VITA

Solomon M. Fulero

February, 2008

Degrees Earned

Doctor of Philosophy (psychology), University of Oregon, Eugene, Oregon, August 1979.
Juris Doctor (law), University of Oregon, Eugene, Oregon, December 1979.
Master of Arts (psychology), University of Oregon, Eugene, Oregon, June 1975.
Bachelor of Arts (with Honors, psychology/sociology), University of Maryland, College Park, Maryland, June 1973.

Licenses and Certificates

Respecialization certificate in Clinical Psychology, Wright State University, August 1988 (full program of retraining, including course work, practica, and APA-approved internship).
State of Ohio, Psychologist License No. 3796, December 1986.
State of Ohio, Attorney License, Reg. No. 0000113, May 1980.

Awards and Honors

Member, National Institute of Justice Technical Working Group on Eyewitness Evidence, 1998-2000 (34-member panel of law enforcement officers, prosecuting and defense attorneys, and eyewitness psychologists, final report sets forth national standards and guidelines for the handling of eyewitness evidence)
Member, Committee to Study the Insanity Defense, 1993-94 (7-member “blue-ribbon” panel appointed by Governor, final report eventually led to Ohio Senate Bill 285, legislation to make changes to competency/sanity/post-NGRI release laws in Ohio).
Editorial Board, Law and Human Behavior, 1995- (Associate editor, 2000-)
Scholar-in-Residence Award, Sinclair College, 1990-1998 (each year).
Russell Sage Foundation Predoctoral Residency in Law and Social Science, at University of Oregon School of Law, 1977-78, 1978-79.

Areas of Specialization

My major area of specialization is legal psychology. In particular, my interests include the social and clinical interfaces of law and psychology, including generally the behavioral assumptions underlying evidentiary rules, jury processes, eyewitness reliability, competency and insanity, malpractice, ethics, and applications in civil law areas such as torts and family law. In order to pursue my broad forensic interests, I completed a clinical recertification program, with an APA-approved internship. This, along with my social psychology and legal training, gives me a unique opportunity to pursue "cutting edge" cross-disciplinary issues in forensic psychology, in both its social/experimental and clinical aspects.

Present Academic Positions

Professor of Psychology, Sinclair College, Dayton, Ohio (Department Chair, September 1993-April 2002, Professor, September 1988-present, Associate Professor, 1984-1988; Assistant Professor, 1980-1984).
Clinical Assistant Professor of Psychology, Wright State University School of Professional Psychology, Dayton, Ohio, 1980-present.
Clinical Assistant Professor of Psychiatry, Wright State University School of Medicine, 1991-present.

Memberships in Professional Organizations

American Psychological Association:
President, Division 41, American Psychology/Law Society, 2003-2004 (President-Elect, 2002-2003; Past President, 2004-2005).
Fellow status, elected 2000 (Division 41, American Psychology/Law Society)
Chair, Committee on Legal Issues (COLI), 2002-2003, Member, 2000-2003
Member of APA Council of Representatives (elected from Division 41), 2000-2003
Chair, Division 41 Dissertation Award Committee, 1990-93
Chair, Division 41 Continuing Education Committee, 1995-2000
Division 41 Executive Committee, elected Member-at-Large, 1995-1998
Member, APA Task Force on Teaching of Psychology in Community Colleges, 1996-1997
American Psychological Society
Ohio Psychological Association
Midwestern Psychological Association
Ohio State, Dayton, Greene County, Butler County Bar Associations

Peer reviewer for scientific journals

Law and Human Behavior (Associate Editor, 2000-2002)
Journal of Forensic Psychology Practice (also on editorial board)
Psychology, Public Policy, & Law
Behavioral Sciences and the Law
Journal of Experimental Social Psychology
Professional Psychology: Research and Practice
Journal of Applied Social Psychology
Journal of Personality and Social Psychology
--also have reviewed grant proposals for the National Science Foundation and National Institute of Mental Health

Clinical Experience

Clinical Director, Center for Forensic Psychiatry, Hamilton, Ohio, February 1992-September 1997. Executive officer of non-profit agency with 10 employees, $850,000 budget; responsible for court-referred evaluations in four-county area (Butler, Warren, Clinton, Preble) in Southwest Ohio as well as crisis, prehospital screening, and other mental health services in Butler County. Performed hundreds of evaluations for competency, sanity, conditional probation, mitigation, treatment in lieu of conviction, sexual predator status, presentence investigation, police employment screening, fitness for duty, custody and visitation, guardianship, etc.

Private Practice of Psychology, 1989-present, forensic psychology specialization. See above.

Consulting Psychologist, *Dayton Mental Health Center, Forensic Unit*, 1989-1992. For duties, see below.

Internship, Wright State University School of Professional Psychology, September 1987-September 1988 (APA-approved). Placements at Wright State University Psychological Services Center and Dayton Mental Health Center, Acute Care Unit, 2000 hours total. For duties, assessment and therapy descriptions at WSU-PSC, see below. At DMHC Acute Care Unit, duties included individual group psychotherapy and assessment on an acute care female admissions ward. Other residency activities included training in supervision.

Practica, Wright State University, School of Professional Psychology:

--*University Psychological Services Center*, January 1987-August 1987. Duties included assessment and therapy (individual and group) with a college population in a college counseling center setting.

--*Dayton Mental Health Center, Forensic Unit*, June 1986-March 1987. Practicum placement. Duties included assessment of competency to stand trial, insanity, need for maximum security hospitalization.

Publications

Fulero, S. & Wrightsman, L. (2008, in press). Forensic Psychology, Third Edition. Belmont, CA: Cengage/Thomson/Wadsworth.

Fulero, S. (in press). System and estimator variables in eyewitness testimony: A review. In J. Lieberman and D. Krauss (Eds.), Psychology in the courtroom. Hampshire, UK: Ashgate Publishing.

Otto, R., & Fulero, S. (2006). Integrating psychology and law into undergraduate instruction. *Observer (Association for Psychological Science), 19,* retrieved from http://www.psychologicalscience.org/observer/getArticle.cfm?id=1919

Simone, S. & Fulero, S. (2005). Tarasoff and the duty to protect. In S. Bucky, J. Callan, and G. Stricker (Eds.), Ethical and Legal Issues for Mental Health Professionals: A Comprehensive Handbook of Principals and Standards.

New York: Haworth Press, co-indexed/co-published in Journal of Aggression, Maltreatment, & Trauma, 11, 145-168.

Wrightsman, L. & Fulero, S. (2005). Forensic Psychology, Second Edition. Belmont, CA: Thomson/Wadsworth.

Fulero, S. & Everington, C. (2004, Spring). Assessing the capacity of persons with mental retardation to waive *Miranda* rights: A jurisprudent therapy perspective. Law and Psychology Review, 28, 53-69.

Fulero, S. (2004). Expert psychological testimony on the psychology of interrogations and confessions. In G. D. Lassiter (Ed.), Interrogations, Confessions, and Entrapment. Kluwer Publishers.

Fulero, S. & Everington, C. (2004). Mental retardation, competency to waive Miranda rights, and false confessions. In G. D. Lassiter (Ed.), Interrogations, Confessions, and Entrapment. Kluwer Publishers.

Technical Working Group on Eyewitness Evidence (2003). Eyewitness evidence: A trainer's manual for law enforcement. (co-author, alternate member of TWGEYEE Identification Training Team). Washington, D.C.: United States Department of Justice, National Institute of Justice. Document No. NCJ 188678.

Steblay, N., Dysart, J., Fulero, S., & Lindsay, R.C.L. (2003). A meta-analytic comparison of showup and lineup identification accuracy. Law and Human Behavior, 27, 523-540.

Darley, J., Fulero, S., Haney, C., & Tyler, T. (2002). Psychological jurisprudence. In J.R.P. Ogloff (Ed.), Taking psychology and law into the 21st century: Perspectives in Law and Psychology, Volume 14. New York, NY: Plenum Publishing.

Fulero, S. (2002). Empirical and legal perspectives on the impact of pretrial publicity: Effects and remedies. Law and Human Behavior, 26, 1-2 (foreward to Special Issue, S. Fulero, Issue Editor)

Fulero, S. (2002). Afterword: The past, present, and future of applied pretrial publicity research. Law and Human Behavior, 26, 127-133.

Fulero, S. (2001, May). Recent cases on false confessions and expert testimony. American Psychological Association Monitor, 32, 5-6.

Steblay, N., Lindsay, R., Fulero, S., & Dysart, J. (2001). Eyewitness accuracy rates in sequential and simultaneous lineup presentations: A meta-analytic review. Law and Human Behavior, 25, 459-474.

Simone, S., & Fulero, S. (2001). Psychologists' perceptions of their *Tarasoff* duty to protect uninformed sex partners of HIV-positive clients. Behavioral Sciences and the Law, 19, 423-436.

Finkel, N., Fulero, S., Haugaard, J., Levine, M. & Small, M. (2001). Everyday life and legal values: A concept paper. Law and Human Behavior, 25, 109-123.

Fulero, S. (2001). Review of the Level of Service Inventory-Revised (LSI-R). In B. Plake and J. Impara (Eds.), Mental measurements yearbook, 14th Edition (pp. 692-693). Lincoln, NE: University of Nebraska Press.

Fulero, S. (2001). Review of the Malingering Probability Scale (MPS). In B. Plake and J. Impara (Eds.), Mental measurements yearbook, 14th Edition (pp. 701-703). Lincoln, NE: University of Nebraska Press.

Wells, G., Fisher, R., Lindsay, R., Turtle, J., Malpass, R., & Fulero, S. (2000). From the lab to the police station: A successful application of eyewitness research. American Psychologist, 55, 581-598.

Technical Working Group on Eyewitness Evidence (1999). Eyewitness evidence: A guide for law enforcement (one of 34 authors/members). Washington, D.C.: United States Department of Justice, National Institute of Justice. Document No. NCJ 178240.

Fulero, S. (1999). A history of Division 41 of the American Psychological Association (American Psychology-Law Society): A Rock and Roll Odyssey. In D. Dewsbury (Ed.) Unification through division: Histories of divisions of the American Psychological Association, Volume 4 (pp. 109-127). Washington, D.C.: American Psychological Association.

Everington, C., & Fulero, S. (1999). Competence to confess: Measuring understanding and suggestibility in defendants with mental retardation. *Mental Retardation*, *37*, 212-220.

Borum, R. & Fulero, S. (1999). Empirical research on the insanity defense and attempted reforms: Evidence toward informed policy. *Law and Human Behavior*, *23*, 375-394.

Fulero, S., Greene, E., Hans, V., Nietzel, M., Small, M., & Wrightsman, L. (1999). Undergraduate education in legal psychology. *Law and Human Behavior*, *23*, 137-153.

Steblay, N., Besirevic, J., Fulero, S., & Jimenez-Lorente, B. (1999). The effects of pretrial publicity on jury verdicts: A meta-analytic review. *Law and Human Behavior*, *23*, 219-235.

Wells, G., Small, M., Penrod, S., Malpass, R., Fulero, S., & Brimacombe, C.A.E., (1998). Good practice recommendations for lineups and photospreads. *Law and Human Behavior*, *22*, 603-647.

Olsen-Fulero, L. & Fulero, S. (1997). An empathy-complexity theory of rape story making. *Psychology, Public Policy,and Law, 3,* 402-427.

Turner, D. & Fulero, S. (1997). Can civility return to the courtroom? Will American jurors like it? *Ohio State Law Journal, 58,* 131-174.

Fulero, S. (1997). Review of Mistaken Identification, by Brian Cutler and Steven Penrod. New York: Cambridge University Press, 1995. *Contemporary Psychology, 42,* 395-396.

Fulero, S. & Turner, D. (1997). Using British trial procedures in American cases: A more "civil" trial? *Law and Human Behavior, 21,* 439-448.

Turner, D. & Fulero, S. (1996, July 5). Can civility return to the American courtroom? *New Law Journal*, *146*, 985-986 (abridged version of above published in England.)

Fulero, S. (1996). Review of Assessing Dangerousness: Violence by Sexual Offenders, Batterers, and Child Abusers, by Jacquelyn C. Campbell (Ed.). Thousand Oaks, CA: Sage Publications, Inc., 1995. *Criminal Justice Review, 21(1),* 102-103.

Fulero, S. (1995). Review of the Psychopathy Checklist--Revised (PCL-R). In J. Impara (Ed.), Mental measurements yearbook, 12th Edition (pp. 453-454). Lincoln, NE: University of Nebraska Press.

Penrod, S., Fulero, S., & Cutler, B. (1995). Expert psychological testimony in the United States: A new playing field? *European Journal of Psychological Assessment, 11,* 65-72**.**

Fulero, S. & Everington, C. (1995). Assessing retarded defendants' competency to waive Miranda rights. *Law and Human Behavior, 19,* 533-543.

Penrod, S., Fulero, S., & Cutler, B. (1995). Eyewitness expert testimony before and after *Daubert*: The state of the law and the science. *Behavioral Sciences and the Law, 13,* 229-259.

Knapp, S., VandeCreek, L., & Fulero, S. (1993). The attorney-psychologist-defendant privilege in judicial proceedings. *Psychotherapy in Private Practice*, *12(2)*, 1-15.

Finkel, N., & Fulero, S. (1992). Insanity: Making law in the absence of evidence. *International Journal of Medicine and Law*, *11,* 383-404.

Fulero, S. (1992). Legal liability in computerized assessment. In L. VandeCreek (Ed.), Innovations in Clinical Psychology, A Sourcebook, Volume 11. St. Petersburg, FL: Professional Resource Exchange.

Bremer, D., VandeCreek, L., & Fulero, S. (1992). What to do when the subpoena comes. In L. VandeCreek (Ed.), Innovations in Clinical Psychology, A Sourcebook, Volume 11. St. Petersburg, FL: Professional Resource Exchange.

Malmstrom, F., Perez, W., Fulero, S., & Weber, R. (1992). Measuring the speed of mental images. *Bulletin of the Psychonomic Society*, *30(3)*, 229-232.

Fulero, S. (1992). Recent developments in the duty to protect. *Psychotherapy in Private Practice*, *8*, 33-43.

Fulero, S., & Finkel, N. (1991). Barring ultimate issue testimony: An "insane" rule? *Law and Human Behavior*, *15*, 495-507.

Fulero, S. (1991). Plus ca change, plus c'est la meme chose: Legal and ethical issues in the practice of psychology. Review of Stromberg et al., The psychologist's legal handbook and Rinas & Clyne-Jackson, Professional conduct and legal concerns in mental health practice. *Contemporary Psychology*, *36*, 43-44.

Fulero, S. & Penrod, S. (1990). Attorney jury selection folklore and scientific jury selection: What works? *Ohio Northern Law Review*, *17*, 229-253.

Fulero, S, & VandeCreek, L. (1990). Privilege in group, marital and family therapy: A review of cases. *Psychotherapy Bulletin*, 25(2), 14-17.

VandeCreek, L. & Fulero, S. (1990). Potential liability for patient referral systems. *Psychotherapy Bulletin*, 25(1), 16-17.

Fulero, S. & Penrod, S. (1990). Attorney jury selection folklore: What do they think and how can psychologists help? *Forensic Reports*, *3*, 233-259.

Fulero, S. (1988a). Ohio Law and Psychology Handbook. Columbus, OH: Ohio Psychology Publishing Co.

Fulero, S. (1988b). Tarasoff: Ten years later. *Professional Psychology: Research and Practice*, *19*, 184-190.

Fulero, S. & Wilbert, J. (1988). Record-keeping policies of clinical and counseling psychologist: A survey of practitioners. *Professional Psychology: Research and Practice*, *19*, 588-590.

Wilbert, J. & Fulero, S. (1988). Impact of malpractice litigation on professional psychology: Survey of practitioners. *Professional Psychology: Research and Practice*, *19*, 379-382.

Fulero, S. (1987). The role of behavioral research in the free press/fair trial controversy: Another view. *Law and Human Behavior*, *11*, 259-264.

Fulero, S. (1983). Review of Schutz, B., Legal liability in psychotherapy. *Ohio Psychologist*, *29*, 27.

Cohen, S. & Fulero, S. (1982). Applying social psychology. In D. Sherrod, (Ed.), Social psychology (pp. 416-448). New York: Random House.

Fulero, S. (1980, March). Effects of adjective base rate and social desirability on stereotype formation. *Dissertation Abstracts International*, *40 (9-B)*, 4560-4561.

Rothbart, M., Evans, M., & Fulero, S. (1979). Recall for confirming events: Memory processes and the maintenance of social stereotypes. *Journal of Experimental Social Psychology, 15,* 343-355.

Rothbart, M., Fulero, S., Jensen, C., Howard, J., & Birrell, P. (1978). From individual to group impressions: Availability heuristics in stereotype formation. *Journal of Experimental Social Psychology, 14,* 237-255.

Fischhoff, B. & Fulero, S. (1977). What makes a good explanation? (Bulletin No. DR-10). Eugene, OR: Decision Research.

Fulero, S. (1977). Review of Nejelski, P. (Ed.), Social research in conflict with law and ethics. *Victimology*, *2*, 149-150.

Fulero, S. (1977). Perceived influence of endorsements on voting choices. *Journalism Quarterly*, *54* 789-791.

Fulero, S. & DeLara, C. (1976). Rape victims and attributed responsibility: A defensive attribution approach. *Victimology, 1,* 512-518.

Fulero, S. & Fischhoff, B. (1976). Election results and media ratings: The "bearer of bad tidings" effect. *Communication Research*, *3*, 22-36.

Rothbart, M., Dawes, R., Fulero, S., & Shaklee, H. (1975). Oregon social behavior inventory. Eugene, OR: Oregon Research Institute.

Convention presentations

Fulero, S. (2008, March). Case law on the admissibility of expert testimony about Miranda competency and interrogative suggestibility. Paper presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL.

Fulero, S. (2007, August). The role of race and jury instructions. In symposium, "Death penalty on trial." Presented at the annual meeting of the American Psychological Association, San Franciso, CA.

Fulero, S. (2007, June). Expert testimony in the U.S. on eyewitness reliability and eyewitness evidence collection: Tales from the front. International

Academy of Law and Mental Health (IALMH), XXXth International Congress on Law and Mental Health, Padua, Italy.

Fulero, S. (2007, June). The death penalty and mentally retarded defendants: Atkins v. Virginia and the APA amicus brief. International Academy of Law and Mental Health (IALMH), XXXth International Congress on Law and Mental Health, Padua, Italy.

Fulero, S. (2004, August). Ten legal fictions I have known and "loved." Presidential address presented at the annual meeting of the American Psychological Association, Honolulu, Hawaii.

Fulero, S. (2004, March). A contrarian response to Bersoff's contrarian concerns: Atkins and the APA position. Paper presented at the annual meeting of the American Psychology-Law Society, Scottsdale, Arizona.

Fulero, S. (2003, August). APA amicus involvement and the Atkins case: A contrarian response to contrarian concerns. Paper presented at the annual meeting of the American Psychological Association, Toronto, Ontario, Canada.

Fulero, S. (2003, July). Psychological damages in civil cases. Workshop presented to the Faculty of Advocates, at the joint American Psychology-Law Society and European Association of Psychology and Law conference, Edinburgh, Scotland.

Fulero, S. (2003, July). Mental retardation, Miranda rights waivers, and confessions: Some policy recommendations. Paper presented at the joint American Psychology-Law Society and European Association of Psychology and Law conference, Edinburgh, Scotland.

Penrod, S., Fulero, S., & Steinman, M. (2003, July). Evaluations of eyewitness research and researchers by U.S. courts. Paper presented at the joint American Psychology-Law Society and European Association of Psychology and Law conference, Edinburgh, Scotland.

Fulero, S. (2003, July). Public policy implications of pretrial publicity effects. Paper presented at the joint American Psychology-Law Society and European Association of Psychology and Law conference, Edinburgh, Scotland.

Fulero, S. (2002, August). Practicing ethically. Symposium presented at the American Psychological Association convention, Chicago, IL.

Steblay, N., Dysart, J., Fulero, S., & Lindsay, R.C.L. (2002, March). A meta-analytic comparison of showup and lineup identification accuracy. Paper presented at the American Psychology-Law Society conference, Austin, TX.

Dysart, J., Steblay, N., Fulero, S., & Lindsay, R.C.L. (2002, March). Eyewitness accuracy in sequential versus simultaneous lineups: A meta-analytic review. Paper presented at the American Psychology-Law Society conference, Austin, TX.

Fulero, S. (2001, August). Psychology and law collaboration: Benefits to state psychological associations: Ohio. Paper presented at the American Psychological Association convention, San Francisco, CA.

Fulero, S. (2000, August). The effects of stress on time overestimation: A field study. Paper presented at the American Psychological Association convention, Washington, D.C.

Steblay, N., Lindsay, R., & Fulero, S. (2000, June). A meta-analysis of sequential versus simultaneous lineup procedures. Paper presented at the annual meeting of the Society for Applied Research in Memory and Cognition (SARMAC), Miami, Florida.

Fulero, S. (2000, March). Back to the future: The 1966 ABA Standards on Free Press and Fair Trial. Paper presented at the biennial meeting of the American Psychology-Law Society, New Orleans, Louisiana.

