defense experts, argue that considerable evidence supports the claim that emotion generally improves memory, both for peripheral and central details.[48] Expert testimony relating to the possibility that post-event information provided to a witness may make them more confident in their identification of an assailant over time is similarly suspect. A study by Dr. Zaragoza in 1994 showed that post-event information does not consistently result in "source misattributions" nor does it result in subjects claiming to remember things that they do not.[49] Finally, an assertion often made by cognitive psychologists and laymen alike, that less exposure time causes eyewitness identifications to be less accurate, has been called into question. A study by Shapiro and Penrod found that variance in exposure time will affect the rate of "hits" (correctly identifying suspect from line-up) versus "misses" (failing to identify the suspect from line-up), but has little or no affect on the rates of "false alarms" (falsely identifying a person from the line-up whom the witness had not seen before; misidentification).[50] Thus, there may be several questionable assumptions and sources upon which expert witnesses testifying as to the accuracy of eyewitness identifications rely, which is

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[47] J.C. Yuille & J.L. Cutshall, *A Case Study of Eyewitness Memory of a Crime*, 71 J. APPLIED PSYCHOL. 291 (1986).

[48] *See* F. Heuer & D. Reisberg, *Emotion, Arousal, and Memory for Detail*, *in* THE HANDBOOK OF EMOTION AND MEMORY: RESEARCH AND THEORY (S.A. Christianson, ed.) (1992); J.L. McGaugh, et al., *Neuromodulatory Systems and Memory Storage: Role of the Amygdala*, 58 BEHAV. BRAIN RES. 81 (1993). A study by Deffenbacher resulted in a meta-analysis of other stress and memory studies. Dr. Deffenbacher looked at 21 studies and found that one-half of the studies had concluded that people in highly stressful situations tended to be more accurate in their identifications and one-half concluded the opposite. K.A. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, *in* EVALUATING EYEWITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES (S.M.A. Lloyd-Bostock & R.B. Clifford, eds.) (1983). In 1987, Drs. Tooley, Brigham, Maass and Bothwell conducted a study in which they subjected people to blasts of noise and electric shocks as they viewed numerous slides. Those subjects placed under greater stress showed more accuracy in identifications made later. V. Tooley, *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. APPLIED SOC. PSYCHOL. 845 (1987). Finally, a study supported by the National Institute of Justice in 1987 by Drs. Cutler, Penrod and Martens varied the degree of violence into which subjects were placed in order to test the effects of varying stress levels on eyewitness identification accuracy. Subjects were not forewarned of the stresses, but reported increased stress levels and there was no concomitant decrease in the accuracy of their identifications. B.L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629 (1987).

[49] M.S. Zaragoza & S.M. Lane, *Source Misattributions and the Suggestibility of Eyewitness Memory*, 20 J. EXPERIMENTAL PSYCHOL: LEARNING, MEMORY, & COGNITION 934 (1994).

[50] P.N. Shapiro & S. Penrod, *Meta-analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986).

another reason to hesitate before allowing the free admission of such testimony into criminal trials.

II. The Admission of Expert Testimony on the Reliability of Eyewitness Evidence

A. Admission under the Rules of Evidence

Under the Federal Rules of Evidence, there are two main venues through which to admit expert testimony on eyewitness evidence. Article VII deals with expert testimony, and especially pertinent is the standard under which such evidence is admitted under Rule 702. Also informing the discussion is the ever-present balancing test of Rule 403, excluding evidence that may be more prejudicial than probative. The Alabama Rules of Evidence closely parallel the Federal Rules, although the commentary to these rules may alter the analysis.

The proponent of expert eyewitness testimony has the burden of establishing that the admissibility requirements are met by a preponderance of the evidence.[51] Such an offer of proof is typically made in a pre-trial hearing on a motion *in limine* pursuant to Rule 104(a),[52] during which all types of evidence may be offered in order for the court to determine whether such evidence is admissible as well as whether it will be helpful to the jury.[53]

1. Federal Rules of Evidence

Pursuant to Rule 702,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and

[51] Bourjialy v. United States, 483 U.S. 171, 176 (1987).
[52] FED. R. EVID. 104(a). This is often referred to as a "Daubert hearing," so named for the leading U.S. Supreme Court case on the admissibility of expert evidence. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).
[53] *See* Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 MINN. L. REV. 1345, 1374–75 1994).

> methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[54]

The analysis contemplating the admission of expert testimony on eyewitness evidence under these rules merits parsing the Rule itself. First, is such evidence scientific knowledge? Proponents of admission will cite to the scientific studies outlined in Part I.A., *supra*,[55] while opponents of admissibility will undoubtedly point to the criticisms recited in Part I.B, *supra*. Second, is the particular witness in question qualified as an expert in this field? This, undoubtedly, would turn upon the particular witness's qualifications generally, his or her qualifications in light of the specific issues in the case, and his or her knowledge of the facts and familiarity with the witnesses in the case at bar.[56] Next, is the witness purporting to base his testimony on reliable principles and methods as well as sufficient data? This is a hotly contested issue in the case law,[57] although the overwhelming consensus seems to be that the fields of cognitive and behavioral psychology have not yet reached the requisite level of consensus on many issues on which expert eyewitness testimony would comment at trial. Finally, is the witness reliably applying the aforementioned methods to the case at trial? Again, this may be a fact-intensive issue, examining not only the foundations of the expert's proposed testimony, but also the expert's knowledge of the case at hand, and how the expert intends to relate these "scientific" findings to the eyewitness testimony in question.

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[54] FED. R. EVID. 702.

[55] *See, e.g.*, Hon. Robert P. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 381–86 (1999).

[56] Some courts find this last criterion to be the deciding factor on the admissibility of such testimony. *See, e.g.*, People v. Acala, 842 P.2d 1192, 1219–20 (1992) (noting that "[a]lthough [the expert] was prepared to testify that police investigators had employed improper interrogation techniques while interviewing [the witness], he had not attended those sessions, a circumstance that lessened the probative value of the opinion he would render).

[57] *See* Part II.B.1 and 2, *infra*.

