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## Rethinking the Role of Expert Testimony Regarding The Reliability of Eyewitness Identifications in New York

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RETHINKING THE ROLE OF EXPERT TESTIMONY  
REGARDING THE RELIABILITY OF EYEWITNESS  
IDENTIFICATIONS IN NEW YORK

SCOTT WOLLER\*

I. INTRODUCTION

Assume you are on trial for murder in New York. The government's case consists solely of the testimony of three eyewitnesses who say you are the killer. All three witnesses initially identified you from a photograph, and one also picked you at a lineup. These pretrial identifications took place *seven* years after the commission of the crime. One of the witnesses, when viewing the photo, said it was a "close match", and another said it was only "similar." Yet, you were indicted and brought to trial. Your attorney calls a psychologist who is an expert on eyewitness identification.<sup>1</sup> The court refuses to admit the testimony however, citing the *Frye* test, an archaic doctrine formulated in 1923 to determine the admissibility of "novel" scientific evidence.<sup>2</sup> In New York, the decision to admit expert testimony on the unreliability of eyewitness testimony is in the discretion of the trial court.<sup>3</sup> Thus, if the defendant is unlucky, the judge may strictly apply *Frye* and refuse to allow an expert to testify.<sup>4</sup> If the defendant is lucky, the court may hold *Frye* inapplicable and admit the expert testimony.<sup>5</sup>

This Note argues that because of the many psychological factors that may make eyewitness identification unreliable, New York should either (1) stop applying *Frye* to expert testimony on the reliability of eyewitnesses or alternatively, hold such testimony satisfies the *Frye* test; or (2) adopt the test set out by the Supreme Court in

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1. This is the factual and procedural background of *People v. Legrand*, 747 N.Y.S.2d 733 (N.Y. Sup. Ct. 2002), which will be discussed *infra*.

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

3. *People v. Lee*, 750 N.E.2d 63 (2001) (holding that "... the decision whether to admit [expert testimony] rests in the sound discretion of the trial court").

4. See *Legrand*, 747 N.Y.S.2d at 738.

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

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>6</sup> for the admission of expert testimony.

Part II of the Note discusses the history of the admissibility of expert testimony regarding eyewitness reliability, both nationally and in New York. It traces the traditional universal refusal to admit such testimony and the more recent willingness of some courts to allow it. Part II also discusses the different standards courts have used in deciding admissibility. Part III will highlight the recent experience in the New York courts and some of the problems with eyewitness testimony subject to expert testimony. Finally, in Part IV the Note will propose a solution and respond to some of the likely criticisms of adopting *Daubert*.

## II. HISTORY OF THE ADMISSIBILITY OF EXPERT TESTIMONY REGARDING EYEWITNESS RELIABILITY

### A. *The Early Rejection of Expert Testimony on Eyewitness Identification*

The earliest reported decision concerning expert testimony on eyewitness identification is *Criglow v. State*,<sup>7</sup> decided in 1931.<sup>8</sup> The defendant Criglow sought to call an expert to give his opinion as to the powers of observation and recollection of two eyewitnesses, neither of whom had ever seen the defendant prior to the robbery.<sup>9</sup> The trial court excluded this testimony, and the Supreme Court of Arkansas affirmed. The court held that such testimony would usurp the function of the jury to pass upon the credibility and weight of evidence.<sup>10</sup> In 1952, a California appellate court in *People*

6. 509 U.S. 579 (1993).

7. 36 S.W.2d 400 (Ark. 1931). R.E. Criglow and two other men were arrested and charged with robbing a store in Pulaski County, Arkansas. Two witnesses testified at trial that they recognized the defendant as one of the robbers.

8. See Steven D. Penrod et al., *Expert Psychological Testimony on Eyewitness Reliability Before and After Daubert: The State of the Law and Science*, 13 BEHAV. SCI. AND L. 229, 230 (1995).

9. *Criglow*, 36 S.W.2d at 401.

10. *Id.* (“[T]he question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer.”). In addition, the court reasoned that the extent to which the witnesses might have been frightened and their opportunity to observe the defendant during the robbery were questions that could have been inquired into by examination of the witnesses themselves. *Id.*

*v. Collier*<sup>11</sup> followed the reasoning of *Criglow*. When the defendant sought to call a psychology professor to testify as to the reliability of the victims' observation, the court found that the evidence was not within the "proper field of expert testimony"<sup>12</sup> and that it "was a matter within the province of the jury."<sup>13</sup> An influential 1973 Ninth Circuit case, *United States v. Amaral*,<sup>14</sup> also echoed this reasoning, stating the jury should determine what weight to give an eyewitness' testimony rather than an expert.<sup>15</sup>

Courts also excluded expert testimony about an eyewitness' reliability on the ground that problems with eyewitness identification could be brought out on cross-examination.<sup>16</sup> *Criglow*, *Collier*, and *Amaral* all offered this rationale, as did other cases declining to allow expert testimony.<sup>17</sup> Some courts also expressed a concern that an expert's testimony would be highly prejudicial because of the undue weight lay jurors would give it.<sup>18</sup>

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11. 249 P.2d 72 (Cal. Dist. Ct. App. 1952). *Collier* was a prosecution in which the defendant was charged with raping four different women, all of whom testified that the defendant was the man who raped them.

12. *Id.*

13. *Id.*

14. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

15. *Id.* at 1153. This reasoning, that the problems which could make an eyewitness' testimony unreliable were within the common knowledge, or "province" of the jury, and that such testimony would usurp the fact finding function became the staple holding for courts declining to allow expert testimony on eyewitness identifications. See *e.g., id.*; *People v. Johnson*, 112 Cal. Rptr. 834, 837 (1974) (upholding the trial court's ruling "that the testimony would take over the jury's task of determining the weight and credibility of the witnesses testimony."); *Jones v. State*, 208 S.E.2d 850, 853 (1974) ("The determination of the credibility of a witness, including the accuracy of an eyewitness' identification, is a matter exclusively within the jury's province."); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) ("jury can adequately weigh these problems through common-sense evaluation"); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (expert testimony regarding reliability of eyewitness testimony addresses an issue of which the jury is already aware).

16. See, *e.g., Thevis*, 665 F.2d at 641 ("We conclude, as did the trial judge, that the problems of perception and memory can be adequately addressed in cross-examination. . .").

17. See, *e.g., Amaral*, 488 F.2d at 1153 ("It is the responsibility of counsel during 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.").

18. See, *e.g., United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (expert testimony would cause undue prejudice and confusion because of the special reliability and trustworthiness of an expert's testimony).

Interestingly, most courts that denied the use of expert testimony on eyewitness reliability did so without even mentioning the *Frye* “general acceptance” test, which was the dominant test for the admissibility of expert scientific evidence at least until the adoption of the Federal Rules of Evidence.<sup>19</sup> Only three of the early cases denying the use of such expert testimony mentioned *Frye* and general acceptance, and two of those cases did not even consider whether such testimony satisfied the general acceptance standard.<sup>20</sup> In *Bloodsworth v. Maryland*,<sup>21</sup> the Maryland Court of Appeals acknowledged the *Frye-Reed* standard was appropriate for evidence such as voice-prints and hypnosis,<sup>22</sup> but held that it was inappropriate for expert evidence on eyewitness reliability.<sup>23</sup> This court reasoned that eyewitness reliability “was not beyond the ken of the jurors. . .”<sup>24</sup> Thus, there were no cases excluding such testimony for failure to meet the *Frye* general acceptance standard.

In more recent cases, most appellate courts take the view that the admittance of such expert testimony is within the discretion of the trial court, and will rarely review the decision of a trial judge who excludes the expert testimony.<sup>25</sup> Trial courts thus have broad leeway in how they deal with expert testimony pertaining to the reli-

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19. Adopted in 1975 and last amended in 2000. Rule 702 is the rule that deals with the admission of expert evidence and creates a more liberal standard than the *Frye* general acceptance standard. In 1993, the Supreme Court held in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), that Rule 702 supplanted *Frye*, and developed what has become known as the *Daubert* test.

20. See, e.g., *Fosher*, 590 F.2d at 383 (declining to address the general acceptance question because the defendant, in his offer of the expert testimony, did not address it); *Amaral*, 448 F.2d at 1153 (“We do not reach the question, even assuming our competency to pass on it, whether the proffered testimony was in accordance with the generally accepted theory explaining the mechanism of perception.”).

21. 512 A.2d 1056 (1986).

22. *Id.* *Reed* is Maryland’s version of the general acceptance test based on the *Frye* test. *Reed v. State*, 391 A.2d 364 (Md. 1978) (holding the standard in Maryland for admission of expert evidence is taken from *Frye*, 293 F. 1013). The trial judge in *Bloodsworth*, 512 A.2d 1056, applied the *Frye-Reed* test and denied the use of the expert testimony.

23. *Bloodsworth*, 307 Md. at 184. (stating “[w]e agree that the *Frye-Reed* test is not properly applicable to this evidence.”).

24. *Id.* at 183.