Fulero, S. (2000, March). Lights, camera, action: The use of films and videos in the undergraduate teaching of psychology and law. Paper presented at the biennial meeting of the American Psychology-Law Society, New Orleans, Louisiana.

Fulero, S. (1999, August). HIV and the Tarasoff duty to protect: A case law review. Paper presented at the American Psychological Association convention, Boston, Massachusetts.

Fulero, S. (1999, August). Everyday life and legal values. Paper presented at the American Psychological Association convention, Boston, Massachusetts.

Fulero, S. (1999, July). Daubert and Kumho: Current legal status of scientific and clinical psychological expert testimony in American courts. Paper presented at the joint American Psychology-Law Society and European Association of Psychology and Law conference, Dublin, Ireland.

Fulero, S. (1998, August). Reliability and validity: The psycholegal research agenda after Daubert. Paper presented at the American Psychological Association convention, San Francisco, California.

Simone, S. & Fulero, S. (1998, August). Psychologists' perceived Tarasoff duty to protect with HIV-positive clients. Paper presented at the American Psychological Association convention, San Francisco, California.

Fulero, S. (1998, August). Child custody evaluations under the "Ziskin Rule." Paper presented at the American Psychological Association convention, San Francisco, California.

Fulero, S. & Hagen, M. (1998, August). On the expert testimony of mental health professionals: A debate. Presentation at the American Psychological Association convention, San Francisco, California.

Fulero, S. (1998, August). The Americans With Disabilities Act and psychological and psychiatric disabilities: An overview of the EEOC Guidelines. Paper presented at the American Psychological Association convention, San Francisco, California.

Steblay, N., Besirevic, J., Fulero, S., & Jimenez-Lorente, B. (1998, August). Pretrial publicity and jury verdicts. Paper presented as part of symposium: Penrod, S. (chair), "Psychology, law, and the media," at the 24th International Congress of Applied Psychology, San Francisco, California.

Fulero, S. (1998, March). Historical review of photospread and lineup recommendations. Paper presented as part of symposium: Wells, G. (chair), Malpass, R., Brimacombe, C.A.E., Penrod, S., Fulero, S., & Small,

M. “Good practice recommendations for lineups and photospreads,” at the American Psychology-Law Society convention, Redondo Beach, California.

Steblay, N. & Fulero, S. (1998, March). The effects of pretrial publicity on jury verdicts: A meta-analytic review. Paper presented at the American Psychology-Law Society convention, Redondo Beach, California.

Fulero, S. & Mossman, D. (1998, March). Legal psychology and legal scholarship: A review of the reviews. Paper presented at the American Psychology-Law Society convention, Redondo Beach, California.

Fulero, S., & Malmstrom, F. (1998, March). Accuracy of the mental image reconstruction technique in eyewitness estimates of velocity. Paper presented at the American Psychology-Law Society convention, Redondo Beach, California.

Fulero, S. (1997, August). Comparison of lineup recommendations. Paper presented as part of symposium: Wells, G. (chair), Malpass, R., Brimacombe, C.A.E., Penrod, S., Fulero, S., & Small, M. “Good practice recommendations for lineups and photospreads, presented at the American Psychological Association convention, Chicago, Illinois.

Fulero, S. (1997, August). Historical representation of legal psychology in introductory psychology texts and law reviews. Paper presented as part of smposium: Small, M. (chair), Fulero, S., Wrightsman, L., & Grisso, T., “History of psycholegal scholarship,” presented at the American Psychological Association convention, Chicago, Illinois.

Fulero, S. (1997, August). Insanity defense reform in Ohio. Presented as part of symposium: Fulero, S. (chair), Packer, I., O’Connor, M., Callahan, L., & Perlin, M., “Into the lion’s den: Politics, science, and insanity defense reform,” presented at the American Psychological Association convention, Chicago, Illinois.

Turner, D. & Fulero, S. (1996, March). Using British trial procedures in American cases: A more “civil” trial? Paper presented at the American Psychology-Law Society Conference, Hilton Head, S.C.

Fulero, S. (1996, March). Integration of legal psychology into the introductory psychology course: Legal psychology made “legit.” Paper presented as part of symposium: Wrightsman, L., Nietzel, M., Fulero, S., Small, M., & Hans, V. “The role of psychology and law courses in the undergraduate curriculum,” presented at the American Psychology-Law Society Conference, Hilton Head, S.C.

Everington, C., & Fulero, S. (1996, March). Competence to confess: Measuring understanding and suggestibility in defendants with mental retardation. Paper presented at the American Psychology-Law Society Conference, Hilton Head, S.C.

Fulero, S. (1996, March). Psycholegal consultation in the 90s. Paper presented at the American Psychology-Law Society Conference, Hilton Head, S.C.

Penrod, S., Fulero, S., Cutler B., & Linz, D. (1995, September). Regulating the flow of expert psychological evidence to the courts: Recent developments

in American law. Paper presented at the Fifth European Conference on Psychology and Law, Budapest, Hungary.

Fulero, S. & Everington, C. (1995, August). Competency to waive Miranda rights in defendants with mental retardation. Paper presented at the American Psychological Association convention, New York, N.Y.

Fulero, S. (chair/presenter), Lager, D. & Triplett, M. (1994, August). The lamb silenced: A critical analysis of criminal profiling expert evidence. Symposium presented at the American Psychological Association convention, Los Angeles, California.

Fulero, S., Merriman, P., Wester, W. (1994, April). Memory: Impact on Therapeutic Techniques, Practice Risks, Research, and Pending Ohio Legislation. Symposium presented at the Ohio Psychological Association spring convention, Columbus, Ohio, April 21, 1994.

Fulero, S. & Everington, C. (1993, August). Assessing retarded defendants' competency to waive Miranda rights. Paper presented at the American Psychological Association convention, Toronto, Ontario, Canada.

Martin, T., Fulero, S., & Davis, H. (1993, August). A survey of judges' opinions regarding novel trial techniques. Paper presented at the American Psychological Association convention, Toronto, Ontario, Canada.

Everington, C., Wulff, K., & Fulero, S. (1992, September). Issues in training of competence to stand trial in offenders with mental retardation. Paper presented at the State Mental Health Forensic Directors convention, Portland, Oregon.

Praeger, I., Cutler, B., Fulero, S., Rogers, R., & Bagby, R. (1992, August). Effects of varying levels of expert testimony on insanity verdicts. Paper presented at the American Psychological Association convention, Washington, D.C.

Fulero, S., & Vandecreek, L. (1992, August). Privilege in group, marital, and family therapy: A review of cases. Paper presented at the American Psychological Association convention, Washington, D.C.

Fulero, S. (1991, August). Chair, "Forensic evaluation." Panel presented at the American Psychological Association convention, San Francisco, California.

Fulero, S., et al. (1991, May). Panel Chair, The Americans with Disabilities Act. Symposium presented at the Ohio State Bar Association convention, Columbus, Ohio.

Cutler, B., Hosch, H., Bothwell, R., Brock, P., Steblay, N., McCauley, M., McAllister, H., & Fulero, S. (1991, March). "Theoretical and practical issues in the assessment of eyewitness testimony." Symposium presented at the Southeastern Psychological Association convention, New Orleans, Louisiana.

Fulero, S., & Finkel, N. (1990, August). Barring ultimate issue testimony: An "insane" rule? Paper presented at the American Psychological Association convention, Boston, Massachusetts.

Cutler, B., Praeger, I., & Fulero, S. (1990, August). Jury selection in insanity cases. Paper presented at the American Psychological Association convention, Boston, Massachusetts.

Fulero, S., Wulff, K., & Olsen-Fulero, L. (1990, August). Factor analysis of the Attribution of Rape Blame Scale. Paper presented at the American Psychological Association convention, Boston, Massachusetts.

Fulero, S. (1989, August). Recent developments in the duty to protect. Paper presented at the American Psychological Association convention, New Orleans, Louisiana.

Olsen-Fulero, L., Fulero, S., & Wulff, K. (1989, August). Who did what to whom? Modeling rape jurors' cognitive processes. Paper presented at the American Psychological Association convention, New Orleans, Louisiana.

Fulero, S. & Wilbert, J. (1988, August). Record-keeping policies: A survey of practitioners. Paper presented at the American Psychological Association convention, Atlanta, Georgia.

Fulero, S., Buckhout, R., Cutler, B., Loftus, E., Kassin, S. & Penrod, S., (1988, August). Critical perspectives on the 'battle of eyewitness experts.' Discussion hour presented at the American Psychological Association convention, Atlanta, Georgia.

Fulero, S. (1988, March). Liability risks in computerized assessment. Part of symposium, Fulero, S., Aaronson, A., Brodsky, S., & Hofer, P., "Legal issues in computerized assessment," American Psychology-Law Society, Miami, Florida.

Wilbert, J. & Fulero, S. (1987, August). The effect of the malpractice "crisis" on the practice of clinical psychology: A survey of practitioners. Paper presented at the American Psychological Association convention, New York, NY.

Evans, M., Fulero, S. & Rothbart, M. (1978, May). Mnemonic factors in the maintenance of social stereotypes. Paper presented at the Western Psychological Association convention, Los Angeles, CA.

Fulero, S. (1977, April). Perceived influence of editorial endorsements: An exception to Jones and Nisbett? Paper presented at the Western Psychological Association convention, Seattle, WA.

Fulero, S. (1977, April). Similarity and respectability as factors in the attribution of responsibility to rape victims. Paper presented at the Western Psychological Association convention, Seattle, WA.

Fulero, S., Howard, J., Jensen, C., & Rothbart, M. (1977, April). Extremity effects in stereotype formation. Paper presented at the Western Psychological Association convention, Seattle, WA.

Fulero, S. & Rothbart, M. (1976, May). Attribution of causality for important events: The profound motive fallacy. Paper presented at the Western Psychological Association convention, Los Angeles, CA.

Fulero, S., (1976, May). Messenger evaluation and news valence: The “bearer of bad tidings” revisited. Paper presented at the Western Psychological Association convention, Los Angeles, CA.

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 9-10, 2004

RESOLVED, That the American Bar Association adopts the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Police and prosecutors craft detailed guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy;

2. Police and prosecutors receive periodic training on how to implement the above-referenced guidelines,

3. Police and prosecutors receive periodic training on non-suggestive techniques for interviewing witnesses;

4. Internal mechanisms be created within police departments and prosecutors' offices to periodically update such guidelines to incorporate advances in social scientific research and in the continuing lessons of practical experience; and

5. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

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1. Courts should have the discretion, where appropriate in an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy; and

2. Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.

AMERICAN BAR ASSOCIATION STATEMENT OF BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES DATED AUGUST, 2004

A. General Guidelines for Administering Lineups and Photospreads

1. Whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect;

2. Eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make or the lack thereof;

B. Foil Selection, Number, and Presentation Methods

1. Lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition;

2. Foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect;

3. The advisability of either a sequential lineup or photospread (showing one person or photo to a witness at a time, with the witness being asked to identify or not identify each person or photo immediately after it is presented) or a simultaneous lineup or photospread (showing a witness all lineup members or photographs at the same time) should be carefully considered;

4. Police departments and prosecutors should be urged to participate in properly-designed comparative field experiments in which one group of police districts in a city or county uses simultaneous lineup and photospread methods while another group of police districts uses sequential methods;

C. Recording Procedures

1. Whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness’s confidence statements and any statements made to the witness by the police;

2. Absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.

3. Regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing

the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.

D. Immediate Post-Lineup or Photospread Procedures

1. Police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man" -- the person believed by law enforcement to be the culprit**.**

REPORT

I. *Introduction: Illustrating the Problem*

On June 5, 1999, Calvin C. Johnson, Jr. was released from prison after having served more than 15 years of a life sentence for rape.[1] Johnson was released because he had recently been exonerated by DNA evidence. Johnson's conviction had been based largely on a flawed eyewitness identification.

The rape victim, Ms. Mitchell, had selected Johnson's black-and-white photo from a photospread that included a number of full color pictures. But Ms. Mitchell selected *someone other than Johnson* during a live lineup. Johnson was clean-shaven in the photospread, but his work identification photos taken around the time of the rapes showed him sporting a very full, bushy beard. He still had the beard at the time of the lineup. The lineup was held about one week after the crime, far too soon after the rape for him to have had sufficient opportunity to grow a full beard in the interim. Yet Ms. Mitchell had told the police that her assailant was either clean-shaven or sported some "stubble."

The rape took place mostly in darkness (there was some light from the nearby bathroom shining into the bedroom), with Ms. Mitchell passing in and out of consciousness. Ms. Mitchell was white, while her assailant was African-American, as was Johnson. The police reported finding a single African-American pubic hair on Ms. Mitchell's body, a hair that police forensics examiners twice concluded could not have been Johnson's.

Ms. Mitchell had, at the request of the police, attended a preliminary hearing on another rape charge against Johnson, watching as Johnson was there identified in open court as a rapist. The two rapes were so similar that the police believed that the same man had committed both crimes. Yet Johnson was later acquitted of the second rape, with that victim's father actually congratulating Johnson because, after hearing the evidence, the father believed that Johnson was innocent of the crime.

When Ms. Mitchell identified Johnson at the trial that would eventually lead to his conviction, Ms. Mitchell claimed at one point that she was so upset at the lineup that she *purposely identified the wrong man.* She also changed her story, now saying at trial that her assailant "might have had a beard." At another point, she said, "I just wanted to pick someone out [of the lineup] and get out of there." Johnson offered alibi witnesses to further challenge the victim's testimony. Nevertheless, the jury convicted the entirely innocent Johnson.

When this error was finally brought to light, the prosecutors' office announced that too much time had passed to determine who the real rapist was. Forensics sciences professor Greg Hampikian later explained: "The DA has more pressing needs than to reinvestigate a sixteen-year-old case, especially without an available victim; meanwhile, someone has gotten away with rape."[2]

Although there were numerous likely causes of Calvin Johnson's wrongful conviction, flawed eyewitness identification was a chief contributor. Cross-racial identifications, like that made by Ms. Mitchell, the research shows, are less trustworthy than intra-racial ones; the victim had little opportunity to observe her assailant; she misidentified someone as her attacker at the lineup; and her testimony was tainted by her attendance at a hearing in another related case, all of which happened in the face of forensics evidence

[1] This summary of Calvin Johnson's case is drawn from CALVIN C. JOHNSON, JR., WITH GREG HAMPIKIAN, EXIT TO FREEDOM: THE ONLY FIRSTHAND ACCOUNT OF A WRONGFUL CONVICTION OVERTURNED BY DNA EVIDENCE XCI-XVII, 73-74, 84-133, 239-47 (2003). A more complete version of this Report will be available to the public soon.

[2] *Id.* at 281.

excluding Johnson as a suspect.[3] Johnson's conviction starkly illustrates how entirely innocent persons can be convicted when condemned by confident eyewitnesses in good faith fingering the wrong man.

The reliability of eyewitness identification is frequently questionable, as this Report will explain, even under circumstances in which the police do a much better job than they did with Calvin Johnson. Nor is Johnson's case unusual. Numerous high-profile cases of exonerations where the innocent were convicted based substantially upon inaccurate eyewitness testimony have made their way into the media.[4]

The most notorious of the recent cases was that of Anthony Porter, who was once but a few days from execution and whose experience eventually led to a complete re-examination of the death row process in Illinois.[5] Other notorious cases have been the subject of recent best-selling or well-received books.[6] Perjured or compelled eyewitness testimony is part of the problem and is addressed in a related paper.[7] The subject of this Report, however, is *mistaken* eyewitness testimony, and its status has been concisely summarized by award-winning journalist Stanley Cohen, who notes that many criminal cases commonly include the sorts of factors that wrongly took away Calvin Johnson's freedom:

> It is difficult to counter [a] mistaken identification offered in good faith by a witness who actually saw the accused. But even when the sole intent of the witness is to abet the judicial process, eyewitness accounts have been found to be generally unreliable. The original identification is often made under unfavorable conditions; the witness was likely to be a good distance away from the accused who was possibly shrouded in darkness; the glimpse of a suspect was likely a fleeting one, perhaps no more than a second or two; observations made in extreme circumstances, when adrenaline is running high, tend to be untrustworthy. When a defendant is convicted solely on the basis of such testimony, the possibility of error is exceptionally high.[8]

Cohen's point is not to suggest that eyewitnesses are routinely wrong - - an extreme position that would flatly require exclusion of most such testimony from trial.[9] Rather, Cohen apparently argues that the *risk* of error is so high that safeguards are needed to minimize that risk.[10] The state of the research into the causes of, and cures for, eyewitness error is luckily sufficiently advanced that there is widespread agreement on some ways that we can do better now.[11] In other areas, there is a dispute about whether the research has

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[3] *See infra* text accompanying notes 16-20 for a discussion of the significance of these factors.

[4] *See, e.g.*, STANLEY COHEN, THE WRONG MAN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS 39-82 (2003) (discussing many of these cases); BARRY SCHECK, PETER NEUFELD, JIM DWYER, WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 53-100 (2001) (discussing additional cases).

[5] *See* COHEN, *supra* note 4, at 41-46.

[6] *See generally* COHEN, *supra* note 4; SCHECK, *supra* note 4.

[7] *See* COHEN, *supra* note 4, at 40 (on perjured or compelled eyewitness identifications); Honorable Arthur L. Burnett, Sr., *A Preliminary Analysis of How the Criminal Justice System Handles Accomplice and Informant Testimony and Some Recommendations for Improvements* (internal report to the ABA Ad Hoc Committee on Innocence and the Integrity of the Criminal Justice System).

[8] *See* COHEN, *supra* note 4, at 39-40.

[9] *Cf.* Edward J. Imwinkelried, *Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards*, 18 CRIM. J. 28, 30 (2003) ("The problem with erroneous expert testimony is smaller than and more tractable than the problem of mistaken eyewitness testimony by layperson.").

[10] Although Cohen does not expressly state his argument in terms of risk, a fair reading of his work suggests that risk minimization is his goal, though he also sees the fear of error as grounds for opposing the irreversible punishment of death. *See* COHEN, *supra* note 4, at 39-82, 269-90. This Report expresses no opinion on the question of capital punishment. The risk of eyewitness error is present in many types of criminal cases, the vast majority of which do not involve even a potential death sentence.

[11] *See infra* Part III; Saul M. Kassin, *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405 (2001) (survey of experts reveals an agreement rate of at least 80% on many of the factors affecting eyewitness accuracy that are discussed in this report).

gone far enough to justify implementing certain new procedures without more data.[12] This Report summarizes the state of, and lessons learned from, that research. The Report concludes that the research unequivocally supports: (1) using "double-blind" procedures in which no one involved in administering a lineup or photospread knows who is the suspect; (2) carefully instructing eyewitnesses not to assume that the right person is in the line or spread; (3) increasing the number of "foils" in the line and selecting them to match the particular eyewitness's description of the perpetrator; (4) the witness's reciting in her own words how confident she was in her selection; and, whenever practicable, (5) videotaping or digitally video recording a lineup. The Report further concludes that powerful research mandates wider use of special jury instructions and expert testimony on eyewitness identification problems to assist factfinders in fairly evaluating the evidence in appropriate cases. However, concerns about the maturity of the research and its dependence on simulations rather than fieldwork caution against a too-ready embrace of one new procedure, "sequential" lineups or photospreads, in which foils and the suspect are presented to the witness one-at-a-time instead of, as is currently done, in a single simultaneous presentation of all the participants.[13] This Report does recommend, however, that the accuracy and practicability of the promising sequential techniques should be tested in comparative field studies in which some police districts use the new method while others do not, an approach similar to that recently implemented in Illinois by statute.[14] Greater detail about these proposals is contained in the *Resolution on Eyewitness Identification* attached to this Report.[15]

Part II of this Report examines the causes of eyewitness error, while Part III summarizes the data relevant to our suggested improvements for conducting lineups and photospreads. Part IV explores the data on ways to enhance the jury's ability better to gauge the quality of eyewitness testimony, with Part V summarizing other reform efforts and stating this Report's conclusions.

II. *The Causes of Eyewitness Error*

A. *Factors Affecting Identification Accuracy*

The sorts of factors that can lead eyewitnesses into or out of sin are routinely grouped into five categories, specifically, those concerning witness characteristics, perpetrator characteristics, the nature of the event (the crime) itself, post event experiences, and witnessing or testifying factors:

1. *Witness Characteristics:* Neither the eyewitness's sex, race, nor ethnicity, nor his intelligence (if within normal range), belief in having strong face-recognition skills, personality, or expectation of a future recall or recognition test have any influence on his ability accurately to identify the perpetrator. However, very young children do poorer than older ones or adults at recognizing strangers and are more susceptible to suggestion, while the elderly may have information – recall and face-recognition - - disadvantages. Witnesses intoxicated at either the time of the crime or during a later interview respectively have greater encoding and accurate recall problems.[16]

2. *Perpetrator Characteristics:* Perpetrators with distinctive appearances, such as unusual hairstyles, tattoos, or scars, are more easily recognized than are the less distinctive. Cross-racial identifications are generally inferior to within-race identifications.[17]

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[12] *See infra* text accompanying notes 34-35.
[13] *See infra* text accompanying notes 34-35.
[14] *See infra* text accompanying notes 97.
[15] *See Resolution on Improving the Eyewitness Identification Process*.
[16] BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13-17 (2002).
[17] *Id.* at 18. For more details on cross-racial identification, *see American Psychological Association, Special [Symposium] Theme: The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decisionmaking*, 7 PSYCH., PUB. POL'Y, & L. 3-262 (2001).