Rule 403 authorizes the exclusion of otherwise relevant evidence that, considering all factors, would unduly burden a court or mislead the trier of fact.[58] Therefore, even if found to be scientifically valid and otherwise relevant to the issues in the case, the court may opt to exclude such evidence for more administrative or practical reasons under this "balancing test." Rule 403 states the permissibility of exclusion, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[59] Again, perhaps it is best to parse through the various issues in the rule. Basically, the rule gives the trial judge the discretion to exclude relevant evidence if one of three qualifiers is present: the evidence would be more prejudicial than probative to the trier of fact; the evidence would confuse or mislead the trier of fact; or the admission of such evidence would result in the court's time being misspent. At least two members of the scientific community,[60] bolstered by several court opinions,[61] have argued that such expert eyewitness evidence is inherently more prejudicial than probative as the scientific bases upon which these opinions are founded is at best shaky and may not be relevant to the particular case in which it is presented. Several courts have also pointed out that such testimony would only confuse the jury,[62] or result in a "battle of experts" that would inevitably waste the court's time.[63]

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[58] FED. R. EVID. 403.
[59] FED. R. EVID. 403.
[60] *See* Ebbesen & Konecni, *supra* note 25.
[61] *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (expressing concern about "open[ing] the door to a barrage of marginally relevant psychological evidence"); United States v. Fosher, 590 F.2d 381, 384 (1st Cir. 1979); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974).
[62] United States v. Lumpkin, 192 F.3d 280, 289 (2d. Cir. 2000) (expert testimony on eyewitness evidence may confusing); United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994); United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (expert testimony could "muddy the waters").
[63] *See, e.g.*, United States v. Fosher, 590 F.2d 381, 383–84 (1st Cir. 1979); People v. McDonald, 690 P.2d 709, 727 (Cal. 1984) (en banc) (arguing that the trial court still has discretion to exclude eyewitness expert testimony to avoid

2. Alabama Rules of Evidence

Rule 702 of the Alabama Rules of Evidence was revised to adopt the wording of the Federal Rule dealing with expert testimony. It states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[64] The Advisory Committee notes that historically, expert witnesses have been permitted only upon subjects found to be beyond the understanding of the average layperson; therefore, the phrase "assist the trier of fact" has been interpreted strictly to exclude expert testimony on subjects within the prototypical juror's comprehension,[65] which arguably includes much expert eyewitness evidence.[66] The threshold determinations of whether an expert's testimony qualifies as "scientific" and whether a particular expert is qualified to testify on a certain subject are squarely within the discretion of the trial court,[67] as well as the judgment as to whether or not such testimony will "assist the trier of fact."[68] In refusing to incorporate the 1991 federal amendment concerning the three requirements for the bases of qualified expert testimony, the Advisory

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having too much expert testimony); State v. Chapple, 660 P.2d 1208, 1224 (Ariz. 1983) (en banc) (admitting eyewitness expert testimony, but arguing that the admission is not meant to "open the gates" to such testimony). *See also*, Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1040–41 (1995).

One commentator suggests that the problem of eyewitness expert testimony creating a "battle of the experts" will diminish as prosecutors begin to call more expert witnesses to rebut defendants' experts. *See* Joseph Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17. TEX. TECH. L. REV. 1409, 1469 (1986). Because the prosecution's rebuttal witnesses will limit the effectiveness of bringing an eyewitness expert, defendants will save their experts only for those instances in which the scientific literature clearly favors its side. *Id*.

[64] ALA. R. EVID. 702.

[65] ALA. R. EVID. 702 advisory committee's notes.

[66] *See* Part III.E *infra*.

[67] Hagler v. Gilliland, 292 So. 2d 647 (Ala. 1974); Griffin v. Gregory, 355 So. 2d 691 (Ala. 1978) (observing that whether to allow a witness to testify as an expert is largely in the trial court's discretion and that the exercise of this discretion will not be disturbed except for abuse).

[68] *See* Baker v. Edgar, 472 So. 2d 968 (Ala. 1985); Price v. Jacobs, 387 So. 2d 172 (Ala. 1980); Glaze v. Tennyson, 352 So. 2d 1335 (Ala. 1977). *See also* C. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 127.01(5) (4th ed. 1991).

Committee noted that such an amendment "raises more questions than it answers,"[69] and thus preferred to retain Rule 703 as the only evidentiary rule detailing the allowable foundations for expert testimony.

Alabama Rule 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."[70] In Alabama, an expert witness may give opinion testimony based upon either facts about which he has personal knowledge or facts already in evidence or to be placed in evidence presented to him by a hypothetical.[71] At first glance, this would appear to suggest that most eyewitness expert testimony would be inadmissible, as most of these witnesses are unfamiliar with the particular witnesses in the case and have only read the case file at most. However, according to the Alabama Supreme Court, expert opinions based on abstract theory and recited by experts unfamiliar with the facts of the case in question may be admissible.[72]

Alabama Rule of Evidence 403 reads exactly as the Federal Rule, reproduced above.[73] It generally expresses the development of the common law in Alabama prior to the revision of the Federal Rules, allowing the trial judge to exclude evidence when she determines that the probative value of such evidence is outweighed substantially by the prejudicial effect, confusing or misleading the jury, undue delay, or needless presentation of cumulative evidence.[74] The overwhelming majority of Alabama case law arising under Rule 403 concludes that the trial court has discretion to exclude evidence on these grounds,[75] and such discretion will not be

[69] ALA. R. EVID. 702 advisory committee's notes.
[70] ALA. R. EVID. 703.
[71] ALA. R. EVID. 703 advisory committee's notes.
[72] *Id*. (quoting Ex Parte Williams, 594 So. 2d 1225, 1227 (1992)).
[73] ALA. R. EVID. 403.
[74] Valley Mining Corp. v. Metro Bank, 383 So. 2d 158 (Ala. 1980).
[75] ALA. R. EVID. 403 advisory committee's notes. *See, e.g.*, Ott v. Smith, 413 So. 2d 1129 (Ala. 1982) (recognizing that such a decision is largely within the trial court's discretion). *See also* W. SCHROEDER ET AL., ALABAMA EVIDENCE § 4–3 (1987).

reversed on appeal unless abused.[76] An examination of the case law focuses the analysis further on the particular issue of the proper admission expert eyewitness evidence.