25. See, e.g., *McMullen v. Florida*, 714 So. 2d 368, 370 (1998) (stating that “[a]n overwhelming majority of both federal and state courts” have adopted this “discretionary view, which provides that the admission of expert testimony regarding eyewitness identification is in the discretion of the trial judge.” (citations omitted)).

ability of an eyewitness. Trial courts that continue to exclude such evidence rely on several rationales. Some use the traditional reasoning that such evidence is not beyond the knowledge of a jury and would not assist them in making their decision.<sup>26</sup> Other courts exclude such testimony because the defendant can present scientific bases concerning eyewitness fallibility in jury instructions,<sup>27</sup> because the expert's testimony was not applicable to the issues at hand,<sup>28</sup> or because the defendant adequately addressed the issue in cross-examination and closing arguments.<sup>29</sup> Finally, some courts still hold such testimony to be inadmissible *per se*.<sup>30</sup>

*B. A Growing Acceptance of Expert Testimony  
on Eyewitness Identification*

In more recent times, the attitudes of some judges have begun to change. By the 1960's, the Supreme Court explicitly recognized the deficiencies in eyewitness testimony.<sup>31</sup> The adoption of the Federal Rules of Evidence in 1975 led to an increasing acceptance of expert testimony generally. Rule 702 liberalized the admissibility of expert witness testimony.<sup>32</sup> Under Rule 702, expert witnesses may explain scientific or other principles that are relevant to the case and leave it to the trier of fact to apply those principles to the

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26. See, e.g., *State v. Hubbard*, 48 P.3d 953 (Utah 2002) (upholding the trial judge's finding that such testimony would have "amount[ed] to a lecture to the jury as to how they should weigh testimonial evidence."); *State v. Cromedy*, 158 N.J. 112, 133 (1999) (it is a "widely held common sense view that members of one race have greater difficulty . . . identifying members of a different race, [therefore] an expert's testimony would not assist the jury." (citations omitted)); *Green v. U.S.*, 718 A.2d 1042 (D.C. 1998) ("[P]roffered expert testimony did not deal with subject matter beyond the ken of an average juror.").

27. See, e.g., *State v. Maestas*, 63 P.3d 621 (Utah 2002); *State v. Miles*, 585 N.W.2d 368 (Minn. 1998).

28. *State v. McClendon*, 730 A.2d 1107 (Conn. 1999).

29. *Parker v. State*, 968 S.W.2d. 592 (Ark. 1998).

30. *State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002).

31. *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

32. *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 588 (1993) (explaining that Rule 702 is part of the "liberal thrust" of the Federal Rules of Evidence and their "general approach of relaxing the traditional barriers to 'opinion' testimony"; quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)); JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 1997) ("Rule 702 reflects an attempt to liberalize the rules governing the admissibility of expert testimony.").

facts of the case.<sup>33</sup> Rule 702 requires only that the expert evidence be reliable,<sup>34</sup> be helpful to the trier of fact,<sup>35</sup> and assist the trier in reaching its decision.<sup>36</sup>

Under Rule 702, expert testimony concerning a subject within the common knowledge of the jury would not assist the jury in reaching a decision and therefore would generally not be permitted.<sup>37</sup> In some instances, however, experts may still assist the trier of fact in deciding an issue even if the subject is within the common knowledge.<sup>38</sup> Some courts have taken the position, in following the liberal thrust of Rule 702, that “doubts about whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.”<sup>39</sup> This is a significant departure from the common law where expert testimony was admissible only if necessary because the issue was one of science or skill so far beyond the ken of the average juror as to be incomprehensible without benefit of an expert.<sup>40</sup>

*State v. Chapple* was one of the first cases where a court allowed the use of expert testimony about the reliability of eyewitness testimony.<sup>41</sup> The Arizona Supreme Court followed the criteria set out in *United States v. Amaral*, which at the time was the leading case on the issue. Those criteria were: (1) whether the witness was a qualified expert; (2) whether the testimony was the proper subject for an

33. FED. R. EVID. 702 Advisory Committee Note (1972); FED. R. EVID. 702 Advisory Committee Note (2000).

34. *Id.* The reliability criterion was first outlined by the Supreme Court in *Daubert*, and Rule 702 was amended in 2000 to include these criteria.

35. WEINSTEIN, *supra* note 32 at §702.02[3] (“The first prerequisite. . .helpfulness to the finder of fact, has been in effect since the adoption of the Federal Rules of Evidence in 1975.”).

36. *Id.* (“The second prerequisite. . .assistance, has also been in effect since the adoption of the Federal Rules of Evidence in 1975.”).

37. *Id.* at §702.03[2][a].

38. *Id.* at §702.03[2][b].

39. *In re Japanese Electronic Products Antitrust Litig.*, 723 F.2d 238, 279 (3rd Cir. 1983). See also *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985); *Matsushita Elec. Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Larabee v. M M & L Int'l Corp.*, 896 F.2d 1112 (1990).

40. *Dougherty v. Milliken*, 57 N.E. 757, 759 (N.Y. 1900).

41. 660 P.2d 1208 (Ariz. 1983). This was a landmark decision, because until this case, no appellate court had reversed a trial court’s decision to exclude such testimony. Although I have no evidence of this, I cannot find one case where this occurred. In addition, the court stated that it recognized the fact that the cases that had considered the subject had uniformly affirmed trial court rulings denying the admission of this type of testimony. *Id.* at 291.

expert; (3) whether it conformed to a generally accepted explanatory theory; and (4) weighing the probative value compared to prejudicial effect.<sup>42</sup> However, unlike *Amaral* and the cases following it, the court here found that the criteria were met based upon the specific facts of the case.<sup>43</sup>

Under Arizona's Rule 702,<sup>44</sup> the court found that an expert may testify to general factors that were applicable to the case and might affect the reliability of the witnesses, but not to the accuracy of the specific identifications made by the witnesses.<sup>45</sup> The court disagreed with courts disallowing expert testimony on eyewitness reliability because the matter is within the common knowledge of the jury. The court reasoned that Rule 702 only requires an expert's testimony to assist the jury in determining an issue.<sup>46</sup> Because the testimony *would* assist the trier of fact, Rule 702 was satisfied and thus was a proper subject for an expert.

Almost two years later, in *People v. McDonald*,<sup>47</sup> the Supreme Court of California reversed a trial court ruling excluding the defendant's expert witness from testifying on the psychological factors that may affect the accuracy of eyewitness identification.<sup>48</sup> Although California has no "702 type" evidence rule,<sup>49</sup> the court's analysis was very similar to that of the *Chapple* court. First, the ex-

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42. *Amaral*, 488 F.2d at 1153.

43. *Chapple*, 660 P.2d at 1218 ("We approve [the *Amaral*] test and find that the case at bar meets these criteria.").

44. Arizona's Rule 702 is almost identical to Rule 702 of the Federal Rules of Evidence, and states: "a witness qualified as an expert by knowledge, skill, experience training, or education, may testify thereto in the form of an opinion or otherwise." ARIZ. REV. STAT. R. 702 (2003).

45. *Chapple*, 660 P.2d at 1219 ("Rule 702 recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.").

46. The court stated "while most jurors would no doubt realize that memory dims as time passes" and "assuming jurors of ordinary education need no expert testimony to enlighten them to the danger of eyewitness identification . . . [w]e cannot assume that the average juror would be aware of the variables concerning identification and memory about which [the expert] was qualified to testify." *Id.* at 1220-221.

47. 690 P.2d 709 (Cal. 1984) *McDonald* was a murder prosecution where the only evidence against the defendant was the testimony of four witnesses, and in each witness's testimony there were factors that could have raised doubts as to the reliability of the identifications.

48. *Id.* at 711.

49. California's rule dealing with experts is CAL. EVID. CODE §801 (2004).



pert was going to testify merely to various factors that *could* affect an eyewitness's identification, not to whether any particular witness might be mistaken.<sup>50</sup> Second, the court rejected the objection that such testimony was within the common experience of the jury, stating: "[T]he jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission: if that were the test, little expert opinion testimony would ever be heard."<sup>51</sup> Instead, the testimony should be admitted whenever it would assist the jury.<sup>52</sup> Finally, the court held that the *Frye-Kelly*<sup>53</sup> general acceptance rule applies only to novel scientific devices or processes that possess an "aura of infallibility,"<sup>54</sup> not to the testimony of a person giving his opinion, even if he qualifies as an expert.<sup>55</sup>

In *United States v. Downing*,<sup>56</sup> the Third Circuit also remanded a case because the trial court refused to admit the defendant's expert when the conviction was based solely on eyewitness identifications. The court briefly discussed *Chapple*, *McDonald* and *United States v. Smith*,<sup>57</sup> and concluded that under certain circumstances, expert testimony on the reliability of eyewitness identifications can assist the jury and meet the helpfulness requirement of Rule 702.<sup>58</sup> In

50. *McDonald*, 690 P.2d at 715-17.

51. *Id.* at 720.

52. *Id.* at 720.