3. *Event Factors*: The longer the crime, the more time effectively to encode information, thus enhancing memory. Visible weapons ("weapons focus"), however, draw a witness's attention to, for example, the gun or knife, thus reducing accuracy in describing people, things, or events. Moderate levels of stress-induced physiological arousal enhance memory performance but low or high arousal levels harm performance.[18]

4. *Post-Event Factors:* The greatest memory decline occurs shortly after the crime, but memory degradation continues as more time passes. If an eyewitness commits to an identification of a mug shot, the witness is likely to identify the same person at later photo arrays, lineups, or trials, whether or not the suspect is the perpetrator. "Unconscious transference" is also a significant problem "in which an eyewitness is familiar with the suspect from some event other than the crime (perhaps, for example, because both occasionally use the same subway station), does not recall why he knows the suspect, and therefore assumes that he knows the suspect because the suspect is the perpetrator."[19]

5. *Testimonial Factors:* These factors concern the relationship between the quality of eyewitness testimony and the accuracy of identification. Counter-intuitively, a mismatch between an eyewitness's description of a perpetrator and the appearance of the suspect is often not an appropriate reason to doubt the witness's accuracy. This is so because of the difference between "recall" - - retrieving information from memory - - and "recognition," simply recognizing the right answer when someone else presents it to you. Research reveals that the quality of the recall process of describing the perpetrator is only weakly related to the accuracy of the recognition process of identifying a lineup or photospread suspect. Similarly, inconsistency among multiple perpetrator descriptions given by a single witness can be caused by variation in interview methods, interviewer expectations, or other factors, but is, in any event, not a good predictor of identification accuracy.

   Also counter-intuitively, there is a *weak* association between the eyewitness's confidence in the accuracy of an identification and its true accuracy. Confidence is also malleable and can be raised or lowered by post-crime events such as investigating officer feedback that the witness "picked the right man."[20]

Countering these factors' influence can be done at two separate stages: the input stage in which identification events are implemented by law enforcement and the processing stage in which the judicial system must evaluate the accuracy of identifications resulting during input.

III. *Improving Inputs: Police Procedures and Human Memory*

A. *The Victim or Eyewitness's Initial Report of a Crime and Pre-Identification Interviews*

Suggestion can inadvertently be introduced by the police during their first contact with a witness, such as a 911 call. Non-leading, open-ended questions; a thorough effort to obtain complete information; and careful record-keeping (ideally audio or video records, whenever possible) are among the suggestions made by research psychologists for minimizing the influence of the police on witness memory and for later accurate reporting of the witness's memory as it existed *at the time of the contact with the police.*

[18] CUTLER, *supra* note 16, at 18-20.
[19] *Id.* at 21-22.
[20] *See id.* at 22-25.

B. *The Lineup*

The main goals for improving lineup accuracy are reducing potential sources of suggestion and the influence of relative judgment processes. Research suggests that a substantial amount of guessing goes on by eyewitnesses in lineups. Sometimes guessing results in accidentally identifying a guilty party, sometimes in fingering the innocent, as defined in simulation and archival studies.[21] The potentially pernicious influence of guessing must, therefore, also be controlled. Here are some of the various techniques for accomplishing these goals:

1. *Sequential Lineups*: The usual lineup procedure is to present all suspects to the witness simultaneously in a line.[22] However, this process encourages relative judgments, that is, choosing the person who, among those in the line, looks most like the perpetrator.[23] With sequential lineups, the witness views one lineup participant at a time and is not told how many he will see.[24] As each participant is presented, the eyewitness states whether or not it is the perpetrator.[25] The witness is thus encouraged to compare the individual participant's face to the witness' recollection of the perpetrator's face rather than also comparing the participants' faces to one another in a quest for the "best match." Once an identification is made in a sequential procedure, the procedure stops.[26]

There is near uniform agreement in all the published literature that the sequential procedure "produces a lower rate of mistaken identifications when the perpetrator is absent…."[27] This conclusion was reaffirmed in a recent "meta-analysis" of studies conducted around the world using a variety of methodologies.[28] This meta-analysis concluded that false identifications were twice as likely in target-absent arrays using simultaneous presentation than when using sequential presentation.

The vast majority of researchers also conclude that sequential methods result in "little loss of accuracy when the perpetrator is present."[29] However, what constitutes a "little loss" is debatable. Thus the same "meta-analysis" noted above reported a 15 percent loss in correct identifications by foregoing simultaneous methods in favor of sequential ones.[30] Professor Steven Penrod suggests that this loss may be attributable, however, largely to former "lucky guessers" now making no choice whatsoever, thus constituting no real loss at all. Sequential methods arguably function best, however, only in conjunction with the "blind lineup" procedure, in which no one involved in administering the lineup knows who is the suspect, a procedure about which there is no scientific dispute and is also of critical importance in administering accurate simultaneous lineups. These methods may face resistance in the field because they differ so much from the old ones and are not self-evidently superior based on officers' everyday commonsense.[31] Nevertheless, some police departments in the United States are already making tentative efforts toward adopting sequential methods.[32]

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[21] *See* Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. J. 37, 37-45 (2003).
[22] *See* CUTLER, *supra*, note 16, at 39.
[23] *See* Michael J. Saks, *et. al*, *Model Prevention and Remedy of Erroneous Convictions Act, 22ARIZ. ST. L.J. 665 (2001) [hereinafter* Saks, *Model Act*].
[24] *See* CUTLER, *supra* note 16, at 39.
[25] *Id.* at 39.
[26] *Id.* at 39.
[27] Saks, *Model Act, supra*, note 23, at 686; *see also* Gary L. Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUMAN BEHAVIOR 603, 639 (1998); Penrod, *supra* note 21, at 46 (summarizing literature); CUTLER, *supra*, note 16, at 39; Kassin, *supra* note 11, at 410-11.
[28] *See* Penrod, *supra*, note 21, at 46.
[29] Saks, *Model Act, supra*, note 23, at 686 (citing Wells, et. al., *supra*, note 27, at 639-40).
[30] *See* Penrod, *supra*, note 21, at 46.
[31] *See* Wells et. al., *supra*, note 27, at 617.
[32] *See* CUTLER, *supra* note 16, at 56-67.

Justice Robert Kreindler also ordered a sequential lineup in a recent case in which he concluded that the scientific community was "unanimous in finding that sequential lineups are fairer and result in a more accurate identification."[33] Justice Kreindler further noted that he found not "a single scientific article criticizing the sequential lineup or criticizing the scientific method used by psychologists in their experiment."[34]

Justice Kreindler was not, however, entirely correct. There is a growing dissenting view among some very well-respected social scientists that the research has not proceeded far enough to determine under what conditions, if any, a sequential lineup is to be preferred to a simultaneous lineup.[35] Moreover, say some researchers, it may be that there are factors other than the simple order of presentation that are the cause of better outcomes for sequential lineups in many experiments. Additionally, field studies have not been done to determine the practicability of sequential methods, though new technologies entering the marketplace now may substantially reduce the time and out-of-pocket costs involved. These dissenters do not argue that simultaneous lineups are the preferred method, and some seem to believe that sequential lineups will eventually be proven superior in many circumstances. Nevertheless, their current view, if accepted, suggests that the scientific evidence is insufficient to choose one method over another; therefore, either might do. To add to the knowledge base and to test the practicability of the sequential method, Illinois has by statute mandated that some police districts in cities of varying sizes uses sequential methods, while others use simultaneous methods, with careful tracking of the results and problems by social scientists or by others working under their guidance. Although the dissenters are thus far few in number, this Committee finds their critique persuasive and the Illinois approach most consistent with an effort to improve the long run accuracy of lineups and thus the chances of convicting the guilty while acquitting the innocent.

2. *Lineup Size:* Lineups in the United States typically involve five or six participants.[36] Given the substantial evidence of eyewitness guessing, larger lineups should reduce the chances of a false positive - - of a guesser selecting the (in fact innocent) suspect focused on by the police. The math is straightforward: there is 1 in 6 chance of selecting the suspect by entirely random guessing (if no other forces are at work) in a 6 person lineup but only a 1 in 12 chance of doing so in a 12 person lineup.[37]

There is no magic correct number. Britain, for example, uses arrays of 9.[38] The point is simply that any increase in size will help to reduce the false positive rate.[39] But many researchers believe that 6 person lineups create an unacceptably high risk of error, one study concluding, for example, that in real-world 6 person lineups the likely risk of a false positive would be 10% *even if most of the other recommendations to*

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[33] *State of New York v. Rahim Thomas* (2001). Although the vast majority of researchers accept the superiority of sequential methods, Justice Kreindler was wrong to find, "unanimity" among those researchers. *See infra* text accompanying notes 62-76.
[34] *Id. See also* CUTLER, *supra*, note 16, at 57. Other New York State judges have disagreed, however, with Judge Kreindler, largely doing so in unpublished decisions collected by Committee member Dino Amoroso.
[35] The sources relied upon for the position stated in this paragraph are Ebbe B. Ebbesen and Heather D. Flowe, *Simultaneous v. Sequential Lineups: What Do We Really Know?*, www.psy.ucsd.edu%7eeebbesen/SimSeq.htm2003; Dawn E. McQuiston, Roy S. Malpass, & Colin Tredoux, *Sequenital v. Simultaneous Lineups: A Review of Method and Theory* (draft); Amina Memon & Fiona Gabbert, *Unraveling the Effects of Sequential Presentation in Culprit Present Lineups* (in press); Kassin, *supra* note 11.
[36] Penrod, *supra*, note 21, at 45.
[37] *See id.* at 45.
[38] *See id.* at 45. *But see* Roy Malpass, *General Principles of Lineup Fairness Evaluation*, www.eyewitness.utep.edu/consult04.html (last visited April 13, 2004) (American Psychology and Law Policy guidelines for constructing fair lineups suggest, in Dr. Malpass's view, a lineup size of at least 9 foils, meaning an array of at least 10 persons when including the target).
[39] *See* Penrod, *supra*, note 21, at 45.

improve lineup accuracy were followed.[40] This report therefore urges larger size lineups than is currently the case whenever practicable. However, given debate over the necessary lineup size, this report does not mandate a specific minimum number of foils, leaving that to the judgment of local jurisdictions in light of the teachings of science and the resources available to local departments. It is useful to note, nevertheless, that computerized databases should make it easier to have more foils in photo arrays than in live lineups so that there need not necessarily be the same required minimum number of foils in both sorts of procedures.

3. *Foil Selection:* Foils should be selected so that they fit the witness's description of the culprit rather than that the foils and the suspect look like one another.[41] If all foils fit the suspect description, then a witness cannot guess based on who comes closest to that witness's description - - a relative judgment process and a reasoned guess.[42] On the other hand, if every effort is made to select foils because they all look so much like the suspect rather than because they fit the suspect description, then, at some point, "the lineup would be composed of clones," unduly interfering with recognition of a guilty suspect.[43] Furthermore, there are a small number of special circumstances in which alternative foil-selection strategies make more sense.[44]

   At the same time, the lineup must be designed to avoid the suspect's standing out unduly from the foils. For example, if the suspect is the only one wearing clothes similar to those worn by the perpetrator during the crime,[45] that would draw undue attention to that suspect.[46]

4. *Avoiding Instruction Bias:* The instructions given by the lineup administrator can significantly raise the risk of false identification, even where the biases are subtle.[47] Eyewitnesses must be told that the perpetrator may not be in the lineup, that they should not therefore feel that they must make an identification, and that the person administering the lineup does not himself know which person is the suspect.[48] Non-verbal cues must also be avoided by the lineup administrator. [49] Of course, where there are multiple eyewitnesses, each lineup must be conducted with one witness at a time and out of the sight of other witnesses.

5. *Collecting Confidence Judgments:* "A clear statement should be taken from the eyewitness at the time of the identification and before any feedback as to whether he or she identified the accurate culprit."[50] This accurately preserves the witness's confidence level at the time the identification was made and before other influences can taint or alter the witness's memory of how confident he was in his choice.[51] Ideally, the witness should never be told whether he selected the "right man" so that his confidence is not artificially inflated by the time of trial.

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[40] *See, e.g.*, Wells, et. al., *supra* note 29, at 635 (describing the 10% error rate as "far higher than what would seem acceptable to the justice system."); Penrod, *supra* note 48.
[41] *See* Penrod, *supra*, note 21, at 45-46.
[42] *See* Wells et. al., *supra*, note 27, at 632.
[43] *See id.* at 632.
[44] *See id.* at 632-34.
[45] *See* CUTLER, *supra*, note 16, at 40-41.
[46] *See* Wells, et. al., *supra*, note 27, at 630.
[47] *See* CUTLER, *supra*, note 16, at 34.
[48] *See* Penrod, *supra*, note 21, at 45.
[49] *See* CUTLER, *supra* note 16, at 34.
[50] Penrod, *supra*, note 21, at 46.
[51] *See id.* at 46. Psychology Professor Brian L. Cutler summarizes much of the research on the relationship between a witness's confidence in an identification and its accuracy thus:

> [T]he relationship between a witness's confidence and the accuracy of her testimony or identification is modest at best. This is because confidence and accuracy are influenced by different things. Some people are always confident, but not always right. Others may be rarely confident, but frequently correct. The bigger problem with eyewitness confidence is that it is malleable.

6. *Accurately Record the Lineup, Including Videotaping*: Accurate records of a lineup procedure can help to improve later judicial and jury assessment of the quality of the lineup and the accuracy of the identification.[52] Videotaping would especially enable accurate recreation of lineup circumstances.[53] However, multiple cameras are likely necessary to achieve this goal most effectively; the procedure does not itself improve lineup accuracy; and videotaping can be costly in terms of time, money, and equipment. [54] Nevertheless, on balance, videotaping or digital video recording of lineups seems highly desirable, where practicable.

C. *Show-ups*

Show-ups involve showing a single suspect to an eyewitness and asking him to identify or reject the suspect as the perpetrator.[55] There is clear evidence that show-ups are more likely to yield false identifications than properly constructed lineups.[56] Show-ups hint to the witness that the police believe that "this is the man," a highly suggestive message.[57] Moreover, given no other options, it is often hard

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CUTLER, *supra* note 16, at 24-25. Concerning this last point, the research reveals that telling a witness that she made the correct choice increases confidence while reducing the confidence-accuracy correlation. *See* Steven Smith, et. al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed in the Cross-Race Situation?*, 7 PSYCH., PUB. POL'Y, & LAW 153, 165 (2001). Repeated post-event questioning can have a similar effect. *See id.* at 165. *The bottom line*: The at-best modest association between confidence and accuracy when measured "'cleanly' - - just after an interview or identification and without any social influence" - - degrades as social influences seep in with the passage of time. *See* CUTLER, *supra* note 16, at 25. Therefore, prompt recording of a witness's stated confidence level elicited in a non-suggestive manner immediately after the identification is essential. *See* Penrod, *supra* note 21, at 46.

[52] *See* Wells et. al., *supra*, note 27, at 640.

[53] *See id*.

[54] *See id.* at 641.

[55] *See* ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 788 (2d ed. 2003). There is some research suggesting that show-ups may be widely used. Thus one study found that 55% of identifications in a 488 case sample over a four year period in a major metropolitan area were show-ups; another study found a show-up rate of 30% in El Paso, Texas; and an intensive study of one Illinois detective found a 77% show-up rate. *See* Steblay, *et. al., Eyewitness Accuracy Rates In Police Show-up and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUMAN BEH. 523, 524 (2003) (summarizing research) [hereinafter Steblay, E*yewitness Show-up Accuracy Rates*].

[56] Wells et. al., *supra*, note 27, at 631. However, a more recent meta-analysis of the research done on the accuracy of show-ups versus lineups strikes a more cautionary note. *See* Steblay, *Eyewitness Show-up Accuracy Rates, supra* note 114. These researchers found only eight papers on the subject, with conflicting results; found further that, depending on the measure chosen, under certain conditions show-ups may be no more dangerous for the innocent than are lineups, though using other measures the opposite conclusion might be reached; and found inadequate exploration of the impact of a wide array of variables on accuracy. Their conclusion, however, was that the "data currently available leave us with residual concern regarding potential dangers of show-ups and with a strong appreciation of the need for research that will specifically address show-up accuracy under realistic conditions comparing competent practice with biased procedure." *Id.* at 539. Overall, there was a "paucity of data and…[a] need for more deliberate attention to show-ups." *Id.* at 539.

A few related points must be noted. For any identification method, accuracy declines as the time between the crime and the identification increases, thus raising the number of false identifications. *See* Otto H. Maclin, et. al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCH., PUB. POL'Y, & L. 134, 136-37 (2001). If part of the argument in favor of show-ups is that they enable prompt identifications when memories are the most fresh, that argument vanishes for show-ups done significantly after the time of the crime. *But see id.* at 538 ("The fact that the show-up generally occurs shortly after the crime may further convince witnesses that the suspect is unlikely to be innocent. They may ask themselves, 'How many people can there be in this area that are wearing clothes like that?"' But more research on clothing bias is needed). Moreover, new software programs usable on laptops or personal digital assistants combined with digital camera technology enable the prompt creation of on-the-scene video or photographic lineups by either simultaneous or sequential methods, perhaps in the near future further minimizing the need-for-urgent-action justification for using show-ups. *See* Otto H. Maclin, et. al., *PCE_Basic: A Computerized Framework for the Administration and Practical Application of Research in Eyewitness Psychology* (March 2004) (paper presented at the 2004 Annual Conference of the American Psychology and Law Society).

[57] *See* Wells, *supra* note 27, at 631.

independently to judge the accuracy of the witness's choice.[58] On the other hand, there is some research suggesting that "a show-up is preferable to a poorly constructed lineup,"[59] though well-constructed lineups are unquestionably the best choice.[60] Furthermore, show-ups can enable the quick release of innocent persons at the crucial early stages of an investigation. [61] Many representatives of law enforcement at the recent American Judicature Society Conference on Wrongful Convictions described show-ups as common and as essential to effective law enforcement, contrary to the constitutional mandate that they be used only when "necessary." Given these competing concerns, it is difficult, absent further research, to craft a general rule concerning when even prompt show-ups should or should not be permissible, so this Report postpones any recommendation on this subject.

D. P*hotospreads*

Photo arrays are governed by substantially the same principles as for lineups. Thus blind and sequential spreads of adequate size, with foils selected to match eyewitness descriptions, with efforts made to avoid the suspect's standing out, and with proper instructions from the lineup administrator, are generally advised by researchers.[62] One study comparing subject responses to photos of lineups versus videotaped lineups maintains that a photo of a lineup and a photo array (a collection of photos of individuals) are very different things.[63]

Photo arrays are probably becoming increasingly important. As a Washington Post investigative staff writer recently explained:

> Like woolen uniforms, wooden batons and six-shot revolvers, the old-fashioned lineup is a vanishing part of police work. The DC police department is the only one in the Washington area that still uses it regularly, and only a decade ago it conducted 300 lineups a year.
>
> Police departments today are far more apt to ask victims or witnesses to identify photographs of suspects instead of the suspects themselves. Detectives can use computer programs to comb through photo databases and can quickly create an array of pictures from which a suspect can be identified at any time or place.
>
> A live lineup is "a big hassle, compared to what we can do with what's already on the computer," said Capt. John Fitzgerald of the Montgomery County police.[64]

Some in law enforcement continue to be lineup advocates, however, noting that "lineups display a suspect's profile, posture and other features that a simple mug shot cannot capture, all of which can aid the

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[58] *See id.* at 631.
[59] Saks, *Model Act, supra* note 23, at 687.
[60] *See id.* at 687.
[61] *See id.* at 687.
[62] *See* CUTLER, *supra*, note 16, at 31-32.
[63] *See* Tim Valentine & Pamela Heaton, A*n Evaluation of the Fairness of Police Lineups and Video Identifications,* 13 Applied Cognitive Psychology 559 (1999).
[64] David A. Fahrenthold, L*ack of Suspect Look-Alikes Helps Lead to Demise,* WASH. POST, April 19, 2004, A01. The Post reporter explained further:

> D.C. Police have trouble not only in finding enough officers who bear some resemblance to the suspect, but also in locating officers who can spare the time to go to police headquarters when they could be patrolling the streets or investigating crimes. These human scavenger hunts can take hours, they said.

victim or witness in making an identification."[65] Lineups also add the dimension of voice that is missing from photospreads.[66] As former United States Attorney for the District of Columbia, Joseph E. diGenova, explains: "They [the witnesses] didn't look at a photo when the crime was committed. They looked at a person."[67]

If photospread use is indeed rising relative to lineup frequency, that merely underscores the importance of using the same principles for sound identification procedures, whether done by lineup or photospread.

Caution in administering photospreads and show-ups is especially important because flawed ones can easily taint later lineup and at-trial identifications. [68]

IV. *Improving the Processing Stage*

Once an identification has been made at a lineup, show-up or photo array, a new set of concerns must be addressed: How, if at all, can we improve factfinders' abilities properly to evaluate the fairness and accuracy of lineup identifications. A variety of options have been suggested. Here we discuss just two that we found most promising: use of experts and revamped jury instructions.

