Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?

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The reliability of eyewitness identifications poses one of the most serious problems confronting the criminal justice system. A commentator expressed his concern that faulty identifications present "conceivably the greatest single threat to the achievement of our ideal that no innocent men shall be punished."[1] Numerous cases of misidentification and subsequent conviction of innocent defendants have been well documented.[2] Of prime concern are "pure identification" cases where a conviction is based solely on eyewitness testimony without corroborating evidence.

The United States Supreme Court, recognizing the inherent dangers of eyewitness identification,[3] established some constitutional safeguards in a series of cases commonly referred to as the *Wade* trilogy.[4] These safeguards apply, however, only when the police use a lineup, a showup, or a photographic identification procedure.[5] Thus, a criticism of the *Wade* trilogy is that it protects only against improper pretrial confrontations and does not address the inherent deficiencies of human perception, retention, and recall.[6]

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1. McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970).

2. *See, e.g.*, E. Borchard, *Convicting the Innocent* 367 (1932) (collection of 65 criminal prosecutions and convictions of innocent people, 29 of which were the result of a positive identification of the defendant by the victim); E. BLOCK, THE VINDICATORS (1963); J. FRANK & B. FRANK, NOT GUILTY (1957). *See also* United States v. Wade, 388 U.S. 218, 228 n.6 (1967); Duke v. State, 260 Ind. 638, 298 N.E.2d 453 (1973) (police officer positively identified one of the two men sitting at the defense counsel's table. The man identified was not the defendant charged); TIME, April 2, 1973, at p. 59 (Assistant District Attorney William Schrager was arrested and charged with a series of sexual assaults. Four victims identified him as the attacker. Schrager was released when a similar looking postman, 40 pounds heavier than Schrager, confessed to some of the crimes).

3. United States v. Wade, 388 U.S. 218 (1967). "The vagaries of eye-witness identification are well known: the annals of criminal law are rife with instances of mistaken identification . . . 'what is the worth of identification testimony even when uncontradicted? 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.' " *Id.* at 228 (Brennan, J., *quoting* Frankfurter, J.)

4. The *Wade* trilogy consists of United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

5. For a discussion of the constitutional safeguards afforded by the *Wade* trilogy see T. Mauet *Prior Identifications in Criminal Cases: Hearsay and Confrontation Issues*, 24 ARIZ. L. REV. 29 (1982).

6. Studies on human perception, retention and recall are reviewed by Levine & Tapp, *The*

To reduce the likelihood of convicting an innocent defendant on the basis of an erroneous identification, commentators have urged that defense counsel be allowed to present expert testimony on the reliability of eyewitness identification.[7] Such testimony would consist of a description of the studies that have been conducted on human perception and memory, the factors that affect the reliability of eyewitness identifications, and a discussion of the particular factors present in the case before the court.[8]

Traditionally, those federal and state courts that have rejected expert testimony on eyewitness identification have done so predominantly on the ground that the subject of the opinion offered is not beyond the knowledge and experience of an average juror.[9] Thus, the testimony would invade the province of the jury.[10] The decision to permit or exclude expert testimony is left to the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of discretion.[11]

Until recently, no appellate court has overruled a denial of the introduction of expert testimony on eyewitness identification. In fact, decisions to the contrary are numerous.[12] However, in *State v. Chapple*,[13] the Arizona Supreme Court held that a trial court abused its discretion by precluding the introduction of expert testimony on the reliability of

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Psychology of Criminal Identification: The Gap From Wade to Kirby, 121 U. PA. L. REV. 1079 (1973).

7. E. LOFTUS, EYEWITNESS TESTIMONY 191 (1979); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1006 (1977); Portman, *Mistaken Eyewitness Identification: A Remedy*, CRIMINAL DEFENSE MAGAZINE, at 6 (July 1976).

8. *See* E. LOFTUS, *supra* note 7, at 191.

9. *See infra* note 39 and accompanying text.

10. The conclusion that the expert testimony will invade the province of the jury is based upon the premise that it is solely the province of the trier of fact to determine the credibility and ability of the eyewitness to observe and recall. As one court put it: "[c]redibility . . . is for the jury—the jury is the lie detector in the courtroom." United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). For cases which have concluded that expert testimony on eyewitness identification would invade the province of the jury, see United States v. Watson, 587 F.2d 365 (7th Cir. 1978) (because the eyewitness' testimony was so prompt and positive, expert testimony was unnecessary and would invade the province of the jury); United States v. Brown, 501 F.2d 146 (9th Cir. 1974); United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd mem.*, 523 F.2d 1051 (3d Cir. 1975); Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978).

11. *E.g.*, Salem v. United States Lines Co., 370 U.S. 31 (1962); United States v. Green, 548 F.2d 1261 (6th Cir. 1977); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973).

12. *See* United States v. Smith, 563 F.2d 1361, 1363 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Brown, 501 F.2d 146, 150-51 (9th Cir. 1974), *rev'd on other grounds*, 422 U.S. 225 (1975); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); United States v. Fosher, 449 F. Supp. 76 (D. Mass. 1978); United States v. Collins, 395 F. Supp. 629, 635-37 (M.D. Pa.), *aff'd mem.*, 523 F.2d 1015 (3d Cir. 1975); State v. Valencia, 118 Ariz. 136, 137-38, 575 P.2d 335, 336-37 (Ct. App. 1977); Criglow v. State, 183 Ark. 407, 409-10, 36 S.W.2d 400, 401-02 (1931); People v. Brooks, 51 Cal. App. 3d 602, 608-09, 124 Cal. Rptr. 492, 495 (1975), *cert. denied*, 424 U.S. 970 (1976); People v. Guzman, 47 Cal. App. 3d 380, 383-86, 121 Cal. Rptr. 69, 71-72 (1975); People v. Johnson, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 836-37 (1974); People v. Lawson, 37 Colo. App. 442, 444-45, 551 P.2d 206, 208-09 (1976); Dyas v. United States, 376 A.2d 827, 831-32 (D.C.), *cert. denied*, 434 U.S. 973 (1977); Jones v. State, 232 Ga. 762, 763-66; 208 S.E.2d 850, 852-54 (1974); Pankey v. Commonwealth, 485 S.W.2d 513, 522 (Ky. 1972); Commonwealth v. Jones, 362 Mass. 497, 501-02, 287 N.E.2d 599, 602-03 (1972); Commonwealth v. Middleton, 6 Mass. App. 902, 902, 378 N.E.2d 450, 450 (1978); Porter v. State, 94 Nev. 142, 148, 576 P.2d 275, 278-79 (1978); People v. Suleski, 58 A.D.2d 1023, 1024, 397 N.Y.S.2d 280, 281-82 (1977); People v. Valentine, 53 A.D.2d 832, 832-33, 385 N.Y.S.2d 545, 546 (1976).

13. 135 Ariz. 281, 296-97, 660 P.2d 1208, 1223-24 (1983).

eyewitness identification. In reaching its decision, the court concluded that in the majority of cases the reasons cited by the trial judge would permit preclusion of such testimony, but it was error to exclude the testimony in this instance.[14]

While concluding that the trial court had abused its discretion, the Supreme Court attempted to limit its holding to the "peculiar facts" of *Chapple*.[15] Thus, the court stated that a trial court's discretionary ruling on the admissibility of expert testimony on eyewitness identification will be supported in the "usual" case.[16]

Chapple, a radical departure from prior case law, raises many unanswered questions.[17] The major question raised by the decision, and the focus of this Note, is what are the "peculiar facts" of this case which convinced the court that it was an abuse of discretion to preclude expert testimony on eyewitness identification? Conversely, what constitutes the "usual" case in which the trial court could properly exercise its discretion to allow or preclude expert testimony on eyewitness identification?

