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EXPERT TESTIMONY ON THE RELIABILITY OF EYEWITNESS IDENTIFICATIONS: A CRITICAL ANALYSIS OF ITS ADMISSIBILITY

*State v. Lawhorn*¹

*State v. Whitmill*²

Eyewitness identification has continually played a significant role in the American criminal justice system. Prosecutors and judges have often relied upon eyewitness testimony to obtain convictions. On numerous occasions, juries have convicted defendants based solely on the testimony of a single eyewitness. The widespread acceptance of eyewitness testimony is demonstrated by adherence to the "one-witness" rule which allows convictions based on the uncorroborated identification testimony of a single eyewitness in a majority of jurisdictions.³ The need for eyewitness identification testimony partially explains the continued acceptance. Eyewitness identification adds an element of certainty to cases involving weak circumstantial evidence.⁴ Often the only evidence linking the defendant to a crime is a positive identification by an eyewitness.

American jurists have justified their unabashed reliance on eyewitness testimony with the assumption that eyewitness identifications are generally reliable. This assumption, however, is questionable. Three factors cast doubt on the reliability of eyewitness identification. First, commentators have thoroughly documented the occurrence of erroneous convictions based on

1. *State v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988) (en banc).

2. *State v. Whitmill*, No. 30-472 (Mo. Ct. App. Jan. 3, 1989).

3. *United States v. Telfaire*, 469 F.2d 552, 554 (D.C. Cir. 1972); Comment, *Eyewitness Identification: Should Psychologists Be Permitted to Address the Jury?*, 75 J. CRIM. L. & CRIMINOLOGY 1321, 1322 (1984) (authored by Margaret J. Lane) [hereinafter Lane]; Comment, *Eyewitness Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1391-92 (1982) (authored by Steven E. Holtshouser) [hereinafter Holtshouser]. See generally 7 J. WIGMORE, EVIDENCE § 2034, at 342-43 (Chadbourn rev. ed. 1978). But see *United States v. Butler*, 636 F.2d 727 (D.C. Cir 1980), cert. denied, 451 U.S. 1019 (1981) (one-witness rule questioned in dissenting opinion in criminal prosecution when conviction was based on testimony of one eyewitness to crime).

4. Lane, *supra* note 3, at 1322.

mistaken identification.⁵ Justice Felix Frankfurter once commented, "The 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."⁶ Furthermore, conviction of innocent people is inconsistent with concepts of justice. Mistaken identifications "have been thought by many experts to present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished."⁷

Second, the United States Supreme Court, as well as many lower courts, has recognized persistent problems associated with eyewitness testimony.⁸ In *United States v. Wade*,⁹ the Supreme Court emphatically stated: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."¹⁰ The Supreme Court has attempted to establish constitutional safeguards to protect criminal

5. See generally E. BLOCK, *THE VINDICATORS* (1963); E. BOCHARD, *CONVICTING THE INNOCENT* (1932); F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927); E. GARDNER, *THE COURT OF LAST RESORT* (1952). In *CONVICTING THE INNOCENT*, Bochard described wrongful criminal convictions of 65 persons in 27 different states. Yet, several psychologists claim that "documented cases of wrongful conviction resulting from mistaken eyewitness testimony obviously represent only a small fraction of 1% of the cases in which defendants were convicted at least in part on the basis of eyewitness testimony." McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550, 552 (1983).

6. F. FRANKFURTER, *supra* note 5, at 30.

7. McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970). See also *Stovall v. Denno*, 388 U.S. 293, 297 (1967) (mistaken identification is a gross miscarriage of justice); *People v. Lewis*, 137 Misc. 2d 84, 86, 520 N.Y.S.2d 125, 127 (N.Y. Co. Ct. 1987) ("[M]istaken identification 'probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'") (quoting *United States v. Wade*, 388 U.S. 218, 229 (1967)).

8. *United States v. Wade*, 388 U.S. 218, 228-32 (1967). See also *Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting) (eyewitness identification notoriously unreliable); *State v. Warren*, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981) ("[C]ases of mistaken identification are not infrequent and the problem of misidentification has not been alleviated.").

Trial courts have devised interesting methods to combat the possibility of mistaken identifications. For instance, one commentator noted:

A judge in New York City developed his own system to check on the frequency of mistaken identifications. In ten cases in which the identification of the accused was virtually the only evidence, the judge permitted defense attorneys to seat a look-alike alongside the defendant. In only two of the ten cases was the witness able to identify the defendant.

Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 969 n.3 (1977) (citing TIME, April 2, 1973, at 59).

9. 388 U.S. 218 (1967).

10. *Id.* at 228.

defendants from misidentifications. Its efforts have centered on the elimination of suggestive police procedures at pre-trial identification proceedings rather than the explanation of eyewitnesses' inability to accurately perceive, remember and retrieve their observations.¹¹ Unfortunately, these constitutional protections, which were fairly extensive at one point, have now been greatly limited by subsequent Supreme Court decisions.¹² Therefore, mistaken identifications still present pervasive problems within the criminal justice system for which a satisfactory solution must be found.

Third, an extensive body of psychological research refutes the assumption that eyewitness identification is reliable.¹³ Psychologists claim that

11. Discussion of the constitutional safeguards protecting defendants from suggestive identifications is beyond the scope of this Note. Briefly, however, the United States Supreme Court decided the landmark *Wade* trilogy in 1967, which established a defendant's constitutional right to have counsel present at any critical stage of criminal prosecutions, including pre-trial lineups. The trilogy included *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967). The Court held that evidence of suggestive pre-trial lineup identifications was *per se* inadmissible. *Gilbert*, 388 U.S. at 273. In addition, it held that in-court identifications, made after suggestive lineups, were likewise inadmissible unless "clear and convincing evidence" showed the identification had a basis independent of the pre-trial identification. *Wade*, 388 U.S. at 240.

12. Subsequent Supreme Court decisions have greatly undermined the effectiveness of the *Wade* trilogy, particularly *Kirby v. Illinois*, 406 U.S. 682 (1972), and *United States v. Ash*, 413 U.S. 300 (1973). These decisions modified the *Wade* trilogy such that the right to counsel now attaches only after the initiation of formal judicial criminal proceedings. *Kirby*, 406 U.S. at 689-90. Furthermore, there is no right to counsel at photographic display sessions. *Ash*, 413 U.S. at 321.

This curtailing of constitutional protection has received much criticism. One commentator, in reference to *Kirby* and *Ash*, stated: "The right to counsel at identification procedures established in *Wade* has become virtually a dead letter owing to two decisions." N. SOBEL, *EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS* § 1.5, at 1-10 (2nd rev. ed. 1985).

13. See generally CLIFFORD & BULL, *THE PSYCHOLOGY OF PERSON IDENTIFICATION* (1979); *EVALUATING EYEWITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES* (Lloyd-Bostock & Clifford ed. 1983); *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (G. Wells & E. Loftus eds. 1984) [hereinafter *PSYCHOLOGICAL PERSPECTIVES*]; E. LOFTUS, *EYEWITNESS TESTIMONY* (1979) [hereinafter E. LOFTUS]; N. SOBEL, *supra* note 12; P. WALL, *EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES* (1965); YARMEY, *THE PSYCHOLOGY OF EYEWITNESS TESTIMONY* (1979); Brigham & Barkowitz, *Do "They All Look Alike?" The Effect of Race, Sex and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY 306 (1978); Buckhout, *Eyewitness Testimony*, 15 JURIMETRICS 171 (1975); Cutler, Penrod & Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41 (1988); Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980); Fox & Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 LAW & HUM. BEHAV. 215 (1986); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 LAW & HUM. BEHAV. 317 (1986); Hosch, Beck & McIntyre, *Influence*

eyewitness identifications are frequently inaccurate due to subtle suggestive influences that occur during the memory process.¹⁴ In addition, these researchers argue that the average juror or judge is unaware of these influences.¹⁵ In fact, studies show that most jurors have many common misconceptions regarding the reliability of eyewitness identification.¹⁶ In many instances, these misconceptions are contrary to the actual operation of the memory process.¹⁷ Given jurors' tendency to hold these misconceptions and their tendency to place considerable weight on eyewitness testimony,¹⁸ many psychologists and attorneys advocate the admission of expert

of *Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287 (1980); Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Konecni, *Courtroom Testimony by Psychologists on Eyewitness Identification Issues: Critical Notes and Reflections*, 10 LAW & HUM. BEHAV. 117 (1986); Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 LAW & HUM. BEHAV. 261 (1980); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Lindsay, *Confidence and Accuracy of Eyewitness Identification from Lineups*, 10 LAW & HUM. BEHAV. 229 (1986); Loftus & Green, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980); Wells, *Expert Psychological Testimony*, 10 LAW & HUM. BEHAV. 83 (1986); Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979); Wells, Lindsay & Tausignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980); Yarmey, *Ethical Responsibilities Governing the Statements Experimental Psychologists Make in Expert Testimony*, 10 LAW & HUM. BEHAV. 101 (1986); Yarmey & Kent, *Eyewitness Identification by Elderly and Young Adults*, 4 LAW & HUM. BEHAV. 359 (1980); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977) (authored by Fredric D. Woocher) [hereinafter Woocher]. See generally *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981).

14. E. LOFTUS, *supra* note 13, at 21-22; P. WALL, *supra* note 13, at 8-9.

15. E. LOFTUS, *supra* note 13, at 21-22; P. WALL, *supra* note 13, at 8-9.

16. *State v. Chapple*, 135 Ariz. 281, —, 660 P.2d 1208, 1220-21 (1983); Abney, *Expert Testimony and Eyewitness Identification*, 91 CASE & COM. 26 (1986). See also E. LOFTUS, *supra* note 13, at 171-77; Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982); Note, *Admission of Expert Testimony on Eyewitness Identification*, 73 CALIF. L. REV. 1402, 1404 (1985) (authored by Christopher M. Walters) [hereinafter Walters]; Note, *Evaluating Eyewitness Testimony in Criminal Trials: Can Jurors Use Help From Experts?* 63 CHI.-[KENT L. REV. 137, 141 (1987) (authored by Maureen A. Gorman) [hereinafter Gorman].

17. See also *Chapple*, 135 Ariz. at —, 660 P.2d at 1220-21; *People v. McDonald*, 37 Cal. 3d 351, 368, 690 P.2d 709, 720, 208 Cal. Rptr. 236, 247 (1984); E. LOFTUS, *supra* note 13, at 171-77; Deffenbacher & Loftus, *supra* note 16; Walters, *supra* note 16, at 1404; Gorman, *supra* note 16, at 141.

18. See E. LOFTUS, *supra* note 13, at 8-19; P. WALL, *supra* note 13, at 19-23; Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983); Wells, Lindsay

testimony¹⁹ regarding the unreliability of eyewitness identification.²⁰ They contend that the admission of expert psychological testimony which outlines various factors affecting identification reliability would mitigate the problems associated with eyewitness testimony.²¹

The issue of whether expert psychological testimony should be admitted is yet unresolved. Despite recommendations of the psychology profession, courts have traditionally excluded such testimony for a host of reasons.²² A modern trend, however, favors the admissibility of such expert evidence.²³ This trend began in 1983 when the Arizona Supreme Court became the first appellate court to overrule a trial court's exclusion of expert psychological testimony in *State v. Chapple*.²⁴ The California Supreme Court immediately followed Arizona's lead with a similar holding in *People v. McDonald*.²⁵ Yet, admission of such testimony has continued to meet strong resistance in other jurisdictions.

Missouri appellate courts have indirectly confronted the issue of admission of expert psychological testimony in *State v. Bullington*²⁶ and *State*

& Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440, 446-47 (1979); Gorman, *supra* note 16, at 141. *But see* Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1546, 1551 (1978) (no empirical evidence supports the assumption that jurors and judges overbelieve witnesses).

One court stated, "[B]ecause eyewitness testimony is such powerful stuff and can decide a case on its own strength, it can blind a jury to other exculpatory evidence or inferences. . . . [E]yewitness testimony is among the most influential, even as it is among the least reliable, forms of proof." *Kampshoff v. Smith*, 698 F.2d 581, 587 (2d Cir. 1983).

19. The term "expert psychological testimony" shall be used hereinafter in reference to expert testimony regarding the unreliability of eyewitness identifications.

20. E. LOFTUS, *supra* note 13, at 8-19; N. SOBEL, *supra* note 12, §§ 9.6-9.8; P. WALL, *supra* note 13, at 212-13; Lane, *supra* note 3, at 1322; Woocher, *supra* note 13, at 969-1030. *See generally* Monahan & Loftus, *Trial by Data—Psychological Research as Legal Evidence*, 35 AM. PSYCHOLOGY 270 (1980); Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW & PSYCHOLOGY REV. 1 (1982).

21. E. LOFTUS, *supra* note 13, at 8-19; N. SOBEL, *supra* note 12, §§ 9.6-8; P. WALL, *supra* note 13, at 212-13; Monahan & Loftus, *supra* note 20, at 191; Rahaim & Brodsky, *supra* note 20, at 1; Lane, *supra* note 3, at 1322; Woocher, *supra* note 13, at 969-1030.

22. Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17 TEX. TECH L. REV. 1409, 1422 (1986); Lane, *supra* note 3, at 1339-1345. *See supra* notes 89-113 and accompanying text for discussion of the most common of these justifications.

23. *State v. Cooper*, 708 S.W.2d 299, 303 (Mo. Ct. App. 1986) (eastern district).

24. 135 Ariz. 281, 660 P.2d 1208 (1983).

25. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

26. 680 S.W.2d 238 (Mo. Ct. App. 1984) (western district), *conviction over-*

v. Cooper.²⁷ Neither case, however, ruled the question "authoritatively and unequivocally," therefore, the issue remained unresolved.²⁸ In 1988, the Missouri Supreme Court addressed the admissibility of such testimony as an issue of first impression in *State v. Lawhorn*.²⁹ In January 1989, the Missouri Court of Appeals, Southern District, also confronted the issue in *State v. Whitmill*.³⁰

This Note will analyze the use and admissibility of expert psychological testimony. It will explain the nature of expert psychological testimony, the common misconceptions affecting a juror's view of the reliability of eyewitness identification and the standard reasons used to justify the exclusion of such expert testimony. It will survey the treatment of this type of testimony in other jurisdictions. It will emphasize the status of admissibility in Missouri, focusing on *State v. Lawhorn* and *State v. Whitmill*, as well as analyze prior treatment of the issue by Missouri courts. Finally, it will argue that the Missouri Supreme Court failed to resolve the issue of admissibility in *Lawhorn* and that *Whitmill's per se* rule of inadmissibility is logically incorrect and should be overruled. Instead, the supreme court should have adopted a multi-factor guideline for use by trial courts in determining when exclusion of such testimony constitutes an abuse of discretion.

I. THE NATURE OF EXPERT PSYCHOLOGICAL TESTIMONY

A. Substance of the Testimony

Expert psychological testimony focuses on various factors that may have a critical impact on the accuracy of identifications.³¹ Psychological researchers argue that testimony related to factors affecting the process of identification would aid the jury in evaluating identification testimony.³²

27. 708 S.W.2d 299 (Mo. Ct. App. 1986) (eastern district).

28. *State v. Lawhorn*, 762 S.W.2d 820, 822 (Mo. 1988) (en banc).

29. 762 S.W.2d 820, 822 (Mo. 1988) (en banc).