A. *Expert Testimony*

There is substantial psychological research establishing that eyewitness identification and memory processes are not common knowledge[69] and correspondingly not within the knowledge of most jurors.[70] Jurors are likely unaware of such phenomena as weapons focus, retention intervals, and instruction bias.[71] Wells and colleagues summarize matters thus:

> Taken together, the survey, post diction and mock-juror experiments, and the confidence-accuracy studies converge on a worrisome set of conclusions: Jurors appear to overestimate the accuracy of identifications, fail to differentiate accurate from inaccurate eyewitnesses - - because they rely so heavily on witness confidence, which is relatively nondiagnostic - - and are generally insensitive to other factors that influence identification accuracy. Furthermore, this picture is even gloomier when one considers that eyewitness confidence proves to be highly malleable.[72]

Expert testimony is thus needed to educate jurors. Moreover, much of such expert testimony, if properly presented by a qualified witness, should logically survive scrutiny under *Daubert* and other potential hurdles to admissibility. Nevertheless, the courts are divided on the question. Some state and federal courts have found such expert testimony inadmissible because it concerns knowledge within jurors' everyday understanding[73] or because cross-examination is deemed adequate to reveal deficiencies in eyewitness

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] CUTLER, *supra* note 16, at 42-44.
[69] *Id.* at 129-30.
[70] Wells et al., *supra*, note 27, at 354.
[71] *Id.* at 354.
[72] *Id. at 454.*
[73] *See, e.g., U.S. v. Larkin*, 978 F. 2d 964 (7th Cir. 1992); *U.S. v. Purham,* 725 F. 2d 450 (8th Cir. 1974); *U.S. v. Fosher,* 590 F. 2d 381 (1st Cir. 1979); *State v. Gaines,* 260 Kan. 752 (1996); *Commonwealth v. Ashley,* 427 Mass. 620 (1998); *State v. Coley,* 32 S. W. 4d 831 (Tenn. 2000); *Commonwealth v. Simmons,* 541 Pa. 211 (1995).

testimony.[74] Other courts leave it within the discretion of the trial judge to admit or exclude expert testimony, such trial-judge-deference apparently being the predominate view among both federal and state courts.[75] Still other jurisdictions allow expert testimony only under specific circumstances.[76]

In a recent study, researchers found that expert testimony enhances jurors' sensitivity to the factors that influence identification accuracy without overly increasing juror skepticism of the witness's identification.[77] These conclusions are largely consistent with numerous earlier trial simulation studies concluding that expert testimony does indeed increase juror awareness of factors affecting eyewitness accuracy, assists them in evaluating eyewitness testimony effectiveness, and reduces conviction rates.[78]

D. *Jury Instructions*

Some courts give special instructions about eyewitness testimony, often as a replacement for expert testimony. The earliest and most well-known of these is the *Telfaire* instruction.[79] The *Telfaire* instruction, however, omits many important factors and can be misleading, for example, by suggesting that witness confidence is a good predictor of eyewitness accuracy when the research shows otherwise.[80] The "Revised Telfaire Instruction," proposed by Professor Edith Greene, has been found in her own jury research to be more effective than the original *Telfaire* instruction.[81] This revision is simpler, more accurately conveys the lessons of the research, and explains the processes by which various factors affect eyewitness memory.[82] But, in the view of one of the leading experts in the area, California's *Wright* instruction does an even better more thorough job.[83] The *Wright* instruction can readily be updated with new research and easily tailored to the factors important to a particular case.[84]

In most jurisdictions, the question whether a jury instruction is proper is left to the trial court's discretion. Some courts find an instruction necessary where the evidence raises serious doubts as to the accuracy of an

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[74] *See e.g., U.S. v. Poole,* 794 F. 2d 462 (9th Cir. 1986). Support for the assertion that expert eyewitness identification testimony by qualified witnesses should survive *Daubert* scrutiny and related admissibility tests can be found in CUTLER, *supra* note 163, at 125-32.

[75] *See e.g., U.S. v. Curly,* 977 F. 2d 1042 (7th Cir. 1992); *U.S. v. Hudson,* 884 F. 2d 1016 (1st Cir. 1995); *U.S. v. Blade,* 811 f. 2d 461 (8th Cir. 1987); *U.S. v. Langford,* 802 F. 2d 1176 (9th Cir. 1986); *U.S. v. Brien,* 59 F. 3d 274 (1st Cir. 1995), *cert. denied,* 516 U.S. 953 (1995); *U.S. v. Hicks,* 103 F. 3d 837 (9th Cir. 1996); *State v. Chapple,* 135 Ariz. 281 (1983); *State v. Nordstrom,* 200 Ariz. 229 (2001); *People v. Lee,* 96 N.Y. 2d 157 (2001); *State v. Cole,* 147 N.C. App. 637 (2001).

[76] *See e.g., State v. Moon,* 45 Wash. App. 692 (1986); *U.S. v. Hines,* 55 F. Supp. 2d 62 (D.Mass. 1999); *Brodes v. State,* 250 Ga. App. 323 (2001); *People v. Whittington,* 74 Cal. App. 3d Supp. 806 (1997).

[77] *See* Jennifer Devenport, Brian Cutler, Veronica Stinson, & David Kravitz, *How Effective Are the Cross-Examination and Expert Testimony Safeguards? Juror' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures,* 87 J. Applied Psych. 1042 (2002).

[78] *See, e.g.,* S. Fox & G. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock-Juror Judgment,* 10 L. & Human Beh. 387 (1980); Elizabeth Loftus, *Impact of Experts Psychological Testimony on the Unreliability of Eyewitness Identification, 65 J. of Applied Psychology* 9 (1980); G. Wells, R. Lindsay & J. Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony,* 4 L. & Human Behavior 2785 (1980). *See also* BRIAN L. CUTLER & STEVEN L. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 240 (1995) (concluding that various studies support this conclusion: "Expert testimony improve[s] sensitivity without affecting jurors' overall level of skepticism about the identification."). There is, however, reason to believe that identifying errors in *cross-racial identifications* may still be particularly difficult, even for the most well-informed and well-instructed juries. *See* Smith, *supra* note 106, at 165-67.

[79] *See United States v. Telfaire,* 469 F. 2d 552, 558-59 (D.C. Cir. 1979).

[80] *See* CUTLER, *supra,* note 16, at 159-60.

[81] *See* Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision,* 18 J. APPLIED SOCIAL PSYCH. 252, 252-76 (1988); CUTLER, *supra,* note 16, at 160-63) (reprinting the revised instruction).

[82] *See* CUTLER, *supra,* note 16, at 163.

[83] *See id.* at 163-68 (also reprinting the *Wright* instructions, which was first articulated in *People v. Wright,* 43 Cal. 3d 399 (1987)).

[84] *See id.* at 168.

identification.[85] Omission of an instruction is usually found to be an abuse of discretion only where identity is *the* central issue, there is no corroborating evidence, and the circumstances raise doubts about the reliability of the defendant's identification.[86] Some jurisdictions, by contrast, hold as a general proposition that special instructions are unnecessary.[87] Still others consider it adequate to use only general instructions about judging the credibility of any witnesses,[88] or special instructions to be unnecessary where identification testimony has been corroborated by other evidence.[89] Jury instructions in other areas generally have not, however, had a good record of sufficiently altering jury reasoning processes as intended so that the efficacy of a more specific instruction, at least absent other reforms, such as use of expert testimony on the subject and improvement of the quality of identification procedures themselves, is in doubt.[90] Jury instructions about eyewitness identification accuracy tend to instruct jurors on general principles, such as "unconscious transference," that are relevant to the facts involved in a particular case but do not more specifically instruct the jury about how those principles apply to the case at hand.[91] The instructions are necessarily general because even experts cannot reliably opine after the fact that a particular identification was reliable. Generality also avoids "usurping the jury's role" as factfinder. [92] Nevertheless, some prosecutors object to specific instructions precisely because, in their view, generalities tell the jury nothing about the particular case.[93] Some judges might also hesitate to give instructions not supported by expert testimony at the particular trial.[94] On the other hand, jury instructions on the areas in which there is widespread scientific consensus can save time, much in the way that operation of the doctrine of judicial notice does.[95] Moreover, there is reason to believe that well-crafted jury instructions in this area can at least have some positive impact, however modest, on creating a more-informed jury better able to reach a rational decision.[96]

V. *Other Efforts at Reform and Conclusions*

Well-known efforts at reform have been undertaken by the National Institute for Justice (NIJ), the New Jersey State Police, Former Illinois Governor Ryan's Commission on Capital Punishment, and North Carolina's Actual Innocence Commission.[97] Here we offer the briefest summaries of those approaches and a comparison among them.

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[85] *See e.g., State v. Harden*, 175 Conn. 315 (1978); *Commonwealth v. Ashley*, 427 Mass. 620 (1998); *State v. Mann*, 56 P. 3d 212 (Kan. 2002); *State v. Pierce*, 330 N.J. Super. 479 (2001).
[86] *See e.g., State v. Cromedy*, 158 N.J. 112 (1999).
[87] *See e.g., State v. Chatman*, 109 A112. 275 (1973), *cert. denied*, 414 U.S. 1010 (1973); *State v. Osorio*, 187 Ariz. 579 (1996); *State v. Taft*, 57 Conn. 19 (2000); *Young v. State*, 226 Ga. 640 (1997).
[88] *See e.g., McLean v. People*, 172 Colo. 338 (1970); *Riley v. State*, 268 Ga. 640 (1997); *State v. Jones*, 273 S.C. 723 (1979)), or the availability of an alibi (*See e.g., State v. Valencia*, 118 Ariz. 136 (1977); *State v. Sloan*, 575 S.W. 2d 836 (Mo. App. 1978).
[89] *See e.g., Taylor v. State*, 157 Ga. App. 212 (1981); *Gunning v. State*, 347 Md. 332 (1997).
[90] *See* generally RANDOLPH JONAKAIT, THE AMERICAN JURY SYSTEM 202-15, 290-94 (2003).
[91] *See* CUTLER, *supra*, note 16, at 163-68.
[92] *See* generally David L. Faigman, et. al., SCIENCE IN THE LAW: SOCIAL SCIENCE ISSUES (2002).
[93] *See* Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony*, 7 PSYCH. PUB. POL'Y. & L. 247 (2001).
[94] This view was expressed by one sitting judge at the Criminal Justice Section's Spring 2004 Council Meeting at which this Report and its associated recommendations were discussed.
[95] *See* STEVEN FRIEDLAND, ET. AL., EVIDENCE LAW AND PRACTICE (2000)(discussing judicial notice).
[96] *See* Christian A. Meissner & John Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, 7 PSYCH., PUB. POLICY, & L. 3, 25 (2001) ("cautionary jury instructions may have some potential…assuming that they contain accurate information…") (summarizing research).
[97] The summary of these reports in this section is drawn from reviewing the following sources: CUTLER, *supra* note 19, at 45-47, 56-57; *DOJ-Suggested Standards for Pretrial Identifications* 376-83; *The JusticeDepartment Guidelines: An Incomplete Attempt to Remedy Police Contamination, reprinted in* WRONGFUL CONVICTIONS: A CALL TO ACTION 379, 379-83 (The Criminal Justice Institute of Harvard Law School, April 19-20, 2002); *Attorney General Guidelines for Preparing and Coinducting Photo and Live Lineup Identification Procedures, reprinted in* WRONGFUL CONVICTIONS: A CALL TO ACTION, *supra*, at 387-93; *Ryan Commission Report*; Saks, et al., *Model Act*, *supra* note 23; SB 472 and Edwin Colfax, *Status of Action on Recommendations of the Illinois Goivernor's Commission on Capital Punishment*, www.northwestern.edu/depts./clinics/wrongful/documents/GCEStatus.htm; and *North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification.*

Three of these four organization's reports mandate double-blind lineups, with the fourth (DOJ) acknowledging that double-blind is the best practice. These same three reports mandate sequential lineups, with DOJ acknowledging their likely advantages but questioning their practicability absent field studies. The Illinois state legislature, as noted above, rejected the Ryan Commission's mandating of sequential procedures, instead adopting a pilot study requiring three police districts, each in police departments in municipalities of various sizes, to use sequential procedures and to evaluate their effectiveness and practicability using mechanisms "consistent with the most objective scientific research methodology." This Council recommends a conservative approach similar to that adopted by Illinois. All these reports mandate a specific *minimum* number of lineup or photospread foils, but these numbers, while minima and not maxima, are still smaller than the best practices suggested by the science. However, rather than specify a precise number, and given resource concerns, this Council has simply recommended embracing the principle that there should, where practicable, be a sufficient number of foils to minimize the risk of error by guessing, an approach that makes larger numbers of foils aspirational, but not mandatory, and that allows for local variation and change as the teachings of science improve. Most of the remaining recommendations by this Council concerning lineup and photospread procedure are largely inspired by similar variations adopted in one or another of these reports. The best practices recommended in this Report – including blind lineups, experimental use of sequential methods, enhanced number of foils, expert testimony, and special jury instructions -- are fully supported by the scientific data and will go far toward improving identification procedure accuracy.

Respectfully submitted,

Norman Maleng, Chair, Criminal Justice Section, August 2004

GENERAL INFORMATION FORM

1. Summary of Recommendation

This recommendation on eyewitness testimony seeks to increase the chances of convicting the guilty while reducing the risks of convicting the innocent by reforming eyewitness identification procedures, such as lineups and photospreads, to improve their likely accuracy. The primary components of the recommendation are that police and prosecutors should draft detailed guidelines to improve the accuracy of eyewitness identification procedures; that those guidelines should at least address the topics and reflect the teachings of the ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures; and that police and prosecutors should receive periodic training in these procedures and create internal mechanisms for updating them. The recommendation also states that, where appropriate in an individual case, courts should: (1) have the discretion to allow properly qualified experts to testify on the factors affecting eyewitness accuracy and, (2) when there has been a pretrial identification of the defendant, and identity is a central issue in a case tried before a jury, consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup and photospread accuracy.

2. Approved by Submitting Entity.

This recommendation was approved by the Criminal Justice Section Council at its April 17-18, 2004 meeting.

3. Similar Recommendations Submitted Previously.

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. Relevant Existing ABA Policies and Affect on These Policies.

There are no relevant existing ABA Policies.

5. Urgency Requiring Action at this Meeting.

The problem of wrongful convictions has recently received widespread attention as numerous defendants have been exonerated after spending years in prison, while the real culprits have gone free. Public pressure and pressure within the legal profession for quick and effective improvements in our system of justice is intense. States and localities throughout the nation are considering a variety of reforms. If the ABA does not act now, it will lose the opportunity to influence this national debate in a positive way. This urgency is greatest in the case of eyewitness misidentification, which is the single largest contributor to mistaken convictions.

6. Status of Congressional Legislation (If applicable).

No legislation is currently pending.

7. Cost to the Association.

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the

recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest (If Applicable).

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the August 2004 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:
All Sections and Divisions

10. Contact Person (Prior to 2004 Annual Meeting).

Prof. Andrew Taslitz
Howard University School of Law
2900 Van Ness St., NW
Washington, DC 20008
Phone: (202) 806-8029
E-Mail: ataslitz@law.howard.edu

11. Contact Persons (Who will present the report to the House).

Neal R. Sonnett
Law Offices of Neal R. Sonnett
One Biscayne Tower
Two South Biscayne Blvd. Suite 2
Miami, Florida 33131
Phone: (305) 358-2000
FAX: (305) 358-1233
E-Mail: nsonnett@sonnett.com

Stephen Saltzburg
George Washington University
School of Law
720 20th Street, NW - Room B-303F
Washington, DC 20006
Phone: (202) 994-7089
FAX: (202) 994-7143
E-Mail: ssaltz@main.nlc.gwu.edu

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UNITED STATES OF AMERICA, PLAINTIFF, v. GREGORY SULLIVAN, DEFENDANT.

CRIMINAL ACTION NO. 02-45-JBC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, COVINGTON DIVISION

246 F. Supp. 2d 696; 2003 U.S. Dist. LEXIS 3015

January 31, 2003, Decided
January 31, 2003, Filed

DISPOSITION: [**1] Plaintiff's motion to exclude the defendant's expert denied, and the defendant's motion to admit expert testimony granted.

CASE SUMMARY:

PROCEDURAL POSTURE: In a criminal case, the United States moved to exclude expert testimony on the subject of eyewitness identification and defendant moved to admit the same. The court conducted a Daubert hearing on the motions.

OVERVIEW: Defendant proffered the testimony of an expert who testified at the Daubert hearing about general theories of memory and the impact of various factors on the reliability of eyewitness identification. The expert's testimony was scientific and sufficiently reliable under Daubert. In addition, the expert was qualified to testify concerning memory and eyewitness identifications. The United States argued that not all factors that could affect the accuracy of eyewitness identifications were present in the instant case, and, therefore, the expert's testimony would not assist the jury. The court disagreed; although testimony concerning some factors not implicated by the eyewitness identifications in the instant case were not relevant and, thus, were excluded, if evidence elicited at trial showed that a particular factor might have influenced an eyewitness's identification of defendant, the expert's opinions could be applied and testimony on such factors was relevant. Contrary to the United States' argument, the court found that the expert's testimony would educate, not confuse, the jury.

OUTCOME: The court denied the United States' motion and granted defendant's motion.

LexisNexis(R) Headnotes

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
[HN1] While courts have traditionally hesitated to admit expert testimony on eyewitness identifications, the current trend in many courts, including the United States Court of Appeals for the Sixth Circuit, is to admit such testimony, at least in some circumstances.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
[HN2] The admissibility of expert testimony is governed by *Fed. R. Evid. 702*.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
[HN3] See *Fed. R. Evid. 702*.

Criminal Law & Procedure > Evidence > Scientific Evidence > Daubert Standard
[HN4] The United States Supreme Court has clarified the trial court's role as a gatekeeper under *Fed. R. Evid. 702*. As a gatekeeper, the court must determine that the expert's testimony, whether scientific, technical, or otherwise falling under Rule 702, is relevant and reliable.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
Criminal Law & Procedure > Evidence > Scientific Evidence > Daubert Standard
[HN5] A non-exhaustive list of factors guides a federal court's inquiry into whether proposed scientific evidence is relevant and reliable: (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review or publication; (3) its known or potential rate of error; and (4) whether the theory has gained general acceptance in its field. These factors may not apply in every instance and the trial court has broad latitude in determining the reliability of an expert witness's testimony.

Criminal Law & Procedure > Evidence > Scientific Evidence > Daubert Standard
[HN6] Daubert does not require universal acceptance--only general acceptance. That some scientists in a field disagree with an expert's theories or conclusions does not render those theories or conclusions unreliable under Daubert.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
Criminal Law & Procedure > Evidence > Scientific Evidence > Daubert Standard
[HN7] After determining whether proposed scientific evidence is reliable, the court must consider whether the expert testimony is relevant and will assist the trier of fact.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
[HN8] Regarding the relevance of expert testimony about eyewitness identification, many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive.

Evidence > Relevance > Confusion, Prejudice & Waste of Time
[HN9] *Fed. R. Evid. 403* provides for the exclusion of relevant evidence where the probative value of the evidence is substantially outweighed by its tendency to confuse the issues or mislead the jury.

Evidence > Witnesses > Expert Testimony
Criminal Law & Procedure > Evidence > Expert Testimony
[HN10] Some factors affecting perception, such as the acuity of the witness's vision or the quality of light at the scene, are within the ordinary knowledge of jurors and are not, therefore, appropriate subjects for expert testimony.

COUNSEL: Kerry L. Neff, Covington, KY, for defendant.

Gary J. Sergent, O'Hara, Ruberg, Taylor, Sloan & Sergent, Covington, KY, for defendant.

Laura Klein Voorhees, U.S. Attorney's Office, Covington, KY, for plaintiff.

JUDGES: Jennifer B. Coffman, Judge, United States District Court, Eastern District of Kentucky.

OPINIONBY: Jennifer B. Coffman

OPINION:

[*697] **ORDER**

This matter is before the court on the plaintiff's motion to exclude expert testimony on the subject of eyewitness identification and the defendant's motion to admit the same. A *Daubert* hearing was conducted in Lexington, Kentucky on January 29, 2003. The court, having reviewed the record and being otherwise sufficiently advised, will permit the defendant's expert to testify.

At the outset, the court notes that while [HN1] courts have traditionally hesitated to admit expert testimony on eyewitness identifications, the current trend in many courts, including the Sixth Circuit, is to admit such testimony, at least in some circumstances. *United States v. Langan, 263 F.3d 613, 621 (6th Cir. 2001).* [**2] [HN2] The admissibility of expert testimony is governed by *Fed. R. Evid. 702*, which provides:

> [HN3] 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.