B. Case Law

1. Federal Cases

Unquestionably, the seminal case on the admission of expert testimony in general is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, decided by the Supreme Court in 1993.[77] The *Daubert* court held that the previous test for the admission of expert testimony enunciated in *Frye v. United States*[78] was superseded by the adoption of the Federal Rules of Evidence.[79] The court went on to announce a new test for the admissibility of expert testimony based upon the principles announced in Rule 702 of the Federal Rules and the scientific method.[80] The court devised an inquiry to aid trial courts in determining the admissibility of expert testimony, which focused on: whether the technique can and has been tested; peer review and publication; the known and potential rate of error in the methodology; and the general acceptance by the scientific community.[81] Thus, the court envisioned that the trial judge would conduct a preliminary hearing in which she would not only determine the general relevance of the proffered expert testimony under Rules 401 and 403, but also the admissibility of the evidence based upon its scientific merit—or more specifically, whether the "theory or technique is scientific knowledge that will assist the trier of fact"[82]—under Rule 702, following the guidelines

[76] AmSouth Bank, N.A. v. Spigener, 505 S. 2d 1030 (Ala. 1986) (holding that questions of materiality, relevancy, and remoteness rest largely with the trial judge and that rulings thereon will not be disturbed unless the judge's discretion has been absued).
[77] 509 U.S. 579 (1993).
[78] 293 F. 1013 (D.C. Cir. 1923).
[79] Daubert, 509 U.S. at 587.
[80] Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1065 (2001).
[81] Daubert, 509 U.S. at 593–94.
[82] *Id*. at 593.

set out by the court.[83] The Supreme Court further clarified this standard in *Kumho Tire Co. v. Carmichael*,[84] deeming the *Daubert* test to be "flexible" and stating that the *Daubert* factors "neither necessarily nor exclusively apply to all experts or in every case."[85] The *Kumho* opinion suggests that a search for assurances of scientific validity is inherent in the discretionary process afforded the trial court.[86]

Since *Daubert* binds only the federal courts by interpreting the Federal Rules of Evidence, its predecessor—*Frye v. United States*[87]—still remains the governing standard in Alabama, and in many other states.[88] The *Frye* court announced the "general acceptance" test:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[89]

Thus, in Alabama, scientific studies are admissible only when they have gained general acceptance in the particular field,[90] and the studies supporting expert eyewitness testimony are not "generally accepted" in the psychological field.[91]

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[83] Such a hearing would be appropriate under Rule 104(a) of the Federal Rules, which allows for the court to determine the admissibility of evidence outside the province of the jury.

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a).
[84] 526 U.S. 137 (1999).
[85] *Id*. at 140–41.
[86] Dillickrath, *supra* note 80, at 1065–66.
[87] 293 F. 1013 (D.C. Cir. 1923).
[88] ALA. R. EVID. 702 advisory committee's notes. *See also* Ex Parte Perry, 586 So. 2d 242, 247 (Ala. 1991).
[89] Frye, 293 F. at 1014.
[90] *See* Kent v. Singleton, 457 So. 2d 356 (Ala. 1984); Ex Parte Dolvin, 391 So. 2d 677 (Ala. 1980).
[91] *See* Part I.B *supra*.

One notable Supreme Court case directly addressing eyewitness identification is *Neil v. Biggers*.[92] In reviewing a conviction based largely on the victim's eyewitness identification, the court elaborated on factors to be considered in evaluating the eyewitness testimony:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[93]

The court was unsatisfied with the lower court's substitution of its judgment for that of the jury in the case and determined that the jury was in the best position to determine if the identification was reliable or not.[94] Thus, the Supreme Court is hesitant to take the determination of the reliability of eyewitness testimony out of the province of the jury.

In *United States v. Amaral*,[95] the Ninth Circuit applied the *Frye* test in an eyewitness expert case.[96] The court listed four elements which must be met before an expert is permitted to testify: the witness must be qualified as an expert; the testimony must concern a subject matter proper for expert testimony; the testimony must be in accordance with a generally accepted scientific theory; and the probative value of the evidence must outweigh its prejudicial effect.[97] The court found that the expert testimony was properly excluded as this issue was squarely within the trial judge's discretion, the trial judge could have plausibly determined that such evidence would have been more prejudicial than probative, and the trial judge was within his discretion in holding that such evidence would improperly take the determination of the

[92] 409 U.S. 188 (1972).
[93] *Id*. at 199–200.
[94] *Id*. at 200.
[95] 488 F.2d 1148 (9th Cir. 1973).
[96] *Id*. at 1152.
[97] *Id*. at 1153.

eyewitnesses' credibility out of the province of the jury.[98] The Ninth Circuit reaffirmed their position on such testimony in *United States v. Rincon*,[99] this time holding that such evidence did not conform to a generally accepted scientific theory and it would have confused the jury.[100]

In *United States v. Smith*, the Sixth Circuit reviewed the conviction of a defendant for armed robbery, based in part on eyewitness testimony of the victims.[101] The court recited the four elements cited by the Ninth Circuit in *Amaral*.[102] Despite the fact that the government conceded that the witness was a qualified expert, and even though the court determined psychological testimony may have been a proper subject for expert testimony, conformed to a generally accepted explanatory theory, and provided probative value, the court went on to hold that the trial court's exclusion of such evidence under Rule 403 of the Federal Rules was harmless error.[103] Since the government had forensic evidence in addition to the independent identifications of three eyewitnesses, the court found that the exclusion of the evidence "did not 'prejudice' the defendant to the extent of affecting the verdict."[104]

Similarly, the Eighth Circuit upheld the defendant's conviction for robbery in *United States v. Purham*.[105] In finding that the trial court did not abuse its discretion in excluding expert testimony on eyewitness identification, the court approved of the trial court's determination that such evidence was not sufficiently beyond the understanding of lay jurors to satisfy Rule 702 of the Federal Rules.[106] The court further noted, "the unfair prejudice which might have resulted because of the aura of reliability and trustworthiness that surrounds scientific evidence

[98] *Id*. at 1152–53.
[99] 984 F.2d 1003 (9th Cir. 1993).
[100] *Id*. at 1005–1007.
[101] 736 F.2d 1103 (6th Cir. 1984).
[102] *Id*. at 1105.
[103] *Id*. at 1105–1107.
[104] *Id*. at 1108.
[105] 725 F.2d 450 (8th Cir. 1984).
[106] *Id*. at 454.

outweighed any small aid the expert testimony may have provided."[107] The Eighth Circuit adhered to this line of reasoning in *United States v. Blade* where it held that the admission of such testimony was soundly within the trial court's discretion, and thus was properly excluded.[108] Furthermore, the court noted that there was substantial corroborating evidence linking the defendant to the crime.[109]

In *United States v. Moore*, the Fifth Circuit accepted that expert eyewitness testimony is admissible in certain cases as it could often be helpful to the trier of fact.[110] However, after consideration of all of the evidence, the court found that the exclusion of expert testimony in this particular case was properly within the discretion of the trial court and did not prejudice the defendant, as the other evidence of guilt was overwhelming.[111] The court emphasized that "[a]lthough admission of expert eyewitness testimony is proper, there is no federal authority for the proposition that such testimony *must* be admitted."[112] Concluding the discussion of the issue, the court noted that in a case in which the sole testimony is casual eyewitness identification, "expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged."[113] A year later, in *United States v. Alexander*, the Fifth Circuit distinguished *Moore*.[114] In *Alexander*, the defendant was convicted of bank robbery based solely on the identification of his photograph by three bank employees.[115] The defendant put forth a defense of mistaken identity and offered the testimony of two experts—one an orthodontist specializing in celphalometrics (the scientific measurement of the dimensions of the head) and the other a