30. *State v. Whitmill*, No. 30-472 (Mo. Ct. App. Jan. 3, 1989).

31. Brigham, *The Accuracy of Eyewitness Evidence: How do Attorneys See It?*, 55 FLA. B.J. 714, 720 (1981).

32. E. LOFTUS, *supra* note 13, at 191; P. WALL, *supra* note 13, at 212-13; Rahaim & Brodsky, *supra* note 20, at 1-2; Wells, Lindsay & Tousignant, *supra* note 13, at 284-85. Furthermore, Professor McCormick clearly expressed his approval of the use of expert psychological testimony in some instances. He stated:

[I]t would seem that the researchers have something to offer, and that where a case turns on uncorroborated eyewitness recognition, the courts should be receptive to expert testimony about the knowledge, gleaned from methodologically sound experimentation, concerning the factors that may have produced a faulty identification. . . . While it seems that expert testimony on the psychology of eyewitness identification may not be necessary or appropriate in many cases, in those instances where the case turns on the eyewitness testimony and the expert's assistance could make a difference, the scientific knowledge generally should be admitted.

McCormick on EVIDENCE § 206, at 624-25 (3d ed. 1984) [hereinafter MCCORMICK].

A synopsis of the psychological process of eyewitness identification is helpful in understanding the nature of the expert testimony. Psychologists universally recognize three stages in the process: (1) perception; (2) retention; and (3) retrieval.³³ First, the eyewitness must perceive or observe the individual's face.³⁴ At this point, the image is encoded in the eyewitness's memory.³⁵ Next, he must retain the full perception without distortion during the intervening time from observation to recollection.³⁶ Finally, the individual must retrieve an accurate description of the stored image.³⁷ Various psychological factors may affect eyewitness identification at each of these stages.³⁸ A qualified psychologist could testify to the existence and effect of each relevant factor. He could explain "event factors"—those related to the actual observation and nature of the encounter³⁹—as well as "witness factors"—those related to the emotions and experience of a particular person.⁴⁰ In addition, a psychologist could refute many misconceptions that are held by jurors regarding identification reliability.

Psychological research regarding eyewitness identification reliability began in the early nineteenth century.⁴¹ Noting the recurring discrepancies between eyewitness accounts, psychologists began to study the memory process in relation to eyewitness identification.⁴² Despite this early start, the majority of the research on the subject has been conducted in the past fifteen to twenty years by a number of respected psychologists.⁴³ Today, an expansive body of empirical research exists supporting these psychol-

33. E. LOFTUS, *supra* note 13, at 21; Lane, *supra* note 3, at 1333.

34. E. LOFTUS, *supra* note 13, at 21.

35. *Id.* at 21; Woocher, *supra* note 13, at 974 n.11.

36. E. LOFTUS, *supra* note 13, at 21; Woocher, *supra* note 13, at 974 n.11.

37. E. LOFTUS, *supra* note 13, at 21; Woocher, *supra* note 13, at 974 n.11.

38. Lane, *supra* note 3, at 1333.

39. E. LOFTUS, *supra* note 13, at 23.

40. *Id.* at 32.

41. Woocher, *supra* note 13, at 974. Psychological research regarding eyewitness identification evolved from distinct, specialized subcategories within the psychology field, each previously studied independently. These subcategories revolved around perception, memory and social psychology. Research on the reliability of eyewitness identification reflects a combination of these three areas. *Id.*

Psychologists working within these separate fields concentrate on different aspects of the human memory. Perception specialists focus on factors affecting an individual's awareness of stimuli by the use of his sensory organs. They also study the influence that prior experiences have on sensory ability. Memory specialists concentrate on alterations made to encoded images during the interim from perception to retrieval. Social psychologists delve into the influences other individuals have on the memory process. *Id.*

42. *Id.* The preeminent researcher at the time was Hugo Munsterberg who wrote the classic treatise on the subject. See H. MUNSTERBERG, *ON THE WITNESS STAND* (1908).

43. Among these scholars are Dr. Elizabeth Loftus, professor of psychology at the University of Washington-Seattle, and Dr. Robert Buckhout, professor of psychology at Brooklyn College, Brooklyn, New York.

ogists' argument that their testimony can assist a jury in evaluating eyewitness testimony.⁴⁴

Although the majority of psychologists support the admission of expert psychological testimony, a small faction contends that only weak empirical evidence supports the hypothesis that such expert testimony will improve a juror's ability to evaluate eyewitness testimony.⁴⁵ Yet, this minority concedes that such expert testimony may offer at least some assistance to jurors.⁴⁶ These psychologists also contend that juries tend to overemphasize expert psychological testimony. Such overemphasis results from the supposed "aura of reliability" surrounding expert testimony.⁴⁷ Therefore, this faction requests more research concerning the effect expert psychological testimony has on jurors.⁴⁸

B. Common Misconceptions Regarding Identification Reliability

The average juror holds many erroneous beliefs regarding the reliability of eyewitness identification. Proponents of expert psychological testimony claim that such testimony can be useful in dispelling these misconceptions. For instance, many jurors lack a comprehensive understanding of the "own-race effect" by which an eyewitness is more accurate in identifying a person of his own race than someone of another race.⁴⁹ Although many jurors

44. See generally E. LOFTUS, *supra* note 13; PSYCHOLOGICAL PERSPECTIVES, *supra* note 13; N. SOBEL, *supra* note 12; P. WALL, *supra* note 13; Buckhout, *supra* note 13; Cutler, Penrod & Stuve, *supra* note 13; Deffenbacher, *supra* note 13; Fox & Walters, *supra* note 13; Goodman & Reed, *supra* note 13; Hosch, Beck & McIntyre, *supra* note 13; Johnson, *supra* note 13; Konecni, *supra* note 13; Leippe, *supra* note 13; Lindsay, *supra* note 13; Loftus & Green, *supra* note 13; Wells, *supra* note 13; Wells, Lindsay & Tournant, *supra* note 13; Yarmey, *supra* note 13; Yarmey & Kent, *supra* note 13; Woocher, *supra* note 13.

45. See generally McCloskey & Eggeth, *supra* note 5; Eggeth & McCloskey, *Expert Testimony About Eyewitness Behavior: Is It Safe and Effective?*, in PSYCHOLOGICAL PERSPECTIVES, *supra* note 13, at 283.

In *People v. McDonald*, the Arizona Supreme Court addressed the position of this minority group. The court indicated that "on close examination it appears the principal complaint of Eggeth and McCloskey is not so much that expert testimony on eyewitness identification should never be admissible, as that it is too soon to admit it: additional research is needed." 37 Cal. 3d 351, 369 n.15, 690 P.2d 709, 721 n.15, 208 Cal. Rptr. 236, 248 n.15 (1984). The court also observed, "[T]his is a frequent conclusion of academic authors [A]ppellate judges do not have the luxury of waiting until their colleagues in the sciences unanimously agree that on a particular issue no more research is necessary. Given the nature of the scientific endeavor, that day may never come." *Id.*

46. McCloskey & Eggeth, *supra* note 5, at 558. As noted, these psychologists suggest that additional research is necessary. *Id.*

47. *Id.*

48. *Id.*; Sanders, *supra* note 22, at 1459-64.

49. *McDonald*, 37 Cal. 3d at 368, 690 P.2d at 720, 208 Cal. Rptr. at

are probably somewhat aware of this "own-race effect," most do not realize its "pervasive and even paradoxical nature."⁵⁰ Cross-racial identifications tend to be most inaccurate when white witnesses attempt to recognize black individuals.⁵¹ There is particularly strong empirical evidence supporting the cross-racial identification theory.⁵²

Three factors related to cross-racial identifications are likely to be contrary to juror belief. First, white witnesses who are not racially prejudiced are just as likely to make cross-racial misidentifications as those who are prejudiced.⁵³ Second, white witnesses who have experienced significantly more social contact with blacks are no more accurate in their identifications than those who have not.⁵⁴ Third, jurors may deny the existence of the "own-race effect" because it seems racist or may avoid discussing it in deliberations for fear of appearing prejudiced.⁵⁵

The existence of the "own-race effect" presents the strongest argument for admission of expert psychological testimony. The empirical evidence supporting the theory is considerably stronger than for any other factor affecting identification. Since cross-racial identification arises in many criminal trials and is a factor of which many jurors are unaware or refuse to recognize, expert psychological testimony concerning cross-racial identification could truly assist jurors in many cases. Yet, most judges refuse to allow such testimony.⁵⁶

Jurors also typically believe that the accuracy of an eyewitness identification increases with the eyewitness' certainty.⁵⁷ Empirical data suggests that, in reality, no correlation exists between confidence and accuracy.⁵⁸ This is especially true when the eyewitness views the perpetrator under poor visibility conditions.⁵⁹ In some studies, the correlation was negative—the more confident the witness, the more inaccurate his identification.⁶⁰ Furthermore, experimental data indicates that expert psychological testimony reduces the jury's reliance on eyewitness confidence in its evaluation of

50. *McDonald*, 37 Cal. 3d at 368, 690 P.2d at 720, 208 Cal. Rptr. at

51. Johnson, *supra* note 13, at 938-39.

52. *Id.* at 936. According to one commentator, "In the last fifteen years, psychologists have compiled empirical evidence that incontrovertibly demonstrates a substantially greater rate of error in cross-racial recognition of faces." *Id.*

53. *Id.* at 943-44.

54. *Id.* at 944.

55. *Id.* at 969; *McDonald*, 37 Cal. 3d at 368, 690 P.2d at 721, 208 Cal. Rptr. at

56. Johnson, *supra* note 13, at 936.

57. E. LOFTUS, *supra* note 13, at 100-01; Abney, *supra* note 16, at 26.

58. Deffenbacher, *supra* note 13, at 245-46; Fox & Walters, *supra* note 13, at 216; Leippe, *supra* note 13, at 271; Lindsay, *supra* note 13, at 230-31.

59. Fox & Walters, *supra* note 13, at 216.

60. Wells & Murray, *Eyewitness Confidence*, in *PSYCHOLOGICAL PERSPECTIVES*, *supra* note 13, at 159-62.

the eyewitness's testimony.⁶¹ Because other studies have demonstrated only a weak confidence-accuracy relationship,⁶² several psychologists have requested additional research to resolve the conflicting results before experts incorporate the confidence-accuracy theory into their testimony.⁶³

Many laypersons believe that a witness' memory is enhanced by the stress experienced in a criminal encounter.⁶⁴ In fact, research indicates that one-third of the population erroneously believes that stress increases identification accuracy.⁶⁵ Yet, psychological research does not fully support this belief. According to the Yerkes-Dodson law, "strong motivational states such as stress or other emotional arousal facilitate learning and performance up to a point, after which there is a decrement."⁶⁶ During the extremely stressful situation of a criminal encounter, an eyewitness' ability to accurately perceive and remember details is greatly reduced due the individual's limited attention to details.⁶⁷ As tension mounts, people increasingly concentrate on only a few details and pay less attention to others.⁶⁸ This phenomenon produces the "weapons effect."⁶⁹ When an assailant brandishes a weapon, an eyewitness focuses on the weapon rather than the assailant.⁷⁰ Thus, the eyewitness's ability to accurately identify an attacker is greatly reduced.⁷¹ Researchers admit, however, that evidence of the "weapons effect" is not conclusive.⁷²

Many jurors also erroneously believe that a group consensus among eyewitnesses lends reliability to identifications.⁷³ But, due to the "feedback factor," a group consensus is more likely to be inaccurate than an individual identification.⁷⁴ Feedback occurs when multiple eyewitnesses engage in discussions regarding the identification of the offender.⁷⁵ The result is that each witness reinforces the others' certainty in the identifications.⁷⁶

Psychologists sometimes contend that the average juror also may not be aware of the "forgetting curve."⁷⁷ The "forgetting curve" depicts the

61. Fox & Walters, *supra* note 13, at 216.

62. *Id.*

63. Leippe, *supra* note 13, at 261-62; Lindsay, *supra* note 13, at 237-38.

64. E. LOFTUS, *supra* note 13, at 33-36, 153-56; Abney, *supra* note 16, at 26-27.
26. See also State v. Chapple, 135 Ariz. 281, ___, 660 P.2d 1208, 1221 (1983).

65. *Id.* at 174.

66. E. LOFTUS, *supra* note 13, at 33.

67. *Id.* at 33-35, 153-55.

68. *Id.* at 35.

69. *Id.*

70. *Id.*; Abney, *supra* note 16, at 26-27.

71. E. LOFTUS, *supra* note 13, at 35; Abney, *supra* note 16, at 27.

72. E. LOFTUS, *supra* note 13, at 35.

73. Abney, *supra* note 16, at 27.

74. *Id.* See also State v. Chapple, 135 Ariz. 281, ___, 660 P.2d 1208, 1221 (1983).

75. Abney, *supra* note 16, at 27.

76. *Id.*

77. Lane, *supra* note 3, at 1336.

human memory's propensity to fade over time.⁷⁸ It demonstrates that the majority of an eyewitness' memory loss occurs within minutes of the crime.⁷⁹ Expert psychological testimony related to the "forgetting curve," however, would not greatly assist the jury since "it is common knowledge that memory and sense impressions fade with the passage of time. Any belief that memory is enhanced or remain[s] consistent over time is 'contrary to the natural order of things.'"⁸⁰

Most jurors are unaware that post-event external information can enhance or change a witness's memory or even cause nonexistent details to become integrated into the previously stored image.⁸¹ A change in the stored data can result from the witness's exposure to newspaper reports, questions from police officers, conversations with other witnesses or additional exposure to the accused offender.⁸² This is a relatively unknown phenomenon.

Also, few jurors are familiar with the common occurrence of "unconscious transference."⁸³ Unconscious transference refers to the tendency of the eyewitness to confuse a person seen in one situation with a person seen in another situation.⁸⁴ Strong empirical data supports its existence.⁸⁵ The phenomenon is particularly troublesome because it is nearly impossible to detect.⁸⁶ Transference is aggravated by an uncertain witness's tendency to close memory gaps by adjusting his recollection of an incident.⁸⁷ Witnesses may also guess in response to a subconscious need to reduce uncertainty or to cooperate in the investigation.⁸⁸

II. STANDARD REASONS FOR EXCLUSION OF EXPERT PSYCHOLOGICAL TESTIMONY

The majority of jurisdictions have upheld trial court exclusion of expert psychological testimony.⁸⁹ In doing so, courts have relied upon many dif-

78. E. LOFTUS, *supra* note 13, at 53; Lane, *supra* note 3, at 1336.

79. Lane, *supra* note 3, at 1336.

80. P. WALL, *supra* note 13, at 127 (quoting *People v. Cassidy*, 160 A.D. 651, 657, 146 N.Y.S. 15, 18-19 (N.Y. App. Div. 1914)).

81. E. LOFTUS, *supra* note 13, at 55; Lane, *supra* note 3, at 1336.

82. E. LOFTUS, *supra* note 13, at 78.

83. E. LOFTUS, *supra* note 13, at 142-43; Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCHOLOGY 93, 96 (1976) [*Unconscious Transference*]; Lane, *supra* note 3, at 1338.