To explore these questions, this Note examines the "peculiar" facts of *Chapple* and the traditional role of the expert. The Note reviews the case law on the admissibility of expert testimony on eyewitness identification and discusses the particular factors found by the Arizona Supreme Court to warrant the admission of expert testimony on the reliability of eyewitness identification. Finally, the Note examines the shortcomings of the *Chapple* decision and posits some potential problems militating against the admissibility of expert testimony on eyewitness identification.

The Facts of State v. Chapple

State v. Chapple involved three drug-related murders which occurred in Maricopa County, Arizona.[18] In early December 1977, Mel Coley, a Washington, D.C. drug dealer, contacted a Phoenix drug dealer, Malcolm Scott. Coley told Scott that he was interested in purchasing a large quantity of marijuana and asked that Scott and his sister, Pamela Buck, act as go-betweens on the deal.[19] Scott met Coley and two men known only as Eric and Dee at the Phoenix airport. The transaction was to take place at a

14. *Id.* It should be noted that the Arizona Supreme Court also found that the trial court erred in admitting inflammatory photographs of the murder victims. *Id.* at 290, 660 P.2d at 1217.

15. *Id.* at 297, 660 P.2d at 1224.

16. *Id.*

17. Other questions raised by *Chapple* are: Does the expert testimony aid the jury in determining the reliability of the particular witness before them? How far should the courts go in allowing psychological theories to substitute for the common sense of the jury? What factors allegedly capable of affecting eyewitness identification are not within the knowledge of an average juror? Does the probative value of the testimony, if any, warrant the additional time and expense which would result from a battle of the experts? Should expert testimony on eyewitness identification be admissible in civil cases?

18. Actually, some question remains as to the county in which the murders occurred. The Arizona Supreme Court indicates that the murders occurred near Higley, in Pinal County, Arizona. *Id.* at 284, 660 P.2d at 1211. However, the Appellee/Cross-Appellant's Answering Brief on page 5 states that the murders occurred in Maricopa County, Arizona. Nonetheless, the case was tried in the Superior Court of Maricopa County.

19. The facts and controversy of *Chapple* are found at 135 Ariz. 281, 283-85 660 P.2d 1208 1210-12 (1983).

small trailer on Scott's parents' farm. Coley, Eric, and Dee were waiting when the supplier, Varnes, arrived with two companions. A few moments later, Varnes and both his companions were dead.

Ultimately, motivated by fear or remorse, Scott sought the aid of a lawyer. More than one year after the crime, Malcolm Scott and Pamela Buck picked Dolan Chapple's photograph out of a lineup. Chapple was accused of being Dee and was charged with murder.[20] The state's case against Chapple centered on the testimony of the two eyewitnesses, Scott and Buck. No physical evidence placed him at the scene of the crime.[21]

Defense counsel argued that if Scott and Buck were not lying, their identification was, nonetheless, erroneous. To support this argument, the defense proffered the testimony of Dr. Elizabeth Loftus on the reliability of eyewitness identifications and the factors present in the instant case which could affect the accuracy of the eyewitness' identification.[22] The trial court granted the state's motion to suppress Dr. Loftus' testimony on the ground that the testimony was not within the proper sphere of expert testimony.[23] After a trial by jury, Chapple was found guilty on all

20. CHAPPLE, 135 Ariz. at 285, 660 P.2d at 1212. Chapple was charged with three counts of first degree murder, one count of unlawfully transporting marijuana, and one count of conspiring to unlawfully transport marijuana. Scott and Buck were given immunity from prosecution except for any murder that they could be shown to have actually committed.

21. *Id.* Dolan Chapple was convicted solely on the testimony of the two eyewitnesses. Chapple contended that he had never been in Arizona, had never met Pam Buck, or Malcolm Scott, and did not know Bill Varnes, Carlos Elsy, or Edwardo Ortiz. Finally, three witnesses testified that Chapple was in Cairo, Illinois on December 11, 1977, the day of the murders. *Id.* at 286, 660 P.2d 1213.

22. *Id.* Dr. Loftus' proffered testimony on the "forgetting curve" involved data on experiments that indicate that forgetting occurs rapidly and then tends to level out and that, therefore, immediate identification is more trustworthy than delayed identification. One of the complications of the case centered on a photographic lineup shown to Scott at the inception of the investigation at which he remarked that the photograph of James Logan resembled "Dee." The defense argued that because of the "forgetting curve," this tentative identification was probably more reliable than Scott's identification of Chapple's photograph in the photographic lineup 13 months later. Furthermore, Scott failed to identify Chapple's photograph when it was first shown to him on March 26, 1978, four months after the crime, when, according to Dr. Loftus' studies, Scott's ability to identify would have been greater.

The proffered testimony about the problems of "unconscious transfer" also related to the March 26, 1978 photographic lineup. According to Dr. Loftus, the phenomenon occurs when the witness confuses a person seen in one situation with a person seen in a different situation. Thus, the defense argued that Scott's identification of Chapple may have resulted from his familiarity with the photograph shown to him in March 1978 rather than from Chapple's participation in the crime. Dr. Loftus contended that a "feedback factor" operated. According to Loftus' interview, the two witnesses, brother and sister, engaged in discussion with each other about the identification. (Scott and Buck denied that they had ever discussed the identification of Dee with each other.) Discussions between eyewitnesses as to the identification of the suspect can reinforce their individual identifications of the defendant. Dr. Loftus also contended that it was impossible for the witnesses to view photographs on seven different occasions without experiencing some "feedback" as to what the officers expected the witness to find, a phenomenon somewhat related to "unconscious transfer" and labeled "post event information." This allegedly occurs when a witness talks to others and thinks about the incident. Thus, after exposing himself to new information, the witness can incorporate information into his reconstruction of the incident.

Another variable in the case involved the effects of stress upon perception. Testimony would have indicated that, contrary to what most laymen believe, stress causes inaccuracy of perception. Finally, Dr. Loftus' testimony would have indicated that no relationship exists between the certainty a witness has in his identification and the reliability of that identification. *Id.* at 293-94, 660 P.2d at 1220-21. For a detailed discussion of these concepts, see E. LOFTUS, *supra* note 7.

23. *Chapple*, 135 Ariz. at 291, 660 P.2d at 1218.

counts.[24] Chapple appealed and the Arizona Supreme Court held that the trial court had abused its discretion by precluding the expert testimony on eyewitness identification. In the Supreme Court's view, the testimony of Dr. Loftus would have assisted the jury in resolving issues raised by the facts.[25] Traditionally, this has been the role of the expert.

The Role of the Expert

The purpose of expert testimony is to assist the jury in understanding the evidence presented by providing the expert's opinion on matters about which the average juror has little knowledge or experience.[26] Rule 702 of the Arizona Rules of Evidence provides that expert testimony on scientific, technical or other specialized knowledge is admissible if it will assist the trier of fact in understanding the evidence or in determining a fact in issue.[27] Thus, in general, the test regarding the admissibility of expert testimony is whether the jury can receive "appreciable help" from the expert witness.[28] That determination necessitates a balancing of the probative value of the testimony against its potential prejudicial effect.[29]

Basically, expert testimony must meet two requirements to be admissible.[30] First, the subject of the expert testimony must be so distinctly related to some science, business, or occupation that it is beyond the common knowledge of the average juror.[31] Second, the expert must have

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24. *Id.* Chapple was sentenced to life imprisonment without the possibility of parole for 25 years for each of the murder counts. In addition, he received a sentence of not less than 25 years nor more than life on the transportation count, and a sentence of not less than 25 nor more than 30 years on the conspiracy count. The sentence in each count was to run concurrently with the sentences on all counts. *Id.* at 283, 660 P.2d at 1210.

25. *Id.* at 297, 660 P.2d at 1224.

26. *See generally* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, §§ 104-105 (1978); 3 WEINSTEIN'S EVIDENCE ¶ 702[01] to 704[04] (1982).

27. Rule 702, of the Arizona Rules of Evidence is identical to Federal Rule 702 and has been adopted by Arizona without change. Rule 702 provides: "[i]f 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."