[107] *Id*.
[108] 811 F.2d 461, 465 (8th Cir. 1987).
[109] *Id*. at 466.
[110] 786 F.2d 1308, 1312 (5th Cir. 1986).
[111] *Id*. at 1312–13.
[112] *Id*. (emphasis in original).
[113] *Id*. at 1313.
[114] 816 F.2d 164 (5th Cir. 1987).
[115] *Id*. at 166.

former F.B.I. agent with expertise in photograph comparisons—both of which concluded that it was impossible for the defendant to be the person depicted in the photographs.[116] In distinguishing this case from *Moore*, the court reasoned that here the proffered testimony pertained to the precise issue before the jury, while the defendant in *Moore* offered expert testimony only about the general problems with eyewitness perception and memory.[117]

> Requiring the admission of the expert testimony proffered in *Moore* would have established a rule that experts testifying generally as to the value of eyewitness testimony would have to be allowed to testify in every case in which eyewitness testimony is relevant. This would constitute a gross overburdening of the trial process by testimony about matters which juries have always been deemed competent to evaluate.[118]

The First Circuit found expert eyewitness evidence properly excluded by the trial court in *United States v. Fosher*.[119] Not only was this issue within the sound discretion of the trial court, but the trial court could also properly conclude that "scientific evaluation either has not reached, or perhaps cannot reach a level of reliability such that scientific analysis of a question of fact surpasses the quality of common sense evaluation inherent in jury deliberations."[120] Noting that it shared the trial court's concerns that such evidence would be more prejudicial than probative, the court further voiced its concerns that the presentation of the expert testimony could impose the unnecessary time and expense involved in a battle of experts.[121]

The Third Circuit focused the discussion of the admission of expert eyewitness testimony on the "fit" of the proffered evidence to the facts of the case at trial in *United States v. Downing*.[122] The *Downing* court established a two-part test for the admission of expert eyewitness testimony, which made the admission of such testimony "not automatic but

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[116] *Id*. at 167.
[117] *Id*. at 169.
[118] *Id*.
[119] 590 F.2d 381 (1st Cir. 1979).
[120] *Id*. at 382–83 (citing 3 WEINSTEIN'S EVIDENCE § 702 (01), at 702–6).
[121] *Id*. at 383–84.
[122] 753 F.2d 1224 (3d Cir. 1985).

conditional" upon its satisfaction of the test.[123] The first inquiry is essentially a balancing test, weighing the reliability of the scientific principles upon which the expert testimony rests against the likelihood that the introduction of such testimony may confuse or mislead the jury.[124] The second inquiry depends upon the "'fit' [of the evidence], i.e., upon a specific proffer showing that scientific research has established that particular features of the eyewitness identifications involved may have impaired accuracy of those identifications."[125] Since the defendant in the case was convicted solely on the basis of eyewitness testimony, the court could not deem the exclusion of the evidence by the trial court to be harmless, and thus vacated the conviction and remanded the case to the district court for a hearing on the admissibility of the expert testimony in accordance with the principles the court had announced.[126]

Finally, the Eleventh Circuit, which is most pertinent to Alabama state courts, has often considered the admission of expert eyewitness testimony and held such evidence to be unnecessary or inadmissible. In *Rodriguez v. Wainwright*, the court held, without substantive discussion, that the exclusion of expert testimony concerning the subjects of memory and perception in eyewitness testimony did not deny the habeas petitioner the right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution.[127] One year later, in *Jones v. Smith*, the court held that the failure of the defendant's attorney to offer expert testimony on the unreliability of eyewitness identification did not constitute ineffective assistance of counsel, as the likelihood of mistaken identification was brought to the jury's full attention through cross-examination.[128] Finally, in *United States v. Smith*, the court definitively held

[123] *Id*. at 1226.
[124] *Id*.
[125] *Id*.
[126] *Id*. at 1226–27.
[127] 740 F.2d 884, 885 (11th Cir. 1984).
[128] 772 F.2d 668, 674 (11th Cir. 1985).

expert eyewitness testimony inadmissible under *Daubert*.[129] Relying on its decision in *Thevis*,[130] the court found that "expert testimony regarding eyewitness reliability was not needed, because the jury could determine the reliability of eyewitness identification with the tools of cross-examination."[131] The court reasoned that since expert testimony that does not assist the trier of fact can be excluded under the second prong of the *Daubert* test, and *Thevis* held that expert eyewitness testimony does not assist the jury, *Thevis* was therefore in harmony with *Daubert* and would not be overruled.[132] Since the court determined itself to be bound by prior precedent until overruled by the Supreme Court or *en banc*, the court held that such evidence was inadmissible in the Eleventh Circuit, although it emphasized that other adequate measures could be taken by the defense to mitigate the effects of eyewitness testimony, including effective cross-examination and requesting jury instructions on the subject.[133] The Eleventh Circuit bar on the admissibility of such evidence serves to reinforce the argument that Alabama state courts can permissibly establish a presumption against the admissibility of such evidence, since, aside from the Supreme Court, the Eleventh Circuit's decisions provide the most guidance to Alabama state courts, located in that circuit.

2. Alabama Cases

The seminal Alabama case on the admissibility of expert eyewitness testimony is *Ex Parte Williams*.[134] A jury had convicted the defendant of attempted murder and robbery in the first degree based solely on the victim's identification of her assailant.[135] The Supreme Court granted the defendant's petition to examine the issue of whether the trial court had abused it

[129] 122 F.3d 1355 (11th Cir. 1997).
[130] United States v. Thevis, 665 F.2d 616 (5th Cir. Unit B 1980).
[131] Smith, 122 F.3d at 1358.
[132] *Id*. at 1358–59.
[133] *Id*. at 1359.
[134] 594 So. 2d 1225 (Ala. 1992).
[135] *Id*. at 1225–26.