84. E. LOFTUS, *supra* note 13, at 142; Lane, *supra* note 3, at 1338.

85. *Unconscious Transference*, *supra* note 83, at 94-96. One controlled experiment indicated that 79% of the subjects experienced unconscious transference. *Id.*

86. E. LOFTUS, *supra* note 13, at 142-44.

87. E. LOFTUS, *supra* note 13, at 82-83; Lane, *supra* note 3, at 1337.

88. Buckhout, *supra* note 13, at 181.

89. *State v. Lawhorn*, No. 39-524, slip op. at 6 (Mo. Ct. App. Feb. 9, 1988) (unreported western district appellate decision).

ferent justifications for the wholesale exclusion of such testimony. A brief discussion of some of the common justifications propounded by these courts is beneficial.

The most commonly cited reason for exclusion of expert psychological testimony is the claim that such testimony "invades the province of the jury" or "usurps" its function as the trier of fact.⁹⁰ The bald use of these phrases as justification for exclusion of evidence, without more, has generally met with disapproval from legal scholars.⁹¹ Many courts, however, have extended their analyses and stated that invasion of the jury's province occurs because the factors encompassed within such testimony are within the common knowledge of jurors.⁹² Furthermore, many appellate courts

90. *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Brown*, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom. United States v. Nobles*, 422 U.S. 225 (1975); *Caldwell v. State*, 267 Ark. 1053, 1059, 594 S.W.2d 24, 28 (Ark. Ct. App. 1980); *People v. Walker*, 41 Cal. App. 3d 116, —, 711 P.2d 465, 473, 222 Cal. Rptr. 169, 177 (1985), *aff'd on rehearing*, 47 Cal. App. 3d 605, 765 P.2d 70, 253 Cal. Rptr. 863 (1988); *People v. Brooks*, 51 Cal. App. 3d 602, —, 124 Cal. Rptr. 492, 495 (1975); *Jones v. State*, 232 Ga. 762, 764, 208 S.E.2d 850, 852-53 (1974); *State v. Stucke*, 419 So. 2d 939, 945 (La. 1982); *State v. Ammons*, 208 Neb. 812, 815, 305 N.W.2d 812, 814-15 (1981); *Porter v. State*, 94 Nev. 142, —, 576 P.2d 275, 278-79 (1988); *People v. Brown*, 117 Misc. 2d 587, 594, 459 N.Y.S.2d 227, 232 (N.Y. Co. Ct. 1983); *People v. Valentine*, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (N.Y. App. Div. 1976).

91. 7 J. WIGMORE, EVIDENCE § 1920, at 18-21 (Chadbourn rev. ed. 1978). Wigmore adamantly stated:

[T]he phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. . . . [T]he witness, in expressing his opinion, is not attempting to 'usurp' the jury's function [T]he jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.

Id. at 18-19 (footnotes omitted). *Bloodsworth v. State*, 307 Md. 164, 185, 512 A.2d 1056, 1066 (1986), noted that both "Wigmore and McCormick think little of the argument that opinions on the very issue before the jury should be rejected because they invade the province of the jury." *Id.* McCormick states that the phrase "invades the province of the jury" is not intended to be taken literally, rather it suggests the danger that the jury might be overly impressed by the expert's testimony. MCCORMICK, *supra* note 32, § 12, at 30. In addition, *Grismore v. Consolidated Production Co.*, 232 Iowa 328, 345, 5 N.W.2d 646, 655-56 (1942), similarly noted that courts have permitted the "invasion of the province of the jury" objection "to become almost a fetish." *Id.* Grismore noted, "The ablest writers and authorities on evidence have severely condemned these objections as being without any sound basis." *Id.* See also Murphy, *An Evaluation of the Arguments Against the Use of Expert Testimony on Eyewitness Identification*, 8 U. BRIDGEPORT L. REV. 21, 27-28 (1987).

92. *United States v. Dowling*, 855 F.2d 114, 118 (3rd Cir. 1988); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Watson*, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *United States*

believe that expert psychological testimony essentially tells the jury whether or not to believe the eyewitness. Thus, it interferes with the jury's task of weighing the credibility of witnesses—a task entrusted to the jury.⁹³

Using either Federal Rule of Evidence 403 or a similar state rule,⁹⁴ some courts have excluded expert psychological testimony because its prejudicial effect is said to substantially outweigh its probative value.⁹⁵ Supposedly, the "aura of reliability" surrounding expert testimony leads the jury to give undue consideration to the expert testimony; thus, expert testimony greatly diminishes jury belief of eyewitness testimony.⁹⁶ Although

v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978), *aff'd*, 590 F.2d 381 (1st Cir. 1979); State v. Poland, 144 Ariz. 388, —, 698 P.2d 183, 193 (1985), *aff'd*, 476 U.S. 147 (1985); People v. Beaver, 725 P.2d 96, 99 (Colo. Ct. App. 1986); State v. Kemp, 199 Conn. 473, 477-78, 507 A.2d 1387, 1389 (1986); Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977); Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983); Nelson v. State, 362 So. 2d 1017, 1021 (Fla. Dist. Ct. App. 1978); Porter v. State, 188 Ga. App. 675, —, 373 S.E.2d 805, 807 (1988); State v. Hoisington, 104 Idaho 153, 165, 657 P.2d 17, 29 (1983); People v. Dixon, 87 Ill. App. 3d 814, 818, 410 N.E.2d 252, 256 (1980); State v. Stucke, 419 So. 2d 939, 945 (La. 1982); State v. Fernald, 397 A.2d 194, 197 (Me. 1979); Commonwealth v. Francis, 390 Mass. 89, 101, 453 N.E.2d 1204, 1210 (1983); Commonwealth v. Middleton, 6 Mass. App. Ct. 902, —, 378 N.E.2d 450, 450 (1978); State v. Helterbride, 301 N.W.2d 545, 547 (Minn. 1980); State v. Ammons, 208 Neb. 812, 814, 305 N.W.2d 812, 814 (1981); People v. Valentine, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (1976); State v. Porraro, 121 R.I. 882, 892-93, 404 A.2d 465, 471 (1979); State v. Wooden, 658 S.W.2d 553, 556 (Tenn. Crim. App. 1983); State v. Onorato, 142 Vt. 99, 104-05, 453 A.2d 393, 395-96 (1982).

One court has reasoned:

If the reliability of the identifications can be adequately questioned by [cross-examination and closing arguments] and the jury is capable of understanding the reasons why they may be unreliable, the introduction of expert testimony would be "a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence."

State v. George, 194 Conn. 361, 373, 481 A.2d 1068, 1074-75 (1984), *cert. denied*, 469 U.S. 1191 (1985).

93. A more complete refutation of this argument is presented in Section V in the context of the *State v. Lawhorn* analysis. See *infra* notes 195-218 and accompanying text.

94. See *infra* note 203 for the text of FED. R. EVID. 403.

95. United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Watson, 587 F.2d 365, 368-69 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973).

96. United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); United States v. Collins, 395 F. Supp. 629, 637 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (1975); Commonwealth v. Francis, 390 Mass.

research supports this assertion, there remains some question of whether jurors actually hold expert testimony in any higher esteem than eyewitness testimony.⁹⁷ Courts also rely on Federal Rule of Evidence 403 or similar state rules to argue that admission of such expert testimony results in undue consumption of trial time or tends to confuse the jury.⁹⁸

A number of courts have also stated that admitting expert psychological testimony would lead to a "battle of the experts."⁹⁹ If courts freely allowed defendants to introduce such testimony, prosecutors would presumably demand introduction of their own expert to counter the defendant's expert. In this manner, the floodgates would open and a battle between the two experts would ensue in many criminal cases. Thus, opponents argue that exclusion of the expert testimony is necessary to minimize the confusion resulting from the jury's struggle to determine which expert to believe and to avoid undue time consumption. Assuming that misidentification is a troublesome and recurring problem and that expert testimony may alleviate it, should courts exclude expert testimony based merely on grounds of undue time consumption or juror confusion?¹⁰⁰

Almost all courts ruling such testimony inadmissible have asserted that various procedural protections are sufficient to protect defendants against misidentification.¹⁰¹ These procedural safeguards include: exclusion of sus-

89, 96, 453 N.E.2d 1204, 1207-08 (1983); *Porter v. State*, 94 Nev. 142, 147-48, 576 P.2d 275, 278-79 (1978). See also Hosch, Beck & McIntyre, *supra* note 13, at 287-89; Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9, 14-15 (1980); Sanders, *supra* note 22, at 1460; Wells, Lindsay & Tousignant, *supra* note 13, at 279-80.

97. Hosch, Beck & McIntyre, *supra* note 13, at 294 (expert psychological testimony does significantly influence jurors' beliefs in the reliability and accuracy of eyewitness testimony but does not lower eyewitness's credibility; it lowers the weight accorded eyewitness identification); Wells, Lindsay & Tousignant, *supra* note 13, at 284-85 (expert psychological testimony can reduce overbelief bias and greatly reduce jurors' reliance on eyewitness confidence).

98. *United States v. Brown*, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* *United States v. Nobles*, 422 U.S. 225 (1975) (undue consumption of time would substantially outweigh the probative value of expert psychological testimony); *United States v. Amaral*, 488 F.2d 1148, 1154 (9th Cir. 1973) (expert psychological testimony might tend to result in jury confusion and undue consumption of time); *Commonwealth v. Francis*, 390 Mass. 89, 100, 453 N.E.2d 1204, 1210 (1983) (Expert psychological testimony can "prolong a trial, raise collateral issues, and significantly increase the cost of trial."); *Porter v. State*, 94 Nev. 142, 148, 576 P.2d 275, 278-79 (1978).

99. Gorman, *supra* note 16, at 145. See also *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

100. Generally, most courts have not hesitated to exclude expert testimony based on these reasons. However, others have been more reluctant. See *Francis*, 390 Mass. at 100, 453 N.E.2d at 1210 ("[T]hese reasons alone would not justify the exclusion of evidence that would assist a trier of fact.").

101. See *infra* notes 221-36 and accompanying text.

picious eyewitness testimony by the trial court,¹⁰² opportunity for cross-examination, making closing arguments, giving cautionary instructions, and grant of a motion for new trial if the trial court deems the identification evidence too unreliable.¹⁰³ Unfortunately, the two procedural devices most often relied upon by courts in excluding such evidence—cross-examination and closing argument—cannot attain their full protective character without the admission of the expert testimony.¹⁰⁴

Finally, some jurisdictions exclude expert psychological testimony because they believe it entails novel scientific evidence and fails to meet the standard for admissibility set forth in *Frye v. United States*¹⁰⁵ or a similar test. The *Frye* test requires that the underlying scientific principles “must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁰⁶

Much disagreement exists concerning the validity of the *Frye* test and its exact meaning.¹⁰⁷ Regardless, many courts continue to adhere to it.¹⁰⁸

102. Although trial courts have the authority to exclude suspicious eyewitness testimony, they rarely do. Eyewitness testimony would most often be found suspicious when the police have used suggestive identification procedures in line-ups or photographic displays. Yet, as long as the prosecution can demonstrate that the in-court identification has a source independent from the previous suggestive pretrial confrontation, courts typically will not exclude the eyewitness testimony. See *Manson v. Brathwaite*, 432 U.S. 98, 106-07 (1977); *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972); *McCORMICK*, *supra* note 32, § 174, at 494-96. The Supreme Court has decided only one case where it determined that eyewitness testimony was erroneously admitted in spite of its suspicious nature. See *Foster v. California*, 394 U.S. 440 (1969); *McCORMICK*, *supra* note 32, § 174, at 495-96.

One commentator argues that exclusion of eyewitness testimony apart from suggestive pretrial identification should serve as a “last resort” because such exclusion would prevent conviction of the truly guilty. Woocher, *supra* note 13, at 1000-01. Eyewitness evidence is often the only means of linking defendants to crimes and even unreliable identifications are preferable to none, since the identification could actually be accurate. *Id.*

103. *Johnson*, *supra* note 13, at 951-55; *Sanders*, *supra* note 22, at 1464-68; *Lane*, *supra* note 3, at 1360-63; *Walters*, *supra* note 16, at 1403; Woocher, *supra* note 13, at 1000-05.

104. The deficiencies of these two procedural devices are discussed more fully in Section V, which analyzes *State v. Lawhorn*. See *infra* notes 221-30 and accompanying text.

105. *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923). See also Gorman, *supra* note 16, at 142-44; Woocher, *supra* note 13, at 1021-23.

106. *Frye*, 293 F.2d at 1014.

107. Gorman, *supra* note 16, at 143-44.

108. *Id.* at 144. Missouri courts generally adhere to the *Frye* test in admitting new methods of scientific analysis. R. HASL & J. O'BRIEN, MISSOURI LAW OF EVIDENCE §§ 9-10, 10-18, at 131, 165-66 (1984). See also *Alsbach v. Bader*, 700 S.W.2d 823, 828 (Mo. 1985) (en banc) (“This court has explicitly adopted the *Frye* standard for determining the admissibility of new scientific techniques.”); *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984) (en banc) (“[A]dmission of scientific evidence depends on wide acceptance in the relevant scientific community of its

Some courts have explicitly rejected expert psychological testimony due to its perceived failure to meet the *Frye* test.¹⁰⁹ Yet, some jurisdictions following *Frye* have determined that such testimony meets the general acceptability standard.¹¹⁰

The requirement that expert psychological testimony meet a *Frye*-type test has diminished in importance in recent decisions.¹¹¹ One commentator stated: "It begins to appear that arguments over the admission of eyewitness expert testimony may now begin to focus not on the scientific worth of the testimony in general but on its probative force and its prejudicial effect."¹¹² Apparently, this is the trend in Missouri. None of the Missouri appellate decisions have mentioned the *Frye* test as a ground for exclusion of expert psychological testimony. Rather, they have argued that such testimony is not a proper subject for the jury.¹¹³

III. OVERVIEW: TREATMENT OF EXPERT PSYCHOLOGICAL TESTIMONY IN OTHER JURISDICTIONS

An appellate court may choose from four potential rulings whenever it considers the admissibility of expert psychological testimony: (1) *per se*

reliability.") (citations omitted); *State v. Ross*, 523 S.W.2d 841, 845 (Mo. Ct. App. 1975) (applied *Frye*-type standard to neutron activation analysis).

109. *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985); *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979); *United States v. Watson*, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *People v. Plascencia*, 168 Cal. App. 3d 546, 554, 214 Cal. Rptr. 316, 320 (1985); *People v. Brown*, 117 Misc. 2d 587, 594, 459 N.Y.S.2d 227, 232 (N.Y. Co. Ct. 1983).

110. *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984) ("The day may have arrived . . . when [the expert's] testimony can be said to conform to a generally accepted explanatory theory."); *People v. McDonald*, 37 Cal. 3d 351, 372-73, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984) (the defendant failed to persuade the court that expert psychological testimony was "scientific enough" for admissibility); *Bloodsworth v. State*, 307 Md. 164, 184-85, 512 A.2d 1056, 1066 (1986) (*Frye* does not apply to expert psychological testimony); *People v. Brooks*, 128 Misc. 2d 608, 620, 490 N.Y.S.2d 692, 701 (N.Y. Co. Ct. 1985) ("The fact that this type of testimony is somewhat novel should not preclude its admission into evidence."); *State v. Taylor*, 50 Wash. App. 481, 488, 749 P.2d 181, 184 (1988) (State did not challenge the acceptability of expert psychological testimony under *Frye*).

111. N. SOBEL, *supra* note 12, § 9.6(b). See, e.g., *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

112. N. SOBEL, *supra* note 12, § 9.6(b). Another commentator declares that "recent cases on expert testimony seem to ignore the *Frye* test altogether and to apply only the requirements of proper subject matter and qualified expert." Woocher, *supra* note 13, at 1022.