It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance, and duration. It appears from the professional literature, however, that other 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.

*Id.*

53. *Id.* at 724. *Kelly* is the California version of the *Frye* general acceptance test, and it comes from *People v. Kelly*, 549 P.2d 1240 (Cal. 1976).

54. "[S]uch as lie detectors, truth serum, Nalline testing, experimental systems of blood typing, voiceprints, identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis." *Id.* at 724 (internal quotes omitted).

55. *Id.* at 723-24.

56. 753 F.2d 1224 (3rd Cir. 1985).

57. 736 F.2d 1103 (6th Cir. 1984). The Court held that the district court's error of not allowing a defense expert to testify as to problems with eyewitness identifications was harmless, although it did acknowledge that in some circumstances, such testimony would meet the "helpfulness" standard of Rule 702. *Id.* at 1107-1108.

58. *Downing*, 753 F.2d at 1231.

addition, the court noted that cross-examination is not always an effective way to attack an eyewitness' credibility.<sup>59</sup>

Following these seminal cases, additional courts held that expert testimony regarding the problems with eyewitness identifications could assist the jury and was thus admissible, either under a state rule or Federal Rule 702.<sup>60</sup> Two of these cases expressly addressed the *Frye* issue. In *Cambell v. Colorado*,<sup>61</sup> the Colorado Supreme Court held the trial court erred when it relied on *Frye* to exclude the testimony.<sup>62</sup> *Frye*, the court stated, has been "employed as a special foundational requirement for novel scientific devices or process."<sup>63</sup> With eyewitness identification expert testimony, by contrast, "we deal with no such scientific device or process. Rather, the testimony concerns an explanation by a psychologist on how certain factors, such as stress and post-event information, can affect memory and perception, and thus eyewitness identification."<sup>64</sup> In *State v. Whaley*,<sup>65</sup> the South Carolina court similarly held that this type of expert testimony was "distinguishable from 'scientific' evidence, such as DNA test results, blood splatter interpretation, and bite

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59. *Id.* at 1231 n.6 ("[t]o the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weakness in a witness' [sic] recollection of an event."). This case is also important as a precursor of *Daubert* as the court spends considerable time discussing the *Frye* general acceptance test and its applicability after the adoption of Rule 702. After considering some of the praise and the criticism of the *Frye* test, as well as its relation to the Federal Rules of Evidence, the court rejected "general acceptance" as an independent test for the admissibility of scientific evidence, saying "*Frye* . . . should be rejected as an independent controlling standard of admissibility." *Id.* at 1237. Instead, the general acceptance of a scientific technique could be a factor when determining the reliability of such evidence under Rule 702. *Id.* However, the Court went on to say, based on the record and otherwise, that the scientific evidence on the reliability of eyewitness testimony was sufficiently reliable.

60. See *Cambell v. Colorado*, 814 P.2d 1 (Colo. 1991); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991); *State v. Buell*, 489 N.E.2d 795 (Ohio 1997); *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991).

61. 814 P.2d 1 (Colo. 1991).

62. *Id.* at 8 ("the court found that the studies relied on by Dr. Green did not provide a 'scientifically established standard' and stated that it was applying the *Frye* test to deny her testimony").

63. *Id.*

64. *Id.*

65. 406 S.E.2d 369 (1991).

mark comparison,” and therefore was not required to meet the *Frye* test.<sup>66</sup>

In sum, in recent years many courts have admitted expert testimony on the reliability of eyewitness identification. In addition, all of the courts that have addressed the issue have held that such evidence need not meet the general acceptance standard of *Frye*.

### C. *The New York Experience*

Only a few New York cases have considered the admissibility of expert testimony on eyewitness reliability. The reasons proffered for and against admissibility mirror the reasons given in other jurisdictions. In *People v. Valentine*,<sup>67</sup> a short Appellate Division opinion, the court held that “expert opinions were not necessary to enable the jury to comprehend the potential for unreliability,” and that to allow such testimony would constitute “trespass on the jury’s domain.”<sup>68</sup> Several other cases followed similar reasoning, holding that such expert testimony is a matter of “common knowledge not beyond the ken of lay jurors” and that deficiencies in the accuracy of identifications can be conveyed to the jury through cross-examination, closing arguments, and instructions to the jury.<sup>69</sup> In only one case, *People v. Brown*,<sup>70</sup> did a court deny the use of an expert on eyewitness testimony and expressly mention *Frye* or general acceptance.<sup>71</sup>

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66. *Id.* at 371. The court also stated that such testimony is admissible where, as in the case, “the sole evidence of identity is eyewitness identification.” *Id.* at 372. *See also*, *United States v. Smithers*, 212 F.3d 306, 316 (2000) (stating that “there is no question that many aspects of perception and memory are not within the common knowledge of most jurors, and in fact, many factors that affect memory are counter-intuitive”); *Commonwealth v. Christie*, 2002 WL 31887744 (Ky. 2002) (holding that “where identity is a crucial and closely contested issue 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 distracted by other factors, expert testimony seems more clearly warranted”).

67. 385 N.Y.S.2d 545 (N.Y. App. Div. 1976).

68. *Id.* at 546.

69. *People v. Slack*, 516 N.Y.S.2d 309 (N.Y. App. Div. 1987). *See also* *People v. Brown*, 479 N.Y.S.2d 110, 112 (Westchester County Ct. 1984); *People v. Gibbs*, 550 N.Y.S.2d 400 (N.Y. App. Div. 1990); *People v. Wright*, 558 N.Y.S.2d 842 (N.Y. App. Div. 1990).

70. 459 N.Y.S.2d 227 (Westchester County Ct. 1983).

71. The court stated that “there was no showing that [the expert’s] research has reached the level of general acceptance in the field of scientific inquiry.” *Id.* at 593 (citing *Frye*, 293 F. 1013).

A few cases have gone the other way. *People v. Brooks*,<sup>72</sup> for example, relied on two Court of Appeals decisions, *People v. Cronin*<sup>73</sup> and *De Long v. County of Erie*,<sup>74</sup> for the principle that expert opinions could be used to “clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.”<sup>75</sup> The court stated that expert opinion eyewitness testimony met this standard, and that the expert would assist the jury “by bringing to their attention scientific studies with which they would not otherwise be familiar.”<sup>76</sup> *Brooks* thus applied similar reasoning to the courts in other jurisdictions permitting such testimony. The court did not, however, mention *Frye*.

It was not until *People v. Mooney*<sup>77</sup> that the Court of Appeals considered this issue. The majority did not resolve it,<sup>78</sup> relying upon the “sound discretion of the trial court” to avoid actually taking a position.<sup>79</sup> Judge Kaye’s dissent, by contrast, addressed the issue head-on. She attacked all three reasons the trial court gave for excluding the expert testimony on the reliability of the eyewitnesses.<sup>80</sup> First, Judge Kaye questioned whether the general acceptance standard of *Frye* should apply to this type of expert evidence at all:

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72. 490 N.Y.S.2d 692 (Westchester County Ct. 1985).

73. 458 N.E.2d 351 (N.Y. 1983).

74. 457 N.E.2d 717 (N.Y. 1983).

75. *Brooks*, 490 N.Y.S.2d at 697 (citing *De Long*, 60 N.Y.2d at 307).

76. *Id.* (the court limited the testimony, ruling that the expert would not be permitted to give an opinion on whether the particular witness in question was or was not reliable, emphasizing that was the job of the jury). The few other courts allowing such expert testimony all followed reasoning, holding that the subject of the testimony was not known to the common juror, and that the jury’s function would not be usurped because jurors were free to reject the expert’s findings. See *People v. Beckford*, 532 N.Y.S.2d 462, 463 (N.Y. Sup. Ct. 1988); see also *People v. Lewis*, 520 N.Y.S.2d 125, 127 (Monroe County Ct. 1987); *People v. Drake*, 728 N.Y.S.2d 636, 640 (N.Y. Sup. Ct. 2001).

77. 559 N.E.2d 1274 (N.Y. 1990).

78. *Id.* at 1274 (“On this appeal, we need not decide whether the expert testimony sought to be presented was of the type that could, as a matter of law, properly be admitted.”).

79. *Id.* (“Here, the trial court based its decision to exclude the testimony in the exercise of its sound discretion to which such evidence would, if legally admissible at all, be entrusted.” (emphasis added)).

80. *Id.* (“The trial court’s error is evident upon review of its three unelaborated reasons.”).