[HN4] The Supreme Court clarified the trial court's role as a gatekeeper under *Fed. R. Evid. 702* in *Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)* and in *Kumho Tire Co., Ltd., v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).* As a gatekeeper, the court must determine that the expert's testimony, whether

scientific, technical, or otherwise falling under Rule 702, is relevant and reliable. *Id.*

[HN5] A non-exhaustive list of factors guides the court's inquiry: (1) whether the [*698] theory or technique can be or has been tested; (2) whether it has been subjected to peer review or publication; (3) its known or potential rate of error; and (4) whether the theory has gained general acceptance in its [**3] field. *Daubert, 509 U.S. at 592-594.* These factors may not apply in every instance and the trial court has broad latitude in determining the reliability of an expert witness's testimony. *Kumho Tire Co., Ltd., v. Carmichael, 119 S. Ct. at 1167.*

The proposed testimony.

At the *Daubert* hearing, the defendant proffered the testimony of Dr. Solomon Fulero. Dr. Fulero testified as to general theories of memory and the impact of those theories on the reliability of eyewitness identification. Dr. Fulero testified that there are three stages of memory -- acquisition, retention, and retrieval. For each stage, he testified to numerous factors that may affect the ability of eyewitnesses to make accurate identifications. These factors were identified through extensive psychological studies and research.

Reliability

At the first step, the court finds that the theories of memory underlying Dr. Fulero's testimony are scientific. Dr. Fulero testified that the studies establishing those theories were conducted in accordance with the scientific method -- hypotheses were developed; experiments to test the hypotheses, designed to control for [**4] different variables, were conducted; and the results produced were analyzed and subject to replication by other researchers. Additionally, after considering the *Daubert* factors, the court finds that those theories provide a sufficiently reliable basis for Dr. Fulero's testimony.

The court finds that the theories underlying Dr. Fulero's testimony are generally accepted within the field of memory study and in the field of psychology generally. While it is true that there are scientists who disagree with those theories, [HN6] *Daubert* does not require universal acceptance -- only general acceptance. That some scientists in a field disagree with an expert's theories or conclusions does not render those theories or conclusions unreliable under *Daubert.*

The court also finds that the theories underlying Dr. Fulero's testimony are testable and have been tested. Dr. Fulero described how studies of the theories were carried out and discussed the general results, illustrating his points with discussions of specific studies.

The court finds that the theories underlying Dr. Fulero's testimony have been published and subjected to peer review. Dr. Fulero testified that he had published peer-reviewed [**5] articles on factors affecting eyewitness identifications, and that thousands of other articles had been published within the field.

Finally, due to the nature of Dr. Fulero's testimony, the court finds that there is no applicable "error rate." Dr. Fulero proposes to testify about the impact of certain factors on eyewitness reliability. For example, Dr. Fulero opined that a photographic array in which photographs are presented sequentially is more reliable than such an array in which the witness views all of the photographs simultaneously. Such an opinion is not susceptible to an error rate in the traditional sense because it makes no claim about the accuracy of an identification in a particular case. Accordingly, the court finds that error rate is not a relevant factor in this case.

In sum, the court finds that the theories underlying Dr. Fulero's testimony are scientific and sufficiently reliable under *Daubert.* [*699] The court also finds that Dr. Fulero is qualified to testify concerning memory and eyewitness identifications. Dr. Fulero's qualifications are impressive. n1 Of particular note, Dr. Fulero was a member of the National Institute for Justice Technical Working Group for [**6] Eyewitness Evidence, a multidisciplinary group that developed a handbook *Eyewitness Evidence: A Guide for Law Enforcement.* That publication further refers readers to an article co-authored by Dr. Fulero, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 22 Law and Human Behavior 603 (1998).

n1 His qualifications were outlined in detail in the Vita submitted as defendant's exhibit 2 to the *Daubert* hearing.

Relevance

[HN7] Next, the court must consider whether the expert testimony is relevant and will assist the trier of fact. *Daubert, 509 U.S. at 592-93.* The court finds that Dr. Fulero's proposed testimony is relevant and can be successfully applied to the facts in this case. The plaintiff complains that not all factors that affect the accuracy of eyewitness identifications are present in this case, and, therefore, that such testimony will not assist the jury. The court agrees that testimony concerning factors not implicated by the eyewitness [**7] identifications in this case are not relevant and are excluded. n2 Where the evidence elicited at trial shows that a particular factor may have influenced an eyewitness's identification of the

defendant, however, Dr. Fulero's opinions can be applied and testimony on such factors is relevant.

n2 For example, there is no indication that drug or alcohol use were factors in the eyewitness identification in this case.

The plaintiff also argues that Dr. Fulero's testimony would confuse the jury and should, therefore, be excluded. n3 To the contrary, the court finds that such testimony would educate -- not confuse -- the jury. Many of the hazards of eyewitness identification are not within the ordinary knowledge of most lay jurors. *United States v. Smithers, 212 F.3d 306, 316 (6th Cir. 2000)* ("Today, there is no question that [HN8] many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive."). n4 Indeed, "jurors [**8] tend to be unduly receptive to, rather than skeptical of, eyewitness testimony." *Id. at 315-16.* Dr. Fulero's testimony will aid the jury in evaluating the accuracy of the eyewitness identifications of the defendant.

n3 *Fed. R. Evid. 403* [HN9] provides for the exclusion of relevant evidence where the probative value of the evidence is substantially outweighed by its tendency to confuse the issues or mislead the jury.

n4 Dr. Fulero acknowledged that [HN10] some factors, such as the acuity of the witness's vision or the quality of light at the scene, were within the ordinary knowledge of jurors and were not, therefore, appropriate subjects for expert testimony.

The plaintiff contends that an instruction alerting the jury to the various factors affecting the accuracy of eyewitness identification would be sufficient. The court finds that solution to be problematic for two reasons. First, without expert testimony on the theories of memory that underlie these factors, there is no foundation supporting the issuance [**9] of such instructions. Second, the court finds that introducing such factors for the first time in the jury instructions, without providing the jury any information about how those factors affect the identification process, is likely to be more confusing than helpful.

Conclusion

The court finds that Dr. Fulero's testimony is both relevant and reliable under [*700] *Daubert* and, therefore, Dr. Fulero will be permitted to testify. n5 Accordingly,

n5 The court expects that Dr. Fulero's testimony will substantially conform to the testimony offered at the *Daubert* hearing.

IT IS ORDERED that the plaintiff's motion (Docket No. 66) to exclude the defendant's expert is **DENIED** and the defendant's motion (Docket No. 72) to admit expert testimony is **GRANTED.**

This is the 31st day of January, 2003.

Jennifer B. Coffman, Judge

United States District Court

Eastern District of Kentucky

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES SMITHERS, Defendant-Appellant.

No. 98-1722

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

212 F.3d 306; 2000 U.S. App. LEXIS 9045; 2000 FED App. 0160P (6th Cir.); 53 Fed. R. Evid. Serv. (Callaghan) 1273

August 6, 1999, Argued

May 8, 2000, Decided

May 8, 2000, Filed

SUBSEQUENT HISTORY: [**1] Rehearing En Banc Denied July 13, 2000, Reported at: 2000 U.S. App. LEXIS 16496.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 97-80248. Avern Cohn, District Judge.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: ARGUED: Andrew N. Wise, FEDERAL PUBLIC DEFENDERS OFFICE, Detroit, Michigan, for Appellant.

Kathleen Moro Nesi, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

ON BRIEF: Andrew N. Wise, FEDERAL PUBLIC DEFENDERS OFFICE, Detroit, Michigan, for Appellant.

Kathleen Moro Nesi, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

JUDGES: Before: BATCHELDER and COLE, Circuit Judges; MARBLEY, District Judge. * MARBLEY, D. J., delivered the opinion of the court, in which COLE, J., joined. BATCHELDER, J., delivered a separate dissenting opinion.

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION BY: ALGENON L. MARBLEY

OPINION: [***2]

[*308] ALGENON L. MARBLEY, District Judge. Appellant James Smithers was convicted of bank robbery in violation of 18 U.S.C. § 2113(a). Smithers now appeals various aspects of his trial, including the district court's exclusion of the testimony of an [**2] eyewitness identification expert, the limitation of Smithers's wife's testimony, and the district court's response to questions posed by the jury after it began deliberating. For the following reasons, we REVERSE the conviction below and REMAND this case for a new trial pursuant to the law set forth herein.

I.

On the morning of November 12, 1996, a man walked into the Monroe Bank and Trust in Terence, Michigan, and presented bank teller Teresa Marino a note. The note read, "I have a gun. Give me your large bills." Ms. Marino complied with the demand by turning over the money from her teller drawer. The robber asked for more money, and Ms. Marino unlocked her other drawer and gave him three packs of large bills totaling $ 3,400. When the robber repeated his demand for more money, Ms. Marino told him that was all she had, and he ran from the bank. The entire incident lasted about two minutes. [***3]

Two other witnesses observed the robbery. The first, Debra White, was also

working as a teller at the bank on November 12, 1996. She was sitting at a desk behind Ms. Marino when she noticed an unfamiliar customer standing at Ms. Marino's teller station. Ms. White [**3] looked away for a moment and when she looked back, the man grabbed the money and walked quickly out of the bank. Ms. White asked Ms. Marino if she had been robbed. Learning that she had, Ms. White yelled that they had been robbed and went to lock the bank doors. While doing so, she observed the robber getting into the passenger side of a car parked in the parking lot.

Timothy Wilson, the second witness, was a bank customer who walked into the bank at the same time as the robber. The robber held the door open for him as they both entered the building. Mr. Wilson saw the robber go straight to the teller and then leave the bank quickly.

Investigators from the Monroe County Sheriff's Department spoke to the witnesses that day. Ms. Marino, who was approximately three feet from the robber, described him as a white male in his late twenties wearing a Nike jacket, baseball cap and sunglasses, over 6' 2" tall, 180-185 pounds, with long bushy dark hair, a moustache and a thin beard. Ms. White described the robber as taller than average, with squinty eyes and wearing a bulky striped jacket. Ms. White described the [*309] car as a two-toned brown and black, late 1970's Monte Carlo, with a cream colored [**4] landau roof and an Ohio license plate. Mr. Wilson recalled the robber as a very tall man, with a moustache and partial beard, wearing a baseball cap, dark sunglasses and a winter jacket.

The next day, officers of the Toledo Police Department noticed a vehicle fitting the description of the car used in the robbery at an apartment complex in Toledo. Monroe County Detective Thomas Redmond drove Ms. White to the vehicle, a 1976 Oldsmobile Cutlass, which she identified as the car used in the robbery. The car was registered to James Smithers. [***4]

Officers then went to Smithers's home, where his wife, Josette Smithers, informed them that he was at his parents' house. The officers searched Smithers's apartment but found no incriminating evidence. They located Smithers at his parents' home, and he accompanied the police to his apartment. Smithers told the officers that he bought the vehicle from his brother-in-law, Steve Dallas, who still retained a set of keys to the car. Smithers also stated that on the morning of November 12, 1996, he had noticed his rear license plate was missing, so he had moved his front plate to the rear. He also claimed to have noticed gas missing from the [**5] car on other mornings; later, Smithers said that there was a hole in the gas tank. Smithers consented to a search of the car, which produced no incriminating evidence. Smithers voluntarily went to the sheriff's department where he provided handwriting samples and was photographed and fingerprinted. When photographing him, Detective Redmond noted Smithers's height as 6' 6 1/2 ".

Detective Redmond prepared a photo spread of six photographs, including a photo of Smithers. On November 14, 1996, Detective Redmond showed the photo spread to Ms. Marino, Mr. Wilson and Ms. White. Ms. Marino and Mr. Wilson could not identify the robber from the photo spread. Ms. White picked out Mr. Smithers.

Immediately after her identification, Ms. White told Ms. Marino that she had been able to identify the robber from the photo spread.

Smithers's handwriting exemplars were submitted to the FBI laboratory for analysis. The results were inconclusive. The demand note was submitted to the Michigan State Police Laboratory for fingerprint analysis. The analysis produced one identifiable print. The government claims the print was inconclusive; Smithers claims the analysis showed that the print did not belong [**6] to him.

Peter Smith, an FBI examiner who specializes in analyzing exhibits in photographic form, performed a height analysis of the robber depicted in the bank videotape. Mr. Smith concluded that the robber measured approximately 6' 5". Mr. [***5] Smith also conducted a comparative analysis of the robber in the bank photos with a photograph of Smithers. He could neither positively identify nor eliminate Smithers as the bank robber.

On June 16, 1997, a grand jury returned an indictment charging Smithers with one count of bank robbery in violation of 18 U.S.C. § 2113(a).

On December 18, 1997, Smithers filed a ten-page motion in limine to determine the admissibility of certain expert testimony regarding eyewitness testimony. The district court commenced Smithers's jury trial on January 14, 1998. After the jury was empaneled, the district court heard argument on Smithers's motion in limine, and denied the motion, noting that everything an expert would have to

say about eyewitness identification was within the jury's "common knowledge" The court stated that it would give an instruction on eyewitness testimony. Smithers's attorney requested permission [**7] to make a written proffer, which the court allowed.

The government presented its case, including eyewitness testimony from Ms. Marino, Ms. White and Mr. Wilson. Despite their prior inability to identify Smithers from a photo spread, Ms. Marino and [*310] Mr. Wilson identified Smithers as the robber in court. Ms. Marino and Ms. White testified that they did not notice that the robber had any distinguishing features. The government rested on January 16, 1998.

Smithers filed his renewed motion in limine and offer of proof, regarding expert testimony, on eyewitness identification on January 20, 1998. This proffer described the anticipated testimony of Dr. Solomon Fulero, a proposed expert on eyewitness identification. It noted that Dr. Fulero would "educate the jury about the general factors that may affect eyewitness accuracy," including the specific the issues of: (1) "detail salience" (the fact that eyewitnesses tend to focus on unusual characteristics of people they observe); (2) the relationship between the time that has passed since observing the event and the accuracy of recalling it; (3) the [***6] effect of post-identification events on memory; (4) the fact that when one person [**8] both prepares and administers a photo spread, the likelihood of misidentification increases; (5) the "conformity effect" (the fact that witnesses' memories are altered by talking about the event with each other after it occurs); and (6) the

relationship between a witness's confidence in her recollection and its accuracy. Regarding the issue of detail salience, the proffer stated that "had Mr. Smithers been the robber, the eyewitnesses would have observed and been able to recall the large scar on Mr. Smithers' [sic] neck."

After hearing oral argument on the Defendant's renewed motion, the district court ruled that it would exclude the expert testimony:

> primarily because it's late in the day. It should have been done much earlier. On the other hand, I think you've got a very good, if there's a conviction, I think you've made an excellent record that I've abused my discretion in failing to allow it, and I think there's a certain - I prefer to see it that way.

The court also opined that Dr. Fulero's testimony was "not a scientifically valid opinion," "a jury can fully understand that its [sic] got an obligation to be somewhat skeptical of eyewitness testimony," and [**9] "admission of Dr. Fulero's testimony is in this case is almost tantamount to the Court declaring the defendant not guilty as a matter of law. . . . Absent the eyewitness testimony I don't think there's enough here to go to the jury." Finally, the district court remarked, "I'm also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it's the defendant's fate that's at stake, but you can always argue for a new trial if he's convicted."

After this ruling, Smithers presented a few witnesses, including his wife, who attempted to establish an alibi defense. Ms. Smithers testified that Smithers was sleeping in their house from 3:00 a.m. to 11:30 a.m. the morning of November 12, and that as a light sleeper she would have [***7] heard her husband leave the apartment. Ms. Smithers also spoke about her husband's appearance, maintaining that Smithers weighed 245 pounds in November of 1996, is 6' 8" tall and has a four-inch long scar on the right front side of his neck.

The case was submitted to the jury on January 21, 1998. The next day, the jury returned a verdict of guilty. The district court sentenced Smithers on June 4, 1998, to [**10] a forty-one month term of imprisonment. Smithers timely filed a notice of appeal on June 8, 1998. Smithers now appeals various aspects of his trial, only one of which we address today: the exclusion of Dr. Fulero as an eyewitness expert.

II.

Generally, a trial court's evidentiary determinations are reviewed for an abuse of discretion. See United States v. Moore, 954 F.2d 379, 381 (6th Cir. 1992).

[*311] Smithers argues that the district court's denial of his motion to introduce testimony by an identification expert warrants the reversal of his conviction. The crucial element of the government's case was eyewitness identification of the defendant and his car, Smithers argues, and Dr. Fulero's testimony involved a proper subject that would have been helpful to the jury in

evaluating this issue. Smithers, therefore, contends that the decision to exclude this expert's testimony, to indulge the district judge in his rather eccentric courtroom experiment, was improper. The government counters that the district court's decision was well within its discretion. The district court properly excluded Dr. Fulero's testimony, the prosecution argues, based upon its lack of scientific [**11] validity, invasion of the jury's province, possibility of confusion and the tardiness of Smithers's proffer.

Courts' treatments of expert testimony regarding eyewitness identification has experienced a dramatic transformation in the past twenty years and is still in a state of flux. Beginning in the early 1970's, defense attorneys began to bring expert testimony into the courtroom. Then, courts were uniformly [***8] skeptical about admitting such testimony, elaborating a host of reasons why eyewitness experts should not be allowed to testify. In the first case to address the issue, United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973), the Ninth Circuit held that the district court did not err in excluding expert testimony regarding eyewitness identification because cross-examination was sufficient to reveal any weaknesses in the identifications. After that decision, a series of cases rejected similar evidence for a variety of reasons. See, e.g., United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984) (finding the question is within the expertise of jurors); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (reasoning [**12] that identification was adequately addressed through cross-examination); United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980) (finding no general acceptance in scientific community); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (ruling that the testimony would be

prejudicial).

This trend shifted with a series of decisions in the 1980's, with the emerging view that expert testimony may be offered, in certain circumstances, on the subject of the psychological factors which influence the memory process. See, e.g., United States v. Moore, 786 F.2d 1308, 1313 (5th Cir. 1986) (finding 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 . . . "); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (reasoning that "expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances"); United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984) ("The day may have arrived, therefore, when Dr. Fulero's [**13] testimony can be said to conform to a generally accepted explanatory theory."). State court decisions also reflect this trend. See, e.g., State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795 (Ohio 1986) (overruling per se rule and holding expert testimony admissible to inform jury about factors generally affecting memory process). Indeed, several courts have held that it is an abuse of discretion to exclude such expert testimony. See, e.g., United States v. Stevens, 935 F.2d 1380, 1400-01 (3d Cir. 1991) (reversing and remanding for [***9] new trial); Smith, 736 F.2d at 1107 (holding error harmless in light of other inculpatory evidence); Downing, 753 F.2d at 1232 (holding error harmless in light of other inculpatory evidence); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (Ariz. 1983) (reversing and remanding for new trial). This jurisprudential trend is not surprising in light of modern scientific studies which show that, while juries rely heavily on

eyewitness testimony, [*312] it can be untrustworthy under certain circumstances. n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 A plethora of recent studies show that the accuracy of an eyewitness identification depends on how the event is observed, retained and recalled. See generally Roger V. Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1018-22 (1995). Memory and perception may be affected by factors such as:

> (1) the retention interval, which concerns the rate at which a person's memory declines over time; (2) the assimilation factor, which concerns a witness's incorporation of information gained subsequent to an event into his or her memory of that event; and (3) the confidence-accuracy relationship, which concerns the correlation between a witness's confidence in his or her memory and the accuracy of that memory. Other relevant factors include: (4) stress; (5) the violence of the situation; (6) the selectivity of perception; (7) expectancy; (8) the effect of repeated viewings; (9) and the cross-racial aspects of identification, that is where the eyewitness and the actor in the situation are of different racial groups.

Alan K. Stetler, Particular Subjects of Expert and Opinion Evidence, 31A Am. Jur. Expert § 371 (1989). Accordingly, "a jury should consider several factors in judging the accuracy of an eyewitness identification. Social science data

suggests, however, that jurors are unaware of several scientific principles affecting eyewitness identifications." Handberg, supra, at 1022. In fact, because many of the factors affecting eyewitness impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong. See Downing, 753 F.2d at 1231 (finding that "factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most") (citations omitted).