113. See *infra* notes 195-218 and accompanying text.

admissibility; (2) traditional discretionary admissibility; (3) modified discretionary admissibility; and (4) *per se* inadmissibility. Categories one and four are straightforward and self-explanatory. Apparently, no court has yet ruled expert psychological testimony *per se* admissible, and so far only one court has ruled such testimony *per se* inadmissible—*State v. Whitmill*.¹¹⁴ Category two allows a trial court to exercise its sound discretion to exclude such evidence. In doing so, a court draws upon its prior experience and knowledge of the facts in the particular case. One can further partition this category into subcategories with either a positive or negative bias toward admissibility. The majority of jurisdictions adopt the category two approach with a negative bias against admissibility. Category three permits the trial court to freely exercise its discretion in admitting the expert testimony except in a limited class of cases in which the court is required to admit it. Courts assuming this approach usually delineate those elements necessary to qualify the case for *per se* admissibility. *People v. McDonald*¹¹⁵ clearly falls into this category.

A. The Majority View

The majority of appellate courts have affirmed trial court exclusion of expert psychological testimony based on a variety of reasons.¹¹⁶ As noted,

114. No. 30-472 (Mo. Ct. App. Jan. 3, 1989). See *infra* notes 237-59 and accompanying text for an extensive analysis of this decision.

115. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

116. *United States v. Dowling*, 855 F.2d 114, 118-19 (3rd Cir. 1988) (proffered expert testimony lacked proper "fit" between the facts of the case and the general principles to which the expert psychologist would have testified plus very short notice given that defendant would proffer such testimony); *United States v. Blade*, 811 F.2d 461, 464-65 (8th Cir. 1987); *United States v. Langsfield*, 802 F.2d 1176, 1179-80 (9th Cir. 1986); *United States v. Poole*, 794 F.2d 462, 468 (9th Cir. 1986); *United States v. Brewer*, 783 F.2d 841, 843 (9th Cir.), *cert. denied*, 479 U.S. 831 (1986); *United States v. Purham*, 725 F.2d 450, 454 (8th Cir. 1984); *United States v. Thevis*, 665 F.2d 616, 641-42 (5th Cir. 1982); *United States v. Sims*, 617 F.2d 1371, 1374-75 (9th Cir. 1980) (not error for trial court to fail to appoint psychologist to assist defense through testimony on eyewitness identification); *United States v. Foshier*, 590 F.2d 381, 384 (1st Cir. 1979); *United States v. Watson*, 587 F.2d 365, 369 (7th Cir. 1978), *cert. denied*, 429 U.S. 1100 (1979); *United States v. Brown*, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd on other grounds sub nom.* *United States v. Nobles*, 422 U.S. 225 (1975); *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973); *United States v. Collins*, 395 F. Supp. 629, 637 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975); *Dunbar v. State*, 677 P.2d 1275, 1279 (Alaska Ct. App. 1984) (excluded videotaped testimony of expert psychological witness because defendant failed to demonstrate that the expert was unavailable); *State v. Poland*, 144 Ariz. 388, —, 698 P.2d 183, 194 (1985); *State v. Rodriguez*, 145 Ariz. 157, —, 700 P.2d 855, 866 (Ariz. Ct. App. 1984) (the facts of the case constituted the "usual" situation, which *Chapple* held was within trial court discretion); *Caldwell v. State*, 267 Ark. 1053, 1061, 594 S.W.2d 24, 28-29 (Ark. Ct. App. 1980); *People v. Walker*, 41 Cal. 3d 116, —, 711 P.2d 465, 473, 222

appellate courts have almost universally affirmed exclusion based on the trial court's discretionary authority. Several factors, however, weaken the precedential value of this majority view, despite its apparent strength and persuasiveness. First, the actual propensity of trial courts to admit such testimony is difficult to discern from the appellate decisions. Expert psychological testimony is virtually always offered by the defendant.¹¹⁷ Where the trial court *admits* such testimony, the issue of admissibility will not arise on appeal; the defendant cannot challenge the admission of his own evidence if he is convicted and no appeal is permitted if he is acquitted.¹¹⁸ Therefore, appellate courts face the issue only when the trial court has

Cal. Rptr. 169, 171 (1985) (facts do not fit within the *McDonald* criteria that qualify a case for mandatory admission of expert psychological testimony; trial court allowed to use its discretion in admitting such testimony); *People v. Plascencia*, 168 Cal. App. 3d 546, 554-55, 214 Cal. Rptr. 316, 320 (1985) (facts do not fit within the *McDonald* criteria); *People v. Beaver*, 725 P.2d 96, 99-100 (Colo. Ct. App. 1986); *People v. Lawson*, 37 Colo. App. 442, —, 551 P.2d 206, 209 (1976); *State v. Kemp*, 199 Conn. 473, 479, 507 A.2d 1387, 1390 (1986); *Taylor v. United States*, 451 A.2d 859, 867 (D.C. 1982); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977); *Hooper v. State*, 476 So. 2d 1253, 1257 (Fla. 1985); *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); *Porter v. State*, 188 Ga. App. 675, —, 373 S.E.2d 805, 807 (1988); *State v. Hoisington*, 104 Idaho 153, —, 657 P.2d 17, 29 (1983); *People v. Clark*, 124 Ill. App. 3d 14, 22, 463 N.E.2d 981, 987 (1984); *People v. Brown*, 110 Ill. App. 3d 1125, 1129-30, 443 N.E.2d 665, 668 (1982); *People v. Johnson*, 97 Ill. App. 3d 1055, 1069, 423 N.E.2d 1206, 1216-17 (1981); *People v. Dixon*, 87 Ill. App. 3d 814, 818, 410 N.E.2d 252, 256 (1980); *State v. Wheaton*, 240 Kan. 345, 349-52, 729 P.2d 1183, 1186-88 (1986); *State v. Warren*, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981) (expert psychological testimony is not the answer; the use of cautionary identification instruction is a better solution for mistaken identifications; when required by the facts, it is error not to give such an instruction when eyewitness testimony is admitted at trial); *State v. Stucke*, 419 So. 2d 939, 945 (La. 1982); *State v. Coleman*, 486 So. 2d 995, 1000 (La. Ct. App. 1986); *State v. Fernald*, 397 A.2d 194, 197 (Me. 1979); *Bloodsworth v. State*, 307 Md. 164, 186, 512 A.2d 1056, 1066-67 (Md. Ct. App. 1986); *Commonwealth v. Francis*, 390 Mass. 89, 101, 453 N.E.2d 1204, 1207-11 (1983); *Commonwealth v. Jones*, 363 Mass. 497, 502, 287 N.E.2d 599, 602-03 (1972); *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980); *State v. Whitmill*, No. 30-472, slip op. at 6 (Mo. Ct. App. Jan. 3, 1989); *State v. Ammons*, 208 Neb. 812, 815, 305 N.W.2d 812, 814 (1981); *Porter v. State*, 94 Nev. 142, 148, 576 P.2d 275, 278-79 (1988); *People v. Brown*, 117 Misc. 2d 587, 594, 459 N.Y.S.2d 227, 232 (N.Y. Co. Ct. 1983); *People v. Valentine*, 53 A.D.2d 832, 833, 385 N.Y.S.2d 545, 546 (N.Y. App. Div. 1976); *State v. Schroeder*, 62 Or. App. 331, 340, 661 P.2d 111, 118 (1983); *State v. Porraz*, 121 R.I. 882, 892-93, 404 A.2d 465, 471 (1979); *State v. Wooden*, 658 S.W.2d 553, 556-57 (Tenn. Crim. App. 1983); *Thomas v. State*, 748 S.W.2d 539, 540-41 (Tex. Ct. App. 1988); *State v. Malmrose*, 649 P.2d 56, 61 (Utah 1982); *State v. Onorato*, 142 Vt. 99, 105, 453 A.2d 393, 395-96 (1982); *State v. Guloy*, 104 Wash. 2d 412, 430, 705 P.2d 1182, 1193 (1985) (*en banc*).

117. *People v. McDonald*, 37 Cal. 3d 351, 365 n.10, 690 P.2d 709, 718 n.10, 208 Cal. Rptr. 236, 245 n.10 (1984).

excluded the testimony.¹¹⁹ The deferential treatment given to a trial court's discretionary exclusion exacerbates the problem by creating the appearance of general disapproval.¹²⁰ Several appellate opinions, however, indicate that the expert psychological testimony was actually admitted at the trial court level.¹²¹ Second, some appellate courts which have confronted the issue have ruled that any error resulting from exclusion was harmless.¹²² These harmless error decisions are misleading because the courts have not directly addressed the admissibility of the testimony, yet their holdings affirm trial court exclusions. Finally, the precedential value of the majority view is most undermined by the development of a modern trend among appellate courts favoring admissibility.

B. The Modern Trend

The emergence of a recent trend supporting the admissibility of expert psychological testimony has seriously challenged the long-standing majority view. In 1983, *State v. Chapple*¹²³ became the first appellate decision to hold that the exclusion of such testimony constituted reversible error as an abuse of discretion.¹²⁴ The *People v. McDonald*¹²⁵ decision reached a similar conclusion one year later. Several other appellate courts have also favored such expert testimony.¹²⁶ A brief review of these two seminal

119. *Id.*

120. *Id.*; McCORMICK, *supra* note 32, § 206, at 623 n.7.

121. *United States v. Booth*, 669 F.2d 1231, 1240 (9th Cir. 1981); *State v. Kay*, 701 P.2d 281, 287 (Idaho Ct. App. 1985); *People v. Brown*, 110 Ill. App. 3d 1125, 1129, 443 N.E.2d 665, 668 (1982); *State v. Chapman*, 410 So. 2d 689, 702 (La. 1981); *State v. Sellars*, 52 N.C. App. 380, 400-02, 278 S.E.2d 907, 921-22 (1981); *Bristol v. State*, 764 P.2d 887, 890 (Okla. Crim. App. 1988); *Hampton v. State*, 92 Wis. 2d 450, 455, 285 N.W.2d 868, 870-71 (1979). Dr. Elizabeth Loftus has testified in over 160 trials (3/4 of which have been criminal trials) in 30 states, while Dr. Robert Buckhout has testified in 82 cases in 20 states and 4 federal jurisdictions. Dr. Buckhout indicated that his testimony is now hardly ever denied in New York state courts. Telephone interview with Dr. Robert Buckhout, Professor of Psychology, Brooklyn College, Brooklyn, New York (April 4, 1989).

In addition, Missouri trial courts have admitted such expert testimony on several occasions. *See State v. Saunders*, No. 85-1462 (Jackson Co. Cir. Ct. Oct. 23, 1986) (unreported state court decision); *State v. Marcus*, No. 38-3562 (Green Co. Cir. Ct. Nov. 13, 1983) (unreported state court decision); *State v. Taylor*, No. 18-0238 (Platt Co. Cir. Ct. Dec. 15, 1981) (unreported state court decision).

122. *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984); *People v. Jackson*, 164 Cal. App. 3d 224, 240-41, 210 Cal. Rptr. 680, 690 (1985); *State v. Cooper*, 708 S.W.2d 299, 303 (Mo. Ct. App. 1986).

123. 135 Ariz. 281, 660 P.2d 1208 (1983).

124. *Id.* at —, 660 P.2d at 1224.

125. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

126. *United States v. Moore*, 786 F.2d 1308, 1311-12 (5th Cir. 1986); *United States v. Downing*, 753 F.2d 1224, 1229-32 (3rd Cir. 1985); *United States v. Smith*, 736 F.2d 1103, 1105-07 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984); *Chapple*, 135

decisions is necessary to fully comprehend the current status of the law on this issue.

State v. Chapple involved a homicide prosecution in which the defendant's conviction hinged on two eyewitness identifications. The Arizona Supreme Court emphasized several factors that it felt cast doubt on the reliability of the identifications.¹²⁷ The court distinguished cases affirming the exclusion of expert psychological testimony because the particular facts of *Chapple* were so compelling.¹²⁸ It also rejected arguments that it should exclude such expert testimony because its prejudicial effect outweighed its probative value or because it was not a proper subject for the jury.¹²⁹ The supreme court held that the testimony would have "significant[ly] assist[ed]" the jury,¹³⁰ but concluded "while we have no problem with the usual

Ariz. at —, 660 P.2d at 1223-24; *McDonald*, 37 Cal. 3d at 367-69, 690 P.2d at 720-21, 208 Cal. Rptr. at 247-48; *State v. Galloway*, 275 N.W.2d 736, 738-39 (Iowa 1979); *People v. Brooks*, 128 Misc. 2d 608, —, 490 N.Y.S.2d 692, 702 (N.Y. Co. Ct. 1985); *People v. Lewis*, 137 Misc. 2d 84, 86-87, 520 N.Y.S.2d 125, 127 (N.Y. Co. Ct. 1987) (exercised discretion and allowed expert psychological testimony, provided it is limited to general principles); *State v. Buell*, 22 Ohio St. 3d 124, 129-33, 489 N.E.2d 795, 801-04, *cert. denied*, 479 U.S. 871 (1986); *Brown v. State*, 689 S.W.2d 219, 223 (Tex. Crim. App. 1985); *State v. Taylor*, 50 Wash. App. 481, 488-90, 749 P.2d 181, 184-85 (1988); *State v. Johnson*, 49 Wash. App. 432, 438-40, 743 P.2d 290, 293-94 (1987); *State v. Hanson*, 46 Wash. App. 656, 671, 731 P.2d 1140, 1149 (1987); *State v. Moon*, 45 Wash. App. 692, 696-99, 726 P.2d 1263, 1266-67 (1986) (exclusion of expert psychological testimony is an abuse of discretion where the identification of the defendant is the principle issue at trial, the defendant presents an alibi defense and little or no other evidence links defendant to the crime); *State v. Hamm*, 146 Wis. 2d 130, 142-46, 430 N.W.2d 584, 590-91 (Wis. Ct. App. 1988), *appeal denied*, 436 N.W.2d 30 (1988) (trial court exclusion of expert psychological testimony is an abuse of discretion because the trial judge had heard no testimony from the expert and, therefore, lacked a factual basis for ruling, otherwise the decision is within the trial judge's discretion); *Hampton v. State*, 92 Wis. 2d 450, 455-61, 285 N.W.2d 868, 871-73 (1979) (trial court permitted expert psychologist to list various factors affecting human perception, however, held such testimony is not admissible *per se*).

127. These factors were: the eyewitnesses were co-participants in a drug sale, both had smoked marijuana on the day of the homicides, neither was previously acquainted with the defendant, both observed the defendant only during the drug sale and homicides—very stressful events, and their identifications were made from a photographic display over one year after their brief encounter with the defendant. *Chapple*, 135 Ariz. at —, 660 P.2d at 1217.

128. *Id.* at —, 660 P.2d at 1218-19.

129. *Id.* at —, 660 P.2d at 1219-24. The court was actually applying two of the four criteria outlined in *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973), for determining admissibility of such testimony: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect. The court had determined that the issues of the qualification of the expert and conformity to accepted theory were not in question. *Chapple*, 135 Ariz. at —, 660 P.2d at 1218-19.