[E]ven if that test is applicable to the results of certain processes such as lie detectors, voiceprints and hypnosis . . . it does not necessarily follow that it is the appropriate standard to be applied to the testimony of a qualified psychologist who proposes to explain to the jury how certain factors shown by the record can affect perception and memory, and thus the accuracy of identification testimony.<sup>81</sup>

Next, Judge Kaye argued that even if *Frye* governs, such evidence arguably is generally accepted.<sup>82</sup> She also rejected as “make-shift reasoning” the argument that the reliability of eyewitness testimony is not a proper subject for expert testimony because the matter is within the ken of the average juror.<sup>83</sup> Judge Kaye concluded that even if such testimony was not beyond the jury’s ken, it still would be admissible to clarify the jury’s general awareness of the issue.<sup>84</sup>

Subsequently, the 1994 Court of Appeals case of *People v. Wesley*,<sup>85</sup> although not dealing with eyewitness expert testimony, held that the *Frye* test was the proper standard in New York for the admissibility of expert scientific evidence. The court upheld the trial court’s use of the *Frye* test and held that DNA evidence was not generally accepted and thus not admissible.<sup>86</sup> The court also stated that *Daubert* did not apply because *Daubert* only dealt with federal courts and the Federal Rules of Evidence.<sup>87</sup>

In 2001, the Court of Appeals reconsidered the issue of expert testimony on eyewitness reliability in *People v. Lee*.<sup>88</sup> Although the court again upheld the denial of the use of such evidence, the court appeared to be a bit more receptive to its admission. First, the

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81. *Id.* at 1275 n.1 (dissenting opinion).

82. *Id.* (“As the cited courts and commentators have found, psychological research data is by now abundant, and the findings based upon it concerning cognitive factors that may affect identification are quite uniform and well documented.”).

83. *Mooney*, 559 N.E.2d 1274 (citing McCORMICK, EVIDENCE § 206, at 624 (Cleary 3d ed.)).

84. *Id.*

85. 83 N.Y.2d 417 (1994).

86. *Id.* at 425.

87. *Id.* at 423 n.2.

88. 750 N.E.2d 63 (N.Y. 2001).

court recognized that such testimony is not inadmissible *per se*.<sup>89</sup> Second, and more important, the court opened the door partially by rejecting the argument that such testimony is within the knowledge of jurors. The court stated that while jurors may be familiar with factors relevant to the reliability of eyewitness identification, “it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.”<sup>90</sup> However, this encouraging language was followed by the qualification that before allowing such testimony, “a trial court may need to determine whether the proffered expert testimony is *generally accepted* by the relevant scientific community.”<sup>91</sup> This obviously adopted *Frye* as the standard of admission, which may cause more problems than it solves.

After *Lee*, three New York trial courts have considered this issue with inconsistent results. In the first case, *People v. Radcliffe*,<sup>92</sup> the court neither denied nor granted the defendant’s request to call the expert witness.<sup>93</sup> The court first recognized that New York law was unclear.<sup>94</sup> The court then listed five questions that must be addressed in an application to admit expert opinion testimony.<sup>95</sup>

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89. *Id.* at 65.

90. *Id.* at 66. This was important because as we have seen, most courts in New York and elsewhere, have relied on that very argument to consistently deny the use of expert testimony on eyewitness reliability.

91. *Id.*

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

93. *Id.* at 235 (the court decided to hold the defendant’s application in abeyance and to give the defendant an opportunity to supplement the application according to the court’s opinion, which set out its own inquiry as to whether expert testimony should be admissible).

94. *Id.* at 232. The court asked itself “what procedure should be followed and what information should a court consider in order to determine whether to admit expert identification testimony?” *Id.* It then went on to say that “at least until the law of New York settles on the parameters of expert identification testimony, the application for the admission of such testimony should be made pretrial because the trial court may need to conduct a hearing and that cannot be conveniently done during a trial.” *Id.*

95. *Id.*

An application to admit expert identification testimony should: (1) to the extent known set forth the pertinent alleged facts of the identification and any corroborative evidence; (2) set forth the name and qualifications of the witness and the proffered testimony; (3) correlate the proffered testimony with the facts of the case to demonstrate the relevance of the expert testimony; (4) explain whether the testimony involves “*novel scientific theories and techniques*,” and if it does, include an offer of proof as to its *general acceptance*

The defendant's application did not address these questions, so the court allowed the defendant time to supplement the application. It was clear, however, that the court considered the general acceptance of the proposed testimony a relevant factor.

In the next case, *People v. Smith*,<sup>96</sup> the court admitted an expert's testimony. Judge Yates avoided *Frye* by holding that it simply does not apply to this type of evidence. He stated that the factors affecting eyewitness memory and perception are not "novel" scientific theories, and therefore a *Frye* determination was unnecessary.<sup>97</sup> According to Judge Yates, the expert merely described academic research and writings in a recognized field of study, just as with other types of expert testimony that are permitted without a *Frye* hearing.<sup>98</sup> Judge Yates interpreted *Lee* to require only that the judge "weigh the request [for expert testimony] against other relevant factors, such as the centrality of the identification issue and the existence of corroborating evidence."<sup>99</sup> He did not believe that the general acceptance of the expert's testimony was applicable.<sup>100</sup> Because the prosecution's case was solely dependant on eyewitness identifications, with no other evidence, the testimony was relevant.<sup>101</sup>

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in the relevant scientific community; and (5) explain why the testimony is warranted if an existing standard jury instruction would appear to cover the area of the proffered expert testimony. (emphasis added).

96. 743 N.Y.S. 2d 246 (N.Y. Sup. Ct. 2002).

97. *Id.* at 248.

The broad field of study involving subjective and objective factors which may affect the reliability of an identification does not necessarily depend upon any particularly novel experiment or technique, but instead describes observations and studies by a wide range of scholars who have observed and examined cognizable behavioral patterns connected with the accuracy of eyewitness testimony.

*Smith* is consistent with the cases from other jurisdictions admitting this type of evidence and refusing to apply the *Frye* test. See, e.g., the discussion of *Cambell*, 814 P.2d 1, *supra* p. 333.

98. See *Smith*, 743 N.Y.S. 2d at 248 (citing cases outlining this point of view).

99. *Id.* at 249 (citing *Lee*, 726 N.Y.S. 2d at 365).

100. *Id.* at 250. Judge Yates "respectfully disagreed" with other New York courts that held such testimony subject to the general acceptance standard. *Id.* Doing so, Judge Yates said, would "distinguish expert testimony in this area from other expert testimony." *Id.*

101. *Id.* at 249. ("In this case, there is no corroborating evidence . . . As such, applying the *Lee* test, i.e. weighing the centrality of the identification issue and the (lack of) corroborating evidence, the Court is impelled to permit Dr. Fulero's testimony.").

The last of the three cases, *People v. Legrand*,<sup>102</sup> recognized the inconsistency between *Radcliffe* and *Smith*,<sup>103</sup> and interpreted *Lee* to require a pretrial hearing to consider if the *Frye* general acceptance standard was satisfied.<sup>104</sup> After a thorough discussion of the expert's qualifications, the subjects of his proposed testimony, and contradictory research, the judge held that general acceptance had not been reached and that an "energized debate" existed on exactly the issue of whether the principles are generally accepted.<sup>105</sup> Thus, the proposed expert testimony was excluded because the judge found that it was not generally accepted.

This decision was unusual because most courts refusing to admit expert testimony in this area have done so on the grounds that it "will not assist the trier of fact."<sup>106</sup> We have seen already that most of the courts deciding the issue do not even discuss general acceptance, let alone hold that the evidence does not meet this standard. A strict general acceptance standard makes it very hard for evidence to be admitted, and, as Professor D. Michael Risinger noted, "under [Judge] Fried's interpretation, virtually no expert testimony from any field of social science would ever be admitted."<sup>107</sup>

102. 747 N.Y.S.2d 733 (N.Y. Sup. Ct. 2002).

103. *Id.* at 738. ("I am aware of two trial court opinions, decided after *Lee*, which have split on the issue of requisite procedures and necessary information to decide the admissibility of expert identification testimony.").

104. *Id.* at 740 (holding that "hearing was required . . . once a pretrial hearing has been determined to be necessary, [and] the trial judge must apply the four-fold test for the admissibility of scientific expert evidence, as set forth in *Frye v. United States*.").

105. *Id.* at 757. In reaching his conclusion, Judge Fried stated:

This is not a debate among experts about a generally accepted principle. Rather, It is a real controversy among the relevant experts concerning whether these principles are generally accepted. Thus, it is the current state of disagreement, and inconclusiveness, and the problems of external validity associated with the research, i.e., transposition to a courtroom setting, that leads me to conclude that this proffered evidence has not been generally accepted within the relevant psychological community.

106. Mark Hansen, *Expertise on Trial: Testimony on Reliability of Eyewitness Identification Stalls on General Acceptance*, 88 A.B.A. J. 22 (2002) ("Legal experts say [Judge] Fried's decision is unusual . . . [as o]nly a few courts have excluded such testimony on the grounds of general acceptance. And in that respect, [Judge] Fried may have gone further than anybody else.").