This ignorance can lead to devastating results. One study has estimated that half of all wrongful convictions result from false identifications. See Elizabeth F. Loftus, Ten Years in the Life of an Expert Witness, 10 Law & Hum. Behav. 241, 243 (1986) (citing a 1983 Ohio State University doctoral dissertation). And "it has been estimated that more than 4,250 Americans per year are wrongfully convicted due to sincere, yet woefully inaccurate eyewitness identifications." Andre A. Moenssens et al., Scientific Evidence in Civil and Criminal Cases § 19.15, at 1171-72 (4th ed. 1995) (citing United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967)). A principal cause of such convictions is "the fact that, in general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers." Patrick M. Wall, Eye-Witness Identification in Criminal Cases 19 (1965). Many jurists agree that eyewitness identifications are the most devastating and persuasive evidence in criminal trials. See, e.g., Watkins v. Sowders, 449 U.S. 341, 352, 66 L. Ed. 2d 549, 101 S. Ct. 654 (1981) (stating that "there is almost nothing more convincing than a live human being who takes the stand, points a finger at

the defendant, and says 'That's the one!'") (Brennan, J., dissenting) (citations omitted); Manson v. Brathwaite, 432 U.S. 98, 120, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977) (stating that "juries unfortunately are often unduly receptive to [identification] evidence") (Marshall, J., dissenting); Hon. D. Duff McKee, Challenge to Eyewitness Identification Through Expert Testimony, 35 Am. Jur. POF 3d 1, § 1 (1996) ("Eyewitness testimony may be the least reliable, and yet the most compelling."). Jurors tend to overestimate the accuracy of eyewitness identifications because they often do not know the factors they should consider when analyzing this testimony. See Handberg, supra, at 1022.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[**14] [***10]

Recognizing the dichotomy between eyewitness errors and jurors' reliance on eyewitness testimony, this Circuit has held that expert testimony on the subject of eyewitness identification is admissible. In United States v. Smith, 736 F.2d 1103 (6th Cir. 1984), this Court held that a trial court abused its discretion in excluding such an expert. In Smith, the defendant sought to introduce the testimony of psychologist Solomon Fulero - the same expert Smithers attempted to introduce at his trial - as an expert in the field of eyewitness identification to shed light upon an eyewitness's testimony. The lower court excluded the testimony, finding that it was inadmissible pursuant to Federal Rule of Evidence 403. On appeal, this Court applied the four prong test for expert testimony articulated in United States v. Green, 548 F.2d 1261 (6th Cir. 1977): (1) that the witness, a qualified expert, (2) was testifying to a proper subject, (3)

which conformed to a generally accepted explanatory theory, and (4) the probative value of the testimony outweighed its prejudicial effect. [***11]

Applying that standard, the Court noted that the [**15] offered testimony would have [*313] been based on "a hypothetical factual situation identical" to the facts of the case and would have explained: (1) that a witness who does not identify the defendant in a first line-up may "unconsciously transfer" his visualization of the defendant to a second line-up and thereby incorrectly identify the defendant the second time; (2) that studies demonstrate the inherent unreliability of cross-racial identifications; and (3) that an encounter during a stressful situation decreases the eyewitness's ability to perceive and remember and decreases the probability of an accurate identification. See Smith, 736 F.2d at 1105-06. The Smith Court held that expert testimony on the reliability of eyewitness identification met the "helpfulness" test of Federal Rule of Evidence 702 and therefore had been excluded improperly at trial. The Court explained that "in reviewing a 403 balancing, the court must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect," id. at 1107, and concluded that "such testimony might have been relevant to the exact [**16] facts before the court and not only might have assisted the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification." Id. at 1106. Further, the Smith Court expressed its acceptance of psychological studies as a scientifically sound and proper subject of expert testimony, noting, "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research." Id. at

1107.

Smith's conviction was nonetheless affirmed on the ground that any error by the district court in excluding the proffered testimony was harmless. The Smith Court noted that the government had not only presented three witnesses who identified the defendant as the perpetrator, but that the defendant's palm print was recovered at the scene of the crime, thus "wholly discrediting the defendant's alibi" defense. Id. at 1107-08. Because there was other significant inculpatory evidence, the trial court's error was deemed harmless, and the defendant's conviction was affirmed. [***12]

Smithers now argues that the proper standard for the admission [**17] of eyewitness expert testimony is that set out in Smith. We disagree. The significance of Smith in terms of evaluating expert testimony is questionable after the landmark decision of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). In Daubert, the Supreme Court articulated the test that trial courts must use in determining whether scientific evidence and testimony is admissible. According to Daubert, a district court must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589. Daubert thus requires trial courts to perform a two-step inquiry. First, the court must determine whether the expert's testimony reflects "scientific knowledge," that is, the court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at

592-93. Second, the court must ensure that the proposed expert testimony is relevant to the task at hand and will serve [**18] to aid the trier of fact. See id. The Supreme Court referred to this second prong as the "fit" requirement. See id.

Citing the concurring opinion of Justice Scalia's in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Dissent proclaims that Daubert is not "holy writ" to evaluate proffered experts under Rule 702. While it is true that the Daubert factors "do not constitute a 'definitive checklist or test . . . ,'" Kumho Tire, 119 S. Ct. at 1175 (citing Daubert, 509 U.S. at 593), the Supreme Court did conclude that "[a] trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of [*314] expert testimony." 119 S. Ct. at 1176. The Court also stressed:

> We conclude that Daubert's general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, 'establishes a standard of evidentiary reliability.' . . . It 'requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.' . . . And where such testimony's factual [***13] [**19] basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'

Id. at 1175 (citations omitted) (emphasis added).

The Supreme Court in Kumho indicated that the standards set forth in Daubert, depending on the "particular circumstances of the particular case," id., should be flexibly applied. Contrary to the Dissent, the Supreme Court's reasoning does not indicate that Daubert should be abandoned totally. This Court finds that in the case sub judice, given the expert and the testimony that was proffered, the standards of Daubert should have been applied. n2

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n2 The Dissent finds that the Supreme Court's Daubert decision is:

> not 'holy writ' that the district court must invoke by name in order to pass our scrutiny.

Instead, the Dissent suggests that the district court should have instead relied on a pre-Daubert Third Circuit precedent, United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991), and United States v. Downing, 753 F.2d 1224 (3d Cir. 1985), as the standard for outlining the steps that Smithers should have followed in making his proffer to the Court. Apparently, the Third Circuit has provided what the Dissent characterizes as "holy writ," notwithstanding the fact that Stevens and Downing are pre-Daubert authority and that the proffer of testimony that these Third Circuit cases require does not meet Daubert's standard for determining whether scientific evidence is admissible.

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While it is true that several post-Daubert eyewitness identification cases have found that the exclusion of the testimony was not an abuse of discretion, see, e.g., United States v. Hall, 165 F.3d 1095 (7th Cir. 1999); United States v. Smith, 156 F.3d 1046 (10th Cir. 1998); United States v. Smith, 122 F.3d 1355 (11th Cir. 1997); United States v. Kime, 99 F.3d 870 (8th Cir. 1996); United States v. Brien, 59 F.3d 274 (1st Cir. 1995); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994), the lesson from these cases is not that expert [***14] testimony on eyewitness identification is never appropriate; rather, the cases indicate that courts must consider whether the testimony would be helpful or confusing to the jury. The cases also discuss whether this type of testimony touched on the "ultimate issue" in the case and therefore usurped the jury's role; whether there was other evidence against the defendant; and whether the jury could more properly evaluate the reliability of eyewitness testimony through cross-examination. In light of these cases, we believe that the [**21] district court should have performed its analysis under the rule of Daubert, rather than, as Smithers argues, that of Smith. In any event, the trial court did not analyze the admissibility of the expert testimony in this case under either of these cases.

We find that the district court abused its discretion in excluding Dr. Fulero's testimony, without first conducting a hearing pursuant to Daubert. There are several bases for this conclusion. As a threshold consideration, we address the

district court's "experiment" comment. The district court explained that it was interested in seeing what a jury would do absent the expert testimony because it would make the trial "more interesting." The district court stated:

> I'm also interested in seeing what a jury will do absent that expert testimony. It makes it a more interesting case. I recognize it's the defendant's fate that's at stake, but you can always argue for a new trial if he's convicted. [*315]

This comment is gamesmanship at its worst and reveals a troubling disregard for this Defendant's rights, relegating those rights to mere abstractions. The district court's reasoning that it could indulge in [**22] this experiment because Smithers could "always appeal" ironically turned this trial into a laboratory experiment where the judge felt free to play with evidentiary variables at the cost of the Defendant's rights. Basing an evidentiary decision on personal curiosity rather than on applicable case law and the rules of evidence is a patent abuse of discretion. [***15]

We do not, however, base our decision on the district court's "experiment" comment alone. Even without this comment, the district court erred in its evidentiary analysis by failing to apply the Daubert test to the proposed expert testimony. Although the decision of whether to admit a witness's testimony is left to the sound discretion of the trial court, a trial court cannot make an arbitrary decision. When a defendant's liberty is at stake, it is incumbent upon the trial court to apply the correct law, follow the appropriate decision-making

steps and articulate the bases upon which its decision rests. Here, the district court should have applied the analytical principles set forth in Daubert, but it did not.

Under Daubert, a trial court should consider: (1) whether the reasoning or methodology underlying [**23] the expert's testimony is scientifically valid; and (2) whether that reasoning or methodology properly could be applied to the facts at issue to aid the trier of fact. The district court, in neglecting to undertake a Daubert analysis, failed to take these factors into consideration. Indeed, the district court did not make any determination as to this expert's scientific reasoning or methodology. We find that if the district court had given this issue proper consideration, it may have deemed Dr. Fulero's testimony scientifically valid.

Following Kumho Tire, 119 S. Ct. at 1176, we next consider the way the district court may have examined the Daubert factors in the present case. Tellingly, this Court has already accredited Dr. Fulero's science and methodology. In Smith, this Court not only noted the jurisprudential movement toward admitting psychological studies of eyewitness experts in general, but praised the qualifications and scientific methods of this same expert witness, Dr. Fulero. In addition, the district court could have concluded that this testimony -- describing psychological factors such as detail salience, the conformity effect, [**24] the dynamics of photo identifications and the confidence-accuracy relationships -- could have been applied to the facts at issue in this case. Information about the effects of detail salience would bear on the witnesses'

failure to notice Smithers's conspicuous scar; evidence about the [***16] conformity effect would apply to Ms. Marino's and Mr. Wilson's ability to identify Smithers only after they had spoken with Ms. White; the suggestibility of photo identifications created and administered by a single person would apply to the procedures that Detective Redmond used; and explaining the lack of correlation between confidence and accuracy would bear upon the credibility of all of the eyewitnesses. Had the district court conducted a proper evaluation of this testimony, we believe it may have found that Dr. Fulero's testimony met the first requirement of the Daubert test.

The trial court should have next considered whether the proposed expert testimony was relevant to the task at hand and would aid the trier of fact. The district court did, to some extent, discuss this second Daubert prong (even if it did not explicitly note that it was doing so), by stating that "a [**25] jury can fully understand" its "obligation to be somewhat skeptical of eyewitness testimony." This point addresses whether the testimony would "aid the trier of fact." The court's statement, however, is simply wrong, and the district court, on remand, should reconsider this factor. As noted above, jurors tend to be unduly receptive to, rather than skeptical [*316] of, eyewitness testimony. Further, accepting the district court's analysis that all jurors are aware of their obligation to be skeptical would lead to absurd results: expert testimony on eyewitness identification would never be admissible. As demonstrated by abundant case law, this is not the conclusion that has been reached by courts addressing this issue. Today, there is no question that many aspects of perception and memory are not within the common experience of most

jurors, and in fact, many factors that affect memory are counter-intuitive. In Smith we recognized the expediency of expert testimony to address these complex issues and to inform jurors fully of the issues they must decide.

The Dissent counters by arguing that eyewitness identification experts are not necessary because cross-examination and jury instructions [**26] should be the tools used in a trial to discredit and flush-out eyewitness testimony. [***17] Unfortunately, the Dissent's homage to trial procedures does not extend to expert witness testimony. The same argument can be made for the admission of expert testimony: cross-examination and jury instructions can be used to question the qualifications of the proffered expert, undermine the basis of the expert's theories, explain the limits of social science's validation studies and pick apart research methods. The only reason given by the Dissent for why cross-examination and jury instructions can serve these goals for eyewitness testimony, but not for expert testimony, is that the jury may take the expert's testimony as "scientifically irrefutable truth." The Dissent's selective faith in the collective intelligence, common sense and decision-making ability of the jury is disheartening, and is also inconsistent with the Dissent's deference to the jury on other matters, including judging the credibility of eyewitness identifications.

Further, based on the comment that Smithers's proffer of Dr. Fulero's testimony was "too late in the day," the Dissent crafts a legal basis for the district [**27] court's exclusion based on Federal Rule of Evidence 403. The Dissent concludes that Rule 403 permits the exclusion of relevant evidence based on

"delay." Fed. R. Evid. 403. The Dissent misquotes and misconstrues the meaning of "delay" in Rule 403. Not all delay authorizes the exclusion of relevant evidence - only "undue delay." Moreover, the term "delay" does not connote delay in the submission of motions or proffers; rather, it encompasses the prolonging of the length of the trial, and can be read properly in conjunction with the other exclusionary factors: "waste of time, or needless presentation of cumulative evidence." See, e.g., John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632 (3d Cir. 1977); United States v. International Bus. Mach., 87 F.R.D. 411 (S.D.N.Y. 1980); SCM Corp. v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977).

"Delay" is a consideration of efficiency and is not readily distinguishable from "waste of time." Charles Alan Wright & Kenneth W. Graham Jr., Federal Practice and Procedure: Evidence § 5218 (1978); see also [***18] Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.5 (1995) (concluding [**28] that "undue delay, waste of time or needless presentation of cumulative evidence" are concerns for the "concessions to the shortness of life," "the limited resources of the judicial system," and the presentation of cumulative evidence) (footnote omitted). "Delay" in Rule 403 does not mean "filed late" as the Dissent concludes.

Furthermore, the cases cited by the Dissent to support the contention that the basis for the district court's exclusion of Dr. Fulero's testimony was a consideration of "delay" under Rule 403 do not explicitly cite to the Rule nor do they mention delay as a factor. See United States v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992); United States v. Dowling, 855 F.2d 114, 118 (3d Cir.

1988).

The exclusion of Dr. Fulero's testimony because the evidence was presented "late in the day," contrary to the Dissent's [*317] assertion, was not a proper basis for exclusion. First, the Defendant filed his ten-page motion in limine requesting a ruling on this issue a full month before trial. At the beginning of trial, Smithers renewed his motion orally. A week later, he submitted an additional seven-page brief on the subject. Thus, it is [**29] impossible to say that either the court or the government did not have adequate notice of the issue. Second, "a criminal defendant's relevant evidence may generally not be excluded on the basis of a discovery sanction. The defendant's Sixth Amendment right to an effective defense will usually outweigh the interest served by pretrial discovery orders." United States v. Collins, 837 F.2d 477, 1988 WL 4434, at *2 (6th Cir. 1988). Given the importance of eyewitness testimony in this case, the district court should not have excluded Dr. Fulero's testimony based on its supposed tardiness. n3

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n3 The government argues additionally that Smithers's proffer demonstrates that the expert testimony would have invaded the jury's province. Specifically, the government points to the sentence in the proffer which states, "Had Mr. Smithers been the robber, the eyewitnesses would have observed and been able to recall the large scar on Mr. Smithers's neck." We agree with the government that this was poorly chosen wording, and that no expert may testify as to what witness did

or did not see. In a case heavily dependent upon eyewitness identification, such testimony could usurp the jury's function and produce an improper comment on the ultimate issue to be decided in the case. The district court, however, did not even mention, much less base its decision on the language in this sentence. Even if it had, the proper solution would have been to excise the inappropriate portion of the proffer rather than to exclude all of the testimony, the remainder of which dealt only with the psychological factors which may have impacted the perception and memory of the witnesses in this case. This evidence would have been both relevant and helpful to the jury.

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[**30] [***19]

Finally, we find that the trial court's error was not harmless. The complexion of the proceedings likely would have changed had the district court conducted a Daubert hearing and determined that Dr. Fulero's testimony was admissible. And, as the Dissent properly points out, expert testimony should be admitted in the precise situation presented to the trial court in this case -- that is, when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications. See Smith, 736 F.2d at 1107; Moore, 786 F.2d at 1313; Downing, 753 F.2d at 1226. n4 Here, eyewitness testimony was the crucial, if not the sole basis for Smithers's conviction.

[***20] The district court in this case concluded that "admission of Dr. Fulero's testimony is in this case is almost tantamount to the Court declaring the defendant not guilty as a matter of law. . . . absent the eyewitness

testimony I don't think there's enough here to go to the jury." The lower court did not seem to realize that eyewitness expert testimony is most appropriate in such situations. n5

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n4 As one commentator has indicated:

> there are some indications of a compromise position that would be more favorably inclined toward [eyewitness identification] testimony when specific factors of need arise. Where identification rests on testimony by someone who knew the defendant well and was in a good position to see the crime, or where the identification seems strongly established for other reasons (like physical evidence connecting defendant to the crime), there is little reason to admit such testimony. Where identity is a crucial and closely contested issue, however, and where critical testimony is given by people who did not know the perpetrator and had only a short time to see him or were limited or distracted by other factors, expert testimony seems more clearly warranted.

Christopher B. Mueller & Laird C. Kirkpatrick, Evidence, § 6.37, at 601 (1995).
[**31]

n5 Presumably, the district court was trying to express that the expert testimony would be unduly prejudicial. This conclusion is flawed. First, as the Smith Court noted, "in reviewing a 403 balancing [in a criminal case], the court

must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." 736 F.2d at 1107. The district court did not apply this standard here. Second, it appears the trial court thought the expert nature of the testimony would unduly impress the jury; this is an improper factor upon which to exclude expert testimony, for if this were the test, no expert could ever testify. The court erred in concluding that merely because testimony is given by an expert, it must be excluded.

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[*318] The district court should have conducted a hearing under Daubert and analyzed the evidence to determine whether Dr. Fulero's proffered testimony reflects scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact. Based on its failure to perform the correct [**32] legal analysis--the Daubert analysis--as well as its "experiment" rationale for excluding the testimony, we find that the district court abused its discretion. We therefore REVERSE Smithers's conviction and REMAND this case for proceedings in accordance with this decision. n6

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n6 Smithers also appealed his conviction on two other grounds: (1) the district court's exclusion of a portion of the testimony of Smithers's wife on relevancy grounds, and (2) the district court's response to questions posed by the jury

after it began deliberating. Because we have remanded this case for a new trial based on the district court's failure to conduct a Daubert test before excluding the eyewitness expert's testimony, these additional issues are moot.

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DISSENTBY: ALICE M. BATCHELDER

DISSENT: [***21]

ALICE M. BATCHELDER, Circuit Judge, dissenting. I would hold that the district court's decision to exclude Dr. Fulero's testimony should be affirmed on the basis of Smithers's delay in proffering it in its specifics [**33] to the court and Government. If we are to reach the merits of the decision, however, I am not nearly so certain as the majority is that the court did not perform the proper legal analysis. Certainly we should make that decision on the basis of a review of the entire record and not, as does the majority, largely on the basis of a handful of unfortunate but irrelevant remarks by the district court. In any event, once we have decided, as the majority has, that the court did not perform the proper Daubert analysis, our response should be to remand the issue for a proper hearing. We should not proceed to do that analysis ourselves, nor should we issue what is essentially a blanket endorsement of expert testimony on a subject deserving of, at best, our careful and skeptical scrutiny, effectively warning the district courts in this circuit that in the future it will be an abuse of discretion not to accept such experts. For these reasons, I must

dissent.

I. Delay

As the majority noted, the district court's primary reason for denying the renewed motion to permit Fulero to testify was that it was made "too late in the day." In reasoning that Smithers's initial motion [**34] in limine put the Government on sufficient notice of Fulero's testimony, the majority makes no mention of the paucity of detail which that motion contained. Furthermore, the legal foundation of the majority's reasoning is, in my view, erroneous.

A brief overview of the appellate courts' reception of expert testimony on the fallibility of eyewitness identifications is necessary in order to explain the inadequacy of Smithers's [***22] initial motion. The majority correctly observes that for approximately the first decade or so in which such testimony was submitted, courts were "uniformly skeptical . . . for a host of reasons." These reasons included distrust of the science behind the testimony, a concern that the majority goes to considerable lengths to dispel. But this was hardly the only reason given for disallowing the testimony, and that skepticism rightly continues in the appellate courts today. The majority opinion in this case acknowledges some of these decisions, but sidesteps the unanimous hesitancy among appellate courts to open the door too far to this testimony. In many cases, the excluded testimony is either a generic, scholarly exploration of psychological theory, [**35] bearing little relation to the facts of the particular case, see, e.g., United States v. Brien, 59 F.3d 274, 277 (1st Cir.

1995); United States v. Rincon, 28 F.3d 921, 925 (9th Cir. 1994); Jordan v. Ducharme, 983 F.2d 933, 939 (9th Cir. [*319] 1994); United States v. Blade, 811 F.2d 461, 464-65 (8th Cir. 1987); United States v. Fosher, 590 F.2d 381, 382-83 (1st Cir. 1979), or else so specifically directed at the validity of a particular witness's testimony as to usurp the jury's role in determining credibility, see, e.g., United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999); United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999); United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996); United States v. Dorsey, 45 F.3d 809, 812 (4th Cir. 1995); United States v. Moore, 786 F.2d 1308, 1311-12 (5th Cir. 1986); United States v. Langford, 802 F.2d 1176, 1179 (9th Cir. 1986); State v. Gaines, 260 Kan. 752, 926 P.2d 641, 645 (Kan. 1996); [**36] State v. Sabetta, 680 A.2d 927, 933 (R.I. 1996). In either situation, even though the testimony may have provided some measure of insight that the jury otherwise would not have possessed, the risk of the jury's being unduly swayed by testimony with the imprimatur of scientific expertise has been deemed significant enough that the decision to exclude it could not be considered an abuse of the trial court's considerable discretion with regard to evidentiary matters. This is especially so in light of the fact that the more traditional methods of exposing the fallibility of eyewitness identifications--cross-examination, jury instruction and closing argument--are more efficacious and far less risky [***23] than expert testimony that can at best be only marginally relevant to the facts at hand. See Moore v. Tate, 882 F.2d 1107, 1110-11 (6th Cir. 1989); Hall, 165 F.3d at 1107; 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); Kime, 99 F.3d at 884; United States v. Ginn, 87 F.3d 367, 370 (9th Cir. 1996); [**37] Rincon, 28 F.3d at

925-26; Jordan, 983 F.2d at 938-39; United States v. Curry, 977 F.2d 1042, 1051 (7th Cir. 1992); Blade, 811 F.2d at 464-65; Moore, 786 F.2d at 1311-12; Fosher, 590 F.2d at 382; State v. McClendon, 248 Conn. 572, 730 A.2d 1107, 1115-16 (Conn. 1999); McMullen v. State, 714 So. 2d 368, 370 (Fla. 1998); Gaines, 926 P.2d at 646-47; State v. Buell, 22 Ohio St. 3d 124, 489 N.E.2d 795, 803-04 (Ohio 1986); Currie v. Commonwealth, 30 Va. App. 58, 515 S.E.2d 335, 339 (Ct. App. Va. 1999). The grounds on which these courts have explained their rulings vary--the testimony was unhelpful, the subject was within the jury's common knowledge, the subject was not a proper one for expert testimony under Evidence Rule 702 or some analogous test, or the prejudice substantially outweighed the probative value pursuant to Rule 403--but the results were the same.