discretion in refusing to allow the defendant's expert to testify as to the reliability of the State's eyewitness, noting that "the admissibility of expert testimony on the subject of human memory process has never been considered by the appellate courts of this state."[136] The court adopted the reasoning of the *Downing* court, stating "the admission of expert testimony on the subject of human memory processes is not automatic but conditional."[137] After reviewing the trend in both state and federal case law to allow expert testimony on the subject of human memory, the court held that "expert testimony on the subject of human memory can be introduced into evidence in cases turning on eyewitness identification."[138] The court went on, "[w]e further hold, however, that the admissibility of such evidence, is, like all other types of expert testimony, subject to the discretion of the trial court."[139] After reviewing the record of the trial court, the court found no abuse of discretion in this case, as the trial court had determined that the proposed expert was not familiar with the facts of the particular case and had no personal contact with the victim, and thus affirmed the conviction.[140] Therefore, the Alabama Supreme Court recognizes the admissibility of expert eyewitness testimony, but will allow the trial court to properly exclude such evidence *even where the State's case rests entirely on eyewitness identification.* The court seems more concerned with the expert's familiarity with the particular facts of the case and the victims/eyewitnesses than with the admission of general abstract theories on the fallibility of eyewitness identification. Therefore, it appears that the Alabama criminal courts would be justified in excluding expert eyewitness testimony in the majority of cases, unless the defense takes measures to familiarize the expert with the specific facts of the case and has the expert

[136] *Id*. at 1226.
[137] *Id*.
[138] *Id*. at 1227.
[139] *Id*. (citing Rannells v. Graham, 439 So. 2d 12 (Ala. 1983)).
[140] *Id*. at 1227–28.

interview the victim/witness in the case. So, the adoption of a presumption against admission, as I suggest, would actually be a liberalization of the court's policy.

After the Alabama Supreme Court's ruling, Alabama trial courts have had several opportunities to apply the standard announced in *Ex Parte Williams*. Although there are several such cases, I will only discuss a few. In *State v. Bonner*, the trial judge admitted the defense's expert eyewitness testimony, finding that the witness was a qualified expert in the field of behavioral psychology and the defense had laid a proper predicate for the admission of such testimony, satisfying the standards of *Daubert*.[141] The trial judge was particularly concerned with the fact that the state's case rested entirely on eyewitness testimony (not the victim's, as the charge was homicide) and circumstantial evidence.[142] One year later, a different trial judge admitted expert eyewitness testimony in *State v. Edwards*.[143] The trial judge was hesitant to admit the expert's testimony as an expert on eyewitness identification, but ultimately allowed the testimony as the state's entire case relied solely on eyewitness identifications of three victims of the robberies.[144] The trial judge went on to state that she was concerned about the fact that the expert had not had any contact with the witnesses, and she also stated that she may not be disposed to rule similarly in other cases dealing with this issue where the State offered other corroborating evidence of guilt.[145] The most recent case considering the admission of expert eyewitness testimony is *State v. Frank*, in which the defendant was charged with robbery.[146] The trial judge excluded the expert's testimony regarding reliability of eyewitness identification after

[141] CC 00-1271, CC 00-1272, Jefferson Co., Ala. Cir. Ct. (Mar. 1, 2000) (allowing the admission of expert testimony on eyewitness identification)
[142] *Id*.
[143] CC 01-183, CC 01-184, Jefferson Co., Ala. Cir. Ct. (Nov. 1, 2001) (allowing the admission of expert testimony on eyewitness identification)
[144] *Id*.
[145] *Id*.
[146] CC 04-4329, Mobile Co., Ala. Cir. Ct. (June 6, 2005) (prohibiting the admission of expert testimony on eyewitness identification).

finding a lack of predicate establishing the authority of the texts and treatises on which the expert relied; therefore, the expert testimony did not qualify for admission under *Daubert*.[147] The court also concluded that the defense failed to prove the research was generally accepted in the field, and thus the evidence failed the *Frye* test, and found the helpfulness of the expert's testimony referencing verdicts in other cases would be outweighed by the confusion caused in the case at bar, and thus could be excluded under Alabama Rule of Evidence 403.[148] To summarize, it appears that the Alabama trial courts are willing to admit such testimony when the State's evidence consists only of eyewitness evidence, but have serious reservations about the quality and helpfulness of the evidence in general, especially in cases where it would be confusing. A presumption against the admission of such testimony would establish consistency among the Alabama circuit courts as well as demanding that the defense ensure that such evidence will be specifically addressed to the issues in the case at bar.

III. Five Arguments Against the Admissibility of Expert Testimony on the Reliability of Eyewitness Testimony in the Case of Alabama

A. Discretion of the Trial Court

First, admitting any expert on eyewitness identification is firmly within the discretion of the trial court and, according to the Supreme Court of Alabama, the "trial court's rulings on admissibility of . . . [expert testimony on eyewitness identification] will not be disturbed on appeal absent a clear abuse of that discretion."[149] The trial court is in the best position to judge if this expert testimony is necessary in the particular circumstances of the case, so that any appellate review on the admissibility ruling of this type of evidence should be extremely limited,

[147] *Id*. *See also* Telephone Interview with Jill Phillips, Deputy District Attorney for Mobile County, Alabama (Dec. 12, 2005).
[148] Frank, CC 04-4329, Mobile Co., Ala. Cir. Ct. (June 6, 2005).
[149] Ex Parte Williams, 594 So. 2d 1225, 1227 (1992).

and is only disturbed after a finding of abuse of discretion.[150] The best case for admitting such testimony is when the state reliance on the testimony is exclusive or especially robust, with little corroboration. Only the trial court is in the position to determine how strongly other evidence inculpates a defendant and whether such evidence corroborates the eyewitness's testimony and thus determine if the witness is warranted.[151]

B. Useful (and Usually Admitted) Only in Certain Cases

Most of the cases in which such testimony has been found to be admissible have involved no other evidence besides the testimony of one eyewitness. Some such cases have also involved identifications of the defendant by several eyewitnesses, but no other corroborating testimony or evidence.[152] These seem to be the rare cases that may call for such expert testimony, as all other cases typically provide some kind of corroborating evidence to be weighed by the finder of fact along with the eyewitness identification.[153] Courts have repeatedly recognized the need for expert eyewitness testimony in cases based solely on eyewitness identifications and encouraged

[150] AmSouth Bank, N.A. v. Spigener, 505 S. 2d 1030 (Ala. 1986) (holding that questions of materiality, relevancy, and remoteness rest largely with the trial judge and that rulings thereon will not be disturbed unless the judge's discretion has been absued).

[151] *See* RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 249 (3d. ed.) (2000) (pointing out that making a decision to admit evidence by looking to see how strongly other evidence inculpates a defendant conflicts with the idea that evidence law is an autonomous set of procedural norms which itself determines the admissibility of the evidence parties offer, but concluding that it may be warranted in the case of eyewitness expert testimony).