107. *Id.*



### III. THE CASE FOR LIBERAL ADMISSIBILITY OF EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATIONS

While the use of experts to testify as to the problems with eyewitness testimony has only recently been allowed by some courts, the shortcomings of eyewitness identifications have been known for a long time.<sup>108</sup> Even the ancient Greeks were aware that eyewitness testimony may be unreliable.<sup>109</sup> One of the most famous cases of mistaken identity occurred in the 1896 English trial of Adolf Beck.<sup>110</sup> Beck was convicted based on the identifications of ten women.<sup>111</sup> He maintained his innocence, and after it was discovered that Beck had spent seven years in prison for a crime he did not commit, a committee was formed to investigate. The committee found that "evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury."<sup>112</sup>

About 25 years after the Beck trial, the infamous trial of Sacco and Vanzetti took place here in America. The two were accused of murdering and robbing a factory cashier and his bodyguard. A jury convicted the two men based on very suspect eyewitness testimony,

108. As one author wrote in the early 1890's, "[a]t first the question of personal identity might seem to be the simplest that could possibly come before a court. But the fact is precisely the reverse . . . the question whether a . . . man . . . is one individual or another, has proved itself over and over again, by far, the most perplexing. Cases of mistaken personal identity have been all but innumerable." PATRICK M. WALL, *EYEWITNESS IDENTIFICATION IN CRIMINAL CASES*, 6 (1965), *citing* New York Medico-Legal Papers 367 (3d ser.), *quoting* HARRIS, *A TREATISE ON THE LAW OF IDENTIFICATION* § 622 n. at 435-36 (1892).

109. PLATO, *PORTRAIT OF SOCRATES, BEING THE APOLOGY, CRITO, AND PHAEDO OF PLATO* (R.W. Livingstone ed., Oxford Univ. Press 1938), *cited in* Hallisey, *Experts on Eyewitness Testimony in Court - A Short Historical Perspective*, 39 HOW. L.J. 237, 237 ("Have sight and hearing in them? Are they not, as the poets are always telling us, inaccurate witnesses?").

110. A. DANIEL YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* 4 (1979); for an account of the Beck trial, *see* WATSON, *THE TRIAL OF ADOLF BECK* (1924).

111. Beck was arrested and accused of "obtaining jewelry and money on false pretenses from loose women." YARMEY, *supra* note 110 at 4. He was convicted and spent 7 years in prison, all the while maintaining his innocence. He claimed he was mistaken for a man named John Smith. While Beck was still in prison, more of these offenses occurred. Smith was eventually arrested and Beck was released. YARMEY, *supra* note 110 at 4.

112. WATSON, *supra* note 110, at 250.

and they were later executed.<sup>113</sup> Felix Frankfurter, while still a professor at Harvard, wrote a book on the case, stating, “[t]he identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.”<sup>114</sup> The recognition that wrongful identifications continue to cause the convictions of innocent defendants persists today. A 1983 study estimated that half of all wrongful convictions result from false identifications.<sup>115</sup>

Many critics cite the research of Harvard Professor Hugo Munsterberg from the early 1900’s as the first major application of behavioral science to eyewitness evidence in this country.<sup>116</sup> In his book, *On the Witness Stand*,<sup>117</sup> Professor Munsterberg republished a collection of articles he had written describing his research. He believed that certain psychological mechanisms that were not commonly understood operated when eyewitness testimony was presented and that experimental psychologists could help shed light on them.<sup>118</sup> Munsterberg acknowledged that in situations where eyewitness testimony is presented, judges had “psychologised on their own account; but to consult the psychological authorities was out of the question.”<sup>119</sup> He argued that this practice should change, and, as he said, “. . .my only purpose is to turn the attention of serious men to an absurdly neglected field which demands the full attention of the social community.”<sup>120</sup>

113. ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY*, 1-3 (1979).

114. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927), *cited in* WALL, *supra* note 108, at 6. *See also*, WILDER & WENTWORTH, *PERSONAL IDENTIFICATION* 37 (1918) (stating that “[c]ases of mistaken identity are alarmingly frequent, and . . . criminal history is full of cases in which, by relying upon such uncertain testimony, innocent men have been compelled to serve long terms of imprisonment, or to submit even to the extreme penalty of the law.”), *quoted in* WALL, *supra* note 108, at 7; EDWARD BOCHARD, *CONVICTING THE INNOCENT* (1932) (collection of twenty-nine stories in which inaccurate eyewitness identifications led to wrongful convictions), *cited in* WALL, *supra* note 108, at 6 n.3.

115. *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).

116. Hallisey, *supra* note 109 at 242.

117. HUGO MUNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1923).

118. *Id.* at 19.

119. *Id.*

120. *Id.* at 12.

Based on his studies, Munsterberg believed that witness observations were filled with “chaos and confusion”, and that “[a]ssociations, judgments, suggestions, penetrate into every one of our observations.”<sup>121</sup> Additionally, he believed that the sources of error in recollection began at the time of the observation, stating that “the observation itself may be defective and illusory; wrong associations make it imperfect; judgments may misinterpret the experience; and suggestive influences may falsify the data of the senses.”<sup>122</sup>

Munsterberg was the first major proponent of using psychologists in criminal cases to help juries understand the vagaries of eyewitness identification. Today, Elizabeth Loftus<sup>123</sup> is probably the most well-known expert on the strengths and weaknesses of eyewitness testimony.<sup>124</sup> In the Preface to the 2nd Edition of her 1979 book, *Eyewitness Testimony*, Loftus claims that prior to 1986 more than one thousand people had been wrongfully convicted of a crime, and some of those convicted were executed.<sup>125</sup> Loftus firmly believes evidence supports the finding that information acquired by memory can subsequently be changed, and “that once memory for some event is distorted by intervening events, the information acquired during perception of the original event may never be recorded.”<sup>126</sup> Additionally, Loftus contends that people can come to believe they saw and heard things that never really happened<sup>127</sup>, and largely unconsciously, use re-fabrication to fill in gaps of incomplete memory.<sup>128</sup> This led her to conclude: “According to the old cliché – memory fades. In fact, however, it grows! . . . Every time we recall an event, we must reconstruct the memory, and so each time it is changed, colored by succeeding events, increased

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121. *Id.* at 33.

122. *Id.* at 56-57.

123. Elizabeth F. Loftus is the preeminent psychological authority in the field of eyewitness testimony. Dr. Loftus is the author of more than a dozen books and 150 scientific articles dealing with various aspects of perception, memory, and expression.

124. Hallisey, *supra* note 109, at 245.

125. ELIZABETH LOFTUS, EYEWITNESS TESTIMONY, vi (1996, 1979)

126. *Id.* at xiii.

127. ELIZABETH F. LOFTUS, MEMORY: SURPRISING INSIGHTS INTO HOW WE REMEMBER AND WHY WE FORGET 39-40 (1980).

128. *Id.* at 40.

understanding, a new context, suggestion by others, [and] other people's recollections."<sup>129</sup>

The circumstances and factors that can affect the memory and perception of an eyewitness, and the factors that are generally the subject of expert testimony, were outlined by Loftus and her co-author James Doyle in their book *Eyewitness Testimony – Civil and Criminal*.<sup>130</sup> The subject was divided between factors that determine perception and factors that determine the retention and retrieval of events.<sup>131</sup>

The factors determining perception were further split into two categories: Event Factors and Witness Factors.<sup>132</sup> Event factors are factors inherent in an event itself,<sup>133</sup> such as the lighting conditions where an event occurs. While it may seem obvious that we see better in good rather than poor lighting or during the day rather than at night, "the relationship between perception during good versus poor lighting, and during daylight versus nighttime, is quite complex."<sup>134</sup> For example, dark adaptation and light adaptation affect perception. When eyes are in lighted conditions but the conditions abruptly become dark, the eyes go through dark adaptation. The opposite occurs with light adaptation.<sup>135</sup> In either situation, full recovery of the eyes does not occur immediately.<sup>136</sup> In dark adaptation, it can take up to five minutes for the cones (the primary mechanism for color vision) and thirty minutes for the rods (mediate nighttime or low-intensity vision) to fully recover. While this time is significantly less in light adaptation, either situation can have a profound affect on an eyewitness perception.<sup>137</sup>

129. *Id.* at 169.

130. ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (2d ed. 1992). *See also*, Roger V. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1018-1022 (1995). *See also* *Downing*, 753 F.2d at 1224, 1229-31 (citing WEINSTEIN'S FEDERAL EVIDENCE, § 702.06[1][c]).

131. LOFTUS & DOYLE, *supra* note 130 at vii-viii.

132. *Id.* at vii-viii.

133. *Id.* at 13.