I will concede that the concept of expert testimony on the subject of eyewitness identification, and the scientific research [**38] behind the testimony, has gained some acceptance and respect in our courts since it was introduced. But the majority's own recounting of the case law on this subject reveals that the appropriateness of using such testimony in court--instead of its traditional alternatives--to counteract the deficiencies of eyewitness identifications is still very much in controversy, for all of the reasons detailed above. The recent trend has been towards allowing the testimony in a limited number of "narrow circumstances," but this merely reflects the liberality of Rule 702 and the gradual maturing of the research, not the "dramatic transformation" of judicial attitudes that the majority claims. See United States v. Smith, 156 F.3d 1046, 1052 (10th Cir. 1998) (holding that cross-examination and common sense will presumptively suffice outside the "narrow circumstances [of]

cross-racial identification, identification after a long delay, identification [***24] [...] under stress, and [...] the feedback factor and unconscious transference"); United States v. Harris, 995 F.2d 532, 535-36 (4th Cir. 1993) (same); Currie, 515 S.E.2d at 338 [**39] (same); Brien, 59 F.3d at 277 ("a door once largely shut is now somewhat ajar"). Some of our sister circuits expressly retain their jaundiced view of this type of testimony. See Hall, 165 F.3d at 1104 ("This Court has a long line of cases which reflect our disfavor of expert testimony on the reliability of eyewitness identification"); [*320] Smith, 122 F.3d at 1357 ("This Court has consistently looked unfavorably on such testimony"). Every court to address the issue has left the admissibility of the testimony to the sound discretion of the district court on a case-by-case basis, either on the authority of Daubert, Rule 702, or an analogous state rule. No appellate court has adopted a presumption or per se rule in favor of admitting eyewitness identification expert testimony, something the majority's opinion comes dangerously close to doing. Many courts have expressly disavowed such a rule. See Smith, 122 F.3d at 1359; United States v. Alexander, 816 F.2d 164, 169 (5th Cir. 1987); Blade, 811 F.2d at 465; Langford, 802 F.2d at 1179; Sabetta, 680 A.2d at 933. [**40]

Moreover, the only federal appellate decisions finding the exclusion of this type of expert testimony to be an abuse of discretion are readily distinguishable from the instant case. In United States v. Stevens, 935 F.2d 1380, 1397 (3d Cir. 1991), the Third Circuit reviewed a district court's decision to admit the expert's testimony as to some psychological theories but not others. The dangers of the expert's testimony in general, then, were not at

issue. The panel reversed because it found no reason why the excluded theories did not "fit" the facts of the case as much as those that were admitted. In United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985), the district court erroneously excluded the testimony per se instead of performing its gatekeeping function. In this circuit's Smith decision, the Government conceded Dr. Fulero's expertise, see 736 F.2d at 1105, and the proffer there specifically tied the theories of transference and cross-racial identification to the facts of that case. See id. at 1106. We used this specificity to distinguish Fosher, which was [***25] representative [**41] of the cases finding expert testimony too removed from the particular facts to be helpful. See id. The lack of specificity in Smithers's proffer likens this case to Fosher far more than to Smith. Apart from this distinction, the majority opinion's characterization of Smith's holding is troubling. At most, this court said in Smith that Dr. Fulero's testimony on the reliability of eyewitness testimony might meet the Green criteria, and might have been improperly excluded. We did not, as the majority opinion claims, express our "acceptance of psychological studies as a scientifically sound and proper subject of expert testimony, noting, '[the] science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research.'" What we noted is that Dr. Fulero had testified to that effect, see id., and, in the final analysis, held that "even if it were error to exclude the expert's testimony, such error was 'harmless.'" Id. at 1106-07 (emphasis added). It is also worth noting that the analysis in Smith was not unanimous; the concurring judge did not find [**42] an abuse of discretion. Since the Smith case, no Sixth Circuit decision has reversed a district court's exclusion of expert testimony on

eyewitness identifications as an abuse of discretion.

I will address in a later segment of this dissent my view of this testimony's utility, but for now it suffices to say that because the range of circumstances in which this testimony should be admitted is so narrow, the party offering it should be required as a threshold matter to make

> an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration. The offer of proof should establish the presence of factors (e.g., stress, or differences in race or age as between the eyewitness and the defendant) which have been found by researchers to impair the accuracy of eyewitness identifications.
> [***26]

Stevens, 935 F.2d at 1397 (quoting Downing, 753 F.2d at 1242). n1 The Downing [*321] court remanded its case for a proper Rule 702 hearing on the proposed expert testimony, because the district court had merely held a brief sidebar [**43] on the issue on the tenth day of trial without a voir dire of the witness or any time for either party to present its view. See Downing, 753 F.2d at 1228. n2 Here, however, the district court properly held a pretrial hearing on various motions in limine, including this one, but the content of Smithers's supporting memorandum was woefully inadequate to enable the court to exercise its discretion in an informed manner. The 10-page supporting memorandum recited the applicable standards of Daubert and Rules 702 and 403, defended the

legitimacy of Dr. Fulero's field of study and academic qualifications, and included a few paragraphs indicting the reliability of eyewitness identifications in general. It contained absolutely no attempt to explain how the testimony would relate to the facts of the case or which of the psychological theories on memory n3 (e.g., stress, "forgetting curve," accuracy-confidence [***27] relationship, etc.) may be applicable in the situation at hand. The memorandum's attachments--Fulero's vita and a selection of journal articles on the topic--plainly did nothing to provide the needed specificity. The Government made precisely this [**44] point in its response memorandum, n4 and cited a number of authorities suggesting that cross-examination and jury instructions were better alternatives. At the hearing, the court began the discussion by opining that "the government writes a pretty persuasive brief. You can argue to the jury people make mistakes all the time. You can bring out the discrepancies [through cross-examination and a jury instruction]." Smithers responded by defending the scientific validity of the testimony. The court asked, "Has [the expert] rendered a report?" Receiving a negative response, the court continued: "I would [*322] have to go through a long voir dire ahead of time. I think if you're going to have an expert you've got to have a report. You've given [***28] me his curriculum vitae . . . . I'd be happy to entertain [an instruction.]" It was after this exchange that Smithers asserted for the first time that Fulero would "testify to the specifics of the case and explain to the jury that there are scientific studies that have shown that eyewitness identification is flawed." Smithers still did not, however, cite a specific theory or fact in the case to which these "scientific studies" would relate. [**45] The court then concluded that "[none of the

cases] cited to me . . . suggests that this is admissible evidence. The government's brief is very persuasive, and I don't have a report from the expert. No, I think . . . you're asking him to comment upon Debra White's credibility." (emphasis added). Smithers conceded the motion and asked permission to proffer the evidence. The court agreed, and although it offered several times to accept an oral proffer at that time, Smithers insisted on delivering it in writing.

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n1 Contrary to the majority's characterization of this citation, I do not offer this quotation as a "holy writ" or rigid "test" that the district court should have adhered to, but rather as a common-sense explanation of Smithers's burden to establish the relevance of his proffered testimony to the case. For this reason, the Stevens court's reasoning--or, for that matter, the identical emphasis on specificity in our Smith decision--is made no less valid by the fact that it pre-dates Daubert.

n2 Tellingly, the district court on remand again dismissed the testimony, this time as unhelpful to the jury and more prejudicial to the prosecution than it was probative to the defense. See 609 F. Supp. 784 (E.D. Pa. 1985). The judgment was affirmed without opinion. See 780 F.2d 1017 (3d Cir. 1985) (table). [**46]

n3 The only assertion made in this memorandum that could arguably be considered

"specific" to Fulero's testimony in this case is the reference to the "known rate of error." This brief discussion actually originated from Smithers's recitation of the Daubert analysis. Smithers was "unclear how the third step in the Daubert analysis, reviewing the rate of known error, would apply to this form of scientific testimony." Not only is this rate-of-error inquiry not a "step" mandated by Daubert but simply one of its "general observations," Daubert, 509 U.S. at 593-94, it is also clearly inapplicable in this case. Daubert cited as an example of scientific testimony the Seventh Circuit's treatment of spectrographic voice identification technique. One method of examining this technique's reliability was to ask how often it produced an erroneous result. Here, the proposed "technique" is of the exactly opposite type; it seeks not to make an identification, but to explain the reasons why an identification may be incorrect. Hence, a proper analogy to this Daubert observation might be to ask how often this technique correctly ascertains that an identification is wrong.

Nevertheless, Smithers continued: "The question of known rate of error is addressed by the [Handberg] article included as Attachment C . . . . This article analyzes in detail the effect that certain variables are likely to have on the ability of eyewitnesses to correctly identify persons they have previously seen, pointing out the rate of error in making identifications. [This] forms parts of the scientific basis of Dr. Fulero's testimony." This passing reference was Smithers's entire treatment of the "rate of error" issue, and does not provide the needed specificity. [**47]

n4 The Government noted that "Fulero's testimony . . . would likewise be of dubious assistance to the jury. His testimony does not relate to a specific fact in this case, such as the efficacy of the photo spread. Instead, defendant will offer his testimony regarding the general problems arising from eyewitness identification, in contrast to the specific issues that were presented in the Smith case."

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It was in the written proffer, which was not filed until after the Government had rested its case and immediately before Smithers rested his, that Smithers first made any colorable attempt to tie Dr. Fulero's testimony to the facts of the case. Smithers identified the stress of the robbery, "detail salience" relating to Smithers's scar, the length of time between the robbery and the trial, the "conformity effect" of subsequently received information, the photo spread methodology, n5 and the relationship between the witnesses' confidence and accuracy as relevant subjects for Fulero's testimony. Smithers also took issue with the adequacy of a jury instruction in counteracting the fallibility of [**48] eyewitness identifications. Smithers had made none of these arguments before this point in the proceedings, either orally or in writing, despite several opportunities to do so. It was in this context that the court held another hearing on the motion, and remarked, "you finally got your act together with this latest filing . . . . Much different from the first filing," to which Smithers responded, [***29] "Admittedly, Your Honor." A lengthier conversation on the merits of the testimony ensued, followed by the court's

decision to continue to exclude the testimony, primarily because of the delay.

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n5 Smithers now proposed to have Fulero testify to the efficacy of the photo spread, despite having no response to the Government's observation in its prior brief that Smithers had thus far proposed no such thing.

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Federal Rule of Evidence 403 permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, delay, waste [**49] of time, or needless presentation of cumulative evidence." (emphasis added). A district court has "very broad" discretion in making this determination. See United States v. Hawkins, 969 F.2d 169, 174 (6th Cir.1992). A Daubert analysis includes a consideration of Rule 403, see Daubert, 509 U.S. at 595; Rincon, 28 F.3d at 925, and several courts have held that Rule 702's "helpfulness" inquiry incorporates Rule 403's concern for undue prejudice. See Hall, 165 F.3d at 1104; Kime, 99 F.3d at 884; Curry, 977 F.2d at 1051. The district court was well within its discretion to refuse to require the Government to prepare a response to an expert witness when the first inkling of what the witness would testify to was not given to the Government until the middle of the trial, after the Government had rested its own case. There is no basis for the majority's holding that Smithers's initial motion--which did little more than introduce Dr. Fulero and his field of

study--or his renewed motion at the start of trial, or his mid-trial brief, put the Government on sufficient notice of [**50] the substance or foundation of Fulero's testimony so as to permit the Government to prepare a rebuttal, either to the motions or the testimony. The consequences of Smithers's procrastination should rest on him, not on the Government. Other courts have held that initial notice of the intent to [*323] call an eyewitness identification expert witness only a few days before trial is grounds for exclusion. See Dorsey, 45 F.3d at 816 (remarking "the case law is clear that it is not an abuse of discretion . . . to disallow expert testimony where a late proffer of evidence by the defense substantially prejudices the government in its ability to find its own expert and conduct similar testing" and upholding exclusion when notice given on first day of trial); Curry, 977 F.2d at 1052 (upholding exclusion when 4 days [***30] notice given); United States v. Dowling, 855 F.2d 114, 118 (3d Cir. 1988) (upholding exclusion when 5 days notice given in trial held in the Virgin Islands); see also Hon. Robert P. Murrian, The Admissibility of Expert Eyewitness Testimony Under the Federal Rules, 29 Cumb. L. Rev. 379, 395-96 (1998-99) [**51] (instructing practitioners that "The offer of proof should establish the factors in the particular case which call for expert testimony, such as the extreme stress of the witness, differences in age or race of the defendant and the eyewitness, and suggestive line up techniques. If the factors necessitating expert testimony are not established, and the court excludes the expert testimony, the decision will likely be upheld on appeal"). These decisions and commentary contradict the majority's blanket statement that delay is "not a proper basis for exclusion." n6

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n6 As I believe my discussion here makes clear, I understand "delay" to mean "prolonging of the length of the trial," and not, as the majority suggests I mean, merely "filed late." This certainly appears to have been the district court's understanding as well, since its ruling was made immediately before Smithers rested his case, and granting the motion would have required a "lengthy voir dire," more preparation by the Government, and the direct and cross-examination of Dr. Fulero.

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[**52]

It is important to note that the majority relies solely on United States v. Collins, 837 F.2d 477, 1988 WL 4434 (6th Cir. 1988) (per curiam) (unpublished), for the proposition that tardiness is not a proper basis for exclusion of expert testimony. This use of Collins is both misleading and inappropriate. In Collins, which is not only unpublished but is pre-Daubert, the defendant proffered a psychologist who would testify that the tendency to fill in gaps in perception made the eyewitness identifications in the case unreliable. See id. at **1. The district court excluded the witness for only one reason--he had not been listed as a witness as instructed by a pretrial order. No admissibility determination of any kind was made. The witness was therefore excluded solely to punish the defendant for noncompliance with a discovery order. It was in this context that the court made the statement quoted by the majority here: [***31] "a criminal

defendant's relevant evidence may generally not be excluded on the basis of a discovery sanction." The Collins court expressly distinguished the case from one determining whether such [**53] evidence was admissible pursuant to our then-recent Smith decision. In fact, the Collins court followed Smith in declining to rule that the testimony was admissible as a matter of law, and proceeded to find the error harmless in light of other evidence. See id. at **2. Collins, then, is completely inapposite to this case, which involves an admissibility determination and not a discovery sanction. Moreover, reliance on unpublished cases in a subsequent written opinion for purposes other than establishing preclusion or law of the case, unless the prior case is truly of such precedential value that it probably should have been published, does violence to the policy we have promulgated in 6. Cir. R. 28(g). This dubious use of Collins will only have the unfortunate side effect of encouraging lawyers to cite other unpublished decisions to us in the future, despite the clear intent of the rule.

II. The District Court's Application of Daubert

The majority finds that the district court abused its discretion by failing to apply the evidentiary gatekeeping principles of Daubert. [*324] I am not convinced that the court committed this error, or that [**54] remand would be necessary even if it did.

The majority pays passing obeisance to the abuse of discretion standard by which we review a district court's decision to exclude expert testimony, but wholly

fails to apply in this case the deference that standard requires. The factors listed in Daubert were meant to suggest to federal courts the relevant subjects of analysis when evaluating proffered experts under Rule 702, but they are "not holy writ" that the district court must invoke by name in order to pass our scrutiny. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1179, 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring). The Supreme Court has recently instructed that [***32]

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. Our opinion in Joiner makes clear that a court of appeals is to apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or [**55] exclude expert testimony. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid unjustifiable expense and delay as part of their search for truth and the just determination of proceedings. Thus, whether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude

to determine. And the Eleventh Circuit erred insofar as it held to the contrary.

Kumho Tire, 119 S. Ct. at 1176 (internal citations, quotations and alterations omitted). The court's failure specifically to cite Daubert as its basis for excluding Dr. Fulero does not itself mandate remand. See Greenwell v. Boatwright, 184 F.3d 492, 498 (6th Cir. 1999) [**56] ("Although the trial court is not required to hold an actual hearing to comply with Daubert, the court is required to make an initial assessment of the relevance and reliability of the expert testimony. Because the district court did not hold a Daubert hearing we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony"); see also Hall, 165 F.3d at 1102 (approving of the district court's evaluation of the testimony in a hearing that did not explicitly cite the two Daubert prongs but frequently [***33] referenced the decision). Instead, our task is to review the district court's performance of its gatekeeping function in light of "the facts of [the] particular case," Kumho Tire, 119 S. Ct. at 1175 (internal quotations omitted), granting "the trial judge [ ] considerable leeway in deciding in [this] particular case how to go about determining whether [this] particular expert testimony is reliable." Id. at 1176. In so doing, we must be mindful of the principles behind Daubert, but "the factors it mentions do not constitute [**57] a definitive checklist or test." Id. at 1175 (internal quotations omitted).

I would hold that the way in which the district court conducted its analysis of

the admissibility of Dr. Fulero's testimony was not abusive of the court's discretion. The core holding of the Daubert decision was that admission of expert testimony is governed by the Federal Rules of Evidence and not the theretofore majority rule of "general acceptance" by the scientific community. See Daubert, 509 U.S. at 587. The primary "locus" [*325] of the court's power to evaluate experts rests in Rule 702. See id. at 589. Rule 702 requires that the testimony be reliable and relevant to be admitted. Because the Government has chosen not to contest Dr. Fulero's qualifications as a psychologist or the abstract scientific validity of the studies he proposes to testify from, either at trial or on appeal, we may assume that Smithers has satisfied the reliability requirement. See Greenwell, 184 F.3d at 498. Instead, the Government has consistently focused its challenge on the relevance aspect of Rule 702, which "further requires that the evidence or testimony assist [**58] the trier of fact to understand the evidence or determine a fact in issue. [...] The consideration has been aptly described . . . as one of 'fit.'" 'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." Daubert, 509 U.S. at 591 (internal quotations omitted). The district court here examined briefs on the issue from both sides in preparation for the hearing on Smithers's limine motion. Both briefs recited the applicable factors from Daubert and Rules 702 and 403. Both examined the leading cases on this type of testimony, both before and after Daubert, focusing especially on United States v. Rincon, [***34] 28 F.3d 921 (9th Cir. 1994) and our decision in United States v. Smith, 736 F.2d 1103 (6th Cir. 1984) (per curiam). The Government's brief went further to explain why the testimony would be unhelpful and prejudicial in this case, and

why cross-examination and jury instructions would better address Smithers's concerns. The court demonstrated its reliance on these briefs when it began the relevant portion of the motion hearing [**59] by noting its belief that the Government's arguments were persuasive, informing Smithers that he could discredit the eyewitness identifications through cross-examination, and asking for Smithers's assistance in choosing an appropriate jury instruction. As recounted above, the court pressed Smithers for additional details on how Fulero's testimony would relate to the facts of the case, but no such details were forthcoming. This left the court with little basis upon which to conclude that the Government was in error in its contention that the testimony would only confuse the jury and invade its province by commenting directly on the credibility of the witnesses. Whether Smithers was unable to demonstrate the relevance of the testimony at this hearing on the first day of trial or was simply procrastinating, the onus should fall on him; the court dealt appropriately with the information and arguments presented to it.

The court also acted properly once Smithers--at the close of his defense--finally proffered the details of Fulero's testimony. At one point during the hearing on the renewed motion to permit Fulero to testify, the court--addressing the prosecutor--explained its reliance on [**60] Rincon, and noted, consistent with the "reliability" element of Daubert, that "the good professor in his affidavit and in his background and in the literature that was cited to me suggests that the fragility . . . of eyewitness testimony has been established scientifically and that he brings an expertise that may assist the jury." How the majority can hold, in light of this statement and the

Government's decision not to challenge Fulero's competence, that "the district court did not make any determination as to this expert's scientific reasoning or methodology" is puzzling. And because reliability was never at issue, any further inquiry into the reliability of the testimony was unnecessary and, [***35] indeed, is precisely the kind of proceeding that Kumho Tire expressly gives the district courts the discretion to avoid.