[152] State v. Edwards, CC 01-183, CC 01-184, Jefferson Co., Ala. Cir. Ct. (Nov. 1, 2001) (allowing the admission of expert testimony on eyewitness identification). In *State v. Edwards*, Kimberly Edwards was accused of entering several stores, asking to speak to the manager or asking for employment information, and then robbing the cashier and/or manager at gunpoint. The defense moved to admit expert eyewitness evidence. The trial judge was hesitant to admit the expert's testimony as an expert on eyewitness identification, but ultimately allowed the testimony as the state's entire case relied solely on eyewitness identifications.

[153] *But see* Rudolf Koch, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell L. Rev. 1097 (2003) (arguing that corroborative evidence of general guilt of a defendant should be considered only in any post-trial harmless error analysis by an appellate court—to determine whether the error in admitting identification testimony resulting from unnecessarily suggestive procedures was harmless—as opposed to the court's consideration of whether the identification was reliable).

its use in these cases, while warning that this should not lead to a general presumption of admissibility in all cases involving eyewitness identifications.[154]

C. More Prejudicial Than Probative

Generally, such experts do not testify to the reliability or accuracy of a particular witness's identification. Instead, these experts testify to the possibility for inaccuracy in eyewitness identifications in general and the research experiments and studies done in this field by the scientific community. Therefore, these experts may not be in the position to offer any evidence with probative value that outweighs its prejudicial effect.[155] Since they have not spoken directly with any witnesses or victims and, further, since they are often only superficially acquainted with the facts of the case, they can only testify to general findings made by some researchers in the field, which may not even be representative of the majority view of the scientific community on a particular issue.[156] A jury may be overwhelmed by the expert's testimony or tend to give it greater credibility or consideration.[157] This would unfairly undermine the state's case, considering the general nature of the expert testimony in these instances and the substantial weight accorded expert testimony by jurors.

D. Not a Well-Established Field of Scientific Research

Additionally, the research field of eyewitness identification has no generally accepted theories of which to boast, neither is there an established procedure for conducting experiments

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[154] *See, e.g.*, United States v. Alexander, 816 F.2d 164, 169 (5th Cir. 1987).

[155] *See* Part II.A *supra*. *See also*, United States v. Lumpkin, 192 F.3d 280, 289 (2d. Cir. 2000) (expert testimony on eyewitness evidence may confusing); United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994); United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (expert testimony could "muddy the waters").

[156] *See* United States v. Brien, 59 F.3d 274, 277 (1st Cir. 1995) ("[cognitive science] experts . . . largely offer rather obvious generalities"); Jordan v. DuCharme, 983 F.2d 933, 939 (9th Cir. 1993) (asserting that expert testimony should be allowed only about "specific identifications in the case, rather than the general reliability of eyewitness testimony").

[157] United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (holding that "the aura of reliability and trustworthiness that surrounds scientific evidence outweighed any small aid the expert testimony [on eyewitness identification] might have provided"). *See generally* Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001).

upon which findings in the field are based.[158] The evidence revealed by many of the studies is inconsistent, the procedures and measures used to study various relationships are not in accord with legal procedure, and there is no evidence that the experts who testify would be any better at detecting witness inaccuracy than uninformed jurors.[159] Therefore, for the reasons more fully explored above, including: the lack of relevance of the foundational studies to the actual eyewitnesses involved; the interaction problem, concerning the relationships among factors tending to make an identification inaccurate; inconsistency amongst the studies; and criticisms of specific theories, such as the relationship of stress to accurate identifications or the theory of weapon focus.

E. Effective Safeguards Already Exist

Finally, there are several procedural safeguards already in place to combat jurors' blind acceptance of eyewitness testimony. The defense can call attention to many factors that may affect identification accuracy through cross-examination and closing arguments.[160] An effective cross-examination, even one touching on theories of the sources of inaccuracy in eyewitness identification, is often more effective than expert testimony at neutralizing damaging eyewitness evidence presented by the prosecution. Also, judges and jurors have common sense and knowledge from their own personal life experiences that they bring into the court room and take

[158] *See* Part I.B *supra*. *See also* United States v. Kime, 99 F.3d 870, 883 (8th Cir. 1996) ("proffered expert testimony and eyewitness identification fails to qualify as 'scientific knowledge' under Daubert[]"); United States v. Rincon, 28 F.3d 921, 924–25 (9th Cir. 1994); United States v. Poole, 794 F.2d 462, 468 (9th Cir. 1986); United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978); Ebbesen & Konecni, *supra* note 25, at 4.

[159] Ebbesen & Konecni, *supra* note 25, at 5, 18–19.

[160] United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) ("any weaknesses in eyewitness identification testimony ordinarily can be exposed through careful cross-examination of the eyewitness"); United States v. Smith 122 F.3d 1355, 1358–59 (11th Cir. 1997); United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996); United States v. Harris, 995 F.2d 532, 536 (4th Cir. 1993); United States v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992 (finding jury aware of hazards of eyewitness identification without expert testimony); United States v. Curry, 977 F.2d 1042, 1051–52, (7th Cir. 1992) ("vigorous cross-examination" of eyewitnesses was sufficient to exclude "intrusion" of expert testimony on eyewitness identifications); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982); United States v. Amard, 488 F.2d 1148, 1153 (9th Cir. 1973).

with them into the jury room.[161] Judges and jurors rarely accept any trial evidence uncritically, and eyewitness testimony, though potentially more convincing, is still subject to review by the trier of fact.[162] These general conclusions are bolstered by the specific fiscal and political situations in which Alabama finds itself regarding indigent defense, discussed below.

IV. Alabama Policy and the Admission of Expert Testimony on Eyewitness Evidence

A. The Criminal Defense Bar

Beyond the five arguments listed above, there are policy reasons particular to the Alabama State Criminal Justice System that militate against admitting such testimony as a matter of course. Presently, Alabama's indigent defense system has been harshly criticized by the American Bar Association and other organizations as being both inefficient and inadequate to meet the needs of indigent defendants.[163] The Alabama system is a decentralized and fragmented system controlled by circuit court (trial level) judges in Alabama's circuits.[164] Most Alabama counties do not have public defender offices—instead there are three representation service models used in Alabama.[165] Out of the forty-one judicial circuits, four have a full-time

[161] United States v. Serna, 799 F.2d 842, 850 (2d. Cir. 1986) (expert testimony on eyewitness testimony consists of mere commonsense claims); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979). *See also* Jeremy C. Bucci, *Revisiting Expert Testimony on the Reliability of Eyewitness Identification: A Call for a Determination of Whether It Offers Common Knowledge*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2002).

[162] United States v. Rincon, 984 F.2d 1003 (9th Cir. 1993) (stating that courts have consistently excluded expert testimony on the reliability of eyewitness identification based upon reasoning that effective cross-examination coupled with the common sense of the jurors themselves would reveal any inconsistencies or discrepancies in eyewitness identifications).