134. *Id.*

135. *See* YARMEY, *supra* note 110 at 39. "A sudden change from light to dark or dark to light requires an adjustment in chemical action between the rods and cones which creates the momentary experience of 'blindness.'" *Id.*

136. *Id.*

137. LOFTUS & DOYLE, *supra* note 130, at 14-16.

Violence is another significant event factor.<sup>138</sup> If someone witnesses a violent event, the violence can profoundly affect the witness' ability not only to recall the event accurately, but also to recall events that happened before the violent event.<sup>139</sup> Some other event factors that can affect perception are the duration of an event, which may affect how well a witness can recall the event's duration or the speed at which it occurred; speed and distance, which relates to how fast or how far away an event occurred; and colors, which relates to a witness' ability to perceive colors correctly.<sup>140</sup>

Witness factors, on the other hand, are factors that are inherent in the witness herself. One of the major witness factors is stress. It is no surprise that an event that causes a very high level of stress in a witness will affect that witness' ability to perceive. However, a very low level of stress can also negatively affect perception because the "nervous system may not be functioning fully."<sup>141</sup> This is known as the Yerkes-Dodson Law, which posits that there is a level of stress where performance will be optimal, but too little or too much will impair performance.<sup>142</sup> In addition, individuals handle stress differently, and the effect stress can have depends on the individual and the task at hand. Therefore, even when stress is high, a person may still correctly perform an easy, well-learned habit.<sup>143</sup>

Another important witness factor is the crime witness' focus on a weapon, which may reduce memory of other details of the crime.<sup>144</sup> Evidence of weapon focus is demonstrated by experi-

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138. *Id.* at 24.

139. *Id.* at 24-25. Loftus and Doyle cite many studies testing the effect of violence or some other traumatic event on a person's ability to perceive and remember that event and events occurring soon before and after. All of these studies yielded similar results.

140. *Id.* at 17-23.

141. *Id.* at 31.

142. Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1064 (2001) (citing ELIZABETH LOFTUS, EYEWITNESS IDENTIFICATION (1979)).

143. LOFTUS & DOYLE, *supra* note 130, at 31.

144. See Loftus, et al., *Some Facts About "Weapons Focus,"* 11 J. LAW & HUMAN BEHAV. 55 (1987). Eighty-eight percent of expert psychologists interviewed believed the presence of a weapon interferes with a witness's ability to remember the perpetrators face. *Id.* at 55, *citing* studies.

ments in which eye movements have been monitored while subjects witness a scene where a weapon is involved.<sup>145</sup>

Expectation is another witness factor.<sup>146</sup> A person may believe she saw something that was not actually there because she expected it to be. Expectation is influenced by one's biases and stereotypes.<sup>147</sup> In one famous study, subjects were shown an event in which a black man and a white man were arguing. The white man was holding a razor. When recalling the incident, many of the subjects stated that the black man had the razor.<sup>148</sup> Other witness factors may include age, sex, training or experience, and the influence of drugs or alcohol.<sup>149</sup>

The factors determining the retention and retrieval of events were also split into two categories: Retaining Events in Memory and Retrieving Events from Memory.<sup>150</sup> Forgetting is the biggest factor affecting the retention of memory. In 1885, Hermann Ebbinghaus conducted a study on himself and invented the "forgetting curve,"<sup>151</sup> demonstrating that we forget a lot of new information soon after we learn it.<sup>152</sup> Forgetting then becomes more gradual.

145. *Id.* at 57-61 (discussing studies); see also MAASS & KOHNKEN, *Eyewitness Identification: Simulating the "Weapon Effect,"* 13 LAW & HUMAN BEHAV. 397-408 (1989).

146. See Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977) (stating that "observers make extensive use of expectancy, not only in developing strategies for determining what to look at, but also in interpreting what they see."). *Id.* at 980, citing Bruner, *Social Psychology and Perception*, in READINGS IN SOCIAL PSYCHOLOGY 88-92 (3d ed. Maccoby, Newcomb & Hartley eds., 1958); Buckhout, *Eyewitness Testimony*, SCIENTIFIC AM., Dec. 1974, at 23, reprinted in 15 JURIMETRICS J. 171 (1975); Haber, *Nature of the Effect of Set on Perception*, 73 PSYCH. REV. 355 (1966). In essence, witnesses unconsciously reconstruct what has occurred from what they assume must have occurred. Consequently, they exhibit a pronounced tendency to perceive the expected." Woocher, *supra*, at 980.

147. *Id.* at 981 (citing Brigham, *Ethnic Stereotypes*, 76 PSYCH. BULL. 15 (1971); Bruner, *supra* note 146, at 89-90; Campbell, *The Stereotypes and the Perception of Group Differences*, 22 AM. PSYCH. 817 (1967)).

148. *Id.* 981, n.40 (citing ALLPORT & POSTMAN, *THE PSYCHOLOGY OF RUMOR* (1947)).

149. LOFTUS & DOYLE, *supra* note 130 at 40-51.

150. *Id.* at viii.

151. *Id.* at 55 (citing EBBINGHAUS, *MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY* (Dover 1964) (1885)).

152. Lane, *Eyewitness Identification: Should Psychologists be Permitted to Address the Jury?*, 75 J. CRIM. L. & CRIMINOLOGY 1321, 1336 (1984) (citing Loftus, *The Eyewitness on Trial*, 16 TRIAL 31, 53 (1980)).

Other studies all demonstrate that over time, our memory of an event deteriorates.<sup>153</sup>

One reason we forget is that the information was never stored in the first place.<sup>154</sup> Another reason is that we do not want to remember bad experiences.<sup>155</sup> Yet another reason is the effect of interference or post-event information. Often, when a witness to an event is exposed to new information about the event, the new information replaces the original memories of the event.<sup>156</sup> As Loftus and Doyle stated: “[t]here is extensive potential for this sort of erroneous supplementation in most (if not all) accident and criminal cases.”<sup>157</sup> Experts disagree about why post-event information affects memory, but all agree that it does.<sup>158</sup>

Closely related to forgetting is distortion, which is generally affected by four variables: “(1) the time interval between viewing and recollecting an event; (2) the verbal form of post-event information; (3) the violence in an event; and (4) whether there is any warning that post-event information received is distorted.”<sup>159</sup> Additionally, our own thoughts, desires, and beliefs can affect our memory and unconsciously distort our original memory of an event.<sup>160</sup>

153. LOFTUS & DOYLE, *supra* note 130 at 56-59 (citing Linton, *I Remember Well*, PSYCHOL. TODAY 81 (July 1979); Wagenaar & Groeneweg, *The Memory of Concentration Camp Survivors*, 4 APPLIED COGNITIVE PSYCHOL. 77-87 (1990); Bahrick, *Memory for People*, in EVERYDAY MEMORY, ACTIONS, AND ABSENTMINDEDNESS 19 (Harris ed., 1983); Defenbacher, *On the Memorability of the Human Face*, in ASPECTS OF FACE PROCESSING (Nijhoff et al. eds., 1985)).

154. *Id.* at 60.

155. *Id.*

156. Woocher, *supra* note 146, at 983 (“The mind combines all the information acquired about a particular event into a single storage ‘bin,’ making it difficult to distinguish what the witness saw originally from what she learned later.”). (citing Baggett, *Memory for Explicit and Implicit Information in Picture Stories*, 14 J. VERBAL LEARNING & VERBAL BEHAVIOR 538 (1875); Buckhout, *supra* note 144; Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOLOGY TODAY, Dec. 1974 at 119, *reprinted in* 15 JURIMETRICS J. 188, 189 (1975).

157. LOFTUS & DOYLE, *supra* note 130, at 62.

158. *Id.* at 67 (“The ‘alteration’ position is that post-event information alters the original memory, the ‘coexistence’ position is that the original memory and the new information exist together, but the original memory is now harder to reach, and the last view is that post-event information does not affect underlying memory at all, only what the witness reports.”).

159. *Id.* at 68.

160. *Id.* at 70-71.

Forgetting and distortion affect the retention of memory, but what happens when a witness must retrieve information from memory? Both trial lawyers and social scientists recognize that retrieval of information can be influenced by the method and wording of questioning.<sup>161</sup> This was known over 80 years ago,<sup>162</sup> yet “very few people are fully aware of how pervasive the influence of questions can be.”<sup>163</sup>

A witness' confidence in his or her recollection is also important to the retrieval of information from memory. A confident witness will likely be believed by a jury and will be harder to crack on cross-examination.<sup>164</sup> Studies suggest that eyewitness confidence is not necessarily a good indicator of eyewitness accuracy.<sup>165</sup> Furthermore, any competent trial lawyer will have her witness prepared to testify at trial, adding to the witness' confidence and thus masking uncertainties.<sup>166</sup> Juries tend to believe a confident eyewitness and “convict on the basis of it.”<sup>167</sup>

Loftus and Doyle also discuss the particular problems associated with the identification of people.<sup>168</sup> When identifying strangers, “a number of interesting phenomena get in the way.”<sup>169</sup> The relationship between certain facial features and identifications is one example. Studies have shown that faces sharing three impor-

161. *Id.* 73-74. See also Woocher, *supra* note 146, at 984 n.55.

162. *Id.* at 74 (citing Musico, *The Influence of the Form of Question*, 8 BRIT. J. PSYCHOL. 351-86 (1916)).

163. LOFTUS & DOYLE, *supra* note 130, at 74 (“Indeed, small changes in question wording can result in dramatically different answers.”).

164. *Id.* at 75 (citing Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981)).

165. See generally, Deffenbacher, *Eyewitness Accuracy and Confidence: Can we Infer Anything About Their Relationship?*, 4 LAW & HUMAN BEHAV. 243 (1980) (discussing the relationship between confidence and accuracy and citing studies); Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCH. POL. AND L. 817 (citing numerous studies demonstrating the lack of correlation between confidence and accuracy); see also Legrand, 747 N.Y.S.2d at 743-45 (discussing published studies)).