28. 7 J. WIGMORE, EVIDENCE § 1923 (Chadbourn rev. 1978).

29. Rule 403 of the Federal Rules of Evidence provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See also* United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973), where the court found that the countervailing considerations that most often will exclude relevant, and material evidence are the risk that admission will 1) require undue consumption of time 2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or 3) unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. *Id.* at 1152.

30. M. UDALL & J. LIVERMORE, ARIZONA PRACTICE LAW OF EVIDENCE § 22 at 28 (1982). In addition, expert testimony must meet the tests of relevancy and materiality. *Id.* at 28. *See generally* 7 J. WIGMORE, *supra* note 28, § 8, at 17-19.

31. M. UDALL & J. LIVERMORE *supra* note 30, § 22 at 28. *See also* Ladd, *Expert Testimony*, 15 VAND. L. REV. 414 (1952) where the author stated that:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Id. at 418.

As the Arizona Supreme Court noted in State v. Dickey, 125 Ariz. 163, 608 P.2d 302 (1980),

sufficient expertise in the particular field to insure that his testimony will be helpful to the trier of fact.[32]

Courts have admitted expert testimony on a variety of subjects[33] and recently in areas which traditionally were not considered subjects for expert testimony.[34] As early as the beginning of the century, scholars advocated a large role in the legal system for psychologists.[35] Arguably, methods of psychology are now more precise[36] and a growing body of studies on human perception and memory suggests the fallibilities of eyewitness identification.[37] Nonetheless, an examination of the case law reveals a continued judicial reluctance to admit expert testimony on eyewitness identification.[38]

An Analysis of the Case Law

Courts have refused to admit expert testimony on eyewitness identification for a variety of reasons. The rationale most often given for its exclusion is that jurors are capable of deciding identification issues without expert assistance, and that, therefore, eyewitness identification is not a proper subject for expert testimony.[39] In conjunction with this rationale, courts usually conclude that proper cross-examination should reveal any

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the primary concern in the admission of expert testimony is "whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." *Id.* at 169, 608 P.2d at 308 (quoting State v. Owens, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975)). Arizona cases holding that expert testimony is not necessary because the subject matter is within the common knowledge of the average juror include: State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977) (trial court in murder prosecution did not err in precluding expert medical witness from testifying to effects of alcohol on the body as subject was matter of common experience and knowledge); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977) (interrogation is a matter of common knowledge of jurors), *cert. denied*, 435 U.S. 908 (1978); State v. Valencia, 118 Ariz. 136, 575 P.2d 335 (Ct. App. 1977) (limitations and weaknesses of eyewitness identification are within common knowledge of average juror).

32. M. UDALL & J. LIVERMORE, *supra* note 31, § 22 at 29.

33. In Arizona, the subjects range from the nature of the Mexican Mafia and prison gangs, State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979), to the redeeming value of pornography, State v. Navarrette, 115 Ariz. 574, 566 P.2d 1050 (Ct. App. 1977). For a detailed list of subjects, see M. UDALL & J. LIVERMORE, *supra* note 30, § 22 at 32-34.

34. *See, e.g.*, United States v. Bowers, 534 F.2d 186 (9th Cir. 1976) (expert testimony on tool mark identification); United States v. Baller, 519 F.2d 463 (4th Cir.) (expert testimony on spectographic identification), *cert. denied*, 423 U.S. 1019 (1975); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979) (expert testimony on "battered woman syndrome" was not inadmissible on ground that it would invade the province of the jury or that its probative value was outweighed by its prejudicial effect. However, the record was insufficient for appellate determination of expert's qualifications on whether expert's methodology for identifying and studying battered women had attained general acceptance).

35. Munsterberg remarked, "It seems indeed astonishing that the work of justice is carried out in the courts without ever consulting the psychologist and asking him for all the aid which the modern study of suggestion can offer." H. MUNSTERBERG, ON THE WITNESS STAND, 194 (1908).

36. E. LOFTUS, *supra* note 7, at 203.

37. Note, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465, 466 (1978).

38. For a recent federal decision which excluded expert testimony on eyewitness identification, see United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). *See also infra* notes 65-70 and accompanying text.

39. *See* United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973); State v. Valencia, 118 Ariz. 136, 138, 575 P.2d 335, 337 (Ct. App. 1977); Caldwell v. State, 594 S.W.2d 24, 28 (Ark. Ct. App. 1980).

inconsistencies or deficiencies in the eyewitness testimony.[40] In other cases, courts have excluded expert testimony on the grounds that the expert is not qualified or that the field of eyewitness identification has not been sufficiently established as a science to warrant the admission of expert testimony.[41] Finally, many courts have concluded that the possibility of prejudice outweighs any probative value that the testimony might have.[42]

The leading federal case in the area is *United States v. Amaral*.[43] In *Amaral*, the defendant was charged with the robbery of a national bank.[44] At trial, defense counsel sought to introduce expert testimony on the effects of stress on perception and on the reliability of eyewitness identification in general. The trial court excluded the expert testimony on several grounds. First, the court concluded that it would be inappropriate to take from the jury the determination of what weight or effect to give to the evidence of the eyewitness identification.[45] Second, the court emphasized that it was the responsibility of defense counsel during cross-examination to reveal any inconsistencies or deficiencies in the eyewitness testimony. The court noted that defense counsel had not uncovered any confusion or uncertainty in any of the eyewitnesses as to the identification of the defendant.[46] Finally, the court rejected defense counsel's argument that expert testimony was needed to show the effects of stress on perception.[47]

Although the Ninth Circuit Court of Appeals affirmed the trial court's exclusion of expert testimony on eyewitness identification, the court adopted a four-part test for the admissibility of expert testimony on eyewitness identification: 1) a qualified expert; 2) a proper subject; 3) conformity of the testimony to a generally accepted explanatory theory; and 4) probative value of the testimony compared to its prejudicial effect.[48] The court thus recognized that expert testimony on eyewitness identification may be proper under certain circumstances. The value of admitting such expert testimony, however, must be measured against the dangers that it may create undue prejudice, confuse the issues, or mislead the jury because of "its aura of special reliability and trustworthiness."[49] Most im-

40. *See, e.g.*, United States v. Brown, 501 F.2d 146, 150-51 (9th Cir. 1974); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

41. For cases that have found that the field of eyewitness identification has not been sufficiently established as a scientific field, see United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978); People v. Brooks, 51 Cal. App. 3d 602, 608-09, 124 Cal. Rptr. 492, 495 (1975); United States v. Jackson, 16 CRIM. L. RPTR. 2507 (D.C. Sup. Ct. 1975) (relying on Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

42. *See, e.g.*, United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975).

43. 488 F.2d 1148 (9th Cir. 1973).

44. *Id.* at 1150.

45. *Id.* at 1153.

46. *Id.*

47. *Id.* The court pointed out that not all the witnesses were under similar stress conditions. One witness saw the defendant while sitting in his car blocking the defendant's exit from the bank parking lot. Another witness saw him as he entered the bank and approached the teller. Another witness viewed him from her house as he returned to his vehicle after robbing the bank.