130. *Id.* at —, 660 P.2d at 1244.

discretionary ruling that the trier of fact needs no assistance from [expert psychological testimony], the unusual facts of this case compel the contrary conclusion."¹³¹

Chapple neither rejected the traditional grant of discretionary authority nor adopted a *per se* rule of admissibility. *Chapple* clearly falls within the category two, positive bias class. *Chapple* is significant in that it is the first appellate decision to recognize that admission of such evidence is sometimes *required*; exclusion in certain factual situations constitutes an abuse of discretion.

*People v. McDonald*¹³² also involved a murder prosecution where eyewitness identification was the sole evidence linking the defendant to the crime.¹³³ The prosecution presented seven eyewitnesses who, with varying degrees of certainty, identified the defendant.¹³⁴ One of the prosecution's own witnesses, however, unequivocally testified that the defendant was *not* the perpetrator.¹³⁵ Furthermore, the defense presented six alibi witnesses who testified the defendant was in another state at the time of the crime.¹³⁶

The California Supreme Court rejected the "invasion of the jury's province" argument and refused to apply the *Frye* test to such testimony.¹³⁷ Moreover, it declared that "although jurors may not be totally unaware of the . . . psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'"¹³⁸ The court reiterated that the decision to admit such testimony remains "primarily a matter within the trial court's

131. *Id.* at ____, 660 P.2d at 1223. Note that Arizona has adopted an expert witness rule identical to FED. R. EVID. 702, which is a more lenient standard of admissibility than some state standards. See, e.g., *Chapple*, 135 Ariz. at ____, 660 P.2d at 1218. See *infra* note 203 for the text of Fed. R. Evid. 702.

132. *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

133. *Id.* at 355-60, 690 P.2d at 711-14, 208 Cal. Rptr. at 238-41. The defense offered six alibi witnesses who testified that the defendant was out of state at the time of the murder.

134. *Id.*

135. *Id.* at 358-59, 690 P.2d at 714, 208 Cal. Rptr. at 241.

136. *Id.* at 360, 690 P.2d at 714, 208 Cal. Rptr. at 241.

137. *Id.* at 371-72, 690 P.2d at 722-23, 208 Cal. Rptr. at 249-50.

138. *Id.* at 369, 690 P.2d at 721, 208 Cal. Rptr. at ____ (footnote omitted).

The court quoted from Rule 801 of the California Evidence Code, which enunciates the standard for admission of expert testimony in California:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact

CAL. EVID. CODE § 801 (West 1966).

This standard is a slightly more stringent standard than FED. R. EVID. 702.

discretion" and that "such evidence will not often be needed."¹³⁹ The court, nevertheless, held:

When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.¹⁴⁰

The *McDonald* rule falls within the purview of category three. The opinion not only reversed the exclusion of the expert psychological testimony but also moved much farther toward an absolute rule of *per se* admissibility than did *Chapple*.

IV. PAST TREATMENT OF EXPERT PSYCHOLOGICAL TESTIMONY IN MISSOURI

Missouri appellate courts in the eastern and western districts have previously considered the admissibility of expert psychological testimony in two decisions—*State v. Bullington* (western district)¹⁴¹ and *State v. Cooper* (eastern district).¹⁴² Neither district determined the issue authoritatively or unequivocally since neither directly confronted the issue.¹⁴³ A brief review of these two decisions is instructive in analyzing the admissibility of expert psychological testimony in Missouri.

A. *State v. Bullington*

The Missouri Court of Appeals, Western District, dealt with the topic of expert psychological testimony in *State v. Bullington*.¹⁴⁴ The court af-

139. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

140. *Id.*

141. 680 S.W.2d 238 (Mo. Ct. App.) (western district), *conviction overturned*, 684 S.W.2d 52 (Mo. Ct. App. 1984).

142. 708 S.W.2d 299 (Mo. Ct. App. 1986) (eastern district).

143. *State v. Lawhorn*, 762 S.W.2d 820, 822 (Mo. 1988) (en banc).

144. 680 S.W.2d 238 (Mo. Ct. App. 1984). *Bullington* involved a defendant charged with first degree murder and first degree burglary. The defendant broke into the victim's home, tied up two of the residents (the mother and brother of the victim), taped their eyes shut, threatened to kill them and took hostage an eighteen year old girl who was later found dead. The two eyewitnesses identified Robert Bullington as the perpetrator and estimated that they observed him between twenty seconds and five minutes during the ordeal. *State v. Bullington*, 684 S.W.2d 52, 53 (Mo. Ct. App. 1984).

Additional corroborating evidence linked the defendant to the crime. For instance, the defendant was seen in the victim's neighborhood on the evening of the incident, a white truck similar to the defendant's was seen parked in front of the victim's house on the evening of the incident and the defendant mentioned to others on two occasions that the police were pursuing him. *Id.*

At trial, the defense sought to introduce expert psychological testimony related to the factors affecting the reliability of eyewitness identifications. However, the trial judge excluded the testimony. *Id.* at 55.

firmed the exclusion of the expert psychological testimony. The holding, however, turned on the defense's insufficient offer of proof, which consisted of a brief narrative statement by the defense concerning the nature of the expert's testimony rather than the preferred question-and-answer interrogation of the expert from the witness stand.¹⁴⁵ Because the appellate court felt it lacked an adequate record of the expert's proposed testimony, it refused to "undertake the formulation of an opinion on a matter of first impression in the state without a more substantial basis from which to proceed."¹⁴⁶

In dicta, the court relied on the argument that such testimony is an improper subject because it invades the province of the jury.¹⁴⁷ This argument stems from the idea that the testimony is a comment on the credibility of another witness's testimony.¹⁴⁸ In the western district's opinion, admissibility of such expert evidence should be left to the trial judge's discretion due to its doubtful probative value.¹⁴⁹

The court strongly implied that it would have deferred to the trial court's broad discretion if it had directly addressed the admissibility of the testimony. Therefore, *Bullington* fits into the category two, negative bias class. Although *Bullington* failed to conclusively address the issue, it provided dicta for the supreme court's consideration in *State v. Lawhorn*.

B. *State v. Cooper*

The Missouri Court of Appeals, Eastern District, likewise dealt with the issue in *State v. Cooper*.¹⁵⁰ Yet, the court indicated it did not need

145. *Id.* at 55; *Bullington*, 680 S.W.2d at 244. Although both forms are acceptable, the question and answer form is preferred. *Id.* at 243. See *State v. Sullivan*, 553 S.W.2d 510, 513 (Mo. Ct. App. 1977). If the offer of proof is a narrative summation, it must be definite, specific and set out the content of the testimony to demonstrate its admissibility. *Bullington*, 680 S.W.2d at 243. See also *McMillin v. McMillin*, 633 S.W.2d 223, 225 (Mo. Ct. App. 1982). When a party uses the narrative statement form, there is a risk that the reviewing court will find the offer insufficient. *Bullington*, 680 S.W.2d at 243-44; *Stapleton v. Griewe*, 602 S.W.2d 810, 813 (Mo. Ct. App. 1980).

146. *Bullington*, 680 S.W.2d at 243-44.

147. *Id.*

148. *Id.*

149. *Id.* at 244 (citing *State v. Hensley*, 655 S.W.2d 810 (Mo. Ct. App. 1983) and *State v. Evans*, 637 S.W.2d 62 (Mo. Ct. App. 1982)).

150. 708 S.W.2d 299 (Mo. Ct. App. 1986) (eastern district). The decision involved a conviction for first degree robbery and armed criminal action. A black man, armed with a pistol and carrying a canvas bag, robbed a supermarket then fled. Three customers followed the perpetrator out of the store; two observed him drive away in a car and immediately provided the license number and a description of the car to the police. Within minutes, the police located a car matching the description and license number. Officers found a pistol and canvas bag in the car,

to "rule upon the admissibility of the proffered testimony because, under the particular facts presented, any error committed by the trial court was necessarily harmless."¹⁵¹

Although it declined ruling on the admissibility of such expert evidence, the court analyzed the relevant Missouri law and summarized the prevailing law in other jurisdictions. The opinion relied on *State v. Taylor*¹⁵² for the standard applicable to the admission of expert testimony in Missouri.¹⁵³ The eastern district indicated, as had the western district in *Bullington*, that the majority of courts tenaciously exclude expert psychological testimony.¹⁵⁴ Unlike *Bullington*, however, it also acknowledged that a "modern trend favors admissibility of such evidence."¹⁵⁵

According to the court, the exclusion was harmless "because the evidence overwhelmingly established the defendant's guilt."¹⁵⁶ Considering the abundance of corroborating evidence, the expert testimony would not have offered much assistance to the jury. Even with the expert psychological testimony, the jury would still have convicted the defendant. Therefore, the exclusion was harmless.¹⁵⁷

Nevertheless, the eastern district proceeded further and stated in dicta that even if such evidence were admissible in Missouri, the decision to

which were later identified as those used in the crime. The officers then quickly drove two of the witnesses to the stopped car; these witnesses identified the defendant as the robber. Three other eyewitnesses identified the defendant at a lineup the next morning. However, only two were able to positively identify the defendant at trial. The trial judge refused to admit the defense's proffered expert psychological testimony based on "invasion of the jury's province." *Id.* at 301-02.

On appeal, the eastern district avoided the offer of proof problem involved in *Bullington* because the trial court had conducted a complete voir dire examination of the expert. The expert, Dr. Joseph Fitzgerald, indicated he would have testified to: (1) cross-racial identification factors; (2) the effect of stress on the ability to perceive and remember; (3) the tendency of memory to fade over time (the forgetting curve); (4) the unconscious transfer of other feelings or events to the observed event; (5) the lack of correlation between the eyewitness' confidence in his identification and his actual accuracy; and (6) memory techniques used to enhance recollection. *Id.* This proffer established that the expert intended to tailor his testimony so as to avoid comment on the specific facts involved in the case or on the credibility of any particular witness' testimony. *Id.* at 303.

151. *Id.*

152. 663 S.W.2d 235 (Mo. 1984).

153. *Cooper*, 708 S.W.2d at 302. See *infra* notes 200-04 and accompanying text.

154. *Id.* at 303.

155. *Id.* (citations omitted).

156. *Id.* The evidence included five eyewitnesses and substantial corroborating evidence. In addition, the defendant was apprehended just minutes after the incident, while hiding in the getaway car containing the gun and canvas bag used in the robbery. *Id.*

157. *Id.*

admit it remained in the trial court's sound discretion.¹⁵⁸ The tone of *Cooper* indicates that it belongs in the category two, positive bias class.¹⁵⁹

V. ANALYSIS OF *STATE V. LAWHORN*¹⁶⁰

A. *The Facts*

On November 28, 1986, Eric Jensen, the sole occupant of a fraternity house on the University of Missouri-Columbia campus, awakened when a black man poked his head into Jensen's bedroom. Jensen observed the man for "just a second" at a distance of ten to fifteen feet then followed him into a well-lighted hallway.¹⁶¹ Jensen conversed with the intruder for two and one-half to five minutes until he noticed that several stereo components were missing from a nearby room.¹⁶² As the intruder took flight, Jensen observed him getting into a maroon Honda automobile and noted the license plate number.¹⁶³ He provided the police with a detailed description of the intruder and the automobile.¹⁶⁴

A police officer soon located the vehicle and the appellant at a nearby house.¹⁶⁵ Appellant donned a hood and glasses when Jensen attempted to identify him approximately fifteen minutes after the incident.¹⁶⁶ Jensen tentatively recognized both appellant's face and voice as the intruder's, but was not certain due to the attempted disguise.¹⁶⁷ Later the same afternoon, Jensen viewed a photographic array containing appellant's photograph and positively identified appellant as the burglar.¹⁶⁸

At trial, the defense presented an extensive *in camera* offer of proof concerning the proposed expert testimony of Dr. Alvin Goldstein, a psychology professor at the University of Missouri-Columbia.¹⁶⁹ Although La-

158. *Id.*

159. *Id.*

160. 762 S.W.2d 820 (Mo. 1988) (en banc).

161. Supplemental Brief for Respondent at 4, *State v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988).

162. *Id.*

163. *Id.* at 5.

164. *Id.*

165. *Id.* at 3.

166. *Id.*

167. *Id.* at 6.

168. *Id.*

169. *Id.* at 25. The offer indicated Dr. Goldstein was well-trained in human visual perception, particularly in face and voice recognition. *Id.* at 7. The proffer further indicated that Dr. Goldstein intended to testify to the "inherent difficulty in cross-racial eyewitness identification, that post-confrontation events affect the witness' perception of what has occurred and that no correlation exists between a witness' confidence in his identification and the correctness of the identification." *Lawhorn*, 762 S.W.2d at 822. He would also have testified that stress adversely affects memory. Brief of Appellant at 22, *State v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988). The trial court rejected the proffered testimony because "(1) [it] was not established as generally accepted in the scientific community; and (2) the proffered hypotheticals would 'clearly invade the province of the jury.'" Supplemental Brief for Respondent, *supra* note 161, at 20.

whorn presented an alibi defense, the jury convicted him of first-degree burglary, and the court sentenced him to a seven year term as a prior offender under Section 558.019 of the Missouri Revised Statutes.¹⁷⁰

B. The Appellate Court Decision

The Missouri Court of Appeals, Western District, affirmed the exclusion of the expert psychological testimony.¹⁷¹ It noted that both *State v. Bullington* and *State v. Cooper* had previously considered the admissibility of expert psychological testimony, but recognized that neither case had directly addressed the issue.¹⁷² The court also acknowledged *State v. Chapple* and *People v. McDonald* as representative of a "modern trend" favoring admission of such testimony. Nevertheless, the court found more impressive the number of cases from other jurisdictions denying admission.¹⁷³ The appellate court concluded that both decisions preserved the traditional rule granting the trial judge broad discretion in admitting expert psychological testimony.¹⁷⁴ It emphasized that the factors which render eyewitness identification suspect are within the common knowledge of jurors and hypothesized that the only situation in which a defendant might need such expert testimony would be "where the facts gave little or no other ground upon which to argue."¹⁷⁵ The court declared, however, that this is "not

170. MO. REV. STAT. § 558.019 (1986). Although on appeal appellant challenged his sentencing under the prior offender statute, this Note will not address the issue. Generally, appellant claimed that application of the statute was unconstitutional as a violation of the prohibition against *ex post facto* laws contained in the United States Constitution, article I, section 10 and the Missouri Constitution, article I, section 13. *Lawhorn*, 762 S.W.2d at 824. The charged offense occurred on November 28, 1986, however, the effective date of the statute was January 1, 1987. *Id.*

The Missouri Supreme Court held the trial court erred in sentencing appellant as a prior offender under the statute and remanded for sentencing according to the "guidelines governing parole eligibility in place when appellant committed the offense." *Id.* at 826.

171. *State v. Lawhorn*, No. 39-524 (Mo. Ct. App. Feb. 9, 1988) (WESTLAW 135419) (unreported western district decision). The Missouri Supreme Court granted transfer of this case. According to Mo. SUP. CT. R. 30.27, the Supreme Court has original jurisdiction when it grants a transfer to hear cases filed in a district of the Missouri Court of Appeals. Therefore, appellate court decisions written prior to transfer are not typically published in the permanent law reports. Thus, the *Lawhorn* appellate court decision will not be reported. See also 19 WEST'S MISSOURI PRACTICE MANUAL § 612 (1985).

172. *Lawhorn*, No. 39-524, slip op. at 3.

173. *Id.* at 5.