166. LOFTUS & DOYLE, *supra* note 130, at 76.

167. *Id.* at 86 (citing Frazzini, *Review of Eyewitness Testimony*, 70 YALE REV. xviii (1981)).

168. *Id.* at 85.

169. *Id.* at 88 (citing CLIFFORD & BULL, *THE PSYCHOLOGY OF PERSON IDENTIFICATION* (1978); SHEPARD et al., *IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION* (1982)).



tant features are often misidentified.<sup>170</sup> These features are age (young, fresh faces versus older, lined faces), facial shape (long, oval faces versus round, pudgy faces), and hair (short, close cropped hair versus long, straggly hair).<sup>171</sup> Thus, two faces with different features such as mouth and eyes could be confused with each other if similarities exist as to age, shape, and hair.<sup>172</sup> Research has also shown that although a witness may give a detailed description of a face from memory, the same witness may not be able to accurately identify the face at a later date.<sup>173</sup> Such findings are contrary to popular belief, including that of the Supreme Court.<sup>174</sup>

A final problem with the recognition of people is cross-racial identifications.<sup>175</sup> Research demonstrates that people have difficulty recognizing individual members of a race different from one's own.<sup>176</sup> Possible explanations are different experiences with mem-

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170. *Id.* at 89 (citing Davies, et al., *Wanted – Faces That Fit the Bill*, *NEW SCIENTIST* 26-29 (May 16, 1985); Green & Geiselman, *Building Composite Facial Images: Effects of Feature Saliency and Delay of Construction*, 74 *APPLIED PSYCHOL.* 714 (1989)).

171. LOFTUS & DOYLE, *supra* note 130, at 89.

172. *Id.*

173. *Id.* at 90, citing Pigott & Brigham, *The Relationship Between Accuracy of Prior Description and Facial Recognition*, 70 *J. APPLIED PSYCHOL.* 547-55 (1985) (subjects who gave accurate descriptions of a "culprit" were no better at later recognizing the culprit than subjects who gave poor descriptions).

174. *Id.* at 89-90 (comparing *Neil v. Biggers*, 409 U.S. 188 (1972) with Pigott & Brigham, *supra* note 173). In *Neil*, the Court upheld an identification in a suggestive "show-up" of a suspect because the victim had a good opportunity to view the suspect and her description to the police was "more than ordinarily thorough." *Neil*, 409 U.S. at 200.

175. See, e.g., Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 *AM. J. CRIM. L.* 207 (2001); Sporer, *Special Theme: The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making: Eyewitness Identification: The Cross-Race Effect: Beyond Recongnition of Faces in the Laboratory*, 7 *PSYCH. PUB. POL. AND L.* 170 (March 2001); Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *CORNELL L. REV.* 934 (1984).

176. See Rutledge, *supra* note 175, at 211 ("The last half-century's empirical studies of cross racial IDs has shown that eyewitnesses have difficulty identifying members of another race. . ." citing Platz & Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 *J. APP. SOC. PSYCHOL.* 972 (1988), GARY L. WELLS & ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (1984)); see also Sporer, *supra* note 175, at 170 ("Differences in accuracy rates for recognizing faces of one's own and other ethnic group have been well documented in the psychological literature. . . There is consensus among psychological experts. . . that the cross-race effect is a sufficiently reliable phenomenon." Citing numerous published studies.).

bers of another race, prejudicial attitudes, or different modes of processing faces of a different race.<sup>177</sup>

It is particularly important that a jury be informed of all of these problems with eyewitness testimony before sending a person to prison. As Judge McCree stated in *United States v. Russell*,<sup>178</sup> “of all the evidence that may be presented to a jury, a witness’ in-court statement that ‘he is the one’ is probably the most dramatic and persuasive.”<sup>179</sup>

#### IV. CHANGING THE LEGAL STANDARDS FOR DETERMINING THE ADMISSIBILITY OF EXPERT TESTIMONY REGARDING EYEWITNESS IDENTIFICATIONS

Using *Frye* to test the admissibility of expert testimony on eyewitness reliability leads to inconsistent results and keeps important evidence from a jury. In *Daubert*, the Supreme Court denoted the “rigid general acceptance” standard of *Frye*, making it only one of several factors to consider. *Daubert* adopted standards for admitting expert testimony that are in touch with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony.”<sup>180</sup>

*Frye* may deprive a jury of relevant evidence<sup>181</sup> because the “relevance of novel scientific evidence does not hinge on its ‘general acceptance’ in the scientific community.”<sup>182</sup> In addition, courts ap-

177. LOFTUS & DOYLE, *supra* note, 130 at 99; *see also* Rutledge, *supra* note 175, at 208 (stating that “stereotyping and prejudice seem to affect [witness’s] reports.”) *citing* MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 175 (1978); Hallisey, *supra* note 109, at 238. (“Individual experience is not recorded on a clean slate; rather, it is immediately interpreted against the background of the observer’s experience, biases, prejudices and preconceptions.”).

178. 532 F.2d 1063 (6th Cir. 1976).

179. *Id.* at 1067.

180. *Daubert*, 509 U.S. at 588 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. at 169).

181. Thus, when the sole or primary evidence against a defendant is the testimony of an eyewitness, whether that testimony is reliable is certainly relevant. *See, e.g., Legrand*, 747 N.Y.S. at 742. The only evidence was the testimony of eyewitnesses, the court stated that there was “no question as to whether the proffered expert testimony is relevant to the issues and facts of this case.”

182. *Downing*, 753 F.2d at 1235 (stating that “some scientific evidence [that] can assist the trier of fact in reaching an accurate determination of facts in issue even though the principles underlying the evidence have not become ‘generally accepted’ in the field to which they belong.”); *see also, State v. Williams*, 388 A.2d 500, 503 (1978).

plying the *Frye* test may admit expert testimony that “derives from inaccurate or unreliable principles or techniques.”<sup>183</sup> As the Alaska Supreme Court stated: “*Frye*. . .excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny.”<sup>184</sup> Courts can also limit the impact of *Frye* in various ways, including by narrowing the relevant scientific community in which the evidence needs to be “generally accepted.”<sup>185</sup> Finally, courts have argued that *Frye* “provides a method by which courts can assess the reliability of novel scientific expert testimony.”<sup>186</sup> The vagueness of general acceptance, however, can create problems in applying the test.<sup>187</sup>

### A. Reinterpreting *Frye*

Reinterpreting *Frye* is one way to facilitate the admission of expert testimony on the reliability of eyewitness testimony. Courts might simply declare *Frye* inapplicable to such testimony or conclude that the research underlying such testimony is generally accepted. Either interpretation would allow New York to continue to adhere to *Frye*, while permitting expert testimony in cases where witness identification is the sole or major evidence against a criminal defendant.<sup>188</sup>

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(Maine Supreme Court interpreting Maine’s rules of evidence, based on the Federal Rules, as not incorporating *Frye*); Woocher, *supra* note 146, at 1017-18 (“[D]epriving jurors of the benefit of scientific research on eyewitness testimony force[s] them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence.”).

183. *Downing*, 753 F.2d. at 1236 n.14 (citing Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197, 1224-26 (1980) (describing the “general acceptance” of the “paraffin test” for detecting gunshot residue before any scientific testing had established the test as reliable)).

184. *State v. Coon*, 974 P.2d 386, 393-94 (Alaska 1999).

185. *See, e.g.*, *People v. Williams*, 331 P.2d 251 (Cal. App. Dep’t. Super. Ct. 1958) (the court held the *Frye* test was satisfied upon a showing of general acceptance by those who are expected to be familiar with the technique of testing for narcotics, although the government’s own expert conceded the lack of acceptance in the medical profession generally); *United States v. Williams*, 583 F.2d 1194, 1198 (1978) (noting the impact of selecting the “relevant scientific community” in applying the *Frye* test).

186. *Downing*, 753 F.2d. at 1235; *see also* *United States v. Addison*, 498 F.2d 741, 743-44 (D.C. Cir. 1974).

187. *See, e.g.*, Giannelli, *supra* note 183, at 1208-28.

188. For example, the Court could issue a holding like the one in the *McDonald* case. *See McDonald*, 690 P.2d at 727 (“When an eyewitness testimony of the defen-

Holding *Frye* inapplicable to such testimony would be consistent with the purpose of *Frye*. *Frye* was concerned about novel scientific principles,<sup>189</sup> not the testimony of a doctor who will “merely describe academic research and writings in a recognized field of study and discuss the factors in [a case] which may affect the ability to identify accurately.”<sup>190</sup> The testimony of an expert regarding the reliability of an eyewitness does not depend on any novel scientific experiment or discovery, rather it “describes observations and studies by a wide range of scholars who have observed and examined cognizable behavioral patterns connected with the accuracy of eyewitness testimony.”<sup>191</sup> Many other forms of expert testimony that do not depend on novel scientific principles are admissible in New York courts without a *Frye* hearing.<sup>192</sup>

The New York Court of Appeals or the state legislature could also decide that the science underlying expert testimony about eyewitness identification is generally accepted. In light of all the literature and studies on this topic discussed above, the psychological factors that may affect an eyewitness’ memory and perception are arguably generally accepted.<sup>193</sup>

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dant is a key element of the prosecution’s case but is not substantially corroborated by evidence giving it independent reliability, and the defendant [offers an expert to testify about the factors that can affect the eyewitness’ identification], it will. . . be error to exclude that testimony.”).