48. *Id.*

49. *Id.* at 1152.

portantly, the court committed the balancing of the probative value against the prejudicial effect to the broad discretion of the trial judge.[50]

The exclusion of expert testimony on eyewitness identification was challenged on constitutional grounds in *Dyas v. United States*.[51] In *Dyas*, the defendant was convicted of armed robbery and possession of a prohibited weapon. On appeal, the defendant argued that he had been deprived of his constitutional right to present his defense by the trial court's refusal to admit expert testimony on eyewitness identification.[52] The appeals court, citing *Amaral*, concluded that the subject matter of the proffered testimony was not beyond the knowledge of average laymen and thus such testimony would not aid the jury in evaluating the witness' testimony.[53] The court noted that defense counsel had an adequate opportunity to fully explore the witness' perception, recollection, and ability to identify the defendant. Thus, expert testimony on eyewitness identification was not needed, and the preclusion of the expert testimony did not deprive the defendant of his constitutional right to present his defense. Therefore, the appeals court found that the trial court did not abuse its discretion in rejecting the proffered testimony.[54]

The payment of the expert was an issue in *United States v. Fosher*.[55] In *Fosher*, the defendant was charged with bank robbery. He applied for government funds to pay a psychologist to testify on the subject of eyewitness identification.[56] The government's case depended almost entirely on the testimony of two eyewitnesses. The defendant's offer of proof stated that the psychologist, Dr. Buckhout, would testify regarding factors related to perception, including limited opportunities to observe and the rate of memory loss.[57] In finding that the testimony could not assist the trier of fact, the trial judge concluded that the jurors would evaluate the eyewitness testimony on the basis of their common sense and life experiences without the testimony of a psychologist, especially when aided by skillful argument and cross-examination.[58]

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50. *Id.* One year after the *Amaral* decision, the Ninth Circuit again approved a trial court's refusal to admit expert testimony on the reliability of eyewitness identification. In *United States v. Brown*, the defendants were charged with bank robbery, and defense counsel attempted to introduce the expert testimony of Dr. Robert Buckhout on the reliability of eyewitness identification. The trial court refused the proffered testimony on grounds different than those stated in *Amaral*. The court concluded that the offer of proof was inadequate, that the testimony would invade the province of the jury, and that the undue consumption of time would substantially outweigh any probative value that the testimony might have. Citing its earlier decision in *Amaral*, the Ninth Circuit found that the trial court had not erred in precluding the expert testimony. 501 F.2d 146, at 150-51 (9th Cir. 1974).

51. 376 A.2d 827 (D.C. 1977).

52. *Id.* at 831.

53. *Id.* at 832.

54. *Id.*

55. 590 F.2d 381 (1st Cir. 1979), *aff'g*, 449 F. Supp. 76 (D. Mass. 1978).

56. *Id.* at 382. The request for government funds was made under 18 U.S.C. § 3006(A)(e).

57. *Id.*

58. *Id.* at 382-83. In concluding that the testimony would not assist the trier of fact, the trial judge stated: "I am convinced, therefore, that the average lay jurors, on the basis of their own life experience and common sense, can make an informed evaluation of eyewitness testimony without the assistance of a psychologist, particularly when the jurors are aided by professional argument and skillful cross-examination." *Fosher*, 449 F. Supp. at 77.

The Court of Appeals for the First Circuit noted several grounds supporting the trial court's preclusion of the expert testimony.[59] First, the court found that the written offer of proof did not explain how the expert testimony would help the jury analyze the particular witness' ability to perceive and remember. Therefore, the testimony had limited, if any, relevance.[60] Second, the court noted that a trial court can, in its discretion, conclude the scientific evaluation has not reached or cannot reach a "level of reliability such that scientific analysis of a question of fact surpasses the quality of common sense evaluation inherent in jury deliberations."[61] Furthermore, the First Circuit found that the trial court had not abused its discretion in balancing the potential prejudice of the expert testimony against its probative value.[62] In particular, the trial court could properly consider that the proffered testimony would create an undue risk of prejudice and confusion because of its appearance of special reliability and trustworthiness.[63] Finally, both the trial and appellate courts were concerned with not imposing upon the parties a costly and lengthy battle of the experts.[64]

One of the most recent federal cases in which a court refused to admit expert testimony on eyewitness identification is *United States v. Thevis*.[65] *Thevis* involved a murder prosecution in which two airplane pilots identified the defendants as the men they had seen at the murder scene around the time of the murders.[66] Defense counsel attempted to counter the eyewitness testimony with the testimony of Dr. Robert Buckhout.

The trial court excluded the proffered testimony, concluding that the subjects of perception, memory, and identification were within the province of the jury. The probative value of the evidence, therefore, was substantially outweighed by the possible prejudice that might result from the testimony.[67]

On appeal, the First Circuit found no abuse of the trial court's discretion in precluding the expert testimony.[68] The court noted that the expert was not prepared to comment specifically on the identification made by the two government witnesses; he would instead have testified about the problems with eyewitness identifications in general. The court concluded that the admission of the testimony, in effect, would allow the expert to comment on the weight and credibility of the eyewitnesses' testimony.[69] Additionally, the court agreed with the trial judge that the problems of perception and memory can be adequately addressed in cross-examination

59. *Fosher*, 590 F.2d at 384.
60. *Id.* at 382-83.
61. *Id.* at 383 (citing 3 WEINSTEIN'S EVIDENCE ¶ 702[01], at 702-6 (1982) [sic] ¶ 704[01] at 704-1).
62. *Id.* at 384.
63. *Id.* at 383.
64. *Id.* at 383-84.
65. 665 F.2d 616 (5th Cir. 1982), *cert. denied*, 456 U.S. 1008.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

and weighed by the jury in reaching its decision.[70]

As noted, state court decisions precluding admission of expert testimony on eyewitness identifications are numerous.[71] One of the earliest state cases to deal with the issue is *People v. Johnson*.[72] In *Johnson*, three men held up a liquor store, shot and killed the proprietor, and wounded a customer.[73] Two defendants were charged with first degree murder, robbery, and assault with a deadly weapon.[74] The trial court rejected an offer of expert testimony on eyewitness identification, viewing it as an attempt to usurp the jury's role of assessing witness credibility.[75] The California Court of Appeals held that the trial court had not abused its discretion. The appellate court characterized the testimony as an improper attempt to impeach the eyewitness by calling another witness to testify as to the eyewitness' capacity.[76]

Another example of a state court's attitude toward the admissibility of expert testimony on eyewitness identification is found in *State v. Galloway*.[77] In *Galloway*, a store owner was shot and killed in the course of an attempted robbery.[78] In 1967, more than three years after the murder, the defendant's photograph was selected from a photographic lineup by two eyewitnesses who identified the defendant as the person who fired the shot. At trial, the defense sought to introduce the testimony of Dr. Elizabeth Loftus that eyewitness identification evidence is less reliable after the passage of time.[79] The trial court excluded the testimony on the ground that it was not a proper subject for expert testimony as it was not beyond the knowledge and experience of an average juror. Noting the trial court's discretion, the Iowa Supreme Court upheld in dicta the exclusion of the expert testimony but, nevertheless, held that such testimony could be admitted if a trial court chose to do so.[80]

A special concurrence, however, representing a majority of the court's

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70. *Id.*

71. *See supra* note 12 and accompanying text.

72. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974). The earliest recorded state court decision on the subject is Criglow v. State, 183 Ark. 407, 36 S.W.2d 400 (1931). In *Criglow*, the court found that the question whether the witnesses were mistaken in their identification, whether from fright or other cause, was for the jury, and not for an expert.

73. *Johnson*, 38 Cal. App. 3d at 5, 112 Cal. Rptr. at 835.

74. *Id.* at 5, 112 Cal. Rptr. at 836.

75. *Id.* at 7, 112 Cal. Rptr. at 837.

76. *Id.* at 6-7, 112 Cal. Rptr. at 837. *See* CAL. EVIDENCE CODE § 780 (West 1966), which states in pertinent part that a jury may consider impeaching evidence, including (Under Subd. (C)) the extent of the witness' capacity to perceive, recollect, or communicate any matter about which he testifies. The court stated that it does not follow from § 780 that,

> a party has a right to impeach a witness by calling another witness to testify as to the former's capacity. Evidence Code Section 801, subdivision (a), limits expert testimony to subjects beyond the range of common experience, thus codifying the decisional rule vesting the trial court with discretion over the subject matter of the testimony.

Johnson, 38 Cal. App. 3d at 6-7, 112 Cal. Rptr. at 837.

The court went on to note that although the crime was frightening, it was not deranging. There was no evidence or claim of emotional disturbance or psychological "abnormality" of any of the prosecution witnesses. *Id.* at 7, 112 Cal. Rptr. at 837.