The majority acknowledges that although the district court did not explicitly explain that it was doing so, it did conduct some inquiry into relevance when it decided that the jury was aware of its obligation to be skeptical of eyewitness testimony. The record of the second hearing, however, reveals that the district court in fact [*326] looked [**61] carefully at the issue of relevance. Even at this point, Smithers did not make Dr. Fulero available for voir dire by the Government, but the court initiated a lengthy discussion with Smithers's counsel on Fulero's familiarity with the facts of the case, including Smithers's scar, the photo lineup procedure, and the stress of the robbery. These are precisely the questions the district court needed to ask to determine the relevance and "fit" of Fulero's testimony to the particular facts of the case. After hearing Smithers's answers, the court concluded that Fulero would have acted in this case as more of an advocate than a neutral, scientific expert--a characterization borrowed from Rincon. See 28 F.3d at 923. The majority fails to suggest any means whatever by which the court could have conducted a better inquiry under the circumstances. Instead it flatly pronounces that the court's conclusion was "simply wrong" because it would lead to the "absurd" result of never allowing such expert testimony.

I suspect that the Seventh and Eleventh Circuits might take umbrage at the majority's characterizing as "absurd," their strong presumptions against expert testimony [**62] regarding eyewitness identifications, see Hall, 165 F.3d at 1103; Smith, 122 F.3d at 1357. More importantly, I think it is the majority's conclusion that is simply wrong. The majority fails to explain how this extreme result would follow from the district court's observation. Indeed, if the district court meant flatly to disallow expert testimony concerning eyewitness identifications, it would not have gone out of its way at this hearing to replace sua sponte the pattern jury instruction on eyewitness identifications to which Smithers had already agreed with what it saw as "a much stronger instruction" in [***36] order to alleviate the genuine concerns that Smithers had raised. The majority is resolute in its conviction that the district court failed to "apply Daubert," but it fails to explain how that court could have done any better with no more information than Smithers provided.

This case presents very few of the "narrow circumstances" identified by other courts in which this kind of expert testimony can be relevant. See Smith, 156 F.3d 1046, 1052; Harris, 995 F.2d at 535-36. There was no [**63] problem of cross-racial identification. The passage of time has been found to be a relevant factor when the recalled event occurred forty years prior, see Krist v. Eli Lilly and Co., 897 F.2d 293, 297-98 (7th Cir. 1990), but not when the time lapse was a "routine" one of "merely" six years. See Curry, 977 F.2d at 1052. Here, the time between the robbery and Ms. White's positive identification of Smithers in the photo array was two days; the time between the robbery and the trial was

only one and a half years. Moreover, although Smithers alleges that there was an unconscious transference of mistaken identifications among the witnesses, the court explicitly found that all the evidence presented at the hearing appeared to suggest otherwise.

Furthermore, the majority identifies its primary basis for finding an abuse of discretion as the court's "experiment" comment, explaining that "basing an evidentiary decision on personal curiosity rather than applicable case law and the rules of evidence is a patent abuse of discretion." The fact that these offhand statements were made is unfortunate. We review them on the cold record, separated them from their [**64] context and texture, including the voice inflection and facial expressions of their delivery. But the proceedings described above make it clear that the district court did not base its exclusion of Fulero on the sinister whimsy that the majority imputes to it. The statements were made at the close of the second hearing, after the court had again denied the motion and instead awarded Smithers a strongly worded instruction. The court's comment to Smithers's counsel that she had "made an excellent record that I've abused my discretion" [***37] was not indifference to the law, but an assurance that she had [*327] done well in preserving a record of her objection for appeal. The observation that admitting Fulero's testimony would have been "tantamount to the Court declaring the defendant not guilty as a matter of law" and that "absent the eyewitness testimony I don't think there's enough here to go to the jury" correctly describes the severely prejudicial effect that Fulero's testimony likely would have had on the Government's case. Finally, the court's "experiment" remark, while perhaps inappropriate, was made

well after the motion had twice been denied and was the last statement made on the [**65] record before Smithers rested his case. It did not form the basis for the court's exclusion of Fulero, nor did it prejudice Smithers in any other way. I do not agree that this single comment can justify the majority's finding of a patent abuse of discretion.

The majority ultimately concludes that this case must be remanded for a new trial that, presumably, will include "a Daubert test," n7 whatever that may be. Were that the extent of our holding, my difference of opinion with the majority would simply be a disagreement about what Daubert requires and how the district court should have proceeded here. But the majority does not stop there. Instead, it proceeds into a lengthy explanation of what the court might have found had it applied Daubert to the majority's liking. This, in my view, is wholly improper. Not only does this exceed our function as an appellate court, but it is anathema to the law that the majority had theretofore laid out; if the gatekeeping function is truly in the district court's discretion and requires a fact-finding hearing, and the district court in this case has failed to exercise that discretion as utterly as the majority concludes, then surely [**66] the record before us is inadequate to permit us to [***38] announce what facts about the testimony the court would have discovered in a hearing. Instead, we should follow the lead of our sister circuits which, upon a finding that the district court has not assessed an eyewitness identification expert's relevance in a manner consistent with Rule 702, have remanded the matter without further discussion. See, e.g., Hall, 165 F.3d at 1102; United States v. Amador-Galvan, 9 F.3d 1414, 1417-18 (9th Cir. 1993); Downing, 753 F.2d at 1226. I take some

comfort in the fact that the majority's sua sponte application of Daubert and glowing praise for eyewitness identification expert testimony are dicta, since they exceed the actual holding that the court abused its discretion. To the extent, however, that the opinion as a whole is seen as persuasive authority cementing the already-extant impression that our circuit is among the most receptive to this type of testimony, see Murrian, supra, at 392, it does our jurisprudence a disservice.

----------Footnotes----------

n7 Of course, in order to perform a more detailed inquiry next time, the district court should have the discretion to require Smithers to present his witness for voir dire, or at least to make an effort to present a sufficiently detailed proffer in a timely fashion. Unfortunately, the majority's opinion would appear to curtain that discretion considerably, if, indeed, the majority's opinion leaves any room for the district court to perform any further inquiry at all.

----------End Footnotes----------

[**67]

III. The Merit of Expert Testimony on Eyewitness Identifications

The trepidation with which nearly all appellate courts have treated this subject is representative of a broader reluctance, which I share, to admit the expert

testimony of social scientists with the same deference given to the testimony of those in the physical sciences. I do not seek to discredit the value of these researchers' work; the ever-expanding psychological disciplines have done much in the past several decades to explode commonly held misconceptions and enrich our understanding of human behaviors. As even those courts most opposed to admitting the testimony in court have acknowledged, those benefits include an enhanced insight into the fallibility of eyewitness identification that can inform our trial procedures. See, [*328] e.g., Hall, 165 F.3d at 1104. The difficulty arises in treating psychological theories as if they were as demonstrably reliable as the laws of physics. Conclusions reached by applying the laws of all but the most theoretical of physical sciences to a particular set of facts are verifiable through replication; disagreements between dueling experts in the physical [**68] sciences (e.g., accident [***39] reconstructionists or DNA experts) typically focus on the data to which the scientific method is applied, which is subject to objective analysis. The certainty of the testimony of social scientists, however, is limited by the nature of their field. They typically base their opinions on studies of small groups of people under laboratory conditions; those studies are then interpreted and extrapolated to predict the likelihood that another person under similar but non-controlled conditions will manifest similar behavior. Each step of this analysis--the choice of sample and control groups, the conditions under which they are observed, the cause and nature of the observed behavior, and the likelihood that the observed behavior will be replicated by a different person in a non-controlled setting--is influenced by the personal opinion of the individual expert. Nor will there be much similarity between the persons

typically studied by social scientists and the witnesses in any given criminal trial. The studies are virtually always based on college students or other readily available test subjects in a controlled environment (which are the most easily measurable), [**69] not individuals involved in real world incidents such as actual robbery victims. See, e.g., United States v. Hines, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) (assessing relevance of studies of college students); Brian L. Cutler and Steven D. Penrod, Assessing the Accuracy of Eye-Witness Identifications, in Handbook of Psychology in Legal Contexts 193 (R. Bull and D. Carson ed. 1995) (Attachment E to Smithers's Motion in Limine) ("Most of what is known about the psychology of eye-witness memory has been acquired through laboratory experiments"). The limits of social science testimony were aptly expressed in Gacy v. Welborn, 994 F.2d 305, 313-14 (7th Cir. 1993):

> Social science has challenged many premises of the jury system. Students of the subject believe, for example, that jurors give too much weight to eyewitness evidence and not enough weight to other kinds. Still, the ability of jurors to sift good evidence from bad is an axiom of the system, so courts not only permit juries to decide these cases but also bypass the sort of empirical findings that [***40] might help jurors reach better decisions. Juries have [**70] a hard time distinguishing "junk science" from the real thing, but aside from some tinkering with the expert testimony admitted at trial, this shortcoming has been tolerated. Jurors reach compromise verdicts, although they aren't supposed to. Juries return inconsistent verdicts, representing irrational behavior or disobedience to their instructions. Juries act in ways no reasonable person would act. This is the standard for granting

> judgment notwithstanding the verdict in a civil case, or acquittal after verdict in a criminal case, or reducing an award of damages, and there are plenty of occasions for these post-verdict correctives. Yet for all of this, courts do not discard the premises of the jury system, postulates embedded in the Constitution and thus, within our legal system, unassailable. This shows up in a striking fact about the Supreme Court's treatment of social science: of the 92 cases between 1970 and 1988 addressing issues of evidence and trial procedure, not one relied on the extensive body of evidence about jurors' conduct.

(citations omitted).

No psychological study will ever bear directly on the specific persons making an eyewitness identification in court; [**71] psychological experts will always be forced to extrapolate from studies done on other people and opine on the relevance such data might have to the facts at hand. [*329] Cross-examination of the identifying witnesses, on the other hand, will always provide more relevant testimony, because by definition the inquiry is limited to what the eyewitnesses themselves saw and experienced. See Smith, 122 F.3d at 1359 ("defendants who want to attack the reliability of eyewitness recollection are free to use the powerful tool of cross-examination to do so"). Indeed, to a certain extent, lawyers are abdicating their own roles when they seek to rely on experts instead of cross-examination to discredit an eyewitness identification. See Amaral, 488 F.2d at 1153 ("Our legal system places primary reliance for the ascertainment of truth on the test of cross-examination. [...] It is the

responsibility of counsel during [***41] cross-examination to inquire into the witness' opportunity for observation, his capacity for observation, his attention and interest and his distraction or division of attention" (internal quotations and citations omitted)). The witness's cross-examination [**72] testimony can then be framed as the defendant chooses in closing argument to maximize its potential to undermine the identification. See Currie, 515 S.E.2d at 339. What the defendant is unable to establish by these means--e.g., the counter-intuitive concept suggested by psychological research that confidence in one's recollection does not necessarily reflect accuracy--can be ably communicated by the court in its jury instructions. Instructions have an advantage over experts in that they can be informed by advances in social science research while communicating only those theories that are relevant to the facts of the case, and avoiding the extra delay and expense of producing and rebutting expert testimony, all without the imprimatur of scientific reliability that accompanies expert testimony. Certainly the utility of jury instructions in these situations was aptly demonstrated in this case, where the district court skillfully addressed Smithers's concerns by adopting an instruction specifically tailored to explain the possible deficiencies of the identifications in this case. In any event, given the utility of cross-examination and jury instructions combined, it [**73] is little wonder that the vast majority of appellate cases have found the choice of these mechanisms over expert testimony, even if the expert may have some particular insight that would not be otherwise revealed, not to be an abuse of the district court's broad discretion under Kumho Tire, Daubert, and Rule 702. See Moore, 882 F.2d at 1110-11; Hall, 165 F.3d at 1107; Smith, 122 F.3d at 1358-59; Hicks, 103 F.3d at 847; Kime, 99 F.3d at 884; Ginn,

87 F.3d at 370; Rincon, 28 F.3d at 925-26; Jordan, 983 F.2d at 938-39; Curry, 977 F.2d at 1051; Blade, 811 F.2d at 464-65; Moore, 786 F.2d at 1311-12; Fosher, 590 F.2d at 382; McClendon, 730 A.2d at 1115-16; McMullen, 714 So. 2d at 370; Gaines, 926 P.2d at 646-47; Buell, 489 N.E.2d at 803-04; Currie, 515 S.E.2d at 339. [***42]

The presence of a person labeled an "expert" by the court in the witness stand inevitably [**74] carries the risk of jurors' accepting that person's testimony as scientifically irrefutable truth. This simple fact underlies the special importance given to the court's gatekeeping function with expert testimony, and it is in the majority's flat rejection of this concept that its reasoning is the shakiest. In its fifth footnote, the majority observes: "it appears the trial court thought the expert nature of the testimony would unduly impress the jury; this is an improper factor upon which to exclude expert testimony, for if this were the test, no expert could ever testify." While it may be correct as a hypothetical matter that exclusion of a witness solely because he was an expert would be an abuse of discretion, that is simply not what occurred here. Rather, the court reasoned that cross-examination and a jury instruction were preferable to permitting the jury to hear testimony that was only marginally relevant and demonstrably prejudicial to the Government. The court was in good company in this conclusion. Daubert itself observed that "expert testimony can be both powerful and quite misleading because [*330] of the difficulty in evaluating it. Because of this risk, the judge [**75] in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses." 509 U.S. at 595. A

number of other courts addressing eyewitness identification expert testimony have explicitly cited the expert's "aura of reliability" as a prejudicial factor weighing against its admissibility. See Lumpkin, 192 F.3d at 289; Brien, 59 F.3d at 276-77; Blade, 811 F.2d at 465; United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); Fosher, 590 F.2d at 383-84 (collecting cases referencing the "aura of reliability"); Downing, 609 F. Supp. 784; United States v. Collins, 395 F. Supp. 629, 636-37 (M.D. Penn. 1975). The majority's citation-free asseveration on this subject is simply untenable.

Expert testimony on eyewitness identifications can also be unduly prejudicial when it is phrased so as to comment directly on the credibility of the eyewitness. No court in any context would allow one witness to testify to the credibility of another, because assessment of the credibility of witnesses [**76] in [***43] our legal system is the sole province of the jury. See Greenwell, 184 F.3d at 496; Gacy, 994 F.2d at 313-14; Murrian, supra, at 380. As illustrated above, a number of courts have cited this tenet as a basis for excluding eyewitness identification experts. That threat was also present in this case, as the majority points out, because Dr. Fulero proposed to testify, among other things, that the eyewitnesses "would have observed and been able to recall the large scar on Mr. Smithers' neck. That deformity would have been more memorable to the witnesses." The majority opinion says that the solution to this admittedly inadmissible testimony is simply to excise the offending language. This ignores the fact that at the second hearing, Smithers identified the scar as "the key issue that [Fulero] would address." Removing this aspect of Fulero's testimony would gut the remainder of the majority's reasoning as to why Fulero's

testimony should have been admitted. Nor is this one sentence the only example of how Fulero's testimony would have stepped over the line. Smithers argued in his renewed motion that "Fulero would testify regarding [**77] the perception of the bank robber by [the witnesses] and how [various factors] are directly related to the accuracy of their identification testimony." (emphasis added). Again: "Fulero would thus testify that the photo spread procedures, and the witness' numerous meetings with the police, FBI, and each other, would have directly influenced the witness' ability to recall the particular characteristics of the bank robber with any degree of accuracy." (emphasis added). Other portions of the motion are phrased in a more appropriate form, indicating that Fulero would testify to research data as it relates to particular conditions experienced by the witnesses, leaving the application of that information to counsel and the jury. But these examples more than adequately justify the district court's conclusion that Fulero (who, incidentally, is also an attorney) would have acted as more of an advocate than a scientific expert in this case. The majority's decision merely to excise the offending portions of the testimony not only leaves very little testimony that is even arguably relevant, but relieves Smithers of his burden of proving that the testimony he proffered is admissible. [**78] Once again, the blame for [***44] Fulero's exclusion lies not with the district court's legal analysis but with Smithers's inadequate production.

The cases holding that expert testimony regarding eyewitness identification is too general and those finding that it comments too directly on witness credibility delimit the narrow range of circumstances in which this testimony is

properly admissible. Unless a very small number of eyewitness identifications form the only evidentiary basis for a conviction, and the proffered testimony relates directly to the facts of the case without commenting on the eyewitnesses' credibility, the need for this testimony will simply not be so great that alternative means of cautioning the [*331] jury on this subject will not suffice. See, e.g, Rincon, 28 F.3d at 923-26. The existence of other inculpatory evidence will usually render any error in excluding the expert testimony harmless. See Smith, 736 F.2d at 1107; Hall, 165 F.3d at 1107-08; Smith, 156 F.3d at 1053-54; Blade, 811 F.2d at 465; Moore, 786 F.2d at 1313. Here, the fact that [**79] three witnesses identified Smithers adds to the probability of their accuracy. Moreover, the Government presented the identification of Smithers's car at the bank, the photo analysis showing that Smithers and the robber shared the rare characteristic of being over 6'5" tall, and a series of lies Smithers told police regarding his whereabouts. While this is not overwhelming evidence, it does alleviate considerably any concern that Smithers was convicted solely on the basis of erroneous eyewitness testimony.

The various failings in Fulero's proposed testimony accentuate the jurisprudential danger posed by the majority's opinion. Its tangible eagerness to find that the district court abused its discretion in excluding this testimony is likely to set a precedent requiring admission of evidence tending to erode further the jury's responsibility for making credibility determinations. Other courts have recognized this danger and steered clear of it. See, e.g., Alexander, 816 F.2d at 169 ("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 [**80] would have [***45] 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"); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. Unit B 1982) ("To admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence"); Sabetta, 680 A.2d at 933 ("it would effectively invade the province of the jury and . . . open a floodgate whereby experts would testify on every conceivable aspect of a witness's credibility"). The logical conclusion of today's holding--if not its implicit intent--is likely to be precisely this type of snowball effect in our circuit.

Acutely aware of the dangers of permitting expert testimony without a rigorous performance of the gatekeeping function, Daubert observed:

> It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between [**81] the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in

> the project of reaching a quick, final, and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic [***46] understanding but for the particularized resolution of legal disputes.

509 U.S. at 596-97. I fear that the majority's opinion here will only undermine the balance between truth-seeking and fairness that the Rules have so carefully crafted, without [**82] adding much at all to the efficacy--at least in this circuit--of criminal justice. Indeed, the majority here holds that "Expert testimony regarding eyewitness identification [*332] must be recognized as scientifically commensurate with all other psychological studies, and may often be a valid source of information to help jurors understand the factors that effect [sic] eyewitness identifications." The effect of the majority's opinion is to establish the district court as the gatekeeper with discretion only to admit, but not to exclude, expert testimony relative to eyewitness identification.

For all of the foregoing reasons, I respectfully dissent.

Document 3 of 17.

Search Terms: United States, Smithers

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

v

MONTREAL CHRISTIAN-BATES,

Defendant.
_____

File No. 05-832-FC

Hon. Beverly Nettles-Nickerson
Circuit Judge

Charged Offenses:
Count I: Armed Robbery
Count II: Home Invasion
Count III: Felon in Possession
Count IV: Felony Firearm
Count V: Felony Firearm

NICHOLAS BOSTIC (P-40653)
ASSISTANT INGHAM COUNTY PROSECUTOR
Attorneys for Plaintiffs
303 W. Kalamazoo Street
Lansing, MI 48933
(517) 483-6108

GEORGE ZULAKIS (P-28520)
BAIRD & ZULAKIS, P.C.
Attorneys for Defendant
4127 Okemos Road
Okemos, MI 48864
(517) 349-5011
_____/

EX-PARTE ORDER FOR APPOINTMENT OF DEFENSE EXPERT

At a session of said Court, held in the City of Lansing, County of Ingham, and State of Michigan, this ____ day of _____, 2006.

PRESENT: HON. BEVERLY NETTLES-NICKERSON, CIRCUIT JUDGE

Upon reading and filing the Motion and Affidavit of Counsel and it appearing that the Court should appoint Dr. Solomon Fulero as an expert on behalf of the Defendant in connection with issues pertaining to eye witness identification, which the Court finds to be a material issue in this case, **NOW, THEREFORE;**

IT IS HEREBY ORDERED that Solomon Fulero, Ph.D., 517 Winding Way,

Kettering, Ohio 45429, is appointed as an expert on behalf of the Defendant, Montreal Christian-Bates, who this Court finds to be indigent and unable to compensate an expert on his own behalf. The Court by this Order shall and does hereby authorize the expenditure of One Thousand, Five Hundred Dollars ($1,500), representing six (6) hours at Dr. Fulero's hourly rate of Two Hundred Fifty Dollars ($250), in connection with Dr. Fulero's review of pertinent materials, communications with Counsel for Defendant, and preparation in connection with his expected testimony herein.

IT IS FURTHER ORDERED that Dr. Solomon Fulero shall be compensated at the rate of Two Hundred Fifty Dollars ($250) per hour, which rate the Court finds to be reasonable herein in light of the expertise of Defendant's proffered expert in connection with his appearance in Court for purposes of testimony herein, and that he shall be reimbursed for reasonable fees and expenses, including overnight accommodations, if necessary, in connection with his travel to and from Court.

_____

Beverly Nettles-Nickerson, Circuit Judge

Countersigned:

_____

Deputy Clerk