189. *Frye*, 293 F. at 1014 (“The court itself stated that it was concerned about scientific principles or discoveries that “cross the line between the experimental and demonstrable.”).

190. *Smith*, 743 N.Y.S.2d at 248.

191. *Id.*

192. *See, e.g.*, *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990) (allowing expert testimony regarding rape trauma syndrome because it was relevant to dispel misconceptions regarding ordinary responses of rape victims); *People v. Brown*, 769 N.E.2d 1266 (N.Y. 2002) (permitting expert testimony regarding the practices and terminology in street level narcotics transactions because it was helpful to the jury in understanding the evidence presented). *See also* *People v. Ciervo*, 506 N.Y.S.2d 462 (N.Y. App. Div. 1986) (permitting the defense to call an expert in the field of psychology to testify as to battered woman’s syndrome); *In re Nicole V.*, 518 N.E.2d 914 (N.Y. 1987) (a therapist was permitted to testify regarding sexually abused child syndrome); *People v. Keindl*, 502 N.E.2d 577, 583, *appeal denied*, 506 N.E.2d 539 (1987) (a psychiatrist was allowed to testify at trial to explain how children who have been repeatedly sexually abused by their stepfather are likely to suffer psychologically).

193. *See Smith*, 743 N.Y.S.2d at 249 (citing other cases holding that the general acceptance standard was satisfied).

### B. Adopting *Daubert*

Adopting *Daubert* as the standard for all expert evidence in New York is also a good solution, but this might encounter opposition from those who think *Daubert* is too lenient. While allowing experts to testify about the problems with eyewitness testimony will benefit defendants, *Daubert* can also help prosecutors.<sup>194</sup> Recent decisions from various state Supreme Courts demonstrate that adopting *Daubert* would maintain standards while making expert testimony more easily admissible.<sup>195</sup>

*People v. Legrand*, which excluded expert testimony on eyewitness identification, would likely have been decided differently under *Daubert*. In *Legrand*, the defense sought to introduce an expert to testify as to: (1) the confidence-accuracy correlation; (2) post-event information and confidence malleability; and (3) weapon focus.<sup>196</sup> The trial judge held the testimony regarding all three psychological theories inadmissible, stating, as to the confidence-accuracy theory, that the “correlation has not yet achieved general acceptability within the relevant scientific community.”<sup>197</sup> It is likely such testimony would have been admitted if the court had applied *Daubert*. First, the proposed testimony was obviously

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194. See, e.g., *Coon*, 974 P.2d 386 (prosecution was permitted to use expert on spectrographic techniques to prove defendant was the person making threatening phone calls); *Schreck*, 22 P.3d 68 (prosecution allowed to use DNA evidence under *Daubert*); *United States v. Plaza*, 188 F.Supp. 2d 549 (2002) (allowing the government to call as experts FBI fingerprint specialists).

195. See *Coon*, 974 P.2d at 395 (adopting *Daubert* to allow the expert testimony of an expert on spectrographic techniques which was excluded under *Frye*). The court stated: “We adopt the *Daubert* standard for determining the admissibility of scientific evidence. We hold that the voice spectrograph analysis evidence was admissible under *Daubert* and the Alaska Rules of Evidence in this case. We therefore affirm *Coon*’s judgment and conviction.” *Id.* at 402-03. See also *People v. Shreck*, 22 P.3d 68 (2001) (overturning the exclusion of DNA evidence because it did not meet *Frye* after adopting *Daubert* and applying it to the facts); *Ex parte State of Alabama (Re: Andre Dwight Turner v. State)*, 746 So.2d 355 (1998) (overturning the exclusion of DNA evidence under *Frye* and admitting the evidence using *Daubert*); *Farm Bureau Mut. Ins. Co. v. Foote*, 14 S.W.3d 512 (Ark. 2000) (adopting *Daubert* and abandoning *Frye* to reject expert testimony regarding a trained canines ability to indicate whether a fire was intentionally set).

196. All of these are discussed in Section II(B).

197. See *Legrand*, 747 N.Y.S.2d at 745.

relevant to the case.<sup>198</sup> Second, the testimony was reliable as analyzed under *Daubert*. The “key question,” as *Daubert* stated, is whether the theory can be and has been tested.<sup>199</sup> The confidence-accuracy correlation is a theory that has been and can be tested.<sup>200</sup> The theory has also been the subject of extensive peer review and publication.<sup>201</sup> Not only is there extensive writing in support of the theory, there is writing opposed to the theory as well.<sup>202</sup>

Additionally, *Daubert* stated that the court “should consider the known or potential rate of error.”<sup>203</sup> The government’s expert testified that because different methods are used to test the theory the results could vary greatly.<sup>204</sup> This merely means that under varying conditions different results may occur, not that there is a high potential rate of error. Many psychologists believe that regardless of the different possible conditions, the correlation between confidence and accuracy is still very low.<sup>205</sup> Finally, “‘general acceptance’ can yet have a bearing on the inquiry.”<sup>206</sup> But, even if the

198. The relevancy was acknowledged by the judge, who stated, because the eyewitness testimony is central to the prosecution’s case-in-chief and there is no other corroborating evidence, that there “is also no question as to whether the proffered expert testimony is relevant to the issues and facts of this case.” *Legrand*, 747 N.Y.S.2d at 742.

199. *Daubert*, 509 U.S. at 593.

200. Even the State’s expert, who testified against the confidence-accuracy correlation, acknowledged that there were three methods psychologists used to test this theory. *Legrand*, 747 N.Y.S.2d at 744.

201. See, e.g., Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, LAW AND HUMAN BEHAVIOR, vol. 22, no. 6, 1-39, at 14 (1998); Saul M. Kassin, et. al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, AMERICAN PSYCHOLOGIST (2001); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, PSYCHOLOGY, 1 PUBLIC POLICY AND LAW no. 4, 909 (1995).

202. McKenna, J. et al., *Expert Psychological Testimony About Eyewitness Reliability: Selling Psychology Before its Time*, PSYCHOLOGY AND SOCIAL POLICY, 283-93 (1992); Lindsay et al., *Accuracy and Confidence in Person Identification: The Relationship is Strong When Witnessing Conditions Vary Widely*, 9 PSYCHOLOGICAL SCIENCE 215 (1998).

203. See *Daubert*, 509 U.S. at 594.

204. *Legrand*, 747 N.Y.S.2d at 743.

205. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, PSYCHOLOGY, PUBLIC POLICY, AND THE LAW, vol. 1, no. 4, 909-59, 927 (“[even under] the most pristine conditions [confidence-accuracy correlation] only tends to be about .40”).

206. *Daubert*, 509 U.S. at 594.

confidence-accuracy correlation is not generally accepted, the testimony could still be admissible.<sup>207</sup>

It is clear that *Daubert* would not only provide trial courts with a reasonable standard to control the admissibility of expert testimony, it would ensure that relevant and reliable evidence would be admissible to assist a jury in making its decision. Defendants could then be protected from the prejudice of potentially unreliable testimony. Traditional safeguards would still exist to protect a party against whom an expert is testifying. As the Supreme Court stated, in responding to fears that abandonment of "general acceptance would lead to a 'free-for-all:'"

[r]espondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.<sup>208</sup>

Additionally, an expert will only testify to the general problems that can affect the memory and perception of an eyewitness. He would not be permitted to state a conclusion as to whether the particular witness in question actually suffered from any of these problems.<sup>209</sup>

## V. CONCLUSION

New York has lagged behind most of the States and the federal government in admitting expert testimony about eyewitness reliability. By either reinterpreting *Frye* or by adopting *Daubert*, New York can make such testimony available to criminal defendants. No person should be deprived of his liberty solely on the basis of eyewitness testimony unless the jury is fully aware of the ways in which such testimony may be flawed.

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207. The judge in *Legrand* stated that some of the experts who studied confidence-accuracy could not state their opinion to a "reasonable degree of scientific certainty." *Legrand*, 747 N.Y.S.2d at 745. However, as the Supreme Court said in its holding in *Daubert*, "arguably, there are no certainties in science." See *Daubert*, 509 U.S. at 595-96.

208. *Daubert*, 509 U.S. at 595-96. (Also, "[a]s is true with all expert testimony, the jury remains free to reject it entirely after considering the expert's opinion."). See *McDonald*, 37 Cal.3d at 722.

209. See, e.g., *McDonald*, 690 P.2d at 722-23; *Chapple*, 660 P.2d at 1219.