77. 275 N.W.2d 736 (Iowa 1979) (Reynoldson, C.J., specially concurring).

78. *Id.* at 737.

79. *See id.* at 738.

80. *Id.* at 739.

members, rejected the position that a trial court could admit such testimony at its discretion.[81] Noting that the goal of the *Wade* trilogy safeguards was the exclusion of unreliable identifications, the concurrence stated that the probative value of an identification able to survive constitutional challenge should not be lessened by expert testimony that all eyewitness identifications are unreliable.[82] Moreover, the concurrence would have held that the trial court was justified in ruling that the testimony is not a proper subject for expert testimony as the reliability of eyewitness identification is not beyond the knowledge and experience of the average juror.[83] Finally, the concurring justices expressed their concern that since much litigation, both criminal and civil, turns on witnesses' recall of past events, a great deal of cost and time would be expended in a battle of the experts if expert testimony in this area were to be admitted.[84]

Application of the Case Law to Chapple

Applying the *Amaral* test in *Chapple*, the Arizona Supreme Court concluded that the trial court had to consider only two of *Amaral's* four criteria.[85] The state conceded that the expert was qualified and that the question of conformity to a generally accepted explanatory theory was not raised. Therefore, the two criteria still at issue were: 1) whether the probative value of the testimony outweighed its possible prejudicial effect, and 2) whether the testimony was a proper subject for expert testimony.

As noted, the trial court found that the subject of eyewitness identification was within the common experience of the jury and, therefore, it was not a proper subject for expert testimony.[86] Furthermore, the court concluded that counsel should uncover inconsistencies and deficiencies in eyewitness testimony in cross-examination and closing argument.[87] On appeal, the Arizona Supreme Court, while acknowledging that such testimony would be properly precluded in the majority of cases, held that it was error to refuse the testimony in the instant case.[88] The court found several specific variables present which allegedly affected the accuracy of the eyewitness identification. Thus, the court would have allowed the jury to hear expert testimony on (1) the "forgetting curve," (2) the effect of stress on perception, (3) "unconscious transfer," (4) the "feedback factor," (5) "post event information," and, (6) confidence and its relationship to

81. *Id.* at 740.

82. *Id.* at 741.

83. *Id.* at 741. In finding that the testimony was not a proper subject for expert testimony the concurrence stated: "[i]n the final analysis, jurors daily experience the fragility of their own memories. They know recollection fades with time and is affected by the relative significance of the incident. Probably most have experienced on several occasions their own or another's misidentification in social or business relationships. Explanation of the scientifically identified mechanisms which bring about memory decay may be of academic interest, but it is of little aid to the jury in judging reliability of the particular eyewitness identification before them." *Id.*

84. *Id.* at 741-42.

85. *Chapple*, 135 Ariz. at 292, 660 P.2d at 1219.

86. *See infra* note 23 and accompanying text.

87. *Chapple*, 135 Ariz. at 293, 660 P.2d at 1220.

88. *Id.* at 297, 660 P.2d at 1224.

accuracy.[89]

With reference to the remaining criteria, the prosecution argued that the expert testimony would have little probative value, especially when weighed against the danger of unfair prejudice.[90] The state contended that the testimony would lack probative value because it would deal with eyewitness identifications in general and not with the specific eyewitnesses that the jury would hear. Additionally, it was argued that the aura of academic prestige surrounding Dr. Loftus would give unfair weight to her testimony.[91]

The Arizona Supreme Court quickly dismissed the state's contention that the probative value of the testimony was outweighed by unfair prejudice. Contrary to the trial court's conclusion, the supreme court found that the testimony's "generality" was a factor favoring its admission.[92] Furthermore, after an examination of Dr. Loftus' testimony, the court concluded that it could not be assumed that the average juror would be aware of the variables concerning identification about which Dr. Loftus would testify. Therefore, the court found that Dr. Loftus' testimony was a proper subject for expert testimony and should have been admitted.[93] The supreme court thus reversed the trial court's decision and remanded the case for a new trial.[94]

Shortcomings of the Chapple *Decision*

What is troublesome about the *Chapple* decision is that little distinguishes it from the myriad of other cases which have precluded expert testimony on eyewitness identification.[95] The decision offers no guidelines to determine what factors must be present to warrant admission of expert testimony on eyewitness identification. Unfortunately, no case prior to *Chapple* analyzed in detail which of the factors allegedly affecting eyewitness identification are so unknown to the average laymen as to require expert testimony.

Usually, courts have merely concluded that the reliability of eyewitness identification in general is within the knowledge of the average juror and, therefore, that it is not a proper subject for expert testimony.[96] However, courts have expressly held some of the specific factors present in *Chapple* to be within the knowledge and experience of an average juror. For example, courts consistently have found the first variable, the effect of the passage of time on memory decay, referred to by psychologists as the

89. *Id.* at 293-94, 660 P.2d at 1220-21. For a detailed discussion of factors which allegedly affect the accuracy of eyewitness identification, see E. LOFTUS, *supra* note 7. For a brief explanation of the factors, see *supra* note 22.

90. *Chapple*, 135 Ariz. at 292, 660 P.2d at 1219.

91. Appellant's Answering Brief at 18 (citing R.T. of April 16, 1980, at 11-19); *Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983). Dr. Loftus is a professor of psychology at the University of Washington. She specializes in experimental and clinical psychology in the area of perception and memory retention. *Id.* at 291, 660 P.2d at 1218.

92. *Chapple*, 135 Ariz. at 292, 660 P.2d at 1219.

93. *Id.* at 294, 660 P.2d at 1221.

94. *Id.* at 299, 660 P.2d at 1226.

95. *See supra* notes 32-82 and accompanying text.

96. *See supra* note 37.

"forgetting curve," to be within the knowledge and experience of an average juror.[97] Furthermore, the courts also consistently have found the second variable, the effect of stress upon perception, to be within the experience and knowledge of an average juror.[98]

For example, in *People v. Lawson*[99] the proffered expert testimony encompassed both the effect of stress upon perception and the effect of the passage of time on memory decay.[100] In *Lawson*, the defendant was charged with committing first-degree murder in the course of robbing a residence. The victim's wife was present in the house at the time of the murder. Fourteen months after the crime, she viewed a lineup and identified the defendant as her husband's assailant.[101] The defense proffered the testimony of a professor of psychology who specialized in the field of perception and memory. The expert would have testified that a woman who sees her husband mortally wounded and who is held at gunpoint by the assailant may be under sufficient emotional stress to make the identification of the assailant questionable. In addition, the expert would have testified that, since fourteen months had elapsed from the time of the incident until the identification of the defendant, the witness' ability to identify might have been impaired by the passage of time.[102]

The trial court rejected the proffered expert testimony because it found the factors that might have made the eyewitness identification questionable to be within the experience and knowledge of an average juror. Thus, the testimony would not aid the jury.[103] The Colorado Court of Appeals found that it was within the trial court's discretion to conclude that the expert testimony would not aid the jury. Therefore, it was not an abuse of the trial court's discretion to exclude the expert testimony.[104]

Finally, while no case has specifically rejected the phenomenon known as "unconscious transfer," cases involving doubtful prior identifications, to which "unconscious transfer" allegedly relates, have rejected expert testimony on eyewitness identification.[105] In *People v. Guzman*[106] the

97. *See* People v. Lawson, 37 Colo. App. 442, 444-45, 551 P.2d 206, 208-09 (1976) (court rejected proffered testimony that a witness' ability to identify would be impaired by the passage of time); Dyas v. United States, 376 A.2d 827, 831 (D.C. 1977) (trial court rejected proffered testimony "that within hours after a criminal episode the ability to accurately remember details begins to rapidly decline"); State v. Galloway, 275 N.W.2d 736, 738 (Iowa 1979) (in murder prosecution, in which defendant was identified more than three years after the crime, trial court rejected expert testimony to the effect that eyewitness identification is less reliable the longer the period between the incident and the identification of the defendant).