[163] *Gideon's Broken Promise: America's Continuing Quest for Equal Justice - A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings*, A.B.A., (Dec. 2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (last accessed Oct. 30, 2005) [hereinafter Gideon's Broken Promise]; *Legal Assistance to Poor People*, Equal Justice Initiative of Alabama, *at* http://www.eji.org/legal_assistance.html.

[164] Press Release, Alabama Appleseed Center for Law & Justice, Alabama's Indigent Defense System Needs Fixing (Feb. 27, 2004) (on file with author).

[165] *See id*.

public defender office, and one judicial circuit has a part-time public defender.[166] Ten judicial circuits use the contract defender system, wherein private attorneys are hired for a set dollar amount each month to handle all indigent cases.[167] Additionally, these contract defenders are allowed to maintain a separate private practice.[168] Twenty-six judicial circuits use an appointment system, whereby private attorneys place their names on an appointment list and are periodically asked to represent indigent defendants.[169] These appointed attorneys are paid on an hourly rate basis, plus an allowance for office overhead.[170]

Anecdotal evidence sheds an unflattering light on the Alabama indigent defense system as well.

> Montgomery defense lawyer Steve Glassroth remembers his encounter, not so long ago, with a defense attorney for an indigent man who didn't recognize his client in the courtroom less than a week before trials were set to start. "He told the judge he couldn't find his client, and he'd been sending him letters," Glassroth said. "The client got up and said, "Here I am."'[171]

In my personal experience as an intern at the Jefferson County District Attorney's Office, I would often see young or otherwise under-employed attorneys waiting in the courtroom on the days that criminal defendants were arraigned. If an indigent defendant had no representation, the "formalities" of picking an attorney from a list would often be overlooked, and the attorneys in the courtroom would bargain amongst themselves for those defendants needing representation. It resembled something of an auction floor or backroom favor system, but did not approach my expectation of justice or meaningful choice for these defendants.

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[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*.
[171] Carla Crowder, *American Bar Faults Alabama on Indigent Cases*, BIRMINGHAM NEWS, Feb. 11, 2005, *available at* http://www.demaction.org/dia/organizations/ncadp/news.jsp?key=1238&t= (last accessed Oct. 28, 2005).

In addition to structural problems with the system, more specific criticisms have been aimed at these different models of indigent representation. Often, the attorneys willing to take such cases are those that have recently graduated from law school, and thus often are not sufficiently experienced to represent indigent defendants.[172] Other attorneys seeking these assignments use these cases to supplement their private practices and it is an unfortunate fact that attorneys will often spend more time on cases in which they have been retained by private parties, as they will usually receive higher compensation for these cases.[173] Contract defenders in Alabama have been accused of providing constitutionally inadequate representation.[174] "In nine of Alabama's judicial circuits where contracts for indigent defense services are utilized, the contracts are awarded on primarily on the basis of cost, not quality or other important considerations, in direct contradiction to guidance contained in national indigent defense standards."[175] Some critics claim that contract defenders are "basically doing nothing" in that the usually just enter guilty pleas for their clients, and may, therefore, spend as little as ten minutes on an individual's case.[176] The Appleseed Foundation's Alabama Center examined the files of four circuits' contract defenders, and found that of the 1,585 completed criminal cases for indigent defendants, eighty-two per cent were guilty pleas and lawyers took only fifty-three of the cases to trial.[177] The most glaring failure of the Alabama indigent defense system may be its

[172] ABA Focus on Alabama (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf (last accessed Oct. 30, 2005) [hereinafter ABA Alabama Focus]. The report notes that "young attorneys with little or no experience are just as likely as others to receive court assignments in Alabama, sometimes even for homicide cases." *Id*.
[173] *See* Gideon's Broken Promise, *supra* note 163.
[174] *See* ABA Alabama Focus, *supra* note 172.
[175] *Id*.
[176] Crowder, *supra* note 171.
[177] *See id*.

lack of data similar to that just presented—something necessary to bring to the forefront the many flaws in the system in individual circuits.[178]

B. Budgetary Concerns

When Governor Bob Riley took office in January 2003, he was faced with a budgetary shortfall gap of $675 million projected for FY 2004 for the combined General Fund and Education Trust Fund budgets, $198 million of which was attributable to the General Fund.[179] In his State of the State address in March 2003, Riley announced an ambitious plan to reduce unnecessary government expenditures and to reform state tax policy to address Alabama's budget problems.[180] In Alabama, many changes in the tax system require a constitutional amendment passed by voter referendum,[181] and thus Riley undertook a comprehensive tax proposal designed not only to meet the projected budget shortfall but also to provide sufficient revenues to invest in a "world-class education" system for the state.[182] The tax reform plan proposed both raising some tax rates and redistributing the burden of taxes across groups.[183] Although the plan would have added an estimated $1-1.2 billion in annual revenues, many Alabama residents, particularly the poor, would have seen reduced taxes.[184] Property taxes would have been raised substantially but would still have remained the lowest in the country.[185] Income taxes would have been reduced for the poorest state residents and raised for the highest

[178] *See* ABA Alabama Focus, *supra* note 172.
[179] KAISER COMM'N ON MEDICAID & THE UNINSURED, *State Responses to Budget Crisis in 2004: An Overview of Ten States—Case Study-Alabama* 3–4 (Jan. 2004) [hereinafter "Kaiser Alabama Study"]. The gap represented about 16.5 percent of the General Fund; in the ETF, the gap was about 11.4 per cent. *Id*. at 4.
[180] Governor Bob Riley, State of the State Address, Mar. 4, 2003, *available at* http://www.stateline.org/live/ViewPage.action?siteNodeId=157&languageId=1&contentId=16178 (last accessed Oct. 24, 2005) [hereinafter "State of the State 2003"].
[181] Kaiser Alabama Study, *supra* note 179 at 4.
[182] State of the State 2003, *supra* note 180.
[183] Jason White, *Alabama Tax Plan Faces Long Odds*, STATELINE.ORG, Sept. 5, 2003, *at* http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15370 (last accessed Nov. 5, 2005).
[184] *See id*.
[185] Neal Pierce, *Alabama Tax Plan Causes Unholy Outrage*, SEATTLE POST-INTELLIGENCER, Aug. 25, 2003, *available at* http://www.commondreams.org/views03/0825-06.htm (last accessed Nov. 2, 2005).

income group.[186] A variety of other tax increases were proposed including taxes on cigarettes, sales, businesses, and utilities.[187] The tax reform referendum was put to the voters in September 2003 and failed by a large margin after a lengthy campaign involved ardent supporters and opponents alike.[188]