174. *Id.* at 4. However, the court noted that, in some instances, the *McDonald* court would always require admission of expert psychological testimony and cited the three-factor test adopted by *McDonald*. *Id.* at 5.

175. *Id.* at 6.

the theory which *Chapple* and *McDonald* embrace."¹⁷⁶ Furthermore, the court indicated that counsel can discuss potential inaccuracies in closing argument.¹⁷⁷

Absent controlling Missouri authority, the court indicated it felt constrained to hold that the admission of expert psychological testimony is discretionary.¹⁷⁸ Adopting a three-part test, it held:

[A] trial court *may* in the exercise of its discretion admit such evidence in a criminal prosecution if the principal issue in the case is identification of the defendant, if the identification is also in some manner suspect and is not corroborated by other evidence and if the proffered witness is properly qualified as an expert in the field. This result leaves to the trial judge the appraisal of the facts in each case.¹⁷⁹

Applying this holding, the court determined that the facts of the case did not warrant admission of the testimony.¹⁸⁰

The tenor of the appellate decision was one of general disapproval of the admissibility of such testimony. In fact, the court implied that such expert testimony is *generally inadmissible*, despite the trial court's discretionary authority. This implication arises from the court's statements that although "such evidence [is not] *always* inadmissible, . . . it appears the facts of this case do not present a situation in which admission . . . warranted consideration as an issue for discretionary decision,"¹⁸¹ and "[n]one of the factors which could persuade a trial judge to admit [expert psychological testimony] was present and thus, no discretionary choice was to be made."¹⁸² Furthermore, the holding implied that courts should admit such testimony solely in situations which satisfy the three-part test adopted by the court. In other words, only when the three-part analysis is satisfied should the trial court exercise its discretion in admitting expert psychological testimony. Otherwise, the implication is that such testimony is *per se* inadmissible. This approach is an odd combination of category three, negative bias and category four.

176. *Id.* This author contends that this is, at least partially, the theory the *McDonald* court had in mind when it adopted its three-part test. The requirements that identification be a key element and that there be a lack of substantial corroboration implicitly revolves around the theory that the facts provide little ground on which to argue.

177. *Id.*

178. *Id.*

179. *Id.* at 7 (emphasis added). Interestingly, this holding is very similar to the three-part *McDonald* test that the appellate court disparaged throughout its opinion. See *supra* note 140 and accompanying text for the *McDonald* test.

180. *Id.*

181. *Id.* at 7 (emphasis added).

182. *Id.*

C. *The Supreme Court Decision*

The Missouri Supreme Court affirmed the conviction upon transfer.¹⁸³ In framing the scope of its opinion, the court declared that the case "squarely" presented the issue of admissibility of expert psychological testimony.¹⁸⁴ Furthermore, the court recognized that it was addressing the issue as one of first impression.¹⁸⁵ Like the court of appeals, the supreme court recognized that both *State v. Bullington* and *State v. Cooper* had considered the issue, but due to the circumstances involved in each, neither had ruled the question "authoritatively and unequivocally."¹⁸⁶ Unlike *Bullington*, appellant's counsel had made a full offer of proof expounding the substance of the proposed testimony.¹⁸⁷ Appellant's identification was the key element upon which the jury based the conviction; the prosecution presented no corroborating evidence, unlike the *Cooper* prosecution.¹⁸⁸

The supreme court cited *State v. Chapple* and *People v. McDonald* as indicative of the modern trend favoring admission of such expert testimony.¹⁸⁹ The court attempted to distinguish these two landmark decisions but only briefly reviewed their holdings.¹⁹⁰ Regarding *Chapple*, the court stated that its particular facts rendered the eyewitness identification "sufficiently suspect" to require admission of the expert testimony.¹⁹¹ The court observed that *McDonald* left intact the traditional rule granting discretion to the trial judge except in those limited instances where three variables are satisfied.¹⁹² Cursorily dismissing both holdings, the court stated, "Neither *McDonald* nor *Chapple* have been widely followed."¹⁹³

The supreme court affirmed the exclusion of the testimony based on two factors: (1) expert psychological testimony is not a proper subject for the jury; and (2) procedural safeguards are sufficient protections against misidentification. Both are among the standard reasons advanced by courts to justify exclusion of such expert evidence.¹⁹⁴

183. *Id.* at 1.

184. 762 S.W.2d 820, 822 (Mo. 1988) (en banc).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* See *supra* notes 123, 127-31 and accompanying text for more complete analysis of *Chapple*.

192. *Lawhorn*, 762 S.W.2d at 822. See *supra* notes 125, 132-40 and accompanying text for more complete analysis of *McDonald*.

193. *Lawhorn*, 762 S.W.2d at 822.

194. See *supra* notes 89-113 and accompanying text for complete discussion of these and other standard reasons for exclusion.

1. *Proper Subject for Jury*

The supreme court believed that all the principles to be presented by the expert were "within the general realm of common experience of members of a jury and [could] be evaluated without an expert's assistance."¹⁹⁵ In *State v. Brooks*, the Missouri Court of Appeals stressed that the jury has the responsibility of weighing eyewitness credibility.¹⁹⁶ Allowing expert psychological testimony on matters within the jury's common knowledge would impermissibly invade its province.¹⁹⁷ According to the court's reasoning, an expert psychologist essentially tells the jury whether it should believe the eyewitness testimony. Yet, the jury is entitled to any information which might significantly bear on the credibility or veracity of a witness.¹⁹⁸

The full extent of this argument is not easily discernible from the opinion. It was implied, however, when the court briefly pointed out that "[e]xpert testimony is also inadmissible if it relates to the credibility of witnesses, for this constitutes an invasion of the province of the jury."¹⁹⁹ The supreme court gleaned support for its argument from two sources: (1) Missouri case law defining the admissibility of expert testimony; and (2) appellate decisions from the other jurisdictions that have upheld the exclusion of such testimony.

The court identified two competing standards which Missouri courts have utilized in the admission of expert testimony—the capability test and the helpfulness test.²⁰⁰ *State v. Taylor* stated, "The rule in Missouri is that expert opinion testimony 'should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge

195. *Lawhorn*, 762 S.W.2d at 823 (citing *State v. Kemp*, 199 Conn. 473, —, 507 A.2d 1387, 1389 (1986)).

196. *State v. Brooks*, 513 S.W.2d 168, 173 (Mo. Ct. App. 1973). The Missouri Court of Appeals stated in *Brooks*, "[F]or a jury to assess the credibility of a witness, it must be aware of facts which might cause a witness to be less than fully truthful or untruthful. The determination of that credibility is solely within the province of the jury and it is entitled to any information which might bear on that credibility." See also R. HASL & J. O'BRIEN, *supra* note 108, § 5-1, at 39.

197. See *supra* notes 90-93 and accompanying text.

198. *State v. Russel*, 625 S.W.2d 138, 141 (Mo. 1981); *Brooks*, 513 S.W.2d at 173; R. HASL & J. O'BRIEN, *supra* note 108, § 5-1, at 39. See also Woocher, *supra* note 13, at 1001. Jeremy Bentham felt that exclusion of evidence was justifiable only in very limited circumstances: "Evidence is the basis of justice; to exclude evidence is to exclude justice." 7 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 338 (J. Bowring ed. 1962).

199. *Lawhorn*, 762 S.W.2d at 823 (citing *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984)).

200. *Id.* at 822-23.

of the subject, to draw correct conclusions from the facts proved."²⁰¹ Upon first consideration, this "capability" standard appears quite stringent. *Taylor* tempered its statement, however, by further declaring that trial courts should admit expert testimony if it will *assist* the jury.²⁰² This is the more lenient "helpfulness" test which many jurisdictions, including the federal courts, have adopted. The "[e]ssential test of admissibility of expert opinion evidence is whether it will be helpful to the jury."²⁰³ One court proposed a guideline for applying this helpfulness test: Expert testimony is proper "if the subject is one with which lay jurors are not likely to be conversant, and [is] one . . . of value to the jury."²⁰⁴

The supreme court did not indicate which of the two standards it applied in *Lawhorn*. The standard used could very well have affected the outcome of the appeal, as the two are very different. The court probably

201. *Taylor*, 663 S.W.2d at 239 (citations omitted); *Cole v. Empire Dist. Elec. Co.*, 331 Mo. 824, 833, 55 S.W.2d 434, 438 (1932). See also *City of St. Louis v. Kisling*, 318 S.W.2d 221, 225 (Mo. 1959); R. HASL & J. O'BRIEN, *supra* note 108, § 9-3, at 120.

202. *Taylor*, 663 S.W.2d at 239. See also *Lawhorn*, 762 S.W.2d at 822-23; *Garrett v. Joseph Schlitz Brewing Co.*, 631 S.W.2d 652, 654 (Mo. Ct. App. 1982); *Wood v. Ezell*, 342 S.W.2d 503, 507 (Mo. Ct. App. 1961); R. HASL & J. O'BRIEN, *supra* note 108, at 120; 19 WEST'S MISSOURI PRACTICE MANUAL, *supra* note 171, § 457, at 472-73.

203. *Parlow v. Dan Hamm Drayage Co.*, 391 S.W.2d 315, 326 (Mo. 1965); *State v. Marks*, 721 S.W.2d 51, 55 (Mo. Ct. App. 1986); *Randolph v. USF & G Co.*, 626 S.W.2d 418, 421 (Mo. Ct. App. 1981). This "helpfulness test" is similar to Federal Rule of Evidence 702 which addresses the admission of expert testimony:

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.

FED. R. EVID. 702.

The Advisory Committee Notes indicate that the rule is purposefully phrased broadly. Many state jurisdictions have adopted the equivalent of Rule 702. These jurisdictions have both admitted and excluded expert psychological testimony when applying this permissive standard. *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983) (admitting); *People v. Beaver*, 725 P.2d 96 (Colo. Ct. App. 1986) (excluding); *Commonwealth v. Francis*, 390 Mass. 89, 453 N.E.2d 1204 (1983) (excluding); *State v. Helterbride*, 301 N.W.2d 545 (Minn. 1980) (excluding); *State v. Buell*, 22 Ohio St. 3d 124, 489 N.E.2d 795 (1986) (admitting); *Thomas v. State*, 748 S.W.2d 539 (Tex. Crim. App. 1983) (excluding); *State v. Moon*, 45 Wash. App. 692, 726 P.2d 1263 (Wash. 1986) (admitting); *State v. Guloy*, 104 Wash. 2d 412, 705 P.2d 1182 (1985) (excluding); *State v. Taylor*, 50 Wash. App. 481, 749 P.2d 181 (1988) (admitting).

One commentator states, "[A]s under the Missouri practice, the trial judge [using Federal Rule of Evidence 702] has broad discretion in the admission or exclusion of expert testimony, and . . . should not be reversed unless it is found to be manifestly erroneous." R. HASL & J. O'BRIEN, *supra* note 108, § 9-3A, at 121.

204. *Wessar v. John Chezik Motors, Inc.*, 623 S.W.2d 599, 602 (Mo. Ct. App. 1981) (citations omitted). See also *Marks*, 721 S.W.2d at 55.

considered both tests and formulated a combined standard. It recognized that expert psychological testimony could potentially aid the jury and might make some contribution in particular cases.²⁰⁵ The court insisted, however, that the proffered expert testimony deal with basic principles of which the jury had a general understanding and was capable of applying to the facts.²⁰⁶ Thus, the court apparently utilized both standards but seemingly gave more weight to the stricter "capability" test, given the outcome of the appeal.

Regardless of the standard actually employed, the "invasion of the province of the jury" premise of the court's argument is questionable. Missouri jurisprudence is replete with cases holding that invasion of the jury's province is not a valid objection to expert testimony.²⁰⁷ More significantly, courts have held that witnesses "may testify to facts which if believed by the jury would have the effect of discrediting another witness before the jury without thereby invading the province of the jury."²⁰⁸ This view seems contradictory to *Taylor. Lawhorn*, however, cited *Taylor* out of context. Examination of the decision reveals that *Taylor* also stated that "opinion (evidence) cannot 'invade the province of a jury.'"²⁰⁹ In addition, *State v. Paglino*,²¹⁰ cited in *Taylor*, posited: "'[a]n objection that an expert opinion invades the province of the jury is not a valid one.'"²¹¹ Taken in the full context of *Taylor*, *Lawhorn's* assertion that comment on the credibility of witnesses is an invasion of the jury's province is not convincing. All expert opinion invades the jury's province to some extent, in the sense that it represents a conclusion gathered from the facts of the case.²¹²

205. *Lawhorn*, 762 S.W.2d at 823 (citing *Commonwealth v. Francis*, 390 Mass. 89, 98, 453 N.E.2d 1204, 1210 (1983)).

206. *Id.*

207. *Wessar*, 623 S.W.2d at 602. See also *Barnes v. Omark Indus.*, 369 F.2d 4, 7 (8th Cir. 1966); *Mann v. Grim-Smith Hosp. & Clinic*, 347 Mo. 348, 353, 147 S.W.2d 606, 608 (1941); *Cole v. Uhlmann Grain Co.*, 340 Mo. 277, —, 100 S.W.2d 311, 322 (1937); *McKinley v. Vize*, 563 S.W.2d 505, 511 (Mo. Ct. App. 1978); *Fair Mercantile Co. v. St. Paul Fire & Marine Ins. Co.*, 237 Mo. App. 511, 520, 175 S.W.2d 930, 934 (1943).

Both McCormick and Wigmore expressed distaste for the "invasion of the jury's province" argument. MCCORMICK, *supra* note 32, § 206, at 623; 3 J. WIGMORE, EVIDENCE § 673, at 936 (McNaughton rev. ed. 1961) ("The usurpation theory . . . has done much to befog bench and bar.").

208. *Fries v. Berberich*, 177 S.W.2d 640 (Mo. Ct. App. 1944). See also *State v. Willis*, 706 S.W.2d 265, 267 (Mo. Ct. App. 1986); *Shearin v. Fletcher/Mayo/Assoc.*, 687 S.W.2d 198, 200 (Mo. Ct. App. 1984) (rejected the holding of *Holliman v. Cabanne*, 43 Mo. 568, 570 (1869), that "[w]itnesses should not give their opinions upon the truth of a statement by another witness.").

209. 663 S.W.2d at 239 (citing *State v. Paglino*, 319 S.W.2d 613, 623 (Mo. 1958)). See also *Eickmann v. St. Louis Public Service Co.*, 363 Mo. 651, 663, 253 S.W.2d 122, 129 (1952).

210. 319 S.W.2d 613 (Mo. 1958).

211. *Id.* at 623 (citations omitted).

212. *Id.* (citations omitted). *Paglino* further stated:

Moreover, expert psychological testimony does not expressly comment on witness credibility because it is usually limited to general psychological principles. Therefore, since the expert does not "particularize" his testimony to the eyewitness, an invasion of the province of the jury cannot occur. In addition, the trial court has broad discretion in placing limits on an expert's testimony.²¹³ Thus, the considerable precedent rejecting the "invasion of the jury's province" argument casts doubt on the *Taylor* viewpoint. Also, since the jury is completely free to either accept or reject the expert's testimony, an expert psychologist cannot invade the jury's province; his testimony is not binding on the trier of fact.²¹⁴

The court avoided several additional arguments typically used to reject such expert testimony, probably deliberately because Missouri law disfavors these arguments. *Lawhorn* did not attempt to exclude the expert psychological testimony because it involved an ultimate fact in issue—the credibility of the eyewitness, which is to be determined by the jury. Missouri courts have expressly rejected this common law doctrine.²¹⁵ Nor did the supreme court reject the expert testimony for failure to make a sufficient offer of proof. Rather, *Lawhorn* announced that appellant's counsel had made a

'An expert witness, in a manner, discharges the functions of a juror' because, in matters in which intelligent conclusions cannot be drawn from the facts by inexperienced persons, experts, 'who by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for purposes of aiding the jury, permitted to give their opinion.'

Id. at 623-24 (citations omitted). See also *McKinley v. Vize*, 563 S.W.2d 505, 510 (Mo. Ct. App. 1978).

213. *State v. Moon*, 726 P.2d 1263, 1267 (Wash. Ct. App. 1986).

214. *Sunset Acres Motel, Inc. v. Jacobs*, 336 S.W.2d 473, 484 (Mo. 1967); *Baugh v. Life & Casualty Ins. Co. of Tenn.*, 307 S.W.2d 660, 665 (Mo. 1957); *J.L.P. v. D.J.P.*, 643 S.W.2d 865, 868 (Mo. Ct. App. 1982); *Tennis v. General Motors Corp.*, 625 S.W.2d 218, 222 (Mo. Ct. App. 1981) (jury in a strict or products liability case, as in any other such case, has leave to believe or disbelieve all, part or none of the testimony of any witness); *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471, 473 n.1 (Mo. Ct. App. 1980); *R. HASL & J. O'BRIEN*, *supra* note 108, § 9-9, at 130; 3 J. WIGMORE, *EVIDENCE*, § 673, at 936 (McNaughton rev. ed. 1961).

215. *Eickmann v. St. Louis Public Service Co.*, 363 Mo. 651, 663, 253 S.W.2d 122, 129-30 (1952); *State v. Willis*, 706 S.W.2d 265, 267 (Mo. Ct. App. 1986); *Wessar v. John Chezik Motors, Inc.*, 623 S.W.2d 599, 602 (Mo. Ct. App. 1981); *McKinley v. Vize*, 563 S.W.2d 505, 510-11 (Mo. Ct. App. 1978); *State ex rel. State Highway Comm'n v. Lindley*, 232 Mo. App. 831, 113 S.W.2d 132 (1938). *But see* *Baptiste v. Boatmen's Nat'l Bank of St. Louis*, 148 S.W.2d 743, 744 (Mo. 1941) (a witness is not permitted to express an opinion on questions directly in issue and thereby invade the province of the jury); *Frangos v. Hartford Accident & Indem. Co.*, 203 S.W.2d 894, 897 (Mo. Ct. App. 1947) (expert testimony is admissible but should not invade the province of the jury upon the ultimate facts to be decided). See also *R. HASL & J. O'BRIEN*, *supra* note 108, § 9-4, at 122; *McCORMICK*, *supra* note 32, § 12, at 30-31.

full offer of proof.²¹⁶ Furthermore, the supreme court lacked any legal basis for upholding the exclusion because the testimony would have concerned only general variables affecting reliability rather than any particular witness's identification. Missouri practice allows an expert witness to simply expound relevant principles in an area without drawing conclusions.²¹⁷ No requirement exists that the expert take "the further step of stating an opinion or inference."²¹⁸

Finally, although the appellate court proclaimed a rule of modified discretion, the supreme court quickly glossed over the discretion issue. The court briefly mentioned discretion at the end of its opinion: "The trial court did not abuse its discretion in refusing to permit Dr. Goldstein's testimony."²¹⁹ From this meager statement, Missouri judges and attorneys are to infer that expert psychological testimony is a matter subject to the trial judge's sound discretion. This weak statement seems odd given that *Lawhorn* was the first Missouri case to directly confront this complex issue, as well as the first such case before the Missouri Supreme Court. The appellate court articulated its approval of discretionary authority much more clearly. Unfortunately, the appellate court opinion will remain unknown to most trial judges and attorneys.²²⁰ If the supreme court intended to confer broad discretion on the trial court, perhaps it should have adopted the appellate court's straightforward approach and stated its holding more emphatically.

2. Procedural Safeguards

The supreme court focused on three procedural safeguards to justify the exclusion of expert psychological testimony: (1) exclusion of unreliable

216. *Lawhorn*, 762 S.W.2d at 822. *Bullington* presented the standard for an adequate offer of proof:

The proper procedure for an offer of proof as to a witness who is . . . precluded from testifying is to present and preserve the offer by questions to and answers by the witness from the stand. An offer of proof may, however, be in narrative form through a summation by counsel, but if so, the summation must be definite, specific and set out the content of the testimony to demonstrate its admissibility. When a party fails to make an offer of proof in question and answer form, the risk is present that a reviewing court will find the offer insufficient.

Bullington, 680 S.W.2d at 243-44. In *Lawhorn*, the defense presented a full *in camera* offer of proof in question and answer form.

217. *State v. Saussele*, 265 S.W.2d 290, 296-97 (Mo. 1954); R. HASL & J. O'BRIEN, *supra* note 108, § 9-3A, at 121.

218. *Id.*

219. *Lawhorn*, 762 S.W.2d at 823. In reference to procedural safeguards, the court mentioned that "if the trial court, in its discretion, denies admissibility," the defendant still has protection. *Id.*

220. See *supra* note 171 and accompanying text.

eyewitness testimony, (2) cross-examination of the eyewitness; and (3) closing argument. According to the supreme court, the appellant's opportunity to cross-examine the eyewitness and to challenge his reliability in final argument compensated for the lack of expert testimony.²²¹

Lawhorn implied that outright exclusion of eyewitness testimony sufficed as a safeguard. It stated "[d]ue process requires that such identifications be used only if they are reliable, and are not the product of unnecessarily suggestive police procedures."²²² The United States Supreme Court adopted five factors for determining whether eyewitness identification testimony is admissible: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation;²²³ and (5) the time between the crime and confrontation.²²⁴ The trial court obviously felt that the eyewitness testimony sufficiently met these factors, for it allowed Jensen's testimony.²²⁵ In addition, the Supreme Court has provided various constitutional protections against suggestive police identification procedures.²²⁶

Lawhorn also indicated that expert psychological testimony is unnecessary because attorneys can thoroughly explore the weaknesses of identifications in cross-examination and closing argument.²²⁷ *Bullington* stated: "probing cross-examination is an adequate tool for presenting to the jury the facts necessary for the jury to evaluate the reliability of the identification evidence."²²⁸ Many other jurisdictions have also held that cross-examination

221. *Lawhorn*, 762 S.W.2d at 823.

222. *Id.* See also Woocher, *supra* note 13, at 1000-02.

223. This factor has been subjected to much criticism from psychologists. Many tend to agree that the eyewitness' certainty of his identification has no correlation to actual accuracy. See *supra* notes 57-63 and accompanying text. This was one of Dr. Goldstein's contentions. *Lawhorn*, 762 S.W.2d at 822.

224. *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199 (1972). These were also adopted by Missouri in *State v. Burns*, 671 S.W.2d 306, 310 (Mo. Ct. App. 1984). See also *State v. Robinson*, 641 S.W.2d 423, 427 (Mo. 1982); *State v. Higgins*, 592 S.W.2d 151, 160 (Mo. 1979); *State v. Craven*, 657 S.W.2d 357, 361 (Mo. Ct. App. 1983); *State v. Hurst*, 612 S.W.2d 846, 851 (Mo. Ct. App. 1981); *State v. Patterson*, 598 S.W.2d 483, 488 (Mo. Ct. App. 1980).

225. However, the significance of the admission of the eyewitness testimony is diminished by the fact that courts rarely ever exclude it.

226. See *supra* notes 11-12 and accompanying text.

227. *Lawhorn*, 762 S.W.2d at 823 (citing *State v. Kemp*, 199 Conn. 473, 475, 507 A.2d 1387, 1390 (1986) (citing *State v. George*, 194 Conn. 361, 369, 481 A.2d 1068, 1075 (1984))).

228. *State v. Bullington*, 680 S.W.2d 238, 244 (Mo. Ct. App. 1984). *State v. Whitmill*, No. 30-472, slip op. at 3 (Mo. Ct. App. Jan. 3, 1989), indicated that "where the weaknesses in identification may be explored on cross-examination and in final argument," it is inappropriate to introduce expert psychological testimony.

is an adequate safeguard against unreliable identification.²²⁹ Some courts have argued that expert psychological testimony can provide assistance to the jury "beyond that obtained through cross-examination."²³⁰

Unlike other courts,²³¹ *Lawhorn* did not claim that a cautionary identification instruction would have served as a sufficient safeguard. This was not an oversight, rather Missouri courts have held that such instructions are unnecessary. *State v. Quinn*,²³² the controlling decision, declared that cautionary identification instructions are unnecessary in Missouri courts because the subject is fully covered by pattern instructions contained in the Missouri Approved Instructions-Criminal (MAI-CR3d).²³³ The MAI-CR3d does not include an instruction regarding misidentification.²³⁴ Fur-

229. *United State v. Thevis*, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 458 U.S. 1109 (1982); *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973); *People v. Plasencia*, 168 Cal. App. 3d 546, 556, 214 Cal. Rptr. 316, 327 (1985); *State v. George*, 194 Conn. 361, 481 A.2d 1068, 1075 (1984), *cert. denied*, 469 U.S. 1191 (1985); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. Ct. App. 1977), *cert. denied*, 434 U.S. 973 (1985); *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); *Porter v. State*, 188 Ga. App. 675, —, 373 S.E.2d 805, 807 (1988); *State v. Kay*, 108 Idaho 661, 667, 701 P.2d 281, 287 (Idaho Ct. App. 1985); *Bloodsworth v. State*, 307 Md. 164, —, 512 A.2d 1056, 1063 (1986); *Commonwealth v. Francis*, 390 Mass. 89, —, 453 N.E.2d 1204, 1208 (1983); *State v. Helterbride*, 301 N.W.2d 545, 546 (Minn. 1980); *Porter v. State*, 94 Nev. 142, 146, 576 P.2d 275, 279 (1988); *State v. Wooden*, 658 S.W.2d 553, 557 (Tenn. Crim. App. 1983); *Thomas v. State*, 748 S.W.2d 539, 540 (Tex. Ct. App. 1988). *See also* Lane, *supra* note 3, at 1358.

230. *State v. Taylor*, 50 Wash. App. 481, 484, 749 P.2d 181, 184 (1988).

231. *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *People v. Lawson*, 37 Colo. App. 442, 551 P.2d 206 (1976); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981).

The argument that cross-examination should serve as an adequate means of drawing eyewitness identification into question is based more on tradition than sound logic. This is demonstrated in *Amaral* by the Ninth Circuit's statement, "Our legal system places primary reliance for the ascertainment of truth on the 'test of cross-examination.'" 488 F.2d at 1153 (citation omitted).

232. *State v. Quinn*, 594 S.W.2d 599 (Mo. 1980).

233. *Id.* at 605. *See also* *State v. Thomure*, 706 S.W.2d 521, 523 (Mo. Ct. App. 1986); *State v. Carter*, 691 S.W.2d 417, 419 (Mo. Ct. App. 1985). *See generally* Harris, *Identification in Criminal Cases: Is Missouri a Decade Behind?*, 43 J. Mo. BAR 93, 95-96 (1987).

234. *Quinn*, 594 S.W.2d at 604. *Quinn* postulated that Missouri Approved Instruction-Criminal (Second) [hereinafter MAI-CR2d] 2.01, defining the duties of the judge and jury, and MAI-CR2d 3.20, the alibi instruction, adequately present the misidentification defense. *Id.*

The pertinent part of MAI-CR3d 302.01, the revised version of MAI-CR2d 2.01, provides:

[Y]ou alone must decide upon the believability of the witnesses and the weight and value of the evidence.

In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witnesses' manner while testifying; the ability and opportunity of the witness

thermore, Note 2 of MAI-CR3d 302.01 states that "no other or additional instruction may be given on the believability of witnesses, or the effect, weight, or value of their testimony."²³⁵ The Missouri Supreme Court generally disapproves of cautionary identification instructions because it believes they constitute an impermissible judicial comment on the evidence.²³⁶ In light of prevailing Missouri law, the supreme court correctly chose not to urge a cautionary identification instruction as a procedural protection against mistaken identification in *Lawhorn*.

to observe and remember any matter about which testimony is given . . . ; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

The pertinent part of MAI-CR3d 308.04, the revised version of MAI-CR2d 3.20, provides:

One of the issues . . . (in this case) is whether the defendant was present at [the time and place of the alleged offense]. On that issue, you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.

2. If the evidence in this case leaves in your mind a reasonable doubt that the defendant was present at [the time and place of the alleged offense], then you must find the defendant not guilty

Justice Seiler, dissenting, stated:

I believe that eyewitness identification testimony presents grave hazards due to the inherent unreliability of human perception and memory, and in the susceptibility of eyewitnesses to suggestive influences

. . . Mistaken identification is a legitimate defense and this incompleteness in our instruction repertoire should no longer be permitted to exist. I believe that we should request our committee on pattern criminal instructions to draft recommended instructions on the subject.

Quinn, 594 S.W.2d at 606 (Seiler, J., dissenting). Despite this request, the Missouri Supreme Court Committee on Criminal Jury Instructions and Charges shows no indication that it plans to recommend such an instruction.

235. MAI-CR3d 302.01, note 2. *State v. Bullington*, 680 S.W.2d 238, 245 (Mo. Ct. App. 1984), stated that the Notes on Use expressly forbid an identification instruction. On motion for rehearing, the court stated that Note 2 was to be "religiously observed" and that the proposed instruction merely repeated the content of an existing pattern instruction. *Id.*; *Quinn*, 594 S.W.2d at 605; *State v. Hutton*, 645 S.W.2d 22, 24 (Mo. Ct. App. 1982) ("In Missouri, it is unnecessary to give an instruction on identification when other instructions given to the jury adequately present the defendant's theory."); *State v. Manning*, 634 S.W.2d 504, 506 (Mo. Ct. App. 1982); *State v. Holmes*, 622 S.W.2d 358, 362 (Mo. Ct. App. 1981). In addition, Missouri Supreme Court Rule 28.02(c) excludes the use of any other instruction whenever there is an applicable MAI-CR3d instruction.

Although the supreme court has held that the refusal to give such cautionary instructions constitutes reversible error, it has done so only in cases decided before the adoption of the Missouri Approved Instructions. *See State v. Murphy*, 508 S.W.2d 269, 276 (Mo. Ct. App. 1974).

236. *State v. Taylor*, 472 S.W.2d 395, 401-02 (1971).