98. United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (court rejected testimony on the effects of stress on perception, remarking that juries are "superbly equipped" to evaluate the impact of stress on perception) (quoting United States v. DeSisto, 329 F.2d 929, 934 (2d Cir. 1964). *See* United States v. Collins, 395 F. Supp. 629, 635-37 (M.D. Pa. 1976) (effects of stress the witness was under when viewing the incident could be brought out in cross-examination); Johnson v. State, 12 Wash. App. 40, 527 P.2d 1324 (1974) (The trier of fact must decide if stress affected the victim's ability to identify).

99. People v. Lawson, 37 Colo. App. 442, 551 P.2d 206 (1976).

100. *Id.* at 445; 551 P.2d at 208.

101. *Id.* at 444-45; 551 P.2d at 207-08.

102. *Id.* at 444-45; 551 P.2d at 208.

103. *Id.* at 445; 551 P.2d at 209.

104. *Id.*

105. People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975); People v. Johnson, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974). In *Johnson*, the appellate court concluded that, "[i]n

defendant was accused of the first degree murder of a jewelry store owner killed in the course of a robbery.[107] At trial the store clerk identified the defendant as the man with the gun. She conceded, however, that the defendant did not particularly resemble a composite drawing made by the police artist from her descriptions at the time of the crime.[108] Defense counsel proffered the testimony of a psychologist concerning the factors affecting identification.[109] The trial judge concluded that the validity of an eyewitness identification was a question for the jury to decide, and, thus, the subject was not a proper one for expert testimony.[110] On appeal, the California Court of Appeals upheld the trial court's refusal to admit the expert testimony.

In *People v. Johnson*,[111] a question also existed as to the witness' prior doubtful identification. In fact, a prior identification of an entirely different person had occurred. The trial court rejected the defendants' proffer of expert testimony on eyewitness identification on the ground that the testimony would in essence take over the jury's function of determining the weight and credibility of the witness' testimony.[112]

Another troublesome aspect of the *Chapple* decision is the court's casual dismissal of the state's contention that the probative value of expert testimony on eyewitness identification was outweighed by its potential prejudice.[113] The state objected to the "generality" of the proffered expert testimony. Contrary to the trial court's conclusion, the Arizona Supreme Court found that the testimony's "generality" was a factor favoring its admission.[114] Other courts that have addressed this aspect of expert testimony on eyewitness identification have drawn the opposite conclusion.[115]

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rejecting defendants' offer of the psychologist's expert testimony, the trial court declared in effect that the testimony would take over the jury's task of determining the weight and credibility of the witness' testimony." *Johnson*, 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

106. 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975).

107. *Id.* at 384, 121 Cal. Rptr. at 70-71.

108. *Id.* at 384, 121 Cal. Rptr. at 71.

109. *Id.* at 384-85, 121 Cal. Rptr. at 71.

110. *Id.* at 385, 121 Cal. Rptr. at 71. After considering a detailed 20 page offer of proof, the judge precluded the expert testimony, stating:

> This type of testimony doesn't come under any rule of evidence that I know of. It is something, I suppose, that could possibly be used to inform the jury about a theory that the psychiatrists have propounded and have become very popular in doing so and hope to become a part of the court system in informing juries of how they should determine facts in a case, but I think the real question here is a question for the jury to decide. It is not a matter that the jury needs expert testimony regarding. It is something that everyone knows about, the problems of identification. The jurors here were well questioned regarding their experience with identification, with having mistakenly identified people. Everyone knows those things happen.

Id.

111. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

112. 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

113. *Chapple*, 135 Ariz. at 292; 660 P.2d at 1219.

114. *Id.*

115. United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Collins, 395 F. Supp. 629, 636-37 (M.D. Pa. 1976); Porter v. State, 94 Nev. 142, 147-48, 576 P.2d 275, 278-79 (1978); State v. Barry, 25 Wash. App. 751, 760-61, 611 P.2d 1262, 1267 (1980).

For example, in *United States v. Collins*, a rationale given for the rejection of the proffered expert testimony was that it would not have directly related to the identifications made by three eyewitnesses to the killing. Instead, the expert would have testified as to the reliability of eyewit-

The Arizona Supreme Court in *Chapple* did not address other factors which the state argued would have rendered Dr. Loftus' testimony of limited probative value. For example, the state argued that Dr. Loftus based her findings entirely on laboratory experiments.[116] Additionally, the prosecution pointed out that Dr. Loftus had not done any experiments where an eyewitness who had actually participated in the crime later identified the defendant,[117] as had both the eyewitnesses in *Chapple*.[118] Moreover, the eyewitnesses in *Chapple* observed the defendant for a longer period of time than was involved in any of the experiments, and they had the opportunity to observe him under different lighting conditions. Finally, many of the factors allegedly capable of adversely affecting identification—short time span of the incident, bad lighting conditions, cross-racial identification, weapon focus, and the accompanying stress—were not present in *Chapple*.[119] Arguably, the cumulative effect of these non-addressed factors coupled with the "generality" of the expert testimony rendered Dr. Loftus' testimony of limited probative value.[120]

In summary, although the supreme court attempted to limit *Chapple* to its "peculiar facts," how this can be accomplished is unclear. The court set forth no guidelines to enable a trial judge to determine when expert testimony on eyewitness identification would be warranted. It is uncertain how many factors or what combination of factors must be present for a trial judge's preclusion of expert testimony on eyewitness identification to constitute an abuse of discretion. Conceivably, the testimony could be routinely proffered in robbery cases, rape cases, or any other case involving an eyewitness identification. The effect of *Chapple* is to burden the trial judge with the difficult task of determining when to admit expert testimony on eyewitness identification. While it is too soon to determine how far-reaching the consequences might be, some potential problems are apparent.

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ness identifications in general. Thus, the court found the testimony would not have materially assisted the jury in analyzing the evidence in the case. Additionally, the court was concerned that the testimony might interfere with the jury's role as fact-finder because of a substantial risk that the expert's credentials and persuasive powers would have had a greater influence on the jury than the evidence presented at trial. Finally, the court noted that scientific or expert testimony especially presents the substantial danger of undue prejudice or of confusing the issues or of misleading the jury because of "its aura of special reliability and trustworthiness." Thus, the court found that because the potential prejudicial effect of the proffered expert testimony outweighed its probative value, it was properly excluded. 395 F. Supp. at 637 (citing United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973)).

116. Appellant's Answering Brief at 20; *Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983).

117. *Id.*

118. *Chapple*, 135 Ariz. at 281, 660 P.2d 1208 (1983).

119. Although a lack of agreement exists as to those factors which are allegedly capable of adversely affecting identification, expert testimony is most often proffered on these subjects. See *supra* notes 39-84 and accompanying text.

120. The state also pointed out that three defense witnesses testified that they saw the defendant in Cairo, Illinois, on the day of the murders. Despite this testimony, the jury chose to believe the testimony of Scott and Buck. Therefore, the state argued that the testimony would have limited probative value in that it was doubtful that the testimony, which would not have addressed these specific eyewitnesses' identification, would have any persuasive power on the jury. Appellants' Answering Brief at 36, *Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983).

POTENTIAL PROBLEM AREAS

Opening the Floodgates

Courts have often expressed the concern that expert testimony on eyewitness identification could open a floodgate whereby experts would testify on every conceivable aspect of a witness' credibility.[121] In fact, psychologists have suggested that a standardized question could be developed which will indicate eyewitness credibility.[122] This method has been advocated as a way to allow the expert to test the eyewitness' memory failings, prejudices, and biases. The expert could thereby testify about possible observation and retention errors which may arise during the witness' testimony.[123]

Another area of concern is the possible expansion of expert testimony on eyewitness identification into civil litigation. Recently, Dr. Loftus noted that an eyewitness may be mistaken not only about the identity of a person, but may be mistaken also about the facts of the case.[124] For example, she pointed out that eyewitness testimony on whether a traffic light was green or red can be crucial on the issue of fault in a civil case.[125] Thus, Dr. Loftus apparently advocates the admission of expert testimony on eyewitness identification in civil as well as criminal cases. As the court in *Chapple* did not address the admissibility of such testimony in civil cases, this issue is yet to be resolved. Obviously, many civil cases, especially personal injury cases, involve eyewitness testimony. If expert testimony is found to be admissible in civil cases, the additional court time consumed and expense to the parties involved could be considerable.