Thus, it was back to the policy drawing board, and Governor Bob Riley next turned to a plan of drastic reductions in state expenditures.[189] One of the proposed budget cuts is reducing the indigent defense budget by thirty per cent by eliminating the overhead payments to contract lawyers and those assigned to cases, and shifting that $14 million into Medicaid.[190] The shift would not only cut indigent defense funding, but would also reduce funds available to lawyers who represent children in abuse and neglect cases, said Bill Blanchard, a Montgomery lawyer who is legislative chairman for the Alabama Criminal Defense Lawyers Association.[191] Blanchard commented:

> The entire culture is starting to realize that the quality of justice you get in these kind of cases depends on having well-trained, well-funded attorneys. Here we have our governor trying to reduce the funding for indigent defense and basically turning their backs on the poorest and most disadvantaged. The primary thing we're talking about is delivery of legal services to the poor. This is a time we're seeing on a daily, a weekly, a monthly basis where cases are being reversed because they don't have adequate representation.[192]

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[186] *See id*.
[187] Paul Prososki, *The Alabama Tax and Budget Situation: History, Effects, and Alternatives* (draft), Americans for Tax Reform, *available at* http://www.atr.org/alabamareport_files/frame.htm (last accessed Nov. 1, 2005).
[188] Gilbert Nicholson, *Votes Reject Riley's Tax Plan*, BIRMINGHAM BUS. J., Sept. 10, 2003, *available at* http://www.bizjournals.com/birmingham/stories/2003/12/29/story2.html (last accessed Oct. 30, 2005).
[189] *See* Crowder, *supra* note 171.
[190] *Id*.
[191] *Id*.
[192] *Id*.

Thus, Alabama's budgetary crisis has put indigent defense in the spotlight—both as a cause for concern and as a possible fiscal reduction.[193] With such a constraint on resources and the failure of the plan to increase revenue, sweeping spending reductions will be made in the state budget. Instead of increasing funding for indigent defense, lawmakers are proposing reducing these resources, making frugality and priorities key to any spending decision. Placing the issue in context, it becomes clearer that state funds, if spent on expert eyewitness testimony, would be misallocated.

C. Solutions

Most cases in which defense attorneys have sought to admit eyewitness expert testimony have been those cases involving appointed counsel.[194] Instead of diverting the court's attention and resources to deciding these pre-trial motions for admissibility and in lieu of exhausting state funds for such expert testimony, the focus of the Alabama Criminal Justice System should be to provide indigent defendants with a more effective and skilled defense in the first place—by either increasing fees for appointed cases and raising the standard that attorneys must meet to qualify for such appointments or by establishing public defender offices throughout the state. Undoubtedly, this is a criticism more properly directed at the structure of the Alabama Criminal Justice System rather than at the discrete issue of admitting eyewitness expert testimony; however, since efforts at recent reform have largely failed in this area,[195] it is best to conserve the state's resources and re-allocate them as it appears that the present system is here to stay, at least

[193] For a good general discussion of rationing criminal defense entitlements in light of state budget constraints see Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

[194] *See, e.g.*, State v. Edwards, CC 01-183, CC 01-184, Jefferson Co., Ala. Cir. Ct. (Nov. 1, 2001) (allowing the admission of expert testimony on eyewitness identification) *and* State v. Bonner, CC 00-1271, CC 00-1272, Jefferson Co., Ala. Cir. Ct. (Mar. 1, 2000) (allowing the admission of expert testimony on eyewitness identification); State v. Frank, CC 04-4329, Mobile Co., Ala. Cir. Ct. (June 6, 2005) (prohibiting the admission of expert testimony on eyewitness identification)

[195] Gideon's Broken Promise, *supra* note 163.

for the time being. Thus, I would propose that the Alabama Courts (acting through an explicit Alabama Supreme Court ruling or by legislative mandate, if necessary) adopt a presumption against admission of eyewitness expert testimony except in cases where state reliance on such evidence is so strong as to warrant the extra protection against a wrongful conviction. There should be a clearly enunciated test as to when such a presumption can be overcome by the defense in any case that does not fall under such exception.[196] Such an evidentiary presumption would hopefully conserve judicial resources and state fiscal resources for more worthy expenditures.

V. Conclusion

After reviewing the scientific research concerning the possible sources of error found in eyewitness testimony, it is clear that human memory and perception is susceptible to numerous defects, especially when subjected to stressful events and asked to identify particular individuals or recall specific details. One proposed solution to this pernicious yet ubiquitous problem is the introduction of expert testimony to elucidate the weaknesses inherent in eyewitness testimony. Rules 403 and 702 of the Federal Rules of Evidence, as well as the Alabama Rules of Evidence, provide some guidance for the admission of expert testimony on the reliability of eyewitness identifications. Federal and state case law affords further instruction for admitting such

[196] One possible test was enunciated by the Fourth Circuit in *U.S. v. Harris*. The *Harris* court noted the recent liberalization of courts' admission of expert eyewitness evidence:

> [T]here has been a trend in recent years to allow such testimony under circumstances described as "narrow." . . . The narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference.

U.S. v. Harris, 995 F.2d 532, 534–35 (4th Cir. 1993). Thus, perhaps the Alabama Supreme Court or the Alabama Legislature could develop a test by which the presumption of such evidence is excluded by singling out those factors or circumstances under which expert eyewitness evidence is particularly helpful, as the *Harris* court seems to suggest.

testimony into evidence, but reserves the ultimate discretion to the trial court's discretion. Legal scholars as well as defense attorneys principally argue that the introduction of such testimony would benefit defendants as the jury would more fully appreciate eyewitness evidence and the end result would reduce the number of wrongful convictions, which, according to them, the system should be unwilling to tolerate. However, the liberal admission of such testimony is not warranted in the case of Alabama. Five principal arguments counsel against the admission of expert testimony, which include: the trial court's discretion in admitting such evidence; the evidence's limited utility; the evidence can be more prejudicial than probative in a jury trial setting; there is considerable disagreement within the scientific community about the accuracy and value of such evidence; and efficacious safeguards already exist or more effective safeguards should take priority over the admission of such evidence. Since the state already suffers from inadequate funding for the defense of the indigent, along with an inefficient and derisory system of indigent defense, I propose that Alabama's criminal justice system and Alabama defendants alike would be better served by implementing a presumption against the admissibility of such expensive expert testimony. This presumption coupled with a bright line test for the admission of this evidence in certain cases would allow the state to concentrate on improving its provision of legal entitlements to all indigent defendants.