VI. *STATE v. WHITMILL: A DEFINITIVE RULING ON EXPERT
PSYCHOLOGICAL TESTIMONY IN THE WAKE OF LAWHORN*

A. *The Facts*

Two brothers, Nivey and Theordis Mitchell, were walking home in Kansas City, Missouri on a February evening in 1987.²³⁷ Prostitutes solicited from passing cars in an area near their home, causing automobile traffic and congestion.²³⁸ The traffic had been a constant annoyance to the brothers.²³⁹ As usual, Nivey and Theordis observed several prostitutes soliciting passing motorists and complained to the women regarding their close proximity to the Mitchell home.²⁴⁰ The confrontation escalated until Theordis shoved one of the women to the ground.²⁴¹ She left and soon returned with a black man who continued the argument until he drew a gun and shot both brothers.²⁴² Nivey later made an in-court identification of the appellant as his assailant, however, Theordis was unable to positively identify him.²⁴³

The appellant presented an alibi defense.²⁴⁴ In addition, Leon Cunn testified that he, not appellant, had shot the men.²⁴⁵ Cunn produced a gun which a ballistics test proved was the gun used in the shooting.²⁴⁶ Two other witnesses testified that Cunn was responsible for the shootings.²⁴⁷ Appellant also offered the expert psychological testimony of Dr. Alvin Goldstein.²⁴⁸ The trial court excluded the testimony and the jury convicted Whitmill of two counts of first degree assault and two counts of armed criminal action.²⁴⁹ He was sentenced to consecutive terms of life imprisonment.²⁵⁰

237. *State v. Whitmill*, No. 30-472, slip op. at 1 (Mo. Ct. App. Jan. 3, 1989).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* The facts in *Whitmill* present a much more compelling case for the admission of expert psychological testimony than the facts of *Lawhorn*. In *Whitmill*, the state's case relied solely on eyewitness identification. Another party confessed to the shootings and no corroborating evidence existed. In *Lawhorn*, substantial corroborating evidence linked the defendant to the crime.

249. *Id.*

250. *Id.* Appellant also challenged as plain error his conviction of two counts of armed criminal action as a violation of the double jeopardy clause of the United States Constitution. *Id.* at 5. He contended that his convictions for the armed criminal actions were "improperly cumulative" when "stacked" on the two counts of first degree assault. *Id.* The appellate court upheld the conviction and sentencing.

Id. Analysis of this issue is beyond the scope of this Note.

B. The Holding

The Missouri Court of Appeals, Western District, reviewed *State v. Whitmill* and handed down its decision only three weeks after the *Lawhorn* decision. The appellate court's opinion is significant in several respects. First, it represents the first attempt by a Missouri court to expound a definitive, *per se* rule on the admissibility of expert psychological testimony. Second, the western district declared a *per se* rule without any clear precedent supporting such a rule. Because no other jurisdiction has yet adopted an absolute rule on admissibility, *Whitmill* presents an innovative approach.

The court expressed dissatisfaction with the approach taken in *Chapple* and *McDonald* because their holdings present serious problems in determining which fact patterns qualify a case for the admission of expert testimony.²⁵¹ Although these prior decisions suggested that an appropriate case for admission of expert psychological testimony would exist when the facts cast doubt on the reliability of the eyewitness identification, they did not:

[I]nform a trial judge with any degree of certainty when his discretionary authority must be abandoned and when the composite of facts makes admission of expert testimony mandatory, what remains is merely an ad hoc determination, case by case²⁵²

Furthermore, the court was discontented with the status of admissibility following *Lawhorn*. Although *Lawhorn* approved the use of discretion, it left open the question of whether expert psychological testimony is appropriate for admission in *any* case.²⁵³ According to the western district, since expert testimony impermissibly undercuts the credibility of an eyewitness, a situation will never arise in Missouri where admission *would* be acceptable.²⁵⁴ In the western district's paternalistic view, "the bench and bar [is] be best served by a definitive statement of the issue of whether [expert psychological testimony] is admissible at all"²⁵⁵

The appellate court held that expert psychological testimony is inadmissible in *every* situation. For the benefit of trial courts wrestling with the problem in the future, the appellate court emphatically held:

[S]uch evidence should be excluded, not as a discretionary decision by the trial court from case to case, but because the subject is one upon which jurors have already become informed by experience in every day life. That common experience is not dependent on the facts of any particular case and therefore no trial court discretion is implicated. Moreover, such expert

251. *Id.* at 5.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

testimony treads upon the prohibition against one witness expressing an opinion upon the credibility of another.²⁵⁶

No other Missouri court has previously adopted such a restrictive approach.²⁵⁷ In fact, *Whitmill* is the only reported decision adopting a strict *per se* rule of inadmissibility of such expert testimony. The decision clearly falls within category four.

The lack of supportive precedent makes the *Whitmill* rule somewhat inexplicable. All previous Missouri decisions have indicated that the decision to admit such expert testimony is subject to the sound discretion of the trial judge and reviewable only for abuse of this discretion. Yet, the western district believed its holding was within the supreme court's intent, as expressed in *Lawhorn*. *Whitmill* emphasized the supreme court's statement in *Lawhorn* that expert psychological testimony is a matter within the common knowledge of the jury. The western district reasoned that "[i]f the matter of reliability . . . of observations by eyewitnesses is within the common experience of jurors, then expert testimony on the subject is inappropriate and a trial judge has *no discretionary authority to admit the evidence*."²⁵⁸

This reasoning is illogical in several respects. The appellate court's reasoning is premised on the assumption that *all* factors affecting identification reliability are *always* within the common knowledge of jurors. Such a broad assertion inherently risks overinclusiveness. Moreover, the grant of discretionary authority to the trial court by the majority of courts would be meaningless if this assumption was valid. If *all* potential factors affecting reliability are considered *always* known by jurors, the trial judge would never have occasion to wield his discretionary power; it would be a useless authority. Surely, this result is not what the majority of courts intended by granting discretionary power. Furthermore, even if the assumption is accurate, future psychological research could reveal additional factors affecting the reliability of identifications which the judiciary might conclude are outside the realm of jurors' knowledge and, therefore, admissible. Under the *Whitmill* rule, the expert testimony would be absolutely prohibited no matter how helpful any future research might be to the jury. The only recourse would be an appeal seeking reversal of *Whitmill*, an expensive and time-consuming process.

While the majority of courts have rejected such expert testimony based on a "common knowledge of jurors" argument, none have followed *Whit-*

256. *Id.*

257. Interestingly, Judge Clark supported the majority opinion in the western district's decision of both *Lawhorn* and *Whitmill*. In the interim, he seems to have varied his opinion on the issue somewhat. He has moved from the more permissive *Lawhorn* holding that expert psychological testimony may be admissible in some cases to the *Whitmill* absolute preclusion of such testimony. This sudden turnabout adds to the confusion stirred by the *Whitmill* decision.

258. *Id.* (emphasis added).

mill's reasoning and adopted a *per se* rule of inadmissibility.²⁵⁹ The logic of *Whitmill* pales when viewed in this context. *State v. Whitmill* disregards the prevailing Missouri law on the admissibility of expert psychological testimony and lacks alignment with the overwhelming majority of other jurisdictions. The court's application of faulty logic in establishing a *per se* rule of inadmissibility renders *Whitmill* an appropriate case for reversal in favor of a more permissive rule of admissibility.

VII. A SUGGESTED APPROACH TO ADMISSIBILITY OF EXPERT PSYCHOLOGICAL TESTIMONY

Lawhorn and *Whitmill* left uncertain the status of admissibility of expert psychological testimony in Missouri. Neither case offered a satisfactory ruling which would assist in combatting the difficulties surrounding eyewitness identification. When the issue again confronts Missouri judges, as it undoubtedly will, perhaps the bench will be receptive to arguments favoring a more permissive rule. If so, what rule *should* the courts adopt?

Clearly, a *per se* rule of admissibility (category one) is an inappropriate approach in Missouri for many of the reasons detailed in Section II. No other jurisdiction has succeeded in justifying such a rule and Missouri courts are just as unlikely to do so. Discretionary admissibility (category 2) is also an inadequate approach since, as *Whitmill* indicated, Missouri case law does not provide any guidelines for the trial judge's use in exercising his discretionary authority nor does it indicate whether any factual situation *mandates* admission.²⁶⁰ *Whitmill* wisely advocated a definitive statement or guideline regarding the admissibility of such expert testimony. A properly formulated guideline would alleviate the possibility of arbitrary exercises of trial court discretion. In addition, a guideline would provide uniformity. Therefore, a rule of modified discretionary authority (category three) best accommodates the interests involved in the admission of expert psychological testimony. Such a rule would provide criteria to assist the trial judge in determining which factual situations would mandate admission of such

259. *State v. Lawhorn*, 762 S.W.2d 820, 823 (Mo. 1988) (en banc). *State v. Hamm*, 146 Wis. 2d 130, 430 N.W.2d 584 (Wis. Ct. App. 1988), *appeal denied*, 436 N.W.2d 30 (1988), involved a situation analogous to the *Lawhorn-Whitmill* duo. The Wisconsin Supreme Court had previously ruled in *Hampton v. State*, 92 Wis. 2d 450, 457-58, 285 N.W.2d 868, 872 (1979), that admission of expert psychological testimony rested within the trial court's discretion, just as the Missouri Supreme Court did in *Lawhorn*. Subsequently in *Hamm*, an appellate court rejected the adoption of a *per se* rule of inadmissibility of such expert testimony, just as the western district should have done in *Whitmill*. *Hamm*, 430 N.W.2d at 591 (held that trial court erred in excluding expert psychological testimony because it lacked factual basis for its ruling—the trial court had heard no testimony from the expert).

260. *Whitmill*, No. 30-472, slip op. at 5.
<https://scholarship.law.missouri.edu/mlr/vol54/iss3/9>

expert testimony. If the defendant could not meet the established criteria, the trial judge would then have complete discretionary authority to either admit or exclude the expert testimony. This rule would preserve the traditional discretionary authority of the trial judge while protecting against potentially erroneous identifications, but only in those instances where the identification is most likely to be unreliable.

Proposed criteria for guiding the trial court in the mandatory admission of expert psychological testimony should include the following: (1) the eyewitness identification of the defendant is the principal element in the prosecution's case; (2) the identification is not substantially corroborated by other evidence which would grant it independent reliability; (3) the proffered expert witness is properly qualified as an expert within the field; (4) there is a proper "fit" between the specific psychological factors encompassed within the proffered expert testimony and the specific facts of the case; (5) the expert psychologist is limited to presenting only general psychological principles or research and is not allowed to tailor his opinion to the reliability of any particular eyewitness; and (6) the expert psychologist is allowed to expound only psychological principles which are both (a) strongly supported by scientific research and (b) scientifically demonstrated to be either partially unknown or misunderstood by the average juror. If these six criteria are met, a trial judge must admit the expert psychological testimony; he makes no discretionary call.

The requirement of a proper "fit" would ensure the exclusion of irrelevant evidence, thus, guarding against undue consumption of time. In addition, the "fit" requirement would reduce confusion as jurors attempt to comprehend the link between the expert testimony and identification reliability. To demonstrate the concept, assume a white eyewitness identifies another white as his assailant; expert testimony concerning the "own race" effect would lack a proper "fit". The same would be true for testimony regarding the "weapons effect" if the evidence indicates that no weapon was involved.

By refusing to allow the expert witness to particularize his testimony to a specific witness, the court would avoid any argument that the expert had improperly commented on the credibility of another witness. Once presented with the general psychological principles, the jury would apply them to the particular facts of the case and determine for itself whether it believes the eyewitness testimony is reliable. The jury would remain free to either accept or reject the expert testimony.

Finally, strong empirical evidence that supports the existence of the factors affecting reliability would add validity to the testimony. In addition, it would refute the argument that trial courts should wholly exclude expert psychological testimony because some research results are weak. The trial court should exclude only those factors affecting eyewitness testimony when

research results are inconclusive or negative.²⁶¹ In addition, the trial court should verify from the offer of proof that scientific research has demonstrated that the proffered reliability factors are not likely to be understood or known by the juror.²⁶² This criterion counters the primary argument against the admission of such expert testimony—that such psychological factors are within the common knowledge of jurors.

Submission of a cautionary identification instruction to the jury in addition to the admission of expert psychological testimony would provide the best protection against erroneous identifications. Since the MAI-CR3d does not include such an instruction, the Missouri Supreme Court would first have to adopt a new pattern instruction.²⁶³

An identification instruction should satisfy two criteria: (1) it should articulate the legal standards that jurors must use to decide the case; and (2) it should describe the factors affecting the reliability of identifications.²⁶⁴ The instruction should address at least five indicia of reliability: (1) the capacity and opportunity of the eyewitness to observe the offender; (2) the circumstances under which the eyewitness made the observation; (3) whether the eyewitness actually made the observation; (4) whether the eyewitness has made an inconsistent identification of the offender; and (5) the credibility of the witness.²⁶⁵

The model instruction adopted in *United States v. Telfaire*²⁶⁶ would provide a basis from which the Committee on Pattern Criminal Instructions could begin drafting an appropriate instruction.²⁶⁷

261. Dr. Alvin Goldstein believes that the existence of the confidence-accuracy relationship, the "own-race effect" and time estimation effect (eyewitnesses tend to overestimate the time spent observing the perpetrator) are most strongly supported by empirical evidence. Telephone interview with Dr. Alvin Goldstein, Professor of Psychology, University of Missouri-Columbia (March 24, 1989).

262. Psychologists have suggested that a variable used in expert psychological testimony should meet three qualifications: (1) it is known to affect eyewitness testimony; (2) it is involved to some extent in the given case; and (3) the influence of the variable is not adequately appreciated by the jury or judge. Wells, Lindsay & Tournant, *supra* note 13, at 284.

263. Missouri appellate courts have consistently affirmed refusals to give cautionary identification instructions. *State v. Quinn*, 594 S.W.2d 599 (Mo. 1980); *State v. Thomure*, 706 S.W.2d 521 (Mo. Ct. App. 1986); *State v. Carter*, 691 S.W.2d 417 (Mo. Ct. App. 1985); *State v. Hurst*, 612 S.W.2d 846 (Mo. Ct. App. 1981). Therefore, support of such an instruction will have to come from the committee on pattern instructions. See *supra* notes 233-38 and accompanying text.

264. Green, *Eyewitness Testimony and The Use of Cautionary Instructions*, 8 U. BRIDGEPORT L. REV. 15, 17 (1987).

265. Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1407 (1983).

266. 469 F.2d 552 (D.C. Cir. 1972).

267. The *Telfaire* court formulated a "Model Special Instruction on Identification," which reads:

Research has shown, however, that the *Telfaire* instruction may not be entirely effective in alerting jurors of misidentification problems.²⁶⁸ Thus,

defendant as the perpetrator of the crime. The Government has the burden of providing identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

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

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

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

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered by his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant

the committee should propose a modified instruction which more adequately communicates information regarding the reliability of identifications.

VIII. CONCLUSION

Missouri courts must take a more lenient stance on the admissibility of expert psychological testimony to adequately combat the vagaries of mistaken identification. A rule of modified discretion would best suit all the interests at stake. Courts will need to overcome the precedent set by *Lawhorn* and *Whitmill*. While *Whitmill* should not be difficult to overrule, obtaining the reversal of *Lawhorn* will provide a greater challenge. In addition, Missouri courts should combine the admission of expert psychological testimony with the adoption of an MAI-CR3d cautionary identification instruction. At least one supreme court judge has recognized that "this incompleteness in [Missouri] instruction repertoire should no longer be permitted to exist."²⁶⁹ Although both of these devices would be somewhat novel to Missouri practice, other jurisdictions have heartily supported them. Moreover, jurisprudence is not static; it is adaptable to meet the needs of justice. Regarding the admission of expert psychological testimony, justice requires a more flexible approach than Missouri courts have been willing to allow. It is time for a change.

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as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

Id. at 558-59 (brackets indicate what the court felt were optional portions).

268. Green, *supra* note 264, at 19-20.

269. *Quinn*, 594 S.W.2d at 606 (Seiler, J., dissenting).