The Conflicting Studies

The court in *Amaral* set forth a four-part test for the admissibility of expert testimony.[126] It is noteworthy that one of the *Amaral* criteria, conformity to a generally accepted explanatory theory, was not raised in *Chapple*.[127] Although the court concluded that Dr. Loftus "wrote the book" on the subject, many of her colleagues do not agree with her findings. In fact, the introduction into the courtroom of expert testimony on

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121. Justice Hays in his dissenting opinion in *Chapple* remarked, "[m]y concern here goes beyond the borders of this case. Once we have opened the door to this sort of impeaching testimony, what is to prevent experts from attacking any real or supposed deficiency in every other mental faculty?" 135 Ariz, at 300, 660 P.2d at 1227. *See also* Jones v. State, 232 Ga. 762, 208 S.E.2d 850, 853 (1974) (quoting Goodwyn v. Goodwyn, 20 Ga. 600, 620 (1856)). In *Jones* the court noted,

> we know of no practice to sanction the introduction of testimony not to impeach the veracity but the memory of the witness. . . Once open the door to this sort of investigation, and it would not be restricted to the memory, but would apply to any real or supposed deficiency in any other mental faculty.

Jones, 232 Ga. at 766, 208 S.E.2d at 853.

122. 1 SOC. ACTION & THE LAW NEWSLETTER 10-11 (1974).

123. Tyrell & Cunningham, *Eyewitness Credibility: Adjusting the Sights of the Judiciary*, 37 ALA. LAW 563, 590 (1976).

124. Loftus, *Silence is Not Golden*, 38 AM. PSYCHOLOGIST 564 (May 1983).

125. *Id.*

126. See *supra* text at note 48.

127. *Chapple*, 135 Ariz. 281, 660 P.2d 1201 (1983).

eyewitness identification has sparked considerable debate among experimental psychologists.

McCloskey and Egeth, experimental psychologists at John Hopkins University have concluded, contrary to Dr. Loftus' contentions, that no evidence indicates that expert testimony on eyewitness identification would aid the jury in evaluating eyewitness testimony.[128] They have also expressed concern that expert testimony on the subject carries with it substantial risks.[129] In particular, the psychologists criticized the two rationales most often given in advocating the use of expert testimony on eyewitness identification: 1) that because jurors are too willing to believe eyewitness testimony, expert testimony should be used to increase juror skepticism, and 2) that jurors cannot without the aid of an expert adequately discriminate between accurate and inaccurate eyewitness testimony.[130]

First, McCloskey and Egeth pointed out that virtually no empirical evidence shows that people are unaware of the problems of eyewitness testimony.[131] In fact, studies have shown that a high percentage of subjects do not overvalue expert testimony.[132] On the other hand, studies do suggest that expert testimony on eyewitness identification may make jurors more skeptical.[133] Thus, one possible effect of the expert testimony is that (in a given case) the jury would give undue weight to the expert's testimony and be more skeptical of the eyewitness' testimony than is warranted. Therefore, McCloskey and Egeth warn that the increase in juror skepticism toward eyewitness testimony might have the detrimental effect of decreasing convictions of the guilty.[134]

Second, the psychologists questioned the use of expert testimony to educate jurors about factors which influence eyewitness identification. They pointed out that a lack of agreement exists as to which factors that affect eyewitness accuracy are not within the knowledge of an average juror.[135] According to McCloskey and Egeth, in order for expert testimony to improve juror discrimination two factors must be present. First, there must be many variables for which psychologists, as a result of empirical research, know the effect on eyewitness identification. In addition, jurors

128. McCloskey & Egeth, *Eyewitness Identification—What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550 (May 1983).

129. *Id.* at 551.

130. *Id.*

131. *Id.*

132. *Id.* at 551-53. In one study by Hosch, Beck, and McIntyre in 1980, eight six-person juries viewed a trial in which an eyewitness positively identified the defendant. Four of the juries heard expert psychological testimony; the other four did not. All eight juries voted unanimously for acquittal. *Id.* at 553.

133. *Id.* at 555. Three recent studies suggest that expert testimony on eyewitness identification may make jurors more skeptical of eyewitness testimony. Horsch, Beck, & McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287-296 (1980); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY, 9-15 (1980). Wells, Lindsay, & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV., 275-285 (1980).

134. McCloskey & Egeth, *supra* note 128, at 552.

135. *Id.* at 556-58.

must be aware of the effect the variables may have on eyewitness accuracy. McCloskey and Egeth contend, however, that many, if not most, of the variables propounded as suitable topics for expert testimony are within the knowledge of an average juror or that the effects of the variable on eyewitness accuracy are unknown.[136] Thus, expert testimony is usually inappropriate because it either asserts effects which no empirical evidence verifies or it calls attention to variables within the knowledge of an average juror.[137]

The External Validity of the Studies

A problem related to the existence of conflicting studies is that of the questionable external validity of the studies. One commentator noted that more than ninety percent of the research studies in the area of eyewitness identification and testimony have been conducted in the laboratory.[138] The studies are criticized because they were conducted in simulated situations, rather than in the real world. Two components which arguably affect the external validity of the studies are the lack of representativeness of the subjects and the artificiality of the settings.[139] It is doubtful that the responses of college students in classroom environments represent those of individuals in real situations. For example, as one commentator pointed out, the laboratory subjects' behavior and decisions have no real consequences.[140]

A final criticism of the external validity of the studies is the artificiality of the tasks asked of the subjects.[141] The studies often oversimplify the kind and amount of information to which the real world participant would be exposed. For example, studies on jury decision-making have been criticized because the student is only given short written summaries of testimony upon which he must base his decision to acquit or convict.[142] In addition, the decisions are made in the absence of legal procedures to which real world participants would be exposed, such as the jury deliberation process, the presumption of innocence, and the burden of proof.[143]

The Inevitable Battle of the Experts

Because of the large number of experts and conflicting studies available, an obvious potential problem of admitting expert testimony on eyewitness identification is the almost inevitable battle of experts.[144] If the

136. *Id.* at 556.

137. *Id.* at 558. Finally, McCloskey and Egeth call for additional research concerning eyewitness testimony, juror evaluation of eyewitness testimony, and the effects of expert testimony on juror's decisions. *Id.*

138. Konecni & Ebbesen, *A Critique of Theory and Method in Social-Psychological Approaches to Legal Issues* in PERSPECTIVES IN LAW AND PSYCHOLOGY, VOL. 2: THE TRIAL PROCESS 481, 486 (B. Sales ed. 1981).

139. Elwork, Sales, and Suggs, *The Trial: A Research Review* in PERSPECTIVES IN LAW AND PSYCHOLOGY, VOL. 2: THE TRIAL PROCESS, 1, 51 (B. Sales ed. 1981).

140. Koneci & Ebbersen, *supra* note 138, at 487.

141. Elwork, Sales & Suggs, *supra* note 139, at 51.

142. *Id.*

143. Konecni & Ebbesen, *supra* note 138, at 487.

144. Weinstein referred to the problem as follows: "Even in the case of strictly medical testi-

defense is allowed to introduce expert testimony on eyewitness identification, the prosecution may counter with its own expert.[145] The prosecution may attempt to utilize the testimony of its expert to impeach the significance of the factors present in the case. In turn, the defense might then attempt to rebut the testimony of the prosecution's witness by calling yet another expert. This process could continue almost indefinitely.

Certainly, the expense and consumption of time involved in a battle of the experts alone is not a valid reason for excluding relevant evidence in a criminal case where the defendant's liberty is at stake. However, when the expert testimony is of limited, if any, probative value because it does not aid the jury in evaluating the eyewitness testimony, the countervailing considerations of Rule 403 of the Federal Rules of Evidence must be examined.[146]

Expert testimony on eyewitness identification carries with it many of the concerns addressed in Rule 403. First, it courts the danger of unfair prejudice.[147] As the court in *Amaral* pointed out, expert testimony creates an undue risk of prejudice because of its appearance of special reliability and trustworthiness.[148] Given the conflicting studies and their questionable external validity, this risk is greatly increased.

Furthermore, two counterveiling considerations of Rule 403 will result from a battle of the experts. First, a battle of the experts would result in confusing the jury by allowing the introduction of diametrically opposed views on the same facts.[149] Second, since the cases involving eyewitness testimony are numerous, routinely calling expert witnesses would result in a considerable expenditure of additional court time.[150]

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mony, where the issue concerns physical rather than mental or psychological conditions or disability—'objective' rather than 'subjective' symptoms—experience has demonstrated the commonness of disagreement among the 'experts.'" WEINSTEIN, EVIDENCE, *supra* note 26, § 405[03], at 405-34 (quoting from Falknor & Sleffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 PA. L. REV. 980, 994 (1954).

145. *Cf.* United States v. Sellers, 566 F.2d 884, 886 (4th Cir. 1977) (in a prosecution for bank robbery, it was error for the district court not to permit the defendant's expert to give his opinion on surveillance photographs while allowing the government's expert to do so. The court noted that Rule 403 of the Federal Rules of Evidence can be used to preclude evidence that wastes time, is cumulative, or is too prejudicial, but the discretion to exclude the testimony must apply to both parties.

146. For the provisions of rule 403 see *supra* note 29.

147. Unfair prejudice means an undue tendency to suggest decision on an improper basis. FED. R. EVID. 403 Advisory Committee note.

148. *Amaral*, 448 F.2d at 1152.

149. Arguably, given the conflicting studies, the expert testimony may even serve to mislead the jury. This would certainly be the case when the expert testimony asserts effects for which there is no empirical evidence.

150. Indeed, Dr. Loftus concedes that the additional court time involved would be substantial. E. LOFTUS, *supra* note 7, at 83. The magnitude of the problem is evident in an examination of only two instances in which expert testimony on eyewitness identification might be proffered. In the criminal area, eyewitness testimony is often presented in armed robbery and rape cases. In 1979 there were 83,273 arrests for robbery and 18,040 arrests for rape in the United States. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1979, at 190 (1980). If a mere 10% of these cases involving an eyewitness identification went to trial, the potential expense and consumption of court time to hear expert testimony on eyewitness identification would be substantial.

Providing Expert Testimony for Indigents

Since our court systems are already experiencing backlogs and budget strains, a pragmatic concern is whether the court must provide expert testimony for indigents. In many jurisdictions the judge is required to authorize defense services when a reasonable attorney would engage such services for a client having the independent financial means to pay for them.[151] In *United States v. Sims*,[152] the defendant claimed that the court's failure to appoint an expert on eyewitness identification violated his constitutional rights.[153] The court rejected this argument, pointing out that a reasonable attorney probably would not have engaged an expert in the case because this type of evidence is strongly disfavored by the courts.[154] However, if it becomes a routine practice for attorneys to engage experts on eyewitness identification, a good argument will exist for requiring a court to provide the expert's services to indigents. Obviously, the additional cost to the court system would be substantial.[155]

CONCLUSION

The potential unreliability of eyewitness identifications has long been a concern for the judiciary. The constitutional protections of the *Wade* trilogy, cross examination, and skillful argument by defense counsel provide some safeguards to prevent conviction of an innocent person accused on the basis of unreliable eyewitness testimony. Expert testimony on the reliability of eyewitness identification has been advocated as an additional safeguard. However, expert testimony on the subject has been repeatedly rejected on a variety of grounds.

In *State v. Chapple*, the Arizona Supreme Court became the first appellate court to find that a trial court abused its discretion by excluding expert testimony on eyewitness identification. Although the court attempted to limit *Chapple* to its "peculiar facts" little distinguishes it from the myriad of cases decided to the contrary. While it is too soon to determine how far-reaching the effects of *Chapple* may be, the Arizona court's

151. United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975); United States v. Bass, 477 F.2d 723 (9th Cir. 1973); United States v. Theriault, 440 F.2d 713 (5th Cir. 1971).

152. 617 F.2d 1371, 1375 (9th Cir. 1980).

153. *Id.* at 1374-75. On appeal, Sims claimed that failure to appoint a psychologist to testify on the reliability of eyewitness identification violated his fifth amendment, sixth amendment, and statutory rights under 18 U.S.C. § 3006A. Section 3006A provides in pertinent part:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. § 3006(A)(e)(1) (1979).

154. *Sims*, 617 F.2d at 1375.

155. It is difficult to estimate what the cost to taxpayers will be as it is uncertain how often expert testimony on eyewitness identification will be profferred by indigents' counsel and admitted by the courts. Additionally, expert's fees will undoubtedly vary. However, in a recent bank robbery prosecution, *State v. LeGrand*, CR 07426, Pima County, Arizona, Feb. 16, 1984, the expert received $1,500 for his testimony. As the defendants were indigents, this cost ultimately fell upon the taxpayer. Conversation with Bruce Burke, Tucson, Arizona, September 7, 1984.

failure to set forth guidelines makes it difficult for a trial judge to determine when expert testimony on eyewitness identification would be warranted.

Concededly, many fields of knowledge are too foreign to common experience for a jury to comprehend absent expert testimony. However, courts draw a distinction between testimony which aids the trier of fact and that which usurps its role as fact-finder. Courts have consistently found that the subject of eyewitness identification is not beyond the knowledge and experience of an average juror, and, therefore, it has been deemed not a proper subject for expert testimony.

Even if expert testimony on eyewitness identification might be considered a proper subject in "unusual" cases, the testimony should be excluded if its admission would create a substantial danger of undue prejudice or would mislead or confuse the jury. Some individuals can make reliable identifications under adverse conditions. Others cannot do so even under the most ideal circumstances. Therefore, expert testimony on the reliability of eyewitness identifications in general will not aid the jury in evaluating the reliability of the particular witness before them. On the other hand, the testimony courts the danger of misleading or confusing the jury. Thus, the limited benefits of expert testimony are substantially outweighed by its potential harm.

Individuals differ enormously in their ability to make reliable identifications.[156] Admittedly, eyewitness testimony, like many types of evidence, may be subject to human error and mistake. However, evidence of identity involves a question for the members of the jury, who are in the best position to determine the credibility and ability of the particular witness to observe and recall.

156. This fact is illustrated by one commentator's experience:

> During the student protest days at Stanford, about ten students disrupted a faculty meeting and, to their great consternation were photographed in the act by the university photographer. Since Stanford is a large university, it was no easy matter to identify all of the students for disciplinary action. Although some of the students were well known by the administration, one proved especially difficult to identify. She was found, however, after a police officer saw a picture. He said that he did not know her name but that he had seen her once before, at night, several weeks earlier in a large crowd demonstrating its dissatisfaction with Stanford by throwing rocks through the library windows. He did not approach her, and there were too many people present to arrest, but he had jotted down the license place number of the Porsche that she had driven away in. It turned out to belong to a Stanford student, who, when located was quite clearly the person pictured in the photograph.
>
> To this day I cannot understand how the police officer identified the woman after seeing her on one fleeting occasion, at a moment of considerable stress, with bad visibility as well—but he indisputably had done it.

Foreword to E. LOFTUS, *supra* note 7, at vii-ix